



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



In the matter of:)
)
) ISCR Case No. 19-03067
)
Applicant for Security Clearance)

Appearances

For Government: Andrea Corrales, Esq., Department Counsel
For Applicant: *Pro se*

02/24/2021

Decision

COACHER, Robert E., Administrative Judge:

Applicant has not mitigated the financial considerations security concerns. Personal conduct concerns were not established. Eligibility for access to classified information is denied.

Statement of the Case

On January 30, 2020, the Defense Counterintelligence and Security Agency Consolidated Adjudications Facility (DCSA CAF) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline F, financial considerations, and Guideline E, personal conduct. DOD acted 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 effective June 8, 2017 (AG).

Applicant answered the SOR on March 9, 2020 (which contained attachments that were considered as part of his answer), and he requested a hearing before an administrative judge. The scheduling of this hearing was delayed because of the

COVID-19 pandemic. The case was assigned to me on November 16, 2020. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on December 10, 2020, and the hearing was convened as scheduled on January 6, 2021. The Government offered exhibits (GE) 1 through 9, which were admitted into evidence without objection. The Government's discovery letter sent to the Applicant and its exhibit list were marked as hearing exhibits (HE I and II). Applicant testified, but he did not offer additional exhibits aside from what he submitted earlier with his answer. The record was kept open until February 12, 2020, to allow him to submit any evidence related to the amended allegation (see below), or for any other relevant purpose. He failed to submit any additional evidence by the established deadline (See HE III—email string last dated February 16, 2021) and the record closed. DOHA received the hearing transcript (Tr.) on January 15, 2020.

Procedural Issue

Department Counsel moved to amend the SOR at hearing to add an additional allegation under Guideline F. Applicant objected to the amendment. The amendment's underlying facts concerned Applicant's untimely filings of federal and state tax returns for years 2010-2012 and 2019. The amended allegation was of a similar nature as the information alleged in SOR ¶ 1.b. The evidence supporting the amended allegation came from documents supplied by Applicant in response to interrogatories or from his hearing testimony. I overruled Applicant's objection and granted the motion to amend. I also ordered the record to remain open for over five weeks (February 12, 2021) to allow Applicant to submit additional evidence to address the amended allegation. As noted above, he did not provide any additional evidence before the deadline. The new SOR allegation is identified as ¶ 1.c and reads as follows: "You failed to timely file your federal and state 2 tax returns for tax years 2010-2012 and 2019." (Tr. at 104-109; GE 3 at pp 16-20)

Findings of Fact

Applicant denied all the allegations (except ¶ 1.c, which was neither admitted nor denied). After a review of the pleadings and evidence, I make the following findings of fact.

Applicant is a 60-year-old employee of a defense contractor. He began working for his current employer in 2009. He is a graduate of the U.S. Air Force Academy and was commissioned a second lieutenant upon his graduation in 1982. He served in the U.S. Air Force on active duty for six years, in the U. S. Air Force Reserve (AFR) for six years, and in the Air National Guard for eight years. He retired after 20 years of honorable service in 2009 as a lieutenant colonel. He earned a master's degree in 1989 and a law degree in 1991. He took out student loans while attending law school and still owes approximately \$60,000 on those loans. He was in private law practice for approximately 18 years after law school. The last nine years of his practice he specialized in bankruptcy law. He has been an active member of a state bar association for over 30 years. He is twice divorced (most recently in 2018) and has one adult son who lives with him. (Tr. at 7, 21-23, 41-42, 44-45; GE 1-2)

Under Guideline F, the SOR (and subsequent amendment) alleged that in 2008, Applicant had a state tax lien (state 1) filed against him in the amount of approximately \$3,382; that Applicant failed to file state 1 tax returns for tax years 2008-2009; and that Applicant failed to timely file his federal and state 2 tax returns for tax years 2010-2012 and 2019 (SOR ¶¶ 1.a-1.c).

Under Guideline E, it was alleged that Applicant deliberately failed to disclose a federal tax lien in the amount of \$6,176, entered in May 2010, on his July 2016 security clearance application (SCA); that he deliberately failed to disclose that his wages had been garnished for a debt, or that he was over 120 days delinquent on any debt previously listed, or that he is currently over 120 days delinquent on any debt on his July 2016 SCA; and that he provided false or misleading information on his February 2008 SCA when he affirmatively responded that he had been over 180 days delinquent on any debts and that he was currently over 90 days delinquent on any debt, and listed those debts as student loans in the amount of \$72,000. In July 2008, Applicant filed a Chapter 7 bankruptcy petition listing unsecured non-priority claims of over \$500,000, including medical, consumer, and non-educational debt of approximately \$173,000, none of which was earlier reported on his February 2008 SCA. (SOR ¶¶ 2.a-2.c).

Applicant's current financial difficulties began in approximately 2008, although he had received a Chapter 7 bankruptcy discharge in 1997. In 2008, he was engaged in the private practice of law in state 1. He also was earning income from his AFR position, which was subject to state 1 income tax. He decided to file for bankruptcy in 2008 because he wanted to dissolve his law practice, close his related credit-counseling business, and his real-estate business. Applicant claimed these actions were necessary because of a dispute he had with his real-estate business partner. He claimed the partner was expending business funds for non-business purposes. When Applicant confronted his partner about his actions and indicated he was going to report it to the police, Applicant claims the partner threatened his and his family's lives. Rather than go to the police, Applicant decided to close up his businesses, file for bankruptcy protection, and move to state 2. (Tr. at 24-26)

Applicant claims that the 2008-2009 time frame was tumultuous for him because of closing down his businesses, going through bankruptcy, moving to state 2, and starting a new job. He offers this as a partial explanation for his state and federal tax issues at the time. (Answer to SOR (Ans.))

The status of Applicant's financial issues is as follows:

State 1 Tax Lien Indebtedness, May 2008-\$3,382. Documentation shows that on May 14, 2008, a lien was filed in the amount of \$3,382 by the Department of Revenue for state 1 against Applicant. The document also shows that the notice of lien was addressed to Applicant's then-business address in state 1. Applicant claims he did not receive this notice and it was not forwarded to state 2, where he relocated in June 2009. He testified that he did not become aware of the lien until receiving interrogatories from the Government in August and November 2019. Despite being a bankruptcy attorney and running a credit-counseling business, he claims he did not run a credit

report to see if it listed any liens. After issuance of the SOR in January 2020, Applicant contacted the tax authorities in state 1 and confirmed the lien and the underlying state income tax debt. He documented a payment of \$4,150 (including penalty) to state 1, but he is unconvinced that he legally owed the state the money. (Tr. 30-33; GE 1, 3, 4, 8; Ans.)

Untimely Filings of Applicant's 2008 and 2009 state 1 tax returns. Applicant testified that he simply forgot about his 2008 return because it was when he was closing down his businesses and moving. He testified that he did not believe he had income from state 1 in 2009 and therefore he did not need to file a state return. He forgot about his AFR income which derived from state 1 and was therefore taxable. In the earlier interrogatories submitted to Applicant, he stated that he was convinced he had filed his 2008 and 2009 state tax returns. However, he had not filed either return when they were due. He presented documentation showing that both returns were not filed until February 2020. (Tr. 33-35; GE 4; Ans.)

Untimely Filings of Applicant's 2010-2012 and 2019 federal tax returns. Tax account transcripts supplied by the Applicant in response to Government interrogatories reflect that for tax year 2010, Applicant failed to file his own tax return by the filing deadline. This is established because the IRS filed a substitute tax return in May 2013. When asked about this at hearing, Applicant stated he could not really explain how this happened. Additional tax account transcripts for tax years 2011 and 2012 show that both years' returns were filed in April 2014, which was untimely for both years. Applicant admitted in his testimony that these filed federal returns, as well as his state tax returns for the same period, were untimely. Applicant was asked if he had other unfiled tax returns. He admitted that his 2019 federal and state tax returns had yet to be filed. The IRS extended the filing deadline from April 15 to July 15, 2020, for tax year 2019 because of COVID-19. Any requested filing extensions until October 15, 2020, also had to be filed by July 15, 2020 (See <https://www.irs.gov/coronavirus/coronavirus-tax-relief-filing-and-payment-deadlines>). Applicant explained that his father had passed away during the past year and he was back in his home state for eight weeks settling his father's affairs and he forgot to file his returns. He was going to get information to his accountant so he could get those returns filed quickly. He was given the opportunity to supplement the record by showing when he actually filed his returns, but he failed to do so. (Tr. at 99-105; GE 3)

Applicant stated that the reason he did not list the 2010 federal tax lien on his 2016 SCA was because he was unaware of the lien at that time. A federal tax lien is listed on Applicant's September 2016 credit report. In his 2008 SCA, Applicant listed a federal tax lien from 2003. A review of his tax transcript for year 2016 shows that he received a \$10,000 tax refund, which would have been captured by the IRS to pay any lien amount if it was still owed. These facts tend to corroborate Applicant's assertion that he was unaware of a federal tax lien when he completed his 2016 SCA. (Tr. at 36-37, 82, 86; GE 2, 3)

In Section 26 of his July 2016 SCA, Applicant was asked *inter alia*, "In the past seven years, have you had your wages . . . garnished for any reason? In the past seven

years, have you been over 120 days delinquent on any debt not previously entered? You are currently over 120 days delinquent on any debt?” He responded by checking the “no” option. Applicant’s wages were garnished beginning in August 2018, which was after he completed his SCA. Therefore, the garnishment question above is not at issue. However, Applicant believed the garnishment was based upon his delinquent student loans. He explained that he held both government-guaranteed loans and privately-held loans totally approximately \$75,000 for his law school education. He claimed that he has paid the government-backed loans since 2009 (up until the COVID-19 deferment). He further stated that he has not made payments on the private loans because the loans have been bought and sold by so many creditors he could not get any accounting of what he owed. He did not start paying on these private student loans until the garnishment took place. He listed his student loans in his 2008 SCA. He believed “no” was the correct answer to the 2016 SCA because he was paying his government-backed student loans and the status of his private-based student loans was unknown by him. (Tr. at 73-81; GE 2, 3, 5; Ans.)

Applicant explained why, in response to Section 28 of his February 2008 SCA, he listed delinquent debts of \$72,000 consisting of student loans, but in July 2008, he reported over \$500,000 in unsecured non-priority claims when he filed his Chapter 7 bankruptcy petition. Applicant stated that because he practiced bankruptcy law, he knew the best practice was to list any possible liability in his petition to ensure that all dischargeable liabilities would be discharged. That meant listing debts that were not delinquent at the time he filed his bankruptcy. An example of this was his listing of a \$100,000 contingency debt to his former business partner who threatened to sue Applicant. No debt was owed, but he listed it in his petition to protect him from a future claim by the partner. A completed breakdown of Applicant’s debts listed in his bankruptcy as to the type of debt and when they were delinquent is listed in his SOR answer. Additionally, Applicant did not run a credit report before completing his 2008 SCA, but he did run one before he completed his bankruptcy petition. (Tr. 37-39, 65-72; GE 1, 2, 6; Ans.)

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 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(a), 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.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, 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 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 that an 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.

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

AG ¶ 18 expresses the security concern for financial considerations:

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.

The guideline notes several conditions that could raise security concerns. I have considered all of them under AG ¶ 19 and the following potentially applies:

(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 had delinquent state tax debt which resulted in the filing of a lien against him in 2008. He failed to pay that debt until February 2020, after the issuance of the SOR. He also failed to timely file his 2008-2009 state 1 tax returns, or his 2010-2012 federal and state 2 tax returns. He also has failed to file his 2019 federal and state 2 tax returns. I find the above disqualifying condition is raised.

The guideline also includes conditions that could mitigate security concerns arising from financial difficulties. I have considered all of the mitigating conditions under AG ¶ 20 and the following potentially apply:

(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; 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.

While going through a bankruptcy, quitting his law practice, moving to a different state in 2009, and his father's death in 2020, may have been conditions beyond his control, Applicant did not take responsible action to timely pay the 2008 state 1 tax debt. He also failed to act responsibly by not timely filing his 2008-2009 state 1 tax returns or his 2010-2012 federal and state 2 tax returns. There is no evidence to show that he has ever filed his 2019 federal or state 2 tax returns. His non-filing and delay in filing shows a lack of reliability, trustworthiness, and good judgment. AG ¶¶ 20(b) and 20(g) partially apply.

Guideline E, Personal Conduct

AG ¶ 15 expresses the personal conduct security concern:

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.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying in this case. The following disqualifying condition is potentially applicable:

(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.

The Government failed to establish that Applicant deliberately falsified or provided misleading answers on his 2016 and 2008 SCAs. Applicant's assertion that he was unaware of the 2010 federal tax lien when he completed his 2016 SCA is corroborated by his past action in listing a tax lien in his 2008 SCA and by his tax transcripts showing that he received a tax refund during 2016.

Applicant credibly asserted that he did not deliberately provide false or misleading information concerning his student loans when completing his July 2016 SCA. He listed his student loans in his 2008 SCA. He had been paying his government-insured student loans, but the status and ownership of his privately-held student loans was unknown at the time he completed his SCA. Applicant's wage garnishment began after he completed his July 2016 SCA.

Applicant credibly asserted that he did not deliberately provide false or misleading information on his February 2008 SCA. The reason why his July 2008 bankruptcy petition contained significantly more liabilities than he listed as delinquent debts in his 2008 SCA was because his bankruptcy petition contained all his liabilities, contingent and those not yet delinquent, whereas his SCA disclosed only his delinquent debts at the time. Because no deliberate falsification was established, it is unnecessary to explore the applicability of any mitigating conditions.

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 guideline and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all relevant facts and circumstances surrounding this case. I have incorporated my comments under Guidelines F and E in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under those guidelines, but some warrant additional comment.

I considered Applicant's military service, his legal education as it related to understanding his tax filing obligation, and how his father's death and settling his affairs impacted the filing of his 2019 federal and state tax returns. His handling of his tax issues, particularly his non-filing of his 2019 federal and state tax returns, causes me to question his trustworthiness, reliability, and good judgment.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the financial considerations. As noted above, the personal conduct security concerns were not established.

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.c:	Against Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraphs: 2.a-2.c:	For Applicant

Conclusion

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

Robert E. Coacher
Administrative Judge