



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



In the matter of:)	
)	
[Redacted])	ISCR Case No. 18-02288
)	
Applicant for Security Clearance)	

Appearances

For Government: Andrea Corrales, Esq., Department Counsel
For Applicant: *Pro se*

07/22/2019

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guideline F (Financial Considerations) by Applicant's failure to timely file a federal income tax return and pay the taxes due. Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on January 26, 2017. On October 5, 2018, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guideline F. 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 December 31, 2018, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on January

30, 2019, and the case was assigned to me on April 23, 2019. On May 8, 2019, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for June 10, 2019. I convened the hearing as scheduled. Government Exhibits (GX) 1 and 2 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibits (AX) A through C, which were admitted without objection. I kept the record open until June 24, 2019, to enable him to submit additional documentary evidence. He timely submitted AX D through G, which were admitted without objection. DOHA received the transcript (Tr.) on June 20, 2019.

Findings of Fact

In Applicant's answer to the SOR, he admitted both allegations. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 52-year-old piping designer employed by a defense contractor since September 2016. His supervisor, who has known him for more than 10 years and supervised him since early 2018, submitted a letter stating that he has "never observed any behavior that would cause concern or preclude [Applicant] from obtaining a security clearance." (AX A.)

Applicant's work history in his SCA reflects unemployment from January to April 2009, September to December 2014, and February to August 2016. He has lived with a cohabitant since October 1998. He has no children. He received a security clearance in August 2007.

When Applicant submitted his SCA, he disclosed that he failed to file his federal income tax return for 2015 and pay the taxes due. He explained that he was unemployed and could not afford to pay the taxes due. (GX 1 at 39.) In response to DOD CAF interrogatories, he estimated that he earned about \$65,000 during tax year 2015. (GX 2 at 5.)

When Applicant answered the SOR, he stated that he had contacted the IRS to resolve his delinquent tax debt. At the hearing, Applicant submitted evidence that he filed his federal income tax returns for 2015 through 2018 and mailed them to the IRS on June 5, 2019. They were received by the IRS on June 10, 2019. (AX G.) He testified that he filed his federal returns in April 2019, but that they apparently were lost, requiring that he file them again. (Tr. 26.)

Applicant owes \$17,299 in federal income taxes for 2015 and \$8,415 for 2017. (AX C at 6, 9-14, 25, 31.) He owed \$1,728 for 2016, and he made credit-card payments of \$1,000 and \$728 on April 17, 2019, which paid his 2016 tax debt in full. (AX C at 1-5, 15, and 22; Tr. 12.)

Applicant owed \$10,739 for 2018 federal income taxes. (AX C at 36.) He submitted evidence that he made credit-card payments of \$4,739 and \$3,000 on April

15, 2019, for tax year 2018, leaving a federal tax debt of about \$3,000 for that year. (AX C at 1-5.)

Applicant estimated that his credit-card payments attributable to the tax payments for 2018 and 2016 would be about \$600 per month, and that it will take six years to pay off the credit-card balances. (Tr. 35.) After the hearing, he submitted evidence that he established an online payment agreement with the IRS in June 2019. His evidence does not reflect the amount or duration of the payments or the tax years covered by the agreement. (AX F.)

In April 2019, Applicant filed his state income tax returns for 2016, 2017, and 2018. He owes \$424 for 2016, \$424 for 2017, and \$588 for 2018. He has not yet filed his state return for 2015, and he has not yet paid any of the state taxes due. (Tr. 28-30.)

Applicant testified that his periods of unemployment required that he use his savings for living expenses and his medical expenses as a Type I diabetic, leaving insufficient funds to pay his federal income taxes. When he found employment in 2016, he “maxed out” his dependents and worked overseas for two years, causing his tax problems to “snowball.” (Tr. 17.) He has now amended his exemptions to zero. (Tr. 33.)

Applicant received DOHA interrogatories about his taxes in September 2018. He testified that he “started trying to get the ball rolling” after receiving the interrogatories, but he did not begin to take action to file the past-due returns until March 2019 because his job required frequent travel. (Tr. 31-32.)

Applicant testified that his cohabitant is employed, but that he usually pays for all their living expenses. (Tr. 23.) He recently leased a new car for his cohabitant, making a down payment of \$5,000. (Tr. 25.) In his post-hearing submission, he stated that his cohabitant has begun making the lease payments. (AX D.) The record does not reflect the amount of his monthly lease payments. He and his cohabitant vacationed overseas in August 2018 at a cost of about \$4,500. (Tr. 24-25.)

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 failed to timely file his federal income tax return for 2015 (SOR 1.a) and owes about \$5,000 in delinquent taxes for 2015 (SOR ¶ 1.b). The SOR does not allege Applicant's failures to timely file federal income tax returns for

2016 through 2018, his failures to file state tax returns for 2016 through 2018, and his federal and state tax debts for 2016 through 2018. Applicant did not object to the evidence of unalleged conduct. To the contrary, he voluntarily presented substantial evidence regarding tax years 2016 through 2018, took advantage of the additional time I granted for post-hearing submissions, and presented evidence of progress in resolving the unalleged tax debts.

Conduct not alleged in the SOR may be considered to assess an applicant's credibility; to decide whether a particular adjudicative guideline is applicable; to evaluate evidence of extenuation, mitigation, or changed circumstances; to consider whether an applicant has demonstrated successful rehabilitation; or as part of a whole-person analysis. ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006). I have considered the unalleged failures to timely file federal and state income tax returns and failures to pay the taxes due for these limited purposes.

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. . . .

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. See ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012).

Applicant's failure to timely file his federal income tax return for 2015 and his failure to pay the taxes due for that year establish 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 relevant:

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; 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. The SOR alleges only one failure to timely file his federal return and one tax debt for 2015. However, Applicant's ongoing, unpaid tax debt for 2015 reflects a continuing course of conduct and makes it "recent" for the purposes of the Guideline F mitigating conditions. ISCR Case No. 15-06532 at 3 (App. Bd. Feb. 16, 2017). The tax debt for 2015 was not incurred under circumstances making recurrence unlikely. To the contrary, his repeated noncompliance with filing requirements and failure to timely resolve his tax debts indicates that recurrence is likely.

AG ¶ 20(b) is not established. Applicant's periods of unemployment in 2014 and 2016 were conditions beyond his control and contributed to his inability to pay the taxes due for 2015. However, he has not acted responsibly. Notwithstanding his significant tax debt, he chose to spend substantial sums to lease a new car and take an overseas vacation. He did not begin to "get the ball rolling" until he received DOHA interrogatories in September 2018 and realized that his tax delinquencies were an impediment to obtaining a security clearance. A person who begins to address security concerns only after having been placed on notice that his or her application for a security clearance is in jeopardy may lack the willingness to follow rules and regulations when his or her personal interests are not at stake. ADP Case No. 15-03696 (App. Bd. Apr. 5, 2019).

AG ¶ 20(c) is not fully established. Applicant obtained professional tax advice and assistance in March 2019. Although he has made progress in resolving his tax problems, his tax debt for 2015 is not resolved, and his other tax problems are not yet under control.

AG ¶ 20(d) is not fully established. Although Applicant submitted evidence that he has a current payment agreement with the IRS, he provided no evidence that it applies to the 2015 tax debt and no evidence of payments under the agreement. He receives some mitigating credit for resolving the 2016 federal tax debt and making substantial payments on his 2018 federal tax debt. However, his resolution of the 2016 debt and partial resolution of the 2018 debt did not substantially improve his overall financial situation, because he resolved the tax debt by incurring credit-card debt.

AG ¶ 20(g) is partially established. Applicant filed his 2015 federal income tax return in June 2018, but he has made no payments on the debt, and he presented no evidence that his current payment agreement applies to the 2015 debt or that he has made any payments under the agreement. Furthermore, Applicant's eventual filing of the 2015 federal income tax return 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 2015 return does not preclude careful consideration of his security worthiness based on his entire record of repeatedly failing to comply with filing and payments requirements. See, e.g., ISCR Case No. 12-05053 (App. Bd. Oct. 30, 2014).

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 Guideline F in my whole-person analysis and applied the adjudicative factors in AG ¶ 2(d). After weighing the disqualifying and mitigating conditions under Guideline F, and evaluating all the

evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns raised by his failure to timely file his 2015 federal income tax return 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 and 1.b:

Against 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