



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
) ISCR Case No. 19-00256
)
)
Applicant for Security Clearance)

Appearances

For Government: Aubrey De Angelis, Esq., Department Counsel
For Appellant: *Pro se*

10/31/2019

Decision

GLENDON, John Bayard, Administrative Judge:

This case involves security concerns raised under Guideline F (Financial Considerations). Applicant failed to file his federal and state tax returns from 2011 to 2017 as required. Based upon the record as a whole, his evidence was insufficient to mitigate the security concerns raised by his extensive tax filing delinquencies. Eligibility for access to classified information is denied.

Statement of the Case

On April 2, 2019, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent Applicant a Statement of Reasons (SOR) setting forth two 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 April 24, 2019, Applicant responded to the SOR, admitting both allegations in the SOR and providing additional comments regarding mitigating circumstances. He requested a hearing before an administrative judge of the Defense Office of Hearings and Appeals (DOHA). On July 17, 2019, the case was assigned to me. DOHA issued a notice of hearing on September 6, 2019, scheduling the hearing on September 25, 2019.

I convened the hearing as scheduled. Department Counsel presented three proposed exhibits, which I marked as Government Exhibits (GE) 1 through 3. Applicant offered three proposed exhibits, which I marked as Applicant's Exhibits (AE) A through C. I kept the record open until October 28, 2019, to give Applicant the opportunity to submit additional evidence. On that date, he wrote to provide details on what steps he has taken to prepare his delinquent tax returns and to request 45 additional days to complete his tax returns. I informed Applicant that the record was closed. I marked that email as AE D, and I marked the Government's Exhibit list as Hearing Exhibit 1. All exhibits were admitted without objection. I received the hearing transcript (Tr.) on October 11, 2019.

Findings of Fact

In his SOR response, Applicant admitted that he failed to file his 2011-2017 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 (SCA), dated February 9, 2018, 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, 64, works as a senior engineer for a defense contractor. He has worked continuously since at least 1995, with two periods of unemployment, one in 2015 and a second shorter period in 2017. He earned a bachelor's degree in 1978. From 1979 to 1994, he held a secret clearance while working for a defense contractor. He has applied for a clearance in connection with his current position, which he has held since October 2017. He is married and has two adult children.

In his February 2018 SCA, Applicant disclosed that he had not filed his federal and state income tax returns since 2010. He wrote that he believed that he has adequate withholding to pay his tax liabilities and was "in the process of gathering the required information to file the appropriate tax forms and seeking the services of a tax service/accountant to help catchup." He blamed his delay on missing paperwork. At that time, his 2017 tax returns were not yet due. (GE 1 at 34.)

In his April 26, 2018 background interview, Applicant again blamed his delinquency on missing paperwork. He told the investigator that he planned to hire a CPA by the end of May 2018 and has a goal of completing all of his returns by July 2018. He said that he had not dealt with this issue because of "anxiety and time." He also said that he did not believe that he owes any back taxes. In his February 28, 2019 response to DOHA's

interrogatories, Applicant disclosed that he has not filed his 2018 federal or state income tax returns. He also wrote that he was “currently working CPA (sic) and submitting back tax forms. Federal 2011 has been filed and working on 2012 and other years.” He indicated that the 2011 tax returns were filed on February 28, 2019, the date of his response. At the hearing, he submitted a letter from the IRS covering tax year 2011 showing that he was due a refund of \$28,283. (GE 2 at 4, 5, 9; AE A.)

In his April 24, 2019 SOR response, Applicant wrote that he and his wife had difficulty filing returns for his wife’s business. He indicated that he needed those returns to file his income tax returns. Since 2011, they have not been able “to catch up.” He wrote that he expects to file his returns within the next two to three months. Applicant received notice of his September 25, 2019 hearing on September 6, 2019. He appeared at the hearing without having filed any additional tax returns. As noted, I left the record open for an additional month to give Applicant the opportunity to take whatever steps he desired to take. After that month, his response was that he needed an additional 45 days to work with his tax preparation firm to complete the delinquent tax returns. He commented that he was “actively working” on the details necessary for the preparation of his tax forms. Under the circumstances, I declined to grant Applicant’s request closed the record, but I admitted his email into the record as evidence of the status of his efforts as of the close of the record. (App. Ex. D at 1-2.)

Applicant submitted at the hearing two photographs depicting his tax records in plastic boxes with each year carefully labeled. He testified the tax firm that prepared his 2011 tax returns was the same firm he and his wife used prior to 2010. He offered no explanation as to why they did not continue with that tax preparation service in the years following 2010. He stated further that he would like to have everything filed by the end of the year and could probably complete his 2012 returns in a week or at least within the next 30 days. He testified that he felt anxious preparing the documentation needed to fill out his tax forms. He could not explain why that was such a problem if he believed he would receive tax refunds. (AE C; Tr. 8-17, 29.)

Applicant presented information regarding his background and his charitable work. He is a member of one or more boards of charitable organizations. He has also spent significant periods taken caring of his sick, elderly parents before they died. He provided assurances that in every other part of his life, he follows the rules. (Tr. 21-23, 43.)

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.

Applicant'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 SOR allegations: AG ¶¶ 19(c) ("a history of not meeting financial obligations") and 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 not established. Applicant's behavior is recent, frequent, and was not in response to any unusual circumstances. Since submitting his SCA in August 2018, Applicant has only filed his federal and state tax returns for one year, 2011. Due to the

instant security clearance process, and in particular his hearing, Applicant is beginning to take his tax filing responsibilities more seriously, and the evidence reflects that he will likely file the delinquent returns in the next few months, and possibly sooner. His pattern of behavior, however, starting in 2012 when his 2011 tax returns were due to be filed, casts doubt on his current reliability, trustworthiness, and good judgment.

AG ¶ 20(b) is not established. To the extent that his parent's illnesses and deaths may have contributed to Applicant's problems preparing his taxes, these problems did not interfere with his pursuit of a successful career. He just did not prioritize his taxes due to his anxiety about collecting the necessary paperwork. In any event, he did not act responsibly under the circumstances.

AG ¶ 20(g) is also not established. Applicant has been informing the Government since he submitted his SCA that he was working on his taxes with a CPA. He has made no arrangements with the IRS or his state tax authorities to schedule the filing of his taxes to bring himself into compliance.

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, maturity, important position as a government contractor, and the absence of any significant reason for his failure to file his tax returns since he submitted his SCA, let alone back when they were originally due.

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 pattern of serious tax filing delinquencies.

Formal Findings

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 interests of the United States to grant Applicant's eligibility for access to classified information. Clearance is denied.

John Bayard Glendon
Administrative Judge