



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



In the matter of:)	
)	
)	ISCR Case No. 20-03335
)	
Applicant for Security Clearance)	

Appearances

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

08/18/2022

Decision

CERVI, Gregg A., Administrative Judge

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

Statement of the Case

Applicant submitted a security clearance application (SCA) on December 26, 2018. On March 23, 2021, the Defense Counterintelligence and Security Agency Consolidated Adjudications Facility (DCSA CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guideline F. The DCSA CAF acted under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective on June 8, 2017.

Applicant answered the SOR on October 11, 2021 (Ans. 1), and requested a hearing before an administrative judge. Department Counsel (DC) amended the SOR on November 18, 2021, to add two new allegations. Applicant answered the amended SOR (Ans. 2) on December 30, 2021. The case was assigned to me on March 31, 2022. The

Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on April 6, 2022, scheduling the hearing for May 17, 2022. The hearing was held via video teleconference, as scheduled. During the hearing, DC moved to again amend the SOR based on Applicant's answers to the amended SOR from 2021. Applicant objected, and the motion was denied.

Government Exhibits (GE) 1 through 9 were admitted into evidence without objection. Applicant testified and submitted Applicant Exhibits (AE) A and B, which were admitted without objection. (Note: Applicant's forwarding email mistakenly labeled AE A as an IRS refund applicable to the 2021 tax year; rather the document relates to the 2019 tax year refund.) The record was held open until May 31, 2022, to permit the parties to submit additional documentary evidence. DC submitted additional exhibits AE 10 through 15, which were admitted over Applicant's objections, and supplemented his closing argument. Applicant submitted additional exhibits, collectively marked as AE C, which were admitted without objection, and supplemented his closing argument. DOHA received the hearing transcript on May 31, 2022.

Findings of Fact

Applicant is a 55-year-old systems engineer and production and design manager for a government contractor, employed since October 2018. He earned a bachelor's degree in 1989. He married in 1996 and divorced in 2017. He has three adult children (ages 25, 24, 21). He has never held a security clearance.

The SOR alleges under Guideline F that Applicant is indebted to the Federal Government for delinquent taxes for tax year 2017, totaling about \$30,058 (SOR ¶ 1.a); and a delinquent tax debt owed to state "A," totaling about \$3,900 (SOR ¶ 1.b). The amended SOR alleged that Applicant is indebted to the Federal Government for delinquent taxes for tax year 2016, totaling \$18,295 (SOR ¶ 1.c); and that Applicant failed to timely file his annual Federal income tax returns as required for tax years 2016 through 2018 (SOR ¶ 1.d). Applicant admitted SOR ¶¶ 1.a and 1.d (Ans. 1), and denied SOR ¶¶ 1.b and 1.c (Ans. 2). In regard to SOR ¶ 1.c, Applicant replied that the correct total owed for 2016 Federal taxes is \$9,000, and that he is on a payment plan. (Ans. 2) He also provided documents with his answers.

Applicant owned a shipyard from about 1998 to 2012. He grew the business to 65 employees, and testified that it was reasonably profitable. He testified that in 2011, he agreed to build two large crew boats costing \$7 million per boat.¹ Despite his cost estimates, the company lost money on the project. (Tr. 11-12)

In 2009, he filed Chapter 11 "reorganization" bankruptcy (Case No. 09-5***3). The business claimed \$3,634,797 in liabilities and \$1,588,050 in assets. (AE C) In October

¹ Applicant testified that the boat contract loss was in 2011 after which he filed bankruptcy, but his company's Chapter 11 bankruptcy was filed in 2009 and the Chapter 7 bankruptcy was filed in 2010. His personal Chapter 13 bankruptcy was filed in 2009. It is unclear whether the boat contract discussed in testimony was part of the larger shipyard business or his subsequent small boat business.

2010, the Chapter 11 trustee filed a motion to convert case No. 09-5***3, to a Chapter 7 bankruptcy, or dismiss the case. On June 16, 2010, the U.S. Bankruptcy Court judge granted the motion to dismiss the Chapter 11 as of May 25, 2010. (GE 12) A final decree discharging the trustee in the Chapter 11 case was granted in July 30, 2010. (GE 12)

In October 2010, Applicant's company filed Chapter 7 bankruptcy (Case No. 10-5***8), on estimated liabilities of \$2,372,589 and assets of \$56,151. The Chapter 7 bankruptcy included claims from 15 creditors, including the IRS for approximately \$142,932, for unpaid taxes, interest, and penalties for Federal Social Security, unemployment, and corporate income taxes in tax years 2008 and 2009. (GE 15) The Chapter 7 bankruptcy was discharged in August 2012. (GE 14) In his supplemental closing argument, he stated that "all taxes that were owed by [boat company], that were in the form of payroll taxes were paid." He claimed in argument that his company accountant stopped paying \$300,000 in payroll taxes after he lost oversight control from another accountant. No independent documentation supporting this claim was submitted.

Applicant filed personal Chapter 13 bankruptcy (Case No. 09-5***6) in 2009 on the advice of counsel to shield him from claims of the boat company's creditors. He completed the Chapter 13 plan by October 2010, and it was discharged. He claimed \$257,344 in liabilities and \$472,520 in assets. (AE C) A total of 45 creditors made claims, including the IRS who claimed approximately \$345,203 in taxes owed; the U.S. Small Business Administration who claimed approximately \$29,808 owed; and his state Department of Revenue who claimed approximately \$104,704 in taxes owed. The IRS claim included debts for unpaid taxes, interest, and penalties for Federal Social Security, unemployment, and corporate income taxes in tax years 2008 and 2009. (GE 13)

In 2011, Applicant started a small boat building business, incorporated as a limited liability company (LLC). He testified that the business has been recently unprofitable. From 2009 to 2012, Applicant worked for a marine consulting company before he was laid off. In 2017, he decided to become self-employed and to use a \$450,000 builders loan and \$250,000 cash (including taking an early withdrawal of \$200,000 from his retirement account with penalties) to build a speculative (spec) home with the intent to sell when completed. He completed the home in 2017, and but could not sell it until 2019 because it was overpriced. (Tr. 13) It sold for \$650,000, well below what he expected to make. He claimed he lost \$75,000 on the sale of the home and \$200,000 in other costs as a result of the spec home project. (Tr. 41-47) From January to October 2018, Applicant worked for another engineering company, before accepting his current position with a defense contractor in October 2018. (GE 1)

Applicant failed to file his Federal income tax returns as required for tax years 2016 to 2018. The 2016 Federal income tax return was originally filed late; in November 2017; and the 2017 and 2018 returns were filed late; in December 2019. No extensions were requested. (GE 5) He failed to pay income taxes due for tax years 2016 and 2017. As of December 2020, he owed \$47,317 in delinquent Federal taxes and about \$5,200 in delinquent state taxes. (GE 4) In his answer to the amended SOR, he noted that he owed about \$9,000 in delinquent Federal income taxes, and continued payments on his

payment plan. Applicant admitted his outstanding Federal tax liability, but as a result of the application of subsequent tax year refunds to his balance, and a payment plan he started in December 2020 and ended in May 2022, he has paid off the Federal tax balance. Part of his 2020 Federal tax refund was applied to his 2017 tax debt. (GEs 4 and 5) He stated in testimony:

And, you know, the taxes – I sort of shoved them to the back. And I focused on my children. And I did. Should I have filed them? Yes. I could have – I could have eliminated some not-to-file penalties – did-not-file penalties. That was definitely a mistake. Did I have the money to pay it? I didn't. I didn't have the cash to pay it. I was doing my best to support my kids, but I could have gotten rid of the penalties. (Tr. 14)

Although not alleged in the SOR, Applicant also filed his 2017 state income tax return late (in January 2020) (GE 2), and his 2018 and 2019 state tax returns late (in December 2021). (GE 2; Ans. 2) Applicant originally owed a \$3,900 to the state for tax years 2016 to 2020, but he filed amended Federal income tax returns that changed his state obligation. As of January 2022, the state notified him that alleged debts for tax years 2016-2019 were canceled based on information he provided them. (Ans. 2; Tr. 65-66) Applicant also failed to file his 2019 and 2020 Federal income tax returns when due (2019 filed in December 2020; 2020 filed in about August 2021). All state and Federal income tax returns have now been filed, and some have been recently amended. (Tr. 55-60; Ans. 2; GEs 2-9)

Applicant has not sought financial counseling, except as required by the court before filing bankruptcy. He blamed a dishonest accountant for his company's failure to pay business taxes when due, and his own reluctance to use an accountant to file his personal taxes, for much of his troubles. He expressed regret for his past financial situation and attributed them to his failed business, overextension because of his spec home, bankruptcy, divorce, as well as expenses related to his children attending college. He admitted not managing taxes well, but claims he has undergone tremendous personal growth since then. He worked diligently to resolve his tax issues, and holds himself to be responsible and accountable. He currently earns \$146,000 per year, has about \$4,000 in liabilities, is paying on a mortgage, and has about \$10,000 in cash. He submitted a page from a credit report showing a "good" credit score.

Policies

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to "control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865 § 2.

National security eligibility is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines in conjunction with an evaluation of the whole person. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider a person's stability, trustworthiness, reliability, discretion, character, honesty, and judgment. AG ¶ 1(b).

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Clearance decisions must be made "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. *Egan*, 484 U.S. at 531. "Substantial evidence" is "more than a scintilla but less than a preponderance." See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability. See, e.g., ISCR Case No. 12-01295 at 3 (App. Bd. Jan. 20, 2015).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. See, e.g., ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; see, AG ¶ 1(d).

Analysis

Guideline F: Financial Considerations

The security concern under this guideline is set out in AG ¶ 18:

Failure to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information. . . .

The relevant disqualifying conditions under AG ¶ 19 include:

- (a) inability to satisfy debts;
- (c) a history of not meeting financial obligations; and
- (f) failure to file or fraudulently filing annual Federal, state, or local income tax returns or failure to pay annual Federal, state, or local income tax as required.

Applicant's admissions, testimony, and the documentary evidence in the record are sufficient to establish the disqualifying conditions AG ¶¶ 19(a), (c), and (f).

The following mitigating conditions under AG ¶ 20 are potentially relevant:

- (a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;
- (b) the conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, a death, divorce or separation, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances;
- (c) the individual has received or is receiving financial counseling for the problem from a legitimate and credible source, such as a non-profit credit counseling service, and there are clear indications that the problem is being resolved or is under control;
- (d) the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts;

(e) the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue; and

(g) the individual has made arrangements with the appropriate tax authority to file or pay the amount owed and is in compliance with those arrangements.

Applicant has a long history of failing to file and pay Federal and state income tax returns, and poor financial decisions. He incurred business losses that may have resulted from poor advice, employee misconduct, or difficult economic conditions that may have been outside of his control, however, I am not convinced that his failure to file Federal income tax returns for tax years 2016 through 2018, or his failure to pay 2016 and 2017 Federal taxes when due were outside of his control. Although he has now filed all of his tax returns to date, and paid delinquent taxes, I am not convinced that he has established a track record of consistent, on-time filing of tax returns when due, and payment of taxes owed when required.

The guideline encompasses concerns about a person's self-control, judgment, and other qualities essential to protecting classified information. A person who is financially irresponsible may also be irresponsible, unconcerned, or negligent in handling and safeguarding classified information. See ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012). A security clearance represents an obligation to the Federal Government for the protection of national secrets. Accordingly, failure to honor other obligations to the Government has a direct bearing on an Applicant's reliability, trustworthiness, and ability to protect classified information. ISCR Case No. 14-03358 at 2 (App. Bd. Oct. 9, 2015). 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). 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. ISCR Case No. 14-01894 at 5 (App. Bd. Aug. 18, 2015).

Applicant's full tax history was not alleged in the SOR and may not be an independent basis for denying his application for a security clearance. However, conduct not alleged in the SOR may be considered to decide whether a particular adjudicative guideline is applicable, to evaluate evidence of extenuation, mitigation, or changed circumstances, or as part of a whole-person analysis. ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006). I have considered Applicant's bankruptcies and, more importantly, his failure to timely file his 2017-2019 state income tax returns when due; and failure to file his 2019 and 2020 Federal tax returns when due. These tax filing and payment failures represent financial irresponsibility and will be considered for the limited purposes described above.

Applicant's financial problems have been longstanding and remain a continuing concern. I give mitigating credit for resolving his tax issues with the IRS and state, however, his repeated failure to file and pay federal income tax returns and taxes when due have not been sufficiently mitigated given the number of years of non-compliance and disregard. I also have concerns about his overall financial responsibility and willingness to comply with future income tax obligations. Applicant may have come to the realization that timely filing and paying Federal income tax obligations is a significant responsibility, however, it has been late in coming. By his own admission, he repeatedly failed to seek financial counseling or use a tax professional to assist him with complicated returns.

Overall, Applicant's financial responsibility, especially with regard to fulfilling his Federal income tax obligations when required, is questionable. He has a poor track record with respect to Federal income tax compliance, and had many years to resolve his tax obligations, yet allowed them to remain unresolved until his ability to obtain a security clearance was jeopardized. Even then, he was slow to respond to the red flags raised about his tax delinquencies since completing his SCA in 2018 and interview in 2019. I believe he fully grasps the reality of his tax obligations, but he has yet to show a consistent record of compliance with tax requirements.

His purported reasons for his tax issues, including pushing them out of mind, divorce, supporting his children, and paying on the spec house, are insufficient to relieve him from complying with his personal tax obligations and he has not provided sufficient evidence to show that these matters were outside of his control, especially for the entire span of tax delinquency years. Applicant is intelligent and experienced in business and accounting. However, although he admitted to not managing taxes well and intentionally failing to file returns when due, he has not sought recent financial counseling or tax accounting assistance. AG ¶ 20 (d) and (g) apply as he has now filed all income tax returns due, and paid off his Federal tax debt, and AG ¶ 20 (e) applies to his extinguished state tax debt. However, no mitigating condition fully relieves him of his overall financial irresponsibility with regard to meeting Federal income tax obligations on a timely basis.

Whole-Person Concept

Under AG ¶¶ 2(a), 2(c), and 2(d), the ultimate determination of whether to grant national security eligibility must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d).

I considered all of the potentially disqualifying and mitigating conditions in light of the facts and circumstances surrounding this case. I have incorporated my findings of fact and comments under Guideline F in my whole-person analysis. I also considered Applicant's business failure, periods of under employment or reduced income, family

responsibilities, and alleged improprieties by his business accountant. I remain unconvinced of his overall financial responsibility, and his ability, intent, and desire to meet his financial obligations in the future, especially in tax compliance given his history.

Accordingly, I conclude Applicant has not carried his burden of showing that it is clearly consistent with the national security interest of the United States to grant him eligibility for access to classified information.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline F:	AGAINST APPLICANT
Subparagraphs 1.a-1.c:	For Applicant
Subparagraph 1.d:	Against Applicant

Conclusion

I conclude that it is not clearly consistent with the national security interest of the United States to grant Applicant eligibility for access to classified information. Applicant's application for a security clearance is denied.

Gregg A. Cervi
Administrative Judge