



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



In the matter of:)
)
) ISCR Case No. 16-02639
)
Applicant for Security Clearance)

Appearances

For Government: Mary M. Foreman, Esq., Department Counsel
For Applicant: *Pro se*

11/02/2017

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant failed to mitigate the security concerns under Guideline F, financial considerations. Applicant refuted the security concerns under Guideline E, personal conduct. Eligibility for access to classified information is denied.

Statement of the Case

On December 9, 2016, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued to Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline F, financial considerations, and Guideline E, personal conduct.¹ The action was taken 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 (AG) effective within the

¹ On July 2017, the SOR was amended and changed the date in ¶ 2.a from November 14, 2015 to June 21, 2012. It also amended the date in SOR ¶ 2.b from February 21, 2014 to June 21, 2012. Applicant did not object and signed the amendment on July 24, 2017.

DOD on September 1, 2006. On June 8, 2017, new AG were implemented and are effective for decisions issued after that date.²

Applicant answered the SOR on February 3, 2017, and requested a hearing before an administrative judge. The case was assigned to another judge on March 16, 2017, who scheduled the hearing for May 9, 2017, which was canceled because Applicant was sick. It was rescheduled for May 30, 2017, and was again canceled because Applicant was sick. It was rescheduled for July 7, 2017, and Applicant requested a change of venue because he had moved. The case was assigned to me on July 25, 2017. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on August 21, 2017. I convened the hearing as scheduled on September 20, 2017. The Government offered exhibits (GE) 1 through 6. Applicant objected to GE 5 and 6 as to their relevance. His objection was overruled, and the Government's exhibits were admitted into evidence. Applicant testified and offered Applicant Exhibits (AE) A through C. There were no objections to the exhibits, and they were admitted into evidence. The record was held open until October 18, 2017, to allow Applicant to submit additional documents. He provided documents that were marked AE D through F, which were admitted without objection, and the record closed.³ DOHA received the hearing transcript on September 28, 2017.

Findings of Fact

Applicant admitted the SOR allegations in ¶¶ 1.b, 1.d, 1.e, 1.g, and 1.h. He denied the SOR allegations in ¶¶ 1.a, 1.c, 1.f, 2.a and 2.b. After a thorough and careful review of the pleadings, testimony, and exhibits submitted, I make the following findings of fact.

Applicant is 52 years old. He was married from 1989 to 1991. There were no children from the marriage. He has an adult child from a previous relationship. He holds a bachelor's degree and two master's degrees earned in 2001. Applicant served on active duty as an officer in the military from 1987 to 1999. He served in the reserves from 2004 until he retired in 2015 in the paygrade of O-5. He is not yet eligible to receive retirement pay.⁴

After leaving active duty in 1999, Applicant worked for a defense contractor until 2001, when he left to start his own consulting business. He worked for defense contractors from April 2002 to April 2009. He worked as an independent contractor from April 2009 to November 2012. He testified that from December 2012 until December 2015, he was unable to find full-time work and worked part-time teaching college courses. He then worked from January 2016 until May 2016 when he became ill and had to leave his job for medical reasons. He presently receives Veteran's Affairs disability and

² I considered the previous AG, effective September 1, 2006, as well as the new AG, effective June 8, 2017. My decision would be the same if the case was considered under the previous AG.

³ Hearing Exhibit I is Government Counsel's email memorandum.

⁴ Tr. 15, 19-28.

unemployment benefits. His family is also providing financial support. He testified that he was living in one state and was looking for work from May 2016 to June 2017 when he moved to another state to be closer to family, due to his medical issues.⁵

The debts alleged in the SOR are supported by Applicant's admissions, testimony, and credit reports from July 2012, July 2016, March 2017, and September 2017.⁶

Applicant denied owing the debt in SOR ¶ 1.a (\$4,930-charged off). The credit card debt became delinquent in approximately 2013. He stated that he made arrangements with the creditor to pay a reduced amount in three equal payments. He was unable to make the third payment because his unemployment check was late. The creditor refused to accept the late payment. He stated in his SOR answer, "At which time, I informed them that of all my creditors they would be the last one I would pay if at all." He testified that he has monitored his credit report and the status of this debt has not changed. He has not made any other payments. He did not provide documentary evidence of payments or his settlement agreement. The debt is unresolved.⁷

The debts in SOR ¶¶ 1.b (\$2,120) and 1.d (\$1,922) are charged-off credit card accounts that became delinquent in approximately 2014 and 2015 respectively. Applicant admitted that he owes these debts and stated in his SOR answer that he contacted the creditors and advised them he was unemployed. He intended to pay the debts when he is employed. He testified that he has received notices from the creditor in SOR ¶ 1.b that the debt has been sold to a collection agency. He will reengage his contact with this creditor once he is employed. The debts remain unpaid.⁸

The debt in SOR ¶ 1.c (\$2,075) is a charged-off account that was incurred in 2014. Applicant explained in his SOR answer that this was an overpayment from a tuition assistance program. He indicated that an error was made by the school he was attending regarding his enrollment status. He attempted to resolve it, but the government creditor garnished his disability payments for one month and then stopped. He intended to resolve the remainder owed once he is employed, or the government entity may continue to garnish his disability payments. At his hearing, Applicant did not provide evidence that payments were made or the current balance owed. The debt remains unresolved.⁹

The debt in SOR ¶ 1.e (\$1,250) is a cell phone debt that became delinquent in 2014. He unsuccessfully disputed the charges with the creditor. He admitted he owed the

⁵ Tr. 28-38.

⁶ SOR Answer; GE 2, 3, 4; AE A, B, D, E, F.

⁷ Tr. 39-41.

⁸ Tr. 42-43, 47.

⁹ Tr. 43-47.

debt and intends to resolve it when he is employed.¹⁰ Applicant denied the debt in SOR ¶ 1.f (\$1,250) owed to a different cell phone carrier because he had made arrangements and paid the debt. He provided evidence to show the debt was resolved in November 2016.¹¹

Applicant admitted that he failed to timely file his 2009, 2010, and 2011 federal income tax returns as alleged in SOR ¶ 1.g. In his SOR answer he stated:

I admit that during my voluntary participation in the non-constitutional federal income tax reporting program, as acknowledged by congress, I filed late returns for the tax years 2009, 2010, and 2011. No reason except procrastination and I filed them when it was convenient (sic) for me. No attempt at evasion. No federal laws were broken.

In his SOR response to ¶ 1.h, which alleged he failed to timely file his 2009, 2010, and 2011 state income tax returns Applicant said, "I admit I filed late [name] state returns for tax years 2009, 2010, and 2011. No reason except procrastination and I filed them when it was convenient (sic) for me. No attempt at evasion."

Applicant testified that he had no excuse for failing to timely file his federal and state tax returns. He stated he believe he subsequently filed his 2009, 2010, and 2011 federal and state tax returns. He believed he owed taxes for those years. When asked if he had filed his 2012 through 2016 tax returns, he did not think they were filed because he was unemployed and did not earn enough. He did not provide documentary evidence to show the delinquent federal tax returns for 2009, 2010, and 2011 are filed. He provided a document from the IRS in his post-hearing submission. It reflects that he does not owe a balance for his 2013 federal taxes. It also shows his 2013 federal income taxes were not filed timely. No other information was provided to show Applicant filed his 2009, 2010, and 2011 federal income tax returns. He testified that he did not think he paid taxes owed for these years, but would check.¹²

Applicant provided a document from the tax authority for the state where he previously had lived as alleged in SOR ¶ 1.h. The date of the document is May 10, 2017. It shows Applicant owes unpaid state taxes and provided explanation codes next to each tax year. The amounts owed include penalties and interest: for 2009-\$701 (failure to file a return by due date and failure to file a return); 2010-\$11,353 (failure to file a return by due date, underpayment of estimated taxes, and failure to file a return); for 2012-\$7,276 (failure to file a return by the due date); and for 2013-\$1,630 (failure to file a return by the

¹⁰ Tr. 47-48.

¹¹ Tr.48; AE A.

¹² Tr. 49-62; AE E. I will not consider any derogatory information regarding other tax years that may not have been timely filed or paid for disqualifying purposes. I may consider the information when making a credibility determination, in the application of mitigation, and when analyzing the whole person.

due date, failure to file a return). Applicant testified that his wages were garnished in 2013 and 2014 to pay state tax liens.¹³

In Applicant's SOR answer, he stated the following:

At this time, there are no further arrangements to make, as any funds I happen to come across go towards maintaining a residence and to subsistence. Once I am gainfully employed, which I anticipate will be very soon after resolution of this ongoing frivolous security clearance investigation, I plan to make arrangements to clear up any outstanding debts.¹⁴

Applicant testified that he intends to pay his debts. His health is improving, but he does not know if he will be able to work because he is still under a doctor's care. He explained that he was frustrated that he first applied for a security clearance in 2012 and he repeatedly was asked the same questions. He believed that his financial issues were trivial in that there were only about \$4,000 of debts and not significant to raise security issues. He credibly testified that he did not believe the process was frivolous, but he was just expressing frustration.¹⁵

In June 2012 Applicant completed a security clearance application (SCA). Section 22 inquired about his police record and it specifically told him to disclose information regardless of whether the record was sealed, expunged, or otherwise stricken from the court record, or the charge was dismissed. The questions requested he disclose if in the past seven years he had been issued a summons, citation, or ticket to appear in court in a criminal proceeding (excluding traffic infractions where the fine was less than \$300 and did not include alcohol or drugs.) It directed him to report if in the past seven years he had been arrested by any police officer, sheriff, marshal or any other type of law enforcement official; if he had been charged, convicted, or sentenced to a crime in any court; and if he had been or was currently on probation or parole; or if he was currently on trial or awaiting trial on criminal charges? Applicant answered "no" to all of the questions and failed to disclose he has arrested for failing to appear in court in May 2008 for a hearing related to a driving under the influence of alcohol (DUI) charge.

Applicant also answered "no" on his June 2012 SCA to questions under Section 22, which stated "other than those offenses already listed, have you EVER had the

¹³ Tr. 62-72; AE B, F. As previously stated, I will not consider any derogatory information for disqualifying purposes, but may consider it as noted above. AE B is a September 2017 credit report that reflects a state tax lien for \$20, 229 was filed in May 2017, and is unpaid. It reflects a state tax lien was filed in September 2011 for \$2,206 that remains unpaid. It reflects a state tax lien filed in April 2011 for \$1,789 and was paid in April 2013. It reflects a state tax lien filed in February 2010 for \$1,950 and was paid in August 2012.

¹⁴ SOR answer.

¹⁵ Tr. 79-91. It appears issues regarding Applicant's finances and tax returns were initially raised by his military department in 2012. There was a gap in processing his security clearance because he was not sponsored by an employer for approximately three years.

following happened to you? Have you EVER been charged with an offense involving alcohol or drugs? Applicant did not disclose he was arrested for DUI in March 2008 and pled nolo contendere to the offense in September 2008.

Applicant denied he deliberately falsified information on his SCA. He explained in his SOR answer the following:

I had been informed that when something gets expunged from your record, you can answer no to any questions about it no matter who is doing the asking. So when asked the question in e-QIP, I answered no to any question about it. There may have been some confusion on my part as to what had actually been expunged and what wasn't, as it was all one court case, there may have been multiple charges. Even though I believe I wasn't required to, I did however, voluntarily divulged ALL of this information to the investigators that I spoke to in person about this. Please check their notes. At any rate, I plan to follow up with the court to ensure that all charges associated with this one case in question are properly expunged. And when asked in the future, I plan to answer no to any question concerning this, which I believe is my right to do so.¹⁶

Applicant testified that it was not his intention to answer the questions untruthfully. He believed he was entitled not to disclose the information on his SCA and when he was asked about it by the government investigator, he disclosed the information. He believed that the failure to appear charge was included with the DUI and both were expunged. I found Applicant's explanation credible and believe he did not intentionally falsify his SCA. He retracted his previous statement and testified that when asked in the future on a SCA about his prior arrest, he would disclose it even though it was expunged.¹⁷

Applicant's two sisters testified on his behalf. One sister also provided a written statement. They described him as trustworthy, responsible, moral, and ethical. He has proudly served in the military and has been an example to family and friends whom he has counseled about the importance of education, career goals, and integrity. Due to unemployment and health problems he has been unable to maintain a normal standard of living and his finances have suffered. They believe that he is not a threat to national security.¹⁸

Policies

When evaluating an applicant's national security eligibility, the administrative judge must consider the AG. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating

¹⁶ SOR Answer.

¹⁷ Tr. 73-79, 91-94.

¹⁸ Tr. 96-102; AE C.

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 ¶ 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 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. Directive ¶ E3.1.15 states 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." 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 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.

AG ¶ 19 provides conditions that could raise security concerns. The following are potentially applicable:

- (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 tax as required.

Applicant has unresolved delinquent debts from at least 2013, which he has been unable or unwilling to satisfy. He failed to timely file his 2009, 2010, and 2011 federal and state income tax returns. There is sufficient evidence to support the application of the above disqualifying conditions.

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 (e.g., loss of employment, a business downturn, unexpected medical emergency, a death, divorce or separation, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances;

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

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

Applicant has delinquent debts that remain unresolved. He did not provide sufficient evidence to show he has filed his delinquent federal or state income tax returns for years 2009, 2010, and 2011. His explanation for his failure to file his tax returns was that he procrastinated and did them when it was convenient to him. There is insufficient evidence to conclude that his behavior is unlikely to recur. Applicant's failure to timely file his tax returns casts doubt on his current reliability, trustworthiness, and good judgment. AG ¶ 20(a) does not apply.

Applicant attributed his financial problems to periods of unemployment, which were beyond his control. He attributed his failure to timely file his federal and state income tax returns to procrastination and indicated he would file them when it was convenient. This was within his control. For the full application of AG ¶ 20(b), Applicant must show that he acted responsibly under the circumstances. Applicant has not provided documented proof that he has filed his delinquent federal income tax returns. The tax document from the state that Applicant provided, reflects for tax years 2009 and 2010, he failed to file a return. There is insufficient evidence to determine that Applicant has acted responsibly with regard to timely filing his federal and state tax returns for the years alleged in the SOR. Applicant provided evidence that he paid one debt, but at this time he does not have the resources to pay the other alleged debts. AG ¶ 20(b) partially applies.

Applicant paid the debt in SOR ¶ 1.f. AG ¶ 20(d) only applies to this debt. The remaining debts alleged in the SOR have not been resolved. Applicant indicated he is unable to pay these debts due to unemployment and health reasons. He did not provide sufficient evidence to conclude his federal and state tax returns have been filed, something that is within his control. There is no evidence that he has received financial counseling and the evidence does not show that his financial problems are under control. AG ¶ 20(c) does not apply.

Applicant denied the debt in SOR ¶ 1.a because the creditor would not accept a late payment on a settlement agreement. He denied the debt in SOR ¶ 1.c indicating it was an error and being paid through garnishment. He did not provide documentary evidence to support the basis of his disputes or evidence of actions he may have taken to resolve the issues. AG ¶ 20(e) does not apply.

Guideline E: Personal Conduct

AG ¶ 15 expresses the security concern for personal conduct:

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 information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. I find the following 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 security clearance eligibility or trustworthiness, or award fiduciary responsibilities;

I have considered all of the evidence and conclude that Applicant did not deliberately falsify his SCA when he failed to disclose his DUI and failure to appear arrests. Although the language of the SCA indicated that he should disclose information even if it was expunged, I believe he erroneously believed at that time he did not have to disclose the information. I also believe his testimony that he thought that both charges were expunged. Applicant refuted the personal conduct allegations.

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 ¶ 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 ¶ 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 F and E in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under those guideline, but some warrant additional comment.

Applicant is 52 years old. He holds three college degrees, including two masters. He retired as an O-5 reserve officer in the military. Applicant has delinquent debts that are unresolved. He attributed them to periods of unemployment. At this time he is unable to pay his delinquent debts.

Applicant failed to timely file his federal and state income tax returns for multiple years. His explanation was because he procrastinated, and it was not convenient to do so. He admitted he did not have a reasonable excuse. He had an opportunity to show that the delinquent returns have been filed, but did not. Documents he provided show that he owes state tax liens that are not paid. The DOHA Appeal Board has held that:

Failure to file tax returns suggests that an applicant has a problem with complying with well-established government rules and systems. Voluntary compliance with these things is essential for protecting classified information. ISCR Case No. 14-04437 at 3 (App. Bd. Apr. 15, 2016). Someone 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. August 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).¹⁹

Applicant's history of non-compliance with a fundamental legal obligation to timely file federal and state tax returns raises serious concerns. He did not provide sufficient evidence in mitigation regarding his finances. I concluded that he did not deliberately falsify his SCA. The record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising under Guideline F, financial considerations. He refuted the security concerns raised under Guideline E, personal conduct.

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.e:	Against Applicant

¹⁹ ISCR Case No. 12-10933 at 3 (App. Bd. June 29, 2016).

Subparagraph 1.f:	For Applicant
Subparagraphs 1.g-1.h:	Against Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraphs 2.a-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 national security to grant Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Carol G. Ricciardello
Administrative Judge