



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



In the matter of:)
)
) ISCR Case No. 21-01505
)
Applicant for Security Clearance)

Appearances

For Government: Bryan Olmos, Esq., Department Counsel
For Applicant: *Pro se*

07/22/2022

Decision

HARVEY, Mark, Administrative Judge:

Applicant failed to file his federal and state income tax returns for tax years (TY) 2017 and 2018. He did not make any progress resolving three delinquent debts. Guideline F (financial considerations) security concerns are not mitigated. Eligibility for access to classified information is denied.

Statement of the Case

On March 22, 2019, Applicant completed an Electronic Questionnaires for Investigations Processing or security clearance application (SCA). (Government Exhibit (GE) 1) On July 21, 2021, the Defense Counterintelligence and Security Agency (DCSA) Consolidated Adjudications Facility (CAF) issued a statement of reasons (SOR) to Applicant under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960); DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive) (January 2, 1992), as amended; and Security Executive Agent Directive 4, establishing in Appendix A, the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AGs), effective June 8, 2017. (Hearing Exhibit (HE) 2)

The SOR detailed reasons why the DCSA CAF did not find under the Directive that it is clearly consistent with the interests of national security to grant or continue a security clearance for Applicant and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

Specifically, the SOR set forth security concerns arising under Guideline F. (HE 2) On July 21, 2021, Applicant provided his response to the SOR, and he requested a hearing. (HE 3)

On November 18, 2021, Department Counsel was ready to proceed. Processing of the case was delayed due to the COVID-19 pandemic. On March 25, 2022, the case was assigned to me. On April 14, 2022, the Defense Office of Hearings and Appeals (DOHA) issued a Notice setting the hearing for June 8, 2022. (*Id.*) His hearing was held as scheduled in the vicinity of Arlington, Virginia using the DOD Microsoft Teams video teleconference system. (*Id.*)

During the hearing, Department Counsel offered seven exhibits, and all proffered exhibits were admitted into evidence without objection. (Tr. 16-19; GE 1-GE 7) Applicant did not offer any documents. On June 22, 2022, DOHA received a copy of the transcript. Applicant provided seven post-hearing exhibits, which were admitted without objection. (Applicant Exhibit (AE) A-AE G) The record closed on July 15, 2022. (Tr. 57)

Some details were excluded to protect Applicant's right to privacy. Specific information is available in the cited exhibits and transcript.

Findings of Fact

In Applicant's SOR response, he admitted all of the SOR allegations. (HE 3) He also provided mitigating information. (*Id.*) His admissions are accepted as findings of fact.

Applicant is a 36-year-old test technician who has worked for the same defense contractor since 2013. (Tr. 7, 9, 21-23, 55; GE 1) Around 2007, he received a General Educational Development Diploma. (Tr. 7) He has about 35 college credits. (Tr. 7) He served in the Marine Corps from 2007 to 2012. (Tr. 7-8) His Marine Corps specialty was "AIRCOM NAV CRYPTOGRAPHIC SYS TECH." (AE E) He served a tour in Iraq from October 2009 to February 2010. (Tr. 8; AE E) He was honorably discharged as a sergeant (pay grade E-5). (Tr. 8; AE D) He was unemployed for about five months after leaving the Marine Corps. (Tr. 21) He has a 20 percent disability rating from the Department of Veterans Affairs (VA). (AE G)

In 2014, Applicant married, and he and his spouse are caring for three foster children, who are ages 6, 12, and 12. (Tr. 10, 19-20) They received some funds from the government to care for the foster children. Applicant and his spouse have been caring for foster children since 2018. (Tr. 19-20) Applicant has worked for his employer on the night shift for about 18 months. (Tr. 21) He has never had any security violations. (Tr. 21) He has not received any reprimands from his employer. (Tr. 22)

Financial Considerations

Applicant and his spouse timely filed their joint tax return for TY 2015; however, they owed \$864. (GE 3 at 19) They had a payment plan with the IRS and resolved their TY 2015 tax debt on April 24, 2017. (GE 3 at 20) SOR ¶¶ 1.a and 1.b allege, and he

admitted, that he did not file a federal or state income tax return for TYs 2017 and 2018. (Tr. 26-30, 34-35, 49; SOR response) When he was preparing his tax returns for those two tax years, he noticed that he owed a substantial amount for taxes; he did not have the funds available to pay the taxes; and he decided not to file the two tax returns. (Tr. 30-31) Applicant and his spouse were earning about \$100,000, and when his spouse lost her job in 2019, the family income went down to about \$60,000. (Tr. 23, 31, 37; SOR response) In addition, she failed to withhold sufficient funds from her income for federal income taxes, and they were unable to pay their federal income taxes when due for TY 2017 and 2018. (Tr. 23-26) They filed their federal and state tax returns for TYs 2019, 2020, and 2021. (Tr. 33, 35; AE A-AE C) They received refunds for each of those three tax years. (AE A-AE C)

Applicant's current gross annual salary is about \$65,000. (Tr. 38; GE 3 at 7) He said he lacked the income to address the delinquent debts in SOR ¶¶ 1.c, 1.d, and 1.e, which allege Applicant has a collection debt for \$4,121, a collection debt for \$2,200, and a charged-off debt for \$1,986. (Tr. 38) He lives paycheck to paycheck. (Tr. 43) He has little savings and sometimes needs to borrow from family. (Tr. 42)

Applicant hoped that his wife would find employment outside their home, and then they could pay their SOR debts and some non-SOR debts such as a car loan, a signature loan, and their mortgage. (Tr. 43-46) He is planning to receive financial counseling, file his tax returns for TYs 2017 and 2018, and establish a payment plan to pay the taxes owed. (Tr. 47, 50)

Character Evidence

Applicant received the following awards from the Marine Corps: Marine Corps Good Conduct Medal; Iraq Campaign Medal (w/1 Star); Certificate of Commendation (Individual Award); National Defense Service Medal; Global War on Terrorism Service Medal; Sea Service Deployment Ribbon; and Sharpshooter Rifle Badge. (AE E)

On November 17, 2021, Applicant completed the CORE Apprentice Certification. (AE F at 5) He received five award certificates from his employer for accountability, and four award certificates for collaboration. (AE F at 1-4, 6-10)

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, "no 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 applicant's 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, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk 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 "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See Exec. Or. 10865 § 7. Thus, nothing in this decision should be construed to suggest that it is based, in whole or in part, on any express or implied determination about applicant's allegiance, loyalty, or patriotism. It is merely an indication the applicant has not met the strict guidelines the President, Secretary of Defense, and Director of National Intelligence have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. "Substantial evidence" is "more than a scintilla but less than a preponderance." See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

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 ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his [or her] security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

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.

The Appeal Board explained the scope and rationale for the financial considerations security concern in ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012) (citation omitted) as follows:

This concern is broader than the possibility that an applicant might knowingly compromise classified information in order to raise money in satisfaction of his or her debts. Rather, it requires a Judge to examine the totality of an applicant's financial history and circumstances. The Judge must consider pertinent evidence regarding the applicant's self-control, judgment, and other qualities essential to protecting the national secrets as well as the vulnerabilities inherent in the circumstances. The Directive presumes a nexus between proven conduct under any of the Guidelines and an applicant's security eligibility.

AG ¶ 19 includes 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 establishes the disqualifying conditions in AG ¶¶ 19(a), 19(c), and 19(f) requiring additional inquiry about the possible applicability of mitigating conditions. Discussion of the disqualifying conditions is contained in the mitigation section, *infra*.

The financial considerations mitigating conditions under AG ¶ 20 are as follows:

(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.

In ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013), the DOHA Appeal Board 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).

Applicant provided some important mitigating information. His family's income was significantly reduced when his spouse lost her employment outside their home in 2019. This circumstance was beyond his control, and it adversely affected his finances. However, "[e]ven if applicant's financial difficulties initially arose, in whole or in part, due to circumstances outside his [or her] control, the judge could still consider whether applicant has since acted in a reasonable manner when dealing with those financial difficulties." ISCR Case No. 05-11366 at 4 n.9 (App. Bd. Jan. 12, 2007) (citing ISCR Case No. 03-13096 at 4 (App. Bd. Nov. 29, 2005); ISCR Case No. 99-0462 at 4 (App. Bd. May 25, 2000); ISCR Case No. 99-0012 at 4 (App. Bd. Dec. 1, 1999)).

Another component under AG ¶ 20(a) is whether Applicant maintained contact with creditors and attempted to negotiate partial payments to keep debts current. He did not prove that he maintained contact with the IRS and the state concerning filing his TYs 2017 and 2018 tax returns or that he worked diligently to timely file his tax returns and timely pay his income taxes. He did not file his TY 2017 and TY 2018 federal and state tax returns. He did not maintain contact with the creditors in SOR ¶¶ 1.c, 1.d, and 1.e.

Applicant failed to timely file his federal income tax returns for TYs 2017 and 2018 and to timely pay any taxes due. A willful failure to timely make (means complete and file with the IRS) a federal income tax return is a misdemeanor-level federal criminal offense. Title 26 U.S.C. § 7203, willful failure to file return or supply information, reads:

Any person . . . required by this title or by regulations made under authority thereof to make a return, keep any records, or supply any information, who willfully fails to . . . make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor

A willful failure to make return, keep records, or supply information when required, is a misdemeanor without regard to the existence of any tax liability. *Spies v. United States*, 317 U.S. 492 (1943); *United States v. Walker*, 479 F.2d 407 (9th Cir. 1973); *United States v. McCabe*, 416 F.2d 957 (7th Cir. 1969); *O'Brien v. United States*, 51 F.2d 193 (7th Cir. 1931). For purposes of this decision, I am not weighing Applicant's failure to timely file his federal income tax returns against him as a crime. In regard to the failure to timely file federal income tax returns when due, the DOHA Appeal Board has commented:

Failure to file tax returns suggests that an applicant has a problem with complying with well-established governmental rules and systems. Voluntary compliance with such rules and systems is essential for protecting classified information. ISCR Case No. 01-05340 at 3 (App. Bd. Dec. 20, 2002). As we have noted in the past, a clearance adjudication is not directed at collecting debts. See, e.g., ISCR Case No. 07-08049 at 5 (App. Bd. Jul. 22, 2008). By the same token, neither is it directed toward *inducing an applicant to file tax returns*. Rather, it is a proceeding aimed at evaluating an applicant's judgment and reliability. *Id.* A person 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).

ISCR Case No. 14-04437 at 3 (App. Bd. Apr. 15, 2016) (emphasis in original). See ISCR Case No. 15-01031 at 4 (App. Bd. June 15, 2016) (citations omitted); ISCR Case No. 14-05476 at 5 (App. Bd. Mar. 25, 2016) (citing ISCR Case No. 01-05340 at 3 (App. Bd. Dec. 20, 2002)); ISCR Case No. 14-01894 at 4-5 (App. Bd. Aug. 18, 2015). The Appeal Board clarified that even in instances where an "[a]pplicant has purportedly corrected [his or her] federal tax problem, and the fact that [applicant] is now motivated to prevent such

problems in the future, does not preclude careful consideration of [a]pplicant's security worthiness in light of [his or her] longstanding prior behavior evidencing irresponsibility" including a failure to timely file federal income tax returns. See ISCR Case No. 15-01031 at 3 & n.3 (App. Bd. June 15, 2016) (characterizing "no harm, no foul" approach to an applicant's course of conduct and employing an "all's well that ends well" analysis as inadequate to support approval of access to classified information with focus on timing of filing of tax returns after receipt of the SOR).

Applying the Appeal Board's jurisprudence, SOR ¶ 1.a is not mitigated because he has not filed his TYs 2017 and 2018 federal income tax returns. Similarly, SOR ¶ 1.b is not mitigated because he has not filed his state tax returns for TYs 2017 and 2018. He is not making payments to address any taxes that are overdue for those TYs. He is not making payment to address the debts in SOR ¶¶ 1.c, 1.d, and 1.e or otherwise resolving them. Under all the circumstances, he failed to establish mitigation of financial considerations security concerns.

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.

Under AG ¶ 2(c), "[t]he ultimate determination" of whether to grant a security clearance "must be an overall commonsense judgment based upon careful consideration of the guidelines" and the whole-person concept. My comments under Guideline F are incorporated in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under that guideline but some warrant additional comment.

Applicant is a 36-year-old test technician who has worked for the same DOD contractor since 2013. He has about 35 college credits. He served in the Marine Corps from 2007 to 2012. He served a tour in Iraq from October 2009 to February 2010. He was honorably discharged as a sergeant. He has a 20 percent VA disability rating. He and his spouse are caring for three foster children, who are ages 6, 12, and 12. He has never had any security violations. He has not received any reprimands from his employer.

Applicant received the following awards from the Marine Corps: Marine Corps Good Conduct Medal; Iraq Campaign Medal (w/1 Star); Certificate of Commendation

(Individual Award); National Defense Service Medal; Global War on Terrorism Service Medal; Sea Service Deployment Ribbon; and Sharpshooter Rifle Badge. On November 17, 2021, Applicant completed the CORE Apprentice Certification. He received five award certificates from his employer for accountability, and four award certificates for collaboration.

Applicant provided important financial considerations mitigating information. His delinquent debts were affected by a circumstance beyond his control--his spouse's loss of her employment outside their home. He plans to file and pay his taxes and his delinquent debts once his spouse obtains employment.

The evidence against grant of a security clearance is more substantial at this time. Applicant did not establish that he was unable to make greater progress sooner filing his federal and state income tax returns for TYs 2017 and 2018 and to pay his federal income taxes debt for those two years. He did not make any progress resolving the debts in SOR ¶¶ 1.c, 1.d, and 1.e. His failure to take prudent responsible actions raise unmitigated questions about his reliability, trustworthiness, and ability to protect classified information. See AG ¶ 18.

It is well settled that once a concern arises regarding an applicant's security clearance eligibility, there is a strong presumption against granting a security clearance. See *Dorfmont*, 913 F. 2d at 1401. "[A] favorable clearance decision means that the record discloses no basis for doubt about an applicant's eligibility for access to classified information." ISCR Case No. 18-02085 at 7 (App. Bd. Jan. 3, 2020) (citing ISCR Case No.12-00270 at 3 (App. Bd. Jan. 17, 2014)).

This decision should not be construed as a determination that Applicant cannot or will not attain the state of reform necessary for award of a security clearance in the future. With more effort towards establishing a track record of financial responsibility, and a better track record of behavior consistent with his obligations, he may well be able to demonstrate persuasive evidence of his security clearance worthiness.

I have carefully applied the law, as set forth in *Egan*, Exec. Or. 10865, the Directive, the AGs, and the Appeal Board's jurisprudence to the facts and circumstances in the context of the whole person. Applicant failed to mitigate 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 through 1.e:	Against Applicant

Conclusion

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

Mark Harvey
Administrative Judge