



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



In the matter of:)	
)	
[Redacted])	ISCR Case No. 19-00806
)	
Applicant for Security Clearance)	

Appearances

For Government: Kelly Folks, Esq., Department Counsel
For Applicant: *Pro se*

01/13/2020

Decision

FOREMAN, LeRoy F., 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 on March 8, 2018. On April 4, 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; 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 May 7, 2019, and requested a hearing before an administrative judge. His answer was returned by the DOD CAF for notarization on August 1, 2019, and he returned the notarized documents on August 18, 2019.

Department Counsel was ready to proceed on September 18, 2019, and the case was assigned to me on October 15, 2019. On October 24, 2019, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for November 14, 2019. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 5 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibits (AX) A through D, which were admitted without objection.

At the hearing, Applicant stated that he had attached several federal and state income tax returns to his answer to the SOR. His answer to the SOR reflected four enclosures: (1) federal income tax returns for 2011-2016; (2) state income tax returns for 2011-2016; (3) a summary of federal taxes due; and (4) a letter from the IRS approving a payment plan. None of these enclosures were attached to his answer when the hearing commenced. At the hearing, he resubmitted the summary of federal taxes due and the IRS letter approving his payment plan. (AX A; AX B at 2-3.)

I kept the record open until December 9, 2019, to enable Applicant to submit additional documentary evidence, including reconstructing the documentation he had attached to his answer. He timely submitted AX E through L, which were admitted without objection. AX E consisted of federal income tax returns for 2011-2017 and state income tax returns for 2011-2015. In his post-hearing submission, he stated that the state did not receive returns for 2016-2018, but that his state taxes were computed based on his federal returns. (AX L.) DOHA received the transcript (Tr.) on December 2, 2019.

Findings of Fact

In Applicant's answer to the SOR, he admitted the allegations in SOR ¶¶ 1.a-1.f and he denied the allegations in SOR ¶¶ 1.g and 1.h. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 55-year-old test engineer employed by a defense contractor since June 2015. He served on active duty in the U.S. Marine Corps from August 1984 to August 1988 and in the U.S. Coast Guard from June 1991 to June 2007, when he retired. (Tr. 58-59.) He was employed by various federal contractors before being hired for his current position. He had periods of unemployment from January to March 2012 and May to June 2015. He received a security clearance in 2003. In his security clearance application, he disclosed that his application to continue his clearance was denied by another federal agency in February 2016 based on financial considerations. (GX 1 at 55-56.)

Applicant earned a bachelor's degree in June 1989 and a master's degree in May 2003. He married in September 1994 and has two children ages 21 and 18.

The SOR alleges a delinquent home-mortgage loan (SOR ¶ 1.a); three delinquent credit card accounts (SOR ¶¶ 1.b-1.d); a Chapter 13 bankruptcy petition that was dismissed (SOR ¶ 1.e); failures to timely file federal and state income tax returns

for tax years 2011 through 2016 (SOR ¶ 1.f); a federal tax debt of \$90,000 for tax years 2011-2016 (SOR ¶ 1.g); and a state tax debt of \$12,000 for tax years 2011-2016. The evidence concerning the allegations in the SOR is summarized below:

SOR ¶ 1.a: delinquent home-mortgage loan for \$572,585, foreclosed in 2018. Applicant purchased this home in December 2011 for \$525,000 at a foreclosure sale, and financed the entire purchase with a loan guaranteed by the Department of Veterans Affairs (VA). (GX 3 at 3.) When he purchased this home, his adjusted gross income was about \$162,593, and his wife was not employed outside the home. (AX E at 1; Tr. 31.) He knew the house “wasn’t in the best of shape.” (Tr. 29.) After moving into the house, he discovered major structural problems. He used credit cards in an effort to finance the repairs. He was laid off in January 2012 and unemployed until March 2012. His annual income was about \$110,000 when he returned to work, and later reduced to \$90,000 when his company’s contract with a U.S. Government agency was protested and delayed for about a year. (Tr. 30, 35.) He testified that the loan was modified at least twice, but he still was unable to catch up on the payments. (Tr. 32.) He listed the property for sale in February 2018 and quickly received an offer, but the contract was never consummated because the prospective buyer’s home inspector determined that the home required more than \$100,000 in structural repairs. (GX 2 at 4; Tr. 37-37.) Applicant has made no further payments on the mortgage loan, and the house remains in a foreclosure status.

SOR ¶ 1.b: delinquent credit-card account charged off for \$15,066. At some time before October 26, 2019, Applicant made a payment arrangement for this debt, but the collection agency was unable to process the scheduled \$100 payments by automatic debit for reasons not reflected in the record. Applicant testified that he made one payment by telephone. (Tr. 117.) The collection agency’s records reflected a balance of \$14,976, indicating that about \$90 had been paid. (AX C.) Applicant testified that he had no reason for not making further payments, except that he was overwhelmed with his financial situation. (Tr. 119.) The debt is not resolved.

SOR ¶ 1.c: delinquent unsecured loan charged off for \$3,554. Applicant testified that he did not know why he stopped making payments on this debt. (Tr. 121.) It is not resolved.

SOR ¶ 1.d: line of credit charged off for \$7,846. This debt was due to overdrafts on Applicant’s bank account. He has not taken any steps to resolve it. (Tr. 123-24.)

SOR ¶ 1.e: Chapter 13 bankruptcy petition filed in March 2017 and dismissed on January 9, 2018. Applicant completed the required financial counseling and made several payments to the bankruptcy trustee before the petition was dismissed on motion of the IRS, apparently because of Applicant’s failures to timely file his federal income tax returns, alleged in SOR ¶ 1.f. (GX 5 at 8-9; Tr. 124-26.)

SOR ¶ 1.f: failures to timely file federal and state income tax returns for tax years 2011-2016. Applicant attributed his failure to timely file his tax returns to procrastination. He did not request extensions of time to file. He erroneously believed that he did not owe any taxes and that his failures to timely file were “no big deal.” He did not file his tax returns until his bankruptcy attorney told him that he needed to file all his returns before filing the bankruptcy petition. (Tr. 97.) His federal income tax returns for 2011-2015 were all signed on September 29, 2016, and his 2016 federal return was signed on March 30, 2017. His state income tax returns for 2011-2015 were all signed on March 29, 2017. (AX E.) He did not file state income tax returns for 2016-2018, but the state tax authority informed him that it had generated substitute returns and computed his state taxes based on his federal returns. (AX L.) He did not submit documentary proof that the returns in AX E were filed and received by the appropriate tax authorities, but he did submit copy of an email exchange with his bankruptcy attorney on December 20, 2016, in which he indicated that he had a certified mail receipt showing that the returns had been mailed. (AX K.)

SOR ¶ 1.g: delinquent federal income tax debt for \$90,000 for tax years 2011-2016. In March 2019, Applicant entered into a payment agreement with the IRS providing for monthly payments of \$661, to be paid by automatic withdrawal from his bank account. (AX A.) He submitted evidence that the required payments were made in August, September, October, and November 2019. (AX B at 1; AX I.) He also submitted evidence reflecting that his total debt for federal income taxes was \$37,158, broken down as follows: \$8,846 for 2011; \$6,496 for 2012; \$12,044 for 2013; \$3,490 for 2015; and \$6,282 for 2018. (AX B at 2-3.)

SOR ¶ 1.h: delinquent state income tax debt of \$12,000 for tax years 2011-2016. In Applicant’s security clearance application, he stated that he was paying the state \$1,000 per month. (GX 1 at 50-51.) However, he has not provided any documentation of payments. In December 2019, he made a payment agreement with the state tax authority to resolve a balance of \$4,176 in 24 monthly installments, with the first payment due in January 2020, after the record closed. (AX J; AX L at 2.)

In October 2019, Applicant and his wife moved into a modest apartment for which they are paying rent of \$1,652. (AX D.) His wife has returned to the workforce and earns about \$2,000 per month. (Tr. 137.) He estimates that they now have about \$1,500 to \$2,000 per month in disposable income that can be used for debt repayment. (Tr. 144.)

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:

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 admissions and the documentary evidence reflecting his delinquent debts and failures to timely file federal and state income taxes and pay the taxes due are sufficient to 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 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;

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. Applicant's delinquent debts are recent, numerous, and were not incurred under circumstances making recurrence unlikely.

AG ¶ 20(b) is established for the delinquent mortgage loan alleged in SOR ¶ 1.a. Applicant purchased a house that he knew was not in good shape, but the latent structural problems in the house were conditions beyond his control. His loss of employment for three months shortly after purchasing the house, followed by two significant reductions in annual income, were conditions largely beyond his control. He acted responsibly by staying in contact with the lender and the VA. He negotiated at least two loan modifications, filed a Chapter 13 bankruptcy petition, and attempted to sell the home, without success. However, he has not acted responsibly regarding the delinquent debts alleged in SOR ¶¶ 1.b, 1.c, and 1.d, for the reasons set out in the discussion of AG ¶ 20(d), below.

AG ¶ 20(c) is not established. Applicant completed the counseling required by the bankruptcy court, but his financial problems are not under control.

AG ¶ 20(d) is not established for the debts alleged in SOR ¶¶ 1.b, 1.c, and 1.d, on which he has not established payment plans or made any recent payments. Although he has contacted the creditors and promised to pay them after he pays his federal tax debts, a promise to pay a delinquent debt in the future is not a substitute for a track record of paying debts in a timely manner. ISCR Case No. 07-13041 at 4 (App. Bd. Sep. 19, 2008). The adjudicative guidelines do not require that an individual make payments on all delinquent debts simultaneously, pay the debts alleged in the SOR first, or establish resolution of every debt alleged in the SOR. He or she need only establish a plan to resolve financial problems and take significant actions to implement the plan. See ISCR Case No. 07-06482 at 2-3 (App. Bd. May 21, 2008). Applicant has little choice about paying his tax debts first to avoid involuntary collection. Although he has promised his other creditors that they will be paid eventually, his promises fall short of a tangible and credible financial plan to resolve his non-tax debts.

AG ¶ 20(d) is established for the federal tax debt alleged in SOR ¶ 1.f, for which Applicant has established a payment plan and is current on the required payments. It is not established for the state tax debt alleged in SOR ¶ 1.g. Applicant claimed in his security clearance application that he was paying the state \$1,000 per month, but he provided no documentary evidence to support his claim. Although he recently established a payment plan for the state tax debt, he submitted no evidence of any payments under the plan.

AG ¶ 20(g) is established for past-due federal tax returns, which have been filed, and the federal tax debt, on which Applicant is making regular payments pursuant to a payment agreement. It is partially established for the past-due state tax returns, which have been filed for 2011 to 2015. The 2016 state return was not filed, but the state tax authority apparently generated a substitute return and computed his state taxes based on his federal return. It is not established for the state tax debt, because Applicant had not begun making any payments in compliance with his payment plan as of the date the record closed. However, Applicant's eventual compliance with his some of his tax obligations 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 past-due federal and state returns "does not preclude careful consideration of Applicant's security worthiness based on longstanding prior behavior evidencing irresponsibility." ISCR Case No. 12-05053 (App. Bd. Oct. 30, 2014). His long-term procrastination regarding his federal and state income taxes returns indicates that he lacks the good judgment and reliability required of persons who are granted access to classified information. ISCR Case No. 14-04159 (App. Bd. Aug. 1, 2016).

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 delinquent debts and failures to timely file his federal and state income tax returns and pay the taxes due.

Formal Findings

I make the following formal findings on the allegations in the SOR:

Guideline F (Financial Considerations):	AGAINST APPLICANT
Subparagraphs 1.a-1.e:	Against Applicant
Subparagraphs 1.f and 1.g:	For Applicant
Subparagraph 1.h:	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