



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



In the matter of:)
)
) ISCR Case No. 18-02160
)
)
Applicant for Security Clearance)

Appearances

For Government: Adrienne Driskill, Esq., Department Counsel
For Appellant: *Pro se*

10/30/2019

Decision

GLENDON, John Bayard, Administrative Judge:

This case involves security concerns raised under Guideline F (Financial Considerations). Applicant was unemployed and underemployed from 2011 to 2017. He failed to file his federal and state income tax returns as required for 2015 through 2017 because he was concerned that he had insufficient funds to pay his taxes. Based upon the record as a whole, his evidence was insufficient to mitigate the security concerns raised by his failures to file his tax returns, as required. Eligibility for access to classified information is denied.

Statement of the Case

On April 12, 2019, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent Applicant a Statement of Reasons (SOR) setting three allegations under Guideline F. The DOD CAF acted under Executive Order 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960); DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) promulgated in Security Executive Agent Directive

4, *National Security Adjudicative Guidelines* (Dec. 10, 2016), for all adjudicative decisions on or after June 8, 2017.

On May 8, 2019, Applicant responded to the SOR, admitting two tax allegations in the SOR with additional comments regarding mitigating circumstances and denying a third allegation (SOR ¶ 1.c), which was subsequently withdrawn. He requested a hearing before an administrative judge of the Defense Office of Hearings and Appeals (DOHA). On June 20, 2019, Department Counsel withdrew the third SOR allegation, which was a drafting error. On August 2, 2019, the case was assigned to me, and DOHA issued a notice of hearing on the same day, scheduling the hearing on August 19, 2019.

I convened the hearing as scheduled. Department Counsel presented four proposed exhibits, which I marked as Government Exhibits (GE) 1 through 4. Applicant offered four proposed exhibits, which I marked as Applicant's Exhibits (AE) A through D. I kept the record open until September 6, 2019, to give Applicant the opportunity to submit additional evidence. He subsequently requested an extension of time until September 20, 2019, which I granted. Applicant submitted five additional exhibits in multiple emails prior to the closing of the record, one of which contained duplicates of AE B through D along with other additional documents. For completeness and the clarity of the record, I have marked all five exhibits and the related emails from Applicant and Department Counsel as AE E through I. All exhibits were admitted into the record without objection. I, *sua sponte*, extended Applicant's time to submit additional evidence until October 25, 2019. On that date, Applicant wrote in an email that he was unable to provide any additional documentation. I have marked his email and a prior thread of emails as Hearing Exhibit 3, and additional prior emails as Hearing Exhibits 1 and 2. I received the hearing transcript (Tr.) on August 30, 2019.

Findings of Fact

In his SOR response, Applicant admitted that he failed to file his 2014-2017 federal and state taxes as required (SOR ¶¶ 1.a and 1.b). I have incorporated his admissions in my findings of fact. Applicant's personal information is extracted from GE 1, his security clearance application, dated August 3, 2017, (SCA) unless otherwise indicated by a parenthetical citation to the record. After a thorough and careful review of the pleadings, Applicant's testimony at the hearing, and the documentary evidence in the record, I make the following findings of fact.

Applicant, 67, has worked as an engineer for a defense contractor since June 2017. Prior to that, he was unemployed since 2011, except for two temporary, low-paying jobs. He earned a bachelor's degree in mechanical engineering in 1975. He held a secret clearance from 1986 to 1991 when he was an employee of a defense contractor. He has never married and has one child (age17). (Tr. 11, 12, 23, 24, 25-26.)

In his SOR response, Applicant admitted that he failed to file federal and state tax returns in 2014 through 2017. He wrote that this was due to the fact that he believed he owed taxes and could not afford to pay them. He was struggling with his unemployment

and was scared. At the hearing he admitted that he did the worst thing he could do, which was nothing. He subsequently determined that he did, in fact, file his federal tax return for 2014 as required, and he provided a copy of that return as evidence. It reflects a filing date of April 13, 2015, and that he was due to receive a refund of \$1,339. The status of his 2014 state tax return is unclear. He also wrote in his SOR response that he was in the process of preparing his delinquent returns, starting with the most recent year, 2018. The SOR does not allege that he failed to file his 2018 federal and state returns as required. (Tr. 31; AE C, D, G.)

At the hearing, Applicant submitted copies of his 2018 and 2017 federal and state tax returns, dated August 1 and 8, 2019, shortly before the hearing date. If he had filed for an extension in 2018 and his federal and state returns and tax payments would have been due on October 15, 2019. He testified that he did not file for an extension, though a letter from his tax preparer suggests that he did. (SOR response; AE C, D, H; AE E at 45-46; Tr. 28-29, 47.)

The remaining security concerns under the SOR allegations were Applicant's federal and state tax returns for 2015 and 2016. On September 11, 2019, he submitted copies of the first two pages of his 2015 and 2016 federal tax returns. Both returns reflect that he owed no taxes. He noted in his email that the returns were not yet filed and would only be released by the tax preparer for filing once he paid the preparer's fee, which he said would "be in a few days." He never communicated or documented after the hearing that these two returns had been filed. (AE H.)

Even though Appellant incorrectly disclosed in his SCA that he owed federal and state income taxes for 2015 and 2016, the SOR does not allege that he failed to pay his federal and state taxes as required. In his SOR response, he volunteered that he was in the process of obtaining a home equity loan to pay his delinquent taxes. As noted, Applicant's federal tax returns for the years 2015 and 2016 reflect he owes no income taxes in those years.

Applicant's 2017 and 2018 federal tax returns reflect that he owes \$340 and \$7,161, respectively. His state returns reflect that he is due a refund for 2017 of \$444 and owes \$2,679 for 2018. He also volunteered a document from the state tax authority, dated March 20, 2019, notifying him that it was garnishing his wages to pay a tax debt of \$6,364 for the year 2016. The notice predates Applicant's filing of his state tax return for that year, so the amount due is merely an estimate by the state and may change since he was unemployed in 2016. (SOR response; AE E at 2, 11, 22, 35, 43, 45-47; AE F at 3; Tr. 32, 35, 43-45, 53.)

At the time of the hearing, Applicant was in the final stage of obtaining a home equity line of credit (HELOC) in the amount of \$75,000. He submitted at the hearing the lender's conditional approval letter, dated as of August 7, 2019. In an email dated August 28, 2019, he wrote that he expected to receive the loan proceeds in about a month. He wrote further that he intends to pay his past due taxes to the IRS and the state tax

authority once the HELOC loan is finalized. After the hearing, Applicant advised that he did not qualify for the HELOC. (AE B, AE G at 1; Tr. 52-60; Hearing Ex. 3 at 4.)

During his extended period of unemployment, Applicant maintained financial stability. Presently, he is earning about \$20,000 in annual income less than he did in 2011, but is able to pay his bills. He has no delinquent consumer debt and has only one credit card with a relatively small balance. His vehicle was paid off in 2010. He has retirement accounts worth about \$600,000. It appears that Applicant is unwilling to pay his tax debts with funds from these accounts. While unemployed in 2015, he refinanced his home mortgage with a 15-year mortgage in the amount of \$159,000. The mortgage loan has a current balance of about \$125,000. He supported himself during his years of unemployment by selling assets in his personal investment account at the rate of about \$75,000 per year for several years. He no longer has those assets, but it is clear from his testimony that he manages his finances very conservatively. He loves his job and would like to continue working there for as long as possible. He wants to do something meaningful with his life and his current position is a good place for him to do so. He had intended to pay for his share of his child's college expenses with assets he has invested over the years in a special college investment account and with borrowing from the HELOC. It is very important to Applicant that his child have the opportunity to attend and complete college. (GE 3 at 5, 8; GE 4 at 3, 4; Tr. 11-16, 36-37, 49-51; Hearing Ex. 3 at 1-3.)

Applicant submitted a personal reference from a long-time friend and former work colleague. The friend wrote that Applicant has a history of protecting his employer's secrets and that despite his financial challenges due to his unemployment, he behaved responsibly during that prolonged period by reducing his expense while also providing for his child. (AE I at 2.)

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 security concern under this guideline is set out in AG ¶ 18 as follows:

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. . . .

This concern is broader than the possibility that a person might knowingly compromise classified information to raise money. It encompasses concerns about a person's self-control, judgment, and other qualities essential to protecting classified information. A person who is financially irresponsible may also be irresponsible, unconcerned, or negligent in handling and safeguarding classified information.

Appellant's admissions in his SOR response, testimony, and the documentary evidence in the record establish the following potentially disqualifying condition under this guideline for the two remaining allegations in the SOR: AG ¶ 19(f) ("failure to file . . . annual Federal, state, or local income tax returns . . . 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; [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 partially established. Applicant's behavior was in response to the highly unusual, lengthy period of unemployment he encountered and the financial stress this created. He recognizes that his unemployment does not excuse his failure to file. He has prepared his delinquent federal tax returns for 2015 and 2016, which reflect that he owes no taxes. He must pay the tax preparer before the federal returns will be released and filed. He provided no evidence that he has filed these returns or the state returns for these two years. With his retirement funds, he has the financial resources available to pay his tax delinquencies. For personal reasons, he has apparently declined to file his two delinquent tax returns and pay his past-due taxes. Under all of the circumstances, his behavior since 2015 casts doubt about his current reliability, trustworthiness, and good judgment.

AG ¶ 20(b) is partially established. Applicant experienced an unusually long period of unemployment or underemployment that was beyond his control. It cannot be said, however, that his failure to file his tax returns during the 2015 through 2017 period were

largely beyond his control. He recognizes that he made a mistake by not filing. He has not remedied his filing delinquencies for 2015 and 2016, and the status of his 2014 state tax return is unknown. He did not act responsibly under the circumstances.

AG ¶ 20(g) is not established with respect to Applicant's delinquent tax filings. He has not filed his 2015 and 2016 tax returns. It not clear why he has not paid his tax preparer and obtained the release of the federal forms for filing, since they are already prepared and they reflect that he owes no taxes for those years.

Whole-Person Analysis

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 and applying the adjudicative factors in AG ¶ 2(d), specifically:

- (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 Guideline F in my whole-person analysis and applied the adjudicative factors in AG ¶ 2(d). Some of the factors in AG ¶ 2(d) were addressed above, but other factors warrant additional comment. I have taken into consideration Applicant's age, his unfortunate, long period of unemployment, and his desire to continue working to support himself and to pay for his son's education.

The SOR does not allege that he failed to pay federal and state taxes in any years. The evidence revealed that he has some tax debts still outstanding. For purposes of a whole-person assessment, it is appropriate to note that he has failed to pay these taxes. It is also appropriate, however, to observe that he voluntarily disclosed these debts at the hearing and in a post-hearing evidentiary submission. Overall, his failure to pay these taxes is part of the larger pattern of Applicant's mismanagement of his important tax obligations.

Applicant's evidence in mitigation is insufficient to address the security concerns raised by his mistakes and errors in judgment. After weighing the disqualifying and

mitigating conditions under Guideline F and evaluating all of the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns raised by his financial considerations.

Formal Findings

Guideline F, Financial Considerations: AGAINST APPLICANT

Subparagraphs 1.a and 1.b: Against Applicant

Subparagraph 1.c: Withdrawn

Conclusion

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

John Bayard Glendon
Administrative Judge