



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



In the matter of:)
)
) ISCR Case No. 17-02794
)
Applicant for Security Clearance)

Appearances

For Government: Nicole Smith, Esq., Department Counsel
For Applicant: *Pro se*

12/28/2018

Decision

KILMARTIN, Robert J., Administrative Judge:

Applicant did not mitigate the security concerns under Guideline F, financial considerations. Applicant’s eligibility for access to classified information is denied.

Statement of the Case

On August 22, 2017, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline F, financial considerations. Applicant timely answered the SOR and elected to have his case decided on the written record in lieu of a hearing.

Department Counsel submitted the Government’s file of relevant material (FORM) on May 23, 2018. Applicant received the FORM on June 27, 2018, and had 30 days to file objections and submit material in refutation, extenuation, or mitigation. Applicant did not object to the Government’s evidence, and he provided no response to the FORM. The Government’s evidence, identified as Items 1 through 6, is admitted into evidence without objection. The case was assigned to me on December 28, 2018.

Findings of Fact¹

Applicant is 54 years old. He graduated from high school in 2004, and had some college, but no degree. He retired after serving honorably in the U.S. Army from 1984 – 2005. He has been employed intermittently as a federal contractor since November 2006, most recently as a functional analyst stationed overseas. He reported a period of unemployment from January 2015 to December 2015. Applicant reported a previous security clearance from DOD in September 2001. Applicant married in September 1983 and divorced in 1992. He married again in 1995, and he has a 16-year-old son, and three adult stepchildren.

Applicant reported his failure to timely file federal income tax returns for tax years (TYs) 2011-2014 in section 26 of his security clearance application (SCA).² There, he stated his intention to hire a tax return preparation agency to file the delinquent income tax returns, and he claimed the matter was resolved in January 2016. In his Answer to the SOR on October 23, 2017, Applicant admitted the allegation of failure to timely file income tax returns at SOR ¶ 1.a. He also admitted the alleged delinquent debts placed for collection in SOR ¶¶ 1.b -1.d, and the charged-off debt for \$1,400 at SOR ¶ 1.e. Applicant claims that he learned he was overdue on filing his federal income tax returns during his personal security interview (PSI) in August 2016.³ He stated his intention to resolve the matter as soon as possible.

Attached to his October 2017 Answer to the SOR, were two checks made out to the U.S. Treasury on Applicant's account in the amounts of \$3,324 and \$1,928. Both checks were dated July 7, 2017. Presumably, this was for back taxes owed, plus penalties and fees to the IRS, because Applicant stated his intent to file all overdue returns and resolve all tax issues with the IRS no later than June 30, 2017.⁴ He provided no explanation why he was unable to file his federal income tax returns timely in the first place. He produced no documentary evidence to show that he followed through and actually filed the tax returns or entered into any repayment arrangement with the IRS except for the two checks.

The single debt in the amount of \$605 alleged in SOR ¶ 1.b was for a utility account that was opened in December 2011 and the last activity was in March 2015 on this account.⁵ Applicant claims to have paid it off in his answer but he provided no substantiation. Similarly, he stated that the energy company debt placed for collection at

¹ Unless stated otherwise, the source of the information in this section is Applicant's January 21, 2016 security clearance application (SCA) (Item 3), or his personal security interview (PSI) on August 18, 2016. (Item 4)

² Item 3.

³ Item 4.

⁴ Item 4, p. 7.

⁵ Item 6.

SOR ¶ 1.d, and the charged-off account at SOR ¶ 1.e, were paid off to the best of his knowledge. Yet, he provided no documentation to confirm payments. The debt for \$470 placed for collection by a bank at SOR ¶1.c, was for a credit card account. Applicant's February 2016 credit bureau report reflects that it was opened in December 2014, and the last activity on the account was in January 2016. (Item 6) It remains delinquent.

Applicant provided no response to the FORM or evidence that he received financial counseling. He provided no budget showing income against expenses, or other documentation to show progress on his delinquent debts. He professed his intentions to file his overdue income tax returns and repay his delinquent debts in his SCA in January 2016, and in his PSI in August 2016. He produced no documentary evidence that he has done so.

Policies

This 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 Administrative Guidelines (AGs) promulgated in Security Executive Agent Directive 4 (SEAD 4), effective within the DOD on June 8, 2017.

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

These guidelines recognize the complexities of human behavior, and are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(a), the adjudicative process is an examination of a sufficient period and a careful weighing of a number of variables of an individual's life to make an affirmative determination that the individual is an acceptable security risk. This is known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

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. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an "applicant is

responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable security decision.”

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. Decisions include, by necessity, consideration of the possible risk that an applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline F, Financial Considerations

The security concern relating to financial considerations is set out in AG ¶18:

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 personnel security concern such as excessive gambling, mental health conditions, substance abuse, 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.

This concern is broader than the possibility that an individual might knowingly compromise classified information in order to raise money. It encompasses concerns about an individual’s self-control, judgment, and other qualities essential to protecting classified information. An individual who is financially irresponsible may also be irresponsible, unconcerned, or negligent in handling and safeguarding classified information.

AG ¶ 19 provides conditions that could raise security concerns. The following apply here:

(b) unwillingness to satisfy debts regardless of the ability to do so;

(c) a history of not meeting financial obligations; and

(f) failure to file or fraudulently filing annual federal, state, or local income tax returns or failure to pay annual federal, state, or local income tax as required.

Applicant's failure to timely file TY 2011-2014 federal income tax returns and the delinquent debts alleged in the SOR are confirmed by his credit reports and answer to the SOR. The Government produced substantial evidence to support the disqualifying conditions in AG ¶¶ 19(b), 19(c), and 19(f), thereby shifting the burden to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the facts.⁶ Applicant has not met that burden.

The guideline also includes conditions that could mitigate security concerns arising from financial difficulties. 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 . . . , and the individual acted responsibly under the circumstances;

(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 endured a one-year period of unemployment in 2015, and a downturn in the economy. He has been assigned overseas for extensive periods of time during the last decade. Arguably, these conditions were beyond his control. Yet, despite his knowledge over a year ago that his delinquency might affect his eligibility for a security clearance when he completed his SCA, and then reinforcing his intention to make payment arrangements in his PSI, he has done very little to resolve these delinquent accounts. He has produced no relevant or responsive documentation either with his Answer to the SOR, or in response to the FORM, except for the two payments to the U.S. Treasury Department. He has not demonstrated that he acted responsibly under the circumstances. Applicant has the burden to provide sufficient evidence to show that his financial problems are under control, and that his debts were incurred under circumstances making them unlikely to recur.

⁶ Directive ¶ E3.1.15. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep 22, 2005) (An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government).

None of the mitigating conditions fully apply. He admitted his failures to timely file the federal income tax returns for three years (2011-2014) and Applicant's credit report and SOR list the delinquent utility and consumer debts totaling \$3,411. Applicant did not provide enough details with documentary corroboration about what he did to address his SOR debts. He did not provide documentation relating to any of the SOR debts: (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 creditors; (2) correspondence to or from the creditors to establish maintenance of contact;⁷ (3) credible debt disputes indicating he did not believe he was responsible for the debts and why he held such a belief; (4) more evidence of attempts to negotiate payment plans, such as settlement offers or agreements to show that he was attempting to resolve these debts; or (5) other evidence of progress or resolution.

In the FORM, Department Counsel informed Applicant that it was important for him to provide corroborating or supporting documentation of resolution of the debt in the SOR. (FORM at 3) Aside from Applicant's uncorroborated statements, there is no documentary evidence that Applicant paid, arranged to pay, settled, compromised, or otherwise resolved the SOR debts. He did not describe financial counseling or provide his budget. The record lacks corroborating or substantiating documentation and detailed explanations of the causes for his financial problems and other mitigating information.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all the circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d):

- (1) the nature, extent, and seriousness of the conduct;
- (2) the circumstances surrounding the conduct, to include knowledgeable participation;
- (3) the frequency and recency of the conduct;
- (4) the individual's age and maturity at the time of the conduct;
- (5) the extent to which participation is voluntary;
- (6) the presence or absence of rehabilitation and other permanent behavioral changes;
- (7) the motivation for the conduct;
- (8) the potential for pressure, coercion, exploitation, or duress; and
- (9) the likelihood of continuation or recurrence.

⁷ "Even if Applicant's financial difficulties initially arose, in whole or in part, due to circumstances outside his [or his] 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.

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 considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my comments under Guideline F in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under those guidelines. Notably, Applicant retired with a pension after a career in the Army, and he has derived his income primarily from taxpayer-funded federal contractors for over a decade. Yet, he has not explained his failure to timely file federal income tax returns. He has gone through unemployment and an unexpected loss of household income, but he has been employed most of his adult life, with the exception of a one-year period of unemployment in 2015. Most importantly, Applicant has not addressed the specific allegations in the SOR. Instead, he has made hollow promises of his intent to file the tax returns and to repay his delinquent debts. He has not met his burden of production.

Applicant's finances remain a security concern. There is insufficient evidence to conclude that Applicant's financial problems are under control. He has not met his burden of persuasion. The record evidence leaves me with serious questions and doubts as to Applicant's suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the security concerns arising under Guideline F, financial considerations.

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
Subparagraph 1.a – 1.e:	Against Applicant

Conclusion

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

Robert J. Kilmartin
Administrative Judge