



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



In the matter of:)
)
) ISCR Case No. 23-01203
)
Applicant for Security Clearance)

Appearances

For Government: Tara R. Karoian, Esquire, Department Counsel
For Applicant: *Pro se*

10/08/2024

Decision

GALES, Robert Robinson, Administrative Judge:

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

Statement of the Case

On June 18, 2021, Applicant applied for a security clearance and submitted an Electronic Questionnaires for Investigations Processing (e-QIP) version of a Security Clearance Application (SF 86). On an unspecified date, the Defense Counterintelligence and Security Agency (DCSA) Consolidated Adjudications Services (CAS) issued him a set of interrogatories. On January 27, 2023, Applicant responded to those interrogatories. On October 25, 2023, the DCSA CAS issued him a Statement of Reasons (SOR) under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended and modified; Department of Defense (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* (AG) (December 10, 2016), effective June 8, 2017.

The SOR alleged security concerns under Guideline F (Financial Considerations) 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.

In two separate statements, dated September 11, 2003, and April 20, 2024, Applicant responded to the SOR and elected to have his case decided on the written record in lieu of a hearing. 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 July 10, 2024, 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 July 17, 2024. His response was due on August 16, 2024. Applicant chose not to respond to the FORM, for as of August 21, 2024, no response had been received. The case was assigned to me on September 27, 2024.

Findings of Fact

In his Answer to the SOR, Applicant admitted, without comments, both of the factual allegations pertaining to financial considerations (SOR ¶¶ 1.a. and 1.b.). Applicant's admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact:

Applicant is a 32-year-old employee of a defense contractor. He has been serving as a marine engineer with his current employer since July 2020. He previously worked for various employers in a variety of positions, including marine engineer (August 2019 – July 2020); test and evaluation support analyst (September 2018 – August 2019); and field engineer (April 2018 – September 2018). A 2010 high school graduate, he received a bachelor's degree in 2014. A merchant marine from June 2014 until April 2018, he was commissioned a lieutenant in the inactive U.S. Naval Reserve in June 2014, and apparently remained in that position until 2022. (Item 4 at 2) He was granted a secret clearance in 2009. Applicant has never been married. He has no children.

Financial Considerations

In his SF 86, Applicant reported that he had failed to file his federal and state income tax returns for the tax year 2021, but that year was erroneously reported as the correct year was 2020. His explanation for his failure was "late filing this year." (Item 3 at 35) No further explanations were provided. On August 31, 2021, he was interviewed by an investigator with the U.S. Office of Personnel Management (OPM). During that interview, he acknowledged that he failed to timely file his income tax returns for 2020 because he has been "lazy." He said he planned on filing both his federal and state tax returns by September 5, 2021. (Item 8 at 2) He eventually reported in his January 2023 response to the interrogatories that in 2020 he moved from one city to another and during

the move he packed his W-2 data and had difficulty locating it. "The taxes were not filed due to neglect and inability to find the proper documents." (Item 4 at 2) An Account Transcript issued by the Internal Revenue Service (IRS), dated March 21, 2023, and attached to Applicant's response to the interrogatories, reports "no tax return filed." (Item 4 at 4, and 6) Applicant furnished a self-prepared (through an online professional tax preparation service) unsigned and undated "draft" of a Form 1040 for 2020 (Item 4 at 8-10) but stated that he was "standing by for final assessment" from the IRS before filing it. The tax preparation service estimated that Applicant had an adjusted gross income of about \$65,000; a total tax of about \$7,368; and an expected refund of about \$1,932. (Item 4 at 8)

Applicant also furnished a self-prepared (through the online professional tax preparation service) unsigned and undated "draft" of a state income tax return form. (Item 4 at 13-16) The online professional tax preparation service noted that Applicant had actually signed the return electronically, and that he had no tax balance or refund due. (Item 4 at 12)

Applicant was repeatedly offered the opportunity to submit documentation to confirm that his federal and state income tax returns for the tax year 2020 had been filed: to the OPM; with his response to the interrogatories; with his Answer to the SOR; and in response to the FORM. Notably, Applicant has never stated that the income tax returns were filed. He only gave dates or an "assessment" by which he intended to file them.

Despite the SOR alleging only Applicant's failure to timely file federal and state income tax returns for the tax year 2020, the government repeatedly refers to unalleged conduct as well: a satisfied city personal tax lien in the amount of \$947; a charged off credit card in the amount of \$688; possibly unfiled federal and state income tax returns for the tax years 2021-23; and possibly unpaid federal and state income tax for those same years.

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. Sep. 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*, 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 a condition that could raise security concerns under AG ¶ 19:

(f) failure to file or fraudulently filing annual federal, state, or local income tax returns or failure to pay annual federal, state, or local income tax as required.

The SOR alleged that Applicant failed to file his federal and state income tax returns for the tax year 2020. As of October 25, 2023, the date the SOR was issued, there is no verifiable evidence that either of those income tax returns had been filed. Applicant was afforded multiple opportunities to submit documentation confirming that his federal and state income tax returns has been filed, but other than his intended filing date expressed to OPM and the pending status he referred to in his response to the interrogatories in January 2023, he has repeatedly failed to submit such confirmation. AG ¶ 19(f) has 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; 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 mitigating conditions apply. The nature, frequency, and recency of Applicant's continuing failure to conclusively resolve those delinquent federal and state income tax issues, despite repeated promises to do so, make it rather easy to conclude that they were not infrequent and, considering the length of time it took him to start to resolve those issues, if he has actually done so, they are likely to remain unchanged in the future. Applicant attributed his financial issues essentially to laziness and due to neglect and inability to find the proper documents. It is unclear what his explanations are for his repeated failures to furnish verification and confirmation that the income tax returns had finally been filed.

An applicant who begins to resolve his or her 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).

Applicant completed his SF 86 in June 2021; underwent his interview with an OPM investigator in August 2021; completed his responses to the interrogatories in January 2023; the SOR was issued in October 2023; and the FORM was issued in July 2024. Each step of the security clearance review process placed him on notice of the significance of the financial issues confronting him. With respect to his unfiled federal and state income tax returns, there is no verifiable evidence that Applicant has filed those income tax returns. By failing to present such evidence, he has not demonstrated the high degree of good judgment and reliability required of those granted access to classified information.

The DOHA Appeal Board has observed:

Failure to file tax returns suggests that an applicant has a problem with 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 toward 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. See, e.g., ISCR Case No. 14-01894 at 5 (App. Bd. Aug. 18, 2015). See *Cafeteria & Restaurant Workers Union Local 473 v. McElroy*, 284 F.2d 173, 183 (D.C. Cir. 1960), *aff'd*, 367 U.S. 886 (1961).

ISCR Case No. 14-04437 at 3 (App. Bd. Apr. 15, 2016). See ISCR Case No. 14-05476 at 5 (App. Bd. Mar. 25, 2016) (citing ISCR Case No. 01-05340 at 3 (App. Bd. Dec. 20, 2002)); ISCR Case No. 14-01894 at 4-5 (App. Bd. Aug. 18, 2015).

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).

Applicant's actions, or inaction, under the circumstances cast doubt on his current reliability, trustworthiness, and good judgment. (See ISCR Case No. 09-08533 at 3-4 (App. Bd. Oct. 6, 2010).)

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 concerns. Applicant is a 32-year-old employee of a defense contractor serving as a marine engineer since July 2020. A 2010 high school graduate, he received a bachelor's degree in 2014. A merchant marine from June 2014 until April 2018, he was commissioned a lieutenant in the inactive U.S. Naval Reserve in June 2014, and apparently remained in that position until 2022. He was granted a secret clearance in 2009. In his SF 86, he candidly reported that he had failed to timely file his federal and state income tax returns for one particular year, although he misidentified the year in question. During his OPM interview, he also acknowledged that his failure to do so was in part because of laziness.

The disqualifying evidence under the whole-person concept is simply more substantial. Applicant failed to timely file federal and state income tax returns for the tax year 2020. As of the date the SOR was issued in October 2023, or his response to the FORM was due in August 2024, he has failed to say that the income tax returns had been filed, and he has failed to produce verifiable evidence to confirm they had been filed, despite repeated opportunities to do so.

Overall, the evidence leaves me with substantial questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all of these reasons, I conclude Applicant has failed to mitigate the security concerns arising from his financial considerations. 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. and 1.b:	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