



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



In the matter of:)
)
) ISCR Case No. 20-03249
)
Applicant for Security Clearance)

Appearances

For Government: Daniel O’Reilly, Esq., Department Counsel
For Applicant: Leon J. Schachter, Esq.

02/07/2022

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant did not mitigate the personal conduct and financial considerations security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On January 8, 2021, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines E (personal conduct) and F (financial considerations). Applicant responded to the SOR on February 9, 2021, and requested a hearing before an administrative judge. The case was assigned to another administrative judge on September 1, 2021, and reassigned to me on October 15, 2021. The hearing was convened as scheduled on October 26, 2021. The case was continued at Applicant’s request after the SOR was amended, and reconvened on January 21, 2022. The transcript of the first hearing (Tr.) was received on November 2, 2022. The transcript of the reconvened hearing (Tr.2) was received on January 31, 2022.

Procedural and Evidentiary Rulings

Evidence

Government Exhibits (GE) 1 and 3 through 6 were admitted in evidence without objection. GE 2 was withdrawn and returned to Department Counsel after Applicant objected to its admission. Applicant testified and submitted Applicant's Exhibits (AE) A through H at the first hearing, AE I through K at the reconvened hearing, and AE L through O post-hearing, all of which were admitted without objection.

Motion to Amend SOR

Department Counsel's motion to amend the SOR by adding two additional allegations under Guideline F and additional language to SOR ¶ 2.a was granted over Applicant's objection. The new and amended allegations are as follows:

1.f. You owe the Internal Revenue Service about \$40,000 in unpaid taxes.

1.g. You owe the State of [REDACTED] about \$40,000 in unpaid taxes.

2.a. You falsified material facts on an Electronic Questionnaires for Investigations Processing (e-QIP) **And you deliberately failed to report your delinquent federal income taxes under any of the financial questions.** (Additional language in bold)

Findings of Fact

Applicant is a 56-year-old employee of a defense contractor. He has a bachelor's degree and a master's degree. He is married with an 11-year-old child and two adult stepchildren. His two-year-old step granddaughter lives with him and his wife. (Transcript (Tr.) at 14-16, 24, 53; GE 1; AE O)

Applicant has a history of financial problems, including defaulted student loans, bankruptcies, unpaid state and federal income taxes, and delinquent debts. His student-loan issues go back to after he left college, and his tax issues go back to 2002. He attributed his financial problems to periods of unemployment and assisting his family financially. (Tr. at 22-23, 29-31; Tr.2 at 17; GE 1)

Applicant attended one college for a period, which he financed at least partially through student loans. He earned a scholarship to another college where he was an All American athlete. He went to the Olympic Trials in 1992 and 1996. He received a master's degree while coaching at his undergraduate college. He continued to coach high school athletes, and he helped high school athletes prepare for college and receive scholarships. (Tr. at 15-21, 27, 33; AE A)

Applicant filed a Chapter 7 bankruptcy case in January 2013. Under Schedule D, Creditors Holding Secured Claims, the petition listed a \$20,234 auto loan. Under

Schedule E, Creditors Holding Unsecured Priority Claims, the petition listed \$49,132 in federal income taxes, penalties, and interest for tax years 2009, 2010, and 2011. Under Schedule F, Creditors Holding Unsecured Nonpriority Claims, the petition listed claims totaling \$155,269. The claims included \$77,942 in federal income taxes, penalties, and interest for tax years 2003 through 2008. The petition listed \$5,261 in state income taxes, penalties, and interest for tax year 2009, and it listed \$14,061 owed on a guaranteed student loan. (Tr. at 21-24; Applicant's response to SOR; GE 6; AE H)

Applicants dischargeable debts were discharged in May 2013. The order stated: "SEE THE BACK OF THIS ORDER FOR IMPORTANT INFORMATION." The back of the order provided additional information, including the following:

Debts That are Not Discharged

Some of the common types of debts which are not discharged in a chapter 7 bankruptcy case are:

- a. Debts for most taxes;

- d. Debts for most student loans. (GE 6)

Applicant filed a Chapter 13 bankruptcy case in June 2014. Under Schedule E, Creditors Holding Unsecured Priority Claims, the petition listed \$9,395 in federal income taxes for tax years 2012 and 2013, and \$8,546 in state income taxes for the same years. Under Schedule F, Creditors Holding Unsecured Nonpriority Claims, the petition listed \$25,131 in federal income taxes for tax years 2009, 2010, and 2011, and \$6,009 in state income taxes for 2011. The case was dismissed in August 2017. (Tr. at 24-26; Applicant's response to SOR; GE 5; AE H)

Applicant defaulted on his student loans. The September 2019 credit report lists a student loan in collections, owed to the U.S. Department of Education, with a balance of \$41,752. The July 2020 credit report listed that the balance had increased to \$42,660. Applicant admitted that he had not made any payments for about 20 years until he entered into a loan rehabilitation program in February 2021 to make nine monthly payments of \$49. The Department of Education confirmed in October 2021 that Applicant made the required payments, and his loan was rehabilitated and back in good standing. (Tr. at 27-35; Applicant's response to SOR; GE 3, 4; AE B, H)

Applicant settled the \$1,738 debt in SOR ¶ 1.d for \$950 in September 2021. He paid the \$920 debt in SOR ¶ 1.e in September 2021. He received financial counseling from a federal agency, and he received financial advice from a college friend. (Tr. at 29-32, 36-37; GE 3, 4; AE C, D, F-H)

Applicant submitted a Questionnaire for National Security Positions (SF 86) in August 2019. He reported both bankruptcies. For the Chapter 13 bankruptcy, he checked the box indicating that he was discharged of all debts claimed in the

bankruptcy. He explained that “Consolidation in progress,” including state tax liens of \$4,627, filed on September 13, 2013, and \$5,977, filed on October 24, 2012. (GE 1)

Applicant did not report his defaulted student loans on the SF 86 under any of the financial questions. He initially testified that he did not report his student loans because he thought they were in deferment. He stated that he called the student loan provider when he was out of work and asked if his loans could be deferred until he found a job. When he was asked why after 20 years of no payments, he would call the provider and ask for a deferment, he changed his story to he did not call the student loan provider for a deferment, he called the credit card companies. He stated that he did not report the student loans on the SF 86 because he thought they had been discharged in bankruptcy. (Tr. at 29, 32-33, 39-44; GE 1)

Applicant did not report his delinquent federal income taxes on the SF 86 under any of the financial questions, including questions that asked: “**In the last seven (7) years** have you failed to file or pay Federal, state, or other taxes when required by law or ordinance?” and if: “You are currently delinquent on any Federal debt.”

Applicant submitted a personal financial statement at his hearing that reported a monthly remainder of \$3,639 after deductions, liabilities, and expenses were deducted from his gross income. It did not include any deductions for federal and state income taxes. When asked if he owed any federal and state income taxes, he asserted that he was paying his state about \$500 per month toward a debt of \$40,000 to \$45,000. (Tr. at 44-46, 50; AE E) As to the IRS, he was asked:

AJ: And how much do you owe the IRS?

Applicant: It's - - right now currently I don't owe the IRS.

AJ: You don't owe the IRS?

Applicant: Right now, currently I don't. (Tr. at 46-47)

When pressed, Applicant admitted that he probably owed the IRS about \$50,000 to \$70,000, including about \$10,000 for 2020. (Tr. at 47-50) At the reconvened hearing, he was evasive and never gave an actual amount that he owed the IRS, but estimated a figure of \$100,000. (Tr.2 at 9-14, 21-22)

In January 2022, Applicant contracted with a tax attorney to represent his interests with the IRS. He agreed to pay the attorney \$11,273 for his fees, payable in 17 monthly payments of \$626, through May 2023. Applicant's 2013 bankruptcy petition reported that he owed \$127,074 to the IRS for taxes owed through 2011. His 2014 bankruptcy petition reported that he owed the IRS an additional \$9,395 for tax years 2012 and 2013. That adds up to \$136,469 owed to the IRS in 2014, and it does not include additional penalties and interest or the amounts owed for tax years after 2013. Absent any documented proof from Applicant, his testimony that he owes the IRS about \$100,000 is not credible. (Tr.2 at 9-14, 21-22; GE 5, 6; AE I, K)

On October 26, 2021, Applicant entered into a payment agreement with his state to pay \$500 per month toward his income tax debt of \$124,998 for tax years 2002, 2003, 2005 to 2011, 2013 to 2016, 2019, and 2020. He paid the state \$1,537, which included a \$37 service fee, by credit card on October 1, 2021. (Tr.2 at 7-9, 13; AE J, N)

Applicant denied intentionally providing false information on the SF 86. He always filed his tax returns, but he did not always pay what was owed. He testified that since the question asked “have you failed to file **and/or** pay Federal, state, or other taxes” (language in bold is not in the SF 86 question), he only had to answer the question affirmatively if he did not file **and** did not pay. His answer remained the same after he was told that the question in the SF 86 was not an “and/or” question; it was just an “or” question. He provided a similar response to why he answered the question that asked if “You are currently delinquent on any Federal debt.” Applicant was diagnosed in 2003 with a learning disability, and specifically, a reading disorder. With concessions for his learning disability, he worked as a teacher and a coach from 2002 to 2007. His post-hearing submissions included treatises on the ambiguity of “and” and “or” in legal drafting. (Tr. at 51-52; Tr.2 at 11-12, 15-21; GE 1; AE L, M, O)

Applicant volunteers in his community. He submitted documents and letters attesting to his moral character and excellent job performance. He is praised for his trustworthiness, honesty, dedication, humility, kindness, judgment, work ethic, and integrity. (AE A)

Policies

This case is adjudicated 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 (AG), which became effective on June 8, 2017.

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 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.

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;
- (b) unwillingness to satisfy debts regardless of the ability to do so;
- (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 has a history of financial problems, including bankruptcies, delinquent debts, defaulted student loans, and unpaid federal and state taxes. AG §§ 19(a), 19(c), and 19(f) are applicable. While I accept that some of Applicant's financial problems occurred because he was unable to pay his debts, his defaulted student loans and unpaid taxes went on for so long, I conclude that he was unwilling to pay them. AG § 19(b) is applicable.

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;
- (e) the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue; and
- (g) the individual has made arrangements with the appropriate tax authority to file or pay the amount owed and is in compliance with those arrangements.

Applicant's bankruptcies occurred in 2013 and 2014. Those allegations (SOR ¶¶ 1.a and 1.b) are mitigated. He paid or settled the debts in SOR ¶¶ 1.d and 1.e. Those allegations are also mitigated.

Applicant went decades without paying his student loans and taxes. He entered into a loan rehabilitation program in February 2021, shortly after the SOR was issued, to make nine monthly payments of \$49. He made the required payments, and his loan is rehabilitated and back in good standing. In October 2021, he entered into a payment agreement with his state to pay \$500 per month toward his income tax debt of \$124,998. He paid \$1,500 for the first three months. An applicant who begins to resolve security concerns only after having been placed on notice that his or her clearance is in jeopardy may lack the judgment and willingness to follow rules and regulations when his or her personal interests are not threatened. *See, e.g.,* ISCR Case No. 17-04110 at 3 (App. Bd. Sep. 26, 2019).

The status of Applicant's federal income taxes is murky at best. He did not report that he owed taxes on his 2019 SF 86; he initially testified that he did not owe the IRS; he changed his testimony to owing about \$40,000; he testified at the reconvened hearing that he owed about \$100,000; but his bankruptcy petitions reported that he owed the IRS \$136,469 in 2014, and it does not include additional penalties and interest or the amounts owed for tax years after 2013. Applicant had almost three months between the first and second hearing and the assistance of his counsel and tax attorney, but he still provided no documentation about how much he actually owed the IRS. Absent any documented proof from Applicant, his testimony that he owes the IRS about \$100,000 is not credible. He stated that he intended to pay his taxes. However, intentions to pay debts in the future are not a substitute for a track record of debt repayment or other responsible approaches. *See* ISCR Case No. 11-14570 at 3 (App. Bd. Oct. 23, 2013).

Failure to comply with tax laws suggests that an applicant has a problem with abiding by well-established government rules and systems. Voluntary compliance with rules and systems is essential for protecting classified information. *See, e.g.,* ISCR Case No. 16-01726 at 5 (App. Bd. Feb. 28, 2018). A person who fails repeatedly to fulfill his or her legal obligations, such as filing tax returns and paying taxes when due, 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. 17-01382 at 4 (App. Bd. May 16, 2018).

After decades of neglect on his student loans and taxes, his recent payments on debts that are well into six figures are too little, too late. There is insufficient evidence for a determination that Applicant's financial problems will be resolved within a reasonable period. I am unable to find that he acted responsibly under the circumstances or that he made a good-faith effort to pay his student loans and taxes. His financial issues are recent and ongoing. They continue to cast doubt on his current reliability, trustworthiness, and good judgment. I find that the security concerns arising out of Applicant's defaulted student loans and unpaid taxes are not mitigated.

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 information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

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 security clearance eligibility or trustworthiness, or award fiduciary responsibilities.

Applicant did not report his defaulted student loans and unpaid taxes on his 2019 SF 86. He provided inconsistent testimony about why he did not report the student loans. He initially stated that he called the student loan provider when he was out of work and asked if his loans could be deferred until he found a job. He later testified that he meant that the credit cards were deferred, and he thought the student loans had been discharged in bankruptcy. He stated that he misinterpreted the "and/or" nature of the tax questions.

Department Counsel conceded in his closing argument that Applicant "genuinely did not understand the and/or situation [in the SF 86] and the question about filing or paying taxes." He argued that Applicant nonetheless, intentionally failed to report his unpaid taxes under the second question. Applicant argued that I am bound by Department Counsel's concession. I disagree.

I considered all the evidence, including Applicant's age, education, experience, reading disorder, and the sometimes problematic use of "or." I also considered Applicant's inconsistent testimony about his student loans, his initially false testimony that he did not owe the IRS, and his evasive testimony about his taxes. I find by substantial evidence¹ that he intentionally omitted information about his defaulted

¹ Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record." See, e.g., ISCR Case No. 17-04166 at 3 (App. Bd. Mar. 21, 2019) (citing Directive ¶ E3.1.32.1). "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent [a Judge's] finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966). "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); ISCR Case No. 04-07187 at 5 (App. Bd. Nov. 17, 2006).

student loans and unpaid taxes on the 2019 SF 86, including the question that was conceded by Department Counsel. AG ¶ 16(a) is applicable.

AG ¶ 17 provides conditions that could mitigate security concerns. The following are potentially applicable:

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

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by advice of legal counsel or of a person with professional responsibilities for advising or instructing the individual specifically concerning security processes. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(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.

Applicant denied that he lied on the SF 86. Having determined that he intentionally omitted information about his defaulted student loans and unpaid taxes in an attempt to mislead the government, I have also determined that his explanations that the omissions were unintentional were also false. It would be inconsistent to find his conduct mitigated.² Without complete candor, there are no applicable mitigating conditions.

² See ISCR Case 03-22819 at 4 (App. Bd. Mar. 20, 2006), in which the Appeal Board reversed the Administrative Judge's decision to grant Applicant's security clearance:

Once the Administrative Judge found that Applicant deliberately falsified a security clearance application in September 2002, the Judge could not render a favorable security clearance decision without articulating a rational basis for why it would be clearly consistent with the national interest to grant or continue a security clearance for Applicant despite the falsification. Here, the Judge gives reasons as to why he considers the falsification mitigated under a "whole person" analysis, namely that Applicant has matured, has held a position of responsibility, recognizes how important it is to be candid in relation to matters relating to her security clearance, and has changed her behavior so that there is little likelihood of recurrence. However, the Judge's conclusion runs contrary

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 have incorporated my comments under Guidelines E and F in my whole-person analysis. I also considered Applicant's favorable character evidence.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. I conclude Applicant did not mitigate the personal conduct and 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.b:	For Applicant
Subparagraph 1.c:	Against Applicant
Subparagraphs 1.d-1.e:	For Applicant
Subparagraphs 1.f-1.g:	Against Applicant
Paragraph 2, Guideline E:	Against Applicant
Subparagraph 2.a:	Against Applicant

to the Judge's rejection of Applicant's explanations for the security clearance application falsification. At the hearing (after earlier admitting the falsification in her March 2003 written statement to a security investigator), Applicant testified that she had not intentionally falsified her application. Given the Judge's rejection of this explanation as not being credible, it follows that the Judge could not have concluded Applicant now recognizes the importance of candor and has changed her behavior.

Conclusion

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.

Edward W. Loughran
Administrative Judge