



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



In the matter of:)	
)	
)	ISCR Case No. 22-00475
)	
Applicant for Security Clearance)	

Appearances

For Government: Brian L. Farrell, Esq., Department Counsel
For Applicant: *Pro se*

03/19/2024

Decision

PRICE, Eric C., Administrative Judge:

This case involves security concerns raised under Guideline F (Financial Considerations). Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on September 5, 2018. On April 5, 2022, the Department of Defense Consolidated Adjudications Facility (CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guideline F. The CAF acted under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented by the and the adjudicative guidelines (AG) promulgated in Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (December 10, 2016).

Applicant answered the SOR on June 14, 2022, and requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA). The case was assigned to me on May 8, 2023. On May 17, 2023, DOHA issued a notice

scheduling the hearing via video teleconference. I convened the hearing as scheduled on June 6, 2023.

At the hearing, I admitted Government Exhibits (GE) 1 through 3 without objection. Applicant testified and offered Applicant's Exhibits (AE) A through I that were admitted without objection. The record was held open until July 7, 2023, to permit Applicant to submit additional documentation. He timely submitted documents that I did not receive due to a technical problem. I reopened the record, and on July 14, 2023, Applicant submitted AE J through N that were admitted without objection. I reopened the record on February 22, 2024, because Applicant indicated he had been unable to resubmit some documents because of technical difficulties. On March 6, 2024, he submitted AE O through W that were admitted without objection. The record closed on March 7, 2024. DOHA received the hearing transcript (Tr.) on June 14, 2023.

Findings of Fact

In Applicant's answer to the SOR, he admitted all the allegations with explanations. His admissions are incorporated in my findings of fact.

Applicant is 52 years old. He worked for various federal contractors from August 2011 to April 2014, August 2018 to January 2020, and since June 2020. From April 2014 to April 2018, he worked as an independent contractor for a company owned by the government of Country A. He served in the Marine Corps from December 1990 to March 1995 and in the Army from July 1995 to July 2011, was honorably discharged, and retired as an E-7. He was unemployed from April to August 2018, and from January to June 2020. He has held a security clearance since at least 1999. (GE 1, GE 3; Tr. 13, 28-36, 79-84)

Applicant has been married since May 1995. He was previously married from May 1991 to May 1993. He has one adult child and two adult stepchildren, ages 29, 34 and 35. He graduated from high school in 1989 and completed about 36 college credit hours. (GE 1; Tr. 83-84)

Applicant worked in Country A from November 2011 to April 2018. He was employed by a federal contractor from November 2011 to April 2014, and his pay was subject to income tax withholding. He used a tax preparation service provided by his employer to file annual income tax returns for tax year (TY) 2011 through TY 2014. From April 2014 to April 2018, he earned about \$200,000 per year as an independent contractor for a company owned by the government of Country A and his pay was not subject to income tax withholding. (Tr. 22-40; GE 1 at 44-46, GE 2 at 2, GE 3 at 2-4)

In his September 2018 SCA, Applicant disclosed he failed to pay federal and state income taxes and failed to file federal and state income tax returns for TY 2015 through TY 2017. In about July 2018, he hired a tax service company (TSC) to counsel him, to prepare and file his delinquent returns, and to negotiate payment agreements with federal and state tax authorities. In August 2018, the TSC estimated his federal income tax

liability for TY 2015 through TY 2017 as \$86,264, including \$54,371 for TY 2015, \$16,074 for TY 2016, and \$15,818 for TY 2017. The TSC informed Applicant that interest and penalties accrue on unpaid taxes. He submitted evidence he paid the TSC about \$9,400, as of September 2018, and in February 2019 reported he had paid the TSC \$12,000 to assist him. (Tr. 22-41; GE 1 at 44-46, GE 2 at 2-26, GE 3 at 3-16; AE G)

The evidence concerning the allegations in the SOR is summarized below:

SOR ¶ 1.a: failed to file federal income tax returns for TY 2015 through TY 2020. Applicant admitted the allegation and attributed his failure to file his federal income tax returns to bad advice, his mistaken belief that he could file tax returns after returning to the United States from overseas, difficulty finding a preparer to file his returns and in obtaining required information, and delay by a TSC. Applicant filed his federal income tax returns for TY 2019 and TY 2020 in May 2022. He said those filings were delayed because he was missing required information, had experienced difficulties with tax filing software, and tax preparer delay. He has not claimed or submitted documentary evidence he filed federal income tax returns for TY 2015 through TY 2018. (Answer; GE 1 at 44-46, GE 3 at 4-5; AE B, C, G, K, L, P, Q; Tr. 22-58)

Applicant testified he had been frustrated with the TSC's delay in filing his income tax returns for TY 2015 through TY 2018. When asked about his communications with the TSC since September 2018, Applicant testified:

I don't recall. I've had some email contact with them when they were looking for different documentation. So I really haven't --I don't recall. Again, that's one of the things I was hoping that would just go away, and it didn't. But I don't recall -- I know I had some contact with them, but I don't know when. So when I double-checked it . . . a couple weeks ago, they asked for a 2018 [financial document] that I had sent them prior. . . . At this point, [I think they have all they need to file my returns]. But not until about two weeks ago when they asked for that [document] from 2018. (Tr. 69-70)

On March 6, 2024, Applicant submitted a statement that the "IRS doesn't accept filings that have surpassed seven years [and that his 2018] Federal Taxes have been prepared and are being submitted to the IRS [by the TSC]." (AE O) He provided an unsigned, undated federal income tax return for TY 2018 and a certified mail receipt dated March 6, 2024, for mail addressed to the TSC. (AE U, W) He indicated that on March 6, 2024, he forwarded his signed TY 2018 federal income tax return to the TSC, and that the preparer would sign and then submit the return to the IRS. (AE W at 2)

SOR ¶¶ 1.b-1.d: indebted to the federal government for delinquent income taxes of about \$54,371 for TY 2015, \$16,074 for TY 2016, and \$15,818 for 2017. Applicant admitted the allegations and said he intended to pay his tax debt. He testified his income as an independent contractor in Country A from TY 2015 through TY 2017 was not subject to income tax withholding and that he had not paid federal income taxes on that income. The overdue tax amounts alleged in the SOR were derived from his TSC's

estimate of federal tax liabilities in about August 2018. Those estimates do not reflect interest or penalties that may accrue or have accrued since. He has submitted no documentary evidence he has paid federal income taxes due for TY 2015 through TY 2017. (Answer; Tr. 39-52; GE 1-3; AE G, O, U, W)

On March 6, 2024, Applicant submitted an undated statement indicating he had downloaded his available tax account documents from the IRS website and that:

There is no mention of tax debt years 2015, 2016, or 2017 available/accessible from the IRS website. This is by no means inferring they are settled, but the IRS doesn't accept filings that have surpassed seven years. There is a balance for those years, and they must be settled.

I continue to contact [the TSC] with minor progress. My 2018 State and Federal Taxes have been prepared and are being submitted [by the TSC].

The program which I have enrolled with the assistance [of the TSC] is called the New Start Initiative which is an IRS program to become compliant and settle my tax debt to the IRS. It is unlikely I will qualify for the "debt forgiveness." I have every intention to fulfill this obligation, regardless of the decision made on my security clearance. I will do what is necessary to repay the debt to the IRS.

[I] fully and completely accept the responsibility for not paying my taxes in full on time as required by law. There is no excuse. I do however humbly request that you consider that I am current with my (non-disputed) taxes, fully employed with a defense contractor [that] has been steadfast in support of my continued clearance issue [and] has committed to me through this process and continue to keep me aboard until the final decision has been made. (AE O)

Applicant said he mailed his TY 2018 federal income tax return to the TSC on March 6, 2024, and indicated that "[o]nce [the TY 2018 return is filed and] accepted by the IRS, negotiation (on my behalf) of the [TY] 2015-2017 [taxes] owed will be determined [w]ith the assistance of [the TSC] a repayment amount and schedule will be established." (AE W at 2) However, he has not provided documentary evidence he has paid income taxes due for TY 2015 through TY 2017 or of an arrangement with the IRS to pay his overdue taxes. (Answer; Tr. 39-41; GE 1-3; AE G, O, U, W)

Applicant timely filed federal income tax returns for TY 2021 and TY 2022. (AE D-F, M, N, R, S) Although not alleged in the SOR, he had not filed state income tax returns for TY 2015 through TY 2018 prior to his June 2023 hearing. (GE 1 at 44-46, GE 3 at 4; AE O, V, W at 1; Tr. 37-39) He testified he filed state income tax returns for TY 2019 through TY 2021 and submitted some corroborating evidence. (Tr. 53- 57; AE A, AE B at 3-5, AE C at 7-9). He submitted an unsigned TY 2018 state income tax return dated March

4, 2024, a check payable to the state tax authority for \$300 and a certified mail receipt for mail addressed to that tax authority both dated March 6, 2024. (AE O, AE V, AE O at 1).

Applicant testified he earns about \$86,000 per year in his current position and that his wife manages their finances. (Tr. 73-74) He earns about \$19,000 annually in Army retired pay and receives about \$24,000 annually in Department of Veterans Affairs disability payments for a 90% service-connected disability. He had about \$60,000 in joint savings at some point, owns some stock, and has a retirement account but did not know the current balances of those accounts. (Tr. 28-30, 71-75)

Any adverse information not alleged in the SOR will not be considered for disqualification purposes but may be considered in evaluating application of mitigating conditions and in applying the whole-person concept. See, e.g., ISCR Case No. 15-07369 at 3 (App. Bd. Aug. 16, 2017).

Policies

“[N]o 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 applicants 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 § 2.

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, an administrative judge applies these guidelines 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 and 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 that 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 made “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense 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. 15-01253 at 3 (App. Bd. Apr. 20, 2016).

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 burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531.

Analysis

Guideline F, Financial Considerations

The security concern under this guideline 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. . . . An individual who is financially overextended is at greater risk of having to engage in illegal or otherwise questionable acts to generate funds. . . .

This concern is broader than the possibility that a person might knowingly compromise classified information to raise money. It encompasses concerns about a person’s self-control, judgment, and other qualities essential to protecting classified information. A person who is financially irresponsible may also be irresponsible, unconcerned, or negligent in handling and safeguarding classified information. See ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012).

The evidence establishes three disqualifying conditions under this guideline: AG ¶ 19(a) (“inability to satisfy debts”), AG ¶ 19(c) (“a history of not meeting financial obligations”), and AG ¶ 19(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 following mitigating conditions under AG ¶ 20 are potentially applicable:

(a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;

(b) the conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, a death, divorce or separation, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances;

(c) the individual has received or is receiving financial counseling for the problem from a legitimate and credible source, such as a non-profit credit counseling service, and there are clear indications that the problem is being resolved or is under control;

(d) the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts;

(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 failed to file his federal income tax returns for TY 2015 through TY 2018 and filed his federal income tax returns for TY 2019 and TY 2020 in May 2022. He apparently mailed his TY 2018 federal income tax return to his tax service provider on March 6, 2024, for signature by the tax preparer and filing with the IRS. He earned about \$200,000 per year as an independent contractor from TY 2015 through TY 2017 but, to date, has not paid federal income taxes on that income. He claims that he will be able to negotiate a payment agreement with the IRS after his TY 2018 federal income tax is filed.

AG ¶¶ 20(a) and 20(d) are not established. There is insufficient evidence for a determination that Applicant's tax problems will be resolved within a reasonable period. I am unable to find that he acted responsibly under the circumstances or made a good-faith effort to pay his taxes. His tax issues are longstanding, ongoing, and continue to cast doubt on his reliability, trustworthiness, and good judgment.

AG ¶ 20(b) is not established. Although Applicant's TSC's failure to file overdue federal income tax returns since August 2018 may have been beyond his control, his failures to file federal income tax returns for TY 2015 through TY 2018 and to pay federal

income taxes due on his foreign income was within his control. He has not acted responsibly because he has allowed more than five years to pass without ensuring that his delinquent tax returns were filed.

AG ¶¶ 20(c) is not established. Although Applicant has engaged a TSC and received some counseling, his tax problems are not under control.

AG ¶ 20(e) is not established. Applicant has not provided evidence to substantiate the basis of any disputed taxes owed or provided evidence of actions to resolve the issue.

AG ¶ 20(g) is partially established for past-due federal income tax returns (TY 2019 and TY 2020), which have been filed. However, it is not established for his unfiled federal income tax returns for TY 2015 through TY 2018, or for his unpaid federal income taxes for TY 2015 through TY 2017.

A security clearance adjudication is not a tax-enforcement procedure. It is an evaluation of an individual's judgment, reliability, and trustworthiness. The fact that he has filed some of his past-due federal income tax returns "does not preclude careful consideration of Applicant's security worthiness based on longstanding prior behavior evidencing irresponsibility." ISCR Case No. 12-05053 (App. Bd. Oct. 30, 2014). A person who fails repeatedly to fulfill his or her legal obligations, such as paying taxes when due, does not demonstrate the high degree of good judgment and reliability required of those granted access to classified information. See, e.g., ISCR Case No. 17-01382 at 4 (App. Bd. May 16, 2018).

Whole-Person Concept

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. In applying the whole-person concept, an 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. An 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.

I have incorporated my comments under Guideline F in my whole-person analysis and applied the adjudicative factors in AG ¶ 2(d). I considered Applicant's age, education,

military service, employment history, and security clearance history. After weighing the disqualifying and mitigating conditions under Guideline F, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns raised by his failures to timely file his federal income tax returns and pay the taxes due.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline F:	AGAINST APPLICANT
Subparagraphs 1.a-1.d:	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 security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Eric C. Price
Administrative Judge