



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



In the matter of:)
)
) ISCR Case No. 16-01136
)
)
Applicant for Security Clearance)

Appearances

For Government: Aubrey De Angelis, Esq., Department Counsel
For Applicant: Ryan C. Nerney, Esq.

09/28/2017

Decision

WHITE, David M., Administrative Judge:

Applicant underwent a period of financial hardship caused by serious health problems, unemployment, divorce, and the collapse of the real estate market. He has resolved all formerly delinquent debts, and is performing exceptional work in a position that has restored his financial solvency. Resulting security concerns were fully mitigated. Based upon evaluation of the testimony, pleadings and exhibits, national security eligibility is granted.

History of Case

On January 23, 2015, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP). On October 4, 2016, the Department of Defense Consolidated Adjudications Facility (DoD CAF) issued Applicant a Statement of Reasons (SOR) alleging security concerns under Guideline F (Financial Considerations). The action was taken under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines effective within the DoD after September 1, 2006.

Applicant answered the SOR in writing on October 27, 2016 (Answer), and requested a hearing before an administrative judge. The Defense Office of Hearings and Appeals (DOHA) assigned the case to me on December 19, 2016. Applicant's attorney filed his Notice of Representation on April 21, 2017, and DOHA issued a Notice of Hearing on May 2, 2017, setting the hearing for May 18, 2017. On that date, Department Counsel offered Government Exhibits (GE) 1 through 7 into evidence. Applicant objected to GE 2, which was not admitted in the absence of an authenticating witness, pursuant to Directive ¶ E3.1.20. Applicant testified, and offered Exhibits (AE) A through T into evidence. All of Applicant's exhibits were admitted without objection. Three witnesses also testified on Applicant's behalf. I granted Applicant's request to leave the record open until June 8, 2017, to permit possible submission of additional evidence. On June 6, 2017, Applicant's counsel reported that he had no further evidence to submit. DOHA received the hearing transcript (Tr.) on May 31, 2017.

The SOR in this case was issued under the adjudicative guidelines that came into effect within the DoD on September 1, 2006. Security Executive Agent Directive (SEAD) 4, *National Security Adjudicative Guidelines*, implemented new adjudicative guidelines that came into effect on June 8, 2017. All national security eligibility determinations issued on or after June 8, 2017, are to be decided using the new *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AG), as promulgated in Appendix A of SEAD 4. I considered the previous adjudicative guidelines, as well as the new AG, in adjudicating Applicant's national security eligibility. This decision is issued pursuant to, and cites, the new AG; but my decision would be the same under either set of guidelines.

Findings of Fact

Applicant is employed as a Chief Scientist by a Federal contractor, and is applying for a security clearance in connection with that work. The SOR contained nine allegations concerning failures to file or pay Federal and state income taxes between 2002 and 2013, and one allegation concerning his 2014 Chapter 7 bankruptcy. Applicant admitted all of the allegations, except those involving failure to file required Federal tax returns for 2010 through 2013 when he earned no reportable income. (Answer.) Applicant's admissions are incorporated in the findings below.

Applicant is 64 years old. His seven-year marriage ended in divorce in June 1997, and he has no children. He has no previous military or Federal government service, and this is his first application for a DoD security clearance.¹ Between April 2005 and starting work with his present employer in late 2013, he was unemployed for all but 18 months from mid-2007 through 2008, and two months in late 2010. (Answer; GE 1; Tr. 60-62, 83-84.)

¹ Applicant held a "Q" clearance from the Department of Energy for work he performed at a national laboratory as a graduate student during the 1980s.

SOR ¶¶ 1.a and 1.c alleged state income tax liens that were entered against Applicant in October 2006 and February 2011, totaling \$38,471. These tax debts were resolved, and the liens released, in January 2007 and June 2014, respectively. (Answer; GE 3 through GE 7.)

SOR ¶¶ 1.b and 1.d alleged Federal income tax liens that were entered against Applicant in March 2010 and August 2011,² totaling \$54,582. These tax debts were resolved, and the liens released, in June 2012 and July 2015, respectively. (Answer; GE 3 through 7; AE J.)

SOR ¶¶ 1.f and 1.g alleged Applicant's outstanding Federal income tax debts for 2007 and 2009, which formerly totaled \$19,661. These are the only two tax years for which he has not fully resolved his formerly delinquent taxes. He entered into a repayment agreement with the IRS on July 24, 2015, pursuant to which he has regularly been paying \$660 per month toward the outstanding balance by automatic deductions from his checking account. The total tax debt for these two years was reduced to less than \$7,000 by the time the record closed, and Applicant's budget was sufficient to support his continued payments under the agreement. (Answer; GE 3; AE E; AE R; Tr. 73, 87-88.)

SOR ¶¶ 1.h and 1.j alleged Applicant's failure to timely file his Federal income tax returns for tax years 2007 through 2013. He had reportable earned income during tax years 2007 through 2009, but failed to file those returns on time due to the turmoil caused by his failing health and financial situations, as discussed below. He had no earned income during 2010 through 2013, as reflected by IRS records, and was not required to file returns for those years. He filed his 2007 return in May 2010, his 2008 return in August 2011, and his 2009 return in October 2011. As described above, he entered into a repayment agreement for 2007 and 2009 taxes in July 2015, and has made all payments under that agreement. (Answer; GE 3; AE L; AE M; AE N; Tr. 71-72.)

SOR ¶ 1.i alleged Applicant's failure to timely file his state income tax returns for tax years 2007 through 2009. He admitted this allegation. All of his unpaid state income taxes were subsequently resolved through garnishments or his 2014 bankruptcy. (Answer; GE 3; GE 7; Tr. 67-73.)

In 2013 Applicant decided to resolve his outstanding debts through a Chapter 7 bankruptcy proceeding, which was filed in January 2014 and discharged in April 2014 as alleged in SOR ¶ 1.e. The total of discharged debts was approximately \$455,600 comprising consumer debts incurred during his long period of unemployment and some tax and mortgage debts. Since his bankruptcy discharge, Applicant has incurred no new delinquent debt. (Answer; GE 7; Tr. 74-76, 85-87.)

² The SOR erroneously alleged that the lien in SOR ¶ 1.d was also entered in 2010.

Applicant's financial issues first arose in 1992, when he and his wife purchased a home in an exclusive neighborhood with a mortgage loan that was barely within their ability to repay. Two weeks after the loan closed, his then-wife lost her job and thereafter did not earn any income. During the rapid rise in real estate values over the next 15 years, their subsequent divorce, and his periodic unemployment, Applicant was only able to continue living in his home through a series of mortgage refinancing agreements, which culminated in a predatory variable-rate loan requiring monthly payments exceeding \$10,000. When his employment ended in 2008, upon completion of the contracted work he was hired to perform, the real estate market and economy had entered recession and he could no longer afford the mortgage payments. His mortgage lender foreclosed on the home in October 2009. (Answer; GE 1; Tr. 63-71.)

Applicant suffers from a life-long progressive neurological disorder that caused him to endure significant difficulty interviewing for employment, or even performing daily activities of living, after his employment ended in 2008. In 2011, he underwent a surgical implant procedure that has alleviated most of the symptoms of the disorder to the point that he can again perform all physical functions required in his daily living and employment activities. (Answer; Tr. 38-39, 52, 63-67, 71.)

Since 2014, when he completed his bankruptcy proceeding and began employment with a company that highly values his capabilities and performance, Applicant has established stable financial conditions and lived well within his means. He completed five financial counseling courses, and provided a personal financial statement demonstrating a monthly surplus of more than \$1,400 after making his agreed \$660 payment to the IRS for 2007 and 2009 taxes due. He has more than \$40,000 in a 401(k) retirement savings account, and \$12,000 in other bank accounts. (Answer; AE E; AE G; AE H; Tr. 75.)

The owner and chief executive officer of Applicant's company, his facility security officer, and a computer-scientist colleague, all took time to appear in person and testify concerning their observations and judgments of his character. They unambiguously opined that Applicant is a dedicated, loyal, trustworthy, and responsible individual who understands and will comply with all security requirements if granted a clearance. They uniformly agreed that his ability to overcome and resolve his former medical and financial difficulties demonstrated his strength of character, and found his potential for future intellectual contributions to be of particular value to the interests of national security. (Tr. 32-59.)

Policies

When evaluating an applicant's suitability for national security eligibility, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines (AG) list potentially disqualifying conditions and mitigating conditions, which are to be used in evaluating an applicant's national security eligibility.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in AG ¶ 2 describing the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. The entire process is a conscientious scrutiny of applicable guidelines in the context of a number of variables known as the whole-person concept. The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. I have not drawn inferences based on mere speculation or conjecture.

Directive ¶ E3.1.14 requires the Government to present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.15 says that an "applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision."

A person applying for national security eligibility seeks to enter into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants national security eligibility. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified or sensitive information.

Finally, as emphasized in Section 7 of Executive Order 10865, "[a]ny determination under this order adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See *also* Executive Order 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information.)

Analysis

Guideline F: Financial Considerations

The security concerns relating to the guideline for financial considerations are set out in AG ¶ 18, which reads in pertinent part:

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. Financial distress can also be caused or exacerbated by, and thus can be a possible indicator of, other issues of personal 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.

AG ¶ 19 describes three conditions that could raise security concerns 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 annual Federal, state, or local income tax as required.

Applicant encountered financial difficulties starting in 1992, when his then-wife lost her job shortly after they purchased their dream home with a large mortgage debt. He continued to pay bills and mortgage obligations during periodic interruptions in his employment by incurring consumer debt and refinancing his home a number of times. In 2008, he lost a well-paying consulting position when the work was completed, and the real estate market collapsed. He was then unable to satisfy his substantial debts, and stopped filing or paying income taxes for several years due to lack of funds. These facts establish prima facie support for the foregoing disqualifying conditions, and shift the burden to Applicant to mitigate the resulting security concerns.

The guideline includes five conditions in AG ¶ 20 that could mitigate the security concerns arising from Applicant's alleged financial difficulties:

- (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 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;

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

Applicant failed to file required income tax returns for tax years 2007 through 2009 because he was unable to pay the taxes owed for several years. He earned no income in 2010 through 2013, so was not required to file returns for those years. He filed his delinquent Federal returns during 2010 and 2011, and is complying with an IRS repayment agreement he entered into during July 2015 to resolve his only remaining delinquent tax debt, which is now less than \$7,000.

During late 2013 and early 2014, Applicant lawfully obtained a discharge of his other outstanding debts through a Chapter 7 bankruptcy proceeding. His subsequent employment has provided him a substantial monthly surplus of income, and he has incurred no new delinquent debt. He has completed significant financial counseling from a legitimate and credible source, and his personal financial statement demonstrates his likely solvency going forward. His former financial difficulties are known to his employer, and create no potential for pressure or duress.

Applicant's financial difficulties resulted, in large part, from circumstances beyond his control. His health deteriorated to the point that he could not obtain employment after his 2008 consulting position ended. He underwent implant surgery in 2011 to reduce the symptoms of his condition, and is currently functioning at a high level according to his supervisors. He has addressed and overcome the financial turmoil caused by his former spouse's unexpected unemployment, their subsequent divorce, and the real estate market collapse in a lawful, reasonable, and responsible manner.

Accordingly, Applicant established persuasive and substantial mitigation under all of the foregoing conditions. He underwent a period of financial crisis caused, in large part, by deteriorating real estate, marital, and health conditions. He addressed all of the resulting obligations in an orderly, lawful, and comprehensive manner. He is currently living well within his means, eliminating any need or temptation to mishandle sensitive information in response to those former problems.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's national security eligibility 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(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.

According to AG ¶ 2(c), the ultimate determination of whether to grant national security eligibility must be an overall commonsense judgment based upon careful consideration of the applicable guidelines and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all pertinent facts and circumstances surrounding this case. Applicant is a mature adult, who has demonstrated accountability for his decisions that led to substantial debt he was unable to repay. He has fully resolved all of his formerly delinquent debt, except for less than \$7,000 in Federal income taxes toward which he has been making regular agreed monthly payments since July 2015. His coworkers and supervisors provided strong character references. Applicant demonstrated sufficient evidence of rehabilitation and an established track record of compliance with debt-resolution agreements. The potential for pressure, exploitation, or duress is minimal. Overall, the evidence has eliminated the formerly legitimate doubt as to Applicant's eligibility and suitability for a security clearance. He successfully met his burden to mitigate the security concerns arising under the guideline for financial considerations.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of the Directive, are:

Paragraph 1, Guideline F:	FOR APPLICANT
Subparagraphs 1.a through 1.j:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the interests of national security to grant Applicant eligibility for a security clearance. National security eligibility for access to classified information is granted.

DAVID M. WHITE
Administrative Judge