



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



In the matter of:)
)
) ISCR Case No. 21-02521
)
Applicant for Security Clearance)

Appearances

For Government: Erin Thompson, Esq., Department Counsel
For Applicant: Susan Martin, Esq.

02/07/2023

Decision

BENSON, Pamela C., Administrative Judge:

Applicant failed to timely file his Federal and state income tax returns for seven consecutive years. He still owes delinquent Federal and state taxes. He did not mitigate the financial considerations security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On May 10, 2021, Applicant completed his Electronic Questionnaire for Investigations Processing or security clearance application (SCA). On December 16, 2021, the Defense Counterintelligence and Security Agency (DCSA) Consolidated Adjudications Facility (CAF) issued a statement of reasons (SOR) to Applicant under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960); DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive) (January 2, 1992), as amended; and Security Executive Agent Directive 4, establishing in Appendix A the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AGs), effective June 8, 2017.

The SOR detailed reasons why the DCSA did not find under the Directive that it is clearly consistent with the interests of national security to grant or continue a security clearance for Applicant and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked. Specifically, the SOR set forth security concerns arising under Guideline F. On April 28,

2022, Applicant provided a response admitting all of the information alleged in the SOR (¶¶ 1.a through 1.g). He requested a hearing before an administrative judge. (SOR Response)

On August 19, 2022, the case was assigned to me. On October 18, 2022, the Defense Office of hearings and Appeals (DOHA) issued a Notice setting the hearing for October 27, 2022. Applicant's counsel objected to the date, and the hearing was rescheduled for December 6, 2022. The hearing was held as scheduled using the DOD Microsoft Teams video teleconference system.

During the hearing, Department Counsel offered 12 Government exhibits (GE), which I admitted into evidence without objection. Applicant's counsel did not offer any exhibits, but she requested that the record be held open so she could submit documents on behalf of her client after the hearing. I granted her request, and held the record open until January 10, 2023. Applicant timely submitted six documents, which I labeled as Applicant exhibits (AE) A through F. I admitted all of the proffered exhibits into evidence without objection. On December 13, 2022, DOHA received a copy of the transcript (Tr.). The record closed on January 11, 2023.

Findings of Fact

In Applicant's SOR response, he admitted all of the allegations in SOR (¶¶ 1.a, through 1.g). His admissions are accepted as findings of fact.

Applicant is a 63-year-old aircraft mechanic who has worked for a DOD contractor since March 2013. He has continuously worked for various DOD contractors since 1995. He currently earns \$65,000 a year in this position. He received an airframe power plant license in 1994. He is married and has three adult children. His wife is currently employed as a medical technologist. Her annual salary is \$80,000. (Tr. 20-22, 48; GE 1)

Financial Considerations

Applicant stated that he experienced financial problems over the years due to his wife's periods of unemployment, his personal health issues, and because his home was heavily damaged by fire in May 2021. His wife was unemployed from November 2009 to February 2011, December 2012 to May 2015, and from February 2021 to September 2022, for a total of 63 months. He said his wife had been laid off from these employments, but he did not give an explanation as to why she was unable to find employment for an extended period of time between jobs. In November 2020, Applicant had elective surgery, which soon required a second surgery after he developed a staph infection. He later acquired another serious infection, MRSA, which required even more antibiotics and seven weeks of intravenous fluids and a return to the hospital for surgery. Then, on May 27, 2021, his house caught on fire and the damages totaled over \$300,000. He had homeowner's insurance at the time of the fire. (Tr. 23-35, 41, 48; AE E; GE 2)

The SOR alleges four separate bankruptcy filings (SOR ¶¶ 1.a, 1.b, 1.c, and 1.d). Applicant filed for Chapter 7 bankruptcy in October 2001. The case was discharged in

January 2002. He then filed for Chapter 7 bankruptcy in May 2010. The case was discharged in August 2010. In August 2018, he filed for Chapter 13 bankruptcy, but since his tax returns were not yet filed, the bankruptcy case was dismissed. He refiled for Chapter 13 bankruptcy in June 2019. This case was subsequently dismissed in September 2022. (Tr. 29, 39; GE 6, GE 7, GE 8, GE 9, GE 10; AE C; SOR Response)

Applicant stated that he filed for the first Chapter 7 bankruptcy in 2001 because he and his wife fell behind on paying their credit cards, and a creditor had garnished his wages. His wife had been laid off from her part-time employment as a medical technologist. They decided to file for bankruptcy in 2001 to stop the garnishment. The second Chapter 7 bankruptcy was filed in May 2010, after his wife had been laid off from her full-time employment in November 2009. The Chapter 13 bankruptcy, initially filed in 2018, and then refiled in 2019, was initially filed due to their delinquent home mortgage, and their home being placed into foreclosure. While the bankruptcy case proceeded, Applicant was able to obtain a mortgage loan modification and get the foreclosure action dismissed. Once that was arranged, he intentionally failed to make payments to the trustee, and allowed the Chapter 13 bankruptcy case to be dismissed. (Tr. 28-35, 37-39, 42, 45-47; AE B, AE E)

The SOR alleges that Applicant failed to timely file his Federal and state income tax returns for tax years 2012 through 2018. He failed to pay his Federal and state taxes for those tax years, as required, and the taxes remain unpaid. (SOR ¶¶ 1.f, and 1.g.) In Applicant's response to the SOR, he stated that all of his tax returns were filed except for tax year 2019. He attributed the late filings due to complications from his wife's identity theft. He did not give a sufficient explanation as to why he was unable to file his income tax returns separately during those years, or why his wife could not file her tax returns on paper rather than electronically, which is the method the Internal Revenue Service (IRS) advises when an individual's identity is compromised. (Tr. 40-41, 45; SOR Response; GE 1, GE 2)

At the hearing, Applicant stated that all unfiled state and Federal income tax returns had been filed. He was uncertain of the total amount of state and Federal back taxes owed. He had not yet arranged a payment plan with the IRS or with the state tax office, but he hoped to start making tax payments soon. The IRS filed a proof of claim in August 2019 through the bankruptcy court. The claim for unpaid Federal taxes totaled \$20,304 for tax years 2011, 2013 through 2018. No information was provided about the total amount of delinquent state taxes owed. These tax debts remain unresolved. (AE B, AE D; Tr. 39-45)

The SOR alleges that Applicant is indebted for delinquent student loans totaling \$33,220 (SOR ¶ 1.e). He stated that these loans are currently in deferment due to the Coronavirus Aid, Relief, and Economic Security (CARES) Act, and that he is not obligated to make payments while they are deferred. He admitted that these student loans were delinquent before the CARES Act deferment in March 2020. It is his intention to start repaying these student loans when they come out of deferment. (Tr. 43, 49; SOR response, GE 2)

The 2015 state tax return in the record reflected that Applicant and his spouse earned \$95,000 for the year. In 2016, they earned \$97,340. In 2017 and 2018, they earned six figures, \$108,121, and \$100,606, respectively. In 2020, Applicant's filed separately with reported income of \$67,165, and in 2021, his income was reported as \$48,878. I did not see separate income tax returns for his spouse for tax years 2020 or 2021, but this may be due to her period of unemployment. Based on Applicant's testimony, their joint income for tax year 2022 should be near the six-figure range again, with his wife now employed. (GE 2; Tr. 48)

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicant's eligibility for access to classified information "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.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. 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 about potential, rather than actual, risk of compromise of classified information. Clearance decisions must be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See Exec. Or. 10865 § 7. Thus, nothing in this decision should be construed to suggest that it is based, in whole or in part, on any express or implied determination about applicant's allegiance, loyalty, or patriotism. It is merely an indication the applicant has not met the strict guidelines the President, Secretary of Defense, and Director of National Intelligence have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of

establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his [or her] security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

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 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 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 SOR alleges that Applicant filed for bankruptcy protection on four separate occasions, and he has delinquent student loans currently in deferment. He failed to timely file state and Federal income tax returns for seven consecutive years, and he has an unknown amount of delinquent state taxes, and at least \$20,304 in delinquent Federal taxes, which remain unresolved and unpaid. The record establishes the disqualifying conditions in AG ¶¶ 19(a), 19(c), and 19(f), requiring additional inquiry about the possible applicability of mitigating conditions. Discussion of the disqualifying conditions is contained in the mitigation section.

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, 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 bears the burdens of production and persuasion in mitigation. He is given some consideration for his student loans currently in deferment status due to the CARES Act, but it is important to note that these student loans were delinquent well before the

CARES Act became law in March 2020. The multiple filings for bankruptcy clearly show that Applicant and his wife have a long history of not meeting their financial obligations.

I find it troubling that Applicant failed to timely file his Federal and state income tax returns for seven consecutive years. It appears that he filed his tax returns only after his 2018 bankruptcy case was dismissed due to his unfiled returns. His justification that his wife's identity was stolen and caused them to file their state and Federal income tax returns late, is certainly a circumstance beyond their control, but he must also show that he acted responsibly under the circumstances to resolve these issues. There is little information in the record to show why he was unable to make better progress with the filing of his state and Federal tax returns over the years. Allowing this problem to persist for seven consecutive years does not support a finding that he acted responsibly under the circumstances. Although he has now filed these state and Federal tax returns, this accomplishment does not mitigate his long period of inaction in this case.

Applicant did not demonstrate that he acted responsibly under the circumstances to resolve his delinquent state and Federal taxes. There is no evidence of any debt-resolution efforts with the state or Federal government. These tax delinquencies have persisted for several years and are still unresolved. None of the financial considerations mitigation conditions apply. Applicant did not mitigate the financial considerations security concerns.

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.

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 those guidelines but some warrant additional comment.

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. "[A] favorable clearance decision means that the record

discloses no basis for doubt about an applicant's eligibility for access to classified information." ISCR Case No. 18-02085 at 7 (App. Bd. Jan. 3, 2020) (citing ISCR Case No.12-00270 at 3 (App. Bd. Jan. 17, 2014)).

Applicant's untimely filing of his Federal and state income taxes continued for seven consecutive years. As such, he developed significant outstanding tax debts to both the IRS and the state tax authority. He has not provided sufficient documentation that he has arranged a payment plan or made any payments to the IRS or state tax authority. Given his burden to demonstrate reliability, trustworthiness, and good judgment, I conclude Applicant did not meet that requirement.

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. With more effort towards establishing a track record of financial responsibility, and a better record of behavior consistent with his tax obligations, he may well be able to demonstrate persuasive evidence of his security clearance worthiness.

I have carefully applied the law, as set forth in *Egan*, Exec. Or. 10865, the Directive, the AGs, and the Appeal Board's jurisprudence to the facts and circumstances in the context of the whole person. Applicant failed to mitigate financial considerations 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 through 1.g:	Against Applicant

Conclusion

In light of all of the circumstances in this case, it is not clearly consistent with the interests of national security to grant or continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Pamela C. Benson
Administrative Judge