



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



In the matter of:)
)
) ISCR Case No. 15-08319
)
Applicant for Security Clearance)

Appearances

For Government: David F. Hayes, Esq., Department Counsel
For Applicant: *Pro se*

10/24/2018

Decision

KILMARTIN, Robert J., Administrative Judge:

Applicant mitigated the Guideline E, personal conduct concerns, but he did not mitigate the security concerns under Guideline F, financial considerations. Applicant's eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on April 18, 2013. On December 28, 2017, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline F, financial considerations, and Guideline E, personal conduct. The DOD CAF acted 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 (AGs) implemented by DOD on June 8, 2017.

Applicant timely answered the SOR, admitting all of the SOR allegations except for SOR ¶ 2.b. He admitted failing to file federal income tax returns for seven years, and owing federal income tax liens entered in April and September 2007, as alleged in SOR

¶¶ 1.l, 1.m, and 1.n. Applicant also requested a hearing before an administrative judge. The case was assigned to me on August 20, 2018. On September 4, 2018, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for September 26, 2018. I convened the hearing as scheduled.

Government Exhibits (GE) 1 through 9 were admitted into evidence without objection. At the hearing, Applicant testified and submitted two documents, which were marked as Applicant's Exhibits (AE) A and B, and admitted without objection. DOHA received the transcript (Tr.) on October 4, 2018. I granted Applicant's request to leave the record open until October 10, 2018, so that he could provide substantiating documentation. (Tr. 84) He submitted another letter from his certified public accountant (CPA) and attached IRS transcripts. (AE C)

Findings of Fact¹

Applicant is 56 years old. He obtained his GED in 2009, and he is married since 2006 with two grown stepchildren. Applicant has been employed as either a concrete specialist or doing construction work since the 1990s. He traveled to the hearing from an overseas embassy reconstruction project, where he works doing stucco work for a federal contractor. (Tr. 22) He reports filing a previous SCA in 2013, (GE 2) that was never adjudicated. (Tr. 11) In section 26, he disclosed his failure to file and pay federal income taxes for multiple tax years (TYs). He stated "haven't done anything, overwhelmed with amount owed."² However, he did not disclose his numerous tax issues in his recent 2017 SCA. (GE 1) Applicant has worked extensively overseas.

The SOR alleges 11 delinquent consumer debts, totaling \$138,482, including six medical debts placed for collection. Additionally, the SOR alleges his failure to file federal income tax returns for several years, and over \$22,000 in tax liens that were entered against him in 2007. Applicant admitted all of these allegations in his answer to the SOR. Applicant testified that he had worked in the construction industry his whole life, and in the 1990's he switched over to independent contractor (Form 1099) status. (Tr. 22) He failed to pay quarterly taxes as required due to a misconception that he earned too little income to meet the threshold income required to file. (Tr. 23)

In his October 2017 Answers to Interrogatories (GE 4), Applicant attached copies of his IRS tax transcripts for TYs 2005, 2006, 2007, 2010, 2014, 2015, and 2016. He did not provide tax transcripts for TYs 2008, 2009, 2011, or 2012, as requested. Included IRS documents stated "requested data not found" for these particular years. (GE 4) Applicant admits that he did not file income tax returns for these years. (Tr. 68) Applicant testified that he retained a Financial Services company in 2005 to help him resolve his tax delinquencies. (Tr. 25) However, this company accepted two payments

¹ Unless stated otherwise, the source of the information in this section is Applicant's April 18, 2013 Security Clearance Application (SCA) and the summary of his personal subject interview (PSI) on November 12, 2014.

² GE 2, p. 37.

of \$1,500 from Applicant, and appeared to accomplish nothing. So, Applicant terminated this relationship, which he thought was a scam. (Tr. 26) He testified that he has since hired a CPA in 2018 to file all of the overdue federal income tax returns on his behalf. His CPA assured Applicant that all returns have been filed, and he owes no back federal income taxes. (Tr. 72)

Applicant attached a letter from his CPA dated February 15, 2018, to his Answer to the SOR. It stated that he was recently contacted by Applicant to help him catch up on his back tax filings and set up a payment plan for his back taxes owed. The CPA obtained a power of attorney and contacted the IRS twice on Applicant's behalf. He specifically inquired about TYs 2005 to 2016. He was informed by the IRS that all back taxes are paid and his filings are current. No details were provided about when the federal income tax returns were filed for each TY in question.

Applicant testified that he has from time to time, done odd jobs, and worked "under the table." (Tr. 79-80) In some years, he suggested he earned too little to have to file federal income tax returns. However, it is unclear which years pertained, and whether the years of non-filing alleged in the SOR (TYs 2005, 2006, 2007, 2008, 2009, 2011, and 2012) were included. The record was left open for two weeks specifically so that Applicant could provide explicit information from his CPA about what the earnings threshold was for each relevant year, and whether Applicant met that threshold. (Tr. 82 – 84) Applicant responded by providing a September 27, 2018, letter from his CPA. Attached were IRS tax transcripts for TYs 1997, 1999, 2000, 2001, 2002, and 2003. (AE C) Although not all of these TYs are alleged in the SOR, the CPA letter shows that unpaid taxes were due for each of these TYs, resulting in tax liens imposed in 2007, which were removed only in 2016-2017.³ (AE C)

Notably, the CPA's letter of September 27, 2018, states "in a few years, [Applicant] did not file since his income was below that year's threshold to file." (AE C) However, he does not specify the exact years that Applicant fell below the filing threshold in earnings or his exact amount of earnings. Thus, for TYs 2008, 2009, 2011, and 2012, there was no evidence presented about: the threshold amount of earnings required for a taxpayer to file a return; Applicant's actual earnings in those TYs; or tax transcripts to show that he filed returns. The IRS transcripts attached to the CPA letter (AE C) show that Applicant filed a federal income tax return for TY 2005 on February, 13, 2006 (adjusted gross income or AGI was \$19,894); for TY 2006 on February 19, 2007 (AGI \$22,134); and for TY 2007 on February 8, 2008 (AGI \$17,422).

SOR ¶ 1.a resulted from a credit card debt that was charged off in the amount of \$1,793 after Applicant's wife purchased a mattress. (Tr. 30) It has now been paid in full.

³ In ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006), the Appeal Board listed five circumstances in which conduct not alleged in the SOR may be considered stating: a) to assess an Applicant's credibility; b) to evaluate an Applicant's evidence of extenuation, mitigation, or changed circumstances; c) to consider whether an Applicant has demonstrated successful rehabilitation; d) to decide whether a particular provision of the Adjudicative Guidelines is applicable; or e) to provide evidence of whole-person analysis under Directive Section 6.3.

(AE A) SOR ¶¶ 1.b, 1.c, 1.d, 1.e, 1.g, and 1.i, are all for delinquent medical accounts placed for collection. Applicant testified that he went to the emergency room in 2012. (Tr. 41-42) He had no health insurance. Applicant had surgery in December 2012 because his femoral arteries in both legs were blocked, and he was in the hospital for a week. (Tr. 42) Applicant received a \$98,000 bill from the hospital and providers, which he was unable to pay. The hospital wanted payments of \$300 per month. (Tr. 48) He was fined \$600 under the Affordable Care Act for failure to maintain health insurance. (Tr. 43) He reached out to the medical creditors on multiple occasions, but after 2013, Applicant heard nothing more from them. He assumed since he was “out of sight, out of mind” that the providers wrote off these delinquent medical debts. (Tr. 52) SOR ¶ 1.g (radiology) has now been paid in full. (AE A)

Applicant testified that he was out of work for 18 months following hurricane Charley in 2004. (Tr. 53) Then, the mortgagee bank foreclosed on his home in 2007-2008, because he was “upside down” on the mortgage, after making payments for 20 years. (Tr. 54) Applicant tried unsuccessfully to arrange a short sale of the property or renegotiate the terms of the mortgage, before he moved to state A. (Tr. 54) Applicant also voluntarily surrendered his 2004 Ford Explorer around that time. (Tr. 55) The dealership sold the vehicle, and it resulted in a deficiency amount. Applicant has a balance owing of \$6,306, as alleged in SOR ¶ 1.f, that he was unable to pay. (Tr. 56) However, he testified credibly that he has now entered into a payment plan and made six payments of \$100 each to the creditor. (Tr. 58)

Applicant produced documentation showing that the debt placed for collection in the amount of \$3,776 at SOR ¶ 1.h has now been satisfied and a zero balance remains. (AE B) He testified credibly that the delinquent debt placed for collection in the amount of \$120 at SOR ¶ 1.j (insurance) has now been paid in full after a final payment of \$70 pursuant to a repayment plan with that creditor. (Tr. 62) Applicant has reached out to the telecommunications creditor concerning the \$230 debt placed for collection at SOR ¶ 1.k to no avail. However, he still has service by this provider, and his credit with this provider is good. (Tr. 64)

Applicant testified credibly that he did not understand the questions in section 26 of the 2017 SCA. (GE 1) (Tr. 86) Since he had already fully disclosed his tax issues and financial problems in the earlier 2013 SCA, he logically assumed that the Government was apprised of his financial issues. Applicant had no specific intent to deliberately falsify his responses on the SCA or deceive the Government, as alleged in SOR ¶¶ 2.a and 2.b. (Tr. 87-88) He reasonably believed that he only needed to fill in the gaps, with new developments that occurred between the 2013 SCA and 2017 SCA. (Tr. 88) So, he did not disclose these tax problems again.

Policies

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations, the adjudicative guidelines list potentially disqualifying

conditions and mitigating conditions, which are used 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 overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG, Appendix A, ¶ 2(a), the adjudicative process is an examination of a sufficient period and a careful weighing of a number of variables of an individual's life to make an affirmative determination that the individual is an acceptable security risk. This is 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, Appendix A, ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the 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. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an "applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining 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 an 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.

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."

Analysis

Guideline F, Financial Considerations

The security concern relating to 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 abuse, 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

This concern is broader than the possibility that an individual might knowingly compromise classified information in order to raise money. It encompasses concerns about an individual's self-control, judgment, and other qualities essential to protecting classified information. An individual who is financially irresponsible may also be irresponsible, unconcerned, or negligent in handling and safeguarding classified information.

AG ¶ 19 provides conditions that could raise security concerns. The following apply here:

- (a) inability to satisfy debts;
- (b) unwillingness to satisfy debts regardless of the ability to do so;
- (c) a history of not meeting financial obligations; and
- (f) failure to file or fraudulently filing annual federal, state or local income tax returns or failure to pay annual federal, state or local income taxes as required.

Applicant's delinquent debts, failure to file income tax returns, and tax liens, alleged in the SOR, are confirmed by his SCA, clearance interview, and answer to the SOR. The Government produced substantial evidence to support the disqualifying conditions in AG ¶¶ 19(a), 19(b), 19(c), and 19(f), thereby shifting the burden to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the facts.⁴ Applicant has not met that burden. He exercised poor judgment in repeatedly failing to file, or filing federal income tax returns late, going back to 1997. He also failed to pay his

⁴ Directive ¶ E3.1.15. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep 22, 2005) (An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government).

federal income taxes when due. He had multiple tax liens filed against him by the IRS, which were not timely resolved. They were still reflected in his 2015 credit report. (GE 7)

The guideline also includes conditions that could mitigate security concerns arising from financial difficulties. 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 . . . , and the individual acted responsibly under the circumstances;
- (d) the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts; and
- (g) the individual has made arrangements with appropriate tax authority to file or pay the amount owed and is in compliance with those arrangements.

Applicant was overseas continuously for several years preceding the hearing. He suffered through Hurricane Charley in 2004, and emergency surgery (with attendant medical costs) in December 2012. To some extent, these conditions were beyond his control. However, he has not produced relevant and responsive documentation, demonstrating that he acted responsibly under the circumstances. He broached the delinquent income tax debts in his SCA in April 2013. Yet, over five years later, he has not resolved these issues.

The record was left open for two weeks explicitly so that he could obtain a letter from his CPA showing that he either earned insufficient income to require filing, or he filed federal income tax returns for each of the relevant TYs alleged in the SOR. It remains unclear what happened in TYs 2008, 2009, 2011, and 2012. He only obtained the professional services of his CPA in early 2018. Applicant has not met his burden to provide sufficient evidence to show that his financial problems are under control, and that his debts were incurred under circumstances making them unlikely to recur. He has made some progress pursuant to payment plans with numerous creditors on his delinquent consumer debts, and he has now paid off the tax liens. However, his efforts to resolve his medical delinquencies and tax issues have not met the mark. In short, his response has been too little, too late. He produced insufficient substantiating documents even after being specifically requested to do so at the hearing. The allegations of failure to file income tax returns alleged in the SOR have not been resolved for TYs 2008, 2009, 2011, and 2012. AG ¶¶ 20(d) and 20(g) apply only partially for the consumer

debts, taxes owed, and TY 2005, 2006 and 2007. Otherwise, the mitigating conditions enumerated above do not apply.

Guideline E, Personal Conduct

The security concern for personal conduct is set out in AG ¶ 15, as follows:

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

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

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

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying condition is potentially applicable:

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

Applicant had already disclosed his tax issues and financial travails to the Government in his 2013 SCA. He denied any intent to falsify his responses in section 26 of the 2017 SCA. He believed that he only had to update the 2017 SCA with any newly incurred delinquent debts or tax issues since his 2013 SCA was submitted. This was a reasonable interpretation and I accept his testimony in this regard. AG ¶16(a) does not apply. No disqualifying condition has been established.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all the circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG, Appendix 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 AG, Appendix A, ¶ 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.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my comments under Guidelines E and F in my whole-person analysis. Some of the factors in AG, Appendix A, ¶ 2(d) were addressed under that guideline. Applicant raised a family and made significant contributions to the DOD for several years. Most importantly, Applicant has not addressed the specific allegations in the SOR and taken affirmative measures to resolve them. He has not met his burden of production.

Applicant did not intend to falsify his 2017 SCA. However, Applicant's finances remain a security concern. There is insufficient evidence to conclude that his financial problems are under control. The record evidence leaves me with questions and doubts as to Applicant's suitability for a security clearance. For all these reasons, I conclude Applicant has mitigated the personal conduct security concerns under Guideline E, but he has not mitigated the security concerns arising under Guideline F, financial considerations.

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.f, 1.g, 1.h, 1.j and 1.k :	For Applicant
Subparagraphs 1.b through 1.e:	Against Applicant

Subparagraph 1.i:	Against Applicant
Subparagraphs 1.l through 1.n:	Against Applicant
Paragraph 2 , Guideline E:	For Applicant
Subparagraphs 2.a and 2.b:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the interests of national security to grant Applicant a security clearance. Eligibility for access to classified information is denied.

Robert J. Kilmartin
Administrative Judge