



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



In the matter of:)
)
) ISCR Case No. 20-03716
)
)
Applicant for Security Clearance)

Appearances

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

12/05/2022

Decision

MURPHY, Braden M., Administrative Judge:

Applicant did not file annual Federal and state income tax returns on time, as required, for several years, during a period of marital discord. His past-due tax returns have all been filed, and no tax debt resulted. The single debt alleged in the SOR is not his responsibility and is also being resolved. Applicant’s tax filing and financial issues are unlikely to recur and no longer cast doubt on his current judgment, trustworthiness and reliability. He provided sufficient documentary and whole-person evidence to mitigate the financial security concerns. Applicant’s eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted a security clearance application (SCA) on June 4, 2019. On July 20, 2021, the Defense Counterintelligence and Security Agency Consolidated Adjudications Facility (CAF) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline F, financial considerations. The CAF took the action under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within*

Industry (February 20, 1960), as amended; Department of Defense (DOD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (AG), effective June 8, 2017.

Applicant answered the SOR on December 16, 2021, and he requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA). The DOHA Hearing Office received the case on February 22, 2022, and the case was assigned to me on September 8, 2022. On September 30, 2022, DOHA issued a notice scheduling the hearing for October 19, 2022, by video-conference through an online platform.

The hearing convened as scheduled. At the hearing, Department Counsel offered Government's Exhibits (GE) 1 through 6. Applicant testified and offered Applicant's Exhibits (AE) A through Q. All of the exhibits were admitted without objection. After the hearing, I held the record open until November 2, 2022, to provide Applicant the opportunity to submit additional information. He initially did not submit any documents by the deadline, and the record closed. However, on November 28, 2022, Applicant submitted four additional documents for consideration, along with a statement by e-mail. Department Counsel offered no objection, so the e-mail from Applicant (AE R) and the four documents (two character-reference letters, AE S and AE T, and two documents relating to child custody and his divorce, AE U and AE V) are admitted without objection. DOHA received the hearing transcript (Tr.) on October 31, 2022. The record closed on November 28, 2022.

Jurisdiction

Applicant is employed by a U.S. government contractor. The cabinet department that oversees the federal agency where he works has an agreement with DOD establishing DOHA jurisdiction over the case. See Directive 5220.6 at ¶ 2.2. (Tr. 52)

Findings of Fact

Applicant admitted the two SOR allegations (SOR ¶¶ 1.a and 1.b), and provided explanations. His admissions are incorporated into the findings of fact. After a thorough and careful review of the pleadings and exhibits submitted, I make the following additional findings of fact.

Applicant is 42 years old. He and his first wife married in 2006 and divorced in April 2018. He and his first wife have a daughter, age 14. He also has a 20-year-old daughter from a prior relationship. He remarried in 2020, and he and his wife have a young daughter. (GE 1; Tr. 37, 49-51) Applicant held a clearance about 15-20 years ago when he was in the Army Reserve (2000-2006). He was never activated for a deployment, and he was discharged honorably. (Tr. 10, 68-70; GE 1)

Applicant has an associate's degree. He has worked as a federal contractor, for different employers, with limited interruption since mid-2009. He was terminated from one position in August 2018 for alleged poor performance. After about seven months of unemployment, he was hired by his current employer, another contractor for the same government agency, in March 2019. (GE 1) He earned a recent promotion and now earns an annual salary of \$110,000. (Tr. 65-69; GE 1; AE K)

The SOR concerns several years of late-filed state and federal income tax returns, and a single charged-off debt. (SOR ¶¶ 1.a, 1.b) Applicant admitted both allegations in his SOR response, with explanations.

SOR ¶ 1.a alleges, and Applicant admits, that he failed to timely file his state and federal income tax returns on time, as required, for "at least" tax years 2015-2019. Applicant disclosed on his June 2019 SCA that he had two years of unfiled tax returns (2017 and 2018). He said he could not afford to pay his 2017 taxes and noted his recent unemployment. (GE 1) He discussed his tax-filing issues and the debt at SOR ¶ 1.b, during his August 2019 background interview. (GE 2 at 5-6)

Applicant testified that he had a difficult relationship with his first wife. During the tax periods at issue in this case, they were married but had been living separately, since about 2014. Applicant said he prepared his returns each year but acknowledged that his rationale for not filing his tax returns was to "protect myself as much as I could financially" because he did not want his wife to get his refunds. He acknowledged during his testimony that this was not a good decision. He also acknowledged that once his tax-filing issues began, it was difficult to dig himself out. (Tr. 39-49, 55-57; GE 3 at 22-23)

During his hearing, Applicant was initially reluctant to discuss the circumstances of the end of his first marriage in much detail. (Tr. 40) After the hearing, in late November 2022, he provided additional details in an e-mail. (AE R) Essentially, he stated that there came a point in time when he and his first wife had a significant disagreement about his efforts to resolve a custody dispute with the mother of his eldest daughter, in about 2011. Though the parties participated in family counseling and found it helpful, the dispute also led to the end of their marriage. Applicant was reluctant to discuss the matter more fully in the hearing because it is painful and embarrassing. (AE R; AE U) As of September 2022, Applicant no longer has child-support obligations as to his eldest daughter. (AE J) He pays child support for his middle child. (Tr. 51)

Applicant filed his federal tax returns for tax years 2013, 2014, 2015, and 2016 at the same time, in February 2021. For each year, he received a tax credit of several hundred dollars. (AE B) He acknowledged that he was prompted to address his tax returns by the DOHA interrogatory he received in January 2021. (Tr. 60) He filed most of his remaining unfiled federal returns in December 2021. This included the federal returns for 2017 (\$1,165 credit), 2018 (\$1,650 refund), and 2020 (\$1,912 credit). He filed his 2019 federal return in February 2022, and received a \$3,273 refund. (AE B)

Similarly, Applicant provided documentation from state A about his 2015 and 2016 state taxes, including small state tax assessments (of \$67 total) that he resolved in 2021. (AE P, AE Q). He filed those returns in December 2020. (GE 3 at 15) He also documented that his state 2 income tax returns for 2017, 2018, and 2019 were also filed, concurrently with his federal returns for those years. (Tr. 48) He was to receive refunds of between \$100 and \$260 for each tax year. (AE C, AE D, AE E) His 2020 return reflects that he owed about \$500 (AE G), but he testified that he received a refund of less than \$100. (Tr. 58) He has no other unfiled tax returns from prior years, and no outstanding state or federal tax debt. (Tr. 55, 58)

Applicant has also filed his state and federal income tax returns for 2021. He received a federal refund of \$3,688 and a state B tax refund of \$2,459. (AE B, AE F, AE H) He apologized for his actions and now has a better understanding of his responsibility as a citizen to file his tax returns on time, and he intends to do so in the future. (Tr. 49, 63-65, 73-74)

SOR ¶ 1.b (\$32,532) is an account that was charged off by a credit union. (GE XX) Applicant admitted the debt, and it is listed as charged off on credit reports in the record. (GE 3, GE 4, GE 5). The debt is a repossessed vehicle purchased during Applicant's first marriage. The April 2018 Final Order of Divorce notes, in part, that his wife ("Plaintiff") "shall be solely responsible for all expenses related to the vehicle and shall hold Defendant (Applicant) harmless thereon." (AE M, AE V; Tr. 26, 30-33)

The vehicle was sold at auction in November 2018 for about \$10,286, leaving an outstanding debt of \$22,062. (AE O) Even though Applicant's former wife was responsible for the vehicle and the debt following their divorce, he said she had not done so. Although the debt is her responsibility as noted in the divorce decree, he has set up a payment plan to address the debt. He provided documentation at his 2019 background interview (GE 6) and updated it at his hearing. (AE A, AE M, AE N, AE O) Applicant has been making \$100 monthly payments towards the account since late 2019, and the balance owed as of late September 2022 is down to \$18,366. (AE N) He expects to continue making payments on the account. (Tr. 30-36)

Applicant and his wife also recently sold their prior residence, a condominium, for \$265,000, which was \$16,000 over the asking price. While settlement was pending at the time of the hearing, Applicant testified that he expected to use the proceeds from the sale to address the debt at SOR ¶ 1.b. (AE L; Tr. 36-39) Applicant documented that SOR ¶ 1.b is not his responsibility, but he is nonetheless addressing the debt responsibly and has a reasonable plan for its resolution. Applicant has no other delinquencies alleged. (GE 3; AE I)

Applicant attested to his pride and dedication to serving his country in uniform and his desire to continue to do so in his current role. He has worked hard to get where he is. He approaches his professional role and his role as a husband and father with utmost integrity. (Tr. 53-54, 73-74; AE U)

Two work-related references attested in reference letters that Applicant is a dedicated and hard-working professional. He maintains a “cool head” under stress. He has respect for protection of sensitive and classified information. He is honest and trustworthy. He is also a veteran who wants to continue serving his country. There is no reason to question his character or judgment and they recommend him for a clearance. (AE S, AE T)

Policies

It is well established that no one has a right to a security clearance. As the Supreme Court has held, “the clearly consistent standard indicates that security determinations should err, if they must, on the side of denials.” *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988).

When evaluating an applicant’s eligibility 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 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, these guidelines are applied 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(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.” In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have not drawn inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an “applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel and 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.

Analysis

Guideline F, Financial Considerations

The financial considerations security concern 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 sets forth 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 . . . annual Federal, state, or local income tax returns or failure to pay annual Federal, state, or local income tax as required.

The sole delinquent debt in the SOR, at ¶ 1.b, is established by its reference on credit reports in the record, and by Applicant's admission to the allegation. The Government therefore established a *prime facie* case as to that debt under AG ¶¶ 19(a) and 19(c). (Despite this, Applicant also established that the debt is his ex-wife's responsibility, as noted in the mitigation section, below).

Applicant had a duty to file his annual state and Federal income tax returns in a timely manner, and the fact that he did not do so for several years is a security concern. As the Appeal Board has held, in ISCR Case No. 14-04437 at 3 (App. Bd. Apr. 15, 2016):

Failure to file tax returns suggests that an applicant has a problem 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 towards 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.

Applicant failed to timely file his Federal and state income tax returns for several tax years, including 2015-2019, as alleged. This establishes AG ¶ 19(f) specifically, as well as, more generally, AG ¶ 19(c).

Conditions that could mitigate 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;

(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's tax issues began during the breakup of his marriage. With what he now recognizes was a misguided rationale, Applicant chose for several years not to file his state and federal income tax returns while he and his wife were separated, out of his concern that she would capture his (generally rather limited) tax refunds. This continued until shortly after their divorce was finalized in 2018. Later tax-filing issues were due

more to Applicant's brief unemployment and a misunderstanding of his tax-filing responsibilities as a citizen.

Applicant was admittedly prompted to address his tax filings by the interrogatory he received from DOHA in early 2021. He filed most of his remaining returns by the end of the year, and all of his past-due returns have now been filed, along with his most recent returns, for TY 2021. Applicant had little to no resulting tax debt.

While Applicant's tax issues began during the breakup of his marriage, he did not act responsibly by failing to file his tax returns in a misguided attempt to keep any refunds from his wife. His tax issues were also not resolved until some time after his divorce.

In weighing Applicant's responsibility under the circumstances, I must consider the timing of Applicant's actions. The Appeal Board has consistently held that timing of an applicant's resolution of his tax-filing problems is relevant in evaluating mitigation. An applicant who resolves financial or tax problems only when his clearance might be imperiled raises questions about his willingness to follow the sometimes complex rules governing classified information when his personal interests are not at stake. See ISCR Case No. 15-06440 at 4 (App. Bd. Dec. 26, 2017). The Appeal Board has also held that an applicant cannot simply adopt a position of "no harm, no foul" or "all's well that ends well." See ISCR Case No. 14-01894 at 4-5 (App. Bd. Aug. 18, 2015). Given the timing of Applicant's actions, he therefore gets less credit for good-faith efforts than he otherwise might.

However, Applicant's past-due tax filings are now resolved. AG ¶ 20(g) applies. The origin of his tax issues is largely attributable to his marital situation at the time. That situation is now resolved. Applicant and his first wife have now been divorced for several years, and he has begun a new life with a new family. His tax issues also occurred under circumstances that are unlikely to recur, and they no longer cast doubt on his current reliability, trustworthiness, or good judgment. AG ¶ 20(a) applies.

Despite Applicant's admission to the debt at SOR ¶ 1.b and its repeated reference on his credit reports, he established through the divorce order that the auto debt is his ex-wife's responsibility. AG ¶ 20(e) therefore applies. Even so, he entered into a reasonable payment plan to resolve the debt and has adhered to it. He also has a responsible plan to address the remainder of the debt through expected proceeds from the imminent sale of the condo. AG ¶ 20(d) also applies to mitigate SOR ¶ 1.b.

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 in my whole-person analysis.

I had ample opportunity to evaluate Applicant's demeanor at the hearing and to form an opinion of his credibility. He was intelligent, well spoken, and respectful, and he treated the process seriously. He presented a well-documented, well-organized case. I found him to be a credible witness. I also credit his service to the country, both in uniform and as a government contractor for several years, in a position in which he is well regarded. I believe Applicant has learned his lesson through this experience, and is unlikely to find himself in this position again. He has mitigated the financial considerations security concerns. In reaching this conclusion, I considered not only Applicant's credibility, but the record evidence as a whole. Overall, the record evidence leaves me without questions or doubts as to Applicant's eligibility for access to classified information.

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.b: For Applicant

Conclusion

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

Braden M. Murphy
Administrative Judge