



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



In the matter of:)
)
Redacted) ISCR Case No. 15-04033
)
Applicant for Security Clearance)

Appearances

For Government: Eric H. Borgstrom, Esq., Department Counsel
For Applicant: Thomas Albin, Esq.
Matthew Gunter, Esq.

03/06/2017

Decision

MATCHINSKI, Elizabeth M., Administrative Judge:

Applicant did not timely file federal income tax returns for at least tax years 2010 and 2015. His pattern of not complying with his state income tax filing obligations since 2007 also continues to cast doubt on his judgment, reliability, and trustworthiness. He is legally liable for two delinquent credit card debts with no record of repayment. Clearance is denied.

Statement of the Case

On December 29, 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 January 29, 2016, Applicant answered the SOR allegations and requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA). On April 22, 2016, the case was assigned to a DOHA Administrative Judge to conduct a hearing to determine whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. On May 23, 2016, the case was transferred to me. On May 31, 2016, I scheduled a hearing for July 14, 2016.

I convened the hearing as scheduled. Six Government exhibits (GEs 1-6) and one Applicant exhibit (AEs A) were admitted into evidence without objection. Applicant and a witness testified, as reflected in a transcript (Tr.) received on July 22, 2016.

I held the record open until August 15, 2016, for Applicant to supplement the record. No documents were received by the due date, so the record closed on August 15, 2016.

Findings of Fact

The SOR alleges under Guideline F that, as of December 29, 2015, Applicant owed two past-due debts of \$590 (SOR ¶ 1.a) and \$1,227 (SOR ¶ 1.b). Additionally, Applicant is alleged to have failed to file his state income tax returns for at least tax years 2007 through 2012 (SOR ¶ 1.c) and his federal income tax return for at least tax year 2010 (SOR ¶ 1.d). In response to the SOR allegations (Answer), Applicant admitted the debt in SOR 1.b and the failure to timely file state and federal income tax returns as alleged. He explained that he was in the process of having a tax professional file his delinquent state returns while his federal income tax return for 2010 was filed around 2013. Applicant denied the debt in SOR ¶ 1.a in that the credit card had been used by his ex-wife and the matter was in litigation.

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

Applicant is 48-year-old designer technician with an associate degree. He has worked for his defense contractor employer since September 2003. He has held a secret clearance for most of his present employment, and he works in a closed area. (GEs 1, 2; Tr. 27-29, 41, 69.)

Applicant was married from October 2000 to February 2003. (GE 2; Tr. 29-30.) He lived on his own after his divorce until July 2007, when he moved in with his then girlfriend. They had a daughter in May 2009. They had relationship problems within months of their daughter's birth and battled over custody of their daughter. His ex-girlfriend was granted primary physical custody of their daughter. Applicant had visitation rights when he moved out of his ex-girlfriend's home in May 2013. (GEs 1, 6.)

In May 2013, Applicant bought his home. He obtained a conventional 30-year mortgage loan of \$191,836, to be repaid at \$1,227 per month. Also in May 2013, he opened three consumer credit card accounts on which he incurred balances. (GEs 3-5.)

On July 12, 2013, Applicant completed and certified to the accuracy of a Questionnaire for National Security Positions (SF 86) to renew his security clearance eligibility. In response to a financial record inquiry concerning whether he had failed to file or pay federal, state, or other taxes in the past seven years, Applicant indicated that he had unresolved tax issues, as follows:

I was not aware until just recently that an amount was owed for my 2010 tax return. I am currently making payments on that amount. I also failed to file state tax returns for past several years due to issues over custody and claiming exemptions. Those issues have been resolved and I am currently filing state taxes as required. My income tax filing requirements and payments should be up to date and complete by end of August this year.

Applicant indicated that he owed the IRS \$600 for 2010. He explained that while he expected refunds in state taxes, he might owe \$200 in additional back taxes. Applicant also responded affirmatively to financial record inquiries concerning delinquency involving routine accounts. He explained that when he applied for his mortgage, he learned about two past-due debts totaling \$1,647 on his credit record: a credit card debt (SOR ¶ 1.b) from the 1980s that he was attempting to verify and a cable services debt (not alleged) that he paid in 2013. Applicant responded "No" to an inquiry concerning any financial judgments entered against him in the last seven years, but he then indicated under additional comments that his wages had been garnished to collect a small claims judgment. He explained that he had refused to pay a credit line debt because the lender hiked his interest rate to "an obscene amount after a late payment." (GE 1.)

As of August 2013, Applicant's credit report showed that a \$1,650 judgment filed against him in December 2009 had been fully satisfied in February 2011. Applicant reportedly owed a \$1,534 collection balance (high credit \$1,227) on the account in SOR ¶ 1.b. A joint credit card account opened in July 1999 during his marriage was rated as current with a balance of \$3,272 (SOR ¶ 1.a). He was making payments toward \$3,275 in balances on the three credit cards recently opened in May 2013. (GE 5.)

On September 10, 2013, Applicant was interviewed by an authorized investigator for the Office of Personnel Management (OPM). Applicant indicated that he had filed his 2010 federal income tax return in approximately March 2013, and that he has until November 2013 to pay his federal tax delinquency of \$600. He expressed intent to pay the tax debt in monthly payments. He admitted that he had yet to file his delinquent state income tax returns for tax years 2007 through 2012. For the first few years from 2007 to 2009, he had misplaced his paperwork. For tax year 2010, he had a dispute with his now ex-girlfriend about claiming their daughter as a dependent, and as the years went on, he "ended up forgetting to file." Applicant expressed intent to file his delinquent state income tax returns by the end of September 2013. As for the collection debt of \$1,534 on his credit record,

Applicant denied any recollection of when or why the account became delinquent. He denied being pursued for collection and indicated that he would pay the account if it was shown to be his responsibility. Applicant explained that he likewise learned of the \$113 debt for cable services in collection when he applied for his mortgage. He paid the debt in a lump sum in April 2013. (GE 6.)

Applicant opened three additional credit card accounts in 2014. His mortgage loan was 30 days past due in May 2014, January 2015, and February 2015. (GE 4; Tr. 62.) As of April 2015, the joint credit card debt in SOR 1.a was \$590 past due on a balance of \$10,164. Applicant was making payments on six credit card debts totaling \$5,077. (GE 4.) In July 2015, Applicant opened a credit card account with a home-improvement retailer. As of November 2015, the debt on Applicant's current credit cards totaled \$4,087. No payments had been made on the delinquent account in SOR ¶ 1.a since October 2014. The account in SOR ¶ 1.b was listed as having been charged off for \$1,227 due to nonpayment since August 2009. (GE 3.)

In late 2015, the creditor in SOR ¶ 1.a filed for a judgment against him. (Tr. 59.) Applicant contested his liability because his ex-wife kept the credit card after their divorce. According to Applicant, he contacted his ex-wife in late December 2015 about the debt, and she admitted that it had become delinquent when she stopped working. His ex-wife died in July 2016 with the court case still pending. Applicant expects that he will have to pay the debt. (Tr. 31-38.) He is hopeful that the bank will reduce the amount of the debt, although he will pay the full \$10,000 if required. (Tr. 60.) Applicant had yet to inform the court about his ex-wife's death. (Tr. 67.)

Concerning the debt in SOR ¶ 1.b, Applicant indicated in response to the SOR that he was unaware of the debt until he was contacted by a debt collector. He recalls using the credit card sometime after college but not since 2008 or so. He does not recall why he stopped paying on the account. He erroneously assumed that a charged-off account meant that there would be no collection action, but he confirmed in early July 2016 with the lender that it again holds the account after it had been in collection. Applicant expressed intention to pay the debt but indicated that he was waiting to hear from the creditor about repayment terms. (Tr. 44-46, 60-61.)

As for his delinquent state income tax returns, Applicant explained in late January 2016 that he was having a professional file them "now." He claimed without corroboration that his 2010 federal return was filed "in 2013 or thereabouts." (Answer.) Sometime after he answered the SOR allegations, Applicant contacted the IRS for transcripts of his federal returns so that he could file his state returns. (Tr. 47.)

At his security clearance hearing on July 14, 2016, Applicant submitted copies of his state income tax returns for 2007 through 2012, which were prepared by a certified public accountant. His 2012 state income tax return was prepared first, on May 16, 2016. His delinquent state returns for tax years 2007 through 2011 were completed only a day (2008-2011) or two (2007) before Applicant's security clearance hearing. Applicant reported wages of \$44,847 in 2007, \$46,070 in 2008, \$55,613 in 2009, \$66,714 in 2010, \$65,665 in

2011, and \$74,620 in 2012. He reported owing \$1,138 in past-due state taxes for those years. (AE A.) Applicant expressed his intent to file his delinquent state returns and pay the taxes owed within the week. He attributed his failure to comply with his state income tax filing obligation for several years to not being able to find records stored at his ex-girlfriend's house, but also to "nothing more than procrastination." (Tr. 47-49.) He subsequently explained:

Once again, ever since my daughter was born I've focused on two things, and that's taking care of her, going to work, working hard enough to get promotions so that I could afford to send her to college. That's all I've really cared about for the last, ever since she was born, and that's to the exclusion of many other things, like taking care of everyday billing functions, doing my yard. (Tr. 52.)

Applicant expressed uncertainty as to whether he had filed his state income tax returns for tax years 2013 and 2014. The state advised him that, for the one year that it could access when he called for information, the state had no record of him having filed a return for that year. Applicant admitted that he had yet to file his state income tax return for 2015, although it had been completed and he expected a refund. (Tr. 64-68, 73-74.)

Applicant acknowledged at his hearing that "there may have been other federal returns that were filed late." (Tr. 55.) He initially asserted that his federal income tax returns for tax years 2013, 2014, and 2015 had been filed on time. When pressed for the filing date, Applicant indicated that "actually 2015 was filed late." He then acknowledged that he had completed but had yet to file his federal income tax return for 2015 because of "procrastination." (Tr. 62-63, 67.) However, he expressed his belief that his 2014 federal return was filed on time and that he had no outstanding federal tax liability for 2014 or 2015. (Tr. 63.) Applicant presented no documentation showing when or if he had filed his federal income tax returns for 2013 and 2014, or 2010 for that matter.

Applicant pays \$180 per week in child support, but since the summer or fall of 2015, his ex-girlfriend has refunded him \$90 each week because he has their daughter half the time. (Tr. 39-40, 42.) In early 2015, Applicant received a promotion with a significant increase in salary. As of July 2016, he was at the top of the pay category for his position at \$120,000 annually. (Tr. 41-42.)

Character Reference

Applicant's supervisor from 2012 through 2015 testified that the quality of Applicant's work was very good. Applicant was proficient at identifying issues and getting work done within reasonable time. In his present technical position, Applicant's former supervisor relies on Applicant's support for a specific project. Applicant has continued to produce accurate, timely, and quality work. Two days before the hearing, Applicant shared the SOR with his former supervisor. Applicant indicated that he procrastinated about filing his state income tax returns for several years. Applicant's former supervisor understands that Applicant has rectified his delinquent tax returns, and he has no concerns about

Applicant's security worthiness. To his knowledge, Applicant has not committed any security or disciplinary infractions. (Tr. 18-24.)

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.

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 set forth 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 he is contractually liable on a credit card account obtained during his marriage that was \$590 past due on a balance of \$10,164 as of November 2015 (SOR ¶ 1.a). The entity holding the debt was actively seeking a judgment against him as of July 2016. Applicant also defaulted on a line of credit debt that was in collection for \$1,534 as of April 2013 after being charged off for \$1,227 (SOR ¶ 1.b).

Of primary concern here, Applicant did not timely file his federal income tax return for at least tax year 2010 or his state income tax returns for tax years 2007 through at least 2012 as alleged. Applicant knew that he was required to file returns irrespective of whether he owed taxes. His failure to comply with his income tax filing obligation 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." Applicant acknowledged at his hearing that he may not have filed timely federal returns for additional years beyond 2010. Only after he was pressed for the filing date for his 2015 return, Applicant admitted that he had not yet filed his federal income tax return for tax year 2015 due to procrastination. The evidence is inconclusive as to whether he timely filed state income tax returns for 2013 and 2014. The state had no record of him having filed for at least one of those years. He admitted that he had not yet filed his state income tax return for 2015 as of July 2016.¹

Application of the aforesaid disqualifying conditions triggers consideration of five potentially mitigating conditions under AG ¶ 20:

¹ The DOHA Appeal Board has long held that the administrative judge may consider non-alleged conduct to assess an applicant's credibility; to evaluate an applicant's evidence of extenuation, mitigation, or changed circumstances; to consider whether an applicant has demonstrated successful rehabilitation; to decide whether a particular provision of the Adjudicative Guidelines is applicable; or to provide evidence for a whole-person analysis under Section 6.3 of the Directive. See, e.g., ISCR Case No. 03-20327 (App. Bd. Oct. 26, 2006); ISCR Case No. 09-07219 (App. Bd. Sep. 27, 2012).

(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;

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

(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.

The mitigating conditions have limited applicability to his tax issues. Even assuming that Applicant filed his 2010 federal income tax return around May 2013, his persistent failure to comply with his state income tax filing obligation precludes me from concluding that the behavior was infrequent or happened so long ago as to no longer cast doubt on his reliability, trustworthiness, or judgment. A dispute with his ex-girlfriend over claiming their daughter as a dependent could explain a late filing, but only for a limited time pending the legal determination of her custody. The evidence shows that Applicant's noncompliance with his state income tax filing obligation preceded his daughter's birth and continued after custody had been decided. The completion of his delinquent state returns, in May 2016 for 2012 and in July 2016 for 2007 through 2011, is some evidence in reform under AG ¶ 20(c). However, his tax problems are neither resolved nor are under control. Applicant had not yet filed those completed returns as of his hearing on July 14, 2016. He was unclear as to the status of whether he had filed state returns for 2013 and 2014. He had not yet filed his federal and state income tax returns for 2015 because of "procrastination," despite knowing that his failure to comply with his income tax filing obligations was of concern to the DOD. In that regard, he demonstrates ongoing irresponsibility and a lack of good faith.

Similarly, neither AG ¶ 20(c) nor AG ¶ 20(d) are mitigating of the consumer credit delinquencies, given Applicant had made no payments toward the debts as of his hearing. AG ¶ 20(b) partially applies to the debt in SOR ¶ 1.a in that his ex-wife apparently incurred the debt, although Applicant has not disproven his contractual liability to the creditor. In light of her recent death, Applicant may well have to repay the full \$10,164. Irrespective of the outcome of the pending litigation for the debt in SOR ¶ 1.a, Applicant has not provided evidence of any circumstances outside of his control that could mitigate his default of the credit obligation in SOR ¶ 1.b. Applicant has known about the debt since he applied for his home loan in May 2013 and has not been proactive about resolving it.

The Appeal Board has held that an applicant is not required to establish that he has paid off each debt in the SOR, or even that the first debts paid be those in the SOR.² However, an applicant needs to show that he has a plan to resolve his debts and that he has taken significant steps to implement his plan. Applicant's promise to make payments and to resolve his tax issues at some future date is not a substitute for timely payments or timely compliance. See ISCR Case No. 07-13041 at 4 (App. Bd. Sep. 19, 2008) (citing ISCR Case No. 99-0012 at 3 (App. Bd. Dec. 1, 1999)). 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 longstanding 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). Applicant informed an OPM investigator in September 2013 that he intended to address his past-due state tax returns for tax years 2007 through 2012 by the end of September 2013. Apart from some efforts to find records, he did little to address them until 2016. His promises to file them carry little weight in reform. The financial considerations security concerns are not fully mitigated.

Whole-Person Concept

Under the whole-person concept, 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).³ 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.

² 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).

³ 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.

The security clearance adjudication is not aimed at collecting an applicant's personal debts. Rather, it involves an evaluation of an applicant's judgment, reliability, and trustworthiness in light of the security guidelines in the Directive. See ISCR Case No. 09-02160 (App. Bd. Jun. 21, 2010). Applicant has demonstrated good judgment and reliability at work. However, his persistent failure to comply with his income tax filing obligation for several years is clearly inconsistent with the judgment expected of persons who hold access to classified information. Applicant's failure to timely file his federal and state income tax returns for 2015, after the SOR was issued, raises considerable doubts as to whether he is willing to comply with DOD requirements. 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). For the reasons noted above, I am unable to find that it is clearly consistent with the national interest to continue Applicant's 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: AGAINST APPLICANT

Subparagraphs 1.a-1.d: Against Applicant

Conclusion

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

Elizabeth M. Matchinski
Administrative Judge