



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



In the matter of:)
)
) ISCR Case No. 14-05027
)
Applicant for Security Clearance)

Appearances

For Government: Eric H. Borgstrom, Esq., Department Counsel
For Applicant: *Pro se*

07/28/2015

Decision

MATCHINSKI, Elizabeth M., Administrative Judge:

While working as a self-employed painter, Applicant did not file federal or state income tax returns for tax years 2011, 2012, and 2013. As of October 2014, he had made no payments on a \$2,500 judgment from June 2012. The financial concerns raised by a 1999 conviction of two counts of passing a counterfeit certificate are mitigated by his youth and the passage of time. He has satisfied the judgment debt, but the financial concerns are not mitigated where he has yet to file his delinquent tax returns. Clearance is denied.

Statement of the Case

On October 21, 2014, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) to Applicant, detailing the security concerns under Guideline F, Financial Considerations, and explaining why it was unable to find it clearly consistent with the national interest to grant security clearance eligibility for him. The DOD CAF took the action under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense (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 DOD on September 1, 2006.

On December 4, 2014, Applicant answered the SOR allegations. He did not indicate whether he wanted a hearing or a decision on the written record. He subsequently requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA). On April 21, 2015, the case was assigned to me to conduct a hearing to determine whether it is clearly consistent with the national interest to grant or continue a security clearance for him. I scheduled a hearing for May 12, 2015.

I convened the hearing as scheduled. Seven Government exhibits (GEs 1-7) and five Applicant exhibits (AEs A-E) were admitted into evidence without objection. Applicant also testified, as reflected in a transcript (Tr.) received on May 20, 2015.

I held the record open for three weeks after the hearing for Applicant to supplement the record. By email on June 3, 2015, Applicant forwarded a signed copy of his latest performance review. The Government filed no objection by the June 12, 2015 deadline, and the forwarding email and performance review were admitted into the record as AE F.

Summary of SOR Allegations

The SOR alleges under Guideline F that Applicant failed to file federal, state, or local income tax returns for tax years 2011, 2012, and 2013 (SOR 1.a); that he had not paid a June 2012 judgment for \$2,500 as of October 21, 2014 (SOR 1.b); and that he was convicted and placed on three years of probation on March 1999 felony charges of passing a counterfeit certificate and possession of a weapon not firearm (SOR 1.c). When Applicant answered the SOR, he explained that he had not filed income tax returns for those years because he had been unemployed and did not believe he owed any liability. He added that he was gathering his paperwork required to file. Applicant acknowledged the judgment, but he was making payments. Applicant admitted that he had been convicted of the alleged felonies when he was in high school 15 years ago.

Findings of Fact

After considering the pleadings, exhibits, and transcript, I make the following findings of fact.

Applicant is a 35-year-old outside electrician, who has been employed by a defense contractor since May 2014. (Tr. 35.) He seeks his first security clearance. (GE 1.)

A few months before he graduated from high school, Applicant was arrested in March 1999 and charged with two counts of passing counterfeit bills, a felony, and one count of possessing a weapon (brass knuckles), a felony. He had been given two counterfeit \$20 bills by his brother. He passed one of them at a bowling alley and the other at a service station to purchase cigarettes. When he was arrested, he had brass knuckles on him, which belonged to a friend. (GE 7; Tr. 46-48.) He pleaded nolo contendere to the

charges in late March 1999, and he was given concurrent sentences of restitution and three years of probation on each count of passing counterfeit bills. He was placed on probation for one year with forfeiture of the brass knuckles for possessing a weapon. (GEs 1, 3, 5, 6.) In March 2001, he violated his probation by being arrested for injuring or tampering with a vehicle and attempted larceny. (GEs 4, 6, 7.) Applicant had opened a vehicle to get change to buy cigarettes. He was drunk at the time. He pleaded nolo contendere to the tampering charge and had to perform 50 hours of community service. (GE 7.)

Applicant attended a local community college from September 2000 to May 2003, where he earned an associate degree. He continued his education at the state university from August 2003 to 2004 and from 2008 to May 2010. (GEs 1, 7; Tr. 27-28.) In May 2010, he was awarded his bachelor's degree in applied economics. (Tr. 28.) He opened one student loan, of \$6,000 in August 2003, which had a balance of \$3,547 as of April 2014. (GE 2.)

Applicant has operated his own house-painting business since June 2003, which provided him the income to pay for college.¹ (GE 1; Tr. 27-29, 32-34.) Applicant has a contractor's license from the state as a self-employed painter. He is not incorporated and has never employed other painters. Applicant has not filed federal or state income tax returns reporting his income as a painter. (GEs 1, 7; Tr. 29-30.) Applicant estimates that he earned significantly less than \$20,000 in 2011, 2012, and 2013. (Tr. 31.) His current explanation for not filing a return is that he "had nothing to give. Nothing at all." (Tr. 59.) He does not now recall how many painting jobs he had in 2011 while he had two jobs in 2013. His income was "quite possibly" under \$10,000 for each tax year 2011, 2012, and 2013. (Tr. 60-61.)

In June 2012, a \$2,500 judgment was filed against Applicant. Around 2009, he entered into a contract to paint a home in a neighboring state before he was licensed in that state as a painter. He painted the house after he was licensed. When the warranty expired on the painting job, the client wanted him to repaint the home, claiming that the paint was chipping. Applicant did not think that it needed to be repainted, but the judgment was awarded to the client to recover the cost of the painting job. (GEs 1, 7; Tr. 40-41.)

For his defense contractor employment, Applicant completed and executed an Electronic Questionnaire for Investigations Processing (e-QIP) on April 8, 2014. Applicant disclosed his 1999 convictions and some driving offenses in response to the police record inquiries. In response to the financial record inquiries, Applicant answered "Yes" to whether he had failed to file or pay federal, state, or other taxes in the last seven years. He disclosed that he had not filed income tax returns for tax years 2011, 2012, and 2013, and he indicated in each case that he thought he did not have to file because he earned less than \$6,500. Yet, he estimated that he had not paid about \$500 in income taxes owed for each year. Additionally, he disclosed a \$487 electric utility debt had been paid in June 2009

¹ Applicant testified that he paid for his college by painting houses. He paid cash for his tuition, which at the community college was \$600 a semester. (Tr. 33.) As for the state university, he took a class here and there, but he also acknowledged that it cost him around \$12,000 total. (Tr. 34.)

after collection, while a past-due \$443 credit card debt from July 2013 had not yet been paid. As for any civil court actions in the last 10 years, Applicant listed a small claims judgment in June 2012, "10% REFUND ON CONTRACT PRICE OR \$2600," because he proposed painting work before he was licensed, which invalidated the contract. (GE 1.)

On May 1, 2014, Applicant was interviewed by an authorized investigator for the Office of Personnel Management (OPM). Applicant provided details about his police record, the civil financial judgment, his unpaid debts, and his failure to file income tax returns. Applicant explained that he had not filed returns for the previously disclosed tax years of 2011, 2012, or 2013 because he earned under \$6,500 each year and did not think he had to file based on his income. Applicant expressed his belief that he owed federal taxes, but he did not know the amount. He attributed the electricity and credit card debts on his e-QIP to lack of work. He added that he had satisfied the utility debt and was catching up on his other debts. About the civil court judgment, Applicant explained that the plaintiff had sought \$3,600 but was awarded \$2,500. He admitted that he had not yet paid the judgment, although he planned to satisfy it in less than one year. (GE 7.)

Applicant started his defense contractor employment at \$18 an hour on May 28, 2014. (AEs D, E; Tr. 35.) Beginning in December 2014, Applicant's wages were garnished to satisfy the judgment. Applicant testified credibly that the judgment has been paid off, although he did not provide corroborating documentation.² (AE F; Tr. 42-43.)

As of May 2015, Applicant had not yet filed any income tax returns for the tax years 2011 through 2013. (Tr. 36-37.) He allowed the tax filing deadline for tax year 2014 to pass without filing his federal or state income tax returns, even though he earned "probably \$15,000, maybe more" in income from his defense contractor employment in 2014. About his failure to file timely returns, Applicant responded about the returns for 2011 through 2013 that he is "scared." (Tr. 36-37.) About his returns for tax year 2014, Applicant stated, "I figured I'd get it all done at once when I went to the IRS." He expects a refund of tax withheld from his defense contractor pay. However, he also worked as a painter for a builder at an hourly wage in 2014, so he has to pay taxes on that income. (Tr. 62-63.)

Applicant does not know what he has to do to rectify his tax situation for tax years 2011 through 2013. (Tr. 37.) He did not keep receipts of his income, paint, or gasoline from his painting jobs. After he received the SOR, he obtained his bank account records for the last three years showing checking deposits. Records for previous years were not available. (Tr. 38-39.) He plans to meet with the IRS "to hammer something out." (Tr. 68.) With his rent at \$775 per month,³ he cannot afford to pay for professional tax advice at present. (Tr. 36, 39.) In addition to his rent, his monthly expenses include a car payment around \$300; car insurance at \$100; utilities; wireless phone; and Internet. He takes home approximately

² Applicant indicated in an email of June 3, 2015 (AE F) that he would forward an email showing that the judgment was paid in full. No email was received.

³ Applicant's rent was \$300 a month at his previous apartment. He moved to his current apartment shortly after he started his defense contractor employment. His then girlfriend wanted to move in with him, so they leased an apartment together. When their relationship ended, he was "stuck with the higher rent." (Tr. 42.)

\$500 a week. (Tr. 44.) He has no credit cards. (Tr. 45.) Applicant did not intend to renew the license for his painting business when it expired at the end of May 2015. (Tr. 45.)

As of June 3, 2015, Applicant had not yet filed his tax returns for 2010 through 2014. He anticipated that he would not have them filed until late August at the earliest. (AE F.)

Applicant's former (AE A) and current (AE C) landlords found Applicant to be true to his word. He was always dependable. Applicant has done work in his apartment to bring it from good to excellent condition. (AE C.) An owner of a painting company, who has employed Applicant as team foreman in the past, attests to Applicant's leadership ability and competence. He has known Applicant since 2005 and found him to be "hard-working, dedicated, respectful, decent, genuine, [and] highly trustworthy." (AE B).

Six months into his job with the defense contractor, Applicant met his employer's expectations in most respects. He exceeded expectations in one technical aspect, that of contributing proactively to continuous improvement goals. He failed to meet job requirements in following all safe work practices and understanding personal safety responsibilities. Early on in his employment, Applicant had a serious tank infraction. (AE D.) At the end of his first year, Applicant met or exceeded his employer's expectations. He asked his employer how he could improve his performance, and he followed through on all suggestions in the six months since his previous review. He received the highest rating in all aspects of his work related to cooperation and teamwork. (AEs E, F.)

Policies

The U.S. Supreme Court has recognized the substantial discretion the Executive Branch has in regulating access to information pertaining to national security, emphasizing that "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). 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 required to be considered 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 overall 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 access to classified information will be resolved in favor of 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. 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 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 that the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information. Section 7 of Executive Order 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 concerns for financial considerations are articulated in AG ¶ 18:

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 information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

As of the issuance of the SOR in October 2014, Applicant had not made any payments to resolve a June 2012 judgment for \$2,500 awarded a previous client of his painting business. Two disqualifying conditions under AG ¶ 19(a) are implicated because of this judgment debt:

- (a) inability or unwillingness to satisfy debts; and
- (c) a history of not meeting financial obligations.

Additionally, while he was a self-employed painter, Applicant did not make federal or state income tax payments in 2011, 2012, or 2013, and the deadlines for filing his returns passed without any effort to comply on his part. Filing of tax returns and paying any taxes owed are important obligations of U.S. citizenship, and noncompliance could raise security concerns under AG ¶ 19(g), “failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same.” On his e-QIP, Applicant responded

affirmatively to the e-QIP inquiry about any failure to file or pay, in the last seven years, any federal, state, or other taxes when required by law or ordinance. Yet, in explanation, he indicated discrepantly that he earned under \$6,500 during the years at issue, so he thought he did not have to file. (GE 1.) If the evidence fails to establish that he was required to file, then AG ¶ 19(g) would not apply in this case.

Under federal income tax law, single individuals under age 65, were required to file an income tax return if their gross income met or exceeded the following minimum for the respective tax year: \$9,500 in 2011, \$9,750 in 2012, \$10,000 in 2013, and \$10,150 in 2014.⁴ Self-employed persons were required to file a return if their gross income (not reduced by business losses) met the filing requirement amount for their filing status and age. Furthermore, self-employed persons were required to file a Form 1040 and Schedule SE (self-employment tax) if their income was \$400 or more.⁵ The file before me contains little information about Applicant's income for the respective tax years. Even income of less than \$6,500 per year would not have relieved him of his responsibility to file returns because of the self-employment taxes. He indicated on his e-QIP that he owes approximately \$1,500 in taxes for the years at issue. He cannot recall how many painting jobs he had in 2011. He had two jobs in 2013 ("I mean there's like a lot of little tiny gigs, like in and out kind of things."). (Tr. 60.) He likely earned enough from his painting to meet the \$400 self-employment tax filing threshold for the three years covered in the SOR. Whether or not he owes delinquent taxes, AG ¶ 19(g) is implicated due to his failure to file federal returns because of the self-employment tax issue.

Concerning his alleged failure to file state and local tax returns for 2011, 2012, and 2013, I cannot assume that the state or local filing requirements were the same or similar to the federal requirements for any of the tax years at issue. Pertinent state law is appropriate for judicial notice. Applicant's state of residency requires its individual residents to file a state tax return if they are required to file a federal income tax return. Moreover, even if he is not required to file a federal income tax return, he may be required to file a state income tax return if his income for the taxable year is in excess of the sum of his standard exemption and deduction. Self-employed individuals were required under state law to make estimated tax payments when their personal income in the state could reasonably be expected to exceed \$250 after allowing for withholding or credits. The state tax rate was 3.75% on all taxable income earned in the state for those individuals earning

⁴ The Government did not seek to amend the SOR to allege Applicant's failure to file tax returns for 2014. Conduct not alleged cannot provide a separate basis for disqualification. However, the DOHA Appeal Board has long held that the administrative judge may consider non-alleged conduct to assess an applicant's credibility; to evaluate an applicant's evidence of extenuation, mitigation, or changed circumstances; to consider whether an applicant has demonstrated successful rehabilitation; to decide whether a particular provision of the Adjudicative Guidelines is applicable; or to provide evidence for a whole person analysis under Section 6.3 of the Directive. See, e.g., ISCR Case No. 09-07219 (App. Bd. Sep. 27, 2012). His failure to file timely returns for tax year 2014 has to be considered when evaluating whether Applicant has demonstrated reform.

⁵ See the Internal Revenue Service's Publication 17 for each of the tax years at issue, which can be obtained on the IRS website, www.irs.gov.

no more than \$55,000 in 2011, \$57,150 in 2012, \$58,600 in 2013, and \$59,600 in 2014.⁶ Applicant likely would have been required to file estimated taxes to the state on his self-employment income. Applicant's disregard of his tax filing obligation raises doubts about whether he can be counted on to comply with well-established government rules, including the regulations for protecting classified information. See ISCR Case No. 01-05340 (App. Bd. Dec. 20, 2002).

The Government alleged additional financial concerns because of Applicant's 1999 conviction of two counts of passing a counterfeit certificate. Passing a known counterfeit \$20 bill would qualify as a deceptive or illegal practice under AG ¶ 19(d):

(d) deceptive or illegal financial practices such as embezzlement, employee theft, check fraud, income tax evasion, expense account fraud, filing deceptive loan statements, and other intentional financial breaches of trust.

Even so, considering Applicant's youth at the time of the offense, and the absence of any recurrence of similar criminal behavior impugning Applicant's financial integrity, it does not raise current security concerns. AG ¶ 20(a) applies in mitigation, but only to the intentional financial breach of trust raised by his conviction. AG ¶ 20(a) states:

(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.

AG ¶ 20(a) does not mitigate the financial concerns raised by Applicant's disregard for some 2.5 years of the June 2012 judgment debt or his failure to give greater priority to addressing his income tax filing issues. Applicant told the OPM investigator that he did not think he had to file income tax returns for tax years 2011, 2012, and 2013 because he earned less than \$6,500 per year. Applicant was on notice, if not after his May 1, 2014 interview then when he received the SOR, that his income tax filing issues were of concern to the DOD. He indicated on December 4, 2014, that he was gathering the necessary information to file for the tax years and that he should have it in order by January 1, 2015. As of his May 12, 2015 security clearance hearing, Applicant still did not have his paperwork in order.

Mitigating condition AG ¶ 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," has limited applicability. Applicant could not pay the judgment because he did not have a steady income. He attributed his failure to file his income tax returns to the lack of income to cover any taxes owed. Economic considerations may have had a part in Applicant not filing his returns, but it does not excuse his failure to file. Applicant's obligation to report his income exists independently of whether he has the funds to pay any taxes owed.

⁶ See www.tax.ri.gov.

Applicant's wages were garnished to pay the judgment debt starting in December 2014. Involuntary garnishment in particular does not carry the same weight in mitigation than had Applicant arranged repayment terms and then made payments agreed on by the creditor. Disregard of a court judgment raises concerns about an individual's willingness to comply with rules and regulations. That said, Applicant testified that he made larger payments, in excess of \$500 a month, on the judgment to satisfy it sooner than it would have been. (Tr. 41.) AG ¶ 20(c) and AG ¶ 20(d) are potentially applicable because of debt satisfaction:

(c) the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control, and

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

However, Applicant has not shown the reform necessary to fully mitigate the tax filing issues. He had not filed his federal or state income tax returns for 2014 as of May 12, 2015, and there was no evidence that he had asked for an extension of time to file. On June 3, 2015, Applicant was "guessing" that he would not have his tax forms for 2011 through 2014 prepared before late August 2015.

Whole-Person Concept

Under the whole-person concept, the administrative judge must consider the totality of an applicant's conduct and all relevant circumstances in light of the nine adjudicative process factors in AG ¶ 2(a).⁷

Applicant has not filed required federal or state returns to report his self-employment income for tax years 2011 through 2013. Nor has he filed his tax returns for 2014, a year for which he should have no trouble gathering the required documentation. His good work record with his defense contractor employer is viewed favorably, but he does not seem to understand the importance or urgency of complying with his income tax filing obligations. It is well settled that once a concern arises regarding an applicant's security clearance eligibility, there is a strong presumption against the grant or renewal of a security clearance. *See Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990). For the reasons already noted, I am unable to conclude that it is clearly consistent with the national interest to grant Applicant security clearance eligibility at this time.

⁷ The factors under AG ¶ 2(a) are as follows:

- (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.

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
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	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 interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Elizabeth M. Matchinski
Administrative Judge