



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



In the matter of:)
)
-----) ISCR Case No. 21-00968
)
Applicant for Security Clearance)

Appearances

For Government: Allison Marie, Esq., Department Counsel
For Applicant: Frederic Nicola, Esq.

08/24/2022

Decision

KATAUSKAS, Philip J., Administrative Judge:

Applicant contests the Defense Department’s intent to deny his eligibility for access to classified information. He failed to mitigate the security concerns raised by his problematic financial history and his criminal conduct. Accordingly, this case is decided against Applicant.

Statement of the Case

Applicant submitted his security clearance application (SCA) on June 17, 2020. The Department of Defense Consolidated Adjudications Facility (DOD CAF) issued Applicant a Statement of Reasons (SOR) on November 15, 2021, detailing security concerns under Guideline F, financial considerations, and Guideline J, criminal conduct. The DOD CAF acted under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and Security Executive Agent Directive 4, *National Security Adjudicative Guidelines*, effective within the DOD as of June 8, 2017. Applicant answered the SOR on

December 2, 2021, and requested a decision based on the written record without a hearing.

On February 11, 2022, Department Counsel submitted a file of relevant material (FORM), including documents identified as Items 1 through 11. The FORM was mailed to Applicant on the same day. Applicant was given 30 days to file objections and submit material to refute, extenuate, or mitigate the Government's evidence. Applicant received the FORM on February 19, 2022. He responded to the FORM on March 8, 2022, and submitted a brief (Response Brief) and two documents that are marked as Applicant's Exhibits (AE) A and B. Items 1 through 11 and AE A and B are admitted into evidence without objection. The case was assigned to me on April 27, 2022.

Findings of Fact

Applicant is 61 years old, has never married, and has an adult daughter. He is a high school graduate and has completed some college-level courses. Applicant's sponsor is a defense contractor whose employment offer is pending a favorable security clearance determination for Applicant. This is Applicant's first application for a security clearance. (Item 4.) At the time of his Personal Subject Interview (PSI) on July 29, 2020, Applicant was unemployed. He also had periods of unemployment in March 2018 (one month), July to August 2018 (two months), and December 2015 to February 2016 (three months). (Item 4.)

Applicant submitted a character reference email dated November 9, 2021. The author is from Another Government Agency (AGA) to the recipient from AGA and copied to Applicant. The subject is "Outstanding IT Support & Customer Service." The author expressed her "absolute gratitude" for Applicant's support that day "and every time he is assigned" to a project. The author described Applicant's support as "immediate" and made "the process easy, well-understood, and fast." The author described Applicant as "top-notch." (Item 3 at 38.)

Note: The recitation of Guideline F tax allegations below reflects the Government's amendments to the original SOR ¶¶ 1.c., g., and h. The amendments are shown in bold. Brackets indicate the deletions. That recitation also reflects the Government's withdrawal of SOR ¶ 1.e. Applicant did not object to the amendments or to the withdrawal. (Response Brief.)

Under Guideline F regarding taxes, the SOR alleged that Applicant: (1) failed timely to file his federal and state income tax returns, as required, for tax years (TY) 2015, 2016, and 2019; (2) is indebted to the federal government for delinquent taxes of **[\$3,896] \$492.52** for tax year(TY) 2013; (3) is indebted to the federal government for delinquent taxes of \$1,498 for (TY) 2015; (4) is indebted to the state for delinquent taxes of \$727 for TY 2013; (5) is indebted to the **state [federal government]** for delinquent taxes of \$1,491 for TY 2015; and (7) is indebted to the **state [federal government]** for delinquent taxes of \$548 for TY 2018 and 2019. (Item 1.)

Applicant admitted all of the tax allegations. For each allegation, he answered that he was on an installment agreement with the relevant taxing authority. Applicant also referred to “supporting documentation.” (Item 3.) He cited “a lapse of judgment,” “mismanagement,” and “various reasons” for his financial difficulties. (Response Brief at 2-3.)

Under Guideline F regarding consumer debt, the SOR alleged that Applicant: (1) is indebted to a creditor for an account placed in collections for \$5,356; (2) is indebted to a creditor for an account that has been charged off for \$2,674; and (3) is indebted to a creditor for an account that has been charged off for \$3,085. (Item 1.) Applicant denied the three consumer debt allegations, referring to “supporting documentation.” (Item 3.)

Under Guideline J, the SOR alleged that Applicant (1) was arrested in August 2020 for domestic violence offenses and charged with infliction of corporal injury to a spouse or cohabitant and battery with serious bodily injury; and (2) was arrested in April 1993 for a domestic violence offense and charged with injury to a spouse or cohabitant. (Item 1.) Applicant admitted the first allegation (the arrest) but denied that he was charged, as alleged. Applicant denied the second allegation. (Item 3.)

Guideline F Tax Allegations

Each individual SOR tax allegation will be considered in light of Applicant’s Answer (and supporting documents therein), Department Counsel’s FORM brief (and documents therein), Applicant’s Response Brief, and AE A and AE B.

SOR ¶¶ 1.a. and 1.b. Failure to file federal and state income tax returns for tax years (TY) 2015, 2016, and 2019. Applicant answered that he was on an installment agreement with the state. He did not, however, submit any such agreement. The record shows and Department Counsel agrees that those returns have been filed but belatedly so. I concur. Applicant filed his 2015 and 2016 federal and state returns in May 2018 and his 2019 federal and state returns in December 2020. (Item 6 at 1-2.)

SOR ¶ 1.c. Indebted to the IRS for \$492 for TY 2013. Applicant arranged with an entity in November 2021 to make \$200 quarterly payments to the IRS through May 2024 to address this debt. (The arrangement also included a TY 2017 debt that is not at issue here.) Department Counsel is correct that there is no record of payments made under this plan. As I read the record, however, it shows that this debt was paid on March 7, 2019. (Item 3 at 5-7; Item 6 at 5-7.)

SOR ¶ 1.d. Indebted to the IRS for \$1,498 for TY 2015. Applicant answered that he was on an installment agreement with the state. He did not, however, submit any such agreement. AE A is an IRS document that is undated but shows a zero balance due from Applicant for tax year 2015. The document was likely generated before the end of tax year 2021, because there is no amount owed or to be refunded for that tax year.

SOR ¶ 1.e. Withdrawn by the Government

SOR ¶ 1.f. Indebted to the state for \$727 for TY 2013. Applicant answered that he was on an installment agreement with the state. He did not, however, submit any such agreement. Applicant submitted his bank statements showing six payments of \$60 per month to the state Franchise Tax Board from June 2021 to November 2021. Those statements do not indicate to which tax year those payments were directed. If they were directed to tax year 2013, there is no documentation that \$360 satisfied the debt of \$727. (Item 3 at 2, 9-14.)

SOR ¶ 1.g. Indebted to the state for \$1,491 for TY 2015. Applicant answered that he was on an installment agreement with the state. He did not, however, submit any such agreement. Applicant did not submit his state return for TY 2015. He did submit bank statements showing two payments of \$60 to the state Franchise Tax Board on July 23, 2021, and August 23, 2021. Those statements do not indicate to which tax year those payments were directed. (Item 3 at 2; Item 6 at 29-34.)

SOR ¶ 1.h. Indebted to the state for \$548 for TY 2018 and 2019. Applicant answered that he was on an installment agreement with the state. He did not, however, submit any such agreement, nor did any of his documents address that allegation. (Item 3.)

AE B is a one-page bank statement that shows a single payment of \$200 to the “U.S. Treasury” on “February 10.” That entry does not include the year of the payment, nor does the document itself bear a date. Applicant cites AE B as evidence showing “automatic withdrawals to confirm this payment arrangement.” (Response Brief at 9.) Neither Applicant’s Answer nor his Response Brief, however, tied that payment to a particular payment arrangement, a tax year, or a Guideline F tax allegation.

Guideline F Consumer Debt Allegations

Each of the three individual SOR consumer debt allegation will be considered in light of Applicant’s Answer (and supporting documents therein), Department Counsel’s FORM brief (and supporting documents therein), Applicant’s Response Brief, and AE A and AE B. Applicant denied each of those allegations. The three consumer debt allegations are supported by the July 16, 2020 credit report. (Item 7.) In his July 29, 2020 PSI, Applicant explained that in light of the pending offer from his sponsor, he pulled his credit report in May 2020. Applicant explained that he would address the three consumer debts in that credit report beginning in June 2020. (Item 5 at 6-8)

SOR ¶ 1.i. Indebted to a creditor for \$5,356. This debt is owed to Applicant’s former landlord. Applicant vacated the leasehold at the end of the term. He had paid the rent in full. He was never told by the landlord why that amount was due. He speculated that the landlord charged him because Applicant did not participate in an end-of-lease walk-around. When the matter went to collections, he retained counsel to dispute that debt. Applicant provided a retainer agreement duly signed on November 15, 2021, that

recites the name of the creditor, which is the same creditor named in the SOR. (Item 3 at 15-19.)

SOR ¶ 1.j. Indebted to a creditor for \$2,674. Applicant submitted a letter from the creditor dated October 29, 2021, showing that the debt had been paid in full. (Item 3 at 23-23.)

SOR ¶ 1.k. Indebted to a creditor for \$3,085. Applicant submitted a letter from the creditor dated November 3, 2021, stating that the account has a zero balance. (Item 3 at 25.)

Guideline F Allegations Not Alleged in the SOR

In the FORM Brief, Department Counsel makes four allegations not alleged in the SOR that she contends are relevant to the history and extent of Applicant's financial problems. (FORM Brief at 9-10.)

First, Applicant filed a Chapter 7 bankruptcy case on April 25, 1996, that was discharged on August 14, 1996. (Item 8.)

Second, Applicant filed a Chapter 13 bankruptcy case on March 19, 2001, that was discharged on January 4, 2002, for failure to make plan payments. (Item 8.)

Third, Applicant filed a Chapter 13 bankruptcy case on February 11, 2002, that was discharged on March 9, 2007, "after completion of chapter 13 plan." (Item 8.)

Fourth, a federal tax lien was filed against Applicant on August 20, 2009, for \$6,372. (Item 9.) The fate of that lien is unknown.

Applicant did not respond to these four allegations. (Response Brief.)

Guideline J Criminal Conduct

Each of the two SOR criminal conduct allegations will be considered in light of Applicant's Answer (and supporting documents) and Department Counsel's FORM brief (and supporting documents),

SOR ¶ 2.a. Applicant was arrested in August 2020 for domestic offenses and charged with Infliction of corporal injury to a spouse or cohabitant and battery with serious bodily injury. Applicant admitted that he was arrested but denied that he was charged, as alleged. (Item 3.) As evidence of the allegation, the Government submitted police reports documenting the arrest and an emergency room interview of the victim, Applicant's cohabitant. The police also interviewed Applicant at his home. On the evening of the incident, Applicant and his cohabitant were in the bedroom of their residence. Applicant told his cohabitant he needed to go to his daughter's house. Cohabitant did not want him driving due to his alcohol consumption. Applicant became upset and called her a name.

She threw a pillow at Applicant, hitting him in the stomach. In Applicant's version, he threw something back, hitting her in the back. Beyond that throwing exchange, Applicant denied any physical altercation; there was just a verbal one. Applicant claimed that cohabitant had been drinking excessively. He reported that cohabitant had no physical injuries when she left their home that evening. According to cohabitant, Applicant struck her with his closed fist about ten times, in her face, stomach, back, and arms. She left the house and hid in the backyard until he left. At the emergency room, the nurse reported that cohabitant had multiple injuries, including her right arm being fractured in numerous places. Cohabitant said she wished to press charges. Cohabitant was transferred to another hospital to consult with an orthopedic surgeon about her right arm. (Item 10 at 5-7.) Cohabitant later dropped the charges, and the prosecutor declined to prosecute. (Item 3 at 32; Item 5 at 18; Item 10 at 2.)

SOR ¶ 2.b. Applicant was arrested in April 1993 for a domestic violence offense and injury to a spouse or cohabitant. (Item 3 at 36-37.) Applicant did not address the arrest allegation but denied that he was charged, as alleged. (Item 3.) As evidence of the allegation, the Government submitted a Federal Bureau of Investigation (FBI) record documenting the arrest and the charge. In his PSI, Applicant explained that he and his niece had a physical confrontation in his truck on the way back from a trip. He pulled into a rest stop, and his niece became enraged and began throwing things at Applicant. In the process, his niece broke some glass and suffered cuts. Applicant said his niece was intoxicated. A sheriff arrived and took both of them to jail. They stayed two nights, because the courts were closed due to a holiday. Applicant said this was "an isolated incident," and he broke up with his niece shortly thereafter (Item 5 at 16-17.) The FBI document reports that the prosecutor declined to prosecute Applicant. (Item 11.)

Law and Policies

It is well-established law that no one has a right to a security clearance. As noted by the Supreme Court in *Department of the Navy v. Egan*, "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." Under *Egan*, Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

A favorable clearance decision establishes eligibility of an applicant to be granted a security clearance for access to confidential, secret, or top-secret information. An unfavorable clearance decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information. The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted. An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven. In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.

In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of evidence. The Appeal Board has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.

Discussion

Guideline F, Financial Considerations

Under Guideline F for financial considerations, the suitability of an applicant may be questioned or put into doubt when that applicant has a history of excessive indebtedness or financial problems or difficulties. The overall concern is:

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 concern is broader than the possibility that a person might knowingly compromise classified information to obtain money or something else of value. It encompasses concerns about a person's self-control, judgment, and other important qualities. A person who is financially irresponsible may also be irresponsible, unconcerned, or negligent in handling and safeguarding classified information.

In analyzing the facts of this case, I considered the following disqualifying conditions:

AG ¶ 19(a): inability to satisfy debts;

AG ¶ 19(b): unwillingness to satisfy debts regardless of the ability to do so;

AG ¶ 19(c): a history of not meeting financial obligations; and

AG ¶ 19(f): failure to file . . . annual Federal, state, or local income tax returns . . . or failure to pay annual Federal, state, or local income tax as required.

In analyzing the facts of this case, I considered the following mitigating conditions:

AG ¶ 20(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;

AG ¶ 20(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;

AG ¶ 20(d): the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts; and

AG ¶ 20(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 evidence supports a conclusion that Applicant has had a problematic financial history. Security concerns are raised under AG ¶¶ 19(a), (b), (c), and (f). The next inquiry is whether any mitigating conditions apply.

TAXES: The crux of the financial case is Applicant's history of failing timely to file state and federal income tax returns. He filed his 2015 and 2016 federal returns in May 2018 and his 2019 return in December 2020. Applicant filed his 2015 and 2016 state returns in May 2018 and his 2019 return in December 2020. The 2015 and 2016 returns were egregiously tardy. And the 2019 returns barely made it into calendar year 2020, still months overdue.

Failure to file tax returns is itself a separate security concern. ISCR Case No. 01-05340 at 3 (App. Bd. Dec. 20, 2002). Although Applicant is now current on his tax return filings, he demonstrated a careless disregard for his legal obligations under state and federal tax laws. DOHA's mission is not to collect taxes. Nor is it to prod applicants to timely file their tax returns. *See, e.g.,* ISCR Case No. 07-08049 at 5 (App. Bd. Jul. 22, 2008). The mission is to ensure that applicants show the capacity diligently to comply with laws and regulations governing the handling of classified information. That Applicant finally got around to filing his tax returns is not a sufficient defense, without a justifiable reason for the delay. The Appeals Board has regularly rejected the "no harm, no foul" excuse for applicants who play catch-up with their untimely tax filings. *See, e.g.,* ISCR Case No. 14-01894 at 4-5 (App. Bd. Aug. 18, 2015).

Applicant offered "a lapse of judgment," "mismanagement," and "various reasons" for his tax difficulties. Although he should be commended for his candor, those reasons are not justifiable excuses. Those failings do not reflect well on Applicant's judgment, reliability, and ability to protect classified information.

Applicant recited that he was on "installment agreements" for six of the SOR tax allegations. He did not, however, adequately document those agreements. In addition, Applicant did not sufficiently document his payments under those plans. The Appeals Board has routinely held that it is reasonable to expect applicants to produce documentation supporting their efforts to resolve debts. *See, e.g.,* ISCR Case No. 20-00615 at 2 (Jun. 7, 2021). Applicant has not satisfied that basic requirement.

Applicant's tax troubles began as far back as 2013, and they continued from 2014 through 2015, 2016, 2018, and 2019. His tax deficiencies are current and were frequent. Applicant's repeated reliance on installment agreements calls into question his ongoing ability to pay future tax debts. I have also considered Applicant's three brief periods of unemployment (one, two, and three months). Without more information, however, I am unable to conclude that they materially impaired Applicant's ability to file tax returns or pay his taxes. I find that mitigating conditions AG ¶¶ 20(a), (b), (d), and (g) do not apply. Therefore, I find against Applicant on SOR ¶¶ a. through h. (SOR ¶ 1.e. was withdrawn.)

Consumer Debts: Applicant's three consumer debts remain to be addressed. The applicable timeline is relevant here. Applicant completed his SCA on June 17, 2020, in which he listed three consumer debts. In his July 29, 2020 PSI, he stated that he accessed his credit report in May 2020, in connection with his sponsor's pending job offer. In that PSI, he discussed these debts, saying they would be addressed. The SOR was issued on November 15, 2021. By that time, Applicant had settled two of those debts (SOR ¶¶ 1.j. and 1.k.) on October 29, 2021 and November 3, 2021, respectively. And he had retained counsel for the other debt on November 15, 2021 (SOR ¶ 1.i.).

The Appeals Board does not look favorably upon applicants who address their financial issues only once their clearance prospects are in jeopardy. That appears to be the stimulus that prompted Applicant to resolve his consumer debts, which happened just before the SOR was issued. See ISCR Case No. 17-04110 at 3 (App. Bd. Sep. 26, 2019); ISCR Case No. 17-01256 at 5 (App. Bd. Aug. 3, 2018). Therefore, I find against Applicant on SOR ¶¶ 1.i., j., and k.

Unalleged Financial Conduct: In the FORM brief, Department Counsel noted four circumstances not in the SOR that bear on the history and extent of Applicant's financial portrait. Applicant did not object or otherwise respond to those allegations.

The Appeals Board has held that facts not alleged in the SOR may be considered only for limited purposes. One of those purposes is to provide evidence for the "whole-person" analysis. ISCR Case No. 00-0633 at 3 (App. Bd. Oct. 24, 2003), *citing* AG ¶¶ 2(d)(1)-(9) and 2(f)(1)-(6) (the "whole-person" factors). It is for that purpose that I consider these four allegations. Taken together, these four instances show that Applicant has a problematic financial history that reaches back more than 25 years. That history and Applicant's more recent financial issues documented in the SOR do not promote a positive assessment of Applicant's worthiness to hold a national security clearance.

Guideline J, Criminal Conduct

Applicant's background of alleged criminal conduct raises a security concern, which is detailed in AG ¶ 30:

Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules, and regulations.

I have considered the disqualifying conditions under AG ¶ 31. The following potentially applies to both SOR allegations of domestic violence against Applicant, the one in 1993 and the one in 2020.

(b) evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted.

A potentially applicable mitigating condition is set forth in AG ¶ 32 as follows:

(a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment.

Applicant's arrest and two-day detention in 1993 for a domestic relations offense possibly triggers security concerns under AG ¶ 31(b). The circumstances were that Applicant and his niece became involved in a physical altercation at a highway rest stop. The police arrested both of them and jailed them for two days. Applicant denied that he assaulted his niece. He also claimed that his niece was intoxicated. The prosecutor declined to prosecute. On this record, it appears that Applicant and his niece were in equal fault, which is likely why the prosecutor declined to prosecute. Therefore, I do not find that the SOR allegation is based on credible evidence, as required by AG ¶ 31(b). In addition, the incident is 29 years old and occurred under unusual circumstances. AG ¶ 32(a) applies. I find in favor of Applicant on SOR ¶ 2.b.

Applicant's incident in August 2020 involving his cohabitant and domestic violence triggers security concerns under AG ¶ 31(b). For the following reasons, I find that AG ¶ 31(b) applies and is not mitigated. The circumstances have been amply recited in the Findings of Fact above. A fair question is why this incident results in a finding different from the 1993 incident. There are several material distinctions. First, this incident is only two years old. It did not occur that long ago. Second, Applicant and his cohabitant were both detained in the earlier incident, unlike here. Third, and most significant, here the police reports of the emergency room interview of cohabitant identify a strong consistency between her injuries and her recounting of the physical blows she claimed she suffered at the hands of Applicant. This presents credible evidence. Finally, unlike the first incident, here cohabitant did press charges, although she later dropped them. Thus, it is fair to conclude that the prosecutor declined to prosecute, because he would not have the cohabitant as a witness. Therefore, I find against Applicant on SOR ¶ 2.a. It should be reiterated that AG ¶ 31(b) applies "regardless of whether the individual was formally charged, prosecuted, or convicted."

The record raises doubts about Applicant's reliability, trustworthiness, good judgment, and ability to protect classified information. In reaching this conclusion, I weighed the evidence as a whole and considered if the favorable evidence outweighed

the unfavorable evidence or *vice versa*. I also gave due consideration to the whole-person concept. AG ¶¶ 2(d)(1)-(9) and 2(f)(1)-(6). In that regard, I have given full weight to the character reference email sent on November 9, 2021, by an AGA complimenting Applicant on his “Outstanding IT Support & Customer Service.”

Accordingly, I conclude that Applicant failed to meet his ultimate burden of persuasion to show that it is clearly consistent with the interests of national security to grant him eligibility for access to classified information.

Formal Findings

As required by section E3.1.25 of Enclosure 3 of the Directive, I make the following formal findings on the SOR allegations:

Paragraph 1, Guideline F:	AGAINST APPLICANT
Subparagraphs 1.a-1.d:	Against Applicant
Subparagraph 1.e:	WITHDRAWN BY GOVERNMENT
Subparagraphs 1.f-1.k	Against Applicant
Paragraph 2, Guideline J:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	For Applicant

Conclusion

In light of the record as a whole, it is not clearly consistent with the interests of national security to grant Applicant access to classified information.

Philip J. Katauskas
Administrative Judge