



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



In the matter of:)
)
) ISCR Case No. 19-01208
)
Applicant for Security Clearance)

Appearances

For Government: Bryan Olmos, Esq., Department Counsel
For Applicant: *Pro se*

06/17/2020

Decision

HEINY, Claude R., Administrative Judge:

Applicant contests the Department of Defense’s (DoD) intent to deny his eligibility for a security clearance to work in the defense industry. A Statement of Reasons (SOR) was issued under Guideline F, financial considerations, due to three years of then unfiled state and Federal income tax returns and three other delinquent accounts. Financial considerations security concerns are mitigated. Eligibility for access to classified information is granted.

Statement of the Case

On June 14, 2019, the Department of Defense Consolidated Adjudications Facility (DoD CAF) issued an SOR to Applicant, detailing the security concerns under Guideline F, financial considerations, under which it was unable to find it clearly consistent with the national interest to grant or continue security clearance eligibility for him. The DoD CAF acted 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) effective within the DoD on June 8, 2017.

On July 6, 2019, Applicant answered the SOR allegations and requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA). The SOR was amended to allege that the account in SOR 1.d went from being listed as a “collection” account to a “charged-off” account. On August 16, 2019, Applicant responded to the amended SOR allegation, admitting the account. On December 11, 2019, DOHA issued a Notice of Hearing scheduling a hearing that was conducted on January 15, 2020.

Four Government exhibits (Ex. 1 – 4) and three Applicant exhibits (Ex. A – C) were admitted into evidence without objection. The record was held open following the hearing to allow Applicant to submit additional documentation. On March 3, 2020, additional documents were received and admitted into evidence without objection as Ex. D and E. Applicant testified at the hearing, as reflected in a transcript (Tr.) received on January 29, 2020.

Findings of Fact

In Applicant’s answer to the SOR he admitted his tax filings had been delayed and his Federal student loan (NAVIENT) had been charged off. He denied two collection accounts, but later admitted that the debt in SOR 1.d had been charged off. (SOR Responses) After a thorough review of the testimony, pleadings, and exhibits, I make the following findings of fact.

Applicant is a 34-year-old electrician who has worked for a defense contractor since July 2018 and seeks to obtain a security clearance. (Ex. 2, Tr. 16) In April 2013, Applicant married. He and his spouse have two children ages 1 and 6. (Ex. 1, Tr. 18) He has not served in the military. (Tr. 17) His wife is an entrepreneur and has done web design for multiple companies. (Tr. 20) His salary last year was \$53,000, and his salary is currently \$67,000 annually. (Tr. 23, 56) Last year he received a three-percent raise based on his performance. In August 2020, at his two-year point with his employer, he anticipates his annual salary will increase to \$85,000. (Tr. 24)

Applicant’s wife started a digital company, which she still owns, and opened a juice bar. (Tr. 20) The juice bar has not been operating for the past six months. (Tr. 31) Sales stopped in July 2019. (Tr. 34) She is attempting to sell the brick and mortar brewery space. (Tr. 30) His wife is not working as much as she had previously done. (Tr. 23)

Applicant was a joint owner on the business. He could not file his individual taxes until the business taxes were filed. (Tr. 27) His wife, who handled their tax matters, needed an accountant to prepare the business returns. Applicant’s Federal and state income tax returns for tax years 2015, 2016, and 2017 went unfiled as she searched for an accountant. (Tr. 20) It took four years before they could locate an accountant. In June 2018, his wife hired an accountant. (Tr. 32) During that time Applicant and his wife moved from the northeastern United States, to their current location. His wife handled all matters

related to their taxes. (Tr. 33) In August 2018, Applicant sold his home in the northeast. (Tr. 20) After the sale, they had sufficient funds to pay an accountant. (Tr. 20) With the funds from the home sale, Applicant paid the accountant's fee, paid their business taxes, made past-due payments of \$6,000 on his student loans, and had sufficient funds remaining to relocate to their new location. (Tr. 20, 22)

In Applicant's July 26, 2018 Electronic Questionnaires for Investigations Processing (e-QIP), he admitted he had not filed his state or Federal income tax returns for tax year 2015, 2016, and 2017. He stated family issues prevented him from filing his returns and also that he had hired an accountant to help him file his tax returns. (Ex. 1, Tr. 28) In 2015, his mother had been injured at work. (Tr. 29) His mother's injury distracted him from giving priority to his tax matters.

Applicant had two student loan obligations. One was a charged-off private student loan (SOR 1.d) and the other was a Federal student loan (SOR 1.b). In his e-QIP, he admitted owing \$25,000 in student loans debts (SOR 1.b). The loans were obtained starting in November 2003, when he started attending college. The loans became past due when he had been unable to obtain a job that paid sufficient income to pay his student loans. (Ex. 1) At the time, he was making \$410 a week as an electrician. (Tr. 29) As of his person subject interview with an authorized investigator for the Office of Personnel Management (OPM), Applicant was attempting to locate the current holder of the private student loan so that he could contact the correct agency.

The SOR lists a \$25,083 collection debt (SOR 1.d). The debt had apparently been charged off. Department Counsel stated the collection debt and the charged-off debt were the same debt. (Tr. 11) This debt was a private student loan. In May 2019, the creditor cancelled the debt and issued an Internal Revenue Service (IRS) Form 1099-C form. The amount of debt discharged was \$19,638. (Ex. E)

Applicant's Federal student loans (SOR 1.b) had become delinquent because he was working in a position that provided insufficient income to make his monthly loan payments. (Ex. 2, Tr. 7) He now has a better job and lives in a lower cost of living area, he is able to pay his student loans. (Ex. 2) In August 2018, after selling his previous residence, he used \$6,000 from the sale to bring his student loans current. (Ex. 2) In August 2018, he started making monthly payments on his student loans by automatic withdrawal. (Tr. 41) Since August 2018, he has made timely payments of \$675 monthly. (Ex. B, Tr. 40 - 42) His Federal student loans are currently in forbearance, but he continues to make his monthly payments. (Tr. 22) Applicant's January 2020 credit report lists these loans as simply "open." (Ex. C) Some of the loans had previously been past due, but none of the loans were delinquent or past due since August 2018. (Ex. C)

In November 2018, when Applicant was interviewed by the OPM, he indicated his mother had been injured on the job in 2015, and he was helping his mother get to her medical appointments and helping her with legal matters related to her injury. (Ex. 2) He gave priority to assisting his mother and failed to file his tax returns for 2015. He filed extensions of the tax filing deadline for tax years 2016 and 2017, but did not file his returns during the extension period. (Ex. 2)

Applicant's 2015 Federal tax return was due in April 2016. The return was filed on April 7, 2019. He was issued a refund of \$481. (Ex. A, SOR Response, Tr. 6) His 2016 Federal tax return was due in April 2017, but was also filed on April 7, 2019. He was issued a \$1,267 refund. (Ex. A, Tr. 6) His 2017 Federal tax return was due in April 2018, but was not filed until July 1, 2019. He was issued a \$2,653 refund. (Ex. A, SOR Response, Tr. 6) For tax year 2018 he received a \$2,080 refund and for tax year 2014, he received a refund of \$1,165. (Ex. A). These two tax years are not listed as a concern in the SOR, but are included to show his returns have been filed and refunds issued. In 2019, once the business taxes had been filed, he filed his state and Federal tax returns for 2014, 2015, 2016, and 2017. (Tr. 28, 31) He paid \$10,000 in past-due state taxes. (Tr. 51) The current balance of his state taxes for tax years 2015, 2016, and 2017 is zero. (Ex. D) His state tax returns and all of his Federal tax returns in question, except for his tax return for tax year 2017, were filed before the SOR was issued. Although his 2017 returns were in the process of being prepared by their accountant, they were filed two weeks after the date of the SOR. (Ex. A)

The SOR lists a \$135 collection account (SOR 1.c). The debt was for cable equipment, which Applicant asserts he returned the equipment and paid the amount owed. The debt does not appear on his current credit report. (Ex. C) He failed to obtain a receipt when he returned the equipment. (Tr. 22)

On the 5th day of each month, Applicant and his wife address their bills. (Tr. 37) They make sure their monthly \$1,298 mortgage payment, their utility bills, and their loan payments for their two vehicles are made. (Tr. 38) Their vehicle payments and automobile insurance are paid through an automatic deduction. Applicant commutes 120 miles daily to work, and was paying \$150 per week for fuel, so he purchased a new vehicle to lower his transportation expenses. (Tr. 47) He is living within his means and satisfying his financial obligations. He has approximately \$8,000 in his company's 401(k) retirement fund. (Tr. 54) He has done some financial research to learn more about credit and finances. (Tr. 55) Applicant's January 2020 credit report lists his credit score as 686, which is considered "good." (Ex. C) The report lists no past-due or collection accounts. (Ex. C)

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 must be considered 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(a), the adjudication process is an examination of a sufficient period and a careful weighing

of a number of variables of an individual's life to make an affirmative determination that the individual is an acceptable security risk. This is known as the whole-person concept.

The 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.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . .” The applicant has the ultimate burden of persuasion to obtain 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 the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of 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 of 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

AG ¶ 18 articulates the security concern for financial problems:

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. . . .

The Appeal Board explained the scope and rationale for the financial considerations security concern in ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012) (citation omitted) as follows:

This concern is broader than the possibility that an applicant might knowingly compromise classified information in order to raise money in satisfaction of his or her debts. Rather, it requires a Judge to examine the totality of an applicant's financial history and circumstances. The Judge must consider pertinent evidence regarding the applicant's self-control, judgment, and other qualities essential to protecting the national secrets as well as the vulnerabilities inherent in the circumstances. The Directive presumes a nexus between proven conduct under any of the Guidelines and an applicant's security eligibility.

Applicant was past due on his student loans and failed to timely file his Federal and state income tax returns for tax years 2015, 2016, and 2017. AG ¶ 19 includes three disqualifying conditions that could raise a security concern and may be disqualifying in this case: "(a) inability to satisfy debts," "(c) a history of not meeting financial obligations," and "(f) failure to file or fraudulently filing annual Federal, state, or local income tax returns or failure to pay annual Federal, state, or local income tax as required." In ISCR Case No. 08-12184 at 7 (App. Bd. Jan. 7, 2010), the Appeal Board explained:

It is well-settled that adverse information from a credit report can normally meet the substantial evidence standard and the government's obligations under [Directive] ¶ E3.1.14 for pertinent allegations. At that point, the burden shifts to applicant to establish either that [he or] she is not responsible for the debt or that matters in mitigation apply.

The record having established disqualifying conditions, additional inquiry about the possible applicability of mitigating conditions is required. Applicant has the burden of establishing that matters in mitigation apply. Five financial considerations mitigating conditions under AG ¶ 20 are potentially applicable in this case:

(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;

(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

(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.

The Appeal Board has held that an applicant is not required to establish that he has paid off each debt in the SOR, or even that the first debts paid be those in the SOR. See ISCR Case No. 07-06482 (App. Bd. May 21, 2008). The Appeal Board stated in ISCR Case No. 17-00263 (App. Bd. Dec. 19, 2018) that “an applicant must demonstrate a plan for debt repayment, accompanied by concomitant conduct, that is, conduct that evidences a serious intent to resolve the debts.”

Some of the Applicant’s student loans had previously been past due. The loans became delinquent because he was working in a position that provided insufficient funds to make his monthly loan payments. He now has a better job, lives in a lower cost of living area, and is able to make his student loans payments. In August 2018, he sold his home and brought his Federal student loans current. He currently makes his monthly student loan payments by automatic withdrawal even though the Federal student loans are in forbearance. His January 2020 credit report lists his loans as simply “open” and shows no past-due amounts since August 2018. AG ¶ 20(d) applies to his Federal student loans since he has reached a repayment agreement and has been in compliance with that agreement since August 2018.

Applicant’s other student loan (SOR 1.d) was a private student loan. In May 2019, the creditor cancelled the debt and an IRS Form 1099-C form was issued. Applicant is no longer liable for this debt.

Applicant was a joint owner with his spouse on a business. He was unable to file his individual taxes until the business taxes were filed. It took four years before an accountant could be located. In June 2018, his wife hired an accountant. Following the sale of his home, there was sufficient income to pay for the accountant and to pay the past-due state income tax. The accountant filed Applicant’s Federal income tax returns, and he received refunds for tax years 2015, 2016, and 2017. In 2015, his mother had been injured at work. These family issues were also a factor in him not filing timely tax returns. All his Federal and state income tax returns have now been filed and any taxes due have been paid. He filed his delinquent income tax returns for tax years 2015 and 2016 before he received the SOR, which shows his good faith in rectifying his tax issues. His 2017 tax returns were being prepared by the accountant and filed two weeks after the date of the SOR, showing he was acting to address his tax issues prior to the receipt of the SOR.

AG ¶ 20(d) applies to his past-due Federal and state tax filings, which have now been filed and all tax paid. AG ¶ 20(g) would have limited applicability because Applicant

never entered into a repayment arrangement with the appropriate tax authority since he filed his delinquent tax returns, received refunds of his Federal taxes, and paid his past-due state taxes.

The SOR lists a \$135 collection account (SOR 1.c) for cable equipment that was not timely returned. Applicant asserts he paid the debt and failed to obtain a receipt when he returned the equipment. This small debt, even if unpaid, is insufficiently large enough to be of security significance. He disputed this debt, and it does not appear on his current credit report. AG ¶ 20(e) applies to this small debt.

Applicant has done some financial research to learn more about credit and finances. On the 5th day of each month Applicant and his wife sit down and address their bills. They are current on their mortgage, car payments, and utilities. He has approximately \$8,000 in his company's 401(k) retirement fund. His January 2020 credit report lists his credit score as 686, which is considered "good," and lists no past-due or collection accounts. AG ¶ 20(c) applies. There are clear indications that his financial problems are being resolved and are under control.

AG ¶ 20(a) applies in that the tax returns are filed and no money is owed. The student loan is current. Neither taxes nor debts are ongoing. There is little likelihood of recurrence. AG ¶ 20(b) has some application because his student loans went unpaid because he had limited income to pay those loans. Additionally, his ability to file his individual income tax was due to his inability to locate an accountant willing to complete their business returns and his mother injury was also a factor in him not filing timely tax returns.

Applicant needs to show that he has a plan to resolve his debts and that he has taken significant steps to implement his plan, which he has done. The financial considerations security concerns are mitigated.

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 common-sense 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. The comments under Guideline F are incorporated in the whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under that guideline but some warrant additional comment.

Applicant's lack of adequate income to pay the debt resulted in his default of the private student loans rather than an unwillingness to pay the debt. This debt can no longer be a source of financial pressure for him because it has been forgiven. The Federal student loan has been current since August 2018. Between his mother's injury and finding an accountant to address his and his spouse's business tax returns, he was late on filing his individual tax returns. His Federal and state tax returns have now been filed and no Federal or state tax is currently owed. His financial issues have been adequately addressed to whether they no longer present an unacceptable security risk.

The law, as set forth in *Egan*, Exec. Or. 10865, the Directive, and the AGs, have been carefully applied to the facts and circumstances in the context of the whole person. The issue is not simply whether all the delinquent obligations have been paid, it is whether Applicant's financial circumstances raise concerns about his fitness to hold a security clearance. (See AG ¶ 2(c)) A security clearance adjudication is an evaluation of an individual's judgment, reliability, and trustworthiness. It is not a debt-collection procedure. Overall, the record evidence leaves me without questions and doubts about his eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has mitigated the financial considerations security concerns.

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, Financial Considerations: FOR APPLICANT

Subparagraph 1.a – 1.d: For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant a security clearance. Eligibility for access to classified information is granted.

CLAUDE R. HEINY II
Administrative Judge