



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



In the matter of:)
)
) ISCR Case No. 21-01161
)
Applicant for Security Clearance)

Appearances

For Government: Patricia Lynch-Epps, Esq., Department Counsel
For Applicant: *Pro se*

11/17/2022

Decision

RIVERA, Juan J., Administrative Judge:

Applicant's evidence is insufficient to demonstrate financial responsibility. He failed to timely file federal income tax returns for tax years (TY) 2008 - 2019. He failed to pay delinquent taxes for TYs 2008 and 2009. The evidence is insufficient to mitigate the financial considerations security concerns. Clearance is denied.

Statement of the Case

Applicant submitted his first security clearance application (SCA) on September 9, 2020. An investigator from the Office of Personnel Management (OPM) interviewed him on October 6, 2020. After reviewing the information gathered during the background investigation, the Defense Counterintelligence and Security Agency Consolidated Adjudications Facility (DCSA CAF) issued a Statement of Reasons (SOR) alleging security concerns under Guideline F (financial considerations) on July 9, 2021. Applicant answered the SOR on July 12, 2021, submitted documents in mitigation, and requested a hearing before an administrative judge with the Defense Office of Hearings and Appeals (DOHA).

The case was assigned to me on March 18, 2022. The DOHA issued a notice of hearing (NOH) on May 17, 2022, scheduling the hearing for May 27, 2022. I convened the hearing as scheduled. The Government submitted Exhibits (GE) 1 through 4, which I admitted into the record without objection. GE 4 is the Government's discovery letter, dated September 13, 2021, which was marked and admitted into the record, but it is not substantive evidence.

Applicant testified, as reflected in the transcript received on June 7, 2022. He submitted documentary evidence, which I marked as Applicant Exhibits (AE) 1 through 7, and admitted into the record without objections. AE 7 was received post-hearing.

Procedural Issue

At his hearing, Applicant affirmatively waived his right to 15-day advanced notice of his hearing. He stated he had sufficient time to prepare for his hearing and was ready to proceed. (Tr. 8-9)

Findings of Fact

The SOR alleges that Applicant failed to file Federal income tax returns for TY 2008 through 2019; that he is indebted to the IRS for delinquent taxes for TY 2008 (\$15,611) and TY 2009 (\$14,944); and that he had one account in collection for \$1,352, and a second account charged off for \$174.

In his answer to the SOR, Applicant admitted all the SOR factual allegations (§§ 1.a through 1.e). He noted he retained the services of a tax relief company that is helping him resolve the tax issues. He also submitted documentary evidence showing he paid the two accounts alleged in SOR §§ 1.d and 1.e. SOR § 1.d was a delinquent medical debt for Applicant's emergency services at a hospital on or about 2017. He paid this debt in August 23, 2021. (Tr. 36; AE 5) SOR § 1.e was a delinquent 2014 energy bill. He paid this charged-off account in August 11, 2021. (AE 5) He paid both accounts after he was confronted about his delinquent debts during his October 2020 Office of Personnel Management investigative interview, and after he received the SOR in July 2021.

Applicant's SOR admissions, and those at his hearing, are incorporated herein as findings of fact. After a thorough review of the record evidence, I make the following additional findings of fact:

Applicant is 63 years old. He graduated from high school in 1977, received a certificate of completion for a technical school in 1981, and a certificate of completion for a graphic design school in 2016. He married in 1986 and divorced in 2008. He has two adult children, ages 31 and 28. He has been living with a cohabitant since around 2020. (Tr. 25)

Applicant was employed as a computer automated design drafter (CADD) from 1987 to 2012. Between 2012 and 2014, he held small jobs as a steward, bartender, shift

lead, and housekeeping supervisor. He worked as a customer service associate between 2014 and 2018. He started working as an armed security guard in October 2018. His current employer and security sponsor, a federal contractor, hired him as a security officer in July 2020. Since 2012, he has had only one two-week period of unemployment in-between jobs, but some positions were part-time jobs and his earnings were low. (Tr. 26-28)

Applicant is making about \$2,000 a month, sometimes more depending on overtime. At the end of the month, he has \$50 to \$100 of disposable income in his checking account. He has less than \$50 in his savings account. (Tr. 39) He rents an apartment and shares the \$2,200 rent with his roommate. He carries five credit cards and his total outstanding debt is about \$3,700.

In Section 26 (Financial Record) of his 2020 SCA, Applicant disclosed that he had financial problems that included owing income taxes to the IRS for TY 2013, because he did not have the money to pay it. He also disclosed he failed to file income tax returns for TYs 2013 through 2019 because he owed too much and was afraid of the penalties and interest accrued. (GE 1; Tr. 31)

Applicant admitted, and the documentary evidence shows that he failed to timely file his federal income tax returns for TYs 2008 through 2019. He is indebted to the Federal government for delinquent taxes for approximately \$15,611 for TY 2008 and \$14,944 for TY 2009. He stated that he completed his TY 2008 income tax form, and when he saw how much he owed, he did not file it because he did not have the money to pay the tax owed. He did not file income tax returns for TYs 2009 through 2019 because he did not have the money to pay the penalties and interest he accrued. He claimed he filed his income tax returns for TYs before 2008. He prepared and filed his TYs 2020 and 2021 income tax returns. He was expecting a \$174 refund for TY 2020, but the IRS applied the refund to his 2008 delinquent taxes. There was no refund for TY 2021. (Tr. 33-34)

Applicant believes his failure to file his tax returns stemmed from his divorce in 2008. When his ex-wife bought out the marital home, he received \$90,000 for his share of the property. He failed to set aside sufficient money to pay taxes for the transaction. He loaned some of the money to a friend who never paid him back, and he cannot remember how he spent the rest. He explained that after his divorce, he was not in a good state of mind and did things that were not smart and made bad choices. Prior to his divorce, he believes his record would indicate that he was reliable.

Applicant noted that he works hard, but does not earn that much money. He believes he is not a spendthrift; he does his job and then goes home because he does not have money to waste. He believes he has made efforts and achieved progress resolving his tax problems with the IRS, and paying his debts. (Tr. 31)

Applicant did not pay the delinquent taxes he owed for TYs 2008 (\$15,611) and 2009 (\$14,944). Except for the \$174 refund for TY 2020 that the IRS applied to his 2008

tax debt, he never made any payments to the IRS, or attempted to establish a payment agreement to pay his back taxes. He believes the IRS cannot collect the delinquent tax debt for 2008 and 2009, because the Collection Statute Expiration Date (CSED) passed. Internal Revenue Code section 6502 provides that the length of the period for collection after assessment of a tax liability is 10 years. The collection statute expiration ends the government's right to pursue collection of a liability. Applicant did not provide the dates the IRS assessed his tax liability. He believes that he does not owe any back taxes to the IRS. However, his evidence fails to establish that he filed income tax returns for TYs 2008 through 2014, or that the IRS has accepted the income tax returns he filed for TYs 2015 to 2019 in August 2021.

Between 2008 and August 2021, Applicant made no effort to file his delinquent income tax returns for TYs 2008 through 2019. In August 2021, he retained the services of a tax relief company seeking help to file past-due tax returns and resolve his tax debt. He claimed he prepared and filed his TYs 2012 to 2014 income tax returns. He presented no documentary evidence to show that he filed income tax returns for TYs 2008 through 2014. His documentary evidence shows that the tax relief company he retained filed his TYs 2015 to 2019 income tax returns on August 2021. (AE 7)

According to IRS regulations, in 2012, a person making over \$9,750 gross income had to file an income tax return, and in 2021, the filing threshold was \$12,550 gross income. Applicant did not present documentary evidence to show he was below the IRS filing threshold for the years in question.

Applicant believes that if he is granted clearance eligibility, he will be able to resolve all of his financial problems. He noted he was been upfront and truthful during the clearance process. He stated that in 2015, his credit rating was about 580, and he has raised it to about 710 recently. He believes that shows his financial situation is improving. He has been paying his bills on time and maintaining good credit, and he intends to continue to do so in the future. He believes that he is in a good place now, with a steady job, and steady living conditions; his life is good right now. (Tr. 54) He noted that he timely filed income tax returns for TYs 2020 and 2021. His intent is to continue filing his tax returns on time and to pay his taxes.

Applicant promised to be financially responsible in the future. He presented no evidence to show that he is following a budget or that he has participated in financial counseling. However, I will consider he has received financial counseling through his tax relief company.

Policies

The SOR was issued 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* (Directive) (January 2, 1992), as amended; and the *National Security Adjudicative Guidelines for*

Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position (AGs), applicable to all adjudicative decisions issued on or after June 8, 2017.

Eligibility for access to classified information may be granted “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended. The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

The AGs list disqualifying and mitigating conditions for evaluating a person’s suitability for access to classified information. Any one disqualifying or mitigating condition is not, by itself, conclusive. However, the AGs should be followed where a case can be measured against them, as they represent policy guidance governing access to classified information. Each decision must reflect a fair, impartial, and commonsense consideration of the whole person and the factors listed in Security Executive Agent Directive (SEAD) 4, App. A ¶¶ 2(d) and 2(f). All available, reliable information about the person, past and present, favorable and unfavorable, must be considered.

Security clearance decisions resolve whether it is clearly consistent with the national interest to grant or continue an applicant’s security clearance. The Government must prove, by substantial evidence, controverted facts alleged in the SOR. If it does, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. The applicant bears the heavy burden of demonstrating that it is clearly consistent with the national interest to grant or continue his or her security clearance.

Persons with access to classified information enter into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability, and trustworthiness of those who must protect national interest as their own. The “clearly consistent with the national interest” standard compels resolution of any reasonable doubt about an applicant’s suitability for access in favor of the Government. “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; SEAD 4, ¶ E(4); SEAD 4, App. A, ¶¶ 1(d) and 2(b). Clearance decisions are not a determination of the loyalty of the applicant concerned. They are merely an indication that the applicant has or has not met the strict guidelines the Government has established for issuing a clearance.

Analysis

Financial Considerations

AG ¶ 18 articulates the security concern relating to financial problems: Failure or inability 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.

Applicant's financial problems are documented in the record. He failed to timely file federal income tax returns for TY 2008 through 2019. He presented no documentary evidence to show that he ever filed tax returns for TYs 2008 to 2014. He owed the IRS about \$15,611 for unpaid taxes for TY 2008 and \$14,994 for TY 2015. He presented no evidence of efforts to make any payments or enter into a payment agreement with the IRS since he accrued the delinquent taxes. He failed to prove the CSED bars the IRS from collecting the delinquent taxes because he failed to provide the date the IRS assessed the tax debts. Moreover, he did not establish that he failed to request any extensions in the statute of limitations, which taxpayers sometimes request to delay application of a levy on their income. See IRS website, https://www.irs.gov/irm/part5/irm_05-001-019#:~:text=Internal%20Revenue%20Code%20section%206502,pursue%20collection%20of%20a%20liability. Additionally, he had an unpaid medical debt for \$1,352 in collection since 2017, and a \$174 charged-off account from 2014.

AG ¶ 19 provides disqualifying conditions that could raise a security concern and may be disqualifying in this case: "(a) inability to satisfy debts"; "(c) a history of not meeting financial obligations"; and "(f) failure to file . . . annual Federal, state, or local income tax returns . . . or failure to pay annual Federal, state, or local income tax as required." The record established these disqualifying conditions, requiring additional inquiry about the possible applicability of mitigating conditions.

The following mitigating conditions under AG ¶ 20 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;

(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; 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.

The DOHA Appeal Board concisely 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 *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).

ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013).

Applicant stated that his failure to file his income tax returns and to pay his taxes was caused by a combination of his divorce and periods of underemployment. After his divorce, he was not in a good state of mind and did things that were not smart and made bad choices. Apparently, he lost his job and for a period of two years, he only held small or part-time job paying low wages. His underemployment made his financial situation difficult.

I have considered as circumstances beyond Applicant's control his divorce and underemployment. These circumstances could have adversely affected his ability to timely file his income tax returns, albeit for a short period, or aggravated his financial situation. I do not find his failure to file his tax returns as a circumstance beyond his control. I note that Applicant's divorce was in 2012, but he failed to file tax returns for TYs 2008 to 2012. He testified that he failed to file tax returns for TYs 2008 and 2009 because he did not have the money to pay his taxes, and he did not file the following years because he was afraid of the penalties and interest he would owe for his failure to timely file and to pay his taxes.

As of the day of his hearing, Applicant presented no documentary evidence to show he had filed his TYs 2008 to 2014 tax returns. He filed his federal income tax returns for TYs 2015 to 2019 in 2021, after he received the SOR. He took no action to pay his delinquent taxes for TYs 2008 and 2009. He paid the two debts alleged in the SOR after he received the SOR. His evidence is insufficient to establish that he has been financially responsible under the circumstances.

Applicant disclosed his tax problems in his September 2020 SCA. He also answered questions about his tax problems when he was interviewed in October 2020. These incidents should have crystalized for Applicant the security concerns raised by his failure to file income tax returns, and the importance for him to do so. Notwithstanding, he did nothing to file his delinquent federal income tax returns until August 2021, after he received the SOR.

About the failure to timely file federal and state income tax returns, the DOHA Appeal Board has commented:

Failure to file tax returns suggests that an applicant has a problem with complying with well-established governmental rules and systems. Voluntary compliance with such rules and systems is essential for protecting classified information. ISCR Case No. 01-05340 at 3 (App. Bd. Dec. 20, 2002). As we have noted in the past, a clearance adjudication is not directed at collecting debts. *See, e.g.*, ISCR Case No. 07-08049 at 5 (App. Bd. Jul. 22, 2008). By the same token, neither is it directed toward *inducing an applicant to file tax returns. Rather, it is a proceeding aimed at evaluating an applicant's judgment and reliability. Id.* A person who fails repeatedly to fulfill his or her legal obligations does not demonstrate the high degree of good judgment and reliability required of those granted access to classified information. *See, e.g.*, ISCR Case No. 14-01894 at 5 (App. Bd. Aug. 18, 2015). *See Cafeteria & Restaurant Workers Union Local 473 v. McElroy*, 284 F.2d 173, 183 (D.C. Cir. 1960), *aff'd*, 367 U.S. 886 (1961).

ISCR Case No. 14-04437 at 3 (App. Bd. Apr. 15, 2016) (emphasis in original). *See* ISCR Case No. 14-05476 at 5 (App. Bd. Mar. 25, 2016) (citing ISCR Case No. 01-05340 at 3 (App. Bd. Dec. 20, 2002)); ISCR Case No. 14-01894 at 4-5 (App. Bd. Aug. 18, 2015).

The record evidence shows that Applicant has a problem complying with government rules, regulations, and systems. He failed to establish full mitigation of the financial considerations security concerns. I am unable to find that Applicant acted responsibly under the circumstances or that he made a good-faith effort to timely file his income tax returns or pay his taxes. Applicant's financial issues are recent and ongoing. They continue to cast doubt on his current reliability, trustworthiness, and good judgment.

Whole-Person Concept

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, and under the whole-person concept. SEAD 4, App. A, ¶¶ 2(a) and 2(d). Under AG ¶ 2(c), "[t]he ultimate determination" of whether to grant a security clearance "must be an overall commonsense judgment based upon careful consideration of the guidelines" and the whole-person concept. My comments under Guideline F are incorporated in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under that guideline but some warrant additional comment.

Applicant, 63, seeks clearance eligibility for the first time. The evidence against grant of Applicant's security clearance is substantial. He failed to timely file federal income tax returns for many years, and he failed to pay delinquent federal taxes. His financial problems are recent and not under control.

Applicant knew that he needed to file his federal income tax returns and pay his income taxes. Whether he knew he was going to receive refunds or had sufficient or insufficient funds to pay any taxes owed, he had a legal requirement to timely file his tax returns. He did not fully understand or appreciate the importance of timely filing of tax returns in security clearance determinations. His promises of future financial responsibility are insufficient to fully mitigate the financial considerations security concerns.

It is well settled that once a concern arises regarding an applicant's security clearance eligibility, there is a strong presumption against granting a security clearance. See *Dorfmont*, 913 F. 2d at 1401. Unmitigated financial considerations security concerns lead me to conclude that grant of a security clearance to Applicant is not warranted at this time. This decision should not be construed as a determination that Applicant cannot or will not attain the state of reform necessary for award of a security clearance in the future.

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:	Against Applicant
Subparagraphs 1.d and 1.e:	For Applicant

Conclusion

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national security interests of the United States to grant or continue Applicant's eligibility for a security clearance. Clearance is denied.

JUAN J. RIVERA
Administrative Judge