



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



In the matter of:)	
)	
[Redacted])	ISCR Case No. 17-03024
)	
Applicant for Security Clearance)	

Appearances

For Government: Aubrey M. De Angelis, Esq., Department Counsel
For Applicant: *Pro se*

06/26/2019

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guidelines F (Financial Considerations) and G (Alcohol Consumption). Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on December 8, 2015. On March 12, 2018, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines F and G. The DOD CAF acted 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 (AG) promulgated in Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (December 10, 2016).

Applicant answered the SOR on May 4, 2018, and requested a decision on the written record without a hearing. Department Counsel submitted the Government's

written case on March 8, 2019. On March 12, 2019, a complete copy of the file of relevant material (FORM) was sent to Applicant, who was given an opportunity to file objections and submit material to refute, extenuate, or mitigate the Government's evidence. He received the FORM on March 13, 2019. He requested an extension of time to respond to the FORM, and it was granted. He responded on May 10, 2019. His response was admitted in evidence as Applicant's Exhibit (AX) A, without objection. The case was assigned to me on June 6, 2019.

Findings of Fact

In Applicant's answer to the SOR, he admitted the allegations in SOR ¶¶ 1.a, 1.d-1.f, 2.a, and 2.b. He denied the allegations in SOR ¶¶ 1.b and 1.c. His admissions are incorporated in my findings of fact.

Applicant is a 45-year-old mechanic employed by a defense contractor since February 2008. He has held a security clearance since September 2008. He worked at an automobile dealership from December 1998 to October 2007, when the dealership went out of business. He was unemployed from October 2007 until he began his current job.

Applicant married in October 2000 and divorced in February 2007. He has two children, ages 18 and 15, and he shares custody with his ex-wife. He was paying child support for both children until recently. He is no longer paying child support or his daughter, now that she is 18 years old. (AX A.) His child support payments are current.

Applicant filed a petition for Chapter 7 bankruptcy in June 2002 and received a discharge in September 2002. (FORM Item 7.) The record does not reflect the circumstances of this bankruptcy, and it is not alleged in the SOR.

Applicant filed another petition for Chapter 7 bankruptcy in January 2017 and received a discharge in April 2017. (FORM Item 8.) In his answer to the SOR, he attributed this bankruptcy to a back injury in November 2013, back surgery in January 2014, uninsured medical expenses, and unspecified legal issues in 2015.

When Applicant submitted his SCA in December 2015, he disclosed that he had failed to file municipal income tax returns and pay the taxes due for 2013 and 2014, estimated at about \$400 for each year. In response to DOHA interrogatories, he explained that his delinquent municipal taxes were incurred because he moved from a municipality without taxes and was unaware that his new place of residence was subject to municipal taxes. He submitted a statement reflecting that he owed \$740 in municipal income taxes for 2013 and 2014. (FORM Item 6 at 40.) The taxes have not been paid.

IRS tax transcripts reflect that Applicant's 2013 return was filed late on May 12, 2014, and there is no indication that an extension of time was granted for this return. A six-month extension of time to file was granted for the 2014 return, and it was filed in November 2015, about a month after the due date. A six-month extension of time to file

was granted for the 2015 return, and it was filed on December 5, 2016, about two months after the due date. The 2016 return was filed late on May 29, 2017, and there is no indication that an extension was granted for this return. (FORM Item 6 at 34-39.)

IRS income tax transcripts reflect that Applicant owed \$452 for 2013, \$797 for 2015, and \$502 for 2016. IRS transcripts reflect that his refund for 2014 was applied to his tax debt. The transcripts also reflect that he made a payment agreement in September 2014 and made 11 payments of \$25 between March 2015 and October 2016. (FORM Item 6 at 31-39.). He submitted a copy of his federal income tax return for 2017 reflecting an anticipated refund of \$904. (FORM Item 3.) Applicant has filed his federal income tax return for 2018 and expects a refund, which he will use to pay debts. (AX A.)

In Applicant's response to the FORM, he stated that during the recent federal government five-week shutdown, he used all his savings to stay current on his living expenses, and he is just now starting to recover from his loss of pay. He is living paycheck to paycheck. (AX A.) I have taken administrative notice, without objection by Department Counsel, that the federal government was shut down from December 22, 2018 to January 26, 2019, during which time many employees of federal contractors were furloughed without pay.

Applicant disclosed in his SCA that he was charged with driving under the influence (DUI) in July 1996. He was convicted, fined, lost his driver's license for a year, and was required to take a three-day alcohol education class. (FORM Item 4 at 31.) This incident was not alleged in the SOR.

In February 2013, Applicant was cited for public intoxication and disorderly conduct. (FORM Item 15.) In his SCA, Applicant stated that this incident occurred when he was leaving a bar, knocked over a free-standing sign, and was confronted by a security guard who swore at him and ordered him to pick up the sign. Applicant stated that he responded to the security guard in the same hostile and profane manner. He admitted the incident in his answer to the SOR. He paid a fine online. (FORM Item 3 at 2.)

In April 2015, Applicant and his children were visiting at a friend's home. Applicant and his friend were both drinking heavily. Applicant and his then 14-year-old daughter began arguing. He slipped and fell, and his daughter ridiculed him. He slapped his daughter and grabbed her after she continued to make disrespectful comments and kicked him. Someone not identified in the record called the police. Applicant was sleeping on a sofa when the police arrived. According to the police report, Applicant was so intoxicated that the police needed to hold him upright to handcuff him. He was held in jail on an "intoxication watch" for six hours. (FORM Item 14 at 4.) He was charged with domestic violence and endangering a child. He self-reported the incident to his security manager. (FORM Item 3 at 2; FORM Item 4 at 29; FORM Item 5.) He hired an attorney and demanded a jury trial. A few days before the trial, he accepted a plea bargain and pleaded guilty to unlawful restraint. He was sentenced in August 2015 to a \$200 fine

plus court costs. He was placed on probation for two years, required to complete a domestic-violence-awareness class, abstain from alcohol, attend Alcoholics Anonymous (AA) meetings, and meet with a probation officer once a month. (FORM Item 5.)

Applicant underwent an alcohol assessment in June 2016 as part of his probation. The results of the assessment were reported to the court, but Applicant was not informed of them. He did not receive any alcohol-related treatment or receive a diagnosis or prognosis. (FORM Item 6 at 15.) He was released from probation early, after completing one year.

When Applicant was interviewed by a security investigator in January 2017, he told the investigator that his alcohol use had never affected his work performance, but that it had adversely affected his professional and personal relationships. He abstained from alcohol from April 2015 to September 2016, because it was a requirement of his probation. He described himself as a social drinker who has two or three glasses of wine in the evening on weekends. (FORM Item 6 at 15-16.)

Policies

“[N]o one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to “control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information.” *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865 § 2.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines in conjunction with an evaluation of the whole person. An administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available and reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. 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.

Clearance decisions must be made “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is merely an indication the

applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability. See ISCR Case No. 15-01253 at 3 (App. Bd. Apr.20, 2016).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531.

Analysis

Guideline F, Financial Considerations

The SOR alleges that Applicant filed a petition for Chapter 7 bankruptcy in January 2017 and received a discharge (SOR ¶ 1.a). It alleges that he failed to timely file his federal income tax returns for 2013-2016 (SOR ¶ 1.b); that he failed to timely pay the federal income taxes due for 2013, 2015, and 2016 (SOR ¶ 1.c); and that he owes delinquent taxes of \$452 for 2013, \$797 for 2015, and \$502 for 2016 (SOR ¶ 1.f). It alleges that he failed to file regional income tax returns for 2014 through 2016 (SOR ¶ 1.d) and that he owes regional income taxes of \$740 for 2013 (SOR ¶ 1.e). The “regional” taxes alleged in the SOR were municipal taxes levied by the city in which he was residing.

The security concern under this guideline 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. . . . An individual who is

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

The allegations in SOR ¶¶ 1.a-1.c, 1.e, and 1.f are established by Applicant's admissions and the IRS transcripts in the FORM. They reflect that the 2013 return was filed late, in May 2014, and the 2016 return was filed late, in December 2016, with no evidence of an extensions being granted. The transcripts also show that the extensions were granted for the 2014 and 2015 returns, but that the returns were not filed by the extended due date. Applicant's explanation that he was unaware of his obligation to file municipal tax returns, as alleged in SOR ¶ 1.d, was plausible and reasonable, but he has not taken any steps to resolve the delinquent municipal taxes after learning of his obligation to pay them.

The allegations in SOR ¶ 1.c and 1.f are duplicative, because the delinquent taxes alleged in SOR ¶ 1.f are the result of the failure to timely file alleged in SOR ¶ 1.c. When the same conduct is alleged twice in the SOR under the same guideline, one of the duplicative allegations should be resolved in Applicant's favor. See ISCR Case No. 03-04704 at 3 (App. Bd. Sep. 21, 2005) (same debt alleged twice). Accordingly, I have resolved SOR 1.c in Applicant's favor.

The evidence supporting the allegations in SOR ¶¶ 1.a-1.f is sufficient to raise the following disqualifying conditions under this guideline:

AG ¶ 19(a): inability to satisfy debts;

AG ¶ 19(b): unwillingness to satisfy debts regardless of the ability to do so;

AG ¶ 19(c): a history of not meeting financial obligations; and

AG ¶ 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.

The following mitigating conditions are potentially applicable:

AG ¶ 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;

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, a death, divorce or separation, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances;

AG ¶ 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 credit counseling service, and there are clear indications that the problem is being resolved or is under control;

AG ¶ 20(d): the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts;

AG ¶ 20(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; and

AG ¶ 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.

AG ¶ 20(a) is not established. Applicant's delinquent debts are numerous, recent, and were not incurred under circumstances making recurrence unlikely.

AG ¶ 20(b) is not fully established. Applicant has encountered several conditions beyond his control: a marital break-up in February 2007, unemployment from October 2007 to February 2008, inability to work due to a back injury in November 2013, and uninsured medical expenses in January 2014. The five-week unpaid furlough as a result of the government shutdown in December 2018-January 2019 was also a condition beyond his control, which hindered any recent efforts to resolve his debts. However, Applicant's tax delinquencies occurred before the government shutdown. Furthermore, he has not acted responsibly. He made a payment agreement and 11 payments of delinquent federal income taxes, but he took no affirmative actions after October 2016 to resolve his federal tax debt. Instead, he has passively waited for the IRS to apply his refunds to unpaid taxes. He has offered no reasonable explanation for his repeated failures to file his federal income tax returns on time. He submitted no evidence of affirmative action to resolve his delinquent municipal taxes.

AG ¶ 20(c) is not established. Applicant has not received financial counseling and his tax problems are not resolved.

AG ¶ 20(d) is not established. Applicant has no payment plans in effect for his delinquent taxes. Relying on involuntary collection of a delinquent debt does not constitute "good faith" within the meaning of this mitigating condition. See ISCR Case No. 09-5700 (App. Bd. Feb. 24, 2011).

AG ¶ 20(e) is not established. Applicant has not disputed his federal and municipal tax debts.

AG ¶ 20(g) is not fully established. Applicant has filed all his past-due federal returns, but he has not filed his municipal tax returns, and he has not fully paid the past-due taxes. Furthermore, the fact that Applicant has filed his past-due federal returns does not end the inquiry. A security clearance adjudication is not a tax-enforcement procedure. It is an evaluation of an individual's judgment, reliability, and trustworthiness. The fact that Applicant has filed his past-due returns "does not preclude careful consideration of his security worthiness based on longstanding prior behavior evidencing irresponsibility." ISCR Case No. 12-05053 (App. Bd. Oct. 30, 2014). 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. ISCR Case No. 15-00216 at 4 (App. Bd. Oct. 24, 2016), *citing Cafeteria & Restaurant Workers Union Local 473 v. McElroy*, 284 F.2d 173, 183 (D.C. Cir. 1960), *aff'd*, 367 U.S. 886 (1961)

Guideline G, Alcohol Consumption

The SOR alleges an alcohol-related arrest for domestic abuse in April 2015 (SOR ¶ 2.a) and a citation for public intoxication and disorderly conduct in April 2013 (SOR ¶ 2.b). The concern under this guideline is set out in AG ¶ 21: "Excessive alcohol consumption often leads to the exercise of questionable judgment or the failure to control impulses, and can raise questions about an individual's reliability and trustworthiness."

The following disqualifying conditions under this guideline are potentially applicable:

AG ¶ 22(a): alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, disturbing the peace, or other incidents of concern, regardless of the frequency of the individual's alcohol use or whether the individual has been diagnosed with alcohol use disorder;

AG ¶ 22(c): habitual or binge consumption of alcohol to the point of impaired judgment, regardless of whether the individual is diagnosed with alcohol use disorder;

AG ¶ 22(d): diagnosis by a duly qualified medical or mental health professional (e.g., physician, clinical psychologist, psychiatrist, or licensed clinical social worker) of alcohol use disorder;

AG ¶ 22(e): the failure to follow treatment advice once diagnosed;

AG ¶ 22(f): alcohol consumption, which is not in accordance with treatment recommendations, after a diagnosis of alcohol use disorder; and

AG ¶ 22(g): failure to follow any court order regarding alcohol education, evaluation, treatment, or abstinence.

Applicant's admissions and the documentary evidence in the FORM are sufficient to establish the allegations in SOR ¶¶ 2.a and 2.b and raise the disqualifying conditions in AG ¶ 22(a) and 22(c). There is no evidence that Applicant has been diagnosed with an alcohol use disorder; received any counseling, treatment advice, or recommendations regarding his alcohol use; or failed to follow any court orders regarding his alcohol use. Thus, the disqualifying conditions in AG ¶¶ 22(d), 22(e), 22(f), and 22(g) are not established.

The following mitigating conditions are potentially applicable:

AG ¶ 23(a): so much time has passed, or the behavior was so infrequent, or it happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or judgment; and

AG ¶ 23(b): the individual acknowledges his or her pattern of maladaptive alcohol use, provides evidence of actions taken to overcome this problem, and has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations.

AG ¶¶ 23(a) and 23(b) are established. Applicant's last alcohol-related incident was more than four years ago. He acknowledged his maladaptive alcohol use, successfully completed his probation, abstained from alcohol during his probation, and has moderated his alcohol use.

Whole-Person Concept

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. In applying the whole-person concept, an 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. An 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.

I have incorporated my comments under Guidelines F and G in my whole-person analysis and applied the adjudicative factors in AG ¶ 2(d). Because Applicant requested a determination on the record without a hearing, I had no opportunity to evaluate his credibility and sincerity based on demeanor. See ISCR Case No. 01-12350 at 3-4 (App. Bd. Jul. 23, 2003). After weighing the disqualifying and mitigating conditions under Guideline F and G, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns raised by his alcohol consumption, but he has not mitigated the security concerns raised by his repeated failures to timely file his tax returns and pay the taxes due.

Formal Findings

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline F (Financial Considerations): AGAINST APPLICANT

Subparagraphs 1.a, 1.b, 1.e, and 1.f: Against Applicant

Subparagraphs 1.c and 1.d: For Applicant

Paragraph 2, Guideline G (Alcohol Consumption): FOR APPLICANT

Subparagraphs 2.a and 2.b; For Applicant

Conclusion

I conclude that it is not clearly consistent with the national security interests of the United States to grant Applicant eligibility for access to classified information. Clearance is denied.

LeRoy F. Foreman
Administrative Judge