



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



In the matter of:)	
)	
)	ISCR Case No. 19-02518
)	
Applicant for Security Clearance)	

Appearances

For Government: Bryan Olmos, Department Counsel
For Applicant: William C. Meili, Esq.

01/25/2021

Decision

CERVI, Gregg A., Administrative Judge

This case involves security concerns raised under Guideline F (Financial Considerations) and Guideline E (Personal Conduct). Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on June 7, 2018. On October 10, 2019, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guideline F (Financial Considerations) and Guideline E (Personal Conduct). The DOD CAF acted under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AGs), applicable to all adjudicative decisions issued on or after June 8, 2017.

Applicant responded to the SOR on November 18, 2019, and requested a hearing before an administrative judge. The case was assigned to me on January 30, 2020. Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on February 10, 2020, scheduling the hearing in Applicant's metropolitan area for March 24, 2020. The hearing was canceled due to COVID-19 related cessation of travel and courtroom availability.

DOHA issued a notice of video teleconference on November 5, 2020, and the hearing was convened on November 13, 2020. Applicant was not represented by counsel at the hearing. Counsel entered an appearance on November 17, 2020, and requested the hearing be reopened to permit additional testimony from Applicant and evidence, or in the alternative, he requested additional time to submit post-hearing evidence. I denied reopening the hearing, but granted extensions of time to file post-hearing evidence.

Government Exhibits (GE) 1 through 3 were admitted into evidence without objection. Applicant testified and submitted Applicant Exhibits (AE) A through E. The record was initially held open until November 13, 2020, to permit Applicant to submit additional documentary evidence. At the request of Counsel, that deadline was extended to November 30, 2020, and again to December 11, 2020. Applicant submitted additional documents collectively marked AE I, and they were admitted into evidence without objections. DOHA received the hearing transcript on December 1, 2020.

Findings of Fact

Applicant is a 46-year-old avionics technician for a defense contractor, employed since June 2018. He graduated from high school in 1991, and earned an associate's degree in 1998. He was married in 2004 and divorced in 2015. Applicant has eight children between the ages of 14 and 27, but none live with him. This is Applicant's first application for security eligibility.

The SOR alleges under Guideline F that Applicant failed to file Federal income tax returns as required, for tax years 2010, 2012, 2013, 2014, and 2015. (SOR ¶ 1.a) It also alleges Applicant failed to file Federal tax returns in a timely fashion for tax years 2016 and 2017. (SOR ¶ 1.b) Also, the SOR alleges that Applicant is indebted to State "A" for delinquent taxes from 2002, 2003, 2009, and 2011 in the amount of \$25,332. (SOR ¶ 1.c) Finally, the SOR alleges Under Guideline E that Applicant falsified his June 7, 2018 SCA by deliberately failing to disclose that he failed to file or pay Federal or state taxes, as listed as SOR ¶¶ 1.a through 1.c. (SOR ¶ 2.a) Applicant admitted all but the first SOR allegation with explanations. He noted in his Answer to SOR ¶ 1.a, that his Federal income taxes have been filed, and he is currently making payments. As to SOR ¶ 1.b, he stated that his federal taxes were not filed in a timely fashion, but have since been filed. In response to SOR ¶ 1.c, he stated that his "state tax is in process as of the date of this SOR." As to the SCA falsification allegation, Applicant answered that it was an oversight on his behalf, and that he revealed his mistake to his investigator during the interview.

Applicant's Federal tax issues date back to at least 2002. He testified that he was previously on a Federal tax repayment plan, but did not know the dates. His IRS tax transcripts show a refund due in 2008 was credited toward taxes owed in 2003 and 2005. (GE 3) A tax refund due in 2009 was credited for taxes owed in 2002. Applicant testified that negligence on his part resulted in this situation. He is making installment payments for his Federal income tax debts, and he has an installment plan to pay his state tax debt.

As to the SOR tax filing allegations, he admitted that he did not file tax returns as alleged, but testified that he filed 2008 to 2016 tax returns in 2018, and that the 2017 and 2018 returns were filed on time. His 2010 tax return has yet to be filed. Applicant's testimony as to filing dates was contradicted by the tax returns submitted after the hearing. Also, Applicant testified that he filed his 2019 tax return, but did not pay the tax owed because he did not know whether he would have a job after the November elections, despite having about \$25,000 in savings. Applicant testified that he started using an accountant in 2018 or 2019, to assist him with his tax return submissions.

Applicant testified that he agreed to a Federal installment repayment plan in October or November 2018. However, in his post-hearing submission, he provided an IRS letter showing his agreement to a Federal installment agreement beginning in October 2019. (AE F) Applicant's IRS installment agreement statement dated September 23, 2020, shows that he owes Federal taxes for 2012, 2014, 2015, and 2018. (AE A) He testified that he also owes about \$4,000 for unpaid 2019 taxes. Applicant's agreement with the IRS was to pay \$250 per month. He provided evidence that he made inconsistent Federal tax payments under the plan in November 2019 (three payments totaling \$500); January – March 2020; August 2020; September 2020 (two payments totaling \$500); and October 2020. (AE E) He testified that from June to November, he only made two payments because his work hours were reduced from February to June 2020 due to rolling furloughs. However, he lost only two weeks of pay during that period, totaling about \$2,400.

Applicant's state tax delinquencies date from 2002 through 2009, and 2011. He made payments toward state taxes owed in 2004, 2011, and 2019. (GE 3) Applicant testified that his state "A" tax returns were filed in 2018, and that he has a balance of approximately \$25,000. No documentary evidence was submitted showing when his state tax returns were filed. Applicant did not volunteer his tax delinquency with State "A" during his personal subject interview. In fact, made a point of noting to the investigator, that his tax delinquencies involved "just Federal taxes as [state "B"] does not have state taxes." (GE 2)

As of July 21, 2020, Applicant owed the state \$6,967 in tax, \$2,552.51 in penalties, \$15,489.18 in interest, with a balance of \$25,007.69. (AE B) He made a payment under a state installment plan in June 2020, and another payment in September 2020. He noted that he has not made regular monthly payments under the plan. After the hearing, Applicant secured a new payment plan dated December 1, 2020, requiring payments of \$200 per month for 12 months, starting on December 30, 2020. This payment plan will pay \$1,103.33 toward his current total balance due, but does not resolve the total tax

debt. (AE F) He noted in his testimony that he missed state tax payments so that he can make federal tax payments.

In his post-hearing submission, Applicant provided Federal tax returns showing his 2019 return was filed on December 1, 2020, and he owes \$4,638. Applicant's submission does not show when the 2018 return was filed. His 2017 return was filed on April 2, 2019, and his 2012 through 2016 tax returns were filed in March 2019. (AE F) These submissions contradict Applicant's testimony as to when he filed his delinquent returns, and his claim that the 2017 (and maybe 2018) Federal tax returns were filed on time.

Applicant testified that by 2014 or 2015, his financial life improved to allow him to catch up on debts, taxes, and savings. Although he was aware that he owed tax debts, he was fearful of using his savings to pay debts. He decided to accumulate savings rather than address his tax debts. In June 2018, he completed his SCA, but failed to disclose that he failed to file tax returns, or owed Federal and state taxes. He testified that he was aware of his debts, but did not know how much he owed because he had not filed returns. During his November 2018 interview by a Government investigator, he volunteered "that he does have a few years of taxes that he needs to file, which weren't listed due to error," and stated that "he needs to file 4 or 5 years' worth of taxes since he's been in [state "B"]." GE 2)

Applicant testified that he traveled on vacation to Antigua, Canada, and England in 2017, and again to England in 2018 or 2019. He also travels to Las Vegas, but does not gamble. He owes about \$100,000 in a recreational vehicle debt (current) and student loans (deferred until December 2020). In 2014, he testified that he had delinquent student loans and medical debts, but he is now current. He stated that he hoped to pay his tax debts by 2021.

Applicant has about \$25,000 in a savings account, \$500 to \$1,000 in a checking account. He has about \$40,000 in a 401k retirement plan, and just before the hearing, he took out a loan for \$20,000. Applicant's adjusted gross income in 2018 was \$93,727 and \$118,624 in 2019. He testified that he expected to make about \$100,000 in 2020. Applicant testified that despite the availability of funds, he did not plan to pay his taxes until 2021, because he believed it to be more valuable to have savings. He also testified that he hoped to hire legal counsel to assist him in not paying the total tax debts that he owes. He has not had financial counseling.

Applicant submitted credit agency scores and a character letter from a work supervisor who noted Applicant was one of his best employees, dependable, talented, outstanding, and self-directed with no disciplinary issues or infractions. Finally, Applicant incorrectly claimed in his post-hearing submission that the government investigator concluded in Applicant's subject interview summary stating that Applicant's background cannot be used to blackmail or coerce him. As a matter of practice, Government investigators do not make conclusions or evaluations of the interviewee's security status in the subject interview summaries. Rather, statements such as this typically denotes an Applicant's summarized response to a related question.

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.

National security eligibility 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 a person’s stability, trustworthiness, reliability, discretion, character, honesty, and judgment. AG ¶ 1(b).

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Clearance decisions must be made “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. *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, e.g.*, ISCR Case No. 12-01295 at 3 (App. Bd. Jan. 20, 2015).

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, e.g.*, 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; see, AG ¶ 1(d).

Analysis

Guideline F: Financial Considerations

The security concern under this guideline is set out in AG ¶ 18:

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

The relevant disqualifying conditions under AG ¶ 19 include:

- (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’s admissions, testimony, and the documentary evidence in the record are sufficient to establish the disqualifying conditions AG ¶¶ 19(a), (c), and (f).

The following mitigating conditions under AG ¶ 20 are potentially relevant:

- (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.

The DOHA Appeal Board has long held:

Security requirements include consideration of a person's judgment, reliability, and a sense of his or her legal obligations. ISCR Case No. 14-04437 at 3 (App. Bd. Apr. 15, 2016); *Cafeteria & Restaurant Workers Union, Local 473 v. McElroy*, 284 F.2d 173, 183 (D.C. Cir. 1960), *aff'd*, 367 U.S. 886 (1961). Failure to comply with Federal tax laws suggests that an applicant has a problem with abiding by well-established government rules and regulations. Voluntary compliance with rules and regulations is essential for protecting classified information. See, e.g., ISCR Case No. 14-04437 at 3 (App. Bd. Apr. 15, 2016). Someone 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. See, e.g., ISCR Case No. 14-01894 at 5 (App. Bd. Aug. 18, 2015). See *Cafeteria & Restaurant Workers Union Local 473 v. McElroy*, 284 F.2d 173, 183 (D.C. Cir. 1960), *aff'd*, 367 U.S. 886 (1961).

Applicant's long history of failing to fulfill his Federal and state tax obligations shows a history of financial irresponsibility. His financial problems have been longstanding and remain a current concern. A debt that became delinquent several years ago is still considered recent because "an applicant's ongoing, unpaid debts evidence a continuing course of conduct and, therefore, can be viewed as recent for purposes of the Guideline F mitigating conditions." ISCR Case No. 15-06532 at 3 (App. Bd. Feb. 16, 2017) (citing ISCR Case No. 15-01690 at 2 (App. Bd. Sept. 13, 2016)).

Although Applicant has filed most of his delinquent tax returns (except 2010), and has recently begun to reignite his Federal and state installment plans, he has shown an inability or unwillingness to make consistent payments on those plans, and did not begin to address his tax issues until he was interviewed by a Government investigator in November 2018, with the late filing of tax returns beginning in the spring of 2019. His actions appear to be in response to his desire for security eligibility, rather than a legal and moral obligation to abide by Federal and state laws and regulations. His newfound interest in complying with the law amounts to too little, too late. I am not convinced that similar behavior will not recur, and he continues to carry a substantial debt to the IRS and state tax authorities despite his personal savings and substantial income. Despite knowing of the Government's concerns from his personal subject interview, SOR,

interrogatories, and hearing, Applicant testified that he chose to keep a substantial amount of cash in his savings account, and did not intend to use it to pay his tax debts.

Although failure to pay Federal taxes when due was not alleged in the SOR, it is appropriate to consider it:

(a) to assess Applicant's credibility; (b) to evaluate his evidence of extenuation, mitigation, or changed circumstances; (c) to consider whether he has demonstrated successful rehabilitation; (d) to decide whether a particular provision of the Adjudicative Guidelines is applicable; or (e) to provide evidence for whole-person analysis. See ISCR Case No. 03-20327 at 4 (App. Bd. Oct 26, 2006).

Overall, I believe Applicant preferred to ignore his tax obligations while enjoying personal travel and a substantial savings account. Based on the record presented, I am unable to conclude that Applicant's financial problems are under control or are unlikely to recur. Applicant is credited for eventually filing most of his outstanding tax returns and entering into IRS and state tax repayment plans. However, that mitigating credit does not eliminate the security concerns raised by Applicant's overall financial irresponsibility as it relates to meeting Federal and state income tax obligations when required. He has not established a reliable track record of addressing his tax obligations when due, and he has not participated in any financial counseling. I remain doubtful about Applicant's current reliability, trustworthiness, good judgment, and willingness to voluntarily abide by government rules and regulations. None of the mitigating conditions fully apply.

Guideline E: Personal Conduct

The security concern for personal conduct is set out in AG ¶ 15, as follows:

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. 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; and

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

Applicant did not disclose his long history of failure to file or pay taxes as required, on his SCA, despite being fully aware of the matter. The Appeal Board has cogently explained the process for analyzing falsification cases, stating:

(a) when a falsification allegation is controverted, Department Counsel has the burden of proving falsification; (b) proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred; and (c) a Judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning the applicant's intent or state of mind at the time the omission occurred.

ISCR Case No. 03-10380 at 5 (App. Bd. Jan. 6, 2006) (citing ISCR Case No. 02-23133 (App. Bd. June 9, 2004)). The record evidence establishes that Applicant intentionally falsified his 2018 SCA. The evidence shows that Applicant clearly was aware of the existence of the tax debts and unfiled tax returns when he completed his SCA, although he may not have been aware of the total amount of taxes he owed. Applicant discussed his failure to file tax returns with the government investigator during his PSI, but did not volunteer that he owed a substantial amount to state "A" in delinquent taxes, interest, and penalties. Although his failure to disclose his state tax status in his subject interview was not alleged in the SOR, it may be considered for the purposes as previously stated under Guideline F. AG ¶¶16(a) and (b) apply.

AG ¶ 17 provides conditions that could mitigate security concerns in this case:

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

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur; and

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

Mitigating conditions ¶¶ 17 (a) and (e) are applicable to Applicant's circumstances, however I am concerned about the degree of his egregious, intentional falsification of his SCA. Applicant was well aware of his long-standing history of tax deficiencies, but failed to disclose them, ostensibly because he did not know how much he owed. This knowing and willful behavior is strongly disfavored in security eligibility determinations. There are no possible grey areas to hide behind in this regard.

Applicant ignored fully and truthfully answering such a clear and unambiguous question, likely in an attempt to avoid disclosing the extent of his tax problems. His later admission of having a "few years" of taxes to file does not fully mitigate the prior conduct. In addition, I am considering that he did not voluntarily disclose the extent of his tax-related debts to State "A" in his subject interview in my evaluation of Applicant's credibility, mitigation, rehabilitation, and whole-person analysis. Applicant's intentional falsification continues to cast doubt on his reliability, trustworthiness, and good judgment. Overall, personal conduct security concerns are not mitigated.

Whole-Person Concept

Under AG ¶¶ 2(a), 2(c), and 2(d), the ultimate determination of whether to grant national security eligibility must be an overall commonsense judgment based upon careful consideration of the guidelines and the 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).

I considered all of the potentially disqualifying and mitigating conditions in light of the facts and circumstances surrounding this case. I have incorporated my findings of fact and comments under Guidelines F and E in my whole-person analysis. I also considered Applicant's employment status and performance, past financial difficulties, arrangements to pay his taxes, and efforts to late-file his tax returns. However, I remain unconvinced of his overall financial responsibility and ability, intent, and desire to meet his tax obligations in the future, and willingness to report his financial circumstances when required.

Accordingly, I conclude Applicant has not carried his burden of showing that it is clearly consistent with the national security interest of the United States to grant him eligibility for access to classified information.

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: Subparagraphs 1.a – 1.c:	AGAINST APPLICANT Against Applicant
Paragraph 2, Guideline E: Subparagraph 2.a:	AGAINST APPLICANT Against Applicant

Conclusion

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

Gregg A. Cervi
Administrative Judge