



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



In the matter of:)
)
) ISCR Case No. 15-01920
)
Applicant for Security Clearance)

Appearances

For Government: Tara Karoian, Esq., Department Counsel
For Applicant: *Pro se*

04/11/2016

Decision

DUFFY, James F., Administrative Judge:

Applicant refuted the security concerns under Guideline E (personal conduct), but failed to mitigate those concerns under Guideline F (financial considerations). Clearance is denied.

Statement of the Case

On August 28, 2015, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines F and E. This action was taken under Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive); and the adjudicative guidelines (AG) implemented on September 1, 2006.

The SOR detailed reasons why DOD adjudicators could not make the affirmative finding under the Directive that it is clearly consistent with the national interest to grant Applicant's security clearance. On September 28, 2015, Applicant answered the SOR and requested a decision based on the administrative record in lieu of a hearing. On November 2, 2015, Department Counsel requested a hearing (Hearing Exhibit (Hx) 1). The case was assigned to me on November 12, 2015. DOHA issued a notice of hearing on November 18, 2015, and the hearing was convened as scheduled on December 8, 2015.

At the hearing, Department Counsel offered Government Exhibits (Gx) 1 through 4. Applicant testified and submitted Applicant Exhibits (Ax) A through H. The record of the proceeding was left open until January 5, 2016, to provide Applicant the opportunity to submit additional matters. Applicant timely submitted documents that have been marked as Ax I through AK. All exhibits were admitted into evidence without objection.¹ DOHA received the hearing transcript (Tr.) on December 16, 2015.

Findings of Fact

Background Information. Applicant is a 42-year-old security electronic engineer. He has worked in the defense industry for a number of years and recently began working in his current job. He graduated from high school in 1991, earned a bachelor's degree in 2012, and is working on a master's degree. He served in the U.S. Army for about 12 years, attained the grade of sergeant (E-5), and received an honorable discharge in 2003. He worked in Iraq from August 2007 to July 2008. He is married and has four children, ages 15, 19, and twins 26. He was granted a security clearance in 1991.²

Allegations and Applicant's Response. Under Guideline F, the SOR alleged that Applicant had ten delinquent debts totaling \$62,451, including four state tax liens and a federal tax debt, and that he failed to file his federal income tax returns for 2006 and 2008 as required. Under Guideline E, the SOR alleged that Applicant falsified his Electronic Questionnaire for Investigations Processing (e-QIP) dated August 2, 2013, by responding "No" to the question that asked whether he failed to file or pay his federal, state, or other taxes as required in the past seven years. In his Answer to the SOR, Applicant admitted the debts in SOR ¶¶ 1.b, 1.c, 1.d, and 1.e that totaled \$10,030, and denied the remaining allegations. His admissions are incorporated as findings of fact.³

Explanations for Financial Problems. Applicant attributed his financial problems to a period of unemployment and medical problems. In his e-QIP, Applicant disclosed that he was unemployed from October 2012 to June 2013 after a contract ended. He

¹ In his post-hearing submission, Applicant submitted multiple copies of the same documents.

² Tr. 5-7, 12, 30-33, 38, 96; Gx 1, 4.

³ Applicant's Answer to the SOR.

was then employed part-time at a church for at least two months. He was also unemployed for 20 days in August 2008. His wife has been a self-employed cosmetologist for the past 15 years. When she is sick or unable to work, their income is reduced. She had surgery and missed work for a few months in 2015.⁴

SOR ¶ 1.a – mortgage past due in the amount of \$3,383 with a total balance of \$315,408. Applicant's credit report dated August 28, 2013, reflected this account was paid as agreed. His credit report dated December 29, 2014, reflected this account was past due \$3,384 and had a date of last activity of July 2014. In his Answer to the SOR, Applicant denied this debt and indicated he was one month behind on his mortgage payments. At the hearing, Applicant testified that he was then past due about four months on his mortgage. His monthly mortgage payments were originally about \$1,900, but after a mortgage loan modification were reduced to \$897 in about 2013. He testified that he was past due on the mortgage about \$3,384 in December 2013, but then caught up on those payments and fell behind again when his wife encountered health problems. He also testified that he was doubling his mortgage payments each month to eliminate the deficiency. He did not provide proof of those payments at the hearing, indicated that he would provide them in his post-hearing submission, but failed to do so. Insufficient evidence was presented to establish that this debt is being resolved.⁵

SOR ¶ 1.b – account past due in the amount of \$1,333 with a total balance of \$23,853. This is a loan for the purchase of a 2006 Mercedes Benz that his wife was still driving. His credit report dated December 29, 2014, reflected this debt was past due \$1,330, had a balance of \$23,853, and had a date of last activity of August 2014. He testified that the monthly payments on the vehicle were \$571 and that he was one month behind on those payments. He also testified that he had contacted the creditor, that he recently made a payment of \$621 to reduce late fees, and that he would do so again in January 2016. He did not provide proof of those payments at the hearing, indicated that he would provide them in his post-hearing submission, but failed to do so. Insufficient evidence was presented to establish that this debt is being resolved.⁶

SOR ¶ 1.c – charged-off account in the amount of \$7,977. This debt was a loan for an automobile that was repossessed. His credit report dated December 29, 2014, reflected that the date of last activity on this debt was December 2013. This debt became delinquent while he was unemployed. He believed that, when the vehicle was repossessed, he owed about \$7,000 to \$8,000 on the loan, and the vehicle had a fair market value of about \$5,000 to \$6,000. After the repossession, the creditor wanted about \$3,000 to \$4,000 to return the vehicle to him and reinstate the loan. He could not

⁴ Tr. 32-38; Gx 1, 4; Ax AK.

⁵ Tr. 35-42, 44-46, 83-84; Gx 2, 3, 4.

⁶ Tr. 40, 42-46, 83-84; Gx 2, 3, 4.

afford to make that payment. This debt remains unresolved. He stated that he had not taken any recent steps to resolve this debt.⁷

SOR ¶ 1.d – collection account in the amount of \$547. This was a cell phone account that had a date of last activity of January 2013. Applicant testified that the creditor offered to settle this debt for \$350. He indicated that he and his wife planned to settle this debt in the next few months.⁸

SOR ¶ 1.e – delinquent account in the amount of \$173. This is a medical debt that had a date of last activity of December 2012. Applicant believed this debt involved medical treatment for one of his children when they did not have medical insurance. He testified that his wife is handling the medical bills. He did not submit any evidence to show this debt is being resolved.⁹

SOR ¶ 1.f-1.i – state tax liens in the amounts of \$10,427, \$17,938, \$12,019, and \$5,050; SOR ¶ 1.j – failure to file federal income tax returns for 2006 and 2008 as required; and SOR ¶ 1.k – unpaid federal taxes in the amount of \$3,604 for 2006. In his Answer to the SOR, Applicant denied each of the tax-related SOR allegations. His credit reports reflected that state tax liens were filed against him between November 2007 and April 2013. During his Office of Personnel Management (OPM) interview on September 11, 2013, Applicant was asked about his failure to file his federal income tax returns for 2006 and 2008 and federal income tax deficiency. In response to those questions, he claimed he filed his federal income tax returns for those years and also stated he owed the IRS approximately \$17,000.¹⁰

At the hearing, Applicant testified that an accountant had prepared his income tax returns for a number of years, including 2006 and 2008. He stated that the accountant was responsible for transmitting his income tax returns to the Internal Revenue Service (IRS) and state tax authority. He acknowledged that the IRS and state tax authority had no record of him filing income tax returns for 2006, 2007, and 2008. He asserted that those tax returns were filed and must have been lost by the taxing authorities. In the absence of the income tax returns, the IRS and state tax authority filed the missing tax returns for him in a manner that were favorable to the government (e.g., married filing separately, reduced or no exemptions and deductions, etc.) and determined he owed taxes.¹¹

⁷ Tr. 46-52, 83-84; Gx 2, 4.

⁸ Tr. 52-53, 83-84; Gx 2.

⁹ Tr. 53-55, 83-84, Gx 2.

¹⁰ Tr. 55-57; Gx 2, 3, 4. The source of the figure for the unpaid federal taxes (\$3,604) is not reflected in the record.

¹¹ Tr. 57-58, 74-79; Applicant Answer to the SOR.

Applicant testified that, about four years prior to the hearing, he received a statement from the IRS reflecting that he owed them money. He further stated that he had owed the IRS money for years and had not received a refund from the IRS since his children were little. Attached to his federal income tax return for 2011 was an IRS statement dated October 5, 2015, that showed he owed \$921 in past-due taxes for 2011.¹²

Applicant indicated that he contacted his accountant about the missing income tax returns. The accountant claimed that she had mailed the missing tax returns to the taxing authorities and noted it was difficult to find the missing tax returns because of the number of years that had passed. While trying to locate the missing tax returns, Applicant stated that he contacted taxing authorities. Even though he believed he did not owe the state any past-due taxes, he began a repayment plan for the claimed past-due state taxes. He stated that he paid the state \$75 per week (\$300 per month) for about two years. Under that repayment plan, he claimed that he paid the state about \$7,000. However, he provided no proof of those payments.¹³

Appellant testified that copies of the missing tax returns were eventually found. At the hearing, he submitted copies of his federal and state income tax returns for 2006-2008 and 2011-2014. Those copies were not signed or dated by Applicant or his wife. He did not submit income tax returns for 2009 and 2010 because the IRS did not question those years and he thought they were not needed. The copies of the submitted tax returns reflected the following:¹⁴

Federal Income Tax Returns ¹⁵							
Tax Year	2006	2007	2008	2011	2012	2013	2014
Adjusted Gross Income	\$44,355	\$93,202	\$58,129	\$78,253	\$82,655	\$40,000	\$64,155
Refund Due	\$4,289	0	0	\$2,675	\$284	0	0
Taxes Owed	0	\$1,772	\$106	0	0	\$674	\$1,506
Date Entered by Tax Preparer	None	11/12/15	11/12/15	10/13/15	11/21/15	11/21/15	11/12/15

¹² Tr. 64; Ax D.

¹³ Tr. 58-80, 84-85. In his OPM interview, Applicant indicated that his accountant filed an appeal with the IRS and state tax authority in January 2013, and they were waiting to hear the result of the appeal. See Gx 4.

¹⁴ Tr. 58-80.

¹⁵ Ax A-H.

State Income Tax Returns ¹⁶							
Tax Year	2006	2007	2008	2011	2012	2013	2014
Adjusted Gross Income	\$44,355	\$93,202	\$58,129	\$78,253	\$82,655	\$40,000	\$64,155
Refund Due	\$669	0	\$698	\$378	\$1,628	\$828	0
Taxes Owed	0	\$2,519	0	0	0	0	\$351
Date Entered by Tax Preparer	None	11/12/15	11/12/15	10/13/15	11/21/15	11/21/15	11/12/15

After locating the missing tax returns, Applicant testified that he took copies of them to the IRS and state tax authority to show he filed them. At the hearing, he presented the front page of his IRS Form 1040 for 2006, 2007, and 2008 that were marked with an IRS proof of delivery stamp dated November 25, 2015. The taxing authorities informed him that it would take four to six weeks to process the paperwork and determine what, if any, income taxes were owed. At the time of the hearing, he was still waiting to hear from the IRS and state tax authority. In his post-hearing submission, Applicant submitted no further information about his tax situation.¹⁷

Financial Situation. Applicant testified that his annual income in his new job was about \$48,000. He is supporting his two oldest children who are attending college. He is no longer supporting his 19-year-old son who recently enlisted in the military. He indicated that the combined take-home pay for him and his wife was about \$4,000 to \$4,500 per month. He estimated their monthly expenditures were \$3,250, including two car payments totaling \$894. This left them approximately \$1,000 per month in discretionary income.¹⁸

Falsification Allegation. In submitting his e-QIP in August 2013, Applicant responded “No” to all of the financial record questions, including the question that asked whether he failed to file or pay federal, state, or other taxes required in the past seven years. As discussed above, he submitted that response because he thought his federal and state income tax returns for the years in question were filed. He testified that he thought the taxing authorities were claiming he owed past-due taxes because they believed he did not file for those years, which he thought was wrong. According to Applicant, if the taxing authorities had known that he filed the tax returns, he would not have owed past-due taxes.¹⁹

¹⁶ Ax A-H.

¹⁷ Tr. 58-70, 82-83.

¹⁸ Tr. 33-35, 85-91.

¹⁹ Tr. 80-82; Gx 1; Applicant Answer to the SOR.

Character Evidence. In the Army, Applicant was awarded three Army Achievement Medals, three Good Conduct Medals, and other medals and ribbons.²⁰

Policies

The President of the United States 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. *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988). The President has authorized the Secretary of Defense to grant 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. 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).

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These AGs 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 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, in reaching a decision.

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 of 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. See also Executive Order 12968 (Aug. 2, 1995), Section 3. Thus, a clearance decision is merely an indication that the Applicant has or 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.

²⁰ Ax I-AI.

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 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

Guideline F, Financial Considerations

AG ¶ 18 sets forth the security concern for financial considerations:

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.

The guideline notes several conditions that could raise security concerns under AG ¶ 19. Three are potentially applicable 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

Applicant accumulated delinquent debts that he was unable or unwilling to pay for an extended period. Those debts included four state tax liens totaling \$45,434 that were filed against him between November 2007 and April 2013. AG ¶¶ 19(a) and 19(c) apply to SOR ¶¶ 1.a-1.i.

SOR ¶ 1.j alleged that Applicant failed to file his federal income tax returns for 2006 and 2008. He convincingly testified that he hired an accountant to file those tax returns, and he thought they were filed as required. I find in favor of Applicant on SOR ¶

1.j even though the IRS and state tax authority did not receive those tax returns when they were due. AG ¶ 19(g) does not apply.

SOR ¶ 1.k alleged that Applicant owed \$3,604 in unpaid federal taxes for 2006. No evidence was presented to establish that he owed the Federal Government \$3,604 in unpaid taxes for 2006. At the hearing, he submitted a copy of his 2006 federal income tax return that reflected he was due to receive a refund of \$4,289 for that year. I find in favor of Applicant on SOR ¶ 1.k.

Five financial considerations 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), 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; 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.

Applicant encountered periods of unemployment, and his wife incurred medical problems. Those were conditions beyond his control that contributed to his financial problems; however, he failed to establish that he acted responsibly under the circumstances. He provided no proof of payments towards the debts in SOR ¶¶ 1.a through 1.i. Of note, he claimed that he established a repayment plan for the unpaid state taxes and paid about \$7,000 under that plan, but offered no proof of those payments. He submitted his state tax returns for 2006-2008 and 2011-2014. If the "refunds due" for those tax years are added together and then subtracted from the "taxes owed," Applicant ends up owing the state \$1,331 in income taxes for those years; which does not include any interest or penalties that may have been imposed. It also merits noting that, from the evidence in the record, I am unable to determine that the tax

liens apply to the years for which he provided his state income tax returns. It is possible the tax liens apply to different tax years.

In summary, the debts in SOR ¶¶ 1.a-1.i are ongoing and significant. Applicant failed to present sufficient evidence to show that those debts are being resolved. I am unable to find that his financial problems are unlikely to recur and do not cast doubt on his current reliability, trustworthiness, and good judgment. AG ¶ 20(b) partially applies. AG ¶¶ 20(a), 20(c), 20(d), and 20(e) do not apply.

Guideline E, Personal Conduct

AG ¶ 15 sets forth the security concern for personal conduct:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

AG ¶ 16 describes one condition that could raise a security concern and may be disqualifying in this case:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities.

Applicant failed to disclose on his 2013 e-QIP that his 2006 and 2008 federal income taxes were not filed as required by law or that he owed past-due federal and state taxes. As noted above, Applicant believed that he had filed properly his income tax returns for those years. Additionally, he thought that he did not owe past-due federal or state taxes. I find that Applicant did not deliberately falsify his response to the pertinent e-QIP question.

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 relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

(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.

My comments under Guidelines F and E are incorporated in this whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment. I considered all of the record evidence, including Applicant's military service and his work history. Despite the presence of some mitigation, he failed to mitigate the security concerns arising from his delinquent debts.

Overall, the record evidence leaves me with questions and doubts as to his eligibility and suitability for a security clearance. Applicant refuted the security concerns under the personal conduct guideline, but failed to mitigate those concerns under the financial considerations guideline.

Formal Findings

Formal findings as required by Section E3.1.25 of Enclosure 3 of the Directive are:

Paragraph 1, Guideline F:	Against Applicant
Subparagraphs 1.a-1.i:	Against Applicant
Subparagraphs 1.j-1.k:	For Applicant
Paragraph 2, Guideline E:	For Applicant
Subparagraph 2.a:	For Applicant

Decision

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

James F. Duffy
Administrative Judge