



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



In the matter of:)
)
) ISCR Case No. 19-02495
)
Applicant for Security Clearance)

Appearances

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

05/27/2020

Decision

Benson, Pamela C., Administrative Judge:

Applicant did not mitigate the security concerns due to his failure to file Federal income tax returns for eight consecutive years, unresolved delinquent Federal income taxes, and unpaid consumer debt. Eligibility for access to classified information is denied.

Statement of the Case

On November 27, 2019, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant 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 implemented by the DOD on June 8, 2017.

Applicant responded to the SOR on January 2, 2020, and he requested a hearing before an administrative judge. On February 4, 2020, the case was assigned to me, and the Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing, setting the hearing for February 25, 2020. The hearing was held as scheduled.

During the hearing, Department Counsel offered Government Exhibits (GE) 1 through 6 into evidence, which I admitted without objection. Applicant testified, and submitted four documents, which I labeled as Applicant Exhibits (AE) A through D, also admitted into evidence without objection. At the request of Applicant, I held the record open until March 17, 2020 for him to submit additional documentation. On March 11, 2020, Applicant requested an extension of time to submit documentation, without an objection from Department Counsel. I granted Applicant an additional two weeks, until March 31, 2020. DOHA received the hearing transcript (Tr.) on March 5, 2020. On March 31, 2020, Applicant provided eight documents, which I labeled as Applicant Exhibits (AE) E through L, and I admitted all of the documents into evidence without objection. The record closed on March 31, 2020.

Findings of Fact

The SOR alleges financial considerations security concerns based on Applicant's unfiled Federal income tax returns for tax years 2010 through 2017. The SOR also alleges four unpaid credit card accounts totaling approximately \$22,500. In his Answer, Applicant admitted all of the SOR allegations. (SOR ¶¶ 1.a-1.e.) After careful review of the pleadings and exhibits, I make the following findings of fact:

Applicant is 56 years old. He graduated from high school in 1982. He served on active duty in the U.S. Air Force from 1985 to 1989. He was a sergeant at the time of his honorable discharge. After his separation, he was transferred to the inactive reserve. Applicant attended college seeking a physical therapy degree, but in 1999, he dropped out of the last class he needed to complete a college degree. Since February 2018, he has been employed as an engineer with a DOD contractor. His annual salary is approximately \$80,000. He has been married since 1999, and he has two daughters, ages 17 and 14, and an eight-year-old son. His wife works full-time as a comptroller and makes approximately \$90,000 a year. (Tr. 24-29, 31-32; GE 1, GE 2)

Applicant and his spouse have been employed full-time since 2015, making approximately \$150,000 to \$170,000 per year. He stated that their financial and tax problems developed after their restaurant business failed. They opened their first restaurant in 2004, and later sold it in 2012. He stated this restaurant was making a little bit of money over the years. Applicant worked other full-time employments from February 2008 through July 2011, February 2012 to July 2012, and October 2012 to April 2013, which overlapped with his restaurant business. Applicant opened another restaurant in 2013 at an outdoor mall. Due to cold temperatures during the winter season, and other unfavorable weather conditions, the restaurant did not have many customers. The restaurant was occasionally busy on the weekends, but during the weekdays, the restaurant had a very limited number of customers. Applicant and his wife soon used credit cards to fund their business operation. Applicant used what little money he had to pay his employees, to the detriment of his creditors. After two years of losing money, Applicant and his wife decided to close the restaurant in 2015. (Tr. 32-36)

Financial Considerations

Applicant failed to timely file Federal income tax returns, as required, for tax years 2010 through 2017. (SOR ¶ 1.a) He stated that the unfiled Federal income tax returns from 2010 through 2017 resulted from his wife, who was the one who usually prepared their tax returns, being too busy with the restaurant business and children. He admitted at the hearing that the estimated amount of Federal taxes currently owed is more than \$10,000. Although not alleged in the SOR, Applicant also did not timely file his state income tax returns for the same years. He estimated that he owed approximately \$3,000 for delinquent state taxes.

Applicant claimed that he was not aware that their income tax returns had not been filed for several years. Applicant and his spouse filed all of their delinquent Federal income tax returns in September 2019. He stated it took approximately four weeks to gather the necessary paperwork to get their tax returns filed. As of the date of the hearing, Applicant had not reached an agreement with the Internal Revenue Service (IRS) for the repayment of his delinquent Federal taxes, nor had he reached a repayment agreement with the state's department of taxation. Post-hearing documentation submitted by Applicant showed that on March 26, 2020, he and his spouse sent FORM 12153, a Request for a Collection Due Process or Equivalent Hearing, concerning their delinquent Federal taxes owed for tax year 2013. (AE E) Although Applicant's Federal income tax returns have recently been filed, his delinquent Federal tax debt has not been resolved. (Tr. 36-41, 45; GE 3)

Applicant is indebted to a creditor in the amount of \$9,066 for a charged-off credit card balance. (SOR ¶ 1.b) Applicant stated that he contacted the creditor in December 2019, and the creditor told him he had two options with the charged-off account: He could do nothing since the account is no longer in collection, or he could pay the debt. Applicant has not paid any money on this account. His background interview took place in November 2018, and during the interview the delinquent debts alleged in the SOR were discussed with Applicant. During the hearing, Department Counsel asked why it took Applicant over a year after his interview to make contact with the creditor. Applicant stated that he did not have an answer. He stated that this creditor informed him a 1099-C will be issued to him in April 2020. (Tr. 45-48)

Post-hearing documentation submitted by Applicant showed that on March 3, 2020, he and his spouse received a confirmation of settlement offer from the creditor. The letter stated that the current balance was \$9,067, but if a payment of \$4,081 was received no later than March 3, 2021, the account would be considered settled. There was no evidence submitted to show that the settlement payment of \$4,081 was made, therefore, this account is unresolved. (AE F)

SOR ¶ 1.c alleges that Applicant is indebted to a creditor in the amount of \$7,955 for a charged-off credit card balance. Applicant reported that in approximately February 2020 a default judgment was issued against him, which at the time of the hearing, was still unsatisfied. Applicant stated that he contacted the creditor in December 2019 in an attempt to resolve the debt. He admitted that over a year has passed since his

background interview in November 2018, where he did not call, email, or contact the creditor in any fashion to resolve this debt. (Tr. 49-50)

Post-hearing documentation submitted by Applicant showed that on March 3, 2020, Applicant's bank reported to the court that his account had \$3,064 available for garnishment. On March 12, 2020, the creditor sent a letter of acceptance for a payment plan with the following conditions: Balance due \$8,170, and \$425 paid by April 17, 2020, and \$425 paid monthly thereafter until the debt is paid in full. There was no evidence submitted showing that the any payments have been made on this delinquent debt. This account is unresolved. (AE G)

SOR ¶ 1.d alleges that Applicant is indebted to a creditor in the amount of \$2,440 for a charged-off credit card balance. Post-hearing documentation submitted by Applicant showed that on February 28, 2020, the creditor offered a settlement. The settlement offer letter stated that the current balance was \$2,440, and if Applicant made a payment of \$1,099 no later than February 28, 2021, the account would be considered settled. There was no evidence submitted showing that the settlement payment of \$1,099 was made to the creditor, therefore, this account is unresolved. (Tr. 51 AE H)

SOR ¶ 1.e alleges that Applicant is indebted to a creditor in the amount of \$3,027 for an unpaid credit card balance referred for collection. At the hearing, Applicant provided a document showing that the account had been settled in February 2020 after he made a payment of \$1,200. This account has been resolved. (Tr. 16-20, 51; GE 4; AE C)

Applicant admitted there were a couple of more creditors that have developed recently with outstanding balances that were not reported in the SOR. He was unable to state with certainty the total amount of these debts since his wife handles the household finances. Applicant and his wife both purchased new cars in 2015, the same year they closed their restaurant after two years of poor business. Applicant estimated that the cars will be paid off in approximately 18 months. (Tr. 52-54)

Post-hearing documentation submitted by Applicant showed that as of March 28, 2020, he and his spouse did not have sufficient income to pay their monthly expenses and the monthly settlement payment for the debt alleged in SOR 1.c. His wife was furloughed by her employer in mid-March 2020, due to the Coronavirus pandemic. Her monthly unemployment income was \$2,078, and after paying all of the expenses listed on their budget, there was a deficiency balance of -\$1,620 at the end of the month. (AE I)

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are to be 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, administrative judges apply the guidelines 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."

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 the 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 EO 10865 provides that adverse 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 for financial considerations is set out in AG ¶ 18:

Failure or inability to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness and ability to protect classified 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 risk of having to engage in illegal acts to generate funds. . . .

The guideline notes several conditions that could raise security concerns under AG ¶ 19. The following are potentially applicable 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.

Applicant failed to timely file his Federal income tax returns for tax years 2010 through 2017, and owes a substantial debt to the IRS for pass-due taxes. He is also delinquent in four credit card accounts totaling over \$20,000 that have been delinquent for several years. AG ¶¶ 19(a), 19(c), and 19(f) apply.

Conditions that could mitigate the financial considerations security concerns are provided under AG ¶ 20. The following 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.

AG ¶ 20(g) is applicable but not dispositive. To his credit, Applicant has recently filed the 2010-2017 Federal income tax returns, but his tax debt remains unresolved. 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 tax 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).

Applicant's has four credit card delinquent accounts totaling \$22,488. He did not contact these creditors for over a year despite that he had been placed on notice during his 2018 background interview that these debts were a concern to the Government. He only contacted these creditors approximately two months before his hearing. He settled one debt for less than the full value the same month he had his hearing. Applicant has not acted responsibly under the circumstances, and there is no systematic track record of payments to his creditors. There is little evidence of any debt-resolution efforts until his post-hearing submission of documents, and there is no evidence of any credit counseling.

Applicant submitted several settlement offers with a promise to pay the amounts agreed upon at some point in the future. A promise to attend to his debts as soon as he is able, however sincere, is not a substitute for a track record of repayment. See, e.g., ISCR Case No. 99-0447, App. Bd. July 25, 2000 at p. 3 (promise to take remedial steps in future concerning delinquent debts is not evidence of reform or rehabilitation). Applicant's promises to pay his remaining debts are not a substitute for a consistent record of timely remedial action.

In evaluating Guideline F cases, the Appeal Board has previously noted that the concept of "meaningful track record" necessarily includes evidence of actual debt reduction through payment of debts. However, an applicant is not required, as a matter of law, to establish that he or she has paid off each and every debt listed in the SOR. All that is required is that an applicant demonstrate that he or she has ". . . established a plan to resolve his [or her] financial problems and taken significant actions to implement that plan." The Judge can reasonably consider the entirety of an applicant's financial situation and his [or her] actions in evaluating the extent to which that applicant's plan for the reduction of his outstanding indebtedness is credible and realistic. (See Directive ¶ E2.2(a))

Applicant noted in his post-hearing documents that his wife was recently furloughed and their income was reduced due to the Coronavirus pandemic spreading throughout the United States. Due to this situation, he is unable to pay on the settlement offers he obtained from his creditors. This, of course, is unfortunate and certainly a situation beyond his control. However, after reviewing his full financial history, Applicant and his spouse ignored their obligation to file income tax returns for eight consecutive years. They jointly earned \$150,000 to \$170,000 annually, but Applicant did not take any action to set up a payment plan with the Internal Revenue Service, or with their other

creditors, which took place well before the pandemic. Applicant did not mitigate the financial considerations security concerns arising from eight consecutive years of filing late income tax returns, unresolved delinquent taxes, and credit card debt.

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 relevant 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 and the factors in AG ¶ 2(d) in this whole-person analysis.

Applicant filed the 2010-2017 delinquent income tax returns in September 2019. He does not have any established payment plan to resolve his Federal tax debt or the three remaining credit card debts totaling approximately \$20,000. Given his burden to demonstrate reliability, trustworthiness, and good judgment, I conclude Applicant did not mitigate 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, Guideline F:	AGAINST APPLICANT
Subparagraphs 1.a-1.d:	Against Applicant
Subparagraph 1.e:	For Applicant

Conclusion

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

Pamela C. Benson
Administrative Judge