



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



In the matter of:)
)
) ISCR Case No. 17-02349
)
Applicant for Security Clearance)

Appearances

For Government: Gatha Manns, Esq., Department Counsel
For Applicant: *Pro se*

11/02/2018

Decision

RIVERA, Juan J., Administrative Judge:

Circumstances beyond his control contributed, in part, to Applicant's financial problems. He has been acting responsibly under the circumstances. With his current earnings, he should be able to pay for his family's living expenses and current debts. His financial problems are being resolved and are under control. Clearance granted.

Statement of the Case

Applicant submitted a security clearance application (SCA) on January 5, 2016, seeking to continue the clearance required for his position with a federal contractor. He was interviewed by a government background investigator in August 2016, and answered a set of interrogatories in June 2017. After reviewing the information gathered during the background investigation, the Department of Defense (DOD) issued him a Statement of Reasons (SOR) on August 4, 2017, alleging security concerns under Guideline F (financial considerations). Applicant answered the SOR on August 28, 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 April 13, 2018, and issued a notice of hearing on May 31, 2018, setting the hearing for June 20, 2018. At the hearing, the Government

offered six exhibits (GE 1 through 6). Applicant testified and submitted five exhibits (AE 1 through 5). AE 4 and 5 were received post-hearing. They are comprised of federal and state income tax returns and IRS statements for tax years 2014 through 2017, and a record of payments for the debt alleged in SOR ¶ 1.c. All exhibits were admitted without objection. I also marked and admitted as Hearing Exhibit (HE) 1 the Government's discovery letter to Applicant. DOHA received the hearing transcript (Tr.) on June 28, 2018.

Findings of Fact

In his Answer, Applicant admitted the factual allegations in SOR ¶¶ 1.d through 1.f. He denied SOR ¶¶ 1.a through 1.c. 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 graduated from high school and received an associate's degree in 2004. He completed additional college courses while working towards his unfinished bachelor's degree. He married his spouse in 1989, and they have six children, ages 28, 26, 23, 21, 18, and 16. Four of his children live with Applicant and depend on his financial support to attend college and high school.

Applicant enlisted in the U.S. Army in 1994. He served on active duty until he was honorably retired as a chief warrant officer 4 (CW4) in January 2017. Because of his military occupational specialty, he has held a secret clearance continuously since 2001. The clearance was upgraded to top secret with access to sensitive compartmented information (SCI) in 2010. In March 2017, Applicant's current employer, a federal contractor, hired him. (Tr. 7-9)

In his January 2016 SCA, Applicant disclosed that he owed the IRS taxes for tax year 2013 (In fact, he owed for tax year 2012, not 2013). The background investigation addressed his financial problems and revealed the three consumer accounts alleged in the SOR, a federal tax lien filed in March 2017, and that Applicant failed to timely file returns and pay federal and state income tax for tax year 2012.

The SOR alleged that Applicant failed to file and pay federal and state income taxes for tax years 2013 through 2016. (SOR ¶¶ 1.a and 1.b) Applicant's IRS Tax Return Transcripts show that he timely filed his returns for tax years 2014 through 2017. Moreover, for tax years 2014 through 2017, he had sufficient funds withheld from his earnings to pay his taxes in full and received refunds. In 2014 he received a refund of \$1,554; in 2015 he received a refund of \$3,197; in 2016 he received a refund of \$2,712; and in 2017 he received a refund of \$1, 826. According to Applicant's testimony, those returns were applied by the IRS to his back taxes for 2012.

Applicant failed to timely file his 2012 federal and state income tax returns, and he also failed to pay his taxes for that year. The IRS filed a \$19,317 lien against Applicant in March 2017. (GE 3) IRS correspondence, dated October 6, 2017 (AE 2), indicates that Applicant owes taxes only for tax year 2012, in the amount of \$22,885. Moreover, the IRS document confirms that Applicant was placed on a "Currently Not Collectible" status, and that his case has been closed. Applicant submitted a state court document showing that he satisfied a \$1,249 lien that was released. The lien release document pertains to a state tax authority lien and not to an IRS lien. (AE 1)

Based on the record documentary evidence, I find that Applicant timely filed his federal and state income tax returns and paid his taxes for tax years 2013 through 2017. (AE 2, 4, and 5) Applicant's failure to timely file his federal and state 2012 income tax returns, and to pay his taxes of those years, was not alleged in the SOR. Therefore, I may not use that information to disqualify Applicant for a clearance.

Concerning SOR ¶ 1.c, Applicant established a payment plan in June 2017, and he has been making payments. (AE 4 and 5) Applicant testified that he contacted the creditors for the debts alleged in SOR ¶¶ 1.d and 1.e and attempted to establish payment agreements. The creditors refused because both accounts were charged off. He was advised to dispute the accounts through the credit bureaus to remove them from his credit report. He failed to present documentary evidence of his contacts with the creditors and of any disputes filed.

Applicant explained that his tax problems started in 2012 when he failed to withhold sufficient income from his military and part-time jobs to pay taxes, which resulted in him owing taxes for the first time in his career. He testified that he prepared his income tax return, but failed to file it when he realized he did not have the \$4,000 to pay the tax owed. He intended to pay the back taxes with earnings from his part-time job. Before he could resolve the tax situation, Applicant was deployed overseas in early 2013, lost his part-time job, and did not have the money to pay the back taxes. To complicate matters, he was diagnosed with cancer, was operated on overseas, and returned to the United States for chemotherapy in late 2013. While convalescing, he let his tax problems lag.

In September 2015, Applicant retained the services of a tax company to help him resolve his tax problems. The company helped Applicant file his returns and negotiated with the IRS until Applicant was placed on a "Currently Not Collectible" status in October 2017. (GE 2, AE 2) The IRS has been collecting any back taxes owed by keeping Applicant's yearly tax refunds and applying them to his debt. Applicant noted that he satisfied his state lien (presumably for 2012 taxes owed), and that he is current with his state tax authority and owes no back taxes.

Applicant testified that he was unable to pay his back taxes because of several circumstances beyond his control. Applicant has a large family and he is the only breadwinner. His income was sufficient to pay only for his family's living expenses and some debts. After his deployment in early 2013, he lost his part-time job and could not

make additional income to pay the taxes. He underwent a cancer operation while deployed in late 2013, and went through chemotherapy and a long recovery process. Some of Applicant's children were attending college. He has been providing financial assistance to his children to attend college. Applicant believes the combined expenses did not leave him enough money to pay the taxes.

Applicant's financial situation has improved. He started working for his current employer and is making \$90,000 a year. With an additional \$24,000 a year from his military retired pay, Applicant should be able to cover his living expenses, debts, and help his children with college.

Applicant acknowledged that he made a mistake when he failed to timely file his 2012 income tax return because he did not have the money to pay the taxes owed. He should have been more diligent. He believes that he has learned a valuable lesson. He understands the seriousness of the security concerns raised by his tax problems. He credibly promised to timely file and pay his taxes in the future. Applicant highlighted his 22 years of service and current employment with federal contractors while holding a clearance without any issues or concerns, except for his financial problems. Applicant credibly promised to continue paying his legal debts and to resolve his tax problems. He believes that his financial situation is now stable.

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 or Eligibility to Hold a Sensitive Position* (AG), implemented by the DOD on June 8, 2017.

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 for 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 developed financial (tax) problems in 2012 because of his insufficient income withholdings. He failed to timely file and to pay his federal and state taxes for tax year 2012, and acquired a substantial tax debt of over \$20,000. He also had three delinquent accounts and a tax lien filed against him. Applicant rehabilitated the debt alleged in SOR 1.c. He established a payment arrangement and he is current on it. The other two accounts were charged off. He satisfied the state tax lien.

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 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:

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)).

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).

Some 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 because he is still paying his back taxes and two of his debts were charged off. However, his financial problems occurred under circumstances unlikely to recur and they do not cast doubt on his current reliability, trustworthiness, or judgment.

Applicant's financial problems could be attributed to, or were aggravated by, his overseas deployment and cancer illness. Additionally, providing financial support for six children, some of which were attending college, and his inability to pay other debts and living expenses because of the large size of his family are factors that prevented him from paying his back taxes more diligently.

Applicant acknowledged he made a mistake with his insufficient withholdings, and that he should have been more diligent. Notwithstanding, Applicant established that as far back as 2015, he was making arrangements with a tax company to help him resolve his tax problems with the IRS. Applicant increased his withholdings for tax years 2013 through 2017, thereby eliminating the tax payment shortfall after tax year 2012.

Applicant's efforts to pay his tax debt are not ideal, but he made an effort to resolve his tax debt by contacting a tax company to help him negotiate with the IRS. He is paying his tax debt by applying his tax returns to the tax debt. I note that Applicant has timely filed and paid all his taxes for tax years 2013 through 2017. He owes no taxes for those years. His actions show diligence and responsibility in the handling of his tax obligations.

Applicant paid a state lien filed against him for back taxes (not alleged in the SOR), brought one account to current and is making payments on it. He received financial counseling through the tax company he retained in 2015. The evidence does not support a finding that he was negligent paying his back taxes. He simply was not able to pay all his debts at the same time. He divided his financial resources between his tax obligations and his living expenses in order to provide for his children's education.

Considering the evidence as a whole, and including his recent actions, Applicant has been financially responsible under the circumstances. He disclosed his financial problems in his 2016 SCA. His financial situation is improving and there are clear indications that his financial problems are being resolved and under control. His earnings 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) and 2(d). 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 is a 51-year-old employee of a federal contractor. He served 22 years in the military service and has worked for federal contractors since 2017. He held a clearance during his service without any issues or concerns, except for his financial problems. The record evidence is sufficient to establish that his financial problems are being resolved and are under control.

The AGs do not require an Applicant to immediately resolve or pay each and every debt alleged in the SOR, to be debt free, or to resolve first the debts alleged in the SOR. An applicant needs only to establish a plan to resolve financial problems and take significant actions to implement the plan. Applicant has implemented a plan to resolve his financial problems and he has made significant progress implementing his plan.

Applicant is fully aware of the security concerns raised by his failure to timely file and pay his taxes. He promised to maintain financial responsibility to be eligible for a clearance. 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.f:	For Applicant

Conclusion

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

JUAN J. RIVERA
Administrative Judge