



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



In the matter of:

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ISCR Case No. 16-02693

Applicant for Security Clearance

Appearances

For Government: Bryan Olmos, Esq., Department Counsel
For Applicant: *Pro se*

02/28/2018

Decision

WESLEY, Roger C., Administrative Judge:

Based upon a review of the pleadings and exhibits, I conclude that Applicant mitigated the security concerns regarding his financial considerations. Eligibility for access to classified information is granted.

Statement of Case

On November 25, 2016, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) detailing reasons why DOD adjudicators could not make the affirmative determination of eligibility for a security clearance, and recommended referral to an administrative judge to determine whether a security clearance should be granted, continued, denied, or revoked. The action was taken under Executive Order (Exec. Or.) 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 September 1, 2006.

The Security Executive Agent, by Directive 4, *National Security Adjudicative Guidelines* (SEAD 4), dated December 10, 2016, superceded and replaced the September 2006 adjudicative guidelines (AGs). They apply to all covered individuals who require initial or continued eligibility for access to classified information or eligibility to hold a sensitive position. Procedures for administrative due process for contractor personnel continue to be governed by DOD Directive 5220.6, subject to the updated substantive changes in the AGs, effective June 8, 2017. Application of the AGs that were in effect when the SOR was issued would not affect my decision in this case.

Applicant responded to the SOR on December 11, 2016, and requested a hearing. The case was assigned to me on June 20, 2017, and scheduled for hearing on August 1, 2017. The Government's case consisted of ten exhibits. (GEs 1-10) Applicant relied on one witness (himself) and eight exhibits. (AEs A-H) The transcript was received on August 10, 2017.

Procedural Issues

Before the close of the hearing, Applicant requested the record be kept open to permit him the opportunity to supplement the record with an updated mortgage statement from his home lender who foreclosed on his home in 2011. For good cause shown, Applicant was granted seven days to supplement the record. Department Counsel was afforded two days to respond. Applicant did not supplement the record.

Summary of Pleadings

Under Guideline F, Applicant allegedly (a) filed for Chapter 13 bankruptcy relief in March 1992 (dismissed in March 1993); (b) filed for Chapter 7 bankruptcy relief in December 1995 (discharged in March 1996); (c) filed for Chapter 13 bankruptcy relief in February 2012 (discharged in November 2014); (d) incurred a student loan delinquency in the amount of \$45,736; and (e) failed to timely file federal tax returns for tax years 2009 and 2011-2012, as required. Allegedly, the timely filing of his tax returns for tax years 2009 and 2011-2012 and incurred student loan debt have not been resolved.

In his response to the SOR, Applicant admitted the allegations covered by SOR ¶¶ 1.a-1.d with explanations, while denying the allegations covered by SOR ¶ 1.e with explanations. He claimed he pursued a loan modification with his first home lender and was unsuccessful. He further claimed that after he was denied a loan modification for the last time in 2011, his home was foreclosed and sold. He claimed that he engaged an attorney and after fulfilling his retainer agreement payments (\$2,200 in advance) called for in his retainer agreement, filed for Chapter 13 bankruptcy relief in 2012 and was granted a discharge upon completing his payment plan in November 2014.

Addressing his student loan debts, Applicant claimed that he co-signed for a student loan for his son, who ceased making payments on the loan while unemployed and unable to obtain a deferment. Applicant claimed that he worked out an approved payment plan with the lender and has been making agreed \$250 monthly payments to the lender. He also claimed to have respect for the security process and emphasized his

service in the Gulf War as an Air Force enlistee, only to return to face divorce and bankruptcies in 1992 and 1995, and again in 2012.

Findings of Fact

Applicant is a 50-year-old staff field engineer for a defense contractor who seeks a security clearance. The allegations covered in the SOR and admitted by Applicant are incorporated and adopted as relevant and material findings. Additional findings follow.

Background

Applicant married in June 1986 and divorced in March 1991. (GEs 1 and 4 and Applicant's SOR response) He has one child from this marriage. He remarried in April 1994 and has one child from this marriage. (GEs 1 and 4 and Applicant's SOR response)

Applicant earned an associate's degree in February 2005. He took on-line classes between November 1999 and May 2006 and other classes between January 2015 and the present.. He reported no degree or diploma in either instance (GE 1) He enlisted in the Air Force (AF) in September 1985 and served 21 years of active duty before being granted an honorable discharge for medical reasons in March 2006. (GE 1 and AE I)

Applicant has worked for his current defense contractor employer since August 2008 on a recurrent basis. (GEs 1-2; Tr. 71-72) Between March 2006 and August 2008, he worked as a criminal intelligence analyst for a federal government agency. (GEs 1-2; tr. 68-69)

Applicant's finances

After returning from military deployment in 1992, Applicant encountered divorce-related financial issues that he was ill-prepared to address. In an effort to buy him more time to pay off his accumulated debts, he filed for Chapter 13 relief in March 1992. (GEs 1-2, Applicant's SOR response, AE A) Unable to keep up with the payments with his limited income, he fell behind with his trustee payments, and his Chapter 13 petition was dismissed by the court. (GE 5) On the advice of his bankruptcy counsel, he petitioned for Chapter 7 bankruptcy relief in December 1995. (GE 6) Applicant's Chapter 7 petition was discharged in March 1996 as a no-asset case. (GE 6)

Following his After purchase of a second home in April 2010, Applicant encountered difficulties in keeping up with his mortgage payments on the \$222,285 mortgage covering the first home he purchased in May 2006 for around \$200,000. After missing a payment in July 2010, he explored loan modifications with his lender. (GEs 2 and 8-10, Applicant's SOR response, and AE A; Tr. 75-76, 79-82, 89-90) Unable to work out a loan modification with the lender on his first home after purchasing his second home, he lost the first home to foreclosure by the first mortgagee in 2011. (GEs 3, 8-10, and AE A) After selling the home at public auction for \$130,000, the lender was left with a \$70,000 deficiency balance on the loan. (Tr. 76-77)

On the advice of his bankruptcy attorney, Applicant petitioned for Chapter 13 relief in February 2012. (GE 7) In his petition, he listed the \$216,378 mortgage claim of his current mortgagee on his second home, as well as unsecured, nonpriority claims totaling \$161,148 and an unsecured priority tax lien of the Internal Revenue Service (IRS) of \$1,900 for 2009 taxes owed. (GE 7)

Applicant completed the requirements of his approved Chapter 13 plan (inclusive of on-line credit counseling) and was credited by the Chapter 13 trustee with making trustee payments of \$17,094. (GE 7) Payments included the balance of funds owed the IRS under his 2011 installment agreement. Applicant received his Chapter 13 discharge in November 2014. (GE 7)

Records confirm that Applicant co-signed for a private student loan to his son in October 2006. (GEs 8-10) For the first four years, Applicant's son was able to cover the monthly payments called for under the terms of his student loan. (GEs 8-10 and AE A; Tr. 113) By June 2015, Applicant's son had ceased making payments on the loan and defaulted on the note's terms. After earning an associate's degree in 2015, his son worked part-time jobs while looking for full-time employment and did not have enough money to make his loan payments. (Tr. 113)

Called upon by the lender to honor his loan obligations as a co-signor of the loan, Applicant entered into a repayment agreement with the lender in January 2013. (AE B) Applicant has continued to make the \$250 monthly payments called for in his loan agreement since January 2017. (AE B) When he has completed 12 payments, he will be eligible to complete a permanent payment agreement. (AE B and Applicant's SOR response) To date, he has made monthly loan payments exceeding \$3,200. (AE B)

Both in Applicant's tax transcripts covering tax year 2009 and in the installment agreement he completed in August 2011 covering tax year 2009, he was credited by the IRS with filing his 2009 federal tax return untimely in March 2011. (GE 2) Penalties for untimely filing were imposed by the IRS in the amount of \$865. (GE 2 and AEs D-E; Tr. 91) Under the terms of his installment agreement, he agreed to make monthly payments of \$100, to run until the IRS's calculated \$5,364 debt for tax year 2009 is fully paid. (AE D) Applicant's payments included trustee payments under his 2012 Chapter 13 petition to satisfy the IRS's \$1,900 priority tax claim on moneys still owed by Applicant pursuant to the terms of his 2011 installment agreement with the IRS. (GE 7) Applicant completed his installment plan in 2016 and has a zero balance for tax payments owed for tax year 2009. (GE 2; Tr. 94-95)

By contrast, Applicant documented his timely filing of his 2010 federal tax return in March 2011 and issued \$3,596 refund, adjusted to cover taxes owed for 2009. (GE 2; Tr. 91-92) While Applicant's 2011 tax return reflects a June 2012 filing date, no penalties for late filing were reported in the IRS transcript covering the 2011 tax year. (GE 2) The best inferences to draw is that Applicant requested and received an automatic filing extension,

good for six months.(GE 2) The transcript covering Applicant's 2011 tax period reported no taxes owing for this tax year. (GE 2)

Similar to the tax reporting detailed in Applicant's 2009 IRS transcript, Applicant's IRS transcript covering tax year 2012 reported his untimely filing of his tax return for that year. For 2012, Applicant was credited with filing his 2012 tax return in August 2013 and reporting an amount due of \$2,173. (GE 2 and AE C) While Applicant could not be certain of including an extension request with his filed return (Tr. 91), the IRS transcript for tax year 2012 reported an imposed penalty of \$293 for late filing and added interest for his late payment. (GE 2) The transcript made no mention of an extension request. (GE 2) The IRS transcript covering tax year 2012 confirmed that Applicant's 2011 installment agreement was satisfied in May 2016. (GE 2)

Tax transcripts covering Applicant's filed tax returns for tax years 2013 and 2014 report timely filings with no late filing penalties imposed for either year. (GE 2) Likewise, Applicant is credited with filing a timely federal tax return for tax year 2015. (GE 2) Neither transcript noted any penalties imposed for late filing.

Character references, awards, and commendations

Applicant is well-regarded by his managers and supervisors. (AE J) They credited him with displaying exceptional leadership and being a person with a strong moral compass and a history of success in meeting current and future challenges. (AE J)

Applicant's managers and supervisors noted Applicant's unique ability to mentor and help subordinates and customers in exercising sound maintenance practices and delivering quality services. They both vouched for his trustworthiness and reliability and describe him as a highly successful supervisor, committed to achieving results in the performance of his job and being accountable to others. (AE J)

During his 21 years of military service, Applicant earned a number of awards and commendations recognizing his Air Force service. (AE I) His cited awards include the following: AF Recognition Medal; National Defense Service Medal w/1 Bronze Service Star (BSS); Southwest Asia Service Medal; Korean Defense Service Medal; Global War on Terror Service Medal; AF Overseas Long Tour Ribbon w/1 OLC; AF Longevity Service Award w/4 OLCs; NCO Professional Military Education Graduate Ribbon w/1 OLC; Small Arms Expert Marksmanship ribbon/Rifle; AF Training Ribbon; and Kuwait Liberation Medal. (AE I)

Applicant's performance evaluations covering the periods of June 2009 through February 2016 credited Applicant with composite ratings exceeding commitments. (AE K) His overall ratings include consistent credits for his demonstrated personal integrity, honesty and conduct throughout every category of job appraisal. (AE K) Noted performance attributes are doing what is right, respecting others, and performing with excellence. (AE K)

Policies

The SEAD 4, App. A lists guidelines to be used by administrative judges in the decision-making process covering security clearance cases. These guidelines take into account factors that could create a potential conflict of interest for the individual applicant, as well as considerations that could affect the individual's reliability, trustworthiness, and ability to protect classified information. These guidelines include conditions that could raise a security concern and may be disqualifying (disqualifying conditions), if any, and many of the conditions that could mitigate security concerns.

These guidelines must be considered before deciding whether or not a security clearance should be granted, continued, or denied. The guidelines do not require administrative judges to place exclusive reliance on the enumerated disqualifying and mitigating conditions in the guidelines in arriving at a decision. Each of the guidelines is to be evaluated in the context of the whole person in accordance with App. A, AG ¶ 2(c).

In addition to the relevant AGs, administrative judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in App. A, AG ¶ 2(d) of the AGs, which are intended to assist the judges in reaching a fair and impartial commonsense decision based upon a careful consideration of the pertinent guidelines within the context of the whole person.

The adjudicative process is designed to examine a sufficient period of an applicant's life to enable predictive judgments to be made about whether the applicant is an acceptable security risk. The following App A, AG ¶ 2(d) factors are pertinent: (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.

Viewing the issues raised and evidence as a whole, the following individual guidelines are pertinent in this case:

Financial Considerations

The Concern: 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 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 of

dependence. An individual who is financially overextended is at greater risk of having to engage in illegal acts or otherwise questionable acts to generate funds. . . . AG ¶ 18.

Burden of Proof

By virtue of the principles and policies framed by the AGs, a decision to grant or continue an applicant's security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires administrative judges to make a commonsense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a security clearance depends, in large part, on the relevance and materiality of that evidence. See *United States, v. Gaudin*, 515 U.S. 506, 509-511 (1995).

As with all adversarial proceedings, the judge may draw only those inferences which have a reasonable and logical basis from the evidence of record. Conversely, the judge cannot draw factual inferences that are grounded on speculation or conjecture.

The Government's initial burden is twofold: (1) it must prove by substantial evidence any controverted facts alleged in the SOR, and (2) it must demonstrate that the facts proven have a material bearing to the applicant's eligibility to obtain or maintain a security clearance. The required materiality showing, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a security clearance. Rather, the judge must consider and weigh the cognizable risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the evidentiary burden shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation, or mitigation. Based on the requirement of Exec. Or. 10865 that all security clearances be clearly consistent with the national interest, the applicant has the ultimate burden of demonstrating his or her clearance eligibility. "[S]ecurity-clearance determinations should err, if they must, on the side of denials." See *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

Analysis

Security concerns are raised over Applicant's record of recurrent petitions for Chapter 13 relief between 1992 and 2014, one of which was converted into a Chapter 7 petition in 1995 and ultimately discharged in 1996. Additional security concerns are raised over Applicant's failure to promptly address a default and charge-off of a student loan that Applicant co-signed for his son in 2006. And security concerns are raised over Applicant's failure to timely file his 2009 and 2011-2012 federal tax returns.

Applicant's bankruptcy petitions (three in all) filed over a 12-year period, his incurring of a delinquent student loan debt as a co-signer for his son, and his failure to file timely federal tax returns in 2009 and allegedly in 2011 warrant the application of three of the disqualifying conditions (DC) of the Guidelines: DC ¶¶ 19(a), "inability to satisfy debts"; 19(c), "a history of not meeting financial obligations"; and 19(f), "failure to file or fraudulently filing annual Federal, state, or local income tax returns or failure to pay annual Federal, state, or local income tax as required."

Applicant's admitted bankruptcy petitions and student loan delinquency negate the need for any independent proof. See *McCormick on Evidence*, § 262 (6th ed. 2006). Each of Applicant's admitted bankruptcy filings and delinquent student loan debt are fully documented and create some judgment issues. See ISCR Case 03-01059 at 3 (App. Bd. Sept. 24, 2004).

Financial stability in a person cleared to protect classified information is required precisely to inspire trust and confidence in the holder of a security clearance that entitles him to access classified information. While the principal concern of a security clearance holder's demonstrated financial difficulties is vulnerability to coercion and influence, judgment and trust concerns are implicit in cases involving debt delinquencies.

Historically, the incurring of delinquent debts and timing of filing federal tax returns and resolving federal tax delinquencies are critical to an assessment of an applicant's trustworthiness, reliability, and good judgment in following rules and guidelines necessary for those seeking access to classified information or to holding a sensitive position. See ISCR Case No. 14-06808 at 3 (App. Bd. Nov. 23, 2016); ISCR Case No. 14-01894 at 5 (App. Bd. Aug. 18, 2015). Applicant's cited extenuating circumstances associated with his three Chapter 13 petitions (inclusive of the 1995 petition that was converted to a Chapter 7 petition and ultimately discharged) provide some grounds for crediting him with extenuating circumstances. Based on his cited circumstances, MC ¶ 20(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," partially applies to Applicant's situation.

To his credit, Applicant fulfilled the conditions established by the courts considering his 1995 Chapter 13 petition (converted to a Chapter 7 petition the same year), and he is in full compliance with the installment agreements he completed with his son's student loan lender and the IRS relative to his late filed 2009 federal tax return.

Applicant's untimely filings of his 2009 and 2012 federal tax returns are well-documented. Both his 2009 and 2012 tax returns were late: one month late for his 2009 tax return and two months late for his 2012 return. Late filing penalties were imposed in both instances. So, the record is a little mixed with respect to Applicant's timing of his tax filings between 2009 and 2015.

Based on both the age and prior discharges of Applicant's past bankruptcies and his demonstrated compliance with the installment agreements he completed with SOR creditor ¶ 1.d and the IRS concerning SOR creditor ¶ 1.e, he may claim the mitigation benefits of the "acting responsibly" prong of MC ¶ 20(b), as well as the benefits of other applicable mitigating conditions. MC ¶ 20(d), "the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts," is fully applicable. See ISCR Case No. 15-06440 at 3-5 (App. Bd. Dec. 26, 2017); ISCR Case No. 05-11366 at 4 n.9 (App. Bd. Jan. 12, 2007) (citing ISCR Case No. 99-0462 at 4 (App. Bd. Nov. 29, 2005)).

By establishing his compliance with the terms of his 2011 IRS installment agreement, Applicant is also entitled to the full mitigating benefits of MC ¶ 20(g), "the individual has made arrangements with the appropriate tax authority to file or pay the amount owed and is in compliance with those arrangements." See ISCR Case No. 16-02246, at 2 (App. Bd. Dec. 8, 2017).

Because of the age and limited nature of the on-line counseling he received as conditions of his Chapter 13 bankruptcy filings, MC ¶ 20(c), "the individual has received or is receiving financial counseling for the problem from a legitimate and credible source, such as a non-profit counseling service, and there are clear indications that the problem is being resolved or is under control," while potentially applicable, has very limited mitigation benefit to Applicant. None of the other potentially applicable mitigating conditions are available to Applicant.

In evaluating Guideline F cases, the Appeal Board has stressed the importance of a "meaningful track record" that includes evidence of actual debt reduction through voluntary payment of debts, and implicitly where applicable the timely filing of tax returns. ISCR Case No. 07-06482 at 2-3 (App. Bd. May 21, 2008) In Applicant's case, his reported untimely filing of his 2009 federal return was implicitly approved by the IRS in the 2011 installment agreement he completed and fulfilled. Favorable to Applicant, too, are the credited timely filings of his 2010-2011 and 2013-2015 federal tax returns. Summarized, Applicant's case is clearly distinguishable from the facts and circumstances covered in ISCR Case No. 15-06440, *supra*, at 4-5.

Whole-Person Assessment

In making a whole-person assessment of Applicant's trustworthiness, reliability, and good judgment, consideration is given to not only the financial issues raised in the SOR, but the contributions he has made to his employer, his military service, and the defense industry in general.

Applicant's supervisors credit him with displaying exceptional leadership and moral character. They commended him for not only his significant contributions as a

supervisor and mentor, but for his all around trustworthiness and reliability. His performance evaluations are superior and reflect consistent credits for his demonstrated personal integrity, honesty, and conduct throughout every category of his job appraisal. To Applicant's credit, too, are the numerous awards and citations he earned during his 21 years of military service in the AF.

Favorable credit is also warranted for the corrective steps Applicant has taken with his creditors. Each of his bankruptcy petitions resulted in either discharges or a successful conversion to Chapter 7 that ultimately was discharged. Installment agreements in place with Applicant's student loan lender and IRS credit Applicant with compliance.

Overall, Applicant's actions to date in addressing his finances are promising and enable him to overcome any reasonable doubts about his trustworthiness, reliability, and ability to protect classified information. See AG ¶ 18. Conclusions are warranted that his finances are sufficiently stabilized at this time to meet minimum eligibility requirements for holding a security clearance.

Favorable conclusions are warranted with respect to SOR ¶¶ 1.a-1.e. Criteria for satisfying the eligibility requirements for holding a security clearance are satisfied.

Formal Findings

In reviewing the allegations of the SOR and ensuing conclusions reached in the context of the findings of fact, conclusions, conditions, and the factors listed above, I make the following formal findings:

GUIDELINE F (FINANCIAL CONSIDERATIONS): FOR APPLICANT

Subparagraphs 1.a-1.e:

For Applicant

Conclusions

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue Applicant's eligibility to hold a security clearance. Clearance is granted.

Roger C. Wesley
Administrative Judge

