



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



In the matter of:)
)
) ISCR Case No. 20-01105
)
Applicant for Security Clearance)

Appearances

For Government: Adrienne Driskill, Esq., Department Counsel
For Applicant: Alan V. Edmunds, Esq.

October 11, 2022

Decision

TUIDER, Robert, Administrative Judge:

Applicant mitigated security concerns regarding Guideline F (financial considerations). National security eligibility is granted.

Statement of the Case

On August 21, 2018, Applicant submitted a Questionnaire for National Security Positions (SF-86). On July 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 26, 2020, Applicant’s counsel submitted his Answer to the SOR. (SOR Answer) On July 20, 2021, Department Counsel was ready to proceed.

On July 26, 2021, the Defense Office of Hearings and Appeals (DOHA) assigned the case to another administrative judge. On August 25, 2021, DOHA issued a notice of

hearing scheduling the hearing for October 1, 2021. On August 31, 2021, DOHA issued an amended notice of hearings rescheduling the hearing for September 28, 2021. On September 27, 2021, DOHA reassigned the case to me.

The hearing commenced as scheduled. Department Counsel offered Government Exhibits (GE) 1 through 3, which I admitted without objection. Applicant testified and offered Applicant Exhibits (AE) A through N, which I admitted without objection. I held the record open until October 15, 2021, to afford Applicant an opportunity to submit additional evidence. He timely submitted additional portions of AE N, which I admitted without objection. On October 7, 2021, DOHA received the hearing transcript. (Tr.).

Findings of Fact

Background Information

Applicant is a 54-year-old aircraft painter, who has been employed by a defense contractor since August 2018. He seeks to retain his Secret security clearance, which is a requirement of his continued employment. (Tr. 15-; GE 1)

Applicant did not graduate from high school, but did receive his GED in April 1984. He has “some college,” but does not recall how many credit hours he has. Applicant was married from December 1987 to April 1999. That marriage ended by divorce. He has no children, but does provide support for family members. Applicant did not serve in the U.S. Armed Forces. (Tr. 17-19; GE 1; AE K)

Financial Considerations

The SOR lists two allegations under this concern; SOR ¶ 1.a alleges Applicant failed to timely file Federal income returns for at least tax years 2010, 2016, 2017, and 2018; and SOR ¶¶ 1.b alleges Applicant failed to timely file his state income tax returns for at least tax years 2010, 2016, 2017, and 2018.

These allegations are established by Applicant’s August 21, 2018 SF-86; his Office of Personnel Management (OPM) Report of Investigation conducted from March 4, 2019 to April 7, 2019, to include his April 4, 2019 OPM Personal Subject Interview (PSI); his March 8, 2020 DOHA Response to Interrogatories; and his June 26, 2020 SOR Answer. (GE 1-3; SOR Answer)

In his April 4, 2019 OPM PSI and during his testimony, Applicant stated that he could not recall for what years he failed to file his taxes. He went to the IRS, date unspecified, and they informed him he did not owe any taxes, but advised him to file his tax returns in order to get refunds due him. The reason he did not file his tax returns was because he did not know how to. Friends or family members always filed his returns for him by taking his W-2 forms to accountants. Applicant stated he is not knowledgeable about taxes. “Even the IRS guy told him that (the) IRS owes him a

refund.” (Tr. 30-34; GE 2, GE 3) Applicant began working on clearing up his delinquent tax returns “since [he] started [his] job – before that” in 2018. (Tr. 47-48)

SOR ¶ 1.a: Failed to timely file Federal income tax for at least tax years 2010, 2016, 2017, and 2018. Applicant admitted this allegation in his SOR Answer.

Applicant submitted documentation that he filed his 2010, 2016, 2017, and 2019 Federal income returns with his SOR Answer, and was eligible for refunds for all years filed. (SOR Answer; Tr. 21-22, 53-54; AE B, AE C, AE D, AE N) His 2018 return was timely filed on April 10, 2019, before the April 15, 2019 deadline. He also received a refund for his 2018 return. Although not alleged, Applicant submitted documentation with his SOR Answer that his 2019 Federal income tax return was timely filed. (SOR Answer; Tr. 22, 41-42, 53-54; AE E) Applicant timely filed his 2020 Federal income tax return, owed money to the IRS, and tried to set up a payment plan. He was unsure how much he owed stating, “It was a thousand something,” and paid the entire amount due online. (Tr. 45) To the best of his knowledge, Applicant does not owe the IRS any delinquent taxes, penalties, or interest. (Tr. 46)

During his testimony, Applicant elaborated on why he failed to timely file his tax returns. At the time he was required to file his 2010 return, he was unemployed from December 2010 to December 2011, and responsible for supporting his mother and brother. His mother was ill from cancer, and recently passed away. Applicant received unemployment benefits for “about four months.” His focus was on supporting his mother and brother, and earning income. (Tr. 22-24, 27, 35, 39; GE 1)

Applicant further stated that in summer 2017, he sustained a severe head injury in a motorcycle accident. The accident incapacitated him, and he was unable to file his 2016 and 2017 returns. He stated, “It was devastating. It wiped me out. I lost everything and half of my memory.” He has difficulty remembers names and dates. (Tr. 25-27, 35-38, 41) (Note – During his testimony, it became clear that Applicant had difficulty with his memory, especially when it came to recalling dates.) And, in January 2019, he sustained a severe knee injury that required surgery. His Workman’s Compensation claim was delayed, and he was unable to pay his rent and meet his expenses leading to his being evicted from his apartment. He stated, “The knee surgery . . . occurred at my current position and, again, wiped me out. I lost literally everything – photo albums, apartment, motorcycle, everything.” (Tr. 24-25, 35. 50; AE H AE I) **ALLEGATION RESOLVED.**

SOR ¶ 1.b: Failed to timely file his state income returns for at least tax years 2010, 2016, 2017, and 2018.

Applicant admitted this allegation in his SOR Answer. (SOR Answer) Applicant submitted documentation that he filed his 2010, 2016, 2017, and 2019 state income returns, and was eligible for refunds for all years filed. (SOR Answer; Tr. 21-22, 29, 53-54; AE C, AE D, AE N) His 2018 return was timely filed on April 10, 2019, before the April 15, 2019 deadline. He also received a refund for tax year 2018. Although not alleged, Applicant submitted documentation with his Answer that his 2019 state income

tax return was timely filed. (SOR Answer; Tr. 22, 41-42,53-54; AE E) **ALLEGATION RESOLVED.**

Applicant stated that as a result of this experience, he takes the responsibility of filing his tax returns more seriously, especially with the requirement of maintaining his clearance. In 2010, he had a “custom painter’s mentality of bouncing around from job to job trying to make as much money as possible instead of being more responsible with a 9:00 to 5:00 and seeing the benefits of long-term employment and a more conservative simple lifestyle.” (Tr. 28) He added that he does not travel, date, or go out anymore. “Literally nothing. All I do is focus on taking care of these issues that I already admitted I had before I received the SOR. I was already working on them.” (Tr. 28-29)

Applicant self-reported his late tax filings to his Facility Security Officer (FSO), who gave him “a list of items to take care of.” (Tr. 29) Going forward, Applicant meets his tax filing deadlines by “preparing for them the year before, just like last year’s taxes.” (Tr. 29) He stated that he has “developed a friendship with the manager over at [his tax preparer] and I have an accountant on call that would help me prepare last year’s taxes.” (Tr. 30, 43-44, 48) Applicant’s financial situation has improved over the past two years. He has been able to remain in his current residence since 2020 and is current on all of his monthly bills. He has opened a 401(k) and a Roth IRA. (Tr. 49-50) Although not alleged, Applicant provided documentation evidencing that he researched and paid some outstanding parking tickets dating back to around 2004. (Tr. 50-53; AE H)

Character Evidence

Applicant stated that he is a “master painter.” The career progression of painters is apprentice, journeyman, and pro-painter. A master painter “tell(s) the paint companies what to make or they hand them recipes to produce or, in my case, the military Government – how to correct flawed paint systems on their aircraft.” (Tr. 25-26) Applicant identified the numerous types of military aircraft he has painted. Suffice it to say, the list is quite exhaustive. (Tr. 26) As a Government contractor master painter, he is paid \$40 per hour. (Tr. 26)

Applicant submitted two reference letters: (1) from his paint shop supervisor (PSS); and (2) a fellow aircraft painter (AP) coworker. PSS stated that in the last two years Applicant has proven to be one of his outstanding employees, describing him as a team player, willing to give a helping hand, and works with very limited supervision. He added that Applicant is always punctual and is a pleasure to have him in his shop. AP has known Applicant for four years stating he is best known for his honesty and deep respect for others. He is a subject matter expert in his craft and helped him transition from his last job to his present job. AP further described Applicant as honest and respectful and is glad to have him working by his side day in and day out. (AE F) Applicant submitted ten professional certificates documenting training he has received since beginning his current job. (AE J)

Applicant’s resume not only documents his professional work-related accomplishments, but also documents his talent as an artist in a non-military setting

before he began his current employment for a Government contractor. (AE K) He submitted a photograph of him painting at a nationally recognized county fair where he invented an art form. Applicant stated, “[he] was the guy from TV that does the painting in three minutes to music.” For that event, he won that county fair’s “Best in Show” award. (Tr. 54-55; AE L) Applicant has shown his art work on numerous television shows, had his art work displayed in national art museums, has been featured in nationally recognized magazines, and has done custom paint jobs on motorcycles and automobiles for celebrities. Because of the nature of his work, Applicant has lived in various places around the country and was unable to establish roots. (SOR Answer)

Applicant submitted ten samples of his artwork to include a custom motorcycle paint job he did for the photographer of well-known motorcycle magazine, a very colorful painting depicting sea life that the U.S. State Department commissioned him to paint for a Middle Eastern prince, a painting of a tiger that “is a recreation of the black slate technique . . . [i]t’s very hard to master,” and a photograph of him painting a dome ceiling he was commissioned to paint in a prestigious art museum. Although not described on the record, the remaining pictures depicting his art work were equally impressive. (Tr. 55-56; AE M) Applicant stated that these are the same skills he used when he paints jets, adding, “It is literally the only thing I’m good at. Sorry to say.” (Tr. 56)

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 one disqualifying condition that could raise a security concern and may be disqualifying in this case: "(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 condition in AG ¶ 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).

Of concern is the fact that Applicant did not timely file his 2010, 2016, and 2017 Federal and state income tax returns. Contrary to the SOR allegations, he did timely file his 2018 Federal and state income tax returns. The initiation of the clearance process apparently motivated Applicant to address his outstanding tax filing requirements. He was well on his way to having his tax filing requirements resolved by the time of his April 2019 OPM PSI, and he completed all of those requirements by the time he answered his SOR on June 26, 2020.

Applicant was alerted to the fact that his failure to file his Federal and state income tax returns was a concern to the Government when he began the clearance process. From the onset, his FSO helped guide him through the process by identifying problematic areas. Applicant heeded that advice and by the time he answered his SOR, he had filed all of his delinquent Federal and state income tax returns. He has timely filed his tax returns for subsequent years, so the problem has not been repeated.

Applicant's work and residence history before beginning his current job was that of a "custom painter's mentality of bouncing around from job to job trying to make as much money as possible" before settling down to a stable job such as what he has now. Applicant described certain events that impacted his financial situation to include his 2010 unemployment, the financial stress of supporting his brother and his mother diagnosed with cancer, a severe 2017 motorcycle accident that impacted his memory and cognitive skills, and a 2019 knee injury. Applicant recognized that he is not sophisticated when it comes to matters such a filing his income tax returns and to that end has engaged the services of a professional tax preparer. Since beginning his current job with a Government contractor, his life has gained a sense of stability and purpose he otherwise has not had. AG ¶¶ 19(a), 19(b), 19(c), and 19(f) are applicable.

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.

Applicant is a 54-year-old aircraft painter, who has been employed by a defense contractor since August 2018. He needs to retain his Secret security clearance to continue his current employment. Applicant admittedly fell behind on his Federal and state tax filing requirements. He recognizes that and has done everything possible to correct his past missteps and taken preventive action to prevent similar missteps from reoccurring.

Applicant has not had what many would refer to as a traditional career path. He never graduated from high school, but did earn his GED. He was gifted with considerable creative talent as an artist and painter. For the early part of his working life he moved to various locations wherever his talent and skills were in demand. His painting skills varied to include appearing on television shows, being featured in trade magazines, being commissioned to create a painting for foreign dignitaries, painting murals in nationally known museums, and custom painting motorcycles and automobiles for celebrities.

Applicant utilizes those skills in his current position as an aircraft painter for military aircraft. While his lifestyle may have changed from being on the move to one of predictability, his ability to utilize those skills in support of the national defense remains constant. In short, Applicant's extraordinary skills and ongoing contribution to the national defense by skillfully painting military aircraft are recognized by his supervisor and coworker and are an asset to the national defense.

Overall, the record evidence leaves me with no questions or doubts as to Applicant's eligibility and suitability for a security clearance. 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: FOR APPLICANT

Subparagraphs 1.a – 1.b: For Applicant

Conclusion

In light of the record as a whole, it is clearly consistent with the national interest to grant Applicant's security clearance. National security eligibility is granted.

ROBERT TUIDER
Administrative Judge