



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
 [Redacted]) ISCR Case No. 19-02284
)
 Applicant for Security Clearance)

Appearances

For Government: Moira Modzelewski, Esq., Department Counsel
For Applicant: *Pro se*

10/05/2020

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 (SCA) on June 19, 2017. On October 2, 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), and the adjudicative guidelines (AG) promulgated in Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (December 10, 2016).

Applicant answered the SOR on November 8, 2019, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on February 6, 2020, and the case was assigned to me on March 10, 2020. On the same day, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was

scheduled for March 30, 2020. On March 17, 2020, the hearing was cancelled because of DOD worksite and travel restrictions based on the health risks posed by the COVID-19 virus.

On July 24, 2020, DOHA notified Applicant that the hearing was rescheduled for September 3, 2020. I convened the hearing as rescheduled. Government Exhibits (GX) 1 through 3 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibits (AX) A through F, which were admitted without objection. I kept the record open until September 11, 2020, to enable him to submit additional documentary evidence. He timely submitted AX G through N, which were admitted without objection. Department Counsel's comments regarding AX G through N are attached to the record as Hearing Exhibit I. DOHA received the transcript (Tr.) on September 14, 2020.

Amendment of SOR

The SOR originally alleged that Applicant was indebted to the federal government for delinquent taxes of \$23,000 for tax year 2014 (SOR ¶ 1.a) and that he failed to file, as required, federal and state income tax returns for tax years 2014 through 2018. (SOR ¶ 1.b). At the end of the hearing, I granted Department Counsel's motion to amend SOR ¶ 1.a to allege that Applicant was indebted to the federal government for delinquent taxes of **\$21,000** for tax years **2013 and 2014**. (Amendments in bold.) (Tr. 73-74.) Applicant did not object to the amendment.

Findings of Fact

In Applicant's answer to the SOR, he admitted all the allegations. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 70-year-old helicopter-modification manager employed by federal contractors since September 2009. He holds a top secret clearance.

Applicant served in the U.S. Marine Corps from May 1972 to February 2004 and retired as a lieutenant colonel. He married in November 1969, divorced in October 1972, and has been married since June 1973. He has four adult children. After Applicant's retirement from the Marine Corps, he worked in law enforcement positions, and he was a deputy sheriff in the city where he resided until he retired from that position in June 2019. (Tr. 25; AX B.)

In June 2011, Applicant's son was seriously injured in an almost-fatal automobile accident. (Tr. 27.). In August 2011, Applicant's home was damaged by a hurricane. In spite of the hurricane damage and the emotional impact of their son's injuries, he and his wife timely filed their tax returns for 2011 and 2012. In November 2016, Applicant's home was damaged by another hurricane. He testified that most of the records he needed to file his tax returns were lost during this hurricane. He and his wife moved their remaining records to another location, where more records were lost during a hurricane in September 2018. They did not file federal and state income tax returns for tax years 2013

through 2018. Applicant testified that he and his wife failed to file tax returns for those years because, "We were building things, things were going on in our life, and we were just getting overwhelmed and did not do it." (Tr. 51-53.)

For several years, Applicant's wife worked as a real estate agent. She worked as an independent contractor, and no taxes were withheld from her income. She did not file quarterly returns or pay estimated taxes on her income. (Tr. 35.) Until 2012, the tax withholdings from Applicant's income were sufficient to pay the taxes due on their joint income. In 2012, Applicant's wife started a team of realtors, and she began to earn commissions on the sales of her team members. Applicant testified that he and his wife owed significant federal taxes for 2012, although he could not recall the amount. They entered into payment plans providing for payments of \$400 per month to the IRS and \$215 per month to the state tax authority, both by direct debit. (Attachments to SOR Answer.)

When Applicant submitted his SCA in June 2017, he disclosed that he had not filed his federal tax returns for tax years 2015 and 2016, because his home was flooded during a hurricane and his financial records were destroyed. In June 2018, he was interviewed by a security investigator and he again disclosed his failures to file tax returns, citing the flood damage and destruction of his financial records.

In July 2019, DOHA sent Applicant tax interrogatories. He responded on August 7, 2019, and stated that he owed \$23,000 in delinquent taxes for tax year 2014. He also disclosed that he had not filed federal income tax returns for 2015 through 2018 and had not filed state tax returns for 2014 through 2018.

On August 6, 2019, the day before Applicant responded to the tax interrogatories, he and his wife hired a tax attorney, who is also a certified public accountant, to prepare their federal and state income tax returns for 2013 through 2018 and to represent them with the IRS and the state tax authorities regarding their tax liabilities for those years. As of the date of Applicant's answer to the SOR, his tax attorney had filed his federal and state income tax returns for 2013 and 2014. (Attachments to SOR Answer.) As of the date of the hearing, his tax attorney had filed all state and federal tax returns through 2018, but the IRS was still computing Applicant's tax debt for 2013 through 2018, and he had not made any payments for those years. However, in August 2020, he made payments to the IRS and state tax authorities of estimated income taxes for tax year 2020, and he increased the withholding of federal income taxes from his retired pay. (AX D.) At the hearing, Applicant testified that he estimated his federal tax debt to be about \$150,000 and his state tax debt to be between \$30,000 and \$35,000 (Tr. 59-60.).

Applicant and his wife purchased their primary home in 2004 and have about \$200,000 in equity. (Tr. 41.) They have owned another home since 1991, in which they have equity of about \$80,000 (Tr. 41.) Applicant owns a 2003 pickup truck which is fully paid for. His wife purchased a new car in 2019 for about \$39,000, on which the monthly payments are about \$609. He also owns a 2011 motorcycle that he purchased in 2015

for \$10,500, on which the payments are \$235 per month. (Tr. 44.) He has about \$4,000 in savings and investments (Tr. 45.)

Applicant estimated that for the seven years since 2013, his wife's income has fluctuated from about \$60,000 to \$110,000. He testified that for every tax year since 2012, he and his wife had joint income above \$200,000. (Tr. 38.) He estimated that their net monthly remainder each month is between about \$8,000 and \$10,000. (Tr. 65.)

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 in the record establish the following disqualifying conditions under this guideline:

AG ¶ 19(a): inability to satisfy debts;

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 tax debts and repeated failures to timely file his federal and state tax returns were recent, frequent, and did not occur under circumstances making recurrence unlikely.

AG ¶ 20(b) is not established. Applicant's wife's increased income was not a circumstance beyond their control. The destruction of financial records in August 2011 had no significant impact on his ability to file tax returns, and he timely filed his 2011 and 2012 returns. He acted responsibly by making a payment agreement with the IRS for his 2012 tax debt. The destruction of financial records in November 2016 occurred after he had already failed to timely file his federal and state tax returns for 2013 through 2015. His failures to timely file his federal and state returns for 2016 may have been due to conditions largely beyond his control, but he provided no evidence explaining how the destruction of his financial records in 2016 prevented him from timely filing his federal and state tax returns for 2017 and 2018. He did not hire a lawyer until he was interviewed about his tax delinquencies by a security investigator in June 2018 and received tax interrogatories from DOHA in July 2019. An applicant who waits until his clearance is in jeopardy before resolving debts may be lacking in the judgment expected of those with access to classified information. ISCR Case No. 16-01211 (App. Bd. May 30, 2018) *citing* ISCR Case No. 15-03208 at 5 (App. Bd. Mar. 7, 2017).

AG ¶ 20(c) and AG ¶ 20(d) are not established. Applicant has obtained professional tax advice and has filed his past-due returns, but he is still facing a federal tax debt of about \$150,000 and a state tax debt of at least \$30,000, and he has no plan in place to resolve these tax debts.

AG ¶ 20(g) is partially established. Applicant has file his past-due returns but has not yet begun paying the amounts due. However, the fact that he has filed his past-due returns 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 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).

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. Some of the factors in AG ¶ 2(d) were addressed under that guideline but some warrant additional comment. Applicant has held a security clearance for many years. He deserves credit for his many years of military service, but his repeated failures to comply with the tax laws is inexplicable in light of his years of living under military discipline in the U.S. Marine Corps. 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. ISCR Case No. 15-00216 at 4 (App. Bd. Oct. 24, 2016), *citing 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's repeated failures to fulfill his legal obligation to file federal and state tax returns indicate 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).

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 repeated failure to timely file his federal and state tax returns and pay the taxes due.

Formal Findings

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

Paragraph 1, 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 security interests of the United States to continue Applicant's eligibility for access to classified information. Clearance is denied.

LeRoy F. Foreman
Administrative Judge