



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



In the matter of:)	
)	
)	ISCR Case No. 19-02932
)	
Applicant for Security Clearance)	

Appearances

For Government: Tara Karoian, Esq., Department Counsel
For Applicant: Bruce Heurlin, Esq.

03/23/2022

Decision

CERVI, Gregg A., Administrative Judge

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

Statement of the Case

Applicant submitted a security clearance application (SCA) on October 18, 2016. On November 22, 2019, the Defense Counterintelligence and Security Agency Consolidated Adjudications Facility (DCSA CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guideline F. The DCSA 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 adjudicative guidelines (AG) effective on June 8, 2017.

Applicant responded to the SOR on February 18, 2020, and requested a hearing before an administrative judge. On February 18, 2021, Department Counsel amended the SOR by adding allegations ¶¶ 1.c through 1.n. Applicant failed to answer the amended SOR as requested by Department Counsel and required by regulation, until confronted

at the hearing. The case was assigned to me on July 6, 2021. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on November 16, 2021, scheduling the hearing for December 10, 2021. Upon Applicant Counsel's motion to continue the hearing, the hearing was rescheduled for January 7, 2022, without objection. The rescheduled hearing was held via Microsoft TEAMS video teleconference.

Government Exhibits (GE) 1 through 6 were admitted into evidence without objection. Applicant testified and submitted Applicant Exhibits (AE) A through K, which were admitted without objection. The record was held open until January 14, 2022, to permit Applicant to submit additional documentary evidence. Applicant submitted Applicant Exhibits (AE) K (resubmitted) through M, which were admitted without objection. DOHA received the hearing transcript on January 18, 2022.

Findings of Fact

Applicant is a 53-year-old senior engineer and supervisor for a government contractor, employed since September 2019. He previously worked for the same company from 2004 to 2009; he was unemployed from 2009 to 2016 due to medical problems, and worked for another defense contractor from October 2016 to February 2018, but left because he suffered from vertigo. He was employed from July to October 2018 as a contract employee for his current company, and was unemployed until being rehired in September 2019. He also owned an unprofitable company from 2011 to 2019. He honorably served in the U.S. Navy from 1986 to 1988. He married in 1991 and divorced in 1996. He remarried in 2000 and has four children, ages 23, 22, 19, and 17. The youngest two children live with him. He earned a bachelor's degree in 1999, started a master's program in 2016, but stopped after discovering his spouse's infidelity. He is currently enrolled in a master's program at a university where he lives, and plans to begin another program at another university. He currently holds a secret security clearance.

The SOR alleges under Guideline F that Applicant filed a Chapter 7 bankruptcy in February that was discharged in June 1995; he filed a Chapter 13 bankruptcy in 2019 that was dismissed in June 2020 (SOR ¶¶ 1.a – 1.c). Applicant admitted these allegations. SOR ¶¶ 1.d – 1.f allege student loan collection accounts totaling about \$68,871. SOR ¶ 1.g alleges a past-due car loan for \$2,667, with a total balance due of \$33,805. SOR ¶¶ 1.h – 1.j allege state tax liens totaling about \$47,549. SOR ¶¶ 1.k and 1.l are tax debts owed to the Federal government totaling about \$84,254; and SOR ¶¶ 1.m and 1.n allege unpaid judgments totaling about \$43,238. Applicant denied SOR allegations ¶¶ 1.d – 1.n.

Applicant stated that he suffered from a back injury in 1983 and a football injury in 1985. However, he served in the Navy from 1986 to 1998. In 2010 he was having trouble walking after kidney stone surgery, and from 2011-2016 could not work due to his injuries. He stated that his spine was rebuilt in 2013 and he was unable to walk. After six months, he started working part time and his spouse worked full time. He believed he had financial issues during this time, but was not aware of the extent since his spouse handled the family finances. (GE 6) He began full-time employment again in 2016 until he suffered from vertigo and was released in 2018. In 2018, he began consulting with his current

employer, but left the contract in October 2018 after being injured in a car accident in September 2018. No independent documentary information confirming Applicant's medical conditions, inability to work, and his personal company's finances were submitted.

Applicant first filed Chapter 7 bankruptcy in 1995 after his spouse at the time left him with bills that he could not pay. He started school and was permitted to live with his parents but only if he filed bankruptcy. The bankruptcy was discharged in 1995 and he divorced his first spouse in 1996.

Of note, Applicant did not discuss any marital discord with his current spouse during his hearing and claimed that he and his spouse were not separated, but she was living in state A. When interviewed in 2017, he told the investigator he could not answer his phone because his spouse had "confiscated" his cell phone. He also traveled to Mexico with his spouse to visit her family, but she did not return with him and he was not sure she would return. He noted that they were not getting along, and therefore, he was unable to provide financial information. When he asked her about finances, she "only yells at him" and she "is taking all the money from their joint account" and he "can only assume that she is paying bills." He and his spouse are not separated, but he noted during the interview that he did not think their car or mortgage payments were being made. In 2016, he caught her having an affair with another man, and in 2017, Applicant and his spouse had a physical altercation over his accusations that she was visiting dating websites. (GE 6)

Applicant purchased a home in state A in 2006. He noted in his 2017 interview that he had not made a payment on his mortgage since 2010. (GE 6) More recently, he was notified in 2019 that the home would be foreclosed on. In an effort to forestall the foreclosure, he filed Chapter 13 bankruptcy in September 2019 to force the mortgage company to restructure or modify the mortgage. He lives in State B, and stated that he is trying to "get my family out of the house in [State A] so that it can be sold." (Ans.) He claimed \$555,651 in secured payments, and \$189,004 in unsecured payments. No principal or interest was paid. (GE 2) The bankruptcy was dismissed in June 2020.

SOR ¶¶ 1.d and 1.e involve student loans. Applicant obtained student loans in 1995 to 1999 that were later consolidated. He did not begin to pay them until 2009. While unemployed, he did not contact his loan servicing companies regarding his financial status and left his student loans unaddressed from 2009 to 2020. He testified that the loans are now rehabilitated and current. He claimed that he has been paying on the loans since 2019, and that they are not currently in default. Applicant provided a letter from a loan servicing company alleged in the SOR, dated October 29, 2021, stating that his rehabilitated loan has been with student loan servicer N for a few months, and they were inquiring to see if he had "what you need to stay on track repaying your federal student loan." (AE I) He testified that he made his first payment in December 2021, and will start automatic payments of \$360 per month in January 2022, but he was unsure of the exact amount. After the hearing, he provided a personal budget showing a \$350 allocation toward student loans. No financial records of actual payments or a current status of his

student loan accounts were submitted. (AE M) Applicant denied knowledge of a Department of Education (DOE) collection alleged in SOR ¶ 1.f but said he would research it. He testified that he called the DOE in late December 2021, and left a message, but has not contacted them since and remains unaware of the DOE debt. His 2017 credit report shows a DOE deferred student loan, and his 2021 credit report shows the DOE account in collections with \$6,300 past due. (GEs 4 and 5)

Regarding SOR ¶ 1.g that alleges a past-due car loan, Applicant noted in his 2017 interview, that he purchased a car in 2008, but that he had not made a payment on it since 2010. (GE 6) He testified that the SOR debt was for a car loan for his spouse, and the car was destroyed. He claimed the insurance company took the car and paid the loan. Applicant listed the debt in his Chapter 13 bankruptcy filing, but has not inquired about the status of the loan with the creditor. Applicant's February 2021 credit report shows he was about four payments past due at that time, and owes a total of \$33,805. No independent documentation showing the current status of the loan or any insurance payoff was provided.

SOR ¶¶ 1.h – 1.j allege state tax liens from two states, and SOR ¶¶ 1.k and 1.l are tax debts owed to the Federal government. Applicant was aware of the debts in September 2019 as they were included in his Chapter 13 bankruptcy filing. He testified that he was taxed in each state that has filed liens, but did not believe he owed taxes. He claimed that he lived in state B from 2004 to 2006, and was aware of his tax obligations in 2016. He claimed his income taxes were paid by a consulting company. He acknowledged living and working in state A from 2006 to 2019, and failed to file state A income tax returns for tax years 2006 to 2009. He claimed a tax preparer told him in 2016 or 2017 that he did not have to file returns that were over 10 years old.

Applicant testified that he did not have income in 2010 or 2011, so he did not file any tax returns. He claimed he filed state and Federal tax returns in 2012, but did not remember if he owed any tax, but believes he always received a refund from returns that were filed. He also testified that he believes he filed Federal tax returns for tax years 2013 to 2020, and thinks he received refunds. He claimed that he has paid Federal taxes owed, but did not provide IRS transcripts or other evidence of payments. Applicant's 2017 credit report shows tax liens since 2010. (GE 5) He could not recall getting any tax debt notices. Of note, Applicant's financial plan, submitted after the hearing, shows his denial of tax debt allegations, but does not explain any action taken with regard to the debts. He also does not have an allocation toward tax debts in his budget. He testified that he found out in 2016 that he did not file Federal and state tax returns from 2006 to 2009. He spoke to state A tax authority the week of his hearing, and said he made arrangements to resubmit unfiled tax returns. He stated that he intends to refile tax returns for 2006 to 2009 in state A, 2005 or 2006 in state B, and 2005 to 2009 Federal returns after the hearing. After the hearing, Applicant submitted a copy of a check for \$1,047, dated January 2, 2022, apparently written to pay a state A tax assessment from November 4, 2021. (AE L) No information confirming that tax authority's receipt of payment was submitted.

SOR ¶¶ 1.m and 1.n allege two judgments. (GE 5) One for a mobile-home loan that he purchased for his wife in another state while they were separated. He stopped making payments in 2011 and he assumed the home was repossessed and the loan foreclosed. He did not believe he owed any remaining balance. However, he had done nothing to address the debt or confirm its status. The other judgment was for a finance company debt. He testified that he was unaware of the judgment or the basis of the debt, but had not contacted the creditor nor made any effort to determine its status.

Applicant provided several character letters from coworkers, a long-standing friend, and his son who is serving in the Navy, attesting to the importance of his job, his loyalty, and the lack of security incidents or other behaviors that would make him a risk to national security. Of note, the letters appear to use similar language and format, and none discuss his financial history. He also provided many educational and employment awards and certificates. He has cash assets of about \$6,000 to \$8,000, and a 401k retirement account valued at \$70,000, however he borrowed \$7,000 to \$10,000 from it in 2020. He had financial counseling in 1995 and presumably in 2019, coincident with his bankruptcy filings.

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). Although Applicant's failure to file tax returns was not specifically alleged in the SOR, his unalleged conduct may be considered to decide whether a particular adjudicative guideline is applicable, to evaluate evidence of extenuation, mitigation, or changed circumstances, or as part of a whole-person analysis. ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006). I have considered Applicant's failure to timely file state and federal tax returns for these limited purposes.

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;

(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 has a long history of financial irresponsibility. He has had debt accumulation and a history of avoidance of tax obligations to include an inability or unwillingness to comply with income tax filing requirements and payment of taxes owed. He has shown little concurrent effort to resolve his financial obligations until his security eligibility was in jeopardy. He has alleged substantial medical concerns that prevented his from working or maintaining employment, and I give him the benefit of the doubt that his medical problems impacted his finances. However, he has done little to address his debts and delinquent tax obligations. Likewise, his recent rehabilitation of his student loan

debts is long overdue and he has not established a track record of consistent, regular payments to invoke mitigating credit.

The guideline 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. See ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012). 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).

Applicant stated that he intends to file delinquent tax returns and pay tax debts if owed, but has done too little, too late. 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). There is insufficient evidence for a determination that Applicant's financial problems will be resolved within a reasonable period and that he can obtain and maintain a measure of financial responsibility. His financial issues continue to cast doubt on his current reliability, trustworthiness, and good judgment.

Overall, Applicant's financial responsibility is questionable, and he has a poor track record with respect to Federal and state income tax compliance. He had many years to resolve his tax obligations, yet allowed them to remain unresolved until his security clearance was jeopardized. Even then, he was slow to respond to the red flags raised about his tax delinquencies and other debts since completing his SCA and during the investigation process. He may have to wrest control of his finances from his spouse, but in any event, the record reflects a failure to show reasonable knowledge and ultimate control of his finances. Despite some conditions outside of his control, a payment to a state tax authority, and some financial counseling, no mitigation credit fully applies. Applicant's meager efforts were too late to establish financial responsibility and a reliable track record of debt resolution. Based on the record presented, I am not convinced he fully grasps the reality of his financial obligations or has taken full responsibility for his financial situation.

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 Guideline F in my whole-person analysis. I also considered Applicant's employment history, periods of unemployment, military service, medical issues and family responsibilities. I remain unconvinced of his overall financial responsibility, and his ability, intent, and desire to meet his financial obligations in the future, including in tax compliance.

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.n:	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