



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 14-03147

Appearances

For Government: Andrea Corrales, Esq., Department Counsel
For Applicant: *Pro se*

09/17/2015

Decision

HARVEY, Mark, Administrative Judge:

Applicant's statement of reasons (SOR) alleges two delinquent collection accounts, a judgment, a tax lien, and failure to file federal and state tax returns for tax years 2008 and 2010. He failed to file his tax returns as required, and he failed to provide sufficient documentation of his progress in resolving his financial problems. Financial considerations concerns are not mitigated. Eligibility for access to classified information is denied.

Statement of the Case

On February 12, 2013, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP) version of a security clearance application (SF 86). (Government Exhibit (GE) 1) On August 12, 2014, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued an SOR to Applicant, pursuant to Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended; and the adjudicative guidelines (AG), which became effective on September 1, 2006.

The SOR alleged security concerns under Guideline F (financial considerations). (Hearing Exhibit (HE) 2) The SOR detailed reasons why the DOD CAF was unable to find that it is clearly consistent with the national interest to grant Applicant access to classified information and recommended referral to an administrative judge to determine whether Applicant's clearance should be granted or denied. (HE 2)

On February 20, 2015, and July 6, 2015, Applicant responded to the SOR allegations and requested a hearing. (HE 3) On July 27, 2015, Department Counsel was ready to proceed. On July 30, 2015, the case was assigned to me. On August 7, 2015, the Defense Office of Hearings and Appeals (DOHA) issued a notice setting Applicant's hearing for September 1, 2015. Applicant's hearing was held as scheduled. On September 10, 2015, DOHA received the transcript of Applicant's hearing. Department Counsel offered four exhibits into evidence, and Applicant offered seven exhibits into evidence. (Tr. 18-23; GE 1-4; Applicant Exhibit (AE) A-G) All proffered exhibits were admitted into evidence without objection. (Tr. 18-19, 22-23; GE 1-4; AE A-G)

Findings of Fact¹

In Applicant's SOR response, he admitted the SOR allegations in ¶¶ 1.a, 1.b, and 1.e. He denied the other SOR allegations, and he provided extenuating and mitigating information as part of his SOR response. Applicant's admissions are accepted as findings of fact.

Applicant is a 58-year-old facilities services specialist or maintenance technician, who has worked for a large defense contractor for three years.² (Tr. 32-34, 72; GE 1) In 1974, he graduated from high school. (Tr. 6) He has not attended college. (Tr. 6) In 1976, he married, and in 1992, he divorced. (Tr. 7) In 2003, he married his current spouse. (Tr. 7) His children are 30, 37, and 39. (Tr. 7) He has never served in the military. (GE 1) There is no evidence of security violations, abuse of alcohol, or use of illegal drugs.

Financial Considerations

Applicant's credit reports reflect, and his SOR alleges two delinquent collection accounts, a judgment, a tax lien, and failure to file federal and state tax returns for tax years 2008 and 2010. Specific information about the SOR allegations is discussed in the following paragraphs.

a. Applicant failed to file his federal tax returns for tax years 2008 and 2010. Applicant attempted to file his tax returns twice. (Tr. 25) The first accountant he employed did not work out. (Tr. 46) The next person he employed promised to file his

¹Some details have not been included in order to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

²Unless stated otherwise, Applicant's February 12, 2013 Electronic Questionnaires for Investigations Processing (e-QIP) version of security clearance application (SF 86) is the source for the facts in this paragraph and the next paragraph. (GE 1)

tax returns, and instead, she took Applicant's money and then disappeared. (Tr. 25, 46) In June 2014, Applicant hired a tax assistance firm (TAF) to help him file his tax returns. (Tr. 24) He did not file his 2008 and 2010 federal and state tax returns in a timely manner because he did not have the funds to pay the taxes that he owed. (Tr. 51)

In January 2015, Applicant filed his tax returns for 2008 and 2010; however, Applicant claimed the Internal Revenue Service (IRS) rejected the tax returns because they were supposed to be filed as individual and not joint tax returns. (Tr. 24-25, 42, 47-50, 86-88; SOR response) The 2008 tax return the IRS rejected showed that he owed \$7,500 in federal income taxes, and his 2010 tax return the IRS rejected showed that he owed \$3,600 in federal income taxes. (Tr. 51-52)

Applicant is working with a tax advocate, and the TAF should be ready to file his federal tax returns in the next 30 days after his hearing. (Tr. 25, 42) On January 7, 2015, TAF billed Applicant \$2,150, and credited Applicant with paying \$1,450 for working on filing his tax returns for tax years 2008 to 2013 (six years of tax returns). (AE B) On July 31, 2015, the TAF wrote that they are assisting Applicant with filing his tax returns for tax years 2008 through 2014 (seven years of tax returns), and TAF expects "resolution within thirty days." (Tr. 42-43; AE A)

b. Applicant failed to file his state tax returns for tax years 2008 and 2010. The same situation exists for his state taxes as exists for his federal taxes. (Tr. 25-26) The 2008 tax state return generated in January 2015 showed that he owed \$2,000 in state income taxes for 2008, and his 2010 state tax return generated in January 2015 showed that he owed \$10,200 in state income taxes for 2010. (Tr. 51-52)

c. The IRS filed a tax lien against Applicant in 2010 for \$253,000. The IRS generated a tax return for Applicant for tax year 2002 in 2006, for tax year 2003 in 2006, and for tax year 2004 in 2007. (AE E-G) The IRS assessed taxes, interest, and penalties totaling \$253,000. (AE E-G) The IRS garnished about 75 percent of Applicant's wages for 15 weeks, and the IRS seized most of his bank account. (Tr. 27, 41) Applicant was unable to pay his mortgage. (Tr. 27) In 2012, Applicant filed amended federal tax returns for 2002 to 2004, and his tax debt was substantially reduced. (AE E-G) After being credited for levied funds, Applicant had completely paid his 2002 taxes, and reduced his taxes owed for tax years 2003 and 2004 to about \$16,500. (Tr. 26, 44-45; AE E-G) Applicant established a payment arrangement with the IRS, and he now pays the IRS \$220 a month. (Tr. 28) In total, he has paid the IRS about \$3,000 over the past 18 months through this arrangement. (Tr. 28) He explained that he did not file his taxes on time because "why even file [because] I have nothing to give them." (Tr. 39)

d. and e. In 2003, Applicant borrowed 80 percent of his home's purchase price from one creditor³ and 20 percent from another creditor. Applicant's original second

³ Applicant's first mortgage is delinquent and his home is in the pre-foreclosure process or possibly undergoing a loan modification. (Tr. 61) His first mortgage is not listed on the SOR. He is not making his mortgage payment at this time to facilitate a loan modification. (Tr. 63-64) I will not consider his delinquent first mortgage as a negative financial circumstance because it is not listed on his SOR.

mortgage holder loaned Applicant about \$77,000. The debt went to collection, and is now being handled by the creditor E, which is seeking about \$70,000 from Applicant. (Tr. 28, 59-60) Applicant has not made any payments on his second mortgage in the last two years. (Tr. 61) Applicant said creditor E has agreed to wait until he has his tax situation corrected before he will have to set up a payment plan or refinance his mortgage accounts. (Tr. 29)

f. A creditor obtained a judgment against Applicant for \$1,300. On August 31, 2015, the creditor wrote that the debt was paid in full. (Tr. 29, 64-67; AE D)

g. A debt to a creditor for \$1,742 is 120 days past due. Applicant said this debt is paid. (Tr. 29, 68-69) On January 27, 2015, the creditor wrote that the balance on his account was zero. (SOR response)

Applicant said he developed an anxiety disorder. (Tr. 31) He had anxiety and panic attacks, and it was difficult for him to maintain employment. (Tr. 31) He decided to start a construction business because it would enable him to establish his own schedule and arrange for others to do the work that he was unable to do. (Tr. 32, 83) His business did not have employees, as he paid his workers as private contractors, using IRS Form 1099s. (Tr. 82) This avoided the necessity of withholding social security taxes and state taxes, for example, from their pay. (Tr. 82) One problem with his business model was the lack of a good administrative employee. (Tr. 32)

Applicant's current monthly gross income is about \$5,000 and his net income is about \$4,000. (Tr. 35, 72) His vehicle does not have a lien. (Tr. 74) After paying expenses, he has a monthly net remainder of about \$200. (Tr. 78) Applicant does not have a written budget. (Tr. 79) Applicant disclosed that the IRS rejected his tax returns for 2008 through 2014,⁴ and he has not filed his state tax returns for those same years. (Tr. 59; AE A-B)

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.

⁴When Applicant completed Section 26 of his February 12, 2013 SF 86 and in his Office of Personnel Management (OPM) personal subject interview (PSI), he disclosed that he did not file his 2008 and 2010 tax returns. (GE 1, 4) He did not disclose his failure to file his 2009 and 2011-2014 federal and state tax returns on his SF 86 or during his OPM PSI. He did not explain why he failed to disclose his 2009 and 2011-2014 federal and state tax returns on his SF 86 and during his OPM PSI, and I will not consider his failure to disclose this information as evidence.

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. I have not based this decision, 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 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. 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 [or her] 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 relating to 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. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

AG ¶ 19 provides two disqualifying conditions that could raise a security concern and may be disqualifying in this case: "(a) inability or unwillingness to satisfy debts"; "(c) a history of not meeting financial obligations"; and "(g) failure to file annual federal, state, or local income tax returns 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). Applicant's history of delinquent debt is documented in his credit reports and SOR response. Applicant's SOR alleges two delinquent collection accounts, a judgment, a tax lien, and failure to file federal and state tax returns for tax years 2008 and 2010. Failure to file tax returns may be a federal criminal offense as such conduct can violate 26 U.S.C. § 7203.⁵ The Government established the disqualifying conditions in AG ¶¶ 19(a) and 19(c), requiring additional inquiry about the possible applicability of mitigating conditions.

Five 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

⁵ 26 U.S.C. § 7203, willful failure to file return, supply information, or pay tax, provides:

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return, keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than \$ 25,000 (\$100,000 in the case of a corporation), or imprisoned not more than 1 year, or both, together with the costs of prosecution.

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), and the individual acted responsibly under the circumstances;

(c) the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control;

(d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts;⁶ and

(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.

The 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).

⁶The 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)).

ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013).

Applicant's conduct in resolving his delinquent debt does not establish full application of any mitigating conditions to all of his SOR debts. He provided sufficient information about his finances to establish mitigation of the SOR allegations in ¶¶ 1.c, 1.e, 1.f, and 1.g. He presented evidence that he resolved the federal tax lien in SOR ¶ 1.c by establishing a payment plan with the IRS; the debt in SOR ¶ 1.e is a duplication of the debt in SOR ¶ 1.d; and the debts in SOR ¶¶ 1.f and 1.g are paid. Although he suffered from anxiety and this affected his ability to earn income and delayed his filing of his tax returns, it was not reasonable or responsible for him to not file his federal and state tax returns for 2008 and 2010 sooner. (SOR ¶¶ 1.a and 1.b)

Applicant presented insufficient evidence about what he has done since becoming employed with his current employer to pay or make payments to address the debt in SOR ¶ 1.d for about \$77,000. He did not provide any of the following documentation relating to the debt in SOR ¶ 1.d: (1) proof of payments, such as checking account statements, photocopies of checks, or a letter from the creditor proving that he paid or made any payments to the creditor; (2) correspondence to or from this creditor to establish maintenance of contact with this creditor;⁷ (3) a credible debt dispute indicating he did not believe he was responsible for the debt and why he held such a belief; (4) attempts to negotiate a payment plan, such as settlement offers or agreements to show that he was attempting to resolve this SOR debt; (5) evidence of financial counseling; or (6) other evidence of progress or resolution of this SOR debt.

Applicant's failure to prove that he has made more substantial steps to resolve the debt in SOR ¶ 1.d and to file his federal and state tax returns for 2008 and 2010 shows a lack of judgment and responsibility that weighs against approval of his security clearance. There is insufficient evidence that he was unable to make greater progress resolving this delinquent debt, or that his financial problems are being resolved, are under control, and will not recur in the future. Under all the circumstances, he failed to establish that financial consideration concerns are mitigated.

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(a):

⁷“Even if Applicant's financial difficulties initially arose, in whole or in part, due to circumstances outside his [or her] control, the Judge could still consider whether Applicant has since acted in a reasonable manner when dealing with those financial difficulties.” ISCR Case No. 05-11366 at 4 n.9 (App. Bd. Jan. 12, 2007) (citing ISCR Case No. 99-0462 at 4 (App. Bd. May 25, 2000); ISCR Case No. 99-0012 at 4 (App. Bd. Dec. 1, 1999); ISCR Case No. 03-13096 at 4 (App. Bd. Nov. 29, 2005)). A component is whether he or she maintained contact with creditors and attempted to negotiate partial payments to keep debts current.

(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), 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 have incorporated my comments under Guideline F in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under Guideline F, but some warrant additional comment.

There is some evidence supporting approval of Applicant's clearance. Applicant is a 58-year-old facilities services specialist or maintenance technician, who has worked for a large defense contractor for three years. There is no evidence of security violations, abuse of alcohol, or use of illegal drugs.

The financial evidence against approval of Applicant's clearance is more substantial at this time. Applicant has a history of financial problems. His SOR response and hearing statement establish one delinquent collection account for about \$77,000. Applicant failed to provide sufficient documentation of progress to resolve his financial problems. He did not provide any evidence of payments to this SOR creditor, a payment plan, or evidence of his communications to the SOR creditor, showing his attempts to resolve this SOR debt. His failure to provide more corroborating documentation shows lack of financial responsibility and judgment and raises unmitigated questions about Applicant's reliability, trustworthiness, and ability to protect classified information. See AG ¶ 18. He failed to timely file his federal and state income taxes for 2008 and 2010.

I have carefully applied the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. Financial considerations concerns are not 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:	AGAINST APPLICANT
Subparagraphs 1.a and 1.b:	Against Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	Against Applicant
Subparagraphs 1.e through 1.g:	For Applicant

Conclusion

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

Mark Harvey
Administrative Judge