



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
 [REDACTED]) ISCR Case No. 19-01130
)
 Applicant for Security Clearance)

Appearances

For Government: Andrew H. Henderson, Esq., Department Counsel
For Applicant: *Pro se*
01/21/2020

Decision

MARINE, Gina L., 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 February 19, 2017. On August 5, 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 (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) implemented by the DOD on June 8, 2017.

Applicant answered the SOR on September 17, 2019, and requested a decision on the written record without a hearing. On October 16, 2019, the Government sent Applicant a complete copy of its written case, a file of relevant material (FORM), including documents identified as Items 1 through 4. He was given an opportunity to submit a documentary response setting forth objections, rebuttal, extenuation, mitigation, or explanation to the Government’s evidence. He received the FORM on October 28, 2019, and did not respond. Item 1 contains the pleadings in the case. Items

2 through 4 are admitted into evidence. The case was assigned to me on January 3, 2020.

Findings of Fact

Applicant, age 54, has never married nor has any children. He cohabited with his girlfriend from 1995 until she passed away in 2017. He earned his Bachelor of Science degree from a maritime academy in 1987. He served honorably in the U.S. Naval Merchant Marine Reserves from 1987 until 1995. Since at least 2007, he has worked aboard U.S. military vessels as a contractor for various employers. He has been employed full time as a second mate by the same defense contractor since February 2013. He previously held a DOD security clearance from approximately 2001 through 2011.

Applicant failed to timely file his federal and state income tax returns, as required, for at least tax years 2008 through 2017. In each of those tax years, he filed extensions. The status of his returns or extensions for tax year 2018 was not addressed in the record. While he attributed his filing delays primarily to being underway and overseas as a merchant seaman for large periods of time, he also acknowledged that his procrastination played a role. Since at least November 2009, Applicant has lived aboard the vessels on a schedule of between two to four months on and two to four months off. As of September 2019, he had been working the latter. During his off periods, he attends trainings. (Item 1; Item 3 at 7, 9-10)

Applicant filed his 2008 and 2009 federal and state returns in October 2013. For those tax years, he did not owe any federal taxes, and paid the \$15,000 state taxes that he owed by credit card. For tax years 2010 through 2017, he does not anticipate owing any federal taxes due to having the maximum federal taxes withheld from his paychecks. However, because he does not have state taxes withheld from his paychecks, he anticipates that he will owe state taxes. He will not know the amounts due until he files his returns. He proffered that he is willing and able to pay any state taxes owed, assuming that he is able to negotiate a monthly repayment plan. His future intent is to timely file his returns and pay his taxes. (Item 3 at 9-10, 11)

During his September 2017 security clearance interview, Applicant asserted that he had sought the assistance of an accounting firm to file his 2010 through 2017 returns. At that time, he anticipated that the returns would be filed by the end of 2018. He also explained that he had been busy "handling details and business aspects" of his girlfriend's estate following her death in "recent months." In his July 2019 response to interrogatories, Applicant acknowledged that his returns had not yet been filed. He had not been able to gather the documents required by the accounting firm due, in part, to the grief he experienced because of his girlfriend's death and, in part, to his work schedule. He had been on a vessel since May 1, 2019 and anticipated that he would file the returns once he returned home. (Item 3 at 4-6, 9-10)

In his September 2019 SOR response, Applicant acknowledged that his returns remained unfiled. He reiterated that his girlfriend's passing and work schedule

continued to impact his ability to file his delinquent returns. However, he also admitted that he did not “fully understand” until he received the SOR that him “not filing taxes” was influencing the decision as to whether or not to grant him a security clearance. He asked for more time to file his returns. While he did not specify a timeframe, he anticipated that they would be filed “within a reasonable amount of time.” (Item 1)

Applicant was involuntarily unemployed from January 2012 through February 2013, during which time he supported himself through savings and unemployment compensation. Before her passing, his girlfriend assisted Applicant in managing his finances while he was on the vessels. Applicant’s employment income consists of an unspecified bi-weekly salary paid while he is on the vessel, plus an additional \$10,000 to \$12,000 paid after he is off the vessel as a payout of benefits. In September 2017, Applicant reported that he had approximately \$40,000 in credit-card debt, including the \$15,000 he charged in October 2013 to pay his 2008 and 2009 state taxes. His October 2019 credit report revealed no delinquent debts and that he was paying the monthly payments as agreed on eight credit-card accounts with balances totaling \$55,093. (Item 1; Item 3 at 8, 10-11; Item 4)

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.” (*Egan* 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.” (EO 10865 § 2))

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the AG. 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.” (EO 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. 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. (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; AG ¶ 2(b))

Analysis

Guideline F: Financial Considerations

The 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. Financial distress can also be caused or exacerbated by, and thus can be a possible indicator of, other issues of personnel security concern such as excessive gambling, mental health conditions, substance misuse, or alcohol abuse or dependence. 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 and state income tax returns for tax years 2010 through 2017, as required, establishes the following disqualifying condition under this guideline: 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).

None of the following potentially applicable mitigating conditions under this guideline are established:

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.

Applicant repeatedly failed to timely file his federal and state income tax returns over an extended period of time. His work schedule and girlfriend's 2017 death explain filing delays up to a certain point. However, the record suggests that his ongoing procrastination played a more significant role. Moreover, the fact that he apparently lacks sufficient funds to pay his state taxes further undercuts mitigation. He has not actually resolved his 2008 and 2009 taxes because the \$15,000 credit-card debt he incurred to pay them remains outstanding. Applicant's 2010 through 2017 federal and state returns not only remain unfiled, but he has not proffered a specific plan as to when or how they will be filed.

Applicant is credited with filing his 2008 and 2009 returns well before being prompted by the security clearance process. However, his persistent delay in filing his remaining returns beyond any justifiable excuses does not demonstrate responsible action and calls into question his suitability for access to classified information. A person who fails repeatedly to fulfill his or her legal obligations, such as filing income tax returns when due, does not demonstrate the high degree of good judgment and reliability required of those granted access to classified information. (See ISCR Case No. 14-01894 at 5 (App. Bd. Aug. 18, 2015)). "Failure to file income tax returns suggests that an applicant has a problem with complying with well-established government 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)). I am left with doubt about his current reliability, trustworthiness, and good judgment.

