



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 15-06727

Appearances

For Government: Robert B. Blazewick, Esq., Department Counsel
For Applicant: *Pro se*

02/13/2018

Decision

RIVERA, Juan J., Administrative Judge:

Applicant established that circumstances beyond his control contributed, in part, to his financial problems. Notwithstanding, his evidence is insufficient to show that he has been financially responsible. He paid some of his delinquent consumer accounts, but failed to file his federal and state income tax returns for tax years 2010 through 2013. Clearance is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on October 15, 2014. After reviewing it and the information gathered during a background investigation, the Department of Defense (DOD) issued a Statement of Reasons (SOR) on May 15, 2016, alleging security concerns under Guideline F (financial considerations). Applicant answered the SOR on June 14, 2016, and requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA).

DOHA assigned the case to another administrative judge on December 6, 2016, and to me on March 27, 2017. DOHA issued a notice of hearing on February 1, 2017, setting the hearing for March 29, 2017. The hearing was held as scheduled. At the hearing, the Government offered three exhibits (GE 1 through 3). Applicant testified and

submitted exhibit AE 1. AE 2 was submitted post-hearing and is comprised of three favorable reference statements. All exhibits were admitted without objection. DOHA received the hearing transcript (Tr.) on April 7, 2017.

Findings of Fact

Applicant admitted the factual allegations in SOR ¶¶ 1.a, 1.c through 1.e, and 1.g through 1.i. He denied the allegations in SOR ¶¶ 1.b and 1.f. His admissions to the SOR and at his hearing are incorporated herein as findings of fact. After a thorough review of the record evidence, including his testimony and demeanor while testifying, I make the following additional findings of fact:

Applicant is a 53-year-old employee of a federal contractor. He graduated from high school in 1982, and enlisted in the U.S. Army. He honorably served until his discharge in June 1992. He then joined the Army Reserve where he served for one year and received an honorable discharge. Applicant held a clearance while in the service between 1987 and 1992. The clearance lapsed with his discharge. He was granted a secret clearance in 1998 that was upgraded to a top-secret clearance in 2007, and has been renewed to present.

Applicant married his first wife in 1984 and divorced in 1994. He married his second wife in 1995 and separated in 2005, but never divorced. She died in 2015. He has two adult children, ages 32 and 30. Applicant attended some college, but did not earn sufficient credits for a degree. Applicant travelled on vacation to Mexico for about six days in December 2008, and the Bahamas for a period of six days in December 2010.

Applicant worked for a private company between December 1999 and September 2004. In September 2004, Applicant's current employer, a federal contractor, hired him. His current yearly salary is \$73,000. He has been living with a cohabitant since April 2014. He testified that they share the household expenses and with her assistance, he believes he should be able to pay his delinquent debts quickly.

In his October 2014 SCA, Applicant disclosed that he had financial problems, which included some delinquent accounts and a judgment. He also disclosed that he failed to file his federal and state income tax returns between 2010 and 2013. He does not know whether he owes back taxes for those years. Applicant believed that many of the delinquent debts date back to his married days. When his late wife left him, she did not help him to pay their accumulated debts and Applicant assumed those debts. Applicant claimed that he was in the process of contacting a company (C) seeking their assistance to consolidate his debts and set up a payment plan.

Applicant explained in his October 2014 SCA, that he has not able to pay his debts sooner because he was sick with Rheumatoid Arthritis. The sickness flares up periodically and the pain and fatigue prevented him from working. At times, he has become overwhelmed and depressed requiring medical attention. Applicant noted that

he received disability payments and was unable to work between May 2011 and May 2013, and between 2002 and 2004. In 2011, he was earning about \$68,000 a year, and when he returned to work his income was reduced to \$55,000 a year. His disability contributed to his reduced earnings for several years. He was unable to pay his delinquent debts and living expenses. He lived with his grandmother between 2003 and 2016, providing her with some financial assistance.

In his 2014 SCA, Applicant disclosed that he had failed to file his federal and state income tax returns for tax years 2010 through 2013. He explained that his sickness caused him pain, fatigue, and depression, all of which overwhelmed him and prevented him from being financially responsible. Applicant claimed he was getting his records together and had retained the services of tax professionals to help him prepare and file his late income tax returns. In his answer to the SOR, Applicant claimed his sister was helping him to complete and file his delinquent income tax returns. He promised he would file them not later than July 2016.

Applicant also claimed he did not know how to properly file his income tax returns because of his separation. He did not have all the documents he needed, his late wife was not communicating with him, and he did not want to make mistakes in his income tax returns.

In early 2015, Applicant retained the services of a company (F) to help him consolidate some of his delinquent debts and to set up a debt payment plan. His documentary evidence shows current participation and consecutive payments made from 2015 to March 2017.

Concerning the SOR allegations, I find that:

SOR ¶ 1.a (\$1,281) alleged an unpaid judgment against Applicant from 2011. Applicant explained that he has not been able to contact the creditor. He could not explain why the debt was not included in his consolidation plan. (Tr. 45)

Applicant's evidence shows he paid the debts alleged in SOR ¶¶ 1.b (\$254), 1.f (\$195), and 1.g (\$261). (Tr. 33)

SOR ¶¶ 1.c (\$10,712) and 1.e (\$890) are being paid through Applicant's debt consolidation and repayment plan. Between March 2016 and March 2017, Applicant reduced his debt on the account alleged in SOR ¶ 1.c by close to \$3,000.

SOR ¶¶ 1.d (\$440) and 1.h (\$705) are unpaid and are not part of Applicant's debt consolidation plan. Applicant averred that his medical insurance should have paid for the medical account alleged in SOR ¶ 1.d, and that he made some payments on the account alleged in SOR ¶ 1.h. He failed to present any documentary evidence to corroborate his claims.

As of his hearing in March 2017, Applicant had not filed any of his delinquent income tax returns for tax years 2010 through 2013 (SOR ¶ 1.i). (Tr. 35) Moreover, Applicant testified he had not filed federal or state income tax returns for tax years 2014, 2015, and 2016. (Tr. 50)

Applicant states he has learned his lesson. He acknowledged that he should have been more responsible filing and paying his taxes. He believes he was doing the best he could based on his circumstances. Applicant noted his sickness impaired his ability to prioritize and think straight. He highlighted his 10 years of service during most of which he held a clearance without any issues or concerns. Applicant promised to continue paying his legal debts and to resolve his financial problems.

Applicant repeatedly stated that he is not a threat to the United States. He considers himself to be an honest, patriotic, and dedicated American. He would like to continue serving the United States through his work for federal contractors. Applicant has established an excellent reputation for his professionalism, work ethic, knowledge, and quality of his work. He is well liked by his supervisors, clients, and coworkers.

Policies

The SOR was issued under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive) (January 2, 1992), as amended; and the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), implemented by the DOD on September 1, 2006.

While the case was pending a decision, the Security Executive Agent implemented Security Executive Agent Directive (SEAD) 4, *National Security Adjudicative Guidelines* (AG), effective 8 June 2017, which replaced the 2006 AG. I decided this case under the AGs implemented by SEAD 4.

Eligibility for access to classified information may be granted “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, § 2. The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

The AG list disqualifying and mitigating conditions for evaluating a person’s suitability for access to classified information. Any one disqualifying or mitigating condition is not, by itself, conclusive. However, the AG should be followed where a case can be measured against them, as they represent policy guidance governing access to classified information. Each decision must reflect a fair, impartial, and commonsense consideration of the whole person and the factors listed in SEAD 4, App. A ¶¶ 2(d) and

2(f). All available, reliable information about the person, past and present, favorable and unfavorable, must be considered.

Security clearance decisions resolve whether it is clearly consistent with the national interest to grant or continue an applicant's security clearance. The Government must prove, by substantial evidence, controverted facts alleged in the SOR. If it does, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. The applicant bears the heavy burden of demonstrating that it is clearly consistent with the national interest to grant or continue his or her security clearance.

Persons with access to classified information enter into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability, and trustworthiness of those who must protect national interest as their own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access in favor of the Government. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; SEAD 4, ¶ E(4); SEAD 4, App. A, ¶¶ 1(d) and 2(b). Clearance decisions are not a determination of the loyalty of the applicant concerned. They are merely an indication that the applicant has or has not met the strict guidelines the Government has established for issuing a clearance.

Analysis

Financial Considerations

AG ¶ 18 articulates the security concern relating to financial problems:

Failure or inability 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 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. An individual who is financially overextended is at greater risk of having to engage in illegal or otherwise questionable acts to generate funds.

Applicant's history of financial problems is documented in the record. He had several delinquent accounts that have been in collection or charged off since 2011. Moreover, he failed to file his federal and state income tax returns for tax years 2010 through 2013. AG ¶ 19 provides three disqualifying conditions that could raise a security concern and may be disqualifying in this case: "(a) inability to satisfy debts"; "(c) a history of not meeting financial obligations"; and "(f) failure to file or fraudulently filing annual Federal, state, or local income tax returns or failure to pay . . . income tax as

required.” The record established the disqualifying conditions, requiring additional inquiry about the possible applicability of mitigating conditions.

The following mitigating conditions under AG ¶ 20 are potentially applicable:

(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;

(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, or a death, divorce or separation, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances;

(c) the person has received or is receiving 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;

(d) the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts;¹

(e) the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue; and

(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.

¹ The Appeal Board has previously explained what constitutes a “good faith” effort to repay overdue creditors or otherwise resolve debts:

In order to qualify for application of [the “good faith” mitigating condition], an applicant must present evidence showing either a good-faith effort to repay overdue creditors or some other good-faith action aimed at resolving the applicant’s debts. The Directive does not define the term “good-faith.” However, the Board has indicated that the concept of good-faith “requires a showing that a person acts in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation.” Accordingly, an applicant must do more than merely show that he or she relied on a legally available option (such as bankruptcy) in order to claim the benefit of [the “good faith” mitigating condition].

(internal citation and footnote omitted) ISCR Case No. 02-30304 at 3 (App. Bd. Apr. 20, 2004) (quoting ISCR Case No. 99-9020 at 5-6 (App. Bd. June 4, 2001)).

The Appeal Board concisely explained Applicant's responsibility for proving the applicability of mitigating conditions as follows:

Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in security clearance decisions is that articulated in *Egan, supra*. "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." Directive, Enclosure 2 ¶ 2(b).

ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013).

None of the financial considerations mitigating conditions are fully raised by the facts in this case and they do not mitigate the security concerns. Applicant's financial problems are ongoing and recent. Some of his financial problems could be attributed to, or were aggravated by, circumstances beyond his control, such as: his 2005 separation, his sickness and periods of disability with the resulting loss of income, and his financial support to his grandmother. Notwithstanding, considering the evidence as a whole, I find that Applicant failed to establish he was financially responsible under the circumstances, and that his financial problems are unlikely to recur.

Applicant acknowledged he should have been more responsible in addressing his delinquent accounts and his tax obligations. On balance, the record shows he responsibly addressed most of his delinquent consumer accounts based on his financial ability. Nevertheless, Applicant failed to establish his financial responsibility concerning the filing of his income tax returns for tax years 2010 through 2016. Applicant has known of the government's financial concerns about his failure to file his income tax returns since at least 2014 when he submitted his SCA. He was again made aware of the raised security concerns two years later when he received the 2016 SOR. Notwithstanding, as of his hearing day, Applicant had not filed any of his delinquent income tax returns.

Applicant's promises to resolve his longstanding tax situation do not mitigate the financial considerations concerns. His failure to file his income tax returns shows a lack of judgment and an unwillingness to abide by rules and regulations, all of which can raise questions about his reliability, trustworthiness, and ability to protect classified and sensitive information.

Whole-Person Concept

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, and under the whole-person

concept. SEAD 4, App. A, ¶¶ 2(a), 2(d) and 2(f). I have incorporated my comments under Guideline F in my whole-person analysis. Some of these factors were addressed under that guideline, but some warrant additional comment.

Applicant, 53, received an honorable discharge from the U.S. Army after 10 years of service. While in the service, Applicant possessed a clearance. His financial problems could be attributed to, or were aggravated by, circumstances beyond his control. Notwithstanding, Applicant failed to present sufficient evidence of financial responsibility to mitigate the concerns raised by his failure to file federal and state income tax returns between 2010 through 2013. Considering the evidence as a whole, I find that his financial problems occurred under circumstances likely to recur. His financial problems are unresolved and not under control. The financial considerations security concerns are not mitigated.

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:	AGAINST APPLICANT
Subparagraphs 1.a - 1.h:	For Applicant
Subparagraph 1.i:	Against Applicant

Conclusion

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national security interests of the United States to grant eligibility for a security clearance to Applicant. Clearance is denied.

JUAN J. RIVERA
Administrative Judge