



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



In the matter of:)	
)	
)	ISCR Case No. 14-05705
)	
Applicant for Security Clearance)	

Appearances

For Government: Gregg A. Cervi, Esquire, Department Counsel
For Applicant: *Pro se*

02/16/2016

Decision

HENRY, Mary E., Administrative Judge:

Based upon a review of the pleadings and exhibits, Applicant’s eligibility for access to classified information is denied.

Statement of the Case

Applicant completed and certified an Electronic Questionnaire for Investigations Processing (e-QIP) on January 21, 2014. The Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued Applicant a Statement of Reasons (SOR) on January 16, 2014, detailing security concerns under Guideline F, financial considerations. The action was taken under Executive Order 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 for Determining Eligibility for Access to Classified Information* (AG), implemented on September 1, 2006.

Applicant received the SOR. He submitted a notarized, written response to the SOR allegations dated March 23, 2015, and he requested a decision on the written record in lieu of a hearing.

Department Counsel prepared a file of relevant material (FORM) and mailed Applicant a complete copy on October 6, 2015. Applicant received the FORM on December 3, 2015. He had 30 days from receipt of the FORM to file objections and submit material in refutation, extenuation, or mitigation. He did not submit a response. The Defense Office of Hearings and Appeals (DOHA) assigned this case to me on February 2, 2016. The Government submitted nine exhibits, which have been marked as Items 1-5 and 7-9 are admitted into the record. Applicant's response to the SOR has been marked as Item 2, and the SOR has been marked as Item 1.

Procedural and Evidentiary Ruling

Item 6 of the FORM is a portion of the Report of Investigation (ROI) from the background investigation of Applicant. The seven-page document is a summary of an interview with an Office of Personnel Management (OPM) investigator of Applicant, which occurred on March 6, 2014, in conjunction with his background investigation. DoD Directive 5220.6, enclosure 2, ¶ E3.1.20 states, "An ROI may be received with an authenticating witness provided it is otherwise admissible under the Federal Rules of Evidence." (see ISCR Case No. 11-13999 (App. Bd., February 3, 2014)).

Although Applicant, who is representing himself, has not raised the issue via an objection, I am raising it *sua sponte*. While it is clear that Department Counsel is attempting to act in good faith, having highlighted the issue in a footnote in the FORM, Item 6 is not authenticated nor is it a sworn declaration. (See Government's FORM, p.2, footnote 2) Applicant did not respond to the FORM. His failure to do so is not a knowing waiver of the rule. Waiver requires "the voluntary relinquishment or abandonment – express or implied – of a legal right or advantage, the party alleged to have waived a right must have had both knowledge of the existing right and the intention of forgoing it." *Black's Law Dictionary*, 1717 (Bryan A. Garner, 9th ed., West 2009).

Applicant was informed that he could object to the admission of Item 6 on the grounds it was not authenticated as required by ¶ E3.1.20 of the Directive. If he did so, the document in Item 6 would not be considered. I cannot conclude he expressly waived this rule because he did not respond to the FORM. The record does not establish that Applicant's failure to address the accuracy of Item 6 through a response to the FORM was a knowing waiver of the rules outlined in the Directive, enclosure 2, ¶ E3.1.20.

Findings of Fact

In his Answer to the SOR, Applicant admitted all the factual allegations of the SOR. His admissions are incorporated herein as findings of fact. He also provided additional information to support his request for eligibility for a security clearance. After

a complete and thorough review of the evidence of record, I make the following findings of fact.

Applicant, who is 45 years old, works as a systems engineer for a DOD contractor. He began his current employment in March 2014. He previously worked for his current employer from June 1997 until March 2011. During this time, he held a security clearance without any violations of security procedures. From March 2011 until September 2012, Applicant worked another DOD contractor. His employer laid him off in September 2012.¹

Applicant graduated from college with a bachelor's degree in 1992. He and his wife married in 2002. Applicant has a 25-year-old son and a 19-year-old daughter from another relationship. He has a 18-year-old stepson, who lives with him.²

In March 2011, Applicant accepted a position with a DOD contractor in State A. He moved from State B to his new job, and his family joined him in May 2011 after his stepson finished school. In May 2012, he and his wife purchased a home in State A. In September 2012, his employer, Company 1, laid him off along with many other employees. Company 1 is now closed.

Applicant received a job offer two weeks later from Company 2 in State A. However, he had signed a non-compete agreement with Company 1 when he began his employment. Under the terms of the non-compete agreement, Applicant could not work in his area of expertise for another company for 18 months. Company 1 refused to release him from the non-compete agreement, and Company 2 could not hire him because of the agreement. Applicant and other employees sued Company 1 for a release from the non-compete agreement. After six months of litigation, Company 1 agreed to modify the agreement and did. By this time, the job offer from Company 2 had been rescinded.³

Between September 2012, when he was laid-off, and March 2014, when he began his current employment, Applicant worked a two-week contract position from June 3, 2013 until June 14, 2013. He did not otherwise work during this time.⁴

Applicant's income prior to his lay-off and his current income are unknown as the record lacks any documentation of either. He has not provided a financial statement outlining his income and his current expenses. Applicant advised that he is paying some of his debts, but he has not provided documentation showing the payments and the current balance on any of the SOR debts.

¹Item 2; Item 3.

²Item 3.

³Item 2; Item 3.

⁴Item 3.

The SOR listed seven debts, including \$27,690 owed to the Internal Revenue Service (IRS) for unpaid income taxes; \$50,109 for credit debts; and a past-due mortgage of \$40,052. Applicant has not contacted the holders of his credit debts nor has he made any payments on the \$50,109 of credit debts listed in the SOR. The two credit reports of record identified additional delinquent debts not listed on the SOR including \$11,000 in back child support for his two older children and a foreclosure on property in State B. Applicant acknowledged the foreclosure and owing back child support on his e-QIP. He also stated that when he started working again, he would resume his payments on his back child support. The August 2014 credit report showed a balance remaining of \$5,363, which indicates he is paying his past-due child support. Under the law in State B, Applicant does not owe any additional money on the foreclosure debt.⁵

Concerning the tax debt owed to the IRS, Applicant listed this debt on his e-QIP. The IRS has not garnished his salary or filed a tax lien against him. He timely filed his tax return, but he did not have the money to pay the additional taxes. He contacted the IRS. He and the IRS agreed to a monthly payment of \$300. In his response to the SOR, Applicant advised that he and the IRS have an agreement for payment of his tax debt. He has not provided any documents showing payments to the IRS nor has he indicated the amount of his monthly payment.⁶

Regarding his mortgage debt in SOR allegation 1.a, Applicant advised on his e-QIP that he and his lender agreed to a streamlined modification plan for three payments on his mortgage and then a full loan modification. In his response to the SOR, Applicant advised that he and his wife “worked out these issues” with the mortgage lender and that they still owned the house. Applicant did not provide more details or show that he is making his mortgage payments. Both credit reports of record indicate that he is paying his mortgage under a partial payment agreement.⁷

Applicant’s wife and stepson continue to live in the house in State A. They are remaining in State A until his stepson graduates from high school, date unknown. He also advised that his wife would receive her degree as a nurse practitioner in May 2015 and planned to start work as soon as possible. He resides in State B with his parents. Applicant provided the negative financial information on his e-QIP. The record lacks any evidence of financial counseling.⁸

⁵Item 1; Item 4; Item 5.

⁶Item 2; Item 3.

⁷Item 2; Item 4; Item 5.

⁸Item 2.

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, 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 are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines 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(c), the entire process is a conscientious scrutiny 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 access to classified information will be resolved in favor of 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.

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. . . ." An applicant has the ultimate burden of persuasion for 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. 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 access to classified information. Decisions include, by necessity, consideration of the possible risk an 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 information.

Section 7 of Executive Order 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 the guideline for financial considerations is set out in AG ¶ 18:

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 describes the disqualifying conditions that could raise security concerns. I have considered all the conditions, and the following are potentially applicable:

- (a) inability or unwillingness to satisfy debts; and
- (c) a history of not meeting financial obligations.

Applicant developed significant financial problems when he was laid off from his job in September 2012 and prevented from working in his professional field by a non-compete agreement. Most of the debts have not been resolved. These two disqualifying conditions apply.

The financial considerations guideline also includes examples of conditions that can mitigate security concerns. I have considered mitigating factors AG ¶ 20(a) through ¶ 20(f), and the following are potentially applicable:

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

Applicant lost his job as a systems engineer when his employer laid-off staff and eventually closed the business. Even though it laid him off, this employer decided to enforce its non-compete agreement, making it difficult for Applicant to find other employment in his field of expertise. Company 1's decision to enforce the non-compete agreement resulted in the loss of a job offered to Applicant two weeks after he was laid

off by Company 1. Applicant sued Company 1 over the non-compete agreement. He and another co-worker successfully obtained a modification of the non-compete agreement about six months after they initiated court action. He also contacted the IRS immediately to develop a payment plan for his tax debt and worked with his mortgage lender to modify his mortgage. While now working in State B, Applicant lives with his parents, which limits his housing expenses in State B. His actions to resolve his financial problems show he has acted reasonably under the circumstances. AG ¶20(b) applies.

AG ¶ 20(c) is not applicable because the record lacks any evidence of financial or credit counseling and evidence of monthly income and expenses. I am unable to determine if his income and expenses are under control.

On his own initiative, Applicant contacted the IRS to develop an agreement to pay his past-due taxes, and he worked with his mortgage company to resolve his past-due payments. His actions reflect a good-faith⁹ effort on his part to resolve these debts. AG ¶ 20(d) is only partially applicable because Applicant has not provided documentation which reflects that he is making these payments.

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 an 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

⁹The 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 [or statute of limitations]) in order to claim the benefit of [the "good faith" mitigation 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)).

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. The decision to grant or deny a security clearance requires a careful weighing of all relevant factors, both favorable and unfavorable. In so doing, an administrative judge must review all the evidence of record, not a single item in isolation, to determine if a security concern is established and then whether it is mitigated. A determination of an applicant's eligibility for a security clearance should not be made as punishment for specific past conduct, but on a reasonable and careful evaluation of all the evidence of record to decide if a nexus exists between established facts and a legitimate security concern.¹⁰

In reaching a conclusion, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant's financial problems arose when he found himself unemployed in September 2012. He took some steps designed to manage his income and his debts. He returned to work after 18 months of unemployment and is now working slowly to resolve his financial problems. Throughout the security clearance application and investigation process, Applicant has been forthright about his financial problems and has provided explanations for the source of his debts and his efforts to resolve his debts. His honesty is to be commended. What is missing is documentation showing the payments he has made, his monthly income, and his monthly expenses. At this time, I have no ability to assess his overall financial status to ultimately conclude that he has gained control over his finances and his past-due debts. He is not required to pay all his past-due debts at once or to be debt free to hold a security clearance. However, he must establish that he has a track record for debt resolution, which he has not done. The evidentiary record

¹⁰In assessing whether an applicant has established mitigation under Guideline F, the Appeal Board provided the following guidance in ISCR Case No. 07-06482 at 3 (App. Bd. May 21, 2008):

In evaluating Guideline F cases, the Board has previously noted that the concept of "meaningful track record" necessarily includes evidence of actual debt reduction through payment of debts." See, e.g., ISCR Case No. 05-01920 at 5 (App. Bd. Mar. 1, 2007). However, an applicant is not required, as a matter of law, to establish that he has paid off each and every debt listed in the SOR. See, e.g., ISCR Case No. 02-25499 at 2 (App. Bd. Jun. 5, 2006). All that is required is that an applicant demonstrate that he has "... established a plan to resolve his financial problems and taken significant actions to implement that plan." See, e.g., ISCR Case No. 04-09684 at 2 (App. Bd. Jul. 6, 2006). The Judge can reasonably consider the entirety of an applicant's financial situation and his actions in evaluating the extent to which that applicant's plan for the reduction of his outstanding indebtedness is credible and realistic. See Directive ¶ E2.2(a) ("Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination.") There is no requirement that a plan provide for payments on all outstanding debts simultaneously. Rather, a reasonable plan (and concomitant conduct) may provide for the payment of such debts one at a time. See, e.g., ISCR Case No. 06-25584 at 4 (App. Bd. Apr. 4, 2008). Likewise, there is no requirement that the first debts actually paid in furtherance of a reasonable debt plan be the ones listed in the SOR.

lacks documentation to show his payments on his debts as stated and thus, establish his burden of proof.

Overall, the record evidence leaves me with questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the security concerns arising from his finances under Guideline F.

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:	For Applicant
Subparagraphs 1.b-1.e:	Against Applicant
Subparagraph 1.f:	For Applicant
Subparagraph 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 a security clearance is denied.

MARY E. HENRY
Administrative Judge