



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
) ISCR Case No. 21-00462
)
Applicant for Security Clearance)

Appearances

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

June 7, 2022

Decision

TUIDER, Robert, Administrative Judge:

Applicant mitigated security concerns regarding Guideline F (financial considerations). Clearance is granted.

Statement of the Case

On May 26, 2017, Applicant submitted a Questionnaire for National Security Positions (SF-86). On April 30, 2021, the Defense Counterintelligence and Security Agency Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline F. The SOR detailed reasons why the CAF was unable to find that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. On June 7, 2021, Applicant submitted his Answer to the SOR.

On July 26, 2021, the Defense Office of Hearings and Appeals (DOHA) assigned the case to another administrative judge. On September 27, 2021, DOHA reassigned the case to me. On August 24, 2021, DOHA issued a notice of hearing scheduling the hearing for September 27, 2021. On September 27, 2021, DOHA issued an Amended

notice of hearing rescheduling the hearing for September 29, 2021. I convened the hearing as rescheduled. Department Counsel moved to amend the SOR as follows, delete tax year “2014” from SOR ¶¶ 1.a, and remark the SOR paragraphs on page 2 of the SOR as SOR ¶¶ 1.c, 1.d and 1.e. Without objection from the Applicant, I granted Department Counsel’s motions to amend. (Tr. 8-9, 31-33) I admitted Government Exhibits (GE) 1 through 3 without objection, and admitted Applicant Exhibits (AE) A through F without objection. Applicant testified and did not call any witnesses to testify on his behalf. I held the record open until November 10, 2021, to afford Applicant an opportunity to submit additional evidence. Post-hearing, I admitted AE G through M without objection. On October 7, 2021, DOHA received the hearing transcript (Tr.).

Findings of Fact

Background Information

Applicant is a 53-year-old manager, systems engineering II, who has been employed by a defense contractor since May 2015. He has held a secret clearance since 2009, which he obtained when employed by a previous defense contractor. He seeks to upgrade his clearance from Secret to Top Secret as a job requirement. (Tr. 12-14; GE 1, GE 2)

Applicant graduated from high school in 1987. He was awarded a bachelor of arts degree in health, physical education, and recreation in 1992, and he received a single subject teaching credential in 1998. Applicant was awarded a master’s degree in family and child counseling in 2000. (Tr. 14-18; GE 1, GE 2)

Applicant married in 2001, and has three children all living at home. His spouse at present does not work outside the home. His oldest daughter, age 21, finished high school and does “some driving and some babysitting.” His two younger sons, ages 19 and 13, are still in school. (Tr. 18-20; GE 1)

Financial Considerations

Applicant’s SOR lists five allegations, all related to his failure to file Federal and state income tax returns and indebtedness to the Federal Government for back taxes owed. The allegations are established by his May 26, 2017 SF-86; his Office of Personnel Management Personal Subject Interview (OPM PSI); his January 20, 2021 Response to DOHA Interrogatories; and his June 7, 2021 SOR Answer. (GE 1 through 3; SOR Answer; Tr. 23)

Applicant attributes his failure to timely file his Federal and state income tax returns and subsequent indebtedness to the Federal Government to his wife’s mismanagement of their finances; however, he accepts full responsibility for his failure to provide greater oversight of the household finances. He added that he did not become aware of this security concern until he “got notice of this potential action against me . . .” (Tr. 21)

The following is a summary of Applicant's five SOR allegations and their status:

SOR ¶ 1.a – Failed to timely file Federal income returns for 2015, 2016, and 2017. Applicant admitted this allegation. He reiterated that he accepts responsibility for his tax returns not being filed in a timely manner. He explained that his wife was supposed to be working with a neighbor to prepare their tax returns, but that did not happen. When asked about his wife's response regarding their tax returns, he stated, "When the wife shrugs her shoulders, it's hard for me to respond. So I would say, no, I was not aware." (Tr. 20-21, 27)

Applicant submitted IRS transcripts for the respective tax years in question. For tax year 2015, the IRS received his tax return on April 10, 2017. For tax year, 2016, the IRS received his tax return on September 2, 2018. For tax year 2017, the IRS received his tax return on February 27, 2019. For each of those three tax years, Applicant's wife requested extensions, but those returns were submitted past the extended deadlines incurring penalties and late fees, discussed further, *infra*, in SOR ¶¶ 1.c through 1.d. (Tr. 27-28, GE 3; AE B)

Applicant's reiterated throughout his testimony that he "assumed his wife was in control" and that he "trusted her to be as such." He stated that he was unaware that his returns were filed late. Since tax concerns were brought to his attention, he has taken a more active role in ensuring his tax returns are timely filed. Applicant's spouse "contests that she can do it (file taxes) herself. So it's a very hot topic." (Tr. 23-25) He added that in the past his wife "made a boatload of money (selling real estate) - - that means thousands and thousands of dollars during many of those years, if not all of them, and I believe that was the source of our problem with taxes." In addition to selling real estate, Applicant's wife was involved in "a couple of her other adventures. One is technology-driven." She did not have taxes deducted on any of that income and the taxes deducted from Applicant's pay was not enough to cover their joint tax liability. (Tr. 25-26, 46-47, 49)

Although not alleged as a concern, in order to demonstrate moving forward that his past tax filing shortcomings were under control, Applicant provided IRS transcripts documenting that he timely filled his 2018, 2019, and 2020 Federal income tax returns. He was owed refunds of \$2,489, \$3,224, and \$6,070, respectively, amounts that have been applied to back taxes owed for previous years, discussed *infra*. (Tr. 25-28; AE D, AE J, AE K, AE L) **ALLEGATION RESOLVED.**

SOR ¶ 1.b – Failed to timely pay state taxes for tax years 2011, 2015, 2016. Applicant admitted this allegation. Applicant's explanation for his failure to timely pay his state taxes paralleled his explanation under SOR ¶ 1.a, *supra*. He stated, "I was not involved. . . And I did not inquire." He added that he was not aware that he owed state taxes until he asked his wife about their taxes when he completed his SF-86 and these proceedings were initiated. Applicant testified that it was his belief that his state taxes were up to date, but he was unable to state with certainty that was the case. Post-hearing, he submitted documentation from his state tax authority that reflects his tax

returns are current, and he has a zero balance for each tax year from 2011 to 2020. (Tr. 28-32; AE H, AE I, AE J) **ALLEGATION RESOLVED.**

SOR ¶¶ 1.c – 1.e – Indebted to the Federal Government for delinquent taxes in the amounts of \$955 for tax year 2014, \$5,641 for tax year 2015, and \$19,124 for tax year 2017. Applicant admitted these allegations.

Applicant submitted IRS documentation dated May 14, 2021, and May 17, 2021, from his 2020 tax filing indicating that he had overpaid his taxes that year; that \$964 was applied to tax owed on his 2014 tax return; and that \$4,524 was applied to tax owed on his 2015 tax return. Applicant's IRS documentation dated August 9, 2021, indicates that he paid \$428 to pay off the balance owed for tax year 2015. Applicant stated, "Those (referring to IRS documentation) are meant to show my work towards rectifying the situation." (Tr. 33-; AE B, AE D, AE E)

With regard to the \$19,124 owed for tax year 2017, Applicant stated, "I'm chipping away at it." Applicant stated that he set up a \$200 monthly payment plan with the IRS, "This year (2021), when I realized I couldn't trust my wife, to be quite honest." However, his monthly payments have typically exceeded that amount averaging \$400 a month. He submitted recent IRS documentation dated August 9, 2021 and September 3, 2021, indicating that he had made monthly payments of \$428 and \$403, respectively. (Tr. 37-42; AE E, AE F)

Post-hearing, Applicant submitted his IRS transcript dated November 5, 2021 indicating that he owes a balance of \$12,477 for tax year 2017. His IRS Payment Activity record dated November 5, 2021 indicates that he has been making monthly payments to the IRS since January 2021 in amounts ranging from \$200 to \$500. (Tr. 48, 52-54; AE G, AE K) **SOR ¶¶ 1.C & 1.D RESOLVED. SOR ¶ 1.E BEING RESOLVED.**

Applicant realizes the importance of timely filing his Federal and state tax returns and paying his Federal and state income taxes when due. He has taken a much more "hands on" approach and is committed to maintaining ongoing communication with his wife with regard to their taxes. He realizes that his continued employment is dependent on maintaining a security clearance. As the primary income earner in his household, this responsibility weighs heavily on him. (Tr. 44-46) Applicant keeps his finances separate from his wife to avoid similar problems. (Tr. 46) He could not offer an explanation why filing his tax returns became an issue after so many years other than what appears to be a breakdown in communications between him and his wife. (Tr. 49, 57) He did not explain why he did not notice the filings were late at the time he signed his tax returns.

During his hearing, Applicant discussed his assets and expenses. He stated his annual income was "approximately \$180,000." (Tr. 48) He rents a single family home for \$3,600 a month. He has also taken over the responsibility for maintaining the household budget to include making the payments to the IRS and his wife's car payments. He does menu planning and household shopping. (Tr. 50-51)

Character Evidence

Post-hearing, Applicant submitted a reference letter from a company manager, who has worked directly and indirectly with him for seven years. His letter described Applicant as an employee who can be counted on to complete difficult tasks and duties. Applicant has helped “solidify a vision and improve business processes with [defense contractor].” His letter also described Applicant as incredibly dedicated and hard-working, and as an asset to the company. (AE M)

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 AG ¶ 2 describing the adjudicative process. The administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(a), the entire process is a conscientious scrutiny of a number of variables known as the “whole-person concept.” The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that “[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security.”

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 clearance 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

Financial Considerations

AG ¶ 18 articulates the security concern for financial problems:

Failure to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information. Financial distress can also be caused or exacerbated by, and thus can be a possible indicator of, other issues of personnel security concern such as excessive gambling, mental health conditions, substance misuse, or alcohol abuse or dependence. An individual who is financially overextended is at greater risk of having to engage in illegal or otherwise questionable acts to generate funds. Affluence that cannot be explained by known sources of income is also a security concern insofar as it may result from criminal activity, including espionage.

AG ¶ 19 provides three disqualifying conditions that could raise a security concern and may be disqualifying in this case:

- (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.

The record evidence establishes concerns under AG ¶¶ 19(a), 19(c), and 19(f). Further review is required.

AG ¶ 20 lists the following potential mitigating conditions:

(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;

(f) the affluence resulted from a legal source of income; 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 Appeal Board concisely explained Applicant's responsibility for proving the applicability of mitigating conditions as follows:

Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in security clearance decisions is that articulated in *Egan, supra*. "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." Directive, Enclosure 2 ¶ 2(b).

ISCR Case No. 10-04641 at 4 (App. Bd. Sep. 24, 2013)

The evidence does not warrant application of AG ¶¶ 20(a), 20(b), 20(c), 20(e), or 20(f). There is more than one delinquent debt and Applicant's financial problems are not isolated. His Federal tax debt remains a "continuing course of conduct" under the Appeal Board's jurisprudence. See ISCR Case No. 07-11814 at 3 (App. Bd. Aug. 29, 2008) (citing ISCR Case No. 01-03695 (App. Bd. Oct. 16, 2002)).

Per Applicant, his Federal and state income tax problems were caused by an ongoing breakdown in communications with his wife. He first became aware that he had income tax problems when he completed his May 26, 2017 SF-86 and made inquiries with his wife about their tax status. For the tax years in question, Applicant's wife accepted responsibility in their family for filing their income tax returns and paying their taxes. That did not happen. However, Applicant realizes that he bears responsibility for the hands-off approach he took vis-à-vis his taxes. He understands he has a statutory responsibility to timely file his tax returns.

With that said, beginning with tax year 2018 and moving forward, Applicant has taken a more proactive role in ensuring that his Federal and state income tax returns have been filed and taxes paid in a timely manner. All of his delinquent Federal and state income tax returns that were alleged in his SOR have been filed. All of his delinquent Federal and state income taxes have been paid except for tax year 2017. For tax year 2017, he owes approximately \$12,477 on an original balance of \$19,124. Applicant set up a payment plan in January 2021 with the IRS to pay \$200 a month. The evidence he submitted substantiates that his monthly payments more often than not exceed that amount. AG ¶¶ 20(d) and 20(g) are fully applicable.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all the circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d):

- (1) the nature, extent, and seriousness of the conduct;
- (2) the circumstances surrounding the conduct, to include knowledgeable participation;
- (3) the frequency and recency of the conduct;
- (4) the individual's age and maturity at the time of the conduct;
- (5) the extent to which participation is voluntary;
- (6) the presence or absence of rehabilitation and other permanent behavioral changes;
- (7) the motivation for the conduct;
- (8) the potential for pressure, coercion, exploitation, or duress; and
- (9) the likelihood of continuation or recurrence.

The ultimate determination of whether to grant or continue national security eligibility must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. AG ¶ 2(c). The discussion in the Analysis section under Guideline F is incorporated in this whole-person section. However, further comments are warranted.

To review, Applicant is a 53-year-old manager, systems engineering II, who has been employed by a defense contractor since May 2015. He has security clearance experience going back to his first security clearance received in 2009. He is married and has three children. He is the primary income earner in the household. Apart from the SOR allegations that dealt with his tax problems, Applicant has been a responsible citizen and member of his community. Furthermore, he is a valued and trusted employee who is making a contribution to the national defense.

This case is somewhat out of the ordinary involving an individual who, for the better part of his adult life, filed his Federal and state income returns and paid his taxes in a timely manner. The dilemma involving his taxes appears to stem from a relatively recent breakdown in communication, and apparent lack of cooperation, that existed between Applicant and his wife. The difficulties Applicant experienced with his spouse over their taxes have been resolved, beginning in 2018 and onward. What remains for Applicant is to continue making his monthly payments to the IRS to pay down his Federal tax arrearage. Applicant fully understands the fallout that can occur when one fails to live up to their responsibility as a citizen to timely file their Federal and state income tax returns and pay any taxes owed. To that end, he has taken a much more “hands on” approach when it comes to taxes and managing the household budget. This experience has not been lost on Applicant, especially for someone whose continued livelihood is dependent on maintaining a security clearance.

I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my careful consideration of the whole-person factors and supporting evidence, my application of the pertinent factors under the adjudicative process, and my interpretation of my responsibilities under the adjudicative guidelines.

Formal Findings

The formal findings on the allegations set forth in the SOR are as follows:

Paragraph 1, Guideline F: FOR APPLICANT

Subparagraphs 1.a – 1.e: For Applicant

Conclusion

In light of the record as a whole, it is clearly consistent with the national interest to continue Applicant’s security clearance. National security eligibility is granted.

ROBERT TUIDER
Administrative Judge