



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



In the matter of:)
)
) ISCR Case No. 17-02517
)
Applicant for Security Clearance)

Appearances

For Government: Gatha Manns, Esq., Department Counsel
For Applicant: *Pro se*

02/15/2019

Decision

GLENDON, John Bayard, Administrative Judge:

This case involves security concerns raised under Guidelines F (Financial Considerations) and E (Personal Conduct). Eligibility for access to classified information is denied.

Statement of the Case

On September 21, 2017, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent Applicant a Statement of Reasons (SOR) alleging security concerns under Guidelines F and E. The DOD CAF acted under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended (Exec. Or.); DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) promulgated in Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (December 10, 2016), for all adjudicative decisions on or after June 8, 2017.

On November 11, 2017, Applicant, through his counsel at the time, responded to the SOR. Applicant requested a hearing before an administrative judge at the Defense

Office of Hearings and Appeals (DOHA). The attorney subsequently withdrew his appearance, and Applicant proceeded *pro se*. The case was originally assigned to another administrative judge, and on July 17, 2018, it was reassigned to me. On June 21, 2018, DOHA issued a Notice of Hearing scheduling the hearing on August 16, 2018. I convened the hearing as scheduled.

Department Counsel offered six exhibits into evidence, which I marked as Government Exhibits (GE) 1-6. These documents were previously mailed to Applicant's former counsel, but he had not provided these documents to Applicant before he withdrew from the case. I adjourned the hearing for a period of time to give Applicant the opportunity to review the documents. After reviewing them, Applicant had no objection to the admission of these exhibits. Applicant testified and offered five exhibits into evidence. I marked his exhibits as Applicant's Exhibits (AE) A-E. Absent an objection, I admitted all five exhibits into the record. DOHA received the transcript of the hearing (Tr.) on August 24, 2018. (Tr. at 19-36.)

Findings of Fact¹

Applicant is 51 years old and works for a defense contractor. He married in 2004, and he separated from his wife in January 2016. He and his wife have no children, though his wife has an adult son from a prior relationship. Applicant has no financial responsibility to his wife following their separation in January 2016. (GE 2 at 20; Tr. at 39-41, 44.)

Applicant graduated from high school in 1985, and in May 2007, he received his bachelor's degree. He has worked full time for a defense contractor since January 2007. From 2003 to 2017, Applicant had a second, part-time job with a different defense contractor. In or about May 2009, he began working for his current employer and security clearance sponsor. He received his first security clearance in June 2004. His clearance was renewed in 2010 or 2011. He submitted a security clearance application on January 20, 2016, (SCA) seeking the renewal of his top secret clearance. (GE 1; GE 2 at 20, 24; Tr. 39, 44, and 48.)

The SOR contains nine allegations under Guideline F, eight of which involve Applicant's failure to pay federal and state taxes in 2014 and 2015 and state taxes in 2013, as well as his failure to file federal tax returns in 2013, 2014, and 2015. Applicant's total federal and state tax debts are alleged to be about \$32,000 for these years. He is also alleged to owe \$1,339 on a judgment obtained by the homeowners' association (HOA) where he lived with his wife from 2002 to 2016. In his SOR answer, Applicant admitted all of the allegations except the HOA judgment. He also claimed that he owes significantly less in taxes than was alleged in the SOR and that he has filed amended returns to support that position.

¹ Applicant's personal information is extracted from his security clearance application, dated January 20, 2016 (GE 1), unless otherwise indicated by a parenthetical citation to the record.

In August 2016, Applicant was arrested and charged with driving under the influence (DUI) and other related charges. He failed to report the arrest to his part-time employer at the time, as required by the employer's rules. This was a major rules violation, and his employer terminated him on January 20, 2017. Under Guideline E, the SOR alleges Applicant's 2016 DUI arrest and his subsequent termination from his part-time employment. Applicant admitted both allegations in his SOR answer. (GE 4 at 2; GE 2 at 23.)

SOR ¶¶ 1.a, 1.b, 1.c, 1.d, and 1.e: failure to pay federal income taxes in 2014 and 2015 in the approximate amount of \$27,913 and failure to file federal income tax returns, as required, in 2013, 2014, and 2015. In his January 2016 SCA, Applicant disclosed that he failed to file his 2014 federal tax return because he owed taxes for that year. He wrote that he was saving money every month so he could satisfy this obligation in 2015. His SCA, however, was signed on January 20, 2016. He testified that he had originally prepared the SCA in 2015, and due to a technical problem, he had to resubmit the SCA in 2016. (Tr. at 27.)

In response to the DOD CAF'S April 2017 interrogatories, Applicant provided his Internal Revenue Service (IRS) tax account transcripts for the years 2013, 2014, and 2015, which were dated June 5, 2017. The 2013 transcript shows that Applicant failed to file a tax return for that year. The 2014 transcript shows that the return was filed late on April 24, 2017, and that Applicant owed about \$15,500. The 2015 transcript shows that the return was filed late on May 29, 2017, and that Applicant owed approximately \$20,490. (GE 2 at 8-10.)

In his January 2017 background interview, Applicant explained that prior to 2014, he and his wife filed jointly, but in 2015, she advised him that she wanted to file separately. He said that because of this change, he failed to file his 2014 and 2015 tax returns. Applicant advised the investigator that he believed he owed taxes. He said that he had not yet done anything about his taxes, but he intended to work with a friend, who is a tax accountant, to file his returns. He also said he intended to make payment arrangements with the IRS. (GE 2 at 24.)

At the hearing, Applicant testified that later in 2017, he consulted his tax accountant friend and the accountant filed amended returns for those two years and filed the missing 2013 return. He explained that prior to 2013, he and his wife had previously worked together with a large tax preparation company to prepare and file their tax returns. Starting in 2013, his mother and sister became seriously ill and he was busy taking care of them. He also blamed his tax delinquencies on his marital problems with his wife. He failed to work with his tax preparer that year. He did not contact a tax accountant until 2017. During the three years in question, which was before his January 2016 separation from his wife, he also stopped taking any deductions on his family home. Instead he let his wife take these deductions on her separate returns. Applicant claimed that his failure to file for three years was not due to the fact that he knew he owed money and was not in a position to pay the taxes at the time. (Tr. at 67-73; 78, 83, 90, and 106.)

At the hearing, Applicant introduced into evidence updated IRS tax account transcripts, dated August 15, 2018. These transcripts show that Applicant filed his 2013 tax return on September 11, 2017, and owed \$8,572. The reason he owed more taxes was due to his change in his tax filing status and his failure to adjust his withholding after receiving an increase in his income. He testified that he has never changed his withholding. The updated 2014 transcript reflects that Applicant filed an amended return on November 7, 2017, and that he had no balance due as a result of credits for his refunds from 2016 and 2017 and certain other adjustments. Similarly, the updated 2015 transcript reflects that Applicant filed an amended return on November 20, 2017, and that after certain adjustments and a small credit from his 2017 refund, Applicant only owed \$5,008. (Tr. at 73-84; AE A, B, and C.) Accordingly, Applicant's total tax debt for 2013 and 2015 is approximately \$13,580, as of August 15, 2018, based upon Applicant's amended returns.

Applicant admitted at the hearing that the IRS had not fully accepted the numbers in the amended returns, and therefore, the Service has not given him a final number representing his total tax liability for the 2013-2015 period. As a result, he has not commenced paying his federal tax debt on a payment plan. He blamed the 2017 amended returns for the delay. Applicant has not received any financial counseling in connection with his tax indebtedness or more generally since 2013. (Tr. at 86, 95-96, and 109.) His federal tax debt is not resolved, though he ultimately filed his tax returns for 2013-2015 in 2017.

SOR ¶¶ 1.f, 1.g, and 1.h: failure to pay state income taxes in 2013, 2014, and 2015 in the total amount of \$4,088. As noted, Applicant disclosed in his SCA his failure to file his state tax return for 2014. The Government's evidence includes state tax computation notices, dated May, June, and July 2017, for the years 2014, 2015, and 2013, respectively. Applicant testified that these dates in 2017 are the dates he filed his state tax returns. Applicant provided these documents in response to the Government's interrogatories. They reflect Applicant owes state taxes for 2013 in the amount of \$1,889. For 2014, the record evidence shows that he owes \$861, and for 2015, he owes \$1,900. As of mid-2017, Applicant's total state tax debt was approximately \$4,650. (Tr. at 84-94.)

At the hearing, Applicant introduced into evidence a state installment tax bill, dated July 30, 2018, which reflected that his remaining balance was about \$220 and that he owed an installment of about \$94 on August 15, 2018. He testified that he commenced paying on his installment payment plan in approximately January 2018 and presently owes about \$126. (AE D; Tr. at 93.) Applicant has resolved his state tax debt with consistent monthly payments, though he filed his 2013-2015 state tax returns in 2017, long after their due date.

SOR ¶ 1.i: December 2016 judgment in favor of HOA in the amount of \$1,339. At the hearing, Applicant also introduced into evidence a court order quashing the HOA's garnishment of his bank account and ordering the Garnishee bank to return all garnished funds to Applicant. He testified that he was able to have the judgment and the garnishment of his bank account vacated because he was never notified about the

proceeding. Also, the home that was the subject of the HOA dues was solely the responsibility of his wife and he had no obligation to pay these fees. The HOA judgment was obtained against Applicant about 11 months after he left the home, and it was solely occupied by his wife and her son at that time. (Tr. at 98-100; GE 3.)

SOR ¶ 2.a: August 2016 DUI arrest and guilty plea to a lesser offense. Applicant admitted that he used poor judgment the night of his DUI arrest. He had consumed two beers at a bar where he was listening to music and then he drove home when he was arrested. The police officer who stopped him said that he had swerved into another lane. At the security clearance hearing, Applicant testified that he passed the field sobriety test following the traffic stop by the police, though in his background interview, he admitted that he failed the test. He was then given a breathalyzer test and his BAC was over the legal limit at 0.9 grams. He pleaded guilty to a reduced charge and received probation before judgment in December 2016. He was given a one-year period of probation, which he successfully completed. This arrest occurred after his January 2016 separation from his wife. He believes that the sinus medication he was taking that night enhanced the effect of the alcohol he consumed. This was Applicant's second DUI arrest. The first occurred in 1995 when he was 27. That arrest is not alleged in the SOR. He no longer drinks and drives, and he spends his limited free time engaged in more constructive activities. (Tr. at 52-54, 56-58, and 103.)

SOR ¶ 2.b: January 2017 employment termination for failing to report DUI arrest in compliance with employer's security rules. With the consent of the parties, I amended the allegation in SOR ¶ 2.b to correct a scrivener's error in the incorrect reference to the allegation in SOR ¶ 2.a. Department Counsel also moved to amend this allegation to conform to the evidence that the employer's self-reporting policy required reporting within 12 hours of an arrest, not 12 days. With Applicant's consent, I granted the Government's motion to amend this allegation, as noted. Applicant then entered his admission to the modified allegation. (Tr. at 12-14.)

Applicant testified that after the DUI court action was completed, he brought the court papers to his supervisor at his part-time employer and filled out a form disclosing the arrest. The supervisor forwarded these documents to the "front office." He claimed that he verbally reported the arrest and probation before judgment to his supervisor in or about December 2016. He was told that he failed to report the arrest in a timely manner and was suspended pending an investigation. He was subsequently terminated for violating the employer's policy after having worked there for ten years. Applicant testified that he was unaware of the policy. He said that he notified the security officer at his full-time employer shortly after his arrest and subsequently provided the court paperwork when his case was completed. Presently, Applicant only works at his full-time job. (GE 5 and 6; Tr. at 46, 58-67, 108.)

Policies

"[N]o 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 applicants 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 § 2.

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, an administrative judge applies these guidelines 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 and 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 that 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 made “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance 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. 15-01253 at 3 (App. Bd. Apr. 20, 2016).

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

An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” ISCR Case No. 01-

20700 at 3 (App. Bd. Dec. 19, 2002). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531.

Analysis

Guideline F (Financial Considerations)

The security concern under this guideline 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. . . . 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 a person might knowingly compromise classified information to raise money. It encompasses concerns about a person’s self-control, judgment, and other qualities essential to protecting classified information. A person who is financially irresponsible may also be irresponsible, unconcerned, or negligent in handling and safeguarding classified information. See ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012).

Applicant’s admissions, testimony and the documentary evidence in the record establish the following potentially disqualifying conditions under this guideline: AG ¶ 19(a) (“inability to satisfy debts”), AG ¶ 19(c) (“a history of not meeting financial obligations”), and AG ¶ 19(f) (“failure to file . . . annual Federal, state, or local income tax returns or failure to pay annual Federal, state, or local income tax as required”).

The following mitigating conditions are potentially applicable:

AG ¶ 20(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;

AG ¶ 20(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, a death, divorce or separation, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances;

AG ¶ 20(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 indication that the problem is being resolved or is under control;

AG ¶ 20(d): the individual initiated and is adhering to a good-faith effort to repay creditors or otherwise resolve debts;

AG ¶ 20(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; and

AG ¶ 20(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.

AG ¶ 20(a) is not established. Applicant presented no evidence to support a conclusion that his financial irresponsibility with respect to his federal and state tax obligations are unlikely to recur or that this history of irresponsibility does not cast doubt on his current reliability and judgment. Applicant's federal tax indebtedness has continued unresolved for years, and he still has no installment plan to begin paying his delinquent federal taxes.

AG ¶ 20(b) is not established. Applicant's various family issues, though serious and largely beyond his control, should not have caused Applicant to fail to discharge his most basic civic duty of filing his taxes on time. As evidenced by his recent filing of amended returns, he had someone with tax expertise available to help him, and he failed to seek that help in a timely manner. Moreover, Applicant could not pay his taxes when they were due, and his family problems were not the reason for this problem. He was working two jobs, and he failed to withhold sufficient funds from his paycheck to cover his tax liabilities for three years. Also, his inability to pay his taxes when they were due does not explain his failure to enter into payment plans to pay his taxes over time. In his January 2016 SCA, he wrote that he was saving money in 2015 to pay his 2014 federal tax liability, but that payment was not made. Although he has now paid his relatively small state tax debt, he has failed to enter into a payment plan with the IRS. Applicant has not acted responsibly under the circumstances.

AG ¶ 20(c) is partially established. Applicant has not received financial counseling. He has resolved his state tax debt for 2013-2015 and the HOA judgment. His federal tax debt, however, remains unresolved. The IRS has not even accepted his attempt to reduce his taxes by filing amended tax returns for the years 2013-2015.

AG ¶ 20(d) is partially established. Applicant has paid his state tax debt and has filed his state and federal tax returns, though they were filed long after the mandatory filing dates. He has not, however, initiated a payment plan to pay his significant federal tax debt.

AG ¶ 20(e) is fully established with respect to the HOA judgment alleged in SOR ¶ 1.i. Applicant has documented that a civil court has entered an order validating Applicant's dispute of this debt.

AG ¶ 20(g) is partially established. Applicant has filed his federal and state tax returns, though he did so long after the required filing deadlines. His untimely filings only partially mitigates this security issue. To his credit, Applicant entered into an installment payment plan to pay his relatively small state tax debt, and he has documented that he paid off those taxes. The most significant issue raised in his SOR is his substantial federal tax indebtedness. He has not made arrangements with the IRS to pay this debt. The fact that the IRS has not accepted his amended returns is troubling. Applicant may end up being obligated to pay even more than the total amount owed according to his amended returns, *i.e.*, over \$13,000. Due to his late filing of the amended returns and the IRS's possible disagreement with those returns, Applicant has not yet entered into a payment plan with the IRS, let alone establish a track record of consistently making payments under such a plan.

Guideline E (Personal Conduct)

The security concern under this guideline is set out in AG ¶ 15:

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 or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes.

The following disqualifying condition under this guideline is potentially relevant:

AG ¶ 16(c): credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information; and

AG ¶ 16(d): credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information. This

includes, but is not limited to, consideration of: . . . (3) a pattern of . . . rule violations.

Applicant second DUI arrest in August 2016 and his failure to follow his long-term employer's "major rules" with respect to self-reporting security issues establishes the above disqualifying conditions.

The only potentially applicable mitigating condition under Guideline E is the following:

AG ¶ 17(c): the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

AG ¶ 17(c) is not established. His part-time employer considered his violation of its self-reporting requirement to be sufficiently serious to warrant his suspension, an investigation, and ultimately, his termination. The violation was not minor. Insufficient time has passed to conclude that similar rule violations are unlikely to recur. The violation casts serious doubt on his reliability and judgment. Even if Applicant was unaware of his employer's self-reporting rules, it reflects poorly on his judgment that he did not try to determine when he must report the arrest to his employer's security officer. He held a top secret clearance from the Defense Department and that carries with it a significant duty to act responsibly, especially in the area of self-reporting personal circumstances that raise possible security concerns.

The above is particularly concerning in light of Applicant's August 2016 DUI arrest. Standing alone, this criminal offense raises an issue about Applicant's willingness to comply with important criminal laws. When combined with the bad judgment he exercised during the same time period by not reporting his arrest in a timely manner, Applicant evidences a pattern of rule violations. As noted below, this evidence supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, and unwillingness to comply with rules and regulations.

Whole-Person Concept

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. In applying the whole-person concept, an 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 and applying the adjudicative factors in AG ¶ 2(d).²

² The factors are: (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)

I have incorporated my comments under Guidelines F and E in my whole-person analysis and applied the adjudicative factors in AG ¶ 2(d). In particular, I have weighed Applicant's age and maturity, the serious nature of his financial misconduct, and his failure to obey an important rule on self-reporting potential security issues and the criminal law prohibiting driving under the influence of alcohol. His misconduct started in 2013 when he failed to file his federal and state income tax returns and has continued up through the present with his failure to pay of his federal taxes. This history of misconduct and pattern of rule violations increases the likelihood of the recurrence of poor judgment and additional misconduct.

After weighing the disqualifying and mitigating conditions under Guidelines F and E, and evaluating all the evidence in the context of the whole person, I conclude Applicant has failed to mitigate the security concerns raised by his past actions.

Formal Findings

I make the following formal findings on the allegations in the SOR:

Paragraph 1. Guideline F:	AGAINST APPLICANT
Subparagraphs 1.a-1.h:	Against Applicant
Subparagraph 1.i	For Applicant
Paragraph 2. Guideline E:	Against Applicant
Subparagraphs 2.a-2.b:	Against Applicant

Conclusion

I conclude that it is not clearly consistent with the national security interests of the United States to grant Applicant continued eligibility for access to classified information. Clearance is denied.

John Bayard Glendon
Administrative Judge

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.