



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



In the matter of:)
)
) ISCR Case No. 20-00017
)
Applicant for Security Clearance)

Appearances

For Government: Jeff Nagel, Esq., Department Counsel
For Applicant: Asya Hogue, Esq.

August 17, 2022

Decision

TUIDER, Robert, Administrative Judge:

Applicant failed to mitigate security concerns regarding Guideline F (financial considerations). National security eligibility is denied.

Statement of the Case

On July 22, 2019, Applicant submitted a Questionnaire for National Security Positions (SF-86). On April 10, 2020, the Defense Counterintelligence and Security Agency (DCSA) Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline F. The SOR detailed reasons why the DCSA 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 5, 2020, Applicant submitted his Answer to the SOR. On November 27, 2020, Department Counsel was ready to proceed.

On December 15, 2020, the Defense Office of Hearings and Appeals (DOHA) assigned the case to me. On February 18, 2021, DOHA issued a notice of hearing scheduling the hearing for March 24, 2021. On February 22, 2021, DOHA issued a

notice of cancellation due to Applicant's work conflict. On April 8, 2021, DOHA issued a second notice of hearing scheduling the hearing for May 21, 2021. On May 11, 2021, DOHA issued a second notice of cancellation after receiving a notice of appearance from Applicant's recently retained counsel. On that same day, DOHA issued a third notice of hearing; however, the third notice indicated the hearing would be scheduled by DCS video conference on June 28, 2021.

The hearing commenced as scheduled. I admitted Government Exhibits (GE) 1 through 5 without objection. Applicant testified and called one witness to testify on his behalf. I admitted Applicant Exhibits (AE) A through O without objection. I held the record open until August 31, 2021, to afford the Applicant an opportunity to submit additional evidence. (Tr. 53-56) Applicant timely submitted AE P through V without objection. On July 12, 2021, DOHA received the hearing transcript. (Tr.).

Findings of Fact

Background Information

Applicant is a 42-year-old senior technical specialist, who has been employed by a defense contractor since August 2017. He seeks to retain his secret security clearance, which is a requirement of his continued employment. (Tr. 26-27, 32-33; GE 1; AE A, AE M) He has successfully held a security clearance since October 1998. (Tr. 12)

Applicant graduated from high school in June 1997. He attended a community college after high school and earned 32 credit hours, but did not receive a degree. (Tr. 27) Applicant served in the U.S. Marine Corps from May 1998 to July 2003, and was honorably discharged as a sergeant (pay grade E-5). He remained in the inactive Marine Corps Reserve, and was honorably discharged in May 2006 after completing his eight-year service obligation. His military occupational specialty was 7234 (air command and control electronics operator) While on active duty, he made one deployment to Afghanistan in 2002. (Tr. 27-28, 31, 47-48; GE 1; AE B, AE M) Since his discharge from active duty, he has worked as a defense contractor. (AE M)

Applicant married in March 2001. He has a 20-year-old son, and an 11-year-old daughter. His son graduated from high school and is attending community college. Both children live at home and are financially dependent on their parents. Applicant's wife does not work outside the home. (Tr. 29-31; GE 1, AE M)

Financial Considerations

The SOR lists six allegations under this concern, the first two deal with his failure to file his Federal and state income tax returns, and the remaining four deal with collection accounts, all of which are discussed in further detail below. (SOR ¶¶ 1.a – 1.f) These allegations are established by his July 22, 2019 SF-86; his Office of Personnel Management (OPM) Report of Investigation (ROI) conducted from October 16 to 29, 2019, to include summarized results of Applicant's Personal Subject Interviews (PSI) on

October 4, 2019 and October 29, 2019; his September 14, 2019 and November 27, 2020 credit reports; and his June 5, 2020, SOR Response. (GE 1 through 5; SOR Answer)

Applicant's financial difficulties began in 2009 when his business partner and vice president of his former business suddenly departed leaving him responsible for all operations and company debt. His company lost a major contract that was eventually replaced by a much less profitable contract. Applicant estimates this business loss caused his salary to be reduced from "about 120 (thousand dollars a year)" to "around 80 (thousand dollars a year). This unplanned income loss placed Applicant in a precarious financial position, "it was either pay rent and bills or . . . not doing anything else." Added to that, Applicant's state of residence began garnishing his wages for non-payment of state taxes. (Tr. 34-36)

In his SOR Answer, Applicant's explanation for not filing his Federal and state income tax returns from 2012 to 2018 was, "This situation occurred due to me owing taxes and being unable to pay them at the time. I let the time lapse and eventually fell in to being paranoid and afraid to reach out to the IRS and [state tax authority] to pay the taxes and bring my returns up to date. I realize that was not the correct response." (SOR Answer) He added during his hearing, "So, that initially is just because I just kept getting scared because I had that initial tax burden and it just left me in paralysis." (Tr. 36-37) Going forward, Applicant stated that he intends to file his taxes in a timely manner. (Tr. 39)

SOR ¶ 1.a: Failed to file Federal income tax returns for tax years 2012, 2013, 2014, 2015, 2016, 2017, and 2018.

During his hearing, Applicant submitted his 2017 and 2020 (not alleged) Federal income tax returns. These two returns do not reflect filing dates or signatures. As of his hearing date, Applicant had not filed his Federal income returns for tax years 2012, 2013, 2014, 2015, and 2016, a total of five years of returns. Post-hearing, Applicant submitted an agreement with a professional tax preparer, who was to file all of his remaining Federal and state income tax returns. The agreement is dated June 29, 2021, the day after his hearing on June 28, 2021. (Tr. 48, 52-55; AE F, AE H, AE U)

Post-hearing, Applicant submitted his completed Federal income tax returns for tax years 2012, 2013, 2014, 2015, and 2016. All of those tax returns were dated August 23, 2021, except his 2017 return, which is not dated. None of these returns reflect signatures. (AE H, AE P through AE T) In his SOR Answer, Applicant attached his 2018 (alleged) and 2019 (not alleged) Federal income returns. These two returns do not reflect filing dates or signatures. (SOR Answer) Applicant submitted documentation that he had made a \$7,679 payment to the IRS on May 20, 2021, and a \$2,381 payment to his state tax authority on May 20, 2021. (Tr. 39; AE G)

SOR ¶ 1.b: Failed to file state income returns for tax years 2012, 2013, 2014, 2015, 2016, 2017, and 2018.

During his hearing, Applicant submitted his 2017 and 2020 (not alleged) state income tax returns. As of his hearing date, Applicant had not filed his state income returns for tax years 2012, 2013, 2014, 2015, and 2016, a total of five years of returns. Post-hearing, Applicant submitted an agreement with a professional tax preparer, who was to file all of his remaining Federal and state income tax returns. The agreement is dated June 29, 2021, the day after his hearing on June 28, 2021. (Tr. 48, 52; AE F, AE H, AE U)

Applicant stated that his state tax authority filed his returns on his behalf and garnished his wages. (Tr. 48-49) Post-hearing, Applicant submitted copies of his completed state income tax returns for tax years 2012, 2013, 2014, 2015, and 2016. Those returns do not reflect filing dates or signatures. (AE H, AE P through AE T) In his SOR Answer, Applicant attached his 2018 (alleged) and 2019 (not alleged) state income returns. These two returns do not reflect filing dates or signatures. (SOR Answer)

Applicant was alerted to the Government's concerns regarding his failure to file his Federal and state income tax returns during his October 4, 2019 OPM PSI. Applicant stated that he was "scared to file taxes and face the amount that has accumulated over the years and did not have the means to pay them." His state tax authority began garnishing his wages in 2018 for \$20,000 in back taxes owed to the state. During that interview, Applicant stated that he was unsure of the amount he owed for his Federal and state back income taxes. Applicant added that he understood the importance of filing and paying his taxes. He stated that he was currently in the process of contacting a tax assistance group to handle his outstanding debt with the IRS and state tax authority. Applicant was also alerted to the Government's concern regarding his failure to file his Federal and state tax income tax returns when he received his April 10, 2020 SOR. (Tr. 49-50; GE 2) At his hearing, Applicant stated that he was working on filing his Federal and state income tax returns, adding that all of his income tax returns from 2017 to 2021 had been filed. (Tr. 50-52)

Additionally, Applicant's SOR alleged four delinquent accounts, discussed below.

SOR ¶ 1.c – Credit card collection account in the amount of \$17,501. Applicant used this credit card to pay daily expenses during the period of reduced income. He contacted the creditor and settled account for \$1,925 on June 14, 2020. (SOR Answer; Tr. 39-40; AE F) **DEBT RESOLVED.**

SOR ¶ 1.d – Home equity line of credit (LOC) collection account in the amount of \$67,644. The LOC was taken out on Applicant's home at the time, which went through foreclosure and was sold at auction. Applicant contacted the creditor and began making \$300 monthly payments on the account in June 2020 to settle the debt. (SOR Answer; Tr. 40-42; AE I) **DEBT BEING RESOLVED.**

SOR ¶ 1.e – **Credit card collection account in the amount of \$5,043.** Applicant used this credit card to pay his daily expenses during the period of reduced income. He contacted the creditor and settled account for \$1,513 on June 17, 2020. (SOR Answer; Tr. 42-43; AE D) **DEBT RESOLVED.**

SOR ¶ 1.f – **Recreational vehicle collection account in the amount of \$37,627.** Applicant purchased this vehicle in 2015 for approximately \$46,000 and was making \$500 monthly payments on it until he experienced an income reduction. He acknowledged purchasing this recreational vehicle even though he had not filed his income tax returns. Contacted creditor and settled account for \$18,515 on June 3, 2020. (SOR Answer; Tr. 44-47; AE C) **DEBT RESOLVED.**

Applicant drives a 2011 Ford F-250 pick-up truck that he purchased for “\$50,000.” He uses the vehicle for family transportation. His wife drives a 2004 Mercedes. (Tr. 47, 50) His June 4, 2021 credit report reflects a FICO credit score of 720. (AE O)

Character Evidence

Applicant stated that he takes security “very seriously” and is not a security risk. In that regard, he submitted numerous certificates documenting security training he completed. (Tr. 43-44; AE N, AE V) He submitted a detailed letter of recommendation from a client command recognizing his “outstanding support and technical innovation.” (Tr. 44; AE K)

The president of Applicant’s current employer testified on his behalf. She has held a security clearance since 2000. Applicant worked for her company from 2004 to 2009 and was rehired in 2017. The company president provided favorable testimony regarding his work performance, character, and contribution to the national defense. She is aware of his tax and financial problems. She is also familiar with how those problems evolved and what he is doing to resolve them. In short, she does not believe that he is a security risk. Applicant’s company president also provided a reference letter that was submitted with his SOR Answer consistent with her testimony. (SOR Answer; Tr. 11-20) The officer in charge of a client command also provided a reference letter that lauded Applicant’s character and performance. (SOR Answer)

Applicant’s 2020 and 2021 employee evaluations reflect his superior performance. The write-ups describe in further detail his trustworthiness and his value to the company. (AE J) Applicant also submitted recent photographs of his two children. (AE L)

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.

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 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 establishes the disqualifying conditions in AG ¶¶ 19(a), 19(c), and 19(f). Further inquiry is necessary about the potential application of any mitigation conditions.

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 [full cite here] *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's conduct does not warrant full application of AG ¶ 20(a) because there is more than one delinquent debt and his financial problems are not isolated. His 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)).

AG ¶ 20(b) and 20(d) are partially applicable as it pertains to delinquent debts alleged under SOR ¶¶ 1.c through 1.f. His 2009 loss of income no doubt played a role in his ability to remain current on his established obligations at that time. However, Applicant does not receive full credit under either of these two mitigating conditions because of his failure to act responsibly under the circumstances and the time elapsed before addressing these four debts. AG ¶¶ 20(e) and 20(f) are not applicable.

Of greater concern is the fact that Applicant did not timely file his Federal and state income tax returns from 2012 to 2018. Applicant was alerted to the fact that his failure to file these returns was a concern to the Government during his October 2019 OPM PSI and later when he received his April 2020 SOR. These events apparently did not prompt Applicant to recognize the seriousness of his situation and take immediate corrective action. He ultimately filed his Federal and state income tax returns; however, he did not begin to do so until the eve of his hearing and five of his returns were not filed until after his hearing. His explanation of being scared to file his returns and concerned about the amount he would owe is not a convincing explanation for an individual of his age and experience. Yet, he did not hesitate to purchase a \$46,000 recreational vehicle during a seven-year period of non-tax filing compliance. Such a lapse in judgment cannot be overlooked, especially from an individual whose income is derived from tax dollars. The evidence demonstrates that Applicant did not act responsibly with regard to timely filing his Federal income tax returns and paying or making payment arrangements for taxes owed.

In regard to the failure to timely file Federal income tax returns when due, the DOHA Appeal Board has commented in ISCR Case No. 14-04437 at 3 (App. Bd. Apr. 15, 2016):

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). (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). Applying the Appeal Board's jurisprudence, SOR ¶¶ 1.a and 1.b are not mitigated.

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 42-year-old senior technical specialist, who has been employed by a defense contractor since August 2017. He has spent most of his adult life as an active-duty Marine and later working as a civilian employee in support of the defense industry. He has successfully held a clearance since 1998. He seeks to retain his security clearance as a requirement of his continued employment. He is highly regarded and respected by his employer and peers. Applicant is married and has two children. He has all the indicators of an upwardly mobile individual with a bright future ahead of him.

However, for at least seven years, he has failed to grasp the importance of one of the fundamental hallmarks of U.S. citizenship, which is the timely filing of his Federal and state income tax returns and paying taxes when due. This is especially crucial for an individual seeking to retain a security clearance and working for a defense contractor advancing the national security of the United States. From the evidence presented, despite being made aware that the timely filing of his Federal and state income tax returns was a security concern, Applicant failed to comply with this basic and fundamental civic obligation. He is a bright and talented individual, who is more than capable of addressing his income tax problems in a responsible way. 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 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:	AGAINST APPLICANT
Subparagraphs 1.a – 1.b:	Against Applicant
Subparagraphs 1.c – 1.f:	For Applicant

Conclusion

In light of the record as a whole, it is not clearly consistent with the national interest to grant Applicant's security clearance. National security eligibility is denied.

ROBERT TUIDER
Administrative Judge