



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
) ISCR Case No. 19-01347
)
Applicant for Security Clearance)

Appearances

For Government: Carroll Connelley, Esq., Department Counsel
For Applicant: Troy L. Nussbaum, Esq.

03/17/2021

Decision

CERVI, Gregg A., Administrative Judge

This case involves security concerns raised under Guideline F (Financial Considerations). Eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted a security clearance application (SCA) on January 26, 2018. On June 21, 2019, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guideline F (Financial Considerations). 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) effective on June 8, 2017.

Applicant responded to the SOR on September 27, 2019, and requested a hearing before an administrative judge. The case was assigned to me on June 26, 2020. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on July 24,

2020, scheduling the hearing for September 11, 2020. The hearing was canceled at the request of Applicant's counsel due to a pandemic-related positive employee in his office.

DOHA issued a new notice of hearing on September 11, 2020, and the hearing was convened on October 22, 2020. Government Exhibits (GE) 1 through 5 were admitted into evidence without objection. Applicant and a witness testified and he submitted Exhibits (AE) A through O that were admitted without objection. The record remained open for Applicant to submit additional documents. He timely submitted documents collectively marked as AE P that were admitted without objection. DOHA received the hearing transcript on November 13, 2020.

Findings of Fact

Applicant is a 63-year-old senior systems engineer for a defense contractor, employed since 2007. Applicant earned a bachelor's degree in 1988. He was enlisted in the U.S. Navy from 1975 to 1988, and was a commissioned officer from 1988 until he retired in 1996. He deployed four times and has three personal awards. Applicant married in 1979, separated in 2007, and divorced in 2014. He remarried in 2016, and has four adult children. He was last granted security eligibility in 2007.

The SOR alleges under Guideline F that Applicant failed to file Federal income tax returns and pay Federal income taxes from 2004 to 2014 (SOR ¶ 1.a); failed to file state income tax returns and pay state income taxes for tax years 2013 to 2015 (SOR ¶ 1.b); Federal tax liens were entered against him in 2012 and 2016 for approximately \$14,467 (2012) (SOR ¶ 1.e), \$66,075 (2012) (SOR ¶ 1.f), and \$17,632 (2016) (SOR ¶ 1.c); a state tax lien was entered against him in 2015 for approximately \$11,437 (SOR ¶ 1.d); and charged-off and collection accounts totaling approximately \$3,458 (SOR ¶¶ 1.g – 1.j). Two debts listed as SOR ¶¶ 1.j and 1.h are duplicates and will be considered under SOR ¶ 1.j.

While Applicant was married to his first spouse, he became delinquent on Federal and state income taxes and failed to file certain returns when due. He stated that he was often deployed while serving in the Navy, and he had a difficult relationship with his spouse. He became aware that his spouse had not filed income tax returns in about 2000. In 2003 or 2004, he used a commercial tax service to help resolve his tax issues, but he was not clear what they were able to accomplish. As part of the divorce, Applicant took responsibility for the delinquent taxes.

Applicant admits that from 2008 to 2011, he failed to take charge of his tax filings, and became concerned about the amount he owed the IRS. As alleged in the SOR, he did not timely file Federal tax returns or pay taxes owed from about 2004 to 2011. Although he had a portion of his pay deducted from his salary for taxes, it was not enough to cover his tax obligations, and he began to accumulate interest and penalties. He became paralyzed with fear and took no action to correct his past tax delinquencies.

After 2011, Applicant started repaying his Federal tax obligations, and has paid about \$100,000 to date. The IRS garnished his pay in 2011 or 2012, and recovered about \$5,000 per month over a one-year period. Thereafter, Applicant negotiated a repayment plan with the IRS and began paying \$1,000 per month directly from his bank account. Applicant has shown regular and consistent payments since at least 2015, except for one dishonored payment in August 2020, which he intends to correct. He currently owes about \$50,000 to the IRS. He has filed all of his tax returns to date, but his 2013 Federal and state tax returns were filed late due to late delivery of documents to his accountant. His brother-in-law is an accountant and files his tax returns. His Federal tax liens have not yet been released.

Applicant owes State A about \$25,000 for tax years 2013 to 2015. He was living in State A, but working in State B, and had his withholding sent to State B. Applicant has been making payments toward State A's past-due taxes since 2017, and paid off about \$10,000 toward the debt. He currently pays \$300 per month in a payment plan. State A released the tax lien noted in SOR ¶ 1.d. Applicant resolved all of the credit card debts alleged in the SOR. His 2020 credit report shows no accounts in a collection status.

Applicant's current spouse began living with him in 2011. Since that time, except for the 2013 returns that were filed late, all tax returns have been filed and paid when due. His spouse testified that she has helped him correct his tax issues since she moved in with him, and noted that she will never let tax returns go unfiled. They discuss financial matters and work together to ensure all tax returns are filed and taxes are paid. Their combined household income is about \$180,000 per year. Applicant earns the majority of the income. He has not sought financial counseling, but uses an accountant to file tax returns when due. He currently utilizes a budget and he has a \$500 net monthly remainder. He owns a home, two paid-off cars, and has about \$1,500 in savings.

Applicant has been very active in leadership roles of a church and civilian charitable organizations, and submitted favorable letters from a friend in one of the organizations, a coworker and supervisor. All attest to Applicant's service to his community, church, and work. They note Applicant's integrity, loyalty, and dedication. Applicant noted that he has taken responsibility for his poor financial decisions in the past, and has taken positive step to correct them.

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;
- (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;
- (d) the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts; and
- (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.

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 has a history of failure to file tax returns and pay taxes when due. He began incurring tax delinquencies while married in a difficult relationship. He eventually divorced and took responsibility for all delinquent taxes. He also had three credit-card accounts that became past due and were in collection. Typically, significant tax issues alone would serve to render an applicant untrustworthy. Applicants have a heavy burden to overcome that presumption. Without strong mitigating factors, it is difficult to show that an applicant should be otherwise entrusted with national security matters. In this case, Applicant has overcome questions about his reliability, judgment, and willingness to comply with rules and regulations, through a dedicated program to rehabilitate his tax status and pay for past tax delinquencies as contemplated by mitigating condition AG ¶ 20(g).

In 2011, Applicant began addressing his tax issues after facing a garnishment order. After about a year of garnished wages, he negotiated a voluntary payment plan with the IRS and state tax authorities. He remarried and his current spouse works with him to ensure tax and financial matters are properly and timely addressed. He has shown years of generally consistent tax repayment plan payments and has already paid off about \$110,000 in state and Federal taxes, interest, and penalties. He filed all past-due tax returns with the help of an accountant, and resolved the credit card debts. He has been current with his tax filings since 2016. He has no delinquent accounts on his credit report, has a positive net monthly remainder, and uses a budget to manage household expenses and debts. He uses an accountant to file his tax returns and has employed the accountant to clear up his past tax delinquencies.

Overall, I believe Applicant is well on his way to resolving his tax debts and has not incurred additional tax delinquencies in the past five years. He has established a reliable track record of tax plan payments, and he has shown that his financial problems are under control and unlikely to recur. He has sufficient combined income to ensure that he can comply with the tax repayment plans and meet other expenses. I believe that Applicant has utilized the help from his spouse and accountant to responsibly manage his tax obligations, will act responsibly in the future, and is not likely to repeat poor financial decisions. Mitigating conditions ¶¶ 20 (a), (c), (d), and (g) are applicable.

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).

I considered all of the potentially disqualifying and mitigating conditions in light of the facts and circumstances surrounding this case. I have incorporated my findings of fact and comments under Guideline F in my whole-person analysis. I also considered Applicant's employment, divorce, and military service. Applicant has shown a recent history of ability, intent, and desire to meet his financial obligations in the future.

Accordingly, I conclude Applicant has carried his burden of showing that it is clearly consistent with the national security 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:	FOR APPLICANT
Subparagraphs 1.a – 1.j:	For Applicant

Conclusion

I conclude that it is clearly consistent with the national security interest of the United States to grant Applicant eligibility for access to classified information. Applicant's application for a security clearance is granted.

Gregg A. Cervi
Administrative Judge