



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



In the matter of:)
)
) ISCR Case No. 16-03569
)
Applicant for Security Clearance)

Appearances

For Government: Nicole A. Smith, Esq., Department Counsel
Brittany Muetzel, Esq., Department Counsel
For Applicant: *Pro se*

02/15/2018

Decision

MURPHY, Braden M., Administrative Judge:

Applicant did not provide sufficient evidence to mitigate the financial security concerns about his tax issues and delinquent debts. Applicant's eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on July 31, 2014. On January 23, 2017, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline F, financial considerations.¹

¹ The action was taken 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* (January 2, 1992), as amended (Directive); and the adjudicative guidelines effective within the DOD on September 1, 2006.

On December 10, 2016, the Director of National Intelligence (DNI) signed Security Executive Agent Directive 4, issuing *National Security Adjudicative Guidelines* (AG). The new AGs became effective on June 8, 2017, for all adjudicative decisions on or after that date.² Any changes resulting from the implementation of the new AGs did not affect my decision in this case.

Applicant initially answered the SOR on February 24, 2017, and he filed a complete answer on April 6, 2017, requesting a hearing. The case was assigned to me on September 7, 2017. On November 3, 2017, a Notice of Hearing was issued scheduling the hearing for November 21, 2017, a date agreed to by the parties. The hearing convened as scheduled.

Department Counsel submitted Government's Exhibits (GE) 1 through 5, which were admitted without objection. Applicant testified on his own behalf. I held the record open to allow Applicant the opportunity to submit documentation. He subsequently submitted Applicant's Exhibits (AE) A through F, which were admitted without objection. The record closed on January 3, 2018. DOHA received the hearing transcript on December 1, 2017.

Findings of Fact

Applicant admitted all the SOR allegations (§§ 1.a-1.j). His admissions are incorporated into the findings of fact. After a thorough and careful review of the pleadings and exhibits submitted, I make the following additional findings of fact.

Applicant is 52 years old. He has been married twice. His first marriage (1987-1988) was annulled. He remarried two years ago. His wife gave birth six weeks before the hearing. He also has an adult daughter, age 28. After high school, Applicant served in the U.S. Army from 1984 to 1987. He then spent 20 years as a county corrections officer (1988-2008). Applicant has worked as a security officer for his current employer since 2008. He currently holds a security clearance. (Tr. 12, 29-36, 66; GE 1)

The SOR allegations (§§ 1.a-1.j) include unfiled tax returns, past-due state and federal income taxes, unpaid judgments and other debts, a mortgage in foreclosure, and a dismissed bankruptcy petition. The allegations are established by Applicant's admissions, his credit reports, and other documents in the record.³ (GE 1 – GE 5)

Applicant testified that from about 2008 to 2015, he provided several hundred dollars a month in financial support to his family members, including his daughter, sister, mother, and grandmother. (Tr. 34-35, 40-42; GE 5) Applicant met his wife in 2011. Soon thereafter, he also began paying her bills. He provided at least \$1,000 a month in

² Applicant confirmed at the hearing that he had received the new AGs. (Transcript (Tr.) 8)

³ On his SCA, Applicant disclosed that he had unpaid federal tax debt and a debt to a homeowner's association (HOA). (GE 1 at 26-29)

financial support, for her rent, utilities and other expenses. Applicant began falling behind on his own bills in about 2012. He realized he should have paid his own bills, but also felt a responsibility to his family and his girlfriend (now his wife) (Tr. 34-35, 42-44; GE 5)

Applicant filed for Chapter 13 bankruptcy protection in July 2015. He declared about \$208,000 in assets and just under \$240,000 in liabilities. (GE 4) He took a financial counseling class when he filed bankruptcy. The bankruptcy petition was dismissed in February 2016 when he was not able to make the first payment, of about \$1,500. (Tr. 35-36, 61)

Applicant stopped paying his mortgage in August 2014, before he filed bankruptcy. As of early 2016, he owed about \$186,000, and was about \$22,000 past due. The home later went into foreclosure. (Tr.47; GE 3; GE 4) After the hearing, Applicant submitted a court document, filed in November 2017, which appears to indicate that the home was sold at auction. It also says that if the proceeds from the sale are insufficient to pay the secured debt, "the account will result in a deficiency." (AE B) The most recent credit report in the record, from November 2016, shows no balance due on the mortgage, and no deficiency is indicated. (GE 4) (SOR ¶ 1.b)

SOR ¶ 1.c is a \$2,258 charged-off credit card debt. It remains unpaid. SOR ¶ 1.d is a \$432 charged-off credit card debt, which has now been paid. (AE C)

SOR ¶¶ 1.f (\$1,253) and 1.g (\$1,066) are judgments brought against Applicant by his HOA. Applicant testified that the debts have now been paid by garnishment. (Tr. 49, 55-56) He provided a copy of the garnishment order for debt ¶ 1.f, filed in May 2016 (AE G), but he provided no documents showing that either judgment has been satisfied.

SOR ¶ 1.e is a \$1,264 state tax lien entered against Applicant in February 2014. (GE 2, GE 3) SOR ¶ 1.j alleges that Applicant has incurred about \$8,000 of past-due state income tax debt from tax years 2009-2014. In his bankruptcy petition, Applicant disclosed that for tax years 2009, 2011 and 2014, he owed \$8,112 in past-due state income taxes. (GE 4 at 17)

Applicant has incurred about \$15,000 of past-due federal income tax debt from tax years 2009-2014. He reported in his bankruptcy petition that for tax years 2011-2014, he owed \$15,471 in past-due federal income taxes. (GE 4 at 17) (SOR ¶ 1.i)

Applicant testified that his tax problems began when he did his taxes and he realized he owed more than he could pay. (Tr. 49) He initially sought assistance from a tax relief organization, but he said they charged him too much money. (Tr. 59-60) He testified that he intended to take out a loan against his 401(k) pension at work to pay his tax debts, but was hesitant to do so before knowing the outcome of his clearance adjudication. (Tr. 37-39, 64-65) Applicant provided proof of one \$2,000 payment towards his state tax debt, and one \$2,000 payment towards his federal tax debt, both in December 2017. (AE E, AE F)

Applicant failed to file his 2014 state and federal income tax returns as required. (SOR ¶ 1.h) Applicant also acknowledged that he had yet to file his state and federal income tax returns for tax year 2016 (due in April 2017, before the hearing). If he finds that he owes taxes, Applicant sometimes waits a year to file his returns. He acknowledged that he was wrong to do so. (Tr. 58-59) Applicant provided no documentation to show that his 2014 state and federal tax returns have been filed.

Applicant moved in with his wife three months before the hearing. He also received a promotion and was transferred to a job location near where they now live. He works full time, and earns \$25 an hour (\$1,000 a week, or \$52,000 a year). He gets a pension from his previous job in corrections, which he estimated at \$43,000 annually. His wife is a city government employee. He estimated she makes about \$1,500 a month. His finances have improved since he and his wife started living together. He estimated that he has about \$2,000 left over each month.⁴ (Tr. 31-33, 67-68)

Policies

It is well established that no one has a right to a security clearance. As noted by the Supreme Court in *Department of the Navy v. Egan*, “the clearly consistent standard indicates that security determinations should err, if they must, on the side of denials.”⁵

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant’s eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(a), the entire process is a conscientious scrutiny of a number of variables known as the “whole-person concept.” The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that “[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security.” In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have not drawn inferences grounded on mere speculation or conjecture.

⁴ Since Applicant and his wife have a new baby, his \$2,000 monthly surplus may no longer be operative.

⁵ *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988).

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

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

Analysis

Guideline F, Financial Considerations

The security concern for financial considerations is set out in AG ¶ 18:

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

The guideline sets forth several conditions that could raise security concerns under AG ¶ 19. The following are potentially applicable in this case:

- (a) inability to satisfy debts;
- (c) a history of not meeting financial obligations; and
- (f) failure to file . . . annual Federal, state, or local income tax returns or failure to pay annual Federal, state, or local income tax as required.

For several years, Applicant has had delinquent debts and judgments, including a foreclosed mortgage and significant state and federal income tax debt. He also has unfiled state and federal income tax returns. AG ¶¶ 19 (a), (c) and (f) apply.

Conditions that could mitigate financial considerations security concerns are provided under AG ¶ 20. The following 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, 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; 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.

Applicant's financial problems began when he fell behind on his debts after he began providing significant financial assistance to his family members and to his girlfriend (now his wife). While this was admirable and likely done with all good intentions, Applicant did not act responsibly in neglecting his own finances. Nor can his financial predicament be considered a circumstance beyond his control. AG ¶ 20(b) does not apply.

Applicant went through credit counseling during bankruptcy, but he was unable to make the first \$1,500 payment, and the bankruptcy was dismissed. He has not established that his financial problems are being resolved or are under control. AG ¶ 20(c) does not fully apply. Applicant's financial issues are ongoing. He has not established that they are unlikely to recur. AG ¶ 20(a) does not apply.

Applicant's mortgage was foreclosed, and the home sold at auction. It does not appear from Applicant's most recently available credit report (GE 2) that a balance is owed. The two HOA debts were subject to a garnishment order, and may be resolved, as Applicant claims. However, he provided insufficient documentation to verify this. Even so, resolution of a debt through garnishment does not constitute a good-faith effort

to resolve the debt.⁶ SOR ¶ 1.d is the only debt in the SOR that can be considered resolved through Applicant's own responsible actions.

Applicant has several years' worth of past-due state and federal income taxes. SOR ¶ 1.e (\$1,264 state tax lien, listed on credit reports) is likely included in SOR ¶ 1.j (\$8,000 in past-due state taxes from 2009-2014, disclosed in the bankruptcy petition). SOR ¶ 1.e is therefore duplicative and found for Applicant.⁷

Applicant provided two \$2,000 checks, both paid in late December 2017, towards his state and federal income tax debts. This belated effort is insufficient to establish his good-faith efforts to resolve the debts. He provided no indication that he has a payment plan established going forward to resolve them.

Applicant's unfiled tax returns are not attributable to circumstances beyond his control. He decided not to file his tax returns when he could not pay what he owed. While this may be partly attributable to his decision to help his family members in their times of need, his decision not to file his state and federal tax returns for several years was not reasonable. Applicant also did not provide any documentation to establish that his 2014 state and federal income tax returns have yet been filed, even belatedly. He also testified that his 2016 state and federal returns remain unfiled. The 2016 returns are not alleged, so I cannot consider them as disqualifying conduct. However, I can and do consider them in weighing mitigation.⁸ AG ¶¶ 20(d) and 20(g) do not apply.

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 relevant 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

⁶ ISCR Case No. 08-06058 at 6 (App. Bd. Sep. 21, 2009) ("On its face, satisfaction of a debt through the involuntary establishment of a creditor's garnishment is not the same as, or similar to, a good-faith initiation of repayment by the debtor.")

⁷ When the same conduct is alleged twice in the SOR under the same guideline, one of the duplicative allegations should be resolved in Applicant's favor. See ISCR Case No. 03-04704 at 3 (App. Bd. Sep. 21, 2005) (same debt alleged twice).

⁸ ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006).

for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my comments under Guideline F in my whole-person analysis. Although Applicant has begun to resolve his delinquent debts, he needs to establish more of a track record of financial responsibility, as well as more timely and consistent compliance with his tax responsibilities, before he can be considered a suitable candidate for access to classified information. Overall, the record evidence leaves me with questions and doubts as to Applicant's continued eligibility for access to classified information.

Formal Findings

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

Paragraph 1, Guideline F:	AGAINST APPLICANT
Subparagraphs 1.a-1.c:	Against Applicant
Subparagraphs 1.d-1.e:	For Applicant
Subparagraphs 1.f-1.j:	Against Applicant

Conclusion

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

Braden M. Murphy
Administrative Judge