



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



In the matter of:)	
)	
[Redacted])	ISCR Case No. 18-02040
)	
Applicant for Security Clearance)	

Appearances

For Government: Rhett Petcher, Esq., Department Counsel
For Applicant: *Pro se*

06/06/2019

Decision

FOREMAN, LeRoy F., 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

Applicant submitted a security clearance application (SCA) on July 28, 2016. On February 23, 2019, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines F and E. The DOD CAF acted under Executive Order (Exec. Or.) 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) promulgated in Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (December 10, 2016).

Applicant answered the SOR on April 15, 2019, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on April 30, 2019,

and the case was assigned to me on the same day. Applicant requested that his hearing be expedited and held while he was in the United States on leave from an overseas worksite.

On May 3, 2019, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled to be conducted by video teleconference on May 7, 2019. I convened the hearing as scheduled. Applicant waived the 15-day notice requirement of Directive ¶ E3.1.8. Government Exhibits (GX) 1 through 13 were admitted in evidence without objection. Department Counsel's letter transmitting copies of the government's documentary evidenced is attached to the record as Hearing Exhibit (HX) I. Applicant testified but did not submit the testimony of any other witnesses or any documentary evidence. I kept the record open until May 22, 2019, to enable him to submit documentary evidence. He timely submitted Applicant's Exhibits (AX) A through E, which were admitted without objection. Department Counsel's comments about AX A through E are attached to the record as HX II. DOHA received the transcript (Tr.) on May 29, 2019.

Findings of Fact¹

In Applicant's answer to the SOR, he admitted SOR ¶¶ 1.a, 1.g, 1.n, 1.o, and 2.a-2.e. He denied SOR ¶¶ 1.b-1.f, and 1.h-1.m. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 53-year-old waterfront manager employed by a defense contractor since July 1, 2016. He served on active duty in the U.S. Navy from August 1984 to September 1999. He was self-employed and owned a mortgage company from October 2002 to December 2007. He sold the business and was unemployed from December 2007 to June 2008. He worked in various jobs as a consultant or project manager at non-government shipyards from June 2008 to October 2012. He was a federal civilian employee from October 2012 to September 2013. He applied for a security clearance in November 2012, but his application was denied in December 2013.

After Applicant's application for a security clearance was denied, he worked in non-government shipyards from October 2013 and as a truck driver from March 2015 to June 2016. His work history includes unemployment from December 2007 to June 2008, April to June 2011, July to October 2012, and January to March 2015.

Applicant married in July 1984 and divorced in March 1996. He remarried in July 2011. He has four adult children and two adult stepchildren. He obtained a bachelor's degree in 2013 and financed it with student loans. (Tr. 21.)

Applicant filed a petition for Chapter 7 bankruptcy in 2005 and received a discharge in 2006. Approximately \$73,000 in delinquent debts were discharged. He

¹ Applicant's personal information is extracted from his security clearance application (GX 1) unless otherwise indicated by a parenthetical citation to the record.

attributed his financial problems to legal fees totaling about \$70,000 for child-custody litigation and travel to visit his ailing mother. Most of the discharged debts were for business loans and a credit-card account. (GX 12 at 3.) The bankruptcy is alleged in SOR ¶ 1.n.

Between 1996 and 2007, Applicant was charged with check fraud or uttering worthless checks about 21 times. At a personal appearance in November 2013, he admitted these offenses, which occurred when he floated checks before sufficient funds were in his account. (GX 12 at 2.) In his answer to the SOR, he attributed these financial problems to mistakes while trying to start and operate a business. The bad checks are alleged in SOR ¶ 1.o.

In addition to the bankruptcy and bad-check offenses, the SOR alleges multiple failures to timely file federal income tax returns, failures to timely pay federal income taxes, delinquent student loans, and delinquent consumer debts. The federal tax debt, federal tax liens, delinquent student loans, and delinquent consumer debts are reflected in credit reports from December 2012, October 2016, February 2018, and May 2019. (GX 3-6.) The bad-check offenses are reflected in arrest records maintained by the Federal Bureau of Investigation. (GX 7.) The evidence concerning Applicant's financial problems is summarized below.

SOR ¶ 1.a: failure to timely file federal income tax returns for 2000 through 2005, 2007, and 2010 through 2017. Applicant admitted this allegation in his answer to the SOR. Tax transcripts submitted by Applicant in response to DOD CAF interrogatories in June 2018 reflect that substitute returns were filed in 2004 by the IRS for tax years 2000 and 2001; returns for 2002 through 2005 were filed in 2006; the return for 2007 was filed in September 2009; a return for 2010 was filed in November 2011; a return for 2011 was filed in November 2012; returns for 2012 and 2013 were filed in April 2018; and no returns had been filed for 2014 through 2017. (GX 9 at 27-65.)

SOR ¶ 1.b-1.f: failure to timely pay the federal taxes due for 2005, 2006, and 2007; federal tax debt of \$54,297 for 2006; federal tax debt of \$3,007 for 2007; federal tax liens filed in September 2007 and February 2013. In his answer to the SOR, Applicant denied that he failed to pay the taxes due. At the hearing, he admitted that he did not make any voluntary payments, but he relied on garnishments and diversions of refunds to pay the taxes due. (Tr. 44-45.) In April 2006, the IRS erroneously filed a tax lien for \$1.4 million against Applicant. After Applicant challenged the amount of the lien, the lien was released on February 2007. The IRS filed another lien for \$43,264 in September 2007, and a third lien for \$37,202 in February 2013. In February 2018, Applicant hired an attorney to help him resolve his federal tax problems. He testified that he could not hire professional help earlier because he did not have enough disposable income to pay the lawyer's \$4,000 retainer fee. (Tr. 47-48.) The lien for \$43,264 was released in August 2018, and the \$37,202 lien was released in February 2019. In Applicant's answer to the SOR, he provided evidence from his tax lawyer that he had filed the delinquent federal tax returns for 2010 through 2017 in

December 2018, and that the refunds for tax years 2015 through 2017 were sufficient to pay the delinquent taxes for the earlier years and resolve the tax liens that had been filed against him.

SOR ¶ 1.g: delinquent debt placed for collection of \$1,161. In Applicant's answer to the SOR, he presented documentary evidence that the debt had been settled.

SOR ¶¶ 1.h-1.i: five delinquent student loans totaling about \$44,000. In his answer to the SOR, Applicant denied these debts, stating that they had not been delinquent since 2017. The May 2019 credit report reflects five delinquent student loans, on which the last payment was made in April 2017. According to this credit report, the scheduled payment for each loan was \$703, but the actual payments were \$99, \$255, \$166, \$66, and \$115. The loans are reflected as past due for \$5,584; \$15,420; \$9,396; \$3,753; and \$6,504. (GX 6 at 2-3.) The credit report contradicts Applicant's documentation from the Department of Education (DOE), dated March 3, 2019, reflecting monthly payments of \$599 from April 2017 to July 2017; a \$418 payment in July 2017; a \$514 payment in August 2017; monthly payments of \$876 from March 2018 to July 2018; and monthly payments of \$703 from November 2018 to March 2019.

SOR ¶ 1.m: delinquent debt for \$747. In response to DOD CAF interrogatories, Applicant submitted evidence that this debt was settled for less than the full amount. (GX 9 at 72.)

When Applicant submitted an SCA in November 2012, he disclosed that he had not filed his federal income tax returns for 2003, 2004, and 2005. He did not disclose that he had failed to timely file his federal income tax returns for 2010 and 2011. (GX 1 at 45-46.) At the hearing, he testified that he did not know why he did not disclose the past-due tax returns for 2010 and 2011. (Tr. 64.)

During a personal appearance conducted by a DOHA administrative judge in November 2013, he testified that he had filed his federal income tax returns for 2000 through 2012. (GX 13 at 31.) At the hearing, he admitted that his answer during the personal appearance was false. (Tr. 66.)

When Applicant submitted his most recent SCA in July 2016, he answered "No" to the question whether he had failed to file returns or pay federal, state, or other taxes during the past seven years. (GX 2 at 48.) He did not disclose that he had failed to file returns or pay taxes for 2010 through 2015. At the hearing, he testified that he did not know why he answered "No" to this question. (Tr. 64.)

In response to DOD CAF financial interrogatories in March 2018, he stated that he had filed his returns and paid the taxes for 2006 and 2007. (GX 8 at 4.) At the hearing, he admitted that these answers were false. (Tr. 68.)

In response to DOD CAF interrogatories, Applicant submitted a personal financial statement in June 2018 reflecting that he and his wife had a joint net monthly income of about \$12,623; debt payments (including \$1,100 in student loan payments) of \$6,363; mortgage loan payments of \$3,403; and a net monthly remainder of about \$3,220. (GX 9 at 73.) They reported total wage income of \$208,981 for tax year 2017 and \$258,948 for tax year 2018. (AX B; AX C.)

Applicant and his wife own real estate worth more than \$1,000,000. They own four rental properties, two undeveloped lots, and their primary residence. In 2018, Applicant and his wife purchased three investment properties for \$95,000; \$45,000; and about \$70,000. The entire amounts were financed by the sellers. Their monthly payments are \$1,900; \$700; and \$1,400. The properties are rented and generate monthly income of about \$7,000 per month. Applicant testified that he was comfortable taking on additional debt because he believes he could sell each of them within 30 days if he needed to generate income. (Tr. 34-37; 71-72.)

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 and the documentary evidence in the record establish the following disqualifying conditions under this guideline:

AG ¶ 19(a): inability to satisfy debts;

AG ¶ 19(b): unwillingness to satisfy debts regardless of the ability to do so;

AG ¶ 19(c): a history of not meeting financial obligations;

AG ¶ 19(d): deceptive or illegal financial practices such as . . . check fraud . . . and other intentional breaches of trust; and

AG ¶ 19(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.

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 indications 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 overdue creditors or otherwise resolve debts; 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 for SOR ¶¶ 1.a-1.m. Applicant's delinquent debts and past-due tax returns are recent, numerous, and did not occur under circumstances making recurrence unlikely. It is established for the bankruptcy alleged in SOR ¶ 1.n and the bad checks alleged in SOR ¶ 1.o, which are mitigated by the passage of time.

AG ¶ 20(b) is not fully established. Applicant's first period of unemployment was caused by his voluntary decision to sell his business. However, he had several subsequent periods of unemployment and pay reductions. He incurred substantial legal expenses resolving custody of his children. His federal tax problems were complicated when the IRS erroneously filed a tax lien for \$1.4 million. However, he has not acted responsibly. He did not seriously address his past-due tax returns and federal tax debt until February 2018, after he realized that they were an impediment to his second attempt to qualify for a security clearance.

AG ¶ 20(c) is not fully established. Applicant would have been required to obtain financial counseling in connection with his bankruptcy petition in 2005. However, that counseling would not have been directed at his tax problems, which were not resolved until he hired an attorney in 2018.

AG ¶ 20(d) is established for the delinquent student loans alleged in SOR ¶¶ 1.h-1.i and the debts alleged in SOR ¶¶ 1.g and 1.m. The documentation from DOE shows that Applicant has been making payments on his delinquent student loans. The DOE documentation is contradicted by the May 2019 credit report, but I have given more credibility to the DOE documentation. AG ¶ 20(d) is not established for the tax debt, which was resolved by involuntary diversion of tax refunds, which do not constitute a "good-faith effort" to resolve tax debts. See *generally* ISCR Case No. 09-05700 (App. Bd. Feb. 24, 2011).

AG ¶ 20(g) is applicable but not dispositive. To his credit, Applicant has filed the past-due tax returns and resolved his tax debt. However, his eventual compliance with his tax obligations does not end the inquiry. A security clearance adjudication is not a tax-enforcement procedure. It is an evaluation of an individual's judgment, reliability, and trustworthiness. A person 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. ISCR Case No. 15-00216 at 4 (App. Bd. Oct. 24, 2016), *citing Cafeteria & Restaurant Workers Union Local 473 v. McElroy*, 284 F.2d 173, 183 (D.C. Cir. 1960), *aff'd*, 367 U.S. 886 (1961). The fact that Applicant has filed his past-due returns "does not preclude careful consideration of Applicant's security worthiness based on longstanding prior behavior evidencing irresponsibility." ISCR Case No. 12-05053 (App. Bd. Oct. 30, 2014). Applicants who begin to address their security-significant conduct only when their personal interests are at stake may be lacking in judgment and reliability. ISCR Case No. 16-01211 (App. Bd. May 30, 2018).

Guideline E, Personal Conduct

The 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. . . .

Applicant's admissions in his answer to the SOR and at the hearing establish that Applicant falsified his SCA in November 2012, provided false testimony during a DOHA personal appearance in November 2013, failed to disclose his failures to file income tax returns in his July 2016 SCA, and falsified his answers to financial interrogatories in March 2018. His falsifications establish the following disqualifying conditions under this guideline:

AG ¶16(a): deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine national security eligibility or trustworthiness, or award fiduciary responsibilities; and

AG ¶16(b): deliberately providing false or misleading information; or concealing or omitting information, concerning relevant facts to an employer, investigator, security official, competent medical or mental health professional involved in making a recommendation relevant to a national security eligibility determination, or other official government representative.

The following mitigating conditions under this guideline are potentially applicable:

AG ¶ 17(a): the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts; and

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(a) is not established. Applicant did not attempt to correct his falsifications until confronted with the evidence.

AG ¶ 17(c) is not established. Applicant's falsifications were recent, frequent, and did not occur under unique circumstances. A falsification during the adjudication process is not minor, because it "strikes at the heart of the security clearance process." ISCR Case No. 09-01652 (App. Bd. Aug. 8, 2011.)

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

I have incorporated my comments under Guidelines F and E in my whole-person analysis and applied the adjudicative factors in AG ¶ 2(d). 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 not mitigated the security concerns raised by his tax delinquencies and personal conduct.

Formal Findings

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

Paragraph 1, Guideline F (Financial Considerations): AGAINST APPLICANT

Subparagraphs 1.a-1.f: Against Applicant

Subparagraphs, 1.g-1.o: For Applicant

Paragraph 2, Guideline E (Personal Conduct): AGAINST APPLICANT

Subparagraphs 2.a-1.e: Against Applicant

Conclusion

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

LeRoy F. Foreman
Administrative Judge

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) 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.