



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



In the matter of:)
)
) ISCR Case No. 16-03473
)
Applicant for Security Clearance)

Appearances

For Government: Erin Thompson, Esq., Department Counsel
For Applicant: *Pro se*

11/17/2017

Decision

RIVERA, Juan J., Administrative Judge:

Applicant established that circumstances beyond his control contributed to his financial problems and that he has been acting responsibly under the circumstances. With his employment income, disability pay, and his wife’s income, their combined earnings should be sufficient to pay for his family’s living expenses and current debts. His financial problems are being resolved. Clearance granted.

Statement of the Case

Applicant submitted a security clearance application (SCA) on August 14, 2015. After reviewing it and the information gathered during a background investigation, the Department of Defense (DOD) issued him a Statement of Reasons (SOR) on January 17, 2017, alleging security concerns under Guideline F (financial considerations). Applicant answered the SOR on February 11, 2017, and requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA).

DOHA assigned the case to me on June 14, 2017. DOHA issued a notice of hearing on June 26, 2017, setting the hearing for July 13, 2017. At the hearing, the Government offered six exhibits (GE 1 through 6). Applicant testified and submitted one exhibit (AE 1, post-hearing), comprised of several documents corroborating most of his

testimony. All exhibits were admitted without objection. DOHA received the hearing transcript (Tr.) on July 21, 2017.

Findings of Fact

Applicant admitted the factual allegations in SOR ¶¶ 1.a through 1.d. He denied the allegations in SOR ¶¶ 1.e through 1.i. 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 51-year-old employee of a federal contractor. He married his first wife in 1993 and divorced in 2004. He has one son, age 21, of this marriage. He remarried in 2005 and divorced in 2009. He married his current wife in 2014. Applicant graduated from high school in 1984, and attended college in 1984 and 1990, but has not earned sufficient credits for a degree. In 2015, he received a trade-vocational school certificate.

Applicant served in the U.S. Marine Corps between April 1984 and May 1989, and was honorably discharged. He enlisted in the U.S. Army in August 1991, where he served as a Delta Force operator until his retirement as a master sergeant (E-8) in December 2010. While in the Army, Applicant possessed a top-secret clearance. There is no evidence that his clearance was ever suspended or that there were any issues of concern. In 2016, the Department of Veterans Affairs (VA) diagnosed Applicant with combat-related post-traumatic stress disorder (PTSD), and awarded him a 100 percent disability rating. He is currently undergoing counseling and treatment. At his hearing, Applicant anticipated receiving his first disability payment in July 2017.

During his last ten years in the service, Applicant deployed nine times for missions in Iraq and twice to Afghanistan. As a contractor, he deployed four times to Afghanistan. Most of his deployments were for 90 days and involved fast-paced, intense, dangerous missions. In between deployments, he trained for the next mission.

After his retirement, between December 2010 and December 2014, Applicant worked for another federal agency (with its own clearance system) and some federal contractors. Part of his employment was as an independent contractor between August 2012 and December 2014. He was unemployed from December 2014 to April 2015. He then raised money for a foundation supporting research for PTSD and other medical issues suffered by service members.

In August 2015, Applicant's current employer, a federal contractor, hired him as an instructor. His current salary is \$67,500 a year. He anticipated a pay raise to \$87,000, conditioned on his clearance eligibility. Applicant promised he would use his additional employment income and his disability compensation to pay the back taxes owed to the IRS.

In his August 2015 SCA, Applicant disclosed that he had failed to file his 2014 income tax return. He believed he owed \$7,000 to the IRS in back taxes. He also disclosed a bank filed a judgment against him for \$105,000, resulting from a deed in lieu of foreclosure. He explained that he and his then wife had purchased a farm, for which he signed a \$600,000 loan. Several years later, in 2008-2009, they were going through a divorce, the real-estate market was crashing, and he could not afford to pay the mortgage. At about the same time, he was being deployed overseas. Applicant was unable to sell the property. To avoid foreclosure, he gave the bank a deed in lieu of foreclosure. The bank sold the property for \$105,000 less than what he owed, and Applicant acquired the debt. Applicant's documentary evidence shows that he established a payment agreement with the creditor and made six \$200 payments between January and July 2017. (AE A)

During his April 14, 2016 interview with a government investigator, Applicant explained that he had failed to pay his quarterly taxes for tax years 2012, 2013, and 2014. He stated he was not aware that as an independent contractor he was required to pay estimated quarterly taxes. He indicated he hired an accountant to help him resolve his tax problems. He stated that his mistake was unlikely to repeat itself because he had learned from it, he now was aware of his obligation to pay estimated quarterly taxes, he was no longer an independent contractor but a wage employee, and he had retained an accountant to help him resolve his tax problems.

Applicant told the investigator he was not aware of any of the medical accounts alleged in SOR ¶¶ 1.e through 1.i. He believed his ex-wife incurred them illegally, and he was going to ask her to pay them. If not, he intended to dispute them. SOR ¶¶ 1.e through 1.i are reflected on the 2015 credit report (GE 3). Only SOR ¶ 1.e is reflected on the 2016 credit report. Because the accounts are less than seven years old, I infer that they have been resolved and not just removed from the credit report. Applicant presented documentary evidence showing that he disputed SOR ¶ 1.e on July 18, 2017.

A review of the 2015 credit report shows Applicant had 22 accounts in good standing, 1 judgment filed against him (SOR ¶ 1.d), and 5 accounts in collection (SOR ¶¶ 1.e through 1.i). The 2016 credit report shows 20 accounts in good standing, 1 judgment (SOR ¶ 1.d), and 1 account in collection (SOR ¶ 1.e). Applicant has acquired no new debt or delinquent accounts.

SOR ¶ 1.a alleges Applicant failed to timely file his federal income tax returns for tax years 2013, 2014, and 2015. His documentary evidence shows he timely filed his 2012 income tax return on April 15, 2013; paid W-2 or 1099 withholdings of \$30,389; and owed \$10,704 in back taxes as of December 2016. He filed his 2013, 2014, and 2015 income tax returns on May 18, 2016. As of December 13, 2016, he owed \$61,000 for tax year 2013; \$46,715 for tax year 2014; and \$13 for tax year 2015.

With his SOR answer, Applicant submitted an IRS Form 9465, showing he requested to establish an installment payment agreement. As of July 18, 2017, the IRS

had not responded, and Applicant retained the services of an attorney from the Tax Defense Network to help him resolve his problems with the IRS.

Applicant owes his state \$20,532 for unpaid income taxes for tax years 2013 through 2015. (SOR ¶ 1.c) His documentary evidence shows that on February 2, 2017, he agreed to pay \$300 monthly to resolve this debt. As of July 2017, he was current on his agreement. (SOR answer; AE A)

Applicant was unemployed from December 2014 to April 2015. During 2015, his earnings were only \$53,000, about \$100,000 less than in 2012-2014. As of 2017, his yearly income was \$67,500, still a substantial cut in earnings from his time in the service and for the years 2012 through 2014.

Applicant testified he has learned his lesson the hard way. Leaving the military was a huge transition for him and it took him some time to get accustomed to his new life. 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 testified that he never knew whether he was coming back from his deployments. He implied that his PTSD impaired his ability to prioritize and think straight. He highlighted his 24 years of military service during most of which he held a clearance without any issues or concerns. Applicant's service speaks highly about his loyalty, dedication, responsibility, and integrity. Applicant credibly promised to continue paying his legal debts and to resolve his financial problems.

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 failed to timely file his federal income tax returns for tax years 2013 through 2015; owes federal taxes for tax years 2012 through 2015; state taxes for tax years 2013 through 2015; and owes a \$105,634 judgment. 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

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)).

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.

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).

All of the above financial considerations mitigating conditions are raised by the facts in this case and mitigate the security concerns. Applicant's financial problems are ongoing and recent. However, his financial problems could be attributed to, or were aggravated by, circumstances beyond his control - his 2009 divorce, the decline of the real-estate market, his 2010 discharge from the service, his periods of unemployment and underemployment, and his service-related medical condition (PTSD). Considering the evidence as a whole, I find that his financial problems occurred under circumstances unlikely to recur.

Applicant acknowledged he should have been more responsible in addressing his tax obligations. It appears his many deployments, dangerous missions, and PTSD may have impaired his thinking process and clouded his ability to be responsible and dependable. Notwithstanding, he is now under medical treatment and appears to be doing better.

Applicant's documentary evidence shows he retained the services of an accountant and filed all of his late income tax returns. He entered into a payment agreement with his state tax authority; he is making his payments, and appears to be current. In February 2017, he requested to establish an installment payment agreement with the IRS, but received no response. Frustrated with the lack of response, in July 2017, Applicant retained an attorney to help him resolve his income tax problems. I find he is currently making a good-faith effort to resolve his tax debt. I also find Applicant has

received and is receiving financial counseling, and that there are clear indications that his financial problem is being resolved or under control.

Concerning the judgment, Applicant credibly explained that he and his wife purchased the property together and both were paying the mortgage. After his divorce, his earnings alone were insufficient to pay the mortgage and his living expenses. He maintained contact with the bank and attempted to resolve his mortgage loan before he deployed in 2010. Unsuccessful in his efforts to sell the property, he provided the bank with a deed in lieu of foreclosure hoping to resolve the debt. Applicant's documentary evidence shows he recently established a payment plan with the bank and he is current with his payments. Applicant's payment agreements are recent, but they are evidence of Applicant's responsible efforts to resolve his financial situation.

Applicant disputed the accounts alleged in SOR ¶¶ 1.e through 1.i. He believed his ex-wife opened the accounts illegally. Apparently, after talking with her, she paid four of the accounts and they were removed from the 2016 credit report. Only SOR ¶ 1.e remained in the 2016 credit report. However, Applicant's documentary evidence shows he disputed that account with the credit bureaus and asked for its removal. As a retired veteran, Applicant is entitled to medical services. I find it unlikely that he would have incurred the alleged medical debts.

Applicant's evidence is sufficient to establish that his financial problems were caused or aggravated by circumstances beyond his control. Considering the evidence as a whole, and including his recent actions, Applicant was responsible under the circumstances. He disclosed some of his financial problems in his 2015 SCA. His mental health and financial situation are improving. With his job, the anticipated paid raise, his disability income, and his wife's income, their combined income should be sufficient to pay for his family's living expenses and current debts.

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, 51, received an honorable discharge from the Marine Corps after five years of service. He then enlisted in the Army and served 19 years. He retired honorably after a total of 24 years of service. He served 19 years as a Delta Force operator. During the last ten years alone, he deployed on 15 dangerous missions. While in the Army, Applicant possessed a top-secret clearance. There is no evidence that his clearance was ever suspended or that there were any issues of concern.

In 2016, the VA diagnosed Applicant with combat-related PTSD, and awarded him a 100 percent disability rating. He is currently undergoing counseling and treatment. He promised to use his disability compensation to pay his back taxes.

Applicant's financial problems could be attributed to, or were aggravated by, circumstances beyond his control - his 2009 divorce, the decline of the real-estate market, his 2010 discharge from the service, his periods of unemployment and underemployment, and his service-related medical condition (PTSD). Applicant, given the nature, extent, and dangerousness of his military service, is deserving of some leeway under Guideline F, and he has earned the opportunity to show that he will meet his financial and tax obligations from this point forward. Considering the evidence as a whole, I find that his financial problems occurred under circumstances unlikely to recur. Applicant presented sufficient information to establish that he is currently behaving responsibly and that his financial problems are being resolved or are under control. The financial considerations 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.i:	For Applicant

Conclusion

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national security interests of the United States to grant eligibility for a security clearance to Applicant. Clearance is granted.

JUAN J. RIVERA
Administrative Judge