



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 17-01341

Appearances

For Government: Alison O'Connell, Esq., Department Counsel
For Applicant: *Pro se*

02/21/2018

Decision

HARVEY, Mark, Administrative Judge:

Applicant provided insufficient evidence of resolution of his financial issues. Financial considerations security concerns are not mitigated. Eligibility for access to classified information is denied.

Statement of the Case

On November 16, 2015, Applicant signed his Questionnaire for National Security Positions (SF 86) or security clearance application (SCA). Item 5. On July 10, 2017, 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 Security Executive Agent Directive 4, establishing in Appendix A the adjudicative guidelines (AGs) applicable in this case, effective June 8, 2017. The SOR set forth security concerns arising under the financial considerations guideline. Item 1.

On August 16, 2017, Applicant provided a response to the SOR, and he did not request a hearing. Item 4. On October 2, 2017, Department Counsel completed the File of Relevant Material (FORM). On October 10, 2017, Applicant received the FORM, and he did not respond to the FORM. On February 14, 2017, the case was assigned to me.

The case file consists of nine exhibits. Items 1-9. Applicant did not object to any of the Government exhibits, and they are admitted into evidence.

Findings of Fact¹

In Applicant's SOR response, he did not admit or deny the SOR allegations. Item 4. His SOR response provided some extenuating and mitigating information about resolution of his SOR debts.

Applicant is a 64-year-old master trades, and the same employer has employed him since October 2015.² He was unemployed from August 2015 to October 2015. He worked on an oil rig as a senior electrician from April 1997 to August 2015. He attended college from 1973 to 1974, and he did not receive a degree. He served in the U.S. Navy from 1977 to 1997, and honorably retired from the Navy. In 1993, he married, and his child was born in 1990. His step-children were born in 1960, 1964, and 1966. There is no evidence of security violations, abuse of alcohol, or use of illegal drugs.

Financial Considerations

Applicant's SOR alleges five delinquent debts totaling \$52,535 as follows: ¶¶ 1.a and 1.b are charged-off debts for \$963 and \$356; ¶ 1.c is a state tax debt for \$5,878 for tax year 2014; ¶ 1.d is a federal income tax debt for \$24,072 for tax year 2014; and ¶ 1.e is a federal income tax debt for \$21,266 for tax year 2016.³ In his SOR response, Applicant said the ¶¶ 1.a and 1.b debts are paid. He is paying \$600 monthly to address the debt in SOR ¶ 1.c and \$200 monthly to pay the debt in SOR ¶ 1.d. He plans to work with a tax relief company to resolve the debt in SOR ¶ 1.e.

Tax Year	Tax Return Filed	Adjusted Gross Income	Tax Due	Tax Withheld	Tax Paid	Tax Currently Owed
2014	June 8, 2015	\$383,951	\$96,561	\$73,065	\$1,827	\$24,072
2015	May 23, 2016	\$152,729	\$21,389	\$24,943	REFUND	\$0
2016	April 15, 2017	\$201,704	\$36,954	\$16,495		\$21,266

Applicant provided evidence that he consistently paid \$600 monthly to address his state tax debt from June 2016 to April 2017 through garnishment of his salary. Items 4, 6. His documentation indicated he paid the IRS: \$120 in June 2016; \$25 in August 2016; \$400 in December 2016; \$200 in February 2017; and \$200 in June 2017. Item 4.

¹ Some details were excluded to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

² The source of the information in this paragraph is Applicant's November 16, 2015 Questionnaire for National Security Positions (SF 86) or security clearance application (SCA). Item 5.

³ The sources of the information in this paragraph and the following table are Applicant's statement of reasons and his response to the statement of reasons. Items 1, 4. Tax transcripts were used to generate the table, and the tax transcripts were dated July 1, 2017.

Applicant's tax debt in 2014 resulted when Applicant withdrew funds from his 401(k) account in August 2014 after he left his employment and was not re-employed for several months. Item 6. He did not reinvest the 401(k) funds or withhold taxes. Item 6. He paid a tax relief company \$2,500 to help him negotiate with the IRS to resolve his tax debt. Item 6.

The debts in SOR ¶¶ 1.a and 1.b are depicted in Applicant's April 6, 2017 credit report as \$105 and \$75 past due, respectively. Item 7. The balance owed on the two debts is shown as \$963 and \$356. Item 7.

The FORM informed Applicant that he had 30 days from the receipt of the FORM "in which to submit a documentary response setting forth objections, rebuttal, extenuation, mitigation, or explanation, as appropriate. If you do not file any objections or submit any additional information . . . your case will be assigned to an Administrative Judge for a determination based solely" on the evidence set forth in this FORM. FORM at 7. He did not respond to the FORM.

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, Secretary of Defense, and Director of National Intelligence 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 four disqualifying conditions that could raise a security concern and may be disqualifying in this case: "(a) inability to satisfy debts"; "(b) unwillingness to satisfy debts regardless of the ability to do so"; "(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 annual Federal, state, or local income tax as required." In ISCR Case No. 08-12184 at 7 (App. Bd. Jan. 7, 2010), the Appeal Board explained:

It is well-settled that adverse information from a credit report can normally meet the substantial evidence standard and the government's obligations under [Directive] ¶ E3.1.14 for pertinent allegations. At that point, the burden shifts to applicant to establish either that [he or] she is not responsible for the debt or that matters in mitigation apply.

(internal citation omitted). The record establishes the disqualifying conditions in AG ¶¶ 19(a), 19(b), 19(c), and 19(f) requiring additional inquiry about the possible applicability of mitigating conditions.

Seven financial considerations mitigating conditions under AG ¶ 20 are potentially applicable in this case:

(a) the behavior happened so long ago,⁴ 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;

⁴ A debt that became delinquent several years ago is still considered recent because "an applicant's ongoing, unpaid debts evidence a continuing course of conduct and, therefore, can be viewed as recent for purposes of the Guideline F mitigating conditions." ISCR Case No. 15-06532 at 3 (App. Bd. February 16, 2017) (citing ISCR Case No. 15-01690 at 2 (App. Bd. Sep. 13, 2016)).

(d) the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts;⁵

(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.

The DOHA 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).

Applicant's unemployment in 2014 was outside of his control and adversely affected his finances. However, he did not establish that he acted prudently, and how these circumstances beyond his control adversely affected his finances. Applicant did not prove he acted responsibly under the circumstances because he did not establish he was

⁵ 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)).

unable to make more substantial payments to address his federal tax debts for tax years 2014 and 2016.

Applicant is credited with mitigating the debts in SOR ¶¶ 1.a, 1.b, and 1.c. The amounts indicated as overdue for SOR ¶¶ 1.a and 1.b on his most recent credit report are not substantial, and Applicant said the debts are paid. He is making \$600 monthly payments through garnishment of his salary to address his state tax debt.⁶

Applicant failed to prove that he was unable to make more substantial payments to address his federal income tax debt for tax years 2014 and 2016. He paid about \$1,000 from June 2016 to June 2017 to the IRS.

The Appeal Board clarified that even in instances where an “[a]pplicant has purportedly corrected [his or her] 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 [his or her] 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. June 15, 2016) (characterizing “no harm, no foul” approach to an Applicant’s course of conduct and employing an “all’s well that ends well” analysis as inadequate to support approval of access to classified information with focus on timing of filing of tax returns after receipt of the SOR).

The Appeal Board provided the following principal rationale for reversing the grant of a security clearance:

Failure to comply with Federal and/or state tax laws suggests that an applicant has a problem with abiding by well-established Government rules and regulations. Voluntary compliance with rules and regulations is essential for protecting classified information. . . . 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. June 15, 2016) (citations omitted).

There is insufficient evidence about why Applicant was unable to make greater progress sooner resolving his federal tax issues. There is insufficient assurance his

⁶ Of course, Applicant loses some mitigating credit because some debt payments were made through garnishment of his salary. Payment of a debt “though garnishment rather than a voluntary effort diminishes its mitigating force.” *Compare* ISCR Case No. 08-06058 at 4 (App. Bd. Aug. 26, 2010) *with* ISCR Case No. 04-07360 at 2-3 (App. Bd. Sept. 26, 2006) (payment of two of four debts through garnishment did not bar mitigation of financial considerations concerns). *See also* ISCR Case No. 09-05700 at 4 (App. Bd. Feb. 24, 2011) (garnished payments towards delinquent tax debts is not mitigating information in light of other factors); ISCR Case No. 08-06058 at 6 (App. Bd. Sep. 21, 2009) (remanding the case to the administrative judge and stating when addressing an Internal Revenue Service garnishment, “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.”).

financial problems are resolved, under control, and will not recur in the future. Under all the circumstances, he failed to establish mitigation of financial considerations security concerns.

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 64-year-old master trades, and the same employer has employed him since October 2015. He was unemployed from August 2015 to October 2015. He worked on an oil rig as a senior electrician from April 1997 to August 2015. He has about two years of college. He honorably retired from the U.S. Navy after 20 years of active duty service. There is no evidence of security violations, abuse of alcohol, or use of illegal drugs.

Applicant is credited with mitigation of the allegations in SOR ¶¶ 1.a through 1.c. His unemployment for about three months in 2014 was the initial cause, in part, of his financial problems. His unemployment was a circumstance beyond his control.

The evidence against grant of a security clearance is more substantial. Applicant's SOR ¶¶ 1.d and 1.e allege two delinquent federal tax debts totaling \$45,338. Applicant's adjusted gross income is substantial, and he did not explain why he is only paying about \$200 monthly to address his federal income tax debt. He did not explain why he failed to withhold sufficient income to pay his federal income taxes for tax year 2016. He provided insufficient corroborating or substantiating documentary evidence of payments or other mitigating information relating to these two SOR debts. His actions show lack of financial responsibility and judgment and raise unmitigated questions about Applicant's reliability, trustworthiness, and ability to protect classified information. See AG ¶ 18. More

documented information about inability to pay debts, financial history, or financial progress is necessary to mitigate security concerns.

It is well settled that once a concern arises regarding an applicant's security clearance eligibility, there is a strong presumption against the granting a security clearance. See *Dorfmont*, 913 F. 2d at 1401. Unmitigated financial considerations security concerns lead me to conclude that grant of a security clearance to Applicant is not warranted at this time. I have carefully applied the law, as set forth in *Egan*, Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. Financial consideration security concerns are not mitigated at this time.

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 through 1.c:	For Applicant
Subparagraphs 1.d and 1.e:	Against Applicant

Conclusion

In light of all of the circumstances in this case, it is not clearly consistent with the interests of national security to grant Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Mark Harvey
Administrative Judge