



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



In the matter of:)
)
) ISCR Case No. 18-02728
)
Applicant for Security Clearance)

Appearances

For Government: Nicholas Temple, Esq., Department Counsel
For Applicant: *Pro se*

08/23/2019

Decision

BENSON, Pamela C., Administrative Judge:

Applicant was a tax protester for many years, despite the Internal Revenue Service (IRS) sending him notices about his legal requirements for several years. He chose to ignore those notices and accumulated a Federal tax debt of \$250,418. He was also put on notice that he had several delinquent accounts when he had his background interview in 2017, and after the Statement of Reasons (SOR) was issued in late 2018. Applicant failed to act responsibly to resolve his delinquent debts, or to establish a payment agreement with the IRS. His debt, including extensive past-due Federal income tax debt, remains ongoing and unresolved. Guideline F (financial considerations) security concerns are not mitigated. Access to classified information is denied.

Statement of the Case

On October 17, 2016, Applicant signed a security clearance application (SCA). On December 3, 2018, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued an SOR to Applicant, detailing security concerns under Guideline F (financial considerations). The action was taken under Executive Order (EO) 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) effective within the DOD on June 8, 2017.

On December 31, 2018, Applicant responded and requested a hearing. On June 5, 2019, the case was assigned to me, and on June 6, 2019, the Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing, setting the hearing for June 26, 2019. Applicant's hearing was held as scheduled.

During the hearing, Department Counsel offered seven Government Exhibits (GE 1-7) and Applicant offered the two exhibits that were attached with his SOR response, which I labeled as Applicant Exhibits (AE) A and B. Applicant objected to GE 4-6, as noted below. I admitted into evidence all proffered exhibits. I held the record open until July 26, 2019, in the event either party wanted to submit additional documentation. DOHA received the hearing transcript (Tr.) on July 11, 2019. On July 26, 2019, Applicant submitted an e-mail, which I labeled as AE C and admitted without objection, and the record was closed.

Procedural Matters

Applicant objected to GE 4-6, which are Notices of Federal Tax Liens that were filed against Applicant. Applicant stated his evidence showed that the Internal Revenue Service (IRS) classified these tax liens as "closed and non-collectible." Department Counsel stated that while Applicant's evidence may, or may not, mitigate the Government's evidence, the Notices of Federal Tax Liens were authentic and admissible. I reviewed AE A, a letter dated May 27, 2011, which showed that although the IRS temporarily closed Applicant's case due to it not being currently collectible, the letter also specified that Applicant still owed the outstanding taxes to the IRS, and penalties and interest would continue to accrue. Since this information is relevant and material to the issues in this case, I overruled Applicant's objection, and admitted GE 4-6 into evidence. (Tr. 11-12, 16-17)

Findings of Fact

In Applicant's SOR response, he admitted SOR ¶¶ 1.a through 1.n. Applicant's admissions are accepted as findings of fact. Additional findings of fact follow.

Applicant is a 63-year-old systems engineer who has been employed by the same defense contractor since 2011. His annual salary is approximately \$100,000. He has taken side jobs over the past four years and earned an additional \$10,000 - \$15,000 per year. He served in the Air Force from 1974 to 1980, and he received an honorable discharge at the rank of E-4. He attended college from 1981 to 1985 and earned two associates degrees. In 1994, he married and has two adult stepchildren from his wife's former marriage, and they have a daughter, age 24, and a son, age 20. (Tr. 19-20, 23-28, 42-44; GE 1)

Financial Considerations

SOR ¶¶ 1.a, 1.b and 1.c allege Applicant owes Federal income taxes of about \$250,418 for tax years 1998 through 2006. These allegations are established by Applicant's admissions and the Government's evidence. Applicant's tax issues began in

the late 1990s after he researched and adopted tax-protestor theories. He believed the Federal income tax system was invalid and non-obligatory. He did not pay income taxes, and he stopped filing his income tax returns for several years. At the hearing, Applicant was vague with details due to the passage of time. He admitted there were years he filed income tax returns in which he intentionally omitted or underreported his income for that tax period. He filed some of his Federal income tax returns in about 2007, but he could not recall the specific tax years he filed. (Tr. 29-34; GE 4-6)

Applicant's tax beliefs changed in approximately 2007 after a prominent tax protestor he followed was incarcerated. Applicant realized he needed to address his tax and other financial issues. He admitted he had received numerous IRS tax notices over the years informing him of his legal requirement to file and pay Federal taxes. (Tr. 34-36)

Applicant retained a tax preparation service, and according to their calculations, Applicant owed the IRS a total of \$12,000 for tax year 2006. During his October 2017 background interview, he had admitted he owed \$3,550 in Federal taxes for 2008, and \$2,415 in Federal taxes for 2012.

Applicant's position at the hearing was that he no longer owed any Federal taxes for any tax year earlier than 2006, and he will not take any action to resolve those tax debts. He does not currently have any installment agreement in place with the IRS for the Federal taxes that he does owe, and has not made any payments to the IRS for the past three years. Applicant failed to provide copies of his tax records during the 30-day period the record was held open. Applicant's delinquent Federal taxes of about \$250,418 are unresolved. (Tr. 29-35, 37-42, 54, 57; GE 4-6; AE A)

SOR ¶¶ 1.d, and 1.f-1.n allege delinquent medical accounts for \$1,489, to include four accounts with a balance under \$100. Applicant admitted these debts, but he has not made arrangements to pay these outstanding accounts. These delinquent medical accounts are unresolved. (Tr. 46-47, 55; GE 2, GE 3)

SOR ¶ 1.e alleges an unpaid utility account referred for collection in the amount of \$358. (GE XX) Applicant admitted this debt in his SOR response. There is no evidence in the record to show that the debt is paid, or otherwise being resolved. (GE 3)

Applicant is embarrassed about his early tax history and the tax-protestor theories he once followed. He has never participated in financial counseling. He continues to financially support his son and daughter, and he pays for both of their car payments. His step-son has been involved in a contentious custody battle. Applicant and his wife have recently given him about \$12,000 for his legal expenses. He has been unable to make payments toward his delinquent financial obligations since he does not have any available funds to do so. Applicant provided no monthly budget or evidence of his monthly income and expenses during the 30-day period the record was held open. (Tr. 45-48, 51-52, 57-58)

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, “no 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 applicant’s 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.

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, these guidelines are applied 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, 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 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 “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See Exec. Or. 10865 § 7. Thus, nothing in this decision should be construed to suggest that it is based, in whole or in part, on any express or implied determination about applicant’s allegiance, loyalty, or patriotism. It is merely an indication the applicant has not met the strict guidelines 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. 95-0611 at 2 (App. Bd. May 2, 1996).

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 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). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Financial Considerations

AG ¶ 18 articulates the security concern for financial problems:

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 Appeal Board explained the scope and rationale for the financial considerations security concern in ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012) (citation omitted) as follows:

This concern is broader than the possibility that an applicant might knowingly compromise classified information in order to raise money in satisfaction of his or her debts. Rather, it requires a Judge to examine the totality of an applicant’s financial history and circumstances. The Judge must consider pertinent evidence regarding the applicant’s self-control, judgment, and other qualities essential to protecting the national secrets as well as the vulnerabilities inherent in the circumstances. The Directive presumes a nexus between proven conduct under any of the Guidelines and an applicant’s security eligibility.

AG ¶ 19 includes disqualifying conditions that could raise a security concern and may be disqualifying in this case: “(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.”

From the 1990s until about 2007, Applicant was a tax protester. He believed the federal tax system was invalid, and that he did not have to file federal tax returns or pay federal taxes. The IRS sent him notices about his responsibilities under Federal tax laws and regulations, to no avail. Applicant failed to timely file his Federal income tax returns for a number of years. That is not alleged in the SOR, but as a result, he failed to pay his Federal income taxes and accumulated about \$250,418 in past-due Federal tax debt. He also has an unpaid utility account and ten outstanding medical bills. The record establishes AG ¶¶ 19(a), 19(c), and 19(f).

Seven financial considerations mitigating conditions under AG ¶ 20 are potentially applicable in this case:

(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;

(f) the affluence resulted from a legal source of income; 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.

The DOHA Appeal Board concisely explained Applicant's responsibility for proving the applicability of mitigating conditions as follows:

Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. *See Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. *See Directive ¶ E3.1.15*. The standard applicable in security clearance decisions is that articulated in *Egan, supra*. "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." *Directive, Enclosure 2 ¶ 2(b)*. ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013).

None of the mitigating conditions apply. Applicant's acceptance of tax-protestor principles demonstrates poor judgment. This is especially apparent considering that he continued in that practice for a number of years despite the IRS informing him of his legal responsibility to file and pay Federal income taxes. While he had a change of heart in about 2007, and took apparent action to file his past-due returns, his resulting Federal income tax debt remains ongoing and unresolved. There were no circumstances beyond his control that adversely affected his finances. He and his wife made poor financial decisions to the detriment of their unpaid financial responsibilities.

A debt that became delinquent several years ago is still considered recent because "an applicant's ongoing, unpaid debts evidence a continuing course of conduct and, therefore, can be viewed as recent for purposes of the Guideline F mitigating conditions." 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)).

Applicant failed to provide supporting documentation of his actions, if any, to address his past-due taxes. He admitted he has not paid any of the delinquent accounts in the SOR, to include four of his unpaid medical debts that were under \$100.

The DOHA Appeal Board has commented that an Applicant's failure to file income tax returns (or, as alleged here, to address resulting tax debt):

. . . suggests that an applicant has a problem with complying with well-established governmental rules and systems. Voluntary compliance with such rules and systems is essential for protecting classified information. ISCR Case No. 01-05340 at 3 (App. Bd. Dec. 20, 2002). As we have noted in the past, a clearance adjudication is not directed at collecting debts. See, e.g., ISCR Case No. 07-08049 at 5 (App. Bd. Jul. 22, 2008). By the same token, neither is it directed toward *inducing an applicant to file tax returns*. Rather, it is a proceeding aimed at evaluating an applicant's judgment and reliability. *Id.* 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. See, e.g., ISCR Case No. 14-01894 at 5 (App. Bd. Aug. 18, 2015). See *Cafeteria & Restaurant Workers Union Local 473 v. McElroy*, 284 F.2d 173, 183 (D.C. Cir. 1960), *aff'd*, 367 U.S. 886 (1961).

Applicant expressed embarrassment over his prior views about the federal tax system. Even so, he does not currently have a plan in place with the IRS to address his extensive delinquent Federal tax debt. He failed to provide sufficient evidence to explain why he was unable to make payments or otherwise resolve the debts in the SOR. There is no evidence that he received financial counseling, or that he initiated a good-faith effort to repay his financial obligations, tax-related or otherwise. Applicant failed to provide documentation that he has a legitimate basis to dispute any of his outstanding accounts, and the debts remain unpaid and unaddressed. Applicant failed to mitigate financial considerations security concerns.

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 the circumstances. The 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.

Under AG ¶ 2(c), "[t]he ultimate determination" of whether to grant a security clearance "must be an overall commonsense judgment based upon careful consideration of the guidelines" and the whole-person concept. My comments under Guideline F are incorporated in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under those guidelines but some warrant additional comment.

Applicant is a 63-year-old systems engineer who has been employed by the same defense contractor since 2011. His annual salary is approximately \$100,000. He has taken side jobs over the past four years, and has earned an additional \$10,000 - \$15,000 per year.

Applicant did not present sufficient mitigating evidence. He does not have a payment plan established with IRS to address his significant Federal tax debt. When a tax issue is involved, an administrative judge is required to consider factors such as the origin of the tax debts, and how long the applicant waits after a tax debt arises to begin and complete making payments. By his own admission, Applicant has not made any payments to the IRS in the last three years.

The primary problem here is that Applicant accepted tax-protestor theories despite the IRS sending him notices that he had a legal requirement to file his Federal income tax returns for several years. He chose to ignore those notices. While he later had a change of heart and has expressed embarrassment for his prior views, the resulting delinquent tax debt remains extensive, ongoing, and unresolved. He was also put on notice that he had several unpaid medical accounts and a utility account when he had his background interview in November 2017, and when the SOR was issued in December 2018. He failed to take any responsible action to resolve or pay his delinquent debts.

I have carefully applied the law, as set forth in *Egan*, Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. Financial considerations security concerns are not mitigated.

