



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



In the matter of:)	
)	
)	ISCR Case No. 19-00144
)	
Applicant for Security Clearance)	

Appearances

For Government: Eric Price, Esq., Department Counsel
For Applicant: *Pro se*

11/13/2019

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 29, 2017. On February 8, 2019, 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; 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. Applicant answered the SOR (Ans.) on March 19, 2019, and requested a hearing.

The case was assigned to me on February 25, 2019. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on August 20, 2019, scheduling

the hearing for September 12, 2019. The hearing was convened as scheduled. Government Exhibits (GE) 1 through 6 were admitted into evidence without objection. Applicant testified, and submitted Applicant Exhibits (AE) A and B, which were admitted into evidence without objection. DOHA received the hearing transcript (Tr.) on September 20, 2019.

Findings of Fact

Applicant is a 43-year-old logistics information technology task lead, employed by a defense contractor since 2017. He received his first master's degree in 2009, and his second master's degree in 2016. He served on active duty in the U.S. Marine Corps from his enlistment in 1994 until he retired as a Chief Warrant Officer 3 in 2014. He was previously married in 1996, but it was annulled in 1998. He remarried 2001 and has three children, all teenagers that live with him. Applicant's 2017 interim security clearance was revoked in September 2019.

The SOR alleges under Guideline F that Applicant filed a Chapter 13 bankruptcy in December 2018 that is pending; has two federal tax debts totaling \$35,136 for tax years 2016 and 2017; and two state tax debts totaling \$12,335 for tax years 2016 and 2017. Applicant admitted the SOR allegations with explanations. Applicant filed his federal and state tax returns on time, but did not have the funds to pay taxes owed.

Applicant opened a cigar lounge in 2014 that he sold for a profit in 2017. He then opened a sandwich shop in 2017, but quickly changed it into a coffee shop. The same year he opened another cigar lounge and barber shop, but all of the businesses closed in 2018. These endeavors were unprofitable.

Applicant consulted a bankruptcy attorney in late 2018, and filed a Chapter 13 bankruptcy in December 2018. He listed total liabilities of \$621,291 and was required to pay \$221,110 under a Chapter 13 repayment plan. Applicant was unable to make the plan payments, and in August 2019, he was notified that the bankruptcy would be dismissed if he did not convert it to a Chapter 7 bankruptcy or make the required plan payments. Applicant testified that he expected the bankruptcy would be dismissed by the end of September 2019.

As of the date of the hearing, Applicant had not made arrangements to pay delinquent federal and state taxes, and while the bankruptcy was pending, he was prevented from expending funds outside the bankruptcy process. Applicant's home in another state was foreclosed in August 2019, and he testified that he may owe a deficiency balance.

While employed with his current employer, Applicant earns a combined salary, military retirement, and veteran's disability income totaling \$182,000. He has about \$2,200 in savings. In testimony, Applicant took full responsibility for his financial predicament, and understands the security concerns his financial status invokes. Applicant's colleagues and friends provided character letters attesting to his work ethic,

reliability, trustworthiness, and dedication. He is praised for his military service and performance as a defense contractor. Applicant received court-mandated financial counseling before filing his bankruptcy petition.

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 in the record are sufficient to establish the disqualifying conditions above.

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

- (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; and

(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.

Applicant's soon to be dismissed bankruptcy and tax debts arose to some degree, from two unsuccessful businesses. Applicant filed tax returns when due, but failed to pay taxes when owed, resulting in state and federal tax liabilities of over \$47,000. Additionally, his financial liabilities total \$621,291, and he lost a home to foreclosure in August 2019. Despite Applicant's current income of \$182,000, he was unable to comply with the Chapter 13 bankruptcy payment plan, and expects the bankruptcy to be dismissed. Applicant's plan to address his debts and delinquent taxes is unclear, and he was unable to articulate a new financial plan during testimony. He had financial counseling prior to filing bankruptcy, but there is no evidence that he has a firm handle on his financial condition and there are doubts about his financial decision making.

The DOHA 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).

Applicant was unable to pay taxes while operating failed businesses, however his inability to make required plan payments in bankruptcy is inexplicable given his current income. His financial problems have been longstanding and remain a current concern. Applicant failed to produce a plan to address his financial situation, and to pay past-due taxes and resolve debts that will presumably not be discharged in bankruptcy.

Overall, I believe Applicant attempted to utilize the bankruptcy court to relieve the strain on his finances and address his debts, but since he did not successfully comply with the process, he is back to square one financially. I am unable to conclude that his financial problems are under control or are unlikely to recur. No conditions fully apply to mitigate his delinquent tax and other debts. I remain doubtful about Applicant's financial responsibility and good judgment with regard to finances.

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). 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. Despite Applicant's education and military service, he has not shown financial responsibility once the option of bankruptcy was underway, and he has not shown a reasonable effort or plan to address his tax liabilities.

Accordingly, I conclude Applicant has not carried his burden of showing that it is clearly consistent with the national interest 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.e:	Against Applicant

Conclusion

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

Gregg A. Cervi
Administrative Judge