



**DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 15-04263

Appearances

For Government: Julie R. Mendez, Esq., Department Counsel

For Applicant: *Pro se*

11/27/2017

Decision

KATAUSKAS, Philip J., Administrative Judge:

Applicant contests the Defense Department's intent to revoke or deny his eligibility for access to classified information. He failed to present sufficient evidence to explain, extenuate, or mitigate the security concern stemming from his problematic financial history. Accordingly, this case is decided against Applicant.

Statement of the Case

On September 13, 2016, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) sent Applicant a Statement of Reasons (SOR) alleging that his circumstances raised security concerns under the financial considerations guideline.¹ Applicant answered the SOR on October 4, 2016, and requested a hearing to establish his eligibility for continued access to classified information.

On September 12, 2017, a date mutually agreed to by the parties, a hearing was held. Applicant testified at the hearing, and the exhibits offered by the parties at the

¹ The DOD CAF took this action under Executive Order (E.O.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive).

hearing were admitted into the administrative record without objection. (Government Exhibits (GE) 1-5; Applicant's Exhibit (AE) A.) The transcript of the hearing (Tr.) was received on September 20, 2017.

Procedural Issue

On December 10, 2016, the Security Executive Agent issued Directive 4 (SEAD-4), establishing a "single, common adjudicative criteria for all covered individuals who require initial or continued eligibility for access to classified information or eligibility to hold a sensitive position."² The National Security Adjudicative Guidelines (hereinafter "new adjudicative guidelines" or "AG"), which are found in Appendix A to SEAD-4, are to be used in all security clearance cases decisions issued on or after June 8, 2017.³ In light of this explicit direction (and absent lawful authority to the contrary), I have applied the new adjudicative guidelines. ISCR Case No. 02-00305 at 3 (App. Bd. Feb. 12, 2003) (security clearance decisions must be based on current DoD policy and standards).⁴ DOD CAF adjudicators reviewed this case using the previous version of the adjudicative guidelines, dated September 1, 2006, which were in effect at the time. My decision and formal findings under the revised Guideline F would not be different under the 2006 Guideline F. In scheduling the hearing, Department Counsel sent Applicant an email on August 18, 2017, which included a link to the revised AG.

Findings of Fact

Applicant is 49 years old. He was married to his first wife in 1999, and they divorced in 2001. He married his second wife in 2005, and they divorced in July 2014. He married his current wife in November 2014. Applicant has two children by his first two wives and a two-year old daughter by his current wife.⁵

Since October 2014, Applicant has worked for a defense contractor. He makes about \$70,000 per year. His spouse does not work outside the home. From September 2013 to June 2014, Applicant was unemployed. He lived on unemployment compensation and went to shelters for food.⁶ With his current employment, Applicant has very little remainder at the end of each month. Likewise, he has very little in his savings account; his retirement account has about \$5,000. Applicant currently works two jobs to make ends meet.⁷

² SEAD-4, ¶ B, *Purpose*.

³ SEAD-4, ¶ C, *Applicability*.

⁴ See also ISCR Case No. 07-00029 at 3 (App. Bd. Dec. 7, 2007) (when the guidelines were last revised, the Board stated: "Quasi-judicial adjudications must be made within the bounds of applicable law and agency policy, not without regard to them.")

⁵ GE 1; Tr. 27-29.

⁶ GE 1; Tr. 30-32.

⁷ Tr. 24, 44-46.

Applicant called two character witnesses. The first was his direct supervisor, who has known Applicant for about three-and-a-half years. He characterized Applicant as orderly, timely, and having an exemplary work ethic.⁸ The second character witness was Applicant's mother, who is also his pastor. She characterized her son as well-grounded, very truthful and upright, with a work ethic beyond reproach.⁹

The SOR alleges six delinquent consumer debts totaling \$4,271 and a delinquent child support debt of \$775.¹⁰ It also alleges: (1) a Chapter 13 bankruptcy filed in December 2011 that converted to a Chapter 7 and was discharged in July 2012; and (2) that Applicant failed to timely file his federal and state income tax returns for 2009 and 2012.¹¹ Applicant admitted those allegations and further explained his admissions during the hearing.¹²

Applicant explained his bankruptcy. In 2011 Applicant and his second wife were having financial issues, so they filed a Chapter 13 bankruptcy. They did so to protect her security clearance. At that time, Applicant was a self-employed contractor and as such he was "in and out of work" and could not pay his debts. During the pendency of the bankruptcy, divorce proceedings were started, and as a result the Chapter 13 just "fell into Chapter 7," and the discharge was granted in 2012. The debts discharged were one car loan and several credit cards.¹³

Applicant addressed the status of the consumer debts. Except for SOR ¶ 1.g (car loan) and SOR ¶ 1.h (child support), all of the SOR debts are being managed by a credit counseling and consolidation agency.¹⁴ Applicant has not yet been financially able to make any payments on those debts through that agency.¹⁵ He is current on his car loan payments, the lender allowing him to make two catch-up payments, which he did. He is also current on his child support account.¹⁶

Applicant explained his federal and state income tax situation. In 2009 and 2012, he was not employed, so he gave his W-2 forms to his then ex-wife with the understanding

⁸ Tr. 17-19.

⁹ Tr. 23-25.

¹⁰ SOR ¶¶ 1.d-1.j.

¹¹ SOR ¶¶ 1.a-1.c.

¹² Answer ¶¶ 1.a-1.j.

¹³ Tr. 32-34.

¹⁴ SOR ¶¶ 1.d-f and 1.i. and j.

¹⁵ Tr. 42-47.

¹⁶ Tr. 43-45; Answer ¶ 1.g, p. 1 (Deferment Agreement); AE A, p. 7.

that she would file returns for both of them. It was not until he began the security clearance process (October 2014) that he discovered that she had filed for herself but not for him. He has now filed all his back federal income tax returns. He does owe the IRS back taxes, but he does not know the total amount. He has an agreement with the IRS to pay \$181 per month. The IRS has sent him the direct withdrawal form for his bank account but has not yet sent him the installment agreement.¹⁷

Applicant has not yet filed his state income tax returns for State A (years 2011 through 2013) or for his new residence, in State B (years 2014 through 2016).¹⁸

Law and Policies

“[N]o one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). Individuals are eligible for access to classified information “only upon a finding that it is clearly consistent with the national interest” to authorize such access. E.O. 10865 § 2; SEAD-4, ¶ E.4.

When evaluating an applicant’s eligibility for a security clearance, an administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations, the guidelines list potentially disqualifying and mitigating conditions. The guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies the guidelines in a commonsense manner, considering all available and reliable information, in arriving at a fair and impartial decision. SEAD-4, Appendix A, ¶¶ 2(c), 2(d).

Department Counsel must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.14. Applicants are responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven . . . and has the ultimate burden of persuasion as to obtaining a favorable clearance decision.” Directive ¶ E3.1.15.

Administrative Judges are responsible for ensuring that an applicant receives fair notice of the issues raised, has a reasonable opportunity to litigate those issues, and is not subjected to unfair surprise. ISCR Case No. 12-01266 at 3 (App. Bd. Apr. 4, 2014). In resolving the ultimate question regarding an applicant’s eligibility, “[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security.” SEAD-4, Appendix A, ¶ 2(b). See also SEAD-4, ¶ E.4. Moreover, the Supreme Court has held that officials making “security clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531.

¹⁷ Tr. 35-36; GE 1.

¹⁸ Tr. 39-41. At the close of testimony, Department Counsel moved to amend the SOR to add a new ¶ 1.k for failure to file income tax returns in State A for 2011, 2012, and 2013, and to amend the SOR to add a new ¶ 1.l for failure to file income tax returns in State B for 2014, 2015, and 2016. Applicant did not object, and the motion was granted. Tr. 48-49.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk an applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Discussion

Guideline F - Financial Considerations

The SOR alleges that Applicant has a number of delinquent debts, which purportedly raise a security concern under Guideline F. The financial considerations security concern is explained at AG ¶ 18, which in pertinent part, states:

Failure to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information. Financial distress can also be caused or exacerbated by, and thus can be a possible indicator of, other issues of personnel security concern such as excessive gambling, mental health conditions, substance misuse, or alcohol abuse or dependence.

Guideline F is not limited to a consideration of whether a person with financial issues might be tempted to compromise classified information or engage in other illegality to pay their debts. It also addresses the extent to which the circumstances giving rise to delinquent debt and other security-significant financial issues cast doubt upon a person's self-control, judgment, and other qualities essential to protecting classified information.¹⁹

In assessing Applicant's case, I considered the following pertinent disqualifying conditions:

AG ¶ 19(a): inability to satisfy debts;

AG ¶ 19(c): a history of not meeting financial obligations; and

AG ¶ 19(f): failure to file...annual Federal, state, or local income tax returns or failure to pay annual Federal, state, or local income tax as required.

In assessing Applicant's case, I considered the following pertinent mitigating conditions:

¹⁹ ISCR Case No. 11-05365 at 3 (App. Bd. May. 1, 2012).

AG ¶ 20(a): the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;

AG ¶ 20(b): the conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, a death, divorce or separation, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances;

AG ¶ 20(c): the individual has received or is receiving financial counseling for the problem from a legitimate and credible source, such as a non-profit credit counseling service, and there are clear indications that the problem is being resolved or is under control;

AG ¶ 20(d): the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts; and

AG ¶ 20(g): the individual has made arrangements with the appropriate tax authority to file or pay the amount owed and is in compliance with those arrangements.

A security clearance adjudication is not a debt-collection process. Rather, an administrative judge examines the way an applicant handles his or her personal financial obligations to assess how they may handle their security obligations.²⁰ Here, Applicant's security clearance eligibility was called into question by his past financial problems and primarily his failure to file his federal and state income tax returns. AG ¶¶ 19(a), (c), and (f) apply. The next inquiry is whether any mitigating conditions apply.

The Chapter 13 filing in 2011 was caused by financial problems Applicant and his second wife were having. Part of the problem was Applicant being "in and out of work" as a self-employed contractor, which I took to mean periods of unforeseen unemployment. The Chapter 13 was jeopardized by the commencement of divorce proceedings, which caused the Chapter 13 to be converted to a Chapter 7, resulting in a discharge of debts in 2012. Those were circumstances largely beyond Applicant's control, and I find that the filing of a Chapter 13 and its conversion to a Chapter 7 was responsible conduct by Applicant. AG ¶ 20(b) applies.

Applicant has taken prudent steps to address his consumer debts (SOR ¶¶ 1.d-f and 1.i. and j.). He has placed them with a credit counseling and consolidation agency with plans to pay them down through that agency. He has not yet, however, been financially able to make any payments. Applicant's first step in this regard earns him

²⁰ See *generally* ISCR Case No. ISCR Case No. 12-09719 at 2-3 (App. Bd. Apr. 6, 2016).

partial mitigation under AG ¶ 20(c). To show full mitigation, the Board routinely requires that applicants show evidence of a track record of making payments to retire debts.²¹ These debts have not been fully mitigated under AG ¶ 20(c).

The evidence establishes that Applicant has resolved his automobile loan by making two catch-up payments and that he resolved arrearages in his child support account. Those debts have been mitigated under AG ¶ 20(d).

Applicant's income tax problems are a bit more complicated than the above-discussed debts. The SOR alleged that Applicant failed to timely file his 2009 and 2012 federal and state income tax returns, which he admitted. At hearing Applicant explained credibly that because he was unemployed during those years, he gave his then ex-wife his tax paperwork, and he understood that she would file returns for both of them. At the inception of the security clearance process, he learned that she had not filed his returns for those two years. Therefore, he filed all unfiled federal income tax returns and his state returns for the two years at issue, bringing him current on his federal filings. His ex-wife's failure to file his income tax returns is a circumstance largely beyond Applicant's control, and he acted responsibly in mitigating the failure to file for those two years. AG ¶¶ 20(b) applies. That does not, however, end the discussion.

The evidence established that when Applicant filed his overdue federal income tax returns, he learned that he owed the IRS back taxes, but he did not know the total amount. As with his consumer debts, Applicant took proper steps and negotiated a monthly payment arrangement with the IRS to repay those back taxes. He knows the monthly amount of those payments but awaits the final agreement from the IRS. These back federal income taxes are not alleged in the SOR, and, therefore, I discuss them only as they bear on the whole-person concept.²²

This brings us to the SOR amendments allowed without objection at the close of the hearing, failure to file income tax returns in State A for 2011 through 2013 and failure to file income tax returns in State B for 2014 through 2016.²³ Coming to light as they did during the hearing, there is no evidence mitigating these disqualifying conditions.

To sum up, Applicant has mitigated his Chapter 13 bankruptcy filing, has partially mitigated his consumer debts, has mitigated his automobile loan delinquency, his child support arrearage, and has mitigated his failure to file state and federal income tax returns for 2009 and 2012. To fully mitigate his consumer debts, Applicant needs to generate a track record of payments. To mitigate the unfiled back state income tax returns in the two amended SOR allegations, he needs to file those tax returns and pay any taxes due. Finally, to avoid problems in the future with his federal income taxes, he needs to start

²¹ ISCR Case No. 11-06157 at 2 (App. Bd. Nov. 20, 2012); ISCR Case No. 09-01321 at 2 (Feb. 17, 2010).

²² AG ¶ 2(a)(1)-(9). Once Applicant has a finalized agreement with the IRS and has established a track record of making payments under that agreement, AG ¶ 20(g) may be applicable. See note 21, *supra*.

²³ SOR ¶¶ 1.k and 1.l.

and continue to comply with his agreement with the IRS as to back taxes.²⁴ As the foregoing summary shows, Applicant is on the right path to financial stability.

Conclusion

The record raises doubts about Applicant's reliability, trustworthiness, good judgment, and ability to protect classified information. In reaching this conclusion, I weighed the evidence as a whole and considered if the favorable evidence outweighed the unfavorable evidence or *vice versa*. I also gave due consideration to the whole-person concept.²⁵ Accordingly, I conclude that Applicant did not meet his ultimate burden of persuasion to show that it is clearly consistent with the national interest to grant her eligibility for access to classified information.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline F (Financial Considerations):	Against Applicant
Subparagraphs 1.a-1.c:	For Applicant
Subparagraphs 1.d-1.f:	Against Applicant
Subparagraphs 1.g-1.h:	For Applicant
Subparagraphs 1.i-1.l:	Against Applicant

Philip J. Katauskas
Administrative Judge

²⁴ If Applicant can mitigate those several issues noted, he would be a good candidate for reapplying for a security clearance.

²⁵ AG ¶ 2(a)(1)-(9).