



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



In the matter of:

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ISCR Case No. 17-01118

Applicant for Security Clearance

Appearances

For Government: Chris Morin, Esq., Department Counsel

For Applicant: *Pro se*

08/29/2018

Decision

TUIDER, Robert, Administrative Judge:

Applicant mitigated security concerns under Guideline E (personal conduct), however, he was unable to mitigate security concerns under Guideline F (financial considerations). Clearance is denied.

Statement of the Case

On October 27, 2017, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines F and E. On November 22, 2017, Applicant responded to the SOR, and requested a hearing before an administrative judge.

On March 20, 2018, the Defense Office of Hearings and Appeals (DOHA) assigned the case to me. On April 2, 2018, DOHA issued a notice of hearing scheduling the hearing for May 9, 2018. The hearing was convened as scheduled. Government Exhibits (GE) 1 through 4 were admitted in evidence without objection. Applicant testified, did not call any witnesses, and did not offer any exhibits. I held the record open until June 8, 2018 to afford the Applicant an opportunity to submit additional evidence. Applicant timely submitted Applicant Exhibits (AE) AE A through T, which were admitted in evidence without objection. On May 18, 2018, DOHA received the hearing transcript (Tr.).

Findings of Fact

Background Information

Applicant is a 57-year-old logistical analyst employed by a defense contractor since May 2017. (Tr. 12-14) He seeks to reinstate his security clearance which was terminated when his previous employment ended as a defense contractor. A clearance is a requirement of his continued employment. (Tr. 14-15)

Applicant graduated from high school in 1980. He enlisted in the U.S. Army in 1980 and retired in 2007 as a sergeant first class (pay grade E-7), after honorably serving 27 years. He was awarded a bachelor of science degree in business management in 2001. (Tr. 16-17; AE N, AE Q) During those 27 years, he served four combat tours – one year in Iraq and three years in Afghanistan. (Tr. 17-18)

Applicant married in 1999 and has one adult daughter and one adult stepdaughter. His wife is employed fulltime as a traveling nurse. Applicant's daughter is attending dental school and his stepdaughter is employed fulltime for a health care company. Applicant is currently helping his daughter who is attending dental school with tuition and expenses. (Tr. 18-21)

Financial Considerations

The SOR alleges 12 allegations under this concern, ranging from a \$45 delinquent medical account to a 2013 \$98,973 Federal tax lien. The debts primarily consist of consumer debt and medical copays. (SOR Answer; GE 1-4)

After Applicant retired from the Army, his health gradually declined. By 2015, he experienced a significant weight loss and suffered from depression. Applicant self-described himself as a "shell of the man that I was." Appellant's physician placed him on anti-depressants and referred him to Veterans Affairs (VA) for an evaluation. Around the 2015 timeframe, his condition had deteriorated to the point that it became necessary for him to live with his sister for "like five months." (Tr. 22-26) Applicant admitted that he was working and had the money to pay his bills, but as a result of his depression and debilitated state, he let a number of things slip to include his bills. (Tr. 26-28) Applicant stated that he has a pending VA disability claim, but did not provide documentation of same.

Department Counsel questioned Applicant regarding each of his SOR debts. Applicant acknowledged what he needed to provide and was generally very compliant in his post-hearing submissions. Apart from his Federal tax lien, discussed below, his hearing and post-hearing evidence addressed his SOR debts demonstrating that he either paid his debts, has a plan in place, or is making progress towards resolving his debts. (Tr. 28-35, 41-47, 55; AE A-D, AE F-H, AE J, AE M)

However, problematic is his \$98,973 Federal tax lien. Per Applicant's testimony, the tax lien stems from his failure to file his Federal income returns for 2008 to 2009. He

explained that he was overseas and left his wife in charge of the family finances. Applicant stated “for some reason she didn’t file the taxes.” (Tr. 35-36) When Applicant returned home from overseas, he discovered that his tax returns were not filed and retained a tax attorney to address the matter. His tax attorney developed cancer and Applicant then hired a tax firm to deal with his tax issue. Per his testimony, Applicant has been making payments towards his tax lien which had been reduced to approximately \$79,000. However, Applicant did not provide documentation to support this and as Department Counsel noted in his forwarding email, the settlement from his tax firm remains prospective and does not yet appear accepted by the IRS. (Tr. 36-41, 45; AE I, AE K, AE L (see tax firm email dated December 20, 2017), AE L) Applicant’s documentation pertaining to his tax lien provides little insight regarding its current status or whether the lien is resolved or being resolved.

Applicant estimates that his annual salary is \$44,000 and his annual military retirement is \$32,000, for a total of \$76,000. As noted, he has a pending VA disability claim pending. (Tr. 21-22) Applicant’s budget reflects that he is living within his means and has \$2,087 “left over” at the end of each month. (Tr. 51-55; AE E)

Personal Conduct

The SOR alleged and Applicant denied that he deliberately falsified his December 2015 security clearance application when asked whether he ever had a judgment entered against him or a lien placed against his property for failing to pay taxes or other debts in the last seven years, when in fact he had a 2013 Federal tax lien \$98,973 lien placed against him, and a 2015 \$3,122 judgment filed against him. Additionally, he was asked whether in the last seven years he had any bills or debts turned over to a collection agency, had any account or credit card suspended, charged off, or cancelled for failing to pay as agreed, or had his wages, benefits, or assets garnished or attached for any reason, which was not accurate as evidenced by the debts listed in SOR ¶¶ 1.a through 1.g, and 1.j through 1.l. Applicant answered no to both questions.

Applicant testified that he was “pretty ill” when he completed the security clearance application and “just marked it and moved on.” He added that at the time he was suffering from depression and was on antidepressant medication. He further stated that he was not focused and “pretty much out of it” and did not intend to lie. Applicant acknowledged that his answers were incorrect or that he may have misinterpreted the questions, but asserted that he did not intentionally falsify his security clearance application. (SOR Answer; GE 1; Tr. 47-51) In reviewing Applicant’s August 10, 2016 Office of Personnel Management Personal Subject Interview (OPM PSI), he made numerous other mistakes when completing his security clearance application relating to other areas such as personal information, education, family and associates, and prior investigations and clearances. (GE 2)

Character Evidence

Applicant submitted Army evaluation reports from the latter part of his career, Army records, a recent work performance evaluation, and a work-related reference letter. These documents were favorable and support reinstatement of his security clearance. (AE O - T)

Policies

This case is adjudicated 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), which became effective on June 8, 2017.

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 to be 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, administrative judges apply the guidelines 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."

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 the 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 the applicant may deliberately or inadvertently fail to safeguard classified information.

Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that adverse 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

Financial Considerations

AG ¶ 18 articulates the security concern for financial problems:

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

The Appeal Board explained the scope and rationale for the financial considerations security concern in ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012) (citation omitted) as follows:

This concern is broader than the possibility that an applicant might knowingly compromise classified information in order to raise money in satisfaction of his or her debts. Rather, it requires a Judge to examine the totality of an applicant’s financial history and circumstances. The Judge must consider pertinent evidence regarding the applicant’s self-control, judgment, and other qualities essential to protecting the national secrets as well as the vulnerabilities inherent in the circumstances. The Directive presumes a nexus between proven conduct under any of the Guidelines and an applicant’s security eligibility.

AG ¶ 19 includes three disqualifying conditions that could raise a security concern and may be disqualifying in this case: “(a) inability to satisfy debts;” “(c) a history of not meeting financial obligations;” and “(f) failure to file or . . . to pay annual Federal . . . income tax as required.”

Applicant did not file and pay his Federal income taxes for tax years 2008 to 2009 that led to a \$98,973 tax lien. Based on this and other information in the SOR, the record established the disqualifying conditions in AG ¶¶ 19(a), 19(c), and 19(f) requiring additional inquiry about the possible applicability of mitigating conditions.

AG ¶ 20 lists seven potential mitigating conditions:

(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;

(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;

(f) the affluence resulted from a legal source of income; and

(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.

AG ¶¶ 20(a), (b) and (d) are applicable in whole or in part to all of the SOR debts except SOR ¶ 1.h, which is a 2013 \$98,973 Federal tax lien. Applicant realized that he had tax issues, he initially retained the services of a tax attorney and later a tax service. Unfortunately, his evidence does not demonstrate that his tax problems are resolved nor does it reflect an accurate snapshot of his pending IRS lien. It is also of concern that this lien stems from a failure to file his Federal income taxes as far back as 2008 to 2009. That said, Applicant is current on his other debts and lives within his means.

Failure to file Federal tax returns and failure to pay annual Federal income tax is a serious security concern. Applicant is aware of his obligations to remain current on his Federal income taxes. Apart from this two-year tax filing gap that occurred approximately ten years ago, there is no evidence to suggest that he failed to file his tax returns before or since. DOHA Appeal Board has commented:

Failure to file tax returns suggests that an applicant has a problem with complying with well-established governmental rules and systems. Voluntary compliance with such rules and systems is essential for protecting classified information. ISCR Case No. 01-05340 at 3 (App. Bd. Dec. 20, 2002). As we

have noted in the past, a clearance adjudication is not directed at collecting debts. See, e.g., ISCR Case No. 07-08049 at 5 (App. Bd. Jul. 22, 2008). By the same token, neither is it directed toward *inducing an applicant to file tax returns*. Rather, it is a proceeding aimed at evaluating an applicant's judgment and reliability. *Id.* A person 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. Aug. 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).

ISCR Case No. 14-04437 at 3 (App. Bd. Apr. 15, 2016) (emphasis in original). See ISCR Case No. 14-05476 at 5 (App. Bd. Mar. 25, 2016) (citing ISCR Case No. 01-05340 at 3 (App. Bd. Dec. 20, 2002)); ISCR Case No. 14-01894 at 4-5 (App. Bd. Aug. 18, 2015). The Appeal Board clarified that even in instances where an “[a]pplicant has purportedly corrected [the applicant’s] federal tax problem, and the fact that [applicant] is now motivated to prevent such problems in the future, does not preclude careful consideration of [a]pplicant’s security worthiness in light of [applicant’s] longstanding prior behavior evidencing irresponsibility” including a failure to timely file federal income tax returns. See ISCR Case No. 15-01031 at 3 and note 3 (App. Bd. Jun. 15, 2016)

In ISCR Case No. 15-01031 at 2 (App. Bd. Jun. 15, 2016), the Appeal Board reversed the grant of a security clearance, and noted the following primary relevant disqualifying facts:

Applicant filed his 2011 Federal income tax return in December 2013 and received a \$2,074 tax refund. He filed his 2012 Federal tax return in September 2014 and his 2013 Federal tax return in October 2015. He received Federal tax refunds of \$3,664 for 2012 and \$1,013 for 2013.

Notwithstanding the lack of any tax debt owed when the tax returns were filed in ISCR Case No. 15-01031 (App. Bd. June 15, 2016), the Appeal Board provided the following principal rationale for reversing the grant of a security clearance, “By failing to file his 2011, 2012, and 2013 Federal income tax returns in a timely manner, Applicant did not demonstrate the high degree of good judgment and reliability required of persons granted access to classified information.” ISCR Case No. 15-01031 at 4 (App. Bd. Jun. 15, 2016) (citations omitted).

On June 8, 2017, the new AGs went into effect. However, Applicant is unable to gain much relief from the new AGs because his evidence does not support the notion that he “made arrangements with the appropriate tax authority to file [all required federal income tax returns] . . . and is in compliance with those arrangements.” AG ¶ 20(g). Apart from his Federal tax lien, his other SOR debts are mitigated. However, the amount of his tax lien and length of time this debt has been lingering raise serious concerns that Applicant has not adequately addressed.

Personal Conduct

AG ¶ 15 articulates 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 or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes.

AG ¶ 16 describes one condition that could raise a security concern and may be disqualifying in this case:

(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 denied deliberately falsifying his December 2015 security clearance application. Given his experience completing security clearance applications, Applicant knew that lying about any aspect of his security clearance history would be discovered.

Based on the available information, it appears Applicant was confused or careless when completing his December 2015 security clearance application. His lack of attention to detail cannot be imputed as a willful and deliberate attempt to undermine the investigative process. Although the information he provided proved to be incorrect, I attribute this lapse to carelessness and am satisfied that he did not deliberately fail to disclose the required information.¹

In summary, Applicant was able to mitigate personal conduct concerns stemming from allegedly falsifying his security clearance application, but he was unable to mitigate the financial considerations security concerns. In addition to evaluating the facts and applying the appropriate adjudicative factors under Guidelines F and E, I have reviewed the record before me in the context of the whole-person factors listed in AG ¶ 2(a). Applicant has been gainfully employed, and he is presumed to be a mature, responsible

¹ The Appeal Board has cogently explained the process for analyzing falsification cases, stating:

(a) when a falsification allegation is controverted, Department Counsel has the burden of proving falsification; (b) proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred; and (c) a Judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning the applicant's intent or state of mind at the time the omission occurred.

ISCR Case No. 03-10380 at 5 (App. Bd. Jan. 6, 2006) (citing ISCR Case No. 02-23133 (App. Bd. June 9, 2004)).

citizen. Nonetheless, without other information suggesting his financial problems are being addressed, doubts remain about his suitability for access to classified information. Protection of the national interest is the principal focus of these adjudications. Accordingly, those doubts must be resolved against the Applicant.

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.g:	For Applicant
Subparagraph 1.h:	Against Applicant
Subparagraphs 1.i – 1.l:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraphs 2.a – 2.b:	For Applicant

Conclusion

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

ROBERT TUIDER
Administrative Judge