



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



In the matter of:)	
)	
REDACTED)	ISCR Case No. 17-01291
)	
Applicant for Security Clearance)	

Appearances

For Government: Brittany Muetzel and Tovah A. Minster, Department Counsel
For Applicant: Alan V. Edmunds, Esq.

05/04/2018

Decision

MENDEZ, Francisco, Administrative Judge:

Applicant did not present sufficient evidence to mitigate security concerns raised by the sizeable amount of delinquent debt he has amassed, which includes federal tax liens totaling over \$500,000. Clearance is denied.

Statement of the Case

On May 12, 2017, the Department of Defense (DoD) sent Applicant a Statement of Reasons (SOR) alleging security concerns under the financial considerations guideline. Applicant answered the SOR and requested a hearing.

The hearing was originally scheduled for February 27, 2018, but was rescheduled for March 13, 2018 at Applicant's request.¹ At the hearing, Department Counsel offered Exhibits 1 – 3 and 5 – 8, which were admitted into the record without objection. (Exhibit 4, a report of investigation, was withdrawn by the Government after Applicant raised an objection to its admissibility). Applicant testified at the hearing. He submitted Exhibits A – K, which were admitted into the record without objection. The transcript of the proceeding was received on March 22, 2018, and the record closed on March 30, 2018.

¹ Administrative documents reflecting Applicant's continued sponsorship was marked Appellate Exhibit I. Post-hearing, Department Counsel's discovery letter to Applicant and correspondence were remarked Appellate Exhibits II and III, respectively.

Findings of Fact

Applicant, 58, is married with four grown children between the ages of 27 and 32. He holds a master's degree and served in the U.S. military for over 20 years. He is currently employed as a federal contractor, earning approximately \$165,000 annually. Applicant testified that his current financial problems are attributable to a failed business and increased expenses associated with his wife and her mother's medical issues.²

Between October and November 2014, the IRS filed tax liens against Applicant totaling over \$500,000. Applicant testified that the liens are for past-due taxes. He admits to not timely filing income tax returns and paying his income taxes for four to five years. He claims to have reached out to the IRS to address and resolve his sizeable federal tax debt. He promised to present documentation reflecting his efforts to resolve the federal tax debt, but did not supply any such documentation. He reportedly entered into a repayment agreement with the IRS in 2016 to resolve past-due federal taxes for tax years 2009 – 2013, but no documentation of that repayment plan or any other was submitted. Applicant also claims that in 2016 he made some payments to the IRS to resolve the tax debt, but provided no documentation of such payments. The credit report that Applicant submitted post-hearing reflects the three liens.³

Applicant promises to file his tax returns and pay his taxes going forward on condition of automatic revocation of his clearance if he fails to do so.⁴ Applicant did not report his failure to file his tax returns and pay his taxes on the security clearance application he submitted in June 2014.⁵

Applicant's 2014 – 2016 federal tax returns reflect an adjusted gross income (AGI) for 2014 of over \$190,000, for 2015 of approximately \$140,000, and for 2016 of over \$155,000.⁶ On March 12, 2018, the day before his security clearance hearing, Applicant obtained credit counseling. His reported monthly net disposable income is approximately \$2,860. The organization that conducted the pre-bankruptcy credit counseling determined that Applicant's liabilities exceeded his assets by \$540,000.⁷

In addition to the \$500,000 in unresolved federal tax liens, Applicant has also amassed a large amount of other debt. He admits the two charged-off credit accounts listed in SOR 1.f and 1.g totaling over \$75,000. Both debts are listed on the credit report Applicant submitted post-hearing. The credit report reflects that a last monthly payment

² Tr. 12-14, 21-25, 31, 39-47; Exhibit 1; Exhibits B – C.

³ Tr. 15-19, 29-38, 44-45; Exhibit 8; Exhibit H at 1-2.

⁴ Exhibit A.

⁵ In response to a question on the application that asked "**Taxes. In the past seven (7) years** have you failed to file or pay Federal, state, or other taxes when required by law or ordinance?," Applicant answered "No." Exhibit 1 at 42 (emphasis in original) Applicant's failure to report this information was only considered in assessing mitigation and conducting a whole-person review. See *infra* n. 13.

⁶ Exhibits I – K.

⁷ Exhibits E, G.

on the \$70,000 charged-off second-mortgage debt referenced in SOR 1.f was submitted in September 2015, while the charged-off credit card account listed in SOR 1.g was closed by the creditor in September 2015.⁸ In February 2015, an \$8,000 judgment, referenced in SOR 1.d, was entered against Applicant for an unpaid medical bill. Applicant claims his medical insurance paid the debt, but provided no supporting documentation.⁹

Applicant denies his mortgage account is past-due as set forth in SOR 1.e. His credit report reflects that from April to August 2016, Applicant made no mortgage payments and from September to November 2016, he paid less than the amount owed.¹⁰ Applicant claims that his mortgage is up-to-date and promised to provide documentation post-hearing to corroborate his claim, but did not do so.¹¹

At about the same time Applicant was not paying his mortgage, he was reporting to his FSO about a purported offer in compromise and payments he submitted to the IRS to address and resolve the \$500,000 in past-due taxes for tax years 2009-2013.¹² No evidence was submitted that Applicant self-reported his then past-due mortgage account, or the negative financial issues that occurred a year earlier (the two charged-off credit accounts and the \$8,000 judgment), to his facility security officer.

Law, Policies, and Regulations

This case is decided under Executive Order (E.O.) 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 National Security Adjudicative Guidelines (AG), which became effective on June 8, 2017.

“[N]o one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). Instead, persons are only eligible for access to classified information “upon a finding that it is clearly consistent with the national interest” to authorize such access. E.O. 10865 § 2.

When evaluating an applicant’s eligibility for a security clearance, an administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations, the guidelines list potentially disqualifying and mitigating conditions. The guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies the guidelines in a commonsense manner, considering all available and reliable information, in arriving at a fair and impartial decision. AG ¶ 2.

⁸ Answer; Tr. 20-21, 27-28, 46-47; Exhibit H at 1-2.

⁹ Tr. 19, 25-26, 46; Exhibits 5, 6.

¹⁰ Exhibit H at 5.

¹¹ Tr. 19-20, 27.

¹² Tr. 34-36; Exhibit 8.

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

Administrative Judges must remain fair and impartial, and carefully balance the needs for the expedient resolution of a case with the demands of due process. Therefore, an administrative judge will ensure that an applicant: (a) receives fair notice of the issues, (b) has a reasonable opportunity to address those issues, and (c) is not subjected to unfair surprise. Directive, ¶ E3.1.10; ISCR Case No. 12-01266 at 3 (App. Bd. Apr. 4, 2014).

In evaluating the evidence, a judge applies a “substantial evidence” standard, which is something less than a preponderance of the evidence. Specifically, substantial evidence is defined as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record.” Directive, ¶ E3.1.32.1.¹³

Any doubt raised by the evidence must be resolved in favor of the national security. AG ¶ 2(b). See *also* Security Executive Agent Directive 4 (SEAD 4), ¶ E.4. Additionally, the Supreme Court has held that responsible officials making “security clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531.

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. 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 an 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

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. See AG ¶ 18.

¹³ However, a judge's mere disbelief of an applicant's testimony or statements, without actual evidence of disqualifying conduct or admission by an applicant to the disqualifying conduct, is not enough to sustain an unfavorable finding. ISCR Case No. 15-05565 (App. Bd. Aug. 2, 2017); ISCR Case No. 02-24452 (App. Bd. Aug. 4, 2004). Furthermore, an unfavorable decision cannot be based on non-alleged conduct. ISCR Case No. 14-05986 (App. Bd. May 26, 2017). Unless an applicant is provided notice that unalleged conduct raises a security concern, it can only be used for specific limited purposes, such as assessing mitigation and credibility. ISCR Case No. 16-02877 at 3 (App. Bd. Oct. 2, 2017).

The security concern here is not limited to a consideration of whether a person with financial issues might be tempted to compromise classified information or engage in other illegality to pay their debts. It also addresses the extent to which the circumstances giving rise to delinquent debt cast doubt upon a person's judgment, self-control, and other qualities essential to protecting classified information. See *generally* ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012).

In assessing Applicant's case, I considered the applicable disqualifying and mitigating conditions, including:

AG ¶ 19(b): unwillingness to satisfy debts regardless of the ability to do so;

AG ¶ 19(e): consistent spending beyond one's means or frivolous or irresponsible spending, which may be indicated by excessive indebtedness, significant negative cash flow, a history of late payments or of non-payment, or other negative financial indicators;

AG ¶ 19(f): failure to file or . . . failure to pay annual Federal, state, or local income tax as required;

AG ¶ 20(b): the conditions that resulted in the financial problem were largely beyond the person's control . . . and the individual acted responsibly under the circumstances;

AG ¶ 20(c): the individual has received or is receiving financial counseling for the problem . . . and there are clear indications that the problem is being resolved or is under control;

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.

An applicant who fails to timely file or pay his or her taxes, a basic and fundamental financial obligation of all citizens, bears a heavy burden in mitigating the financial considerations security concern.¹⁴ An administrative judge should closely examine the circumstances giving rise to an applicant's tax-related issues and his or her response to it. Furthermore, an applicant's claim of financial reform must be weighed against the lack of judgment and reliability evidenced by the person's failure to timely file their income tax returns or pay their taxes.¹⁵

¹⁴ See *generally*, ISCR Case No. 14-03358 at 3 (App. Bd. Oct. 9, 2015) (Board explained the heightened security concerns raised by tax-related financial issues).

¹⁵ ISCR Case No. 14-05794 (App. Bd. July 7, 2016); ISCR Case No. 14-00221 (App. Bd. June 29, 2016); ISCR Case No. 15-01031 (App. Bd. June 15, 2016); ISCR Case No. 12-09545 (App. Bd. Dec. 21, 2015).

Applicant failed to meet his burden of proof and persuasion. Some matters largely beyond his control negatively impacted his finances (business failure and health issues). However, he has not acted responsibly to address his delinquent debts despite having the apparent means to pay his debts (i.e., nearly \$3,000 in net monthly disposable income and six-figure salary). Of note, Applicant failed to timely file his federal tax returns for tax years 2008 through 2014, resulting in unpaid federal taxes totaling over \$500,000. Liens filed in 2014 to secure this sizeable federal tax debt and over \$75,000 in consumer-related debt from 2015 remain unaddressed as of the close of the record. Applicant's belated effort to obtain financial counseling does not mitigate the security concerns raised by his long history of financial irresponsibility. AG ¶¶ 19(b), 19(e), and 19(f) apply. None of the mitigating conditions fully apply.

Whole-Person Concept

In addition to the specific adjudicative guidelines, a judge must also consider the non-exclusive group of factors falling under the whole-person concept.¹⁶ I hereby incorporate my above analysis and highlight some additional whole-person matters.

Applicant served in the military for over 20 years and thereafter has worked as a federal contractor. This and the other favorable record evidence raise favorable inferences about Applicant's continued fitness to hold a security clearance. However, this favorable evidence is insufficient to mitigate the security concerns raised by Applicant's failure to pay his taxes and the sizeable amount of delinquent debt he has amassed. Applicant's dishonesty during the security clearance process, in not reporting on his security clearance application his repeated failure to file his federal income tax returns and pay his taxes, also detracts from the favorable evidence of Applicant's years of service while holding a clearance. Overall, the record evidence leaves me with serious doubts about Applicant's suitability for continued access to classified information.¹⁷

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 (Financial Considerations):	AGAINST APPLICANT
Subparagraphs 1.a – 1.g:	Against Applicant

¹⁶ See AG ¶ 2. See also SEAD-4, ¶ E.4; Directive, ¶ 6.3.

¹⁷ I also considered the exceptions listed in SEAD 4, Appendix C, especially in light of Applicant's counsel's closing argument. See Tr. 53. However, Applicant did not provide sufficient evidence to warrant application of any of the exceptions in Appendix C.

Conclusion

In light of the record evidence, it is not clearly consistent with the interests of national security to grant Applicant initial or continued eligibility for access to classified information. Applicant's request for a security clearance is denied.

Francisco Mendez
Administrative Judge