



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



In the matter of:)
)
) ISCR Case No. 19-03750
)
Applicant for Security Clearance)

Appearances

For Government: Eric Price, Esq., Department Counsel
For Applicant: *Pro se*

10/03/2022

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 May 20, 2019. On September 8, 2020, the Defense Counterintelligence and Security Agency Consolidated Adjudications Facility (DOD CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guideline F. The DOD 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) promulgated in Security Executive Agent Directive (SEAD) 4, *National Security Adjudicative Guidelines* (December 10, 2016).

Applicant answered the SOR on May 12, 2021, and initially requested a hearing, however, on August 13, 2021, he notified Department Counsel of his desire for a decision on the written record without a hearing. (GE 3) Department Counsel submitted the

Government's written case on September 30, 2021. On February 23, 2022, a complete copy of the file of relevant material (FORM) was sent to Applicant, who was given an opportunity to file objections and submit material to refute, extenuate, or mitigate the Government's evidence. He received the FORM on February 28, 2022. He responded with an undated letter and documents collectively marked as Applicant Exhibit (AE) A, which was admitted in evidence without objection. He later forwarded a Chapter 7 bankruptcy discharge order, marked as AE B, and admitted into evidence without objection. Government Exhibits (GE) 4-7 are admitted into evidence without objection. GEs 1 and 2 are the SOR and Applicant's Answer to the SOR, which are already part of the record. GE 3 is his August 2021 written request for a decision based on the administrative record. The case was assigned to me on June 16, 2022.

Findings of Fact

Applicant is a 52-year-old wireless communications engineer for a defense contractor, employed since April 2019. He was the president of his own communications company from August 1999 to at least April 2019. He earned a bachelor's degree in 1995, a master's degree in 1996, and a professional certificate in 2002. He married in 2014 and has three children.

The SOR alleges under Guideline F, that Applicant is indebted to the Federal Government for delinquent taxes for tax year 2013, totaling about \$33,000 (SOR ¶ 1.a); and owes about \$23,000 in delinquent taxes for tax year 2013 to his state of residence (SOR ¶ 1.b). The SOR also alleges six charged-off debts or collection accounts, totaling \$62,711 (SOR ¶¶ 1.c-1g, and 1.j); and two defaulted student loans totaling \$128,902 (SOR ¶¶ 1.h and 1.i). Applicant admitted the state tax debt and a collection account (SOR ¶¶ 1.b and 1.e); and denied the remaining allegations with explanations. He provided supporting documentation with his Answer to the SOR, in response to Government interrogatories, and in his response to the FORM. The record evidence is sufficient to support the SOR allegations.

Applicant was self-employed from 1999 to 2019. Applicant fell ill in 2001 with Crohn's disease that required hospitalizations and emergency surgery. Prior to 2019, he had flare ups that prevented him from working. He used credit cards to bridge the gaps in his income. His disease is now manageable. (AE A) He stated in his response to the FORM, that a major contract with a large phone and internet carrier was cut in 2018. He said prior to this loss of business, his debts were current. (AE A) Alternatively, he stated in his personal subject interview (PSI) with a Government investigator in July 2019, that the contract with a wireless carrier was cut in the winter of 2015, resulting in a significant financial loss including credit card debts, two vehicle repossessions, and inexplicably, an inability to pay Federal and state income taxes for tax year 2013. (GE 5) Applicant secured employment with a defense contractor in April 2019 with an annual salary of \$130,000.

SOR ¶¶ 1.a and 1.b are Federal and state income tax debts for tax year 2013. In his 2019 SCA, Applicant reported his tax delinquencies for tax year 2013. He stated in response to his state delinquency:

As an entrepreneur we have to balance and make sure payments are made to all parties. Due to slow pay from clients it's a steady game to catch up. There was also a point where I had Chron's [sic] and had to deal with that as well as meeting payroll and invoices. Due to ending of contract I had to make sure that contractors were paid before I could take care of my personal finances. I put subcontractors before me personally. I have requested payment arrangements for both state and federal and have a plan to have it fully paid within 6 months to one year. Although they gave me five years to repay I would like to clear up and pay off early.

In the SCA section reporting the Federal tax delinquency, he stated: “[p]ayment arrangements have been made but the amount was too high. Requested that the agency would reduce the monthly amount.”

In his 2019 PSI, Applicant claimed that he was unable to pay his Federal and state tax obligations for tax year 2013 “due to lack of income from losing the contract.” However, the only lost contract he discussed in the PSI was the loss of the 2015 contract. In his response to interrogatories and adoption of his PSI, he wrote on the PSI; “working with CPA. Proposed payment plan is \$200/mnt.” (GE 5)

Applicant attached a state tax authority payment plan agreement (dated January 2020) to his response to interrogatories to pay \$468.81 per month for 60 months, beginning February 2020. He had a balance due of \$23,773.47. (GE 5 attachment C) In his Answer to the SOR, he said he was unable to make payments according to the agreement due to COVID and a lack of funding. (Ans.) Also, according to his interrogatory response, he failed to file state tax returns when due for tax years 2012, 2013, and 2015 to 2018, and apparently failed to pay state taxes when due for tax years 2011 to 2014. (GE 5 interrogatory response) I have not considered unalleged tax information for disqualification purposes, however it may be considered when assessing Applicant's credibility, in the application of mitigating conditions, and in the whole-person analysis.

Applicant obtained another payment plan with the state, dated July 15, 2021, that established a payment of \$437.73 per month for 60 months, beginning on August 15, 2021. He made one payment of \$430 toward this debt in August 2021. It is unclear why his payment was short of the required amount. (AE A) He then noted in his response to the FORM, that “[w]ithin 30 days of discharge, I will re-establish payment plan terms.” (AE A) There is no evidence of further payments made on this debt.

Applicant's interrogatory response regarding his delinquent Federal taxes shows a failure to file Federal income tax returns in tax years 2012 to 2013, and 2015 to 2018. (GE 5) He is indebted to the IRS for tax years 2010, 2013, and 2014, totaling about \$33,000. (See IRS document attached to Answer) He did not submit IRS account

statements he requested from the IRS in March 2020. (GE 5 attachment) Applicant established a payment plan with the IRS in May 2021, to pay \$667 per month, beginning May 28, 2021, to continue until the balance is paid in full. (Ans.) He paid the user fee and three payments of the required amount in May 2021, to cover balances due for May to July 2021. He then noted in his response to the FORM, that “[t]his debt will not be discharged in the chapter 7 filing, and within 30 days of discharge, I will establish new payment plan terms and resume payment.” There is no evidence of further payments made on this debt.

Applicant filed Chapter 7 bankruptcy in January 2021. Applicant said the tax debts were not discharged under Chapter 7, so he will need to reestablish payment plans with the IRS and the state. (AE A and B) Applicant provided a form showing a Chapter 7 bankruptcy discharge order was signed on May 9, 2022, however he did not provide filing documents that would show what debts were claimed, discharged, or the total amount of the discharge. (AE B)

SOR ¶¶ 1.c and 1.d are charged-off credit accounts. Applicant paid the small debt alleged in SOR ¶ 1.c in December 2020. He claimed to be disputing the account in SOR ¶ 1.d, but did not present evidence of a legitimate dispute. He then negotiated a repayment plan with the creditor in March 2021, paid three of the six required \$50 payments, then stopped. In his response to the FORM, he claimed that the account would be included in his Chapter 7 bankruptcy.

SOR ¶ 1.e is a collection account for an insurance company. Applicant claimed that he disputed the account with a credit repair company, but did not produce evidence of such a dispute or any documentation showing the credit repair company’s work on his behalf. In his response to the FORM, he claimed that the debt would be included in his Chapter 7 bankruptcy.

SOR ¶ 1.g is a collection account for a credit-card company. Applicant made payment arrangements with the collection agent in February 2021, showed evidence of two payments, but claimed he paid three of five \$50 payments in March 2021. In his response to the FORM, he claimed that the account would be included in his Chapter 7 bankruptcy.

SOR ¶¶ 1.f and 1.j are charged-off vehicle loans for two vehicles that were repossessed. Applicant’s 2021 credit bureau report (CBR) shows a Toyota account with the first delinquency reported in September 2015, and a major delinquency reported in April 2021. On the Mercedes-Benz account, the first delinquency was reported in June 2015, and the major delinquency was reported in June 2019. (GE 7) In his PSI, he said the vehicles were used in his business, and were repossessed because he fell behind on payments as a result of his lost contract in 2015. (GE 5) In his SCA, he said the accounts became delinquent in early 2017, and that he had not taken any action after the Toyota was repossessed. Regarding the repossessed Toyota and Mercedes-Benz, he said he believed that once they were repossessed, the issue was resolved. (GE 4) In his Answer to the SOR, he said he was disputing the accounts, but did not provide evidence of the

disputes or their results. He also made subsequent voluntary payments on these accounts in March 2021, where he made three \$100 payments on each account. In his response to the FORM, he claimed that the accounts would be included in his Chapter 7 bankruptcy, but no documentary evidence was submitted to show the debt was included or discharged in bankruptcy.

SOR ¶¶ 1.h and 1.i are student loans. Applicant did not report his delinquent student loans on his SCA. According to his CBRs, his loans were reported delinquent in December 2016, in February 2017, and again reported as 120-days past due in November 2017. In May 2019, the student loans were placed for collection. (GE 7) In Applicant's Answer to the SOR, he noted that "payment terms have been established with the student loan. Payments have been made and are attached." (Ans.) With his Answer, Applicant included a letter, dated May 8, 2020, from a collection agent, agreeing to rehabilitate the loan for nine monthly payments of \$5, beginning in May 2020. No payments were made until December 2020, when Applicant made three \$5 payments after receiving a letter, dated December 1, 2020, from a new loan servicer. The letter shows a balance due of \$137,251, although Applicant deleted what is likely other relevant information on the letter. A student loan statement dated February 23, 2021, shows the loans to be in a forbearance status, with \$5 monthly payments beginning in November 2020 and ending in September 2021, with a balance due of \$137,165. (Ans.) From March 2020 to December 31, 2022, student loan collections were paused due to a Federal COVID-19 relief order. In response to the FORM, Applicant stated that within 30 days of his Chapter 7 discharge, he will "request the income repayment plan and re-establish payment plan terms." (AE A)

Applicant submitted his resume, a certificate of completion, and several positive character letters and letters of recommendation. He is described as trustworthy, honest, a good friend, and having good judgment. He stated that he has previously held security clearances, and was the facility security officer (FSO) for his company when it held a facility clearance. (AE A)

He submitted a personal financial statement (PFS). (AE A) The PFS shows a net monthly income of \$14,500 per month based on his and his spouse's net pay, but appears to understate his gross salary by \$10,000. The PFS indicates that he has a net remainder of \$6,948 per month, and is prepared to pay \$500 monthly payments on his student loans, \$667 per month for Federal tax debt, and \$430 per month for state tax debt. In reference to the PFS, he noted that "[t]he new remainder that is shown on the financial statement indicates that there are funds remaining to apply to" the IRS, state, and student loan debts. (AE A)

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.

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, 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 all available and 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 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. 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. 15-01253 at 3 (App. Bd. Apr. 20, 2016).

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 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.

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.

The documentary evidence in the record is 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 taxes, student loans, and other financial accounts. He incurred business losses that may have resulted in difficult economic conditions that may have been outside of his control, and significant health challenges, however, his health issues and stated loss of a large contract do not match the timeline for his failure to pay his 2013 taxes, student loans, and other delinquent debts over the years. I am not convinced that his failure to pay federal and state income taxes for tax year 2013 when due was outside of his control. Although he has eliminated some debts via a recent Chapter 7 bankruptcy and will attempt to obtain his third IRS and student loan repayment plans, I am not convinced that he has established a current track record of reliable, substantial, and sustained payments, consistent with his income and monthly net remainder, toward the successful resolution of his Federal debts. Likewise, his efforts toward resolution of his state taxes has been ineffective and inconsistent with a considered effort to resolve the matter.

Applicant's efforts to address his debts post-dated his SCA, PSI, and for many, the SOR. He filed Chapter 7 bankruptcy in early 2022 after giving the Government assurances that he was addressing his debts through payment plans or voluntary payments. He paid a small debt alleged in SOR ¶ 1.c, but others were alternately disputed or partially paid. He made limited payments on Federal and state taxes, but stopped because of a lack of enough income or other reasons. His recent track record of debt resolution has been intermittent, disjointed, and inconsistent.

When tax issues are involved, an administrative judge is required to consider how long an applicant waits to file his or her tax returns, whether the IRS generates the tax returns, and how long the applicant waits after a tax debt arises to begin and complete making payments. The Appeal Board's emphasis on security concerns arising from tax cases is instructive. See ISCR Case No. 14-05794 at 7 (App. Bd. July 7, 2016 (reversing grant of security clearance and stating, "His delay in taking action to resolve his tax deficiency for years and then taking action only after his security clearance was in jeopardy undercuts a determination that Applicant has rehabilitated himself and does not reflect the voluntary compliance of rules and regulations expected of someone entrusted with the nation's secrets."); ISCR Case No. 14-01894 at 2-6 (App. Bd. Aug. 18, 2015) (reversing grant of a security clearance, discussing lack of detailed corroboration of circumstances beyond applicant's control adversely affecting finances, noting two tax liens totaling \$175,000 and garnishment of Applicant's wages, and emphasizing the applicant's failure to timely file and pay taxes); ISCR Case No. 12-05053 at 4 (App. Bd. Oct. 30, 2014) (reversing grant of a security clearance, noting not all tax returns filed, and insufficient discussion of Applicant's efforts to resolve tax liens).

The guidelines encompass 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).

I have considered Applicant's claimed income anomalies, attempts to establish payment arrangements, and recent bankruptcy. However, Applicant's financial problems have been longstanding and remain a continuing concern. I give mitigating credit for attempting to resolve his tax issues with the IRS and state, and recent efforts to rehabilitate his student loans, however, his history of failure to pay federal and state income taxes when due, student loans, and other debts have not been sufficiently mitigated given the number of years of non-compliance and disregard. Utilizing the bankruptcy process can be effective in mitigating financial concerns, and substantiated disputes are recognized, but a subsequent sustained and reliable track record of on-time payments on an individual's remaining financial accounts are required to gain full mitigation credit. That track record does not exist in this case. I also have concerns about Applicant's overall financial responsibility and willingness to comply with future financial obligations. Applicant may have recently come to the realization that he should resolve his taxes, student loans, and other financial obligations quickly in order to qualify for security eligibility, but it has been late in coming. He has not shown documentary evidence of financial counseling to assist him with budgeting and resolution of debts when they arise, and substantiated, credible debt disputes. He claimed to have used a debt resolution company, but provided no documentary evidence in support of that claim. He uses a tax consultant to review his self-prepared tax returns, but did not offer evidence that he attempted to resolve his tax debts within a reasonable time after acquiring them.

Overall, Applicant's financial responsibility, especially with regard to fulfilling his Federal financial obligations when required, is questionable. Despite a substantial income and net monthly remainder since April 2019, he has been late to respond to financial delinquencies and may never have responded had his need for a security clearance never arisen. An applicant who waits until his clearance is in jeopardy before resolving debts may be lacking in the judgment and self-discipline expected of those with access to classified information. ISCR Case No. 16-01211 (App. Bd. May 30, 2018). The existence of a payment arrangement with an appropriate tax authority does not compel a favorable decision. ISCR Case No. 17-03462 (App. Bd. Jun. 26, 2019).

Whole-Person Concept

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. In applying the whole-person concept, an 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. An 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.

I have incorporated my comments under Guideline F in my whole-person analysis and applied the adjudicative factors in AG ¶ 2(d). I have considered Applicant's self-employed income anomalies, health challenges, his relatively recent efforts to resolve debts, and his current financial status. Because he requested a determination on the record without a hearing, I had no opportunity to evaluate his credibility and sincerity based on demeanor, or to question him about the circumstances that led to his tax obligations and other debts. See ISCR Case No. 01-12350 at 3-4 (App. Bd. Jul. 23, 2003).

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, including exceptions available under Appendix C of SEAD 4. I conclude Applicant has not mitigated the security concerns raised by his financial delinquencies.

Formal Findings

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline F (Financial Considerations): AGAINST APPLICANT

Subparagraphs 1.a-1.b, and 1.d-1.j: Against Applicant

Subparagraph 1.c: For Applicant

Conclusion

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

Gregg A. Cervi
Administrative Judge