



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



In the matter of:)	
)	
)	ISCR Case No. 18-00171
)	
Applicant for Security Clearance)	

Appearances

For Government: Nicole Smith, Esq., Department Counsel
For Applicant: *Pro se*

02/27/2019

Decision

Gregg A. Cervi, Administrative Judge

This case involves security concerns raised under Guideline F (Financial Considerations). Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on October 23, 2016. On February 2, 2018, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent him a statement of reasons (SOR) alleging security concerns under Guideline F.¹ Applicant answered the SOR and requested a hearing.

The case was assigned to me on August 3, 2018. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on November 8, 2018, scheduling the

¹ The DOD CAF acted under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; and DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive). The Adjudicative Guidelines (AG) were revised effective June 8, 2017, and apply herein.

hearing for November 19, 2018. The hearing was convened as scheduled. Government Exhibits (GE) 1 through 4 were admitted in evidence without objection. Applicant testified. The record was held open to permit Applicant to submit documentary evidence in mitigation, but no evidence was submitted. DOHA received the hearing transcript (Tr.) on November 29, 2018.

Findings of Fact

Applicant is a 32-year-old firearms instructor, employed by a defense contractor since January 2017. He graduated from high school in 2004. He married in 2005 and divorced in 2007, and has one 11-year-old child. He served in the Army National Guard from 2003 until being honorably discharged in 2009. Applicant held a security clearance from 2004 to 2009.

The SOR alleges Applicant is delinquent on three debts totaling approximately \$40,000; defaulted on a mortgage and the home was foreclosed in 2013; and failed to file Federal and state income tax returns for tax years 2015 and 2016. The SOR allegations are supported by substantial evidence. Applicant admitted the SOR allegations with explanations.

Applicant's financial problems began after he divorced in 2007. He incurred sole responsibility for a child-support obligation, home mortgage and other expenses. He was unable to make the mortgage payments, defaulted in about 2008 and the home was foreclosed in 2013. (SOR ¶ 1.f) No deficiency is owed and his credit report no longer shows the debt.

Other debts include a \$39,633 car loan that was reported in his 2017 credit report as \$2,192 past-due. (SOR ¶ 1.c) Applicant stated that he used the loan payments to pay for trips to visit his ill father from 2017 until he passed away in 2018. He testified that he was eight months behind in payments and owed about \$32,000. He did not have an agreement to resolve the delinquent account. Applicant claimed that he paid two small debts listed in SOR ¶¶ 1.d and 1.e, in February or March 2017 with a debit card. No record of the payments was submitted, but they are no longer reflected in his most current credit report.

Applicant testified that he failed to file Federal and state income tax returns for tax years 2015 to 2017 because of stress from a custody dispute with his ex-spouse, and that he is waiting to accumulate sufficient funds to pay a tax lawyer or someone to assist him, and to pay approximately \$3,000 in taxes owed. He noted in testimony that he is unfamiliar with how to file delinquent tax returns and he could not find a tax preparer outside of tax season, but admitted that he had not been diligent in that effort.

Applicant earns about \$80,000 per year, has a monthly net remainder of about \$800, and \$1,000 in savings. He has not sought financial counseling.

Law and 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.

National security eligibility 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 a person’s stability, trustworthiness, reliability, discretion, character, honesty, and judgment. AG ¶ 1(b).

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. *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, e.g., ISCR Case No. 12-01295 at 3 (App. Bd. Jan. 20, 2015).

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, e.g., 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; see, AG ¶ 1(d).

Analysis

Financial Considerations

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. . . .

The relevant disqualifying conditions under AG ¶ 19 include:

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

Applicant’s admissions and the documentary evidence are sufficient to establish the disqualifying conditions above.

The following mitigating conditions under AG ¶ 20 are potentially relevant:

- (a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;
- (b) the conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, a death, divorce or separation, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances;

(c) the individual has received or is receiving financial counseling for the problem from a legitimate and credible source, such as a non-profit credit counseling service, and there are clear indications that the problem is being resolved or is under control;

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

(e) the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue; 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's financial status was likely negatively impacted by his divorce. He testified that his divorce resulted in increased expenses, child support, and an inability to meet the mortgage payments. He also attributed his inability to pay debts such as his car loan, on the need for the money to attend to his father. His reasons for not filing income-tax returns when due is less clear. Applicant has known of his debts and the need to file income tax returns for some time, but has not taken action to address them. In addition, he testified that he owes past-due taxes. He has not provided a financial statement to show his current financial status, and he has not taken action to resolve his tax issues. Two small debts he claimed to have paid are no longer reflected in his latest credit report, and are presumed to be resolved.

Applicant's lack of financial responsibility with regard to tax obligations, and the car loan is particularly concerning. He showed an inability or unwillingness to engage his creditor and the IRS to resolve these accounts. He has not sought financial counseling, and has not disputed his debts or the amounts owed.

The Appeal Board has long held:

Security requirements include consideration of a person's judgment, reliability, and a sense of his or her legal obligations. *Cafeteria & Restaurant Workers Union, Local 473 v. McElroy*, 284 F.2d 173, 183 (D.C. Cir. 1960), *aff'd*, 367 U.S. 886 (1961). Failure to comply with Federal tax laws suggests that an applicant has a problem with abiding by well-established government rules and regulations. Voluntary compliance with rules and regulations is essential for protecting classified information. See, e.g., ISCR Case No. 14-04437 at 3 (App. Bd. Apr. 15, 2016).

Overall, I find that Applicant has not adequately addressed his delinquent debt and tax obligations, nor has he shown the financial responsibility expected of security

clearance applicants. I find insufficient evidence that his financial status is under control and that similar problems are unlikely to recur. No conditions apply to mitigate his delinquent tax obligations and car loan.

Whole-Person Concept

Under AG ¶¶ 2(a), 2(c), and 2(d), the ultimate determination of whether to grant national security eligibility must be an overall commonsense judgment based upon careful consideration of the guidelines and the 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).² Although adverse information concerning a single criterion may not be sufficient for an unfavorable eligibility determination, the individual may be found ineligible if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility, or unstable behavior. AG ¶ 2(e).

I considered all of the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my findings of fact and comments under Guideline F in my whole-person analysis. Applicant's military service and personal difficulties do not overcome his history of financial irresponsibility.

Accordingly, I conclude Applicant has not carried his burden of showing that it is clearly consistent with the national security interests of the United States to grant him 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
Subparagraphs 1.a - 1.c:	Against Applicant
Subparagraphs 1.d - 1.f:	For Applicant

² (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.

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.

Gregg A. Cervi
Administrative Judge