



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



In the matter of:)
)
) ISCR Case No. 17-04259
)
Applicant for Security Clearance)

Appearances

For Government: Andrew H. Henderson Esq., Department Counsel
For Applicant: *Pro se*

12/20/2018

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant failed to mitigate the security concerns under Guideline F, financial considerations. Eligibility for access to classified information is denied.

Statement of the Case

On October 20, 2015, Applicant completed an electronic Questionnaire for Investigation Processing (e-QIP). On February 2, 2018, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued to Applicant a Statement of Reasons (SOR) detailing 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 (AG) effective within the DOD on June 8, 2017.

Applicant answered the SOR on March 26, 2018, and elected to have his case decided on the written record in lieu of a hearing.¹ Department Counsel submitted the Government's file of relevant material (FORM), and Applicant received it on May 4, 2018. He was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation within 30 days of receipt of the FORM. The Government's evidence is identified as Items 1 through 11.

Applicant provided a timely response and submitted documents marked as Applicant Exhibits (AE) A through F. He objected and made clarifications to the FORM, providing explanations and comments to Department Counsel's argument and the Government investigators' summary of Applicant's personal subject interviews (PSI), and additional explanations in other exhibits. He clarified certain parts of his Answer to the SOR, provided by his attorney and submitted by him. The attorney did not represent Applicant on his response to the FORM. I have considered all of Applicant's objections. The objections to parts of his two PSIs are sustained (Items 3 and 4). The remaining parts wherein he provided explanations and clarifications will be considered. Any other objections are overruled. Items 1 through 11 are admitted into evidence with the exceptions noted. I will consider Applicant's explanations and comments as they relate to mitigation. AE A through F are admitted without objection. The case was assigned to me on July 27, 2018.

Findings of Fact

Applicant admitted allegations in the SOR ¶ 1.a through ¶ 1.d and denies ¶ 1.e. After a thorough and careful review of the pleadings and exhibits submitted, I make the following findings of fact.

Applicant is 58 years old. He earned a bachelor's degree in 1982 and a master's degree in 1991. Applicant has been married three times. His last divorce was in 2013. He has no children. He served as a commissioned officer on active duty in the Air Force from 1983 until 1995. He served in the Air Force Reserve from 1996 to 2008. He retired from the military in 2008.² Applicant has worked for federal contractors from 1995 to the present.³

In June 2007, Applicant pled not guilty at a General Court-Martial to violations of the Uniform Code of Military Justice (UCMJ).⁴ He was found guilty of all charges and specifications. They were as follows:

¹ Administrative Exhibit I includes email correspondence verifying and confirming that Applicant elected to have his case decided on the written record.

² There was no evidence as to the characterization of Applicant's discharge.

³ Item 2.

⁴ Items 5, 6, 7.

One specification of violation of UCMJ Article 80, attempting to steal United States currency, military property, of a value of more than \$500 from the U.S. Air Force.

Six specifications of violations of UCMJ Article 107, false official statement. Each specification alleged a different date from April 2, 2005 to April 17, 2006, and different amounts of money claimed for lodging reimbursement on each date. The six amounts claimed were \$4,620; \$180; \$1,010; \$3,060; \$120; and \$2,040. The allegations were that Applicant with intent to deceive, signed an official document, a travel voucher, which was false in that his lodging cost was not the amount claimed, and Applicant knew it was false at the time he signed the voucher.

Four specifications of violations of UCMJ Article 121, larceny. Two specifications alleged that in May 2005 and September 2005, Applicant stole United States currency, military property, of a value of less than \$500, the property of the U.S. Air Force. Two specifications alleged that in April 2005 and September 2005, he stole United States currency, military property, of a value of more than \$500, the property of the U.S. Air Force.

Six specifications of violations of UCMJ Article 132, submission of a false claim. Specifically, the allegations stated that for the purposes of obtaining the approval, allowance, and payment of a claim against the United States, in different amounts for each specification, on six different occasions, Applicant made and used a writing, which Applicant knew said writing was false and fraudulent.

Applicant was sentenced to confinement for 45 days, forfeiture of \$1,000 per month for 12 months, a fine of \$7,350, and a reprimand. He was released from confinement after 37 days due to good behavior. Applicant held the rank of major (O-4) at the time of his General Court-Martial. He retired as a captain (O-3).⁵

The facts surrounding the charges are that Applicant formed a corporation in which he was the only employee. The corporation purchased a recreational vehicle. During his reserve duty, the corporation rented to Applicant the recreational vehicle for lodging. Applicant rented a space to park the recreational vehicle on the military base where he was serving. The space cost \$15 a day. Applicant submitted claims to the U.S. Government for approximately 177 nights of lodging from 2005 to 2006. He claimed he was staying at the XX Apartment Complex. The amount claimed was for the cost of lodging at XX Apartment Complex. The corporation provided Applicant invoices reflecting Applicant had paid for lodging at XX Apartment Complex and the amount Applicant had paid. This was false in that XX Apartment Complex did not exist, and Applicant had not paid a lodging expense for the amount he claimed for reimbursement by the Air Force. Applicant submitted these claims for payment. Applicant's criminal conviction is recorded in the FBI database.⁶

⁵ Items 1, 2, 5, 6, 7; AE A.

⁶ Items 1, 2, 5, 6, 7.

In Applicant's answer to the SOR and response to the FORM, he disputed the Government prosecution's interpretation of the Joint Federal Travel Regulations and other aspects of his General Court-Martial.⁷

In Applicant's October 2015 e-QIP, he disclosed that he failed to timely file his 2012, 2013, and 2014 federal and state income tax returns. Regarding his 2012 returns, he stated: "Unable to compile and complete documentation due to pending divorce."⁸ For 2013, he stated: "Unable to compile and complete documentation due to recent divorce."⁹ For 2014, he stated: Unable to compile and complete documentation due to incomplete tax filings."¹⁰ He provided the same information for any action he had taken regarding his failing to file his returns, stating: "Withholding at single and zero status should have covered all taxes due. Attempting to complete filings in the next two months."¹¹

Applicant was interviewed by a government investigator in January 2016. He admitted to the investigator that he failed to file his state and federal income tax returns because he was unable to organize documents and paperwork for his taxes. This impacted all of his taxes for the following years because he could not file any tax returns until he filed his 2012 tax returns. He told the investigator he intended to file for a six-month extension on his 2015 tax returns and would resolve his tax issues by the end of 2016.¹²

In his answer to the SOR, Applicant said that he filed his 2012 federal and state tax returns in May 2016. He provided an unsigned federal income tax form and a copy of a May 2016 check to the United States Treasury in the amount of \$1,993. Applicant also provided signed copies of his 2013, 2014, and 2015 federal and state income tax returns. They are all dated March 2018. Based on the forms Applicant provided, it shows he was due refunds for those tax years.¹³ There was no copy of an extension request to the IRS.

Applicant denied the debt in SOR ¶ 1.e, a mortgage that was in foreclosure status and was delinquent. In his SOR answer, he indicated he was able to resolve this mortgage

⁷ Item 1; AE A, B, C, D, and F are documents and arguments by Applicant regarding his dispute with the finding and verdict of the General Court-Martial. Applicant's answer to the SOR is in the form of a brief signed by his attorney and submitted on behalf of Applicant. Throughout the decision, comments are attributed to Applicant that were provided as part of his answer to the SOR in the brief.

⁸ Item 2.

⁹ Item 2.

¹⁰ Item 2.

¹¹ Item 2.

¹² Item 4.

¹³ Item 2.

by paying it off. Documents were provided that show the mortgage was paid in 2015.¹⁴ It is resolved.

Applicant admitted the debt alleged in SOR ¶ 1.d, a second mortgage on rental property he owns. Credit reports from November 2015 and February 2017 show the loan is past due. A credit report from April 2018 indicates the debt has been charged off. Applicant stated in his answer that in his last conversation with the creditor he was told that foreclosure actions would be held in abeyance pending Applicant's sale of the property, refinancing it, or bringing the debt current. He planned to pay the debt and refinance it after he received his tax refund.¹⁵

In Applicant's response to the FORM, he stated:

The foreclosure actions by the second mortgage holder were also terminated, and the account is in an agreed status that payment-in-full will be rendered upon any future sale of the property. I acknowledge the debt, and I am working to settle it as soon as possible. I have received no correspondence that indicates the agreed upon status has changed. I continue to list the mortgage holder on the current home insurance policy should any damage or destruction occur to the property.¹⁶

Applicant provided a copy of a voluntarily dismissal of a foreclosure complaint from the creditor in SOR ¶ 1.d that was granted in July 2013. Applicant did not provide documentary evidence to corroborate the "agreed status" or efforts he has taken to pay the delinquent debt, refinance the loan, or sell the property. The debt is now reported as charged off in the most current credit report.¹⁷ Although the creditor is not pursuing foreclosure, evidence was not provided to show the debt is resolved or being resolved.

Applicant attributed his financial problems to his last divorce, stating his wife accumulated excessive debt, and she failed to act responsibly in addressing it. Applicant did not recognize there was a problem until his wife stopped working. He also had tenants that stopped paying, and he was unable to pay the mortgage on his rental property. He stated when he was separated from his wife, she would not help him file joint tax returns. His divorce was finalized in November 2013. He then focused on work and lost sight of many things. He stated he would start to work on filing his tax returns, but something

¹⁴ Item 1; AE A.

¹⁵ Item 1.

¹⁶ AE A.

¹⁷ Item 1; AE A. SOR ¶ 1.d alleged the account was placed in collection in the approximate amount of \$6,752. Items 9 and 10 show the debt past due for the same amount. Item 11, the most recent credit report shows the charged off amount is \$62,735. The last payment made was in February 2012. In Applicant's e-QIP (Item 2) he disclosed the debt was delinquent and listed the amount of the financial issue as \$62,735, and not as \$6,752.

would come up that needed his immediate attention. He decreased his expenses and withdrew money from his pension plan. He increased his withholdings for his taxes, so he would not owe tax when he did file. He saw this as an interest-free loan to the government. He viewed his late filing as a “ministerial action,” but he concedes, a required one, but it did not deprive the government of revenue.¹⁸

Applicant provided copies of performance evaluations from his employers, awards, college transcripts, resume, and a personal financial statement, among other documents. I considered them all, along with his statements and explanations.¹⁹

Policies

When evaluating an applicant’s suitability for national security eligibility, the administrative judge must consider the adjudicative guidelines (AG). 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 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. Directive ¶ E3.1.15 states 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. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government

¹⁸ Item 1.

¹⁹ Item 1; AE A through F.

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 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 the guideline for 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 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. Affluence that cannot be explained by known sources of income is also a security concern insofar as it may result from criminal activity, including espionage.

AG ¶ 19 provides conditions that could raise security concerns. The following are potentially applicable:

- (a) inability to satisfy debts;
- (b) unwillingness to satisfy debts regardless of the ability to do so;
- (c) a history of not meeting financial obligations;
- (d) deceptive or illegal financial practices such as embezzlement, employee theft, fraud, expense account fraud, mortgage fraud, filing deceptive loan statements and other intentional financial breaches of trust; and

(g) 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.

In 2007, Applicant was found guilty at a General Court-Martial of UCMJ for violations involving larceny and frauds against the United States. He failed to timely file his 2012, 2013, 2014, and 2015 federal and state income tax returns. He has a delinquent debt since 2012 that is not resolved. The above disqualifying conditions apply.

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 (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;

(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.

Although Applicant was convicted of charges for larceny, false official statements, and fraud against the Government at his court-martial, he continues to dispute its results. He disclosed on his e-QIP that he had difficulty filing his 2012 tax returns because his divorce was pending. It was finalized November 2013, yet he failed to timely file 2013 and 2014 tax returns, stating on the e-QIP that he would complete the process by the end of 2016. Applicant filed his 2012 tax returns in 2016. Despite being on notice that tax issues are a concern of the Government through the completion of his e-QIP in October 2015, he failed to timely file his 2015 tax returns. After he received the SOR in February 2018, he filed his 2013, 2014, and 2015 delinquent state and federal tax returns. His rationalization that he had additional withholding from his income does not mitigate his failure to responsibly comply with the law for those years. His attitude that he was

providing the government with an interest-free loan and not depriving it of revenue, further demonstrates his failure to comply with rules and regulations, and minimizes his legal duty to do so.

The pattern of Applicant's behavior prevents me from finding future behavior is unlikely to recur. His conduct casts doubt on his current reliability, good judgment, and trustworthiness. AG ¶ 20(a) does not apply.

Applicant attributed his financial problems to a divorce and his wife's failure to responsibly handle their finances. These were circumstances beyond his control. For the full application of AG ¶ 20(b), Applicant must have acted responsibly. I do not find merit to his defense that he was unable to file his tax returns in 2012, 2013, and 2014 due to his divorce that was finalized in November 2013. There is no evidence he filed for extensions or filed as married filing single. He did not file his 2012 tax returns until 2016 and the remaining years were not filed until March 2018, after receiving the SOR. I find AG ¶ 20(b) has minimal application. I find AG ¶ 20(g) applies because the returns are now filed. However, those late filings are insufficient to fully mitigate the financial concerns raised by Applicant's conduct.

Applicant resolved the mortgage foreclosure alleged in SOR ¶ 1.e. AG ¶ 20(d) applies to this debt. Applicant says he has an agreement with the creditor in SOR ¶ 1.d to resolve the debt in the future. There is no evidence documenting the agreement. Credit reports show the debt was in collection for years and is now charged off. Applicant has not made a payment on the debt since 2012. Applicant provided a personal financial statement. It appears he is solvent, but this debt remains unresolved. There is no evidence he received financial counseling. AG ¶ 20(c) does not apply.

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.

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, but some warrant additional comment.

Applicant is a 58-year-old educated man. In 2007, he was found guilty at a General Court-Martial and has a conviction for false official statements, larceny, and fraud. He does not appear to grasp the gravity or illegality of his previous conduct. He retired from the Air Force as a captain. After leaving military service, he repeatedly failed to timely file his federal and state tax returns. He eventually filed his returns for 2013, 2014, and 2015 late, after receiving the SOR in 2018. The DOHA Appeal Board has held that:

Failure to file tax returns suggests that an applicant has a problem with complying with well-established government rules and systems. Voluntary compliance with these things is essential for protecting classified information. ISCR Case No. 14-04437 at 3 (App. Bd. Apr. 15, 2016). Someone who fails repeatedly to fulfill his or her legal obligations does not demonstrate the high degree of good judgment and reliability required of those granted access to classified information. See, e.g., ISCR Case No. 14-01894 at 5 (App. Bd. August 18, 2015). See *Cafeteria & Restaurant Workers Union Local 473 v. McElroy*, 284 F.2d 173, 183 (D.C. Cir. 1960), *aff'd*, 367 U.S. 886 (1961).²⁰

Applicant has not met his burden of persuasion. The record evidence leaves me with serious questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate 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
Subparagraphs 1.a-1.d:	Against Applicant
Subparagraph 1.e:	For Applicant

²⁰ ISCR Case No. 12-10933 at 3 (App. Bd. June 29, 2016).

Conclusion

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

Carol G. Ricciardello
Administrative Judge