



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



In the matter of:

ISCR Case No. 15-08043

Applicant for Security Clearance

Appearances

For Government: Christopher Morin, Esq., Department Counsel
For Applicant: Richard Frizzell, Personal Representative

02/28/2018

Decision

TUIDER, Robert, Administrative Judge:

Applicant failed to mitigate security concerns regarding Guideline F (financial considerations). Clearance is denied.

Statement of the Case

On January 26, 2015, Applicant completed and signed a Questionnaire for National Security Position (SF-86). On May 12, 2016, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a SOR to Applicant under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry*, February 20, 1960; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), January 2, 1992; and the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information*, effective on September 1, 2006 (Sept. 1, 2006 AGs).

The SOR detailed reasons why the DOD CAF did not find under the Directive that it is clearly consistent with the interests of national security to grant or continue a security clearance for Applicant and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked. Specifically, the SOR set forth security concerns arising under Guideline F (financial considerations).

On June 22, 2016, Applicant provided a response to the SOR. On June 30, 2016, Department Counsel was ready to proceed. On June 8, 2017, the case was assigned to me. On June 26, 2017, the Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing, setting the hearing for August 15, 2017. Applicant's hearing was held as scheduled.

During the hearing, Department Counsel offered four exhibits; Applicant offered one exhibit; there were no objections; and all proffered exhibits were admitted into evidence. (Transcript (Tr.) 15-17; GE 1-4; Applicant Exhibit (AE) A) On August 23, 2017, DOHA received a copy of the transcript of the hearing. The record was held open until September 29, 2017, to permit Applicant to submit additional documentation. (Tr. 54, 63) Applicant provided nine post-hearing exhibits, which were admitted without objection. (AE B-AE J)

While this case was pending a decision, the Director of National Intelligence (DNI) issued Security Executive Agent Directive 4, establishing in Appendix A the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AGs), which are applicable to all covered individuals who require initial or continued eligibility for access to classified information or eligibility to hold a sensitive position. The new AGs supersede the Sept. 1, 2006 AGs and are effective on June 8, 2017. I have evaluated Applicant's security clearance eligibility under the new AGs.¹

Procedural Issue

Department Counsel moved to amend the SOR to add SOR ¶ 1.e alleging that Applicant failed to file his federal income tax returns for tax years 2015 and 2016. (Tr. 54, 58) Department Counsel also moved to add SOR ¶ 1.f alleging that Applicant failed to file his state income tax returns for tax years 2015 and 2016. (Tr. 59-60) Applicant did not object, and the motion to amend the SOR was granted. (Tr. 60)

Findings of Fact²

In Applicant's SOR response, he admitted the SOR allegation in SOR ¶ 1.b. HE 3. His SOR response also provided extenuating and mitigating information. His admissions are accepted as findings of fact.

Applicant is 44-years-old, and he has been employed with a DOD contractor as a supply technician since January 2015. (Tr. 17-18) He does not have a security clearance. (Tr. 18) His current position requires a security clearance. (Tr. 19) In 1991, he graduated from high school. (Tr. 19) He has not attended college. (Tr. 19-20) In 2006, he married.

¹ Application of the AGs that were in effect as of the issuance of the SOR would not change my decision in this case. The new AGs are available at http://ogc.osd.mil/doha/5220-6_R20170608.pdf.

² Some details were excluded to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

(Tr. 20) He has one step-child who is 36. (Tr. 20-21) His spouse is employed full-time outside his home. (Tr. 20) He has not served in the U.S. armed forces. (Tr. 21)

Financial Considerations

The SOR details the following allegations, and their status is as follows:

SOR ¶ 1.a alleges that in September 2011, a judgment was filed against Applicant for \$1,930. Applicant leased a vehicle for his spouse. (Tr. 26) In 2011, the creditor claimed wear and tear to the vehicle and obtained a judgment for \$1,930. The creditor received payment through garnishment of Applicant's wages, and the creditor wrote on February 20, 2014 that the debt was paid in full. (Tr. 26, 52; SOR response)

SOR ¶ 1.b alleges that in November 2011, a state tax lien was filed against Applicant for \$625 for real estate taxes. The house with the lien is in his spouse's name, and the state tax lien is not Applicant's debt. (Tr. 27-29) Applicant said he paid the state tax authority \$225, and he plans to pay \$225 for three months, which will resolve his spouse's real estate debt. (Tr. 27-30) The June 22, 2016 installment agreement Applicant submitted to address this lien indicates the debt is for \$894. (SOR response) Department Counsel requested, and the record was held open, to permit Applicant to provide updated status of his state tax debt. (Tr. 30, 54) He did not provide any post-hearing information about this debt.

SOR ¶ 1.c alleges that Applicant failed to file his federal income tax returns for tax years 2012, 2013, and 2014. Applicant filed the tax returns for tax years 2012 (owes \$684) and 2013 (refund \$1,471) in July 2015, and he filed his federal income tax return for tax year 2014 (refund \$1,388) in the winter of 2015. (Tr. 10, 38-39, 41; SOR response). He said his spouse takes care of the family tax returns, and she was under the impression that it was unnecessary to file timely their tax returns. (Tr. 33-34) His family was distracted from filing tax returns when his brother, mother-in-law, and mother suffered serious illnesses. (Tr. 34-35) His brother passed away from cancer. His spouse was exhausted from working 12-hour shifts. (Tr. 34-35, 47) Applicant was underemployed. For example, around 2011 Applicant was earning \$11.50 an hour and later he was making \$12.86 an hour. His spouse had four periods of unemployment. (Tr. 35-36, 47) In 2012 and 2013, he thought a volunteer at the library filed his tax returns; however, they were not actually filed. (Tr. 37)

SOR ¶ 1.d alleges that Applicant owes federal income taxes totaling \$4,400 for tax years 2012 and 2013. On August 11, 2014, the IRS wrote that Applicant owed \$4,426 for tax years 2009, 2010, and 2014, and the IRS assessed the debt as uncollectable. (Tr. 32; SOR response) The August 11, 2014 IRS letter did not provide a year-by-year breakdown on the taxes owed for each tax year. On April 31, 2015, the IRS wrote that Applicant overpaid his taxes \$1,471 for tax year 2013, and \$1,109 was applied to his debt for tax year 2010, and \$361 was applied to his debt for tax year 2009. (AE A) He still owed \$367 to the IRS. (Tr. 31; AE A) Department Counsel requested that Applicant provide tax transcripts. (Tr. 32-33) Applicant asserted he owed the IRS less than \$500. (Tr. 33) Department Counsel requested updated information on the status of this debt. (Tr. 55)

SOR ¶ 1.e alleges that Applicant failed to file his federal income tax returns for tax years 2015 and 2016. (Tr. 43-44, 58) SOR ¶ 1.f alleges he failed to file his state income tax returns for tax years 2015 and 2016. (AE B) As of the date of his hearing, he had not filed his federal and state income tax returns for those tax years. (Tr. 44) He blamed the failure to file his tax return for tax year 2015 on the delay in obtaining a security clearance and “a boss that was actively trying to fire [him] over it.” (Tr. 43) He eventually conceded his problems at work and the delay in approval of his security clearance did not cause him not to timely file his tax returns. (Tr. 44) In September 2017, Applicant filed his federal and state tax returns for tax years 2015 and 2016, and he is “getting some refunds in these tax returns.” (AE F; AE J) He said in the future, he plans to file his tax returns separately from his spouse to ensure his tax returns are timely filed. (Tr. 38, 47, 57)

After Applicant’s hearing, he provided additional evidence about his state income taxes. On unspecified dates, he paid the following amounts to the state tax authority: \$84 for tax year 2012; \$101 for tax year 2013; \$1,361 for tax year 2014; and \$4 for tax year 2015. (AE B-AE E)

Character Evidence

A police officer with more than 20 years of law enforcement experience, a retired Navy chief petty officer, and a retired Army colonel have known Applicant for many years. The general sense of their letters is that Applicant is diligent, trustworthy, and honest. Their statements support approval of his security clearance. (AE G; AE H; AE I)

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information.” *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicant’s eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and

endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information. Clearance decisions must be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See Exec. Or. 10865 § 7. Thus, nothing in this decision should be construed to suggest that it is based, in whole or in part, on any express or implied determination about applicant’s allegiance, loyalty, or patriotism. It is merely an indication the applicant has not met the strict guidelines the President, Secretary of Defense, and Director of National Intelligence have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Financial Considerations

AG ¶ 18 articulates the security concern for financial problems:

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

The Appeal Board explained the scope and rationale for the financial considerations security concern in ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012) (citation omitted) as follows:

This concern is broader than the possibility that an applicant might knowingly compromise classified information in order to raise money in satisfaction of his or her debts. Rather, it requires a Judge to examine the totality of an applicant's financial history and circumstances. The Judge must consider pertinent evidence regarding the applicant's self-control, judgment, and other qualities essential to protecting the national secrets as well as the vulnerabilities inherent in the circumstances. The Directive presumes a nexus between proven conduct under any of the Guidelines and an applicant's security eligibility.

AG ¶ 19 includes 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 annual Federal, state, or local income tax as required." The record establishes the disqualifying conditions in AG ¶¶ 19(a), 19(c), and 19(f) requiring additional inquiry about the possible applicability of mitigating conditions.

Seven financial considerations mitigating conditions under AG ¶ 20 are potentially applicable in this case:

(a) the behavior happened so long ago,³ 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, a death, divorce or separation, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances;

(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;

³ A debt that became delinquent several years ago is still considered recent because "an applicant's ongoing, unpaid debts evidence a continuing course of conduct and, therefore, can be viewed as recent for purposes of the Guideline F mitigating conditions." ISCR Case No. 15-06532 at 3 (App. Bd. February 16, 2017) (citing ISCR Case No. 15-01690 at 2 (App. Bd. Sep. 13, 2016)).

(d) the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts;⁴

(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;

(f) the affluence resulted from a legal source of income; 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.

The DOHA 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).

Applicant and his spouse's unemployment, underemployment, and family illnesses were partially or fully outside his control and adversely affected his finances. However, he did not establish that he acted prudently and responsibly under the circumstances. His

⁴ 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)).

failures to ensure his federal and state income tax returns were timely filed showed poor judgment.

In ISCR Case No. 15-01031 at 4 (App. Bd. June 15, 2016), the Appeal Board reversed the grant of a security clearance and commented as follows:

Failure to comply with Federal and/or state tax laws suggests that an applicant has a problem with abiding by well-established Government rules and regulations. Voluntary compliance with rules and regulations is essential for protecting classified information. . . . By failing to [comply with tax laws], Applicant did not demonstrate the high degree of good judgment and reliability required of persons granted access to classified information.

Applicant is credited with mitigating SOR ¶ 1.a. On February 20, 2014, the creditor received payment through garnishment of Applicant's wages. The debt in SOR ¶ 1.b is mitigated because it is his spouse's debt. SOR ¶ 1.c is partially mitigated because Appellant filed his federal income tax returns for tax years 2012, 2013, and 2014 in July 2015, which was before the SOR was issued.

The main problem here is Applicant's failure to timely file his state and federal tax returns for tax years 2012 through 2016. For some of these years, he was entitled to a refund, or the taxes due were low. For the first three years, he relied on his spouse to file their tax returns. For 2015 and 2016, he filed the tax returns after his hearing. He did not provide documentation showing the specific amount of federal taxes due. His failure to file his tax returns timely several years ago is somewhat excused due to his underemployment, lack of education, financial inexperience, misplaced trust in a tax volunteer, and illnesses in his family. There is insufficient assurance his financial problems are resolved, under control, and will not recur in the future. Under all the circumstances, he failed to establish mitigation of financial considerations security concerns.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an Applicant's eligibility for a security clearance by considering the totality of the Applicant's conduct and all the circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d):

(1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Under AG ¶ 2(c), “[t]he ultimate determination” of whether to grant a security clearance “must be an overall commonsense judgment based upon careful consideration of the guidelines” and the whole-person concept. My comments under Guideline F are incorporated in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under that guideline but some warrant additional comment.

Applicant is 44-years-old, and he has been employed with a DOD contractor as a supply technician since January 2015. In 1991, he graduated from high school. He has not attended college. His spouse is employed full-time outside his home. Several circumstances beyond his control harmed his finances and distracted him and his spouse from timely filing their federal and state tax returns for several years.

A police officer, a retired Navy chief petty officer, and a retired Army colonel have known Applicant for many years and describe him as diligent, trustworthy, and honest. Their statements support approval of his security clearance.

The evidence against grant of a security clearance is substantial. Applicant filed his federal tax returns late for tax years 2012 through 2016. He filed his state tax returns late for 2015 and 2016. He did not provide documentation showing the current status of his federal tax debt. His actions raise unmitigated questions about Applicant’s reliability, trustworthiness, and ability to protect classified information. See AG ¶ 18.

It is well settled that once a concern arises regarding an applicant’s security clearance eligibility, there is a strong presumption against the granting a security clearance. See *Dorfmont*, 913 F. 2d at 1401. Unmitigated financial considerations security concerns lead me to conclude that grant of a security clearance to Applicant is not warranted at this time. I have carefully applied the law, as set forth in *Egan*, Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. Financial consideration security concerns are not mitigated. It is not clearly consistent with the interests of national security to grant Applicant security clearance eligibility at this time.

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.b, and 1.c:	For Applicant
Subparagraphs 1.d, 1.e, and 1.f:	Against Applicant

Conclusion

In light of all of the circumstances in this case, it is not clearly consistent with the interests of national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Robert Tuider
Administrative Judge