



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



In the matter of:

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ISCR Case No. 16-00689

Applicant for Security Clearance

Appearances

For Government: Robert J. Kilmartin, Esq., Department Counsel

For Applicant: Gregory F. Greiner, Esq.

02/26/2018

Decision

TUIDER, Robert, Administrative Judge:

Applicant mitigated security concerns pertaining to Guideline F (financial consideration). Clearance is granted.

Statement of the Case

On September 17, 2014, Applicant completed and signed a Questionnaire for National Security Positions (SF-86). On June 3, 2016, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (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*, which became 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 the financial considerations guideline.

In an undated response, Applicant answered the SOR and requested a hearing. On August 25, 2016, Department Counsel was prepared to proceed. On October 5, 2016, the Defense Office of Hearings and Appeals (DOHA) assigned the case to me. On December 16, 2016, DOHA issued a notice of the hearing, setting the hearing on February 9, 2017. The hearing was held as scheduled.

At the hearing, Department Counsel offered Government Exhibits (GE) 1 through 6, which were received into evidence without objection. Applicant testified and offered Applicant Exhibits (AE) A through K, which were received without objection. I held the record open until February 28, 2017, to afford Applicant the opportunity to submit additional evidence. Applicant timely submitted AE L through M, which were received without objection. On October 19, 2017, DOHA received the hearing transcript (Tr.).¹

While this case was pending a decision, the Director of National Intelligence issued Security Executive Agent Directive 4, establishing *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AGs) which he made 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 “for all covered individuals” on or after June 8, 2017. Accordingly, I have evaluated Applicant’s security clearance eligibility under the new AGs, as required.²

Findings of Fact³

In Applicant’s SOR response, Applicant admitted SOR ¶¶ 1.i through 1.l, and denied the remaining SOR allegations. Additional findings of fact follow.

Background Information

Applicant is a 51-year-old electronics technician employed by a defense contractor since June 2014. He seeks to retain his secret security clearance, which is a requirement of his continued employment. Applicant has successfully held a clearance since about 1988 when he enlisted in the Navy, discussed below. (Tr. 19-21, 60-63)

Applicant graduated from high school in 1984. He attended several colleges from 1985 to 1987 earning about six credit hours before joining the Navy in March 1988. Applicant served in the Navy from 1988 to 1999, and was honorably discharged as a Fire Controlman First Class (pay grade E-6). He joined the Navy Reserve in 2004 and now holds the rank of Senior Chief Fire Controlman (pay grade E-8), filling the billet of Senior Enlisted Advisor at his unit. (Tr. 21-26, 91-92, 94-95; AE G)

¹ The original transcript was misplaced and a replacement transcript was ordered.

² The new AGs are available at http://ogc.osd.mil/doha/SEAD4_20170608.pdf.

³ Some details were excluded to protect Applicant’s right to privacy. Specific information is available in the cited exhibits.

After joining the Navy Reserve, Applicant was mobilized three times, in 2004 to Iraq, in 2007 to Kuwait, and in 2010 stateside to “prepare sailors and their families for deployments overseas.” While on active duty, Applicant made six at sea deployments, four of which were in the Persian Gulf. (Tr. 26-27; AE G) Applicant’s goal is to stay in the Navy Reserve and make Master Chief Fire Controlman. (Tr. 27-29)

Applicant married in January 1991, and has a 22-year-old son, and an 18-year-old daughter. At the time of hearing, Applicant’s son was a senior in college and his daughter was planning to start her freshman year in college. (Tr. 29-30, 94) Applicant’s wife is employed fulltime as an administrative assistant for a utility company. (Tr.30-31)

Financial Considerations

The SOR alleges 13 allegations under this concern, the most significant being that Applicant failed to file his Federal and state income tax returns from 2012 to 2014, that he owed back taxes to the IRS and his state tax authority, and that he fell behind on his first and second mortgages resulting in foreclosure. (SOR ¶¶ 1.a – 1.m) These allegations are established in part through Applicant’s admissions and through the Government’s exhibits. (SOR answer; GE 1 – 6)

Applicant traces his financial difficulties to the 2011 to 2013 timeframe when he was recalled by the Navy Reserve numerous times on short notice for active duty for training. As expected, his civilian job did not pay him while on active duty and his pay as a Navy Reservist was late in paying to the point that he was unable to stay current with his mortgage and other debts. Applicant eventually received his Navy pay, but not in a “timely fashion.” Applicant also acknowledged that he and his wife did not communicate as well as they should have to effectively maintain their household finances. Applicant thought he had resolved his mortgage issues only to find out that he had sold it to a predatory lender with an interest rate that “kept ballooning.” (Tr. 13, 32-36, 96) In 2014, Applicant’s employer reconfigured his territory, which led to the loss of his job. He was unemployed for four months before finding his current job. (Tr. 36-37, 76-78, 92-93, 97; GE 2)

The following describes the status of Applicant’s SOR allegations:

1.a – Filed Chapter 13 Bankruptcy in 2015 that was dismissed in 2016. Applicant filed Chapter 13 to save his house, but after eight to nine months could not afford the “well over \$3,000 a month” payments. (Tr. 38-40, 80-82, 84, 90-91; GE 2, GE 6) **APPLICANT’S FINANCIAL SITUATION RESOLVED.**

1.b – Failed to file Federal tax returns for tax years 2012, 2013, and 2014. Applicant filed all required Federal tax returns in January 2016, owes “a little over \$5,000” to the IRS, and as of his hearing was making \$125 monthly payments to the IRS by direct debit. Post-hearing, he submitted documentation of a \$1,500 lump-sum payment to the IRS and had increased his monthly payments to the IRS to \$225. Applicant explained that after selling his mortgage to a predatory lender, he was unable to get the necessary paperwork from the lender to file his tax returns. It took Applicant “probably two years” to

obtain the information he needed and “. . . it just kind of snowballed and got out of control.” Applicant recognizes that he should have sought professional help, but thought he “could handle it on [his] own.” He acknowledges that he made a mistake, has learned from this, and now hires a tax preparer to file his tax returns. Applicant had never missed filing his tax returns before 2012. (Tr. 40-46, 73-76, 78, 82-84, 87-88, 91; GE 2, GE 3; AE A – C; AE M) **ALLEGATION RESOLVED.**

1.c – Failed to file state tax returns for tax years 2012, 2013, and 2014. Post-hearing, Applicant filed documentation that all required state tax returns were filed and paid. See 1.b above. (Tr. 43-46; GE 2, GE 3; AE L) **ALLEGATION RESOLVED.**

1.d – 1.f – Indebted to his state tax authority in the amounts of \$421 for 2012, \$839 for 2013, and \$365 for 2014, respectively. See 1.c above. (Tr. 43-47, 89-90; GE 2, GE 3; AE L) **DEBTS RESOLVED.**

1.g – Past-due mortgage account for \$33,402, with a total balance of \$167,965. The mortgage company foreclosed on Applicant’s home and he vacated in September 2016. The proceeds from the sale of the property satisfied the first and second mortgages. See 1.m below. The real estate company handling the transaction paid Applicant \$2,500 for leaving the property in excellent condition. (Tr. 47-50, 79-81, 88-89; GE 2, GE 3; AE E) **DEBT RESOLVED.**

1.h - Defense Finance and Accounting Office (DFAS) charged-off account for \$445. This debt arose following an audit DFAS conducted following “over the 30 months or so” of active duty Applicant performed and determined that he had been overpaid. Applicant is unsure of how or when the overpayment occurred. Debt paid in full in February 2017. (Tr. 50-51, 71-72; GE 2, GE 3; AE J) **DEBT RESOLVED.**

1.i – 1.k – Delinquent accounts for medical co-pays for \$78, \$312, and \$230, respectively. Applicant stated these debts occurred when he was alternating health care coverage between his civilian employer and Navy Reserve recalls to active duty. Applicant has been unable to identify these creditors and/or determine status of debts. He is prepared to pay these accounts in full. To complicate matters, the Government exhibits do not identify the names of creditors. (Tr. 51-56, 70; GE 2 - GE 5) **ATTEMPTING TO RESOLVE.**

1.l – Collection veterinary account for \$33. Debt paid in full in February 2017. (Tr. 56-57, 70-71) **DEBT RESOLVED.**

1.m – Charged-off second mortgage account for \$35,411. The proceeds from the sale of the property satisfied the first and second mortgages. See 1.g above. (Tr. 57-59) **DEBT RESOLVED.**

Applicant and his wife attended financial counseling, and have made a concerted effort to focus on and improve their finances. They moved to less expensive housing and do not have any credit card debt or car payments. Their budget reflects they are leading a measured lifestyle and have a net monthly remainder of \$872. (Tr. 63-67, 93-94, 98-99;

AE F) Applicant's February 2017 credit report corroborates the progress that he has made in regaining financial responsibility. (AE K)

Character Evidence

Applicant submitted recent Navy Reserve enlisted and civilian performance evaluations. These evaluations reflect sustained superior performance as a Navy Reservist and as a defense contractor. (Tr. 67; AE H, AE R – AE Y) Applicant desires to continue serving and contribute as a Reservist and a Government contractor. (Tr. 95-96) Applicant's former Commanding Officer submitted a reference letter, who lauded his performance as her Senior Enlisted Advisor. She noted that integrity, honor, and reliability are just a few of his strong personal characteristics. (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 and the Secretary of Defense 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 . . . annual Federal . . . income tax returns or failure to pay annual Federal . . . income tax as required.”

Applicant did not timely file his Federal and state income tax returns for tax years 2012 to 2014. Based on this and other information in the SOR, the record established the disqualifying conditions in AG ¶¶ 19(a), 19(c), and 19(f) requiring additional inquiry about the possible applicability of mitigating conditions.

AG ¶ 20 lists seven potential mitigating conditions:

(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, 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;

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

(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.

AG ¶¶ 20(b), (c), (d), and (g) are fully applicable. When Applicant realized that his financial situation was in jeopardy, he sought financial counseling and adopted measures to regain financial responsibility. Those measures include moving to a less expensive home and adhering to a budget that is measured and conservative. When Applicant's income stream became unpredictable, his mortgage fell behind. He unsuccessfully attempted to work with his mortgage lender and had the misfortune of shifting his

mortgage to a predatory lender. Unable to remain current on an escalating mortgage payment, Applicant tried to remain afloat through Chapter 13 bankruptcy, and when that failed, he was forced to accept foreclosure on his home. Fortunately, the mortgage sale satisfied the first and second mortgages and Applicant even received \$2,500 when he relinquished his home. His other debts are resolved or are being resolved.

The remainder of this analysis will primarily focus on Applicant's failure to timely file his Federal and state income tax returns from 2012 to 2014, the most significant security concern alleged. Under these facts, application of AG ¶ 20(a) initially appears limited because the multiple income tax returns at issue were for recent years and his other debts have been ongoing until recently. Applicant is aware of his obligations to remain current on his Federal and state taxes. He promised to seek professional guidance in the future and to file his Federal and state tax returns on time, as required. Consequently, I find AG ¶ 20(a) applies. Moreover, Applicant is genuinely contrite over his laxity and oversight. He has taken the appropriate corrective action. Evidence of his Federal and state tax return filings was introduced. Applicant's tax situation is now under control.

Applicant fell behind on filing his Federal and state tax returns for three years, primarily because he did not have the required documentation from his then mortgage lender. The DOHA Appeal Board has commented:

Failure to file tax returns suggests that an applicant has a problem with complying with well-established governmental rules and systems. Voluntary compliance with such rules and systems is essential for protecting classified information. ISCR Case No. 01-05340 at 3 (App. Bd. Dec. 20, 2002). As we have noted in the past, a clearance adjudication is not directed at collecting debts. See, e.g., ISCR Case No. 07-08049 at 5 (App. Bd. Jul. 22, 2008). By the same token, neither is it directed toward *inducing an applicant to file tax returns. Rather, it is a proceeding aimed at evaluating an applicant's judgment and reliability. Id.* A person who fails repeatedly to fulfill his or her legal obligations does not demonstrate the high degree of good judgment and reliability required of those granted access to classified information. See, e.g., ISCR Case No. 14-01894 at 5 (App. Bd. Aug. 18, 2015). See *Cafeteria & Restaurant Workers Union Local 473 v. McElroy*, 284 F.2d 173, 183 (D.C. Cir. 1960), *aff'd*, 367 U.S. 886 (1961).

ISCR Case No. 14-04437 at 3 (App. Bd. Apr. 15, 2016) (emphasis in original). See ISCR Case No. 14-05476 at 5 (App. Bd. Mar. 25, 2016) (citing ISCR Case No. 01-05340 at 3 (App. Bd. Dec. 20, 2002)); ISCR Case No. 14-01894 at 4-5 (App. Bd. Aug. 18, 2015). The Appeal Board clarified that even in instances where an "[a]pplicant has purportedly corrected [the applicant's] federal tax problem, and the fact that [applicant] is now motivated to prevent such problems in the future, does not preclude careful consideration of [a]pplicant's security worthiness in light of [applicant's] longstanding prior behavior evidencing irresponsibility" including a failure to timely file federal income tax returns. See ISCR Case No. 15-01031 at 3 and note 3 (App. Bd. Jun. 15, 2016)

In ISCR Case No. 15-01031 at 2 (App. Bd. Jun. 15, 2016), the Appeal Board reversed the grant of a security clearance, and noted the following primary relevant disqualifying facts:

Applicant filed his 2011 Federal income tax return in December 2013 and received a \$2,074 tax refund. He filed his 2012 Federal tax return in September 2014 and his 2013 Federal tax return in October 2015. He received Federal tax refunds of \$3,664 for 2012 and \$1,013 for 2013.

Notwithstanding the lack of any tax debt owed when the tax returns were filed in ISCR Case No. 15-01031 (App. Bd. June 15, 2016), the Appeal Board provided the following principal rationale for reversing the grant of a security clearance, “By failing to file his 2011, 2012, and 2013 Federal income tax returns in a timely manner, Applicant did not demonstrate the high degree of good judgment and reliability required of persons granted access to classified information.” ISCR Case No. 15-01031 at 4 (App. Bd. Jun. 15, 2016) (citations omitted).

On June 8, 2017, the new AGs went into effect. In 2016, Applicant “made arrangements with the appropriate tax authority to file [all required federal income tax returns] . . . and is in compliance with those arrangements.” AG ¶ 20(g). Based on consideration of his credibility, contrition, and new understanding of his responsibilities, there is sufficient assurance that his financial problems are resolved, are under control, and will not recur in the future. Under all the circumstances, financial considerations security concerns are mitigated.

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 a 51-year-old electronics technician employed by a defense contractor since August 2014. He has worked in the defense industry either on active duty, a member of the Navy Reserve, or as a defense contractor his adult life and has successfully held a security clearance since 1988. His Navy Reserve command and his civilian employer value him as a sailor and as an employee and support him for a security clearance.

Once Applicant secured the necessary documentation to file his Federal and state tax returns, he did so. He is not proud of the delay in filing his tax returns and it is clear that if he had to do it over again, he would have sought professional help. His frequently being recalled for active duty impacted his income stream. Applicant acknowledges that he should have maintained better communication with his wife who was paying the bills while he was gone. It is clear from his demeanor and actions to include seeking financial counseling and adhering to the advice received in financial counseling that he takes this matter very seriously. This process has had a sobering effect on Applicant and I am confident that he will endeavor to timely file his tax returns in the future.

I have carefully applied the law, as set forth in *Egan*, Exec. Or. 10865, and the new AGs, to the facts and circumstances in the context of the whole person. I conclude that financial consideration security concerns are 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:	FOR APPLICANT
Subparagraphs 1.a – 1.m:	For Applicant

Conclusion

In light of all of the circumstances in this case, it is clearly consistent with the interests of national security to grant Applicant's eligibility for a security clearance. Eligibility for access to classified information is granted.

ROBERT TUIDER
Administrative Judge