



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



In the matter of:)	
)	
(Redacted))	ISCR Case No. 15-00599
)	
Applicant for Security Clearance)	

Appearances

For Government: Carroll J. Connelley, Esq., Department Counsel
For Applicant: *Pro se*

05/31/2017

Decision

MATCHINSKI, Elizabeth M., Administrative Judge:

Applicant did not file his federal and state income tax returns for tax year 2010 until October 2015. Two judgment debts of \$644 from 2008 and \$793 from 2009 went unpaid until September 2015. He has rectified the financial issues of security concern and is managing his current finances responsibly. Clearance is granted.

Statement of the Case

On August 27, 2015, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) to Applicant, detailing the security concerns under Guideline F, financial considerations, and explaining why it was unable to find it clearly consistent with the national interest to grant or continue security clearance eligibility for him. The DOD CAF took the action under Executive Order (EO) 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 for Determining Eligibility for Access to Classified Information* (AG) effective within the DOD on September 1, 2006.

On September 18, 2015, Applicant answered the SOR allegations and requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA). On October 28, 2016, the case was assigned to me to conduct a hearing to determine whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.¹ On November 1, 2016, I scheduled a hearing for November 29, 2016.

I convened the hearing as scheduled. Three Government exhibits (GEs 1-3) and five Applicant exhibits (AE A-E) were admitted into evidence without objection. Applicant testified, as reflected in a transcript (Tr.) received on December 5, 2016.

Findings of Fact

The SOR alleges under Guideline F that, as of August 28, 2015, Applicant had not yet filed his federal income tax returns for tax years 2009 and 2010 (SOR ¶ 1.a) or his state income tax return for 2010 (SOR ¶ 1.b). Additionally, Applicant is alleged to owe a medical judgment of \$793 from 2009 (SOR ¶ 1.c) and a credit card judgment of \$644 from 2008 (SOR ¶ 1.d). When Applicant responded to the SOR allegations, he admitted the failure to timely file returns for the tax years alleged. He also admitted the judgment debts, but indicated that they were paid on September 18, 2015.

After considering the pleadings, exhibits, and transcript, I make the following findings of fact.

Applicant is 30-year-old high school graduate with some community college credits. He is married to a woman whom he met at Narcotics Anonymous (NA). They began cohabiting in April 2013 (GEs 1, 2) and married in October 2016. (Tr. 45.) Applicant is raising her son, who is now age five, as his own child. (Tr. 41.)

Applicant had a serious drug problem from 2005 through 2011, which led to some illegal activity and irresponsible behavior on his part. (GEs 1, 2.) He has been sober since December 23, 2011 (GEs 1, 2), and his drug abuse and related criminal conduct were not raised as security concerns. They are mentioned to the extent that they provide the context for the issues in the SOR and are relevant under the whole-person evaluation.

Applicant graduated from high school in July 2005. He was supported by friends and his parents while unemployed throughout the fall of 2005. From January 2006 to May 2006, Applicant worked as a short-order cook in a restaurant. By that time, he was using cocaine approximately once a week with some friends. In May 2006, Applicant left the restaurant job to attend training to become a card dealer at a local casino.

In September 2006, Applicant began working as a table games dealer at the casino. While still in his probationary period, he was fired in December 2006 for absenteeism. During his subsequent unemployment from January 2007 to April 2007, Applicant spent his time "being irresponsible, using [illegal] drugs, and sitting around." (GE 2.)

¹ It is unclear what caused the one-year delay in case assignment.

Applicant worked at a fast-food restaurant from April 2007 until December 2007, when he was fired after an altercation with his supervisor. Applicant was introduced to opiates in 2007. He stopped using cocaine as he developed an addiction to non-prescribed opiates (Oxycontin and Percocet). (GE 2.) While he was unemployed, a credit card judgment of \$644 (SOR ¶ 1.d) was filed against him in February 2008. (GE 3; Tr. 29.)

In April 2008, Applicant was re-hired by the casino. His abuse of Oxycontin reached its peak during this employment. He used the drug daily for the most part, and at times spent approximately \$200 a day on the drug. He paid for his drug habit with his income from the casino. (GE 2.) An IRS transcript for 2009 shows that his adjusted gross income was \$27,163. (AE C.)

In approximately 2009, Applicant was taken to the hospital by ambulance for intoxication. He incurred a medical debt that he failed to pay, and in October 2009, a \$793 judgment (SOR ¶ 1.c) was filed against him. (GEs 2, 3; Tr. 24.)

In October 2009, Applicant was fired by the casino for excessive absenteeism after he called in absent about nine times in a year. He reports that he was unemployed until February 2012, but also that he collected unemployment. (GE 2.) His federal adjusted gross income for 2010 was \$16,964. (AE D.)

Unemployed, Applicant began using crack cocaine in June 2010 with a friend from high school with whom he had become reacquainted while working at the casino. He stole \$3,000 from his sister to support his drug habit and purchased crack cocaine from drug dealers, spending \$200 at a time. In October 2010, he began taking steps to address his drug problem. He took Suboxone under the care of a physician. He underwent two detoxification programs in November 2010 and in May 2011 to address his addiction, but he returned to illegal drug use after treatment in both instances. In July 2011, he began attending NA. In December 2011, he stopped using illegal drugs. (GE 2.)

Applicant held employment through a temporary staffing agency as an inspector for a local business from February 2012 to April 2013. He was then employed full time at \$10 an hour for an auction company until January 2014, when he was laid off. (Tr. 54.) For the next few months, he lived off his unemployment compensation and took classes at a local community college. (GEs 1, 2.)

From May 2014 to August 2014, Applicant was a temporary worker placed at \$12 an hour with a marine supply company. In August 2014, a staffing agency placed him in a temporary job at \$10 an hour with a manufacturer. (GEs 1, 2; Tr. 55.)

Applicant applied for employment with a defense contractor, which was contingent on him obtaining a DOD security clearance. (GE 2.) On August 20, 2014, Applicant completed and certified to the accuracy of a Questionnaire for National Security Positions (SF 86). Applicant disclosed a March 2011 larceny charge (theft from his sister) and his involvement with marijuana, non-prescribed opiates, and cocaine. He indicated that he was "kicked out" of a substance abuse program in June 2011 for using drugs, but that he has

been abstinent since December 23, 2011, with the assistance of NA. Applicant responded “Yes” to an inquiry into whether in the last seven years he had failed to file or pay federal, state, or other taxes when required by law or ordinance and indicated that he had not filed his federal or state income tax returns for tax years 2009 and 2010. In response to inquiries concerning any delinquency involving enforcement, he reported the judgment debts in SOR ¶ 1.c and ¶ 1.d and explained that he had become aware of them only recently when he checked a judicial website. Under additional comments, he asserted that he was no longer the irresponsible person that he once was. (GE 1.)

As of August 29, 2014, Applicant had three outstanding delinquencies on his credit record. In addition to the previously disclosed financial judgments, a \$564 medical debt from August 2010 was in collection (not alleged in SOR). Applicant was making timely payments on four consumer credit debts with an aggregate balance of \$1,807. Three student loans totaling \$8,250 were in deferment. (GE 3.)

On September 24, 2014, Applicant was interviewed by an authorized investigator for the Office of Personnel Management (OPM). Applicant detailed his drug involvement and his efforts at rehabilitation. He asserted that he had been completely abstinent from illegal drugs since December 2011 and from alcohol since April 2011. Concerning his tax filings, Applicant indicated that he did not file his income tax returns for 2009 or 2010 because he was “very irresponsible.” About the outstanding financial judgments, Applicant indicated that he became aware of them when he completed his security clearance application because he checked his state’s judicial website. He stated that he needed a better paying job before he could pay them. Applicant denied any knowledge of a \$564 medical debt from 2010 that was on his credit record. He attributed his financial issues to his past drug abuse. (GE 2.)

In October 2014, Applicant returned to work for the auction company. He was paid \$11 an hour as a lot attendant. (Tr. 56.) In November 2015, Applicant began working as a process technician for a private company. (Tr. 25-26, 53.) From 2012 through December 2014, Applicant’s then fiancée was a college student working part time at a supermarket. (Tr. 56.) After she earned her bachelor’s degree, she first worked for an automobile dealer. In August 2015, she began working for the defense contractor that offered Applicant a position contingent on a favorable clearance adjudication. (Tr. 28, 57.)

Small claims court records show that Applicant fully satisfied the medical judgment (SOR ¶ 1.c) on September 22, 2015 (AE A), and the credit card judgment (SOR ¶ 1.d) on October 12, 2015. (AE B.) Applicant gave some thought to satisfying the judgments earlier, but his finances were not sufficiently stable. (Tr. 52.) In October 2015, Applicant filed federal and state income tax returns for tax years 2009 and 2010. (Tr. 29.) As shown in an IRS account transcript for tax year 2009, Applicant learned that he had filed a timely income tax return on February 11, 2010, and that he was issued a \$302 refund. However, the IRS assessed a tax liability of \$240 on unreported income, which Applicant believes was his unemployment compensation for the last two months of 2009. In February 2013, \$317 of his refund for tax year 2012 was applied to resolve his tax liability for 2009. (AE C; Tr. 32-34.)

An IRS account transcript for tax year 2010 shows that Applicant filed his delinquent income tax return for 2010 on October 14, 2015. On February 22, 2016, his income tax refund of \$130 for tax year 2015 was intercepted and applied to his tax debt for 2010. On May 27, 2016, Applicant paid \$1,158 to satisfy the balance of his federal taxes for tax year 2010. (AE D; Tr. 34-36.)

Applicant completed state income tax returns for tax years 2009 and 2010 on October 4, 2015.² On January 12, 2016, he paid \$76 to satisfy his state tax liability for 2010. On February 12, 2016, he paid \$647 to satisfy his state tax liability for 2009. (AE E; Tr. 37-39.) Applicant has no record of late filings since tax year 2010. (Tr. 39.)

As of November 2016, Applicant's take-home pay was \$460 per week. (Tr. 40.) If granted security clearance eligibility, Applicant will earn \$15.86 an hour with the defense contractor. (Tr. 46.) Applicant's spouse's net pay is \$1,500 every two weeks. (Tr. 41.) In the fall of 2016, Applicant and his spouse purchased their new residence for \$210,000. They were scheduled to move into the home the day after Applicant's hearing. Their monthly mortgage payment will be \$1,484. (Tr. 39-40.) They had been paying \$950 per month in rent since December 2015. (Tr. 49.) Applicant and his spouse own their cars outright. (Tr. 42.)

Applicant's student loans had been in forbearance but were in deferment as of November 2016. Applicant planned to resume classes at the community college in the spring of 2017. (Tr. 42-43.) Applicant's spouse is making monthly payments of \$50 toward her student loan debt. (Tr. 43.) As of late November 2016, Applicant and his spouse had \$8,000 in savings. (Tr. 44.) Applicant was making timely payments on three credit cards with an aggregate balance of approximately \$2,400. (Tr. 45.)

Policies

The U.S. Supreme Court has recognized the substantial discretion the Executive Branch has in regulating access to information pertaining to national security, emphasizing that "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are required to be considered in evaluating an applicant's eligibility for access to classified information. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overall adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

² Although Applicant filed his federal income tax return for 2009 on time, he apparently did not file his state income tax return for 2009. He explained that "they were backwards or something." (Tr. 38.)

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that “[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security.” In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . .” The applicant has the ultimate burden of persuasion to obtain a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk 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. Section 7 of EO 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline F, Financial Considerations

The security concerns about financial considerations are articulated in AG ¶ 18:

Failure or inability 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 information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

The Government met its burden of establishing by substantial evidence a record of financial delinquency which raises security concerns under disqualifying conditions AG ¶ 19(a), “inability or unwillingness to satisfy debts,” and AG ¶ 19(c), “a history of not meeting financial obligations.” Available credit reports and Applicant’s admissions indicate that a \$793 medical judgment was filed against him in 2009, and a \$644 credit card judgment was filed against him in 2008.

Applicant indicated on his August 2014 SF 86 and during his September 2014 subject interview that he had not yet filed his federal or state income tax returns for tax years 2009 and 2010. After he filed returns for those tax years in October 2015, he

discovered that he had filed his federal income tax return for 2009 on time. When asked at his hearing about his state income tax return for tax year 2009, he admitted that he had not filed it on time. However, it was not alleged as a security concern in the SOR. The evidence of belated filing is undisputed with respect to his federal and state income tax returns for tax year 2010, and of late payment of taxes owed the IRS and the state for tax years 2009 and 2010. Applicant's failure to comply with his income tax filing obligation for tax year 2010 triggers disqualifying condition AG ¶ 19(g), "failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same."

Application of the aforesaid disqualifying conditions triggers consideration of four potentially mitigating conditions 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, or a death, divorce, or separation), and the individual acted responsibly under the circumstances;
- (c) the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is resolved or is under control; and
- (d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

AG ¶ 20(a) applies in that Applicant's failure to timely file income tax returns was infrequent and occurred under circumstances not likely to recur. When his returns for 2010 were due in 2011, he was battling a serious drug problem. He has timely filed his federal and state income tax returns since he stopped using illegal drugs. The judgment debts were likewise from some time ago, but it is difficult to fully mitigate them under AG ¶ 20(a) because Applicant knew about the judgments in August 2014 and took no steps to address them until September 2015.

Despite Applicant's lengthy unemployment from October 2009 to February 2012, AG ¶ 20(b) is not applicable because his unemployment was caused by his own irresponsibility. Applicant lost his job at the casino after he called in absent nine times in one year for reasons related to drug abuse. His temporary employment opportunities since 2012 did not provide the financial stability needed for him to pay the judgment debts or his tax liabilities. Yet, he did not act responsibly within AG ¶ 20(b) when he took no steps to contact his creditors to attempt repayment arrangements.

After Applicant received the SOR, he satisfied the judgment debts and filed his delinquent tax returns. AG ¶ 20(c) is established in that the financial security concerns in

the SOR have been rectified. In considering AG ¶ 20(d), I cannot ignore Appeal Board precedent, which requires that “a person acts in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation.”³ Even assuming that Applicant was unaware of the financial judgments before September 2014, it is difficult to find that he acted fully responsibly without some evidence that he took steps to address them before September 2015. Similarly, he thought he had not filed his income tax returns for tax years 2009 or 2010 and did not file them before 2015. Even where tax problems have been corrected and an applicant is motivated to prevent such problems in the future, the administrative judge is not precluded from considering an applicant’s trustworthiness in light of prior behavior evidencing irresponsibility. See *e.g.*, ISCR Case No. 14-01894 at 5 (App. Bd. Aug. 2015). The Appeal Board has long held that the failure to file tax returns suggests a problem with complying with well-established government rules and systems. See *e.g.*, ISCR Case No. 14-04437 (App. Bd. Apr. 15, 2016); ISCR Case No. 01-05340 at 3 (App. Bd. Dec. 20, 2002).

In that regard, Applicant has demonstrated some financial reform since overcoming his drug abuse problem. He testified that he filed his income tax returns on time starting with tax year 2011, and he presented corroborating evidence for two of those years. The IRS transcript for tax year 2009 shows that he filed a return for 2012 on time. His \$317 refund for 2012 was taken and applied to his tax debt for 2009 in February 2013. The IRS transcript for tax year 2010 shows that he filed a return for 2015 on time. His \$130 refund was applied to his taxes for 2010 in February 2016. Concerning recent delinquencies, in addition to the two judgment debts, Applicant had a \$564 medical collection debt on his credit record as of August 2014. It is unclear whether it is the same debt as the medical judgment in SOR ¶ 1.c or, if a separate debt, whether it has been satisfied. Applicant did not fully satisfy his IRS debt for 2010 until May 2016. However, Applicant also appears to be managing his day-to-day expenses responsibly. He is making timely payments on three credit cards with a manageable aggregate debt of \$2,400. There is no evidence of recent credit card delinquency that would suggest spending beyond his means. The day after his hearing, Applicant and his spouse planned to move into a new home that they recently purchased. While their mortgage obligation is an increase of \$534 per month over their previous rent payment, they have no car payments. Applicant’s un rebutted testimony is that he and his spouse can afford the mortgage. Should Applicant become employed by the defense contractor, his higher income will give them even more of a financial cushion. The financial considerations security concerns are adequately mitigated.

³ The DOHA Appeal Board stated in ISCR Case No. 07-06482, decided on May 21, 2008, in part:

In evaluating Guideline F cases, the Board has previously noted that the concept of “meaningful track record” necessarily includes evidence of actual debt reduction through payment of debts.” See, *e.g.*, ISCR Case No. 05-01920 at 5 (App. Bd. Mar. 1, 2007). However, an applicant is not required, as a matter of law, to establish that he has paid off each and every debt listed in the SOR. See, *e.g.*, ISCR Case No. 02-25499 at 2 (App. Bd. Jun. 5, 2006). All that is required is that an applicant demonstrate[s] that he has “. . . established a plan to resolve his financial problems and taken significant actions to implement that plan.” See, *e.g.*, ISCR Case No. 04-09684 at 2 (App. Bd. Jul. 6, 2006).

Whole-Person Concept

In assessing the whole person, the administrative judge must consider the totality of an applicant's conduct and all relevant circumstances in light of the nine adjudicative process factors in AG ¶ 2(a).⁴ The analysis under Guideline F is incorporated in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

Applicant demonstrated extremely poor judgment during his late teens and early twenties. He abused various illegal drugs on a regular basis, stole money from his sister for drugs, and spent most of his income on his serious drug habit. It is well settled that once a concern arises regarding an applicant's security clearance eligibility, there is a strong presumption against the grant or renewal of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990).

Yet, security clearance decisions are not intended to punish applicants for past transgressions. The security clearance adjudication involves an evaluation of an applicant's current judgment, reliability, and trustworthiness in light of the security guidelines in the Directive. See ISCR Case No. 09-02160 (App. Bd. Jun. 21, 2010). The Government was sufficiently persuaded of Applicant's reform of his drug problem so as to not allege any security concerns in that regard. Applicant was forthright with the DOD from the start about his drug-abusing past, his noncompliance with his tax filing obligations, and his outstanding delinquencies. More importantly in the current risk assessment, he has accepted responsibility for his past behavior, is committed to not repeat it, and has rectified the issues of security concern. For the reasons noted above, I find that it is clearly consistent with the national interest to grant Applicant security clearance eligibility.

Formal Findings

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

Paragraph 1, Guideline F: FOR APPLICANT

Subparagraphs 1.a-1.d: For Applicant

⁴ The factors under AG ¶ 2(a) are as follows:

(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.

Conclusion

In light of all of the circumstances, it is clearly consistent with the national interest to continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is granted.

Elizabeth M. Matchinski
Administrative Judge