



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



In the matter of:)
)
) ISCR Case No. 20-02970
)
Applicant for Security Clearance)

Appearances

For Government: Raashid Williams, Esq., Department Counsel
For Applicant: Troy Nussbaum, Esq.

12/13/2022

Decision

Curry, Marc E., Administrative Judge:

Applicant’s home equity line of credit and his mortgage payments are both current. He has filed his delinquent tax returns and is working with an accountant to arrange a plan to pay the balance. I conclude that his financial problems are in the process of being resolved and are under control. Clearance is granted.

Statement of the Case

On February 3, 2021, the Department of Defense Counterintelligence and Security Agency Consolidated Adjudications Facility (DCSA CAF) issued a Statement of Reasons (SOR) to Applicant, detailing the security concerns under Guideline F, financial considerations, explaining why it was unable to find it clearly consistent with the interests of national security to grant security clearance eligibility. The DCSA CAF took the action 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 National Adjudicative Guidelines (AG) effective for any adjudication made on or after June 8, 2017. On March 19, 2021, Applicant answered the SOR, denying all of the allegations

except subparagraph 1.f, and requesting a hearing, whereupon the case was assigned to me on August 30, 2021. I scheduled a hearing for December 7, 2021.

Shortly before the hearing, Applicant's counsel requested a continuance, explaining that Applicant had been diagnosed with cancer and had to undergo chemotherapy. I granted the continuance, and postponed the scheduling of the hearing indefinitely, requesting Applicant's counsel to inform me when Applicant was medically able and ready to proceed.

In August 2022, Applicant's counsel informed me that Applicant had successfully recovered and was ready to proceed. Subsequently, I convened the hearing on October 4, 2022. I considered the testimony of Applicant, his wife, and his accountant, together with three government exhibits (Government Exhibit (GE) 1 – GE 3), and ten Applicant exhibits. (Applicant Exhibit (AE) A – AE J) At Applicant's counsel's request, I left the record open to allow him the opportunity to submit additional exhibits. Within the time allotted, he submitted three exhibits, that I incorporated into the record as AE K through AE M. The transcript (Tr.) was received on October 17, 2022.

Findings of Fact

Applicant is a 52-year old married man with two children, ages ten and five. He has a bachelor's degree in information technology. (Tr. 78) For the past 12 years, he has been working for a defense contractor. He writes technical documentation for cybersecurity software. (Tr. 82)

Applicant is highly respected on the job and in his community. (AE I) The former president of the company employing Applicant supervised him for five years. In his experience, Applicant's technical writing prowess was unparalleled. (AE I) He entrusted Applicant to ensure access control to the company's most sensitive documents, and never questioned his ability to "make the right decisions." (AE I) A coworker opined that Applicant is a "consummate bridge builder" who works well with others and exudes the principles of honesty, dependability, and reliability "in spades." (AE I at 5) Applicant lives near a military academy and is active in a sponsor program, providing a home away from home for students. (GE I at 6,9)

Applicant's wife is an attorney. During the prime of her career in the early 2010s, she was extremely successful, earning some years approximately \$200,000 annually. (Tr. 49) Her job was demanding, as she worked long hours and commuted roundtrip approximately two hours daily. (Tr. 53) In addition to working long hours, she managed the family's finances. (Tr. 51) These demands caused her to experience anxiety. (Tr. 52) Preoccupied with trying to maintain her work and life balance, Applicant's wife began to neglect the household finances. Applicant periodically asked her about their finances. She repeatedly lied and told him that she was "on top of it." (Tr. 65) Applicant's wife testified that she had issues with control and that she was embarrassed and ashamed to tell the truth to Applicant. (Tr. 51) Applicant never probed more deeply into the family's finances because his spouse had given him no reason to doubt her veracity. He considered joint

involvement with the finances to be a “duplication of effort,” and assumed that their finances were stable because he and his wife both earned professional incomes. (Tr. 86) Applicant’s wife did not “come clean” about the extent of their financial problems until early 2020, after Applicant told her that their financial problems, previously unbeknownst to him, compelled his facility security officer to speak with him. (Tr. 58, 86)

In 2012, Applicant’s wife’s anxiety began taking a toll on her health, as she had “an exceptional [sic] difficult time recovering from the birth” of their first child. (Tr. 51) After recovering from childbirth, she hired a nanny and returned to work. The help of a nanny did not ameliorate the anxiety that Applicant’s wife experienced before taking maternity leave. In fact, her multiple roles as “an employee, a mother, a wife, and an employer,” triggered postpartum depression. Although her doctor prescribed medication in 2013, the illness did not resolve until 2015. (Tr. 52) That year, Applicant’s wife left her job and took one that was much closer to home. Her new position paid only about half of what she earned previously. (Tr. 73) By then, Applicant and his wife had fallen behind on their mortgage loan and their home equity line of credit, as alleged in subparagraphs 1.a and 1.b, and on one of Applicant’s credit card debts, as alleged in subparagraph 1.c. Moreover, they had failed to file their federal and state income tax returns for 2014 through 2018, as alleged in subparagraphs 1.d through 1.f.

SOR subparagraphs 1.a and 1.b relate to a home Applicant and his wife purchased in 2013. (GE 1 at 40: AE B) When they financed their mortgage loan, their lender did not escrow the property taxes, as Applicant and his wife decided to make payments to the tax authority directly. (Tr. 59) In 2018, they did not set aside enough money to pay their property taxes. Consequently, when the taxes became due, they could not afford to make the payments. (Tr. 59) The mortgage company then began prorating the delinquency and adding it to the monthly mortgage payment, resulting in an \$800 monthly increase. (Tr. 60) Applicant and his wife began to fall behind on their mortgage. They then applied for a loan modification. (Tr. 61) While they were negotiating a modification, the lender filed a foreclosure action. (Tr. 61) After the bank approved the loan modification, Applicant and his wife began rehabilitating the mortgage. By May 2020, they had caught up on the mortgage payments through the rehabilitation plan. (Tr. 94) The lender then dismissed the foreclosure action. (GE 2) As of the date of the hearing, both the mortgage and the home equity line of credit accounts were current. (AE B, AE C)

The debt alleged in subparagraph 1.c, totaling \$385, is the final interest charge on a credit-card bill that Applicant and his wife paid in a lump sum. He suspects that the interest accrued while the lump-sum payment was in the mail. (Tr. 101) Applicant and his wife satisfied this debt in July 2020. (GE 2 at 13)

Applicant and his wife began struggling with federal income tax payments in 2012, the first year they hired a nanny. They had difficulty properly accounting for the payroll tax and related taxes associated with employing a household caregiver. (Tr. 26) When Applicant’s wife calculated the income tax due for tax year 2013, it totaled \$10,000. (Tr. 52) They were unable to afford this payment, and things “spiraled from there.” (Tr. 53) Each successive tax year, Applicant’s wife did not file their federal or state income tax returns.

When she eventually told Applicant about these failures, she explained that she did not know how to rectify the prior years' deficiencies and was afraid they would owe taxes that were beyond their incomes. (GE 1 at 36) In lieu of complying with their income-tax return filing obligations, Applicant's wife focused on whatever financial problem was "on the horizon," and she let the tax issues spiral out of control. (Tr. 53) Ultimately, they failed to file their federal income tax returns for 2014 through 2018.

In February 2020, Applicant and his wife retained an accountant. (GE 2 at 8) With his help, they filed their delinquent state income tax returns and paid the deficiency, totaling \$2,309. (GE 2 at 17-19) After resolving the delinquent state income tax returns, Applicant then focused on the delinquent federal income tax returns, filing them by the summer of 2020. (Tr. 24) Currently, he owes a balance of \$183,000. (AE E; Tr. 23-24)

After filing their delinquent income tax returns in July 2020, Applicant and his wife, with the help of their accountant, initially requested to arrange an installment plan with the IRS to repay the tax delinquency. (Tr. 24) The IRS rejected this plan. After the rejection, Applicant in November 2021 then filed a request to pay the delinquency through a withdrawal from his 401k plan. (Tr. 24, 26) The approval is still pending. The approval process is taking a long time because there was initially a dispute about the amount of tax delinquency. Specifically, after Applicant's accountant filed the returns, the IRS refused to accept the respective Schedule H forms, contending that the accountant's inclusion of them in the tax returns was erroneous. (Tr. 26) Applicant and his spouse then instructed their accountant to re-file the returns without the Schedule H. Several months later, the IRS concluded that Applicant's accountant calculated the taxes correctly when he initially filed the returns with the Schedule H forms.

Applicant's accountant, an expert in assisting individuals resolve tax delinquencies, testified that it was unusual for the IRS to make such a mistake. In addition, he testified that the approval process for a 401k withdrawal was taking two to four times longer than usual. (Tr. 31) He is having similar problems with other clients and attributes it to staffing problems at the IRS and lingering problems stemming from the pandemic. (Tr. 31-32)

Applicant has a balance of \$180,000 in his 401k plan. (AE L) He requested to arrange a temporary payment plan while the approval of the 401k withdrawal plan is pending. (Tr. 33) The IRS rejected this offer, and advised him to wait until they make a decision on the 401k plan. Applicant was then informed that while the approval process is pending, there will be a hold on any collection actions. (Tr. 34)

In March 2021, Applicant and his wife retained a financial counselor. With his help, they crafted a budget. According to the budget, they have \$5,706 of monthly discretionary income. (AE G at 6) Applicant and his wife have a stronger, more transparent relationship, as they now communicate regularly about their finances. (Tr. 63) They discuss any potential expenditure before making it, and they sit down weekly "to talk about what is going on in [their] family, what [their] financial obligations are, [and] how [they are going to] handle things that pop up." (Tr. 62)

Policies

The U.S. Supreme Court has recognized the substantial discretion the Executive Branch has 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). 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 required to be considered 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, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge’s overall 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 ¶ 1(b) requires that “[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security.” In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. 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 applicant or proven by Department Counsel. . . .” The applicant has the ultimate burden of persuasion to obtain a favorable security decision.

Analysis

Guideline F: Financial Considerations

Under this concern, “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.” (AG ¶ 18)

Applicant satisfied the debt alleged in subparagraph 1.c. I resolve this debt in his favor. His remaining debts, together with his late income tax return filings, however, trigger the application of AG ¶¶ 19(a), “inability to satisfy debts,” 19(c); “a history of not meeting financial obligations;” and 19(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 following mitigating conditions under AG ¶ 20 are potentially applicable in this case:

(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.

Applicant was unaware of his financial problems, as his wife managed the family finances, fell behind on bill payments, and tax filings, and would lie to him about their finances when he would periodically ask about them. Ultimately, however, applicants have a responsibility to keep up with their finances, regardless of whether this responsibility is ostensibly managed by a spouse or a domestic partner. The probative value of Applicant's contention is further undercut by the number of years that he and his wife failed to file their income tax returns or pay the delinquencies. Under these circumstances, the fact that Applicant's wife misled him about their financial stability does not constitute a circumstance beyond his control. AG ¶ 20(b) does not apply.

Applicant and his wife now work with a financial counselor who helped them organize a budget and manage their finances. In addition, Applicant and his wife now communicate about financial management and set aside time to discuss spending decisions and pay bills. Since they have been transparent about their finances, they have caught up on their mortgage payments and the payments on their home equity line of credit. As for Applicant's tax problems, he and his wife retained an accountant who helped them file their delinquent tax returns and is working diligently to help them resolve their tax delinquencies. Although the amount of delinquent federal income tax is significant and Applicant has not yet begun to satisfy it, he initiated corrective actions one year before the issuance of the SOR. (See e.g., ISCR Case No. 17-01807 at 3-4 (App. Bd. Mar 7, 2018)) Moreover, the delay in paying the tax delinquency does not relate to any lack of ability or willingness to do so. Rather, it stems from the onerous nature of the resolution process, as the IRS initially rejected the returns, contending that Applicant mistakenly filed them, then told him a few months later, that they were, in fact, mistaken, and that his and his spouse's joint returns were originally filed correctly in July 2020. Applicant is working closely with his

accountant and has ample income to either pay his tax debt through an installment process, a withdrawal from his 401k account, or some combination of both options. Moreover, the IRS stayed any collection activities pending the resolution of the delinquencies. Under these circumstances, I conclude AG ¶¶ 20(c), 20(d) and 20(g) apply, and that Applicant has mitigated the financial considerations security concerns.

Whole-Person Concept

Under the whole-person concept, the administrative judge must consider the totality of an applicant's conduct and all relevant circumstances in light of the nine adjudicative process factors in AG ¶ 2(d). They are as follows:

- (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.

There was clearly a serious lack of communication between Applicant and his spouse, which lasted for several years during their marriage. His wife's shame at losing control of the finances led her to lie to Applicant about their financial well being and generated a security concern for Applicant. He is not blameless, as his failure to work together with his wife on financial issues, while she was balancing multiple demands of managing her job, raising their children, working with the nanny, and overcoming an illness reflected a high degree of inattentiveness. Nevertheless, Applicant and his spouse have addressed their financial problems, paying the delinquent credit card balance, becoming current on their mortgage and line of credit accounts, filing their delinquent income tax returns, and working with their accountant to arrange the payment of their tax delinquency. In addition, they are working with a financial counselor who has helped them better manage their finances, and improve their communication skills so that these problems do not recur in the future.

Security clearance determinations are not intended to punish applicants for past shortcomings. When considered together with Applicant's outstanding work record, and his model character, as demonstrated by his assistance to the local military academy undergraduates, I am confident that Applicant will resolve the tax delinquency, and that no additional financial problems will recur. I conclude that Applicant has mitigated the 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: FOR APPLICANT

Subparagraphs 1.a – 1.f: For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the interests of national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

Marc E. Curry
Administrative Judge