



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:

Applicant for Security Clearance

)
)
)
)
)
)
)

ISCR Case No. 16-03600

Appearances

For Government: David Hayes, Esq., Department Counsel

For Applicant: Chase Dearman, Esq.

01/17/2019

Decision

WESLEY, Roger C., Administrative Judge:

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

Statement of Case

On December 21, 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, 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 the DOD on September 1, 2006.

The Director of National Intelligence, by Security Executive Agent, Directive 4, App. A, National security Adjudicative Guidelines (SEAD 4), dated December 10, 2016, superceded and replaced the September 2006 adjudicative guidelines (AGs).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 January 23, 2018, and requested a hearing. The case was assigned to me on May 20, 2018, and scheduled for hearing on June 6, 2018. The Government's case consisted of four exhibits (GEs 1-4) that were admitted without objection. Applicant relied on one witness (himself) and three exhibits that were admitted without objection as AEs A-C. The transcript was received on June 14, 2018.

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 documented installment agreements with the Internal Revenue Service (IRS) and resident state taxing authority, together with federal and state transcripts for tax years 1999-2015.

For good cause shown, Applicant was granted 30 days to supplement the record. Department Counsel was afforded seven days to respond. Applicant did not supplement the record.

Summary of Pleadings

Under Guideline F, Applicant allegedly (a) is indebted on a judgment filed against him in August 2016 in the approximate amount of \$2,401; (b) is indebted to the IRS for a tax lien entered against him in May 2011 for \$453,709; (c) is indebted to his state of residence for a tax lien entered against him in November 2010 in the approximate amount of \$7,724; (d) is indebted to his state of residence for a tax lien entered against him in June 2007 in the approximate amount of \$27,238; (e) is indebted to his state of residence for a tax lien entered against him in May 2007 in the approximate amount of \$12,453; (f) in indebted to a consumer creditor for an amount placed in collection in the approximate amount of \$1,943; (g) failed to file his federal tax returns for tax years 1999 through 2015; and (h) failed to file his state tax returns for tax years 1999 through 2015.

In his response to the SOR, Applicant denied all of the allegations in the SOR. He claimed no knowledge of the judgment covered by SOR ¶ 1.a. He claimed he engaged counsel and a certified public accountant (CPA) to prepare his tax returns, file them, and to negotiate a payment plan to repay any unpaid taxes. And he claimed no knowledge of the alleged delinquent debt covered by SOR ¶ 1.f.

Findings of Fact

Applicant is a 54-year-old project coordinator for a defense contractor who seeks a security clearance. The allegations covered in the SOR were not admitted by Applicant and are reserved for fact-finding based on the developed evidence at hearing.

Background

Applicant married in April 1988 and has three children from this marriage. He earned a high school diploma in May 2003, but did not report any post-high school education credits. (GE 1) Applicant reported no military service.

Since August 2015, Applicant has been employed by his current defense contractor. (GEs 1-2) Between January 1994 and August 2010, he was self-employed. And between August 2010 and August 2015, he was employed by various non-DOD contractors in various job assignments, interspersed with periods of unemployment. (GEs 1-2)

Applicant's finances

Between 1999 and 2015, Applicant failed to file his federal and state of residence income tax returns, as required by law. (GEs 1-2) He attributed his filing failures to national disasters, filing delays by his lawyers, poor cash flow from his self-employed business, and caring for a relative stricken with cancer. (Tr. 23-27, 69) While he claims to have filed his federal and state returns for tax years 1999-2015 in 2017 (AE C; Tr. 36), he provided no independent corroboration and substantiation of his filing claims, despite afforded post-hearing opportunities to do so.

For years 1999-2015, Applicant accrued delinquent federal and state taxes. Accrued federal taxes for these years are covered by a federal tax lien filed in May 2011 for \$453,709. (GEs 2-4 and AE C; Tr. 37-38) While Applicant claims to have resolved this tax lien through a combination of payments and refunds, to date, he has provided no documentation to verify his claims, and it remains unresolved and outstanding. (AE C; Tr. 36) Credit reports also document state tax liens entered against Applicant in November 2010 for \$7,724 and in May 2007 for \$12,453. (GEs 2-4 and AE C; Tr. 19, 22)

Besides his tax debts, credit reports document Applicant's accruing a judgment against him in August 2016 for \$2,401, as well as a delinquent insurance debt in the amount of \$1,943. (GEs 2-4) To date, these no-tax debts remain unresolved and outstanding.

In an effort to address his delinquent tax and consumer debts, Applicant petitioned for Chapter 13 bankruptcy relief in March 2018. (AEs A-C) In his petition, he listed assets of \$91,801 and liabilities of \$584,835. (AE C; Tr. 40) He listed several claims in his petition as follows: a priority unsecured IRS tax lien of \$453,709 filed in May 2011 and an unsecured priority vendor's lien of \$175,000 filed in March 2015. (AE C) Applicant listed

unsecured non-priority state tax liens in his petition totaling \$10,125. (AE C; Tr. 40) He listed unsecured non-priority state tax liens in his petition totaling \$10,125, an aggregate of tax liens at odds with the \$47,415 figure reported in his credit reports. (AE C) Conceivably, the lower figure represents a reduction of state taxes owed due to payments made and refund offsets. (AE C; Tr. 22) Without state tax transcripts or other reliable data summaries to track his payments and credits, no reliable inferences can be drawn as to the state of his account balance with this state.

In April 2018, the presiding bankruptcy court in Applicant's state of residence, confirmed Applicant's Chapter 13 plan. (AE A; Tr. 42) Under the terms of Applicant's plan, the court imposed payment conditions of \$2,396 monthly payments to the trustee for the remaining term of the plan. (AE A) Scheduled monthly payments were to commence 30 days from the date of Applicant's March 2018 petition filing and continue for the duration of the plan. (AEs A-C) Payment allocations were set as follows: \$1,250 to the vendor lien holder; \$300 to the IRS; and \$1,026 to the tax lien holder of Applicant's state of residence. (AEs A-C)

Whether Applicant has maintained compliance with his Chapter 13 payment terms is unclear, for he has not provided any payment documentation, either at hearing, or during the time reserved for post-hearing updates. (AEs A-C; Tr. 43, 58-60) Further, his claims of additional payments to the IRS on its \$453,709 tax lien, in addition to his payments to the chapter 13 trustee, are neither corroborated nor substantiated. (Tr. 39-40, 49-50)

To date, Applicant has not provided any federal or state transcripts to verify his tax filings, dates thereof, and evidence of any past payments made (voluntarily or involuntarily) for tax years 1999-2015. Because Applicant has not provided any federal or state tax transcripts, tax returns, or payment history for tax years 1999-2015, his filing and payment claims cannot be validated. And, without IRS and state taxing agency approvals of his tax filings and payment plans, his Chapter 13 payment plan cannot be determined to meet federal and state filing and payment requirements for Chapter 13 discharge.

Currently, Applicant nets \$5,633 a month on average; while his wife nets approximately \$2,730 a month. (AE C; Tr. 43-45) Payroll deductions total \$4,088 for himself and \$1,985 for his wife. (AE C) Reported monthly expenses are \$3,466 for both of them. (AE C)

Applicant reported a monthly remainder of \$2,607. (AE C; Tr. 45-46). He has an IRA retirement account with approximately \$12,000 in the account. (Tr. 47) He reported exempt property of \$18,000. (AE C)

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 failure to timely file his federal and state tax returns for tax years 1999-2015, accrual of federal and state tax liens covering delinquent taxes exceeding \$500,000, and two delinquent non-tax debts (a judgment entered in August 2016 for \$2,401) and an insurance debts for \$1,943). These concerns over tax filing and debt delinquencies raise questions about Applicant's judgment and reliability to safely and prudently manage his finances.

Financial Concerns

Applicant's failure to timely file federal and state income tax returns for multiple years (1999-2015) and his incurring of delinquent federal and state tax liens and non-

tax debts for the years at issue warrant the application of four disqualifying conditions (DC) of the Guidelines: DC ¶¶ 19(a), “inability to satisfy debts”; 19(b); unwillingness to satisfy debts regardless of the ability to do so”; 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.”

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 timing of filing federal tax returns and resolving federal and state 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 (i.e., national disasters, poor cash flow, caring for a relative with diagnosed cancer, and lawyer delays) and insufficient income to pay his accrued federal and state taxes and other non-tax debts when due and payable. His claims without more probative evidence to corroborate and substantiate them are not enough to credit him with justifiable extenuation and mitigation.

To date, Applicant has provided no persuasive justification for his failure to timely file his federal and state tax returns, address his federal and state taxes due for the tax years 1999-2015, and provide evidence of his addressing his reported judgment and insurance debts with documented payments and payment plans. Based on Applicant’s cited circumstances, Applicant’s failure or inability to corroborate and substantiate his tax filing and payment claims and demonstrate a good track record of compliance with the terms of his Chapter 13 petition and any payment arrangements he may have with the IRS and state taxing agency of his state and non-tax creditors listed in the SOR preclude him from fully availing himself of the benefits of either 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”: MC ¶ 20(d), “the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts”; or 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.” 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).

And, because Applicant's tax filing and debt issues continue to be considered recent for so long as they remain unresolved, he may not avail himself of the mitigating benefits of MC ¶ 20(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." See ISCR Case No. 15-06532 at 3(App. Bd. Feb. 16, 2017)(citing ISCR Case No. 15-01690 at 2 (App. Bd. Sept. 13, 2016).

Whether Applicant is 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," is unclear at this point. See ISCR Case No. 16-02246, at 2 (App. Bd. Dec. 8, 2017). Applicant provided no documentation at hearing or in permitted post-hearing submissions of any completed installment agreements with the IRS and state taxing agency, much less evidence of compliance with those agreements.

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) And, in a consistent line of decisions, the Appeal Board has questioned the value of bankruptcy petitions initiated after the issuance of an SOR to demonstrate restored financial responsibility and sound judgment. See ADP Case No. 17-00263 at 4 (App. Bd. Dec. 19, 1918 (citing ISCR Case No. 15-00682 at 3 (App. Bd. July 13, 2016)).

In Applicant's case, his failure or inability to provide documentary proof of his filing federal and state income tax returns for tax years 1999-2015, addressing his owed federal and state taxes, and paying or otherwise resolving his two delinquent non-tax-related debts of record before the initiation of the security clearance process precludes him from meeting his evidentiary burden with respect to raised security concerns about the condition of his finances. More effort and results could be reasonably expected of Applicant in taking the necessary steps to restore his finances to stable levels consistent with eligibility criteria for holding a security clearance.

Whole-Person Assessment

Whole-person assessment is unfavorable to Applicant. He has shown insufficient progress to date in filing his federal and state income tax returns over a period of multiple years and addressing his delinquent federal and state tax liens and non-tax debts. While Applicant's general contributions to the U.S. defense effort through his current employer are recognized and merit respect and appreciation, his credits are insufficient o surmount historical trust and judgment issues associated with his failure to timely file his federal and state income tax returns over the course of many years and failure to better address his major tax and non-tax delinquencies.

Overall, Applicant's actions to date in addressing his finances reflect too little evidence of restored financial responsibility and judgment to overcome reasonable

doubts about his trustworthiness, reliability, and ability to protect classified information or occupy a sensitive position. See AG ¶ 18. Conclusions are warranted that his finances are insufficiently stabilized at this time to meet minimum eligibility requirements for holding a security clearance. Unfavorable conclusions are entered with respect to the allegations covered by SOR ¶¶ 1.a-1.h. Eligibility to hold a security clearance under the facts and circumstances of this case is inconsistent with the national interest.

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): AGAINST APPLICANT

Subparagraphs 1.a-1.h:

Against Applicant

Conclusions

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue Applicant's eligibility to hold a security clearance. Clearance is denied.

Roger C. Wesley
Administrative Judge

