



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



In the matter of:)
)
) ISCR Case No. 21-02093
)
Applicant for Security Clearance)

Appearances

For Government: Alison O’Connell, Esq., Department Counsel
For Applicant: *Pro se*

10/26/2022

Decision

Dorsey, Benjamin R., Administrative Judge:

Applicant did not mitigate the financial considerations security concerns. He mitigated the criminal conduct security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On April 21, 2022, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline F, financial considerations, and Guideline J, criminal conduct. Applicant responded to the SOR on March 18, 2022, and requested a decision based on the written record in lieu of a hearing.

The Government’s written case was submitted on June 2, 2022. A complete copy of the file of relevant material (FORM) was provided to Applicant, who was afforded an opportunity to file objections and submit material to refute, extenuate, or mitigate the security concerns. He received the FORM on June 22, 2022. As of August 10, 2022, he had not responded. The case was assigned to me on October 3, 2022. The Government exhibits included in the FORM (Items 1-15) are admitted in evidence.

Findings of Fact

Applicant is a 46-year-old employee of a defense contractor for whom he has worked since January 2019. He was out of work from about September 2017 until about August 2018 after a long-time employer fired him for a conflict of interest when he attempted to start his own business. There is no evidence in the record regarding his education level. He has been married and divorced twice. His marriages were from 1998 until 2000 and from 2006 until 2016. He has two adult children. He served in the Army National Guard from 1997 until 2005, when he received an honorable discharge. (Items 5, 15)

Under Guideline F, the Government alleged Applicant's untimely filed federal income tax returns for the 2013 through 2017 tax years (SOR ¶ 1.a); his untimely filed state income tax return for the 2013 tax year (SOR ¶ 1.b); his delinquent state taxes totaling about \$5,800 for the 2014 and 2015 tax years (SOR ¶¶ 1.c and 1.d); and nine delinquent consumer debts totaling about \$14,700 (SOR ¶¶ 1.e through 1.m). In his SOR response, he admitted all but one of the Guideline F SOR allegations with additional comments. He denied the debt in SOR ¶ 1.m for \$132 because he claimed that he paid it. The Guideline F SOR allegations are established through Applicant's admissions and the Government's evidence. (Items 4-12, 15)

Under Guideline J, the Government alleged Applicant's eight criminal charges from December 1996 through July 2015. Applicant admitted the Guideline J allegations with additional comments for two of the charges, claiming that he was not convicted of those charges. (Items 4-5, 13-15)

Applicant failed to file his federal income tax returns for the 2013 through 2017 tax years, as required. He claimed that this failure resulted from a hardship, but he does not explain the nexus between his hardship and his failure to file. The only documentary evidence he provided of his attempts to remedy these delinquent federal tax filings is an entry in his 2014 IRS account transcript that notes "[t]ax return secured" in July 2020. He provided documentary evidence that he filed his 2018 federal income tax return on time, and that he received a refund for that tax year. However, that refund was offset against his IRS delinquencies for the 2009 and 2010 tax years.¹ (Items 4-7, 15)

Applicant failed to timely file his State A income tax return for the 2013 tax year. He provided no documentary evidence to show that he has since filed this delinquent state tax return. (Items 4-7, 15)

Applicant owes State A for income taxes for the 2014 and 2015 tax years in the approximate amount of \$5,800. With respect to the 2014 tax year, between February 2017 and May 2018, he made payments totaling \$1,763. For the 2015 tax year, a payment of \$798 was credited to Applicant's account. It is unclear whether this credit was a voluntary payment or an offset. There is no evidence in the record that Applicant

¹ Any adverse information not alleged in the SOR, such as Applicant's additional federal and state tax delinquencies, cannot be used for disqualification purposes. It may be considered when assessing the application of mitigating conditions and for the whole-person analysis.

had a payment arrangement with State A's taxation authority with respect to these payments. (Items 4-7, 15)

Applicant provided documentary evidence that he satisfied his State A income tax indebtedness for the 2016 tax year with either payments or offsets in 2019 and 2020. He provided documentary evidence that he satisfied his State A income tax indebtedness for the 2017 tax year with payments and offsets between 2018 and 2020. He provided documentary evidence that he has a zero balance on his income tax with State A for the 2018 tax year. (Items 4-7, 15)

Applicant's nine delinquent consumer debts totaling about \$14,700 remain unresolved. While he claimed that he is working to resolve these delinquencies, he provided no documentary evidence of his efforts to do so. All of these consumer debts with the exception of SOR ¶¶ 1.l and 1.m appear on the 2022 credit report. The debts in SOR ¶¶ 1.l and 1.m appear on the 2021 credit report. Applicant also has an overdrawn account in the amount of \$274 that is not listed in the SOR. (Items 4-12, 15)

Applicant claimed that his financial issues arose because of unemployment, divorce, and caring for his ailing father. He stated that his intent is to make payment arrangements with respect to all his delinquencies. (Items 5, 6, 15)

Applicant was charged with crimes eight times between 1996 and 2015. While it was not listed in the SOR, he was also cited for an HOV lane infraction in October 2018. His criminal charges consist of a total of five domestic violence charges in 2002, 2003, 2007, 2008, and 2015; a drug possession charge in 1996; and two driving under the influence of alcohol (DUI) charges in 2002 and 2005. (Items 4, 5, 13-15)

The 1996 drug possession charge was a felony, but despite having marijuana in his pocket, the charges against Applicant were dropped as the search leading to the charge was considered unlawful. The 2002 and 2005 DUIs resulted in convictions. The 2003 and 2007 domestic violence charges resulted in convictions. The 2007 domestic violence charge was a felony, but he was convicted of a lesser charge. Applicant violated the conditions of his parole for his 2003 domestic violence conviction by committing his 2005 DUI, failing to report to his parole supervisor, failing to pay fees, and failing to report changes in address. The 2008 domestic violence charges were dropped. The 2015 domestic violence charge was a felony but the charges were dropped. All of these domestic violence charges resulted from physical altercations with Applicant's spouse or significant other. (Items 4, 5, 13-15)

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 the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), 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 security 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

Guideline F, Financial Considerations

The security concern for financial considerations 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. 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 guideline notes several conditions that could raise security concerns under AG ¶ 19. The following are potentially applicable 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.

Applicant has a history of financial problems. He has not complied with his federal income tax return filing requirements for several tax years. He has failed to comply with his state income tax return filing requirement for one tax year. He has delinquent state taxes and delinquent consumer debts. The evidence is sufficient to raise the above disqualifying conditions.

Conditions that could mitigate the financial considerations security concerns are provided under AG ¶ 20. The following are potentially applicable:

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

Failure to comply with tax laws suggests that an applicant has a problem with abiding by well-established government rules and systems. Voluntary compliance with rules and systems is essential for protecting classified information. See, e.g., ISCR Case No. 16-01726 at 5 (App. Bd. Feb. 28, 2018). A person who fails repeatedly to fulfill his or her legal obligations, such as filing tax returns and paying taxes when due, 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. 17-01382 at 4 (App. Bd. May 16, 2018).

Applicant has several years of federal income tax returns that he has yet to file. He also has one year of state income tax returns that he has not filed. He failed to show why his failure to timely file his federal and state income tax returns was due to circumstances beyond his control. He has not provided evidence of any arrangement with the IRS or the State A taxation authority to file his late income tax returns. While he has provided documentary evidence of some payments on his delinquent income taxes to State A, he still has a sizeable balance and he provided no evidence of a payment arrangement with State A.

As he suffered from unemployment and had to take care of his ailing father, Applicant's delinquent taxes to State A and his delinquent consumer debts were arguably caused by circumstances beyond his control. However, he has not addressed his consumer debts. Therefore, he has not acted responsibly under the circumstances or made a good-faith effort to repay or otherwise address his consumer debts. There is evidence that Applicant has made some payments towards his delinquent state taxes. However, he still has a balance and there is no evidence of payments on his state taxes after 2020. Therefore, he has not provided sufficient evidence that he acted responsibly or made a good-faith effort to pay or otherwise resolve his state tax debt.

As he has unaddressed delinquent federal and state income tax filings and unresolved state tax and consumer debts, his financial issues are current and ongoing. Further undermining his evidence in mitigation, Applicant also has another delinquent debt not listed in the SOR. For these reasons, none of the Guideline F mitigating conditions apply. His financial issues continue to cast doubt on his current reliability, trustworthiness, and good judgment.

Guideline J, Criminal Conduct

The security concern for criminal conduct is set out in AG ¶ 30:

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

AG ¶ 31 describes conditions that could raise a security concern and may be disqualifying. The following are potentially applicable:

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

(d) violation or revocation of parole or probation, or failure to complete a court-mandated rehabilitation program.

Applicant has been charged with criminal offenses at least eight times. Several of these criminal charges were for felonies and three resulted in conviction. Five of these criminal charges involved domestic violence. Applicant violated the conditions of his parole from his 2003 domestic violence conviction. The above disqualifying conditions are applicable.

Conditions that could mitigate criminal conduct security concerns are provided under AG ¶ 32. The following are potentially applicable:

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

(d) there is evidence of successful rehabilitation; including, but not limited to, the passage of time without recurrence of criminal activity, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

While there is evidence that Applicant was charged with and convicted of serious crimes, the last of his criminal charges came seven years ago. There is no evidence that he has engaged in criminal activity since then. His October 2018 HOV violation is the latest evidence there is that he has committed any rule infraction. Given the at least seven years that have passed since his last criminal charges, I find that his criminal behavior is unlikely to recur and does not cast doubt on his reliability, trustworthiness, or good judgment. I also find that this passage of time without evidence of criminal activity provides evidence of successful rehabilitation. The Guideline J security concerns are 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 relevant 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.

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. I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my comments under Guideline F and Guideline J in my whole-person analysis. I have also considered Applicant's honorable military service.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. I conclude Applicant did not mitigate the financial considerations security concerns, but that he did mitigate the criminal conduct security concerns.

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.m:	Against Applicant
Paragraph 2, Guideline J:	FOR APPLICANT
Subparagraphs 2.a-2.h:	For Applicant

Conclusion

It is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Benjamin R. Dorsey
Administrative Judge