



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



In the matter of:

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ISCR Case No. 17-02003

Applicant for Security Clearance

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Appearances

For Government: Benjamin Dorsey, Esq., Department Counsel

For Applicant: *Pro se*

10/05/2018

Decision

MURPHY, Braden M., Administrative Judge:

Applicant did not provide sufficient evidence to mitigate financial security concerns over his long history of past-due child support debts and late or unfiled annual state and federal income tax returns. Applicant's eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on July 5, 2016. On July 12, 2017, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline F, financial considerations.¹

¹ 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 Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (AG), effective June 8, 2017.

Applicant submitted an Answer to the SOR on August 9, 2017, and a more complete Answer on October 4, 2017. He requested a hearing. The case was assigned to me on April 27, 2018. On June 8, 2018, a Notice of Hearing was issued scheduling the hearing for July 11, 2018. The hearing convened as scheduled. Government's Exhibits (GE) 1 through GE 4 were admitted without objection. Applicant testified and submitted Applicant's Exhibits (AE) A through L, which were admitted without objection.²

During the hearing, the Government moved to amend the SOR by adding two allegations, based on Applicant's testimony. The motion was granted. Applicant admitted the allegations, but requested additional time to submit appropriate documentation. He also requested that the hearing be reconvened at a later date so he could address the new allegations. (Tr. 105-119)

Applicant's hearing reconvened on August 27, 2018, as scheduled. Applicant testified and submitted AE M through AE U, all of which were admitted without objection. The record closed on August 27, 2018. DOHA received the first hearing transcript (Tr.) on July 19, 2018 and the second hearing transcript (2Tr.) on September 6, 2018.

Amendment to the SOR

Based on Applicant's hearing testimony, pursuant to DOD Directive ¶ E3.1.17, the Government moved to amend the SOR to add the following allegations under Guideline F:

- 1.e. You failed to timely file your Federal tax returns for at least the 2006 through 2017 tax years, as required.
- 1.f. You failed to timely file your [home] state tax returns for at least the 2006 through 2017 tax years, as required.³

Findings of Fact

Applicant admitted SOR ¶¶ 1.a-1.d in his Answer. He admitted SOR ¶¶ 1.e and 1.f during his hearing testimony. His admissions are incorporated into the findings of fact. After a thorough and careful review of the pleadings and exhibits submitted, I make the following additional findings of fact.

Applicant is 39 years old. He has never married. He has three daughters, an 18-year-old and 12-year-old twins by two different mothers. He works in the

² AE A through AE G were attached to Applicant's Answer. (Tr. 26)

³ Hearing Exhibit II (July 11, 2018 e-mail from Department Counsel). The motion was granted without objection. Applicant also admitted the allegations. (Tr. 105-109)

telecommunications field. He has worked for his current employer, a defense contractor, since October 2016. Applicant held a security clearance at a prior position, in about 2005, but does not hold one currently. (Tr. 13-14, 37-38, 46, 49; GE 1)

Applicant's first daughter was born in 1999. Applicant had no issues paying \$325 in monthly child support for her until after the twins were born, in 2006. (Tr. 39-41, 46, 67) He testified that after a custody battle with the twins' mother, he was ordered to pay \$10,000 in past due child support. (Tr. 41-49) They previously owned a home together, and began building a home together, in about 2006, before they separated. Applicant testified that he "lost everything" as a result. Since then, Applicant has lived with his parents. (Tr. 101-103)

In 2007, Applicant was also laid off from a job as a systems installer for a security company. Until beginning his current job in 2016, he was largely self-employed or a "1099" contractor. (Tr. 39-46; 50-53) At times, income was sporadic, and he fell behind on his child support obligations for all three children. He testified that he sought to modify his child support requirements in court on numerous occasions, without success. His combined child support obligations, including for arrears, was about \$1,300 to \$1,400 per month. (Tr. 39-54)

By 2016, Applicant had about \$70,000 in past-due child support. (GE 1 at 31, GE 2) SOR ¶ 1.a, related to his twins, was \$55,342 past due. SOR ¶ 1.b, for his eldest daughter, was \$16,594 past due. (Tr. 66-67, 78-79) Applicant admitted the debts but said they are resolved and that he owed no balance. (Answer)

On several occasions, Applicant has been arrested for failure to pay child support. Two of those arrests, in June 2012 and March 2014, are alleged. (SOR ¶¶ 1.c and 1.d) (GE 1; GE 3; AE A) Applicant admitted the allegations but said he was released the same day. (Answer) Applicant testified he would go to his local county courthouse to make child support payments when he was able to do so. On these two occasions, he was behind on his payments, and arrested. Each time, he spent about three hours in jail before he could make payment arrangements, of between \$500 and \$3,000. (Tr. 55-59; Answer) Applicant was also arrested on similar charges in July 2011 and November 2016. (AE E; AE G) Those arrests are not alleged in the SOR.⁴

Applicant explained that when he began his current job in October 2016, he reported his employment to child support authorities so that payments could be withheld from his salary. Because he needed a clearance for his job, Applicant approached the mothers of his children and asked them to forgive any past-due child support. (Tr. 42-44, 64-66)

⁴ I cannot consider the non-alleged arrests as disqualifying conduct. I can consider that conduct in weighing mitigation or changed circumstances, whether Applicant has demonstrated sufficient rehabilitation, under the whole person concept, and in weighing his credibility. ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006).

They both agreed to do so. Both mothers filed motions in county court in February 2017, and specifically asked that the amount in child support arrears be forgiven so he could get a security clearance. (AE I) In an accompanying letter, one of them wrote:

. . . I would like to forgive [Applicant] his child support arrears so that he may have his security clearance at his present job. His wages are being garnished from his current paycheck and I would like to make sure he continues to pay his monthly child support as he has been doing the last few months.

The court granted both motions, and the arrears were forgiven in mid-2017. At the time, the child support in arrears for the twins was \$56,813. (Tr. 78-79, AE B; AE C) The child support in arrears for Applicant's eldest daughter was \$17,058. (Tr. 81; AE D; AE S; AE U)

Applicant's eldest daughter is now in college. He helps her out financially when he can. As of December 31, 2017, she has "aged out" of child support. State child support enforcement authorities have terminated their request to withhold income for her. (Tr. 60-61, 79-81; AE K) Applicant has made weekly child support payments of \$193.85 for his twin girls since at least July 2017. As of July 12, 2018, he has a negative balance of about \$-418. (Tr. 49, 60-62, 65-68) AE P; AE Q; AE T)

Applicant renewed his U.S. passport in December 2017. He said the State Department would not have allowed him to renew it if he had past-due child support. (Tr. 68-69; AE L) Applicant has a valid driver's license but acknowledged that his license has been suspended several times over the last 12 years because of past-due child support. (Tr. 69-70)

Applicant is paid about \$700 a week, or \$2,800 a month, after taxes. (AE R) He lives with his parents and they pay the mortgage. He contributes \$300 a month to household expenses. Earlier this year, he leased a vehicle, and has an \$800 monthly car payment. He has never had credit counseling. (Tr. 78, 81-86) Applicant stated he and his girlfriend are attempting to buy a house together, and have applied for a mortgage. He claimed that his girlfriend filled out the paperwork, "and I just signed it." (Tr. 98)

Applicant initially testified that his state and Federal taxes were current. (Tr. 73) He also said that he had filed his 2016 and 2017 Federal income tax returns late, in May 2018. (Tr. 73-74, 95)

Applicant then acknowledged that he had not filed his state or Federal income tax returns on time for tax years 2006 through 2017. He said all of his income tax returns had been filed several years late, but that he had no unfiled returns. (Tr. 73-74) He said he filed his tax returns late because he had been travelling a lot and had been "real busy" so "I didn't have time to do anything." (Tr. 75) He also said he was "not being

responsible with the paperwork.” (Tr. 95) Applicant also testified that his tax returns from before 2006 were “probably late too.” (Tr. 99)

Applicant claimed that his accountant told him he did not owe any taxes. (Tr. 77-78) He also said his mother had always prepared his tax returns. He also acknowledged that, as a 1099 employee, he was responsible for withholding and paying his own taxes, but that he had not done so. (Tr. 77-78., 93, 99-100)

Applicant claimed not to know that April 15 was the annual deadline for filing Federal income tax returns. (Tr. 77-78, 93-100) He also said, “I don’t know the exact date but I understand taxes do need to be filed.” (Tr. 96)

As a result of Applicant’s testimony, Department Counsel moved to amend the SOR, adding SOR ¶¶ 1.e, 1.f, as noted above. The motion was granted without objection. Applicant exercised his right to continue the hearing to present additional testimony and documents on the new allegations. (Tr. 105-119)

The hearing reconvened on August 27, 2018. Applicant submitted his tax documents to show that the returns and all been filed and that he did not owe any past-due taxes. He said he was also current on his child support. (2Tr. 18) He provided unsigned copies of his Federal income tax returns (Form 1040EZ) for tax years 2008 and 2010 through 2017 (but not 2006, 2007, or 2009). (AE M) He provided IRS “Wage and Income Transcripts” for tax years 2008-2017, and other information from his “W-2” tax forms for tax years 2007-2017. (AE N; AE O) There is nothing on the face of the tax documents Applicant provided to indicate that any of his Federal tax income tax returns have in fact been filed. Applicant provided no copies of any state income tax returns for any tax years alleged. (2006-2017)

After his first hearing, in July 2018, Applicant went to the IRS field office and the state comptroller to make sure all his past-due state and Federal income tax returns were filed, and all his income taxes were paid, before he returned for his reconvened hearing. He was told by state and Federal tax authorities that his state and Federal income tax returns for tax years 2010, 2011 2016, and 2017 had been filed. The remaining years alleged (for tax years 2006-2009 and 2013-2015) were found to be unfiled. Applicant testified that he filed those returns, and all unfiled state returns before returning for his reconvened hearing. (2Tr. 19-25)

This testimony, and evidence, contradicted Applicant’s previous assertions that all of his overdue state and Federal income tax returns had been filed, if belatedly. Applicant acknowledged when his hearing reconvened that his prior testimony on this point was incorrect, but said he did not know at the time that he had several years of unfiled returns. (2Tr. 27-29)

Applicant denied that receiving a security clearance had anything to do with the timing of his actions. “No, that’s not it. Needed the paperwork done. Plus, I’m trying to get a house and a lot of other stuff. Needed to make sure everything’s straight with

that.” (2Tr. 25-26) He acknowledged that he had been negligent in not filing his tax returns on time, and said it would not happen again. (2Tr. 29)

Policies

It is well established that no one has a right to a security clearance. As the Supreme Court noted in *Department of the Navy v. Egan*, “the clearly consistent standard indicates that security determinations should err, if they must, on the side of denials.”⁵

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 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(a), 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 not drawn 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 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

⁵ *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988).

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

Analysis

Guideline F, Financial Considerations

The security concern 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. . . .

The guideline sets forth several conditions that could raise security concerns under AG ¶ 19. The following are potentially applicable in this case:

- (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 . . . annual Federal, state, or local income tax returns . . . as required.

Applicant has a long history of failing to comply with child support obligations for his three children. He first fell behind on those obligations after the birth of his twin daughters, in 2006. These delinquent debts are disclosed on his SCA, and are listed on a 2016 credit report. SOR ¶¶ 1.a and 1.b (totaling over \$70,000) are established. Applicant also has been arrested for failure to pay child support. Two of those arrests, in 2012 and 2014, are alleged. (SOR ¶¶ 1.c, 1.d) AG ¶¶ 19(a), 19(b) and 19(c) are established by the evidence.

Applicant also has a long history of failing to file his state and Federal income tax returns on time, as required. He admitted at his hearing that his state and Federal income tax returns for tax years 2006-2017 had been filed late. (SOR ¶¶ 1.e, 1.f) AG ¶ 19(f) applies.

Conditions that could mitigate financial considerations security concerns are provided under AG ¶ 20. The following 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;

(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 the appropriate tax authority to file or pay the amount owed and is in compliance with those arrangements.

Applicant fell behind on his child support due to a variety of circumstances. He first fell behind on child support in 2006, after the birth of his twin girls. The resulting child support obligations (which he could not pay) also impacted his ability to pay child support for his eldest daughter. This was not a circumstance beyond his control. Applicant did lose his job in 2007, and was self-employed (as a "1099" contractor employee) for some of the next nine years. His income during this period was at times sporadic. The first prong of AG ¶ 20(b) has some obligation to his child support debt. However, for full credit, Applicant must show reasonable action under the circumstances. He has not done this. AG ¶ 20(b) therefore does not fully apply.

Each time he was arrested, Applicant quickly arranged to pay what was necessary to secure his release. Two of those arrests were alleged. (SOR ¶¶ 1.c and 1.d). Two other arrests were not, including one as recently as 2016. That undercuts any finding that Applicant has demonstrated changed circumstances or sufficient rehabilitation.⁶

Applicant declared his past-due child support on his SCA. He realized that that debt might impact his eligibility for a security clearance. In early 2017, he went to the mothers of his children and asked them both to relinquish any claims on past-due child support. They both did so, filing motions in county court to forgive the child support debt in arrears. One of the mothers specifically stated in her cover letter that she made the motion "so that he may have his security clearance at his present job," thereby allowing

⁶ ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006).

him to continue paying child support. Those motions were both granted in the county court, and the past-due child support debt was forgiven.

Applicant's child support is therefore no longer delinquent. His eldest child, now 18, has aged out of child support, and his income is no longer being withheld for her. Applicant is current on his child support obligations for his two younger daughters. In that sense, his child support delinquencies are no longer ongoing.

But that does not end the analysis. The DOHA Appeal Board has repeatedly held that the timing of an applicant's efforts to resolve his debts is a relevant consideration. An applicant who resolves financial problems only when his clearance might be imperiled raises questions about his willingness to follow the sometimes complex rules governing classified information when his personal interests are not at stake.⁷

Here, Applicant sought to "resolve" his child support delinquencies by convincing the mothers of his children to forgive them. He did so, as his own documents demonstrate, precisely because the debt could impact his suitability for a clearance – a clearance he needed for his job, and a job which he needed to continue to pay his current child support obligations. The mere fact that the debts are now forgiven does not bar me from considering how they got so large in the first place. And the simple fact is that Applicant's child support debts got so large because he made no real effort to pay them for a long time.

In short, the behavior which led to Applicant's child support debts is an ongoing concern. It was not infrequent, and did not occur under such circumstances that it is unlikely to recur. His actions continue to cast doubt on his current reliability, trustworthiness, or good judgment. AG ¶ 20(a) does not apply. Further, given his overall track record, the fact that the child support is no longer delinquent does not establish that Applicant undertook good-faith efforts to resolve them (even though he has been paying his debts since October 2016). AG ¶ 20(d) also does not fully apply.

None of the mitigating conditions apply to Applicant's tax returns. Applicant has not timely filed his state or Federal income tax returns for many years. This was due to his own disregard for tax filing requirements, and for rules and regulations in general.

Applicant's tax filing problems began in tax year 2006, the same year he began to fall behind on child support, and they continue to this day. He has essentially no track record of compliance with state and Federal tax filing requirements, nor did he seem to have much of an understanding of them at hearing.

As the DOHA Appeal Board has long held,

⁷ ISCR Case No. 16-03187 at 4 (App. Bd. Aug. 1, 2018); ISCR Case No. 14-03358 at 4 (App. Bd. Oct. 9, 2015)

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 towards 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).⁸

Applicant testified during his first hearing that all of his state and Federal income tax returns since 2006 had been filed, though they were all filed late. In fact, several of the returns at issue had not been filed. His testimony at the first hearing on that point was, at best, incorrect. The tax documents he submitted at his reconvened hearing were unsigned. There was no indication that any of them had in fact been filed, even belatedly. Several Federal returns were not provided, and no state returns were provided at all. Even if Applicant had shown that all his returns had now been filed, he has not shown enough good-faith efforts to establish mitigation. Given his track record, Applicant did not establish that his tax issues are unlikely to recur, or that they no longer cast doubt on his current reliability, trustworthiness, and good judgment. No mitigating conditions apply to SOR ¶¶ 1.e and 1.f.

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 relevant 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.

⁸ ISCR Case No. 14-04437 at 3 (App. Bd. Apr. 15, 2016) (emphasis added). See ISCR Case No. 14-05476 at 5 (App. Bd. Mar. 25, 2016); ISCR Case No. 14-01894 at 4-5 (App. Bd. Aug. 18, 2015).

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 Guideline F in my whole-person analysis.

Applicant has a long track record of failing to live up to two important fiduciary duties: the duty of any citizen to file income tax returns on time as required, and the parental duty to provide financial support for one's children. Only when his security clearance was in jeopardy did Applicant take belated action. There is significant risk that Applicant will fail in these duties again in the future. Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility for access to classified information.

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
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Subparagraphs 1.a-1.f:	Against Applicant
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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 eligibility for access to classified information. Eligibility for access to classified information is denied.

Braden M. Murphy
Administrative Judge