



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



In the matter of:)	
)	
[REDACTED])	ISCR Case No. 17-01199
)	
Applicant for Security Clearance)	

Appearances

For Government: Ross Hyams, Esq., Department Counsel
For Applicant: Ronald C. Sykstus, Esq.

12/04/2018

Decision

HESS, Stephanie C., Administrative Judge:

Applicant failed to mitigate the security concerns raised by his delinquent tax filings, tax debts, and other financial delinquencies. Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (e-QIP) on September 1, 2015. On May 3, 2017, the Department of Defense (DOD) sent him a Statement of Reasons (SOR), alleging security concerns under Guidelines F (Financial Considerations). The DOD acted under Executive Order (Ex. 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 (AG) implemented by DOD on September 1, 2006.

Applicant submitted his Answer to the SOR on June 6, 2017, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on August 14, 2017, the case was assigned to another administrative judge, and the hearing

was scheduled for March 8, 2018. The hearing was canceled and the case was assigned to me on March 20, 2018. On May 18, 2018, the Defense Office of Hearings and Appeals (DOHA) notified Applicant's counsel that the hearing was scheduled for June 4, 2018. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 4 were admitted into evidence without objection. Applicant testified, called four witnesses, and submitted Applicant's Exhibits (AX) A through V, which were admitted without objection. DOHA received the transcript (Tr.) on June 12, 2018.

The SOR was issued under the AG implemented on September 1, 2006. The DOD implemented the amended AG on June 8, 2017, while this decision was pending. This decision is based on the amended AG effective June 8, 2017.

Findings of Fact

Applicant, 52, is a field service technician currently employed by a defense contractor since October 2011. He was previously employed by defense contractors since March 2009. He served honorably on active duty in the U.S. Navy from July 1985 until he retired in July 2005. Applicant received multiple awards and commendations during his service. He earned a bachelor's degree in 2004. He and his wife married in 1991 and have three adult children. He was granted his first security clearance in 1990. (GX 1.)

Under Guideline F, the SOR alleges that Applicant: failed to timely file his state and federal tax returns for tax years 2011, 2012, 2013, and 2014; is indebted to the Federal government for a 2016 tax lien in the amount of \$59,902; is indebted to his former state of residence for a tax lien entered in 2016 in the amount of \$8,428; is indebted on five delinquent accounts totaling \$5,152. The delinquent accounts include: two medical accounts; the balance owed for a repossessed vehicle; a utility bill; and, a cable bill. Applicant admits each of the SOR allegations. The tax liens and delinquent debts are reflected in Applicant's February 2017 and September 2015 credit bureau reports (CBR). (GX 4; GX 3.) His admissions are incorporated in my findings of fact.

Applicant's wife has historically been, and remains primarily responsible for managing the household finances, including preparing and filing their tax returns. (Tr. 21; Tr. 60-61.) In April 2009, Applicant began working abroad in a hazardous-duty environment. It was Applicant's understanding that because the work environment was characterized as hazardous, the majority of his pay was not taxable. Applicant worked abroad until October 2011, when he returned to the United States for different employment. (Tr. 21-22.) In 2012, after preparing his 2011 taxes, Applicant discovered that a large portion of his pay from 2011 was not tax free, and that he owed approximately \$32,000 in Federal income taxes, and an additional amount in state income taxes. (Tr. 24.)

Applicant's wife testified that she panicked when she and her husband realized how much they owed for the 2011 taxes because they did not have the money to pay them. She told her husband that she would figure out how to take care of the taxes, but because she thought they would be required to pay the total amount owed upon filing,

Applicant's wife did not file their 2011 tax returns. She did not consult with an accountant or a tax preparer to determine what action she needed to take. (Tr. 24; Tr. 31; Tr. 65; Tr. 76.)

Applicant and his wife have an adult son with special needs. In late 2011, Applicant's son moved into a group home where he resided until 2014. Because of some administrative glitches, the approval of Applicant's son's application for Medicare coverage was delayed and Applicant was contractually required to pay his son's entire living expenses, including nursing care. These costs were thousands of dollars a month, and consumed virtually all of Applicant's disposable income. (Tr. 76-77.)

Although Applicant started with his current employer in October 2011, and taxes were withheld from his pay, he improperly calculated his withholdings. Applicant's Federal tax liability for 2012 was approximately \$1,400. Because Applicant's wife had not yet filed and paid their 2011 tax liability, she did not file or pay the 2012 taxes. This pattern recurred in 2013 with an approximately \$4,200 Federal tax liability, and in 2014 with an approximately \$3,600 Federal tax liability. (AX P through AX T.)

In August 2015, Applicant was notified by his employer that they were investigating his clearance. Although his employer did not state what the concerns were about, Applicant understood that it was about his failure to file and pay his taxes. (Tr. 53; 63-64.) Applicant obtained a copy of his CBR which he used when listing his delinquent accounts on his September 1, 2015, e-QIP. Applicant disclosed the debts alleged in SOR ¶¶ 1.f through 1.i. He listed a 2012 state tax debt of approximately \$2,500, and stated that the debt was resolved through garnishment. He listed a 2012 IRS tax debt for approximately \$10,000, and stated that he was "working with [an] attorney to reach agreement." (GX 1.)

Applicant underwent a personal subject interview in October 2015, during which he discussed his listed delinquent accounts as well as his tax debt for tax year 2011. Applicant did not disclose his failure to file and pay his 2012, 2013, and 2014 taxes, nor did he disclose his 2015 filing extension or tax debt. (GX 2.) Applicant filed his 2015 Federal tax return on October 24, 2016, the day of his personal subject interview. (AX O.)

On August 14, 2015, after doing research on the Internet, Applicant's wife filed the 2011 Federal returns. She filed the 2012 and 2013 returns on September 4, 2015, and the 2014 return on November 27, 2015. She then contacted the IRS to work out an installment plan, on which Applicant has been making timely payments of \$500 a month since February 2016. (Tr. 97-98.) The IRS placed a lien on Applicant's assets in the amount of \$59,902 in March 2016. (GX 4; AX P.) As of May 2018, Applicant owes: \$37,638 for 2011; \$0 for 2012; \$7,071 for 2013; and, \$4,201 for 2014. (AX L; AX Q through AX S.)

In 2016, Applicant was required an extension for filing his 2015 Federal tax return because he owed approximately \$5,800. In November 2016, Applicant entered another installment agreement with the IRS. As of May 2018, Applicant owes \$6,915 for his 2015 taxes. (AX O.)

Applicant did not file or pay his state taxes for 2009 through 2011 while he was working abroad. Applicant stated that this was due to a miscommunication with his wife in which each thought the other had paid the state taxes. (GX 2.) The state filed three liens against Applicant for \$286, \$114, and \$2,339. In early 2015, Applicant received notice from the state of the liens and the state's intent to garnish Applicant's wages. Applicant submitted to the wage garnishment of \$282 per week. The liens were satisfied and released in July and September 2015. (GX 2; Tr. 58.)

In February 2016, the state filed another tax lien against Applicant for \$8,428 for taxes owed for 2012, 2013, and 2014. (Tr. 21-22.) Applicant entered an installment agreement and this debt was satisfied as of May 2018. (AX K.)

Applicant was unemployed from November 2008 until January 2009 and underemployed as a part-time employee from January 2009 until March 2009. This period of unemployment had a negative impact on Applicant's finances at that time, and Applicant fell behind on his monthly financial obligations. The \$453 utility bill (SOR ¶ 1.g) and the \$309 cable bill (SOR ¶ 1.h) went delinquent in March 2009. In April 2009, Applicant defaulted on his vehicle loan, and the vehicle was later repossessed. The \$3,790 balance (SOR 1.f) was charged-off by the creditor in August 2010. (GX 2; GX 3.)

Applicant's wife testified that she does not recall being contacted by the IRS, the state treasury, or the creditors of the delinquent accounts. She theorizes this was due in part to the fact that she moved to another town in mid-2009 until Applicant returned from working abroad in 2011. Following his return, Applicant and his family moved to another state, and moved to three or four different homes within that state before moving to their current state of residence in 2016. (Tr. 79; Tr. 99.)

After receiving the SOR in May 2017, Applicant settled the \$361 medical debt alleged in SOR ¶ 1.e. The \$239 medical debt alleged in SOR ¶ 1.i was owed to a collection agency. Applicant provided documentary evidence that the debt alleged in SOR ¶ 1.i is a duplicate of the debt alleged in SOR ¶ 1.e. These two debts are resolved. (AX V; AX T; AX U.)

After receiving the SOR, Applicant's wife contacted the utility-company creditor of the \$453 debt alleged in SOR ¶ 1.g. The representative stated that the account was closed and that the company could not release the closed account information without a court order. Applicant did not contact the creditors for the \$3,790 balance owed for the repossessed vehicle (SOR ¶ 1.f) or the \$309 cable account (SOR ¶ 1.h). Although, these accounts do not appear on Applicant's recent CBRs, they remain unresolved. (AX T; AX U.)

Applicant has not incurred any recent delinquent debts other than his failure to timely pay his 2015 tax obligation. (GX 3; GX 4; AX T; AX U.) He lives within his means and is financially stable. (Tr. 61-62; Tr. 111.)

Applicant's witnesses, a coworker, a former coworker whom Applicant managed, and a former fellow sailor, all hold security clearances. They collectively testified that they were aware of Applicant's financial issues, but given Applicant's character and trustworthiness, highly recommend Applicant for continued access to classified information. (Tr. 115-127.) Applicant has received excellent performance evaluations from his employer since 2012. (AX E through AX J.)

Policies

"[N]o 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 applicants 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's meeting the criteria contained in the AG. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines 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 and 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 that 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 made "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, a decision to deny a security clearance 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. 92-1106 at 3, 1993 WL 545051 at *3 (App. Bd. Oct. 7, 1993).

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 burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

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). "[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

Guideline F, Financial Considerations

The concern under this guideline 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.

This concern is broader than the possibility that an individual might knowingly compromise classified information in order to raise money. It encompasses concerns about an individual's self-control, judgment, and other qualities essential to protecting classified information. An individual who is financially irresponsible may also be irresponsible, unconcerned, or negligent in handling and safeguarding classified information. See ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012).

The record evidence establishes two disqualifying conditions:

AG ¶ 19(a): inability to satisfy debts;

AG ¶ 19(c): a history of not meeting financial obligations; and

AG ¶ 19(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.

The following mitigating conditions are potentially applicable:

AG ¶ 20(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;

AG ¶ 20(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;

AG ¶ 20(d): the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts; and

AG ¶ 20(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.

Despite obtaining a CBR in September 2015 and learning of specific delinquent accounts, Applicant took no action to contact the creditors of those accounts until after he received the SOR in May 2017. By that time, the majority of the debts were no longer collectible or even identifiable to the creditors. Of the five non-tax-related SOR debts totaling \$5,152, Applicant has resolved only two, leaving a remaining delinquent-debt balance of \$4,552.

Applicant did not file or pay his 2011 through 2014 taxes, as required. He did not begin to address his Federal tax issues until after August 2015 when he filed his 2011 taxes in the same month as his employer notified him that there were concerns about his security clearance eligibility. Applicant did not file his 2012 and 2013 returns until after completing his e-QIP and his 2014 return until a month after his personal subject interview.

Applicant entered an installment agreement with the IRS in February 2016, under which Applicant pays \$500 a month. As of May 2018, he remains indebted to the IRS for \$50,922 for tax years 2011 through 2014.

In February 2016, Applicant's former state of residents entered and \$8,428 lien against Applicant for delinquent state taxes. He entered an installment agreement and the lien was released as of May 2018.

The appeal board has regularly held that "applicants who only begin to address their security-significant conduct when their personal interests are at stake may be lacking in judgment and reliability. See, e.g., ISCR Case No. 15-06707 at 3 (App. Bd. Aug. 15, 2017.) In specifically addressing mitigating condition 20(g) in ISCR Case No. 17-01807

(App. Bd. Mar. 7, 2018), which has very similar facts to this case, the appeal board observed:

The mere filing of delinquent tax returns or the existence of a payment agreement with an appropriate tax authority does not compel a Judge to issue a favorable decision. As with the application of any mitigating condition, the Judge must examine the record evidence and decide whether the favorable evidence outweighs the unfavorable evidence or *vice versa*. The timing of corrective action is an appropriate factor for the judge to consider in the application of [this mitigating condition]. pp 3-4.

Finally, Applicant's last-minute attempt to address his debts does not constitute a good-faith effort to resolve his financial issues. See ISCR Case No. 10-05909 at 4 (App. Bd. Sep. 27, 2012). Applicant incurred delinquent debts due to periods of unemployment and underemployment, and significant financial obligations for his son's care. However, he did not act responsibly under the circumstances. Despite his awareness of his delinquent accounts and tax-related issues, he continued to rely on his wife to resolve their significant financial problems to his peril. He remains indebted to the IRS and his other delinquent accounts remain primarily unresolved. None of the mitigating conditions apply.

Whole-Person Concept

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. In applying the whole-person concept, an 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 in light of the nine adjudicative process factors listed at AG ¶ 2(d).

I have incorporated my comments under Guideline F in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under that guideline, but I have also considered the following:

Applicant served honorably in the U.S. Navy for 20 years and received numerous awards and commendations for his service. He has worked for his current government-contractor employer since 2011. His past and current coworkers highly recommend Applicant for a continued security clearance, and he has regularly received excellent performance evaluations from his employer. He has held a security clearance since 1990.

Despite Applicant's awareness of his unfiled and unpaid Federal and state taxes from tax year 2011 through tax year 2014, and his 2015 wage garnishment for state tax liens, he failed to ensure that his 2015 tax withholdings were correct. Applicant applied for an extension to file his 2015 Federal taxes, but remains indebted to the IRS for approximately \$6,915 for 2015. He made no effort to address his other delinquent

accounts until after he received the SOR. Applicant has not demonstrated the judgment and reliability required of individuals granted access to classified information.

After weighing the disqualifying and mitigating conditions under Guideline F, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns raised by his failure to file and pay his taxes as required and to resolve his other delinquent debts. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

Formal Findings

As required by section E3.1.25 of Enclosure 3 of the Directive, I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline F (Financial Considerations): AGAINST APPLICANT

Subparagraphs 1.a – 1.c and 1.f – 1.h: Against Applicant

Subparagraphs 1.d, 1.e, and 1.i: For Applicant

Conclusion

I conclude that it is not clearly consistent with the national interest to grant Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Stephanie C. Hess
Administrative Judge