



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
) ISCR Case No. 19-01200
)
)
Applicant for Security Clearance)

Appearances

For Government: Adrienne Driskill, Esq., Department Counsel
For Applicant: *Pro se*

October 8, 2021

Decision

GLENDON, John Bayard, Administrative Judge:

Applicant failed to mitigate security concerns regarding financial considerations. Based upon a review of the pleadings, the documentary evidence, and Applicant's testimony, national security eligibility for access to classified information is denied.

Statement of the Case

On June 3, 2016, Applicant filed a security clearance application (SCA). On May 9, 2019, the Department of Defense (DoD), Consolidated Adjudications Facility (CAF), issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline F (Financial Considerations). The CAF acted under Executive Order 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended (Exec. Or.); DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) promulgated in Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (Dec. 10, 2016), effective within the DoD on June 8, 2017.

Applicant responded to the SOR (Answer). He requested a decision based upon the administrative record without a hearing before an Administrative Judge of the Defense Office of Hearings and Appeals (DOHA). Department Counsel, however, requested a hearing pursuant to Directive ¶ E3.1.7. On May 12, 2021, the case was assigned to me. DOHA issued a notice on July 19, 2021, scheduling the hearing for August 11, 2021. I convened the hearing as scheduled. Department Counsel presented Government Exhibits (GE) 1 through 8, which were admitted without objection. I marked six documents Applicant had attached to his Answer as Applicant Exhibits (AE) A through F, which were admitted without objection. (Hearing Transcript at 13-18.)

I kept the record open until August 18, 2021, to give Applicant the opportunity to supplement the record. He timely submitted one additional document, which I marked as AE G and admitted into the record without objection. DOHA received the hearing transcript (Tr.) on August 18, 2021. (Tr. at 73.)

Findings of Fact

Applicant's personal information is extracted from his SCA unless otherwise indicated by a parenthetical citation to the record. After a thorough and careful review of the pleadings, Applicant's testimony, and the documentary evidence in the record, I make the following findings of fact.

Applicant is 60 years old and has worked for a U.S. defense contractor as an engineer since August 2015. He enlisted in the U.S. Marine Corps at the age of 18 and served honorably for 21 years (1979-2000). He then earned a bachelor's degree in 2003. More recently, he started taking courses with a view towards earning a master's degree, but he has not pursued that further. He has married and divorced twice (1980-2001 and 2002-2008). He and his second wife separated after 3 years of marriage. He has two adult children, ages 37 and 38. (Tr. at 20-21.)

While serving in the Marine Corps, Applicant deployed a number of times, including several deployments to war zones. He experienced service-related post-traumatic stress disorder (PTSD). He has declined treatment of his condition by the U.S. Department of Veterans Affairs because he believes that its doctors place too much emphasis on medications. He sees a private therapist occasionally and is taking some medication for his condition. He suffers from depression and is inclined to procrastinate in doing some tasks, or as he wrote: "not taking care of things and letting them go." (Tr. at 22-24; GE 6 at 15.)

Applicant has held a security clearance for 21 years while in the Marine Corps and for 15 years as a civilian contractor. The CAF issued an SOR to Applicant in 2013 (2013 SOR) alleging security concerns under Guidelines F and E (Financial Considerations and Personal Conduct). A DOHA Administrative Judge granted Applicant continued eligibility for access to classified information in a decision dated September 30, 2013. (GE 8.)

The current SOR (2019 SOR) again alleges security concerns under Guideline F. Three of the four allegations in the 2019 SOR are similar to five of the allegations in the 2013 SOR. These allegations in the 2013 SOR relate to Applicant's failure to file his federal and state tax returns for tax years (TYs) 2009-2011, his failure to pay his federal and state taxes in TYs 2009-2012, and his failure to pay a student loan. (GE 8 at 3, 5.) The details of each of the allegations in the 2019 SOR are as follows:

SOR Allegations

1.a Failure to file and/or pay Federal income taxes in TYs 2008-2016 – Applicant testified that he has filed all of his Federal tax returns for the years alleged. He submitted the returns to the IRS on his own without professional help. He hired a tax firm to file his 2017 return, which it did. The tax firm was supposed to review his tax returns for the prior years and file amendments to reduce his taxes, if appropriate. The firm never did that, and he stopped working with them. At the time he filed his Federal returns, he had not paid all of the taxes he owes. He has not made any payments to the IRS since then, other than through a bankruptcy proceeding for about two years in the 2013–2015 period, as discussed below. (Tr. at 25-42, 51; AE A at 2.)

The CAF sent Applicant interrogatories asking him to provide his IRS Account Transcripts for TYs 2008-2017. He provided with his responses, dated in March 2019, summary account information only for the TYs 2009, 2012, and 2014. He provided wage and income transcripts, which do not contain the relevant information, for TY 2010. The IRS records reflect that he failed to file his tax return in 2009 and filed late in 2012 and 2014. The IRS summary account records also reflect that Applicant owes taxes for each of these three years, \$11,100 (TY 2009), \$408 (TY 2012), and \$4,778 (TY 2014). (GE 6 at 3, 15, 21-23, 26-30, 32-37, 40-42, 45-52.)

As of the date of the hearing, Applicant had no idea how much he owes the IRS for past-due taxes. In September 2020, over one year after he received the SOR, he hired a second tax firm to help him sort out his tax liabilities and to file his 2020 tax return, as well as his returns for TY 2018 and 2019. He has not yet filed those returns. The new firm is also supposed to create an installment payment plan for Applicant to pay his unpaid taxes. As of the close of the record, that had not happened. (Tr. at 25-42, 51-51; AE A at 2.)

1.b Failure to file and/or pay state income taxes in TYs 2008-2015 – Applicant testified that he timely filed all of his state tax returns for TYs 2008-2015 when he filed his Federal returns. He testified that he has also filed his returns for TYs 2016 and 2017. He provided no documents evidencing the filings or when the returns were filed. As of the hearing date, he had not filed his state tax returns for TYs 2018-2020. As noted, he has hired a new tax advisor to file these returns and to review his old returns. In his Answer, Applicant admitted that he has not paid all of his state taxes for TY 2008 to 2015. (Tr. at 42-51; GE 5 at 3; AE A at 2; AE F.)

The record evidence reflects that the state filed as many as three tax liens against Applicant, though Applicant believes there have only been two liens. The first one was filed in December 2010 in the amount of \$3,250. The Government's September 2016 credit report, GE 5, reflects that this lien was paid in July 2012. It likely covers tax deficiencies for TY 2009 or earlier. Applicant incorrectly wrote in his responses to the CAF's interrogatories that this lien was for his 2016 taxes, which post-dates the filing date of the lien. A second lien was filed on July 18, 2017, in the amount of \$9,067. Applicant believes that this lien covers all the tax years prior to 2015. Applicant wrote in his interrogatory responses that the state first garnished his wages in August 2018 in the amount of \$597 per month, but the amount was later reduced to \$125 per month. He testified that this garnishment has ended and the lien was paid off in 2020. The state has issued another garnishment, and likely a third tax lien, which is not in the record, for taxes owed in TY 2018 and 2019. The state takes about \$300 per month from Applicant's wages under this garnishment. Applicant is unaware of the amount of his current tax debt, but he estimates that the total amount of the garnishment is about \$10,000. The garnishment will end in three years. Applicant has paid and is paying his state tax deficiencies since TY 2008 through involuntary garnishments. Even as recently as 2019, he has not paid his state taxes, as required. (Tr. at 42-51; GE 5 at 3; AE A at 2; AE F.)

1.c June 2013 Chapter 13 bankruptcy, converted to a Chapter 7 bankruptcy and discharged in November 2015 – Applicant filed a petition for bankruptcy under Chapter 13 on June 28, 2013, in which he sought to pay his delinquent Federal and state taxes through his bankruptcy repayment plan over five years. He listed on Schedule E his unsecured priority claims, which consisted of Federal tax debts of \$11,641 for TY 2010, \$9,770 for TY 2011, and \$5,270 for TY 2012, totaling \$26,682. He also listed state tax debts of \$1,930 for TY 2010, \$1,998 for TY 2011, and \$1,894 for TY 2012, totaling \$5,822. On Schedule F, he listed two student loans, one for about \$10,610 and a second one for \$114. Four months earlier, the DoD issued the 2013 SOR in which it alleged that Applicant owed past-due Federal taxes for TY 2009-2012 in the total amount of \$41,802 and state taxes for TY 2009-2012 in the total amount of about \$6,668. Applicant admitted each of these debts in the earlier DOHA proceeding. (Tr. at 51-53; GE 7 at 15, 19; GE 8 at 5.)

The Bankruptcy Court approved Applicant's Chapter 13 repayment plan on August 21, 2013. In his September 20, 2013 decision, the DOHA Administrative Judge granted Applicant's security clearance renewal application under the then applicable adjudicative guidelines, writing that: "Applicant has submitted substantial evidence to show that he has filed a Chapter 13 bankruptcy, which will repay all of his past-due debts in full within five years Applicant has made arrangements to pay his tax indebtedness through his bankruptcy plan." He concluded his decision with the comment that: "Applicant has had financial problems for several years, which are now being resolved. He currently shows good judgment with regard to his debt. In my opinion, he will continue to exercise such judgment in the future." (GE 7 at 2; GE 8 at 8-10.)

On December 13, 2013, Applicant's employer was ordered under the Chapter 13 bankruptcy plan to deduct the payments from Applicant's wages and forward the payments to the Trustee for further distribution to Applicant's creditors. Applicant's

Chapter 13 plan provided for him to repay 100% of his debts to all of his creditors over a five-year period. (Tr. at 52-53; GE 7 at 1, 4.)

Less than two years into the five-year repayment plan, Applicant converted his Chapter 13 bankruptcy to Chapter 7 on August 27, 2015. Under Chapter 7, Applicant obtained a discharge on November 24, 2015, of his unsecured non-priority debts totaling \$62,819, less his student loans, which were not discharged. His past-due taxes were also not discharged, though a portion of them may have been reduced by his payments under his Chapter 13 plan during the period from December 2013 to August 2015. After the conversion of the bankruptcy proceeding to Chapter 7, Applicant asked his tax advisor to help set up a payment plan with the IRS. That did not happen. Applicant has never been able to determine how much his Federal tax debt was reduced by his Chapter 13 payments. The limited IRS tax account records Applicant submitted to the CAF reflect five payments made through the bankruptcy proceeding during the period March 2015-June 2015 totaling \$5,302. (Tr. at 52-53; GE 7 at 1, 4.)

Applicant chose to convert his Chapter 13 bankruptcy to Chapter 7 because he left his employment by mutual agreement with the employer. His bankruptcy attorney advised him to make the conversion because it was uncertain when he would find new employment and be able to continue making his Chapter 13 payments. (Tr. at 53-60.)

1.d Charged-off credit-card account in the amount of about \$710 – Applicant opened this account in February 2016 and defaulted on it in August 2016. He is not aware of this account. Applicant suggested that due to a data breach of his credit at Equifax, this account might be the result of identity theft. He has done nothing to resolve his concern about the legitimacy of this debt, and if legitimate, to resolve it. (Tr. at 61-66, 76-78; AE A at 2; GE 3 at 3; GE 4 at 2 .)

1.e Student loan account in collection in the amount of about \$10,792 – Applicant's student loan account was opened in 2003. It became delinquent in about 2016. When Applicant started his master's program, payments on this loan were deferred for about six months. He has been making payments of about \$65 per month since then. His current balance is about \$6,000. This account is being resolved. (Answer; Tr. at 60-61, 66-73; GE 3 at 2-3; GE 4 at 3; GE 5 at 10, 11; AE E; AE G.)

Applicant testified that he received financial counseling through his bank as well as the mandatory financial counseling required when filing for bankruptcy. He said that he prepared a budget and used it for a period. He learned that he should stop buying things that he could not afford. He did not provide any further details. His current annual income is \$111,000. He also receives military retirement and disability benefits of about \$25,000 per year. He prepared a budget of his income and expenses in March 2019, which reflects a monthly net remainder of \$1,710. (Tr. at 74-75.)

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.

Adverse clearance determinations 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 as follows:

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.

The Government’s credit reports listing 18 delinquent debts establish the following conditions under AG ¶ 19 that could be disqualifying:

- (a): inability to satisfy debts;
- (c): a history of not meeting financial obligations; and
- (d): 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 guideline in AG ¶ 20 contains seven conditions that could mitigate security concerns arising from financial difficulties. Six of these mitigating conditions have possible applicability to the facts of 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 taken 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.

AG ¶ 20(a) is not established. Applicant's federal and state tax debts span many years and remain outstanding. They occurred under circumstances that are likely to recur. Applicant's behavior casts doubt on his current reliability, trustworthiness, and judgment.

AG ¶ 20(b) is only partially established. Applicant's financial problems arose in part due to his PTSD and related depression. He has not been able to materially change his behavior with medical intervention, and he has not acted responsibly under the circumstances by effectively working with tax professionals to help him resolve his tax filing and paying issues, which date back to at least 2009.

AG ¶ 20(c) is only partially established. Applicant received financial counseling and the assistance of two tax professionals. There are no clear indications, however, that this counseling has helped him resolve his tax issues.

AG ¶ 20(d) is only partially established. Applicant initiated a good-faith effort to repay his student loan. He is resolving his state tax debts through involuntary garnishments of his wages, which has limited mitigation value under this mitigating condition. He has not, however, entered into a payment plan with the IRS even though he has had the financial means to do so for several years. His decision to convert his Chapter 13 bankruptcy proceeding to a Chapter 7 proceeding had the effect of avoiding his obligations to all of his pre-2013 non-priority creditors, *i.e.*, all of his creditors holding consumer debts. In addition, he did not honor his implicit 2013 commitment made to, and relied upon by, the DOHA administrative judge that he would repay all of his creditors with his Chapter 13 bankruptcy plan.

AG ¶ 20(e) is not established. Applicant disputes the credit-card debt alleged in 1.d, but he has taken no actions to dispute the debt with the collection agency, nor has he submitted any documentation in support of the legitimacy of the dispute and his efforts to resolve it.

AG 20(g) is only partially established. There is limited documentary evidence in the record establishing that Applicant has filed two Federal tax returns, one for TY 2012 and the other for TY 2014. There is also the 2013 DOHA decision in which the Administrative Judge found that Applicant had filed his Federal tax returns for TYs 2009-2011. The Judge found that Applicant filed the first two returns late. Under the circumstances, I find Applicant's testimony credible that he filed his other Federal and state tax returns during the 2008-2016 period, timely or otherwise. As noted, Applicant has not, however, made any arrangements with the IRS to pay his past-due Federal taxes for that period. Applicant candidly admits that he does not know how much he owes the IRS. He is paying or has paid his past-due state taxes involuntarily through the legal process of garnishment. The state initiated that process by filing liens and garnishments. Applicant has no choice but to receive reduced wages due to the state's garnishments.

Whole-Person Analysis

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):

- (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.

I have incorporated my comments under Guideline F in my whole-person analysis and applied the adjudicative factors in AG ¶ 2(d). I have given great weight to Applicant's 21 years of military service and to his service-related disability. His condition deserves significant empathy from everyone in his life, which includes me as the Administrative Judge assigned to adjudicate his security clearance eligibility. His condition, however, does not qualify as a mitigating condition under the applicable adjudicative guidelines. To be eligible to be granted access to classified information, Applicant must demonstrate that he is capable of fulfilling his duties and obligations to his country, which include filing and paying his taxes, as required. Applicant's evidence in mitigation falls short of meeting that standard, which is expected of every U.S. citizen.

Overall, the record evidence as described above leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. After weighing the applicable disqualifying and mitigating conditions and evaluating all of the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns raised by his financial considerations.

Formal Findings

Paragraph 1, Guideline F:	AGAINST APPLICANT
Subparagraphs 1.a through 1.d:	Against Applicant
Subparagraph 1.e:	For Applicant

Conclusion

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

John Bayard Glendon
Administrative Judge