



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



In the matter of:)
)
) ISCR Case No. 22-01008
)
Applicant for Security Clearance)

Appearances

For Government: Brian Farrell, Esquire, Department Counsel
For Applicant: *Pro se*

02/01/2023

Decision

GALES, Robert Robinson, Administrative Judge:

Applicant failed to mitigate the security concerns regarding financial considerations and personal conduct. Eligibility for a security clearance is denied.

Statement of the Case

On May 10, 2021, Applicant applied for a security clearance and submitted a Questionnaire for National Security Positions (SF 86). On November 8, 2021, the Defense Counterintelligence and Security Agency (DCSA) Consolidated Adjudications Facility (CAF) submitted some interrogatories to him asking some questions pertaining to his federal income return filings. He responded to those interrogatories on February 28, 2022. On June 2, 2022, the DCSA CAF issued a Statement of Reasons (SOR) to him under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended and modified; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended and modified (Directive); and Directive 4 of the Security Executive Agent (SEAD 4), *National Security Adjudicative Guidelines* (December 10, 2016) (AG), effective June 8, 2017.

The SOR alleged security concerns under Guideline F (Financial Considerations) and Guideline E (Personal Conduct) and detailed reasons why the DCSA adjudicators were unable to find that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The SOR recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

On September 21, 2022, Applicant responded to the SOR and elected to have his case decided on the written record in lieu of a hearing. (Item 2) A complete copy of the Government's file of relevant material (FORM) was mailed to Applicant by the Defense Office of Hearings and Appeals (DOHA) on October 21, 2022, and he was afforded an opportunity after receipt of the FORM to file objections and submit material in refutation, extenuation, or mitigation. In addition to the FORM, Applicant was furnished a copy of the Directive as well as the Adjudicative Guidelines applicable to his case. Applicant received the FORM on October 31, 2022. His response was due on November 30, 2022. Applicant chose not to respond to the FORM, for as of December 19, 2022, no response had been received. The case was assigned to me on January 26, 2023. The record closed on November 30, 2022.

Findings of Fact

In his response to the SOR, Applicant admitted, with comments, all of the SOR allegations pertaining to financial considerations (SOR ¶¶ 1.a. through 1.d.). He did not address the allegations pertaining to personal conduct (SOR ¶ 2.a.), and his failure to do so is registered as a denial.

Background

Applicant is a 25-year-old employee of a defense contractor. He has been serving as a production technician since he was employed in October 2020. He was previously employed by other employers as a master builder (March 2016 until October 2020), and laborer (June 2015 until January 2016). He is a 2015 high school graduate. He has never served with the U.S. military. He has never been granted a security clearance. As of May 2021, he was engaged but never married. He has three children, born in 2015, 2019, and 2021.

Financial Considerations and Personal Conduct

In his SF 86, Applicant reported that in his 2018 and 2019 federal income tax returns he "found discrepancies and a 1040X form will be filed and the difference will be paid upon request." (Item 3 at 34) On June 15, 2021, he was interviewed by an investigator with the U.S. Office of Personnel Management (OPM). During that interview, Applicant admitted that he intentionally withheld some of his income on his income tax returns, and that he was never caught. However, when he looked online and saw the possible consequences for lying on his income tax returns he decided to rectify the problem. He reportedly addressed the 2018 income tax return with the assistance of a professional tax preparation company and submitted it to the Internal Revenue Service

(IRS) in October 2020. He estimated that he owed the IRS approximately \$2,900 and was waiting to hear from them in order to set up a payment plan. He acknowledged that he had not taken any steps to correct his 2019 federal income tax return because he had been waiting to have a stable job before doing so. He explained that he lied because he saw everyone else getting tax refunds and he wanted the money in order to pay off a few things. He was only 21 and 22 years old at the time and admittedly not mature. (Item 3 at 7)

In his answers to the interrogatories, Applicant acknowledged that he had made immature and undoubtedly poor decisions to withhold a portion of his income on his 2018 and 2019 federal income tax returns. Although he claimed that he had filed the Forms 1040X for both years, he failed to submit any documentation to support his claim, despite being asked to do so. His only submission was for a request for a transcript of tax returns for the two years in question, dated February 28, 2022. (Item 4 at 3-4, 6)

The SOR alleged two still unresolved issues involving intentionally filing fraudulent federal income tax returns for the tax years 2018 and 2019, as well two still delinquent accounts for unpaid income taxes for those two tax years amounting to approximately \$6,500. In addition, there is the cross-allegation under personal conduct covering the identical facts.

In his Response to the SOR, Applicant admitted intentionally filing fraudulent federal income tax returns for the tax years 2018 and 2019 by failing to report his total income for those two years, and that he owed the amounts alleged. He offered “no justified explanation” for his actions, but commented that his immaturity led him to be untrustworthy. He claimed that he has already paid the IRS \$3,000 towards the 2019 taxes, but did not submit any documentation to verify his claim. He acknowledged the federal income tax form for 2018 had not yet been processed by the IRS. (Item 2 at 1-2)

Applicant did not report his net monthly income, his monthly household expenses, or any monthly debt payments. In the absence of such information, I am unable to determine if he has any monthly remainder available for savings or spending. There is a paucity of evidence to indicate that his financial problems are now under control, and it is difficult to determine if Applicant is currently in a better position financially than he had been.

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. The President has authorized the Secretary of Defense or his designee to grant an applicant 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 and modified.)

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the guidelines in SEAD 4. In addition to brief introductory explanations for each guideline, the guidelines list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant’s eligibility for access to classified information.

An administrative judge need not view the guidelines as inflexible, ironclad rules of law. Instead, acknowledging 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. 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 meaningful decision.

In the decision-making process, facts must be established by “substantial evidence.” “Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all contrary evidence in the record.” (ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1)) “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 Government initially has the burden of producing evidence to establish a potentially disqualifying condition under the Directive, and has the burden of establishing controverted facts alleged in the SOR. Once the Government has produced substantial evidence of a disqualifying condition, under Directive ¶ E3.1.15, the applicant has the burden of persuasion to present evidence in refutation, explanation, extenuation or mitigation, sufficient to overcome the doubts raised by the Government’s case. The burden of disproving a mitigating condition never shifts to the Government. (See ISCR Case No. 02-31154 at 5 (App. Bd. Sept. 22, 2005))

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 as well. It is because of this special relationship that the Government must be able to repose a high degree of trust and confidence in those 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 as to potential, rather than actual, risk of compromise of classified information. Furthermore, “security clearance determinations should err, if they must, on the side of denials.” (*Egan*, 484 U.S. at 531)

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 I have based this decision, in whole or in part, on any express or implied determination as to Applicant's allegiance, loyalty, or patriotism. It is merely an indication the Applicant has or has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance. 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 avoided drawing inferences grounded on mere speculation or conjecture.

Analysis

Guideline F, Financial Considerations

The security concern relating to the guideline 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. Affluence that cannot be explained by known sources of income is also a security concern insofar as it may result from criminal activity, including espionage.

The guideline notes several conditions that could raise security concerns under AG ¶ 19:

- (a) inability to satisfy debts;
- (b) unwillingness to satisfy debts regardless of the ability to do so;
- (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 alleged, and Applicant admitted, that he had intentionally and fraudulently filed false federal income tax returns for the tax years 2018 and 2019, and that he was still indebted to the IRS for approximately \$6,500 in unpaid income tax for those two years. AG ¶¶ 19(a), 19(c), and 19(f) have been established. As for AG ¶ 19(b), there is evidence that his actions were to enable him to keep some money to pay off bills,

and that is sufficient evidence to establish an unwillingness to satisfy his debts regardless of an ability to do so. AG ¶ 19(b) has also been established.

The guideline also includes examples of conditions that could mitigate security concerns arising from financial difficulties under AG ¶ 20:

(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.

None of the conditions applies. As noted above, Applicant admitted that he had intentionally and fraudulently filed false federal income tax returns for the tax years 2018 and 2019, and that he was still indebted to the IRS for approximately \$6,500 in unpaid income tax for those two years. He offered "no justified explanation" for his actions, but commented that his immaturity led him to be untrustworthy. Moreover, other than a general statement about filing one of the amended income tax returns, and paying the IRS \$3,000 towards the 2019 taxes, he did not submit any documentation to verify his claims regarding any corrective actions that he might have already taken.

A debt that became delinquent several years ago is still considered recent because "an applicant's ongoing, unpaid debts evidence a continuing course of conduct and, therefore, can be viewed as recent for purposes of the Guideline F mitigating conditions." (ISCR Case No. 15-06532 at 3 (App. Bd. Feb. 16, 2017) (citing ISCR Case No. 15-01690 at 2 (App. Bd. Sept. 13, 2016))). Between the date he was interviewed by the OPM investigator in June 2021 and the date his response to the FORM was expected in November 2022, he offered no documented or other verifiable efforts to address any of the allegations.

Based on the evidence, it appears that Applicant actually ignored his delinquent income tax liabilities and his accurate income tax return filing responsibilities for a substantial period. Because of his failure to confirm payment of any of his delinquent income taxes, and his failure to furnish evidence of his filing of accurate income tax returns, the absence of verifying documentation leads to the conclusion that his financial problems are not under control. He has not acted responsibly by failing to address his delinquent accounts and by failing to make limited, if any, efforts of working with the IRS. The Appeal Board has previously commented on such a situation:

Even if Applicant's financial difficulties initially arose, in whole or in part, due to circumstances outside his [or her] control, the Judge could still consider whether Applicant has since acted in a reasonable manner when dealing with those financial difficulties. ISCR Case No. 05-11366 at 4 n.9 (App. Bd. Jan. 12, 2007) (citing ISCR Case No. 99-0462 at 4 (App. Bd. May 25, 2000); ISCR Case No. 99-0012 at 4 (App. Bd. Dec. 1, 1999); ISCR Case No. 03-13096 at 4 (App. Bd. Nov. 29, 2005)). A component is whether he or she maintained contact with creditors and attempted to negotiate partial payments to keep debts current.

An applicant who begins to resolve his financial problems only after being placed on notice that his or her security clearance is in jeopardy may be lacking in the judgment and self-discipline to follow rules and regulations over time or when there is no immediate threat to his or her own interests. (See, e.g., ISCR Case No. 17-01213 at 5 (App. Bd. Jun. 29, 2018); ISCR Case No. 17-00569 at 3-4 (App. Bd. Sept. 18, 2018) In this instance, Applicant has failed to offer any verified evidence that he has even begun making such efforts.

The Appeal Board clarified that even in instances where an applicant has purportedly corrected his or her federal tax problem, and the fact that the applicant is now motivated to prevent such problems in the future, does not preclude careful consideration of an applicant's security worthiness in light of his or her longstanding prior behavior evidencing irresponsibility including a failure to timely file federal income tax returns. (See ISCR Case No. 15-01031 at 3 and note 3 (App. Bd. June 15, 2016) (characterizing "no harm, no foul" approach to an Applicant's course of conduct and employed an "all's well that ends well" analysis as inadequate to support approval of access to classified information with focus on timing of filing of tax returns after receipt of the SOR).

Clearance decisions are aimed at evaluating an applicant's judgment, reliability, and trustworthiness. They are not a debt-collection procedure. The guidelines do not require an applicant to establish resolution of every debt or issue alleged in the SOR. An applicant needs only to establish a plan to resolve financial problems and take significant actions to implement the plan. There is no requirement that an applicant immediately resolve issues or make payments on all delinquent debts simultaneously; nor is there a requirement that the debts or issues alleged in an SOR be resolved first. Rather, a reasonable plan and concomitant conduct may provide for the payment of such debts, or resolution of such issues, one at a time. Mere promises to pay debts in the future, without further confirmed action, are insufficient. In this instance, Applicant offered no specifics

regarding any past or proposed repayment efforts; submitted no documentary evidence to reflect any payments made; and only made promises of proposed actions. Neither of his delinquent debts has been resolved.

The Appeal Board has previously explained what constitutes a good-faith effort to repay overdue creditors or otherwise resolve debts:

In order to qualify for application of [the “good-faith” mitigating condition], an applicant must present evidence showing either a good-faith effort to repay overdue creditors or some other good-faith action aimed at resolving the applicant’s debts. The Directive does not define the term “good-faith.” However, the Board has indicated that the concept of good-faith “requires a showing that a person acts in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation.”

(internal citation and footnote omitted) ISCR Case No. 02-30304 at 3 (App. Bd. Apr. 20, 2004) (quoting ISCR Case No. 99-9020 at 5-6 (App. Bd. Jun. 4, 2001)).

There is no verifiable evidence of financial counseling, a budget, or current financial information. Applicant’s inaction under the circumstances casts doubt on his current reliability, trustworthiness, and good judgment. See ISCR Case No. 09-08533 at 3-4 (App. Bd. Oct. 6, 2010).

Guideline E, Personal Conduct

The security concern relating to the guideline for Personal Conduct is set out in AG ¶ 15:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes. The following will normally result in an unfavorable national security eligibility determination, security clearance action, or cancellation of further processing for national security eligibility:

(a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, cooperation with medical or psychological evaluation, or polygraph examination, if authorized and required; and

(b) refusal to provide full, frank, and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

The guideline also includes examples of conditions that could raise security concerns under AG ¶ 16:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine national security eligibility or trustworthiness, or award fiduciary responsibilities; and

(b) deliberately providing false or misleading information; or concealing or omitting information, concerning relevant facts to an employer, investigator, security official, competent medical or mental health professional involved in making a recommendation relevant to a national security eligibility determination, or other official government representative.

My discussions related to Applicant's financial considerations are adopted herein. Applicant admitted that he had intentionally and fraudulently filed false federal income tax returns for the tax years 2018 and 2019, and that he was still indebted to the IRS for approximately \$6,500 in unpaid income tax for those two years. He offered "no justified explanation" for his actions, but commented that his immaturity led him to be untrustworthy.

Applicant's admissions support a conclusion that AG ¶¶ 16(a) and 16(b) have been established.

The guideline also includes an example of a condition that could mitigate security concerns arising from personal conduct under AG ¶ 17:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts.

While Applicant's initial acknowledgements were made to the OPM investigator in June 2021, the issues related to his finances and personal conduct continue unresolved to this day. Applicant's actions under the circumstances continue to cast doubt on his current reliability, trustworthiness, and good judgment. AG ¶ 17(a) has not been established.

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 SEAD 4, App. A, ¶ 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 SEAD 4, App. A, ¶ 2(c), the 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. Moreover, I have evaluated the various aspects of this case in light of the totality of the record evidence and have not merely performed a piecemeal analysis. See *U.S. v. Bottone*, 365 F.2d 389, 392 (2d Cir. 1966); see also ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006).

There is some evidence in favor of mitigating Applicant's financial considerations. Applicant is a 25-year-old employee of a defense contractor. He has been serving as a production technician since he was employed in October 2020. He was previously employed by other employers as a master builder and laborer. In his SF 86, he reported that he "found discrepancies" in his 2018 and 2019 federal income tax returns, and in June 2021, he told an OPM that he intentionally withheld some of his income on his income tax returns, and that he was never caught. He gets some credit for initially identifying his financial problem.

The disqualifying evidence under the whole-person concept is simply more substantial and compelling. Applicant admitted that he had intentionally and fraudulently filed false federal income tax returns for the tax years 2018 and 2019, and that he was still indebted to the IRS for approximately \$6,500 in unpaid income tax for those two years. His comments to the OPM investigator were not fully accurate, for his income tax returns did not merely contain "discrepancies," they contained intentionally false information. Other than general statements about contacting the IRS, making payments on his delinquent income taxes, and filing an amended income tax return for one of the years in question, Applicant failed to submit any verifiable evidence in support of his claimed actions. There are lingering questions if Applicant is currently in a better position financially than he had been, as well as continuing doubt about his current reliability, trustworthiness, and good judgment.

Applicant's track record of zero verifiable efforts to resolve his financial and personal conduct issues, the lengthy period of non-contact with the IRS, and his failure to be candid about his delinquent debts when he completed the SF 86, is negative and disappointing. Overall, the evidence leaves me with substantial questions and doubts as to Applicant's eligibility and suitability for a security clearance. Accordingly, I conclude Applicant has failed to mitigate the security concerns arising from his financial considerations and personal conduct. See SEAD 4, App. A, ¶¶ 2(d) (1) through AG 2(d) (9).

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.d.:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a.:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, 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.

ROBERT ROBINSON GALES
Administrative Judge