



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



In the matter of:)	
)	
)	ISCR Case No. 20-01209
)	
Applicant for Security Clearance)	

Appearances

For Government: Mary Margaret Foreman, Esq., Department Counsel
For Applicant: *Pro se*

08/20/2021

Decision

CERVI, Gregg A., Administrative Judge

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

Statement of the Case

Applicant submitted a security clearance application (SCA) on July 25, 2018. On August 31, 2020, the Defense Counterintelligence and Security Agency Consolidated Adjudications Facility (DCSA CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guideline F. The DCSA 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 June 8, 2017.

Applicant answered the SOR on October 12, 2020 (Ans.), and requested a decision based on the written record without a hearing. The Government's written brief with supporting documents, known as the file of relevant material (FORM), was submitted by Department Counsel on April 14, 2021. A complete copy of the FORM was provided

to Applicant, who was afforded an opportunity to file objections and submit material to refute, rebut, or mitigate the security concerns. Applicant received the FORM on May 15, 2021, but did not submit a reply. The case was assigned to me on August 3, 2021. Government Exhibits (GE) 1 through 5 are admitted into evidence without objection.

Findings of Fact

Applicant is a 59-year-old HVAC Supervisor, employed by a government contractor since May 2017. He is a high school graduate, and was previously self-employed as an HVAC technician from 1998 to 2017. He is unmarried and has two children.

The SOR alleges under Guideline F that Applicant failed to file Federal income tax returns for tax years 2010, and 2015-2018, as required. (SOR ¶ 1.a) It also alleges that Applicant is indebted to the Federal Government for delinquent Federal taxes from tax year 2010, for \$26,000. (SOR ¶ 1.b) Applicant admitted the allegations with explanations.

In his Answer to the SOR, Applicant stated that he borrowed money in 2010 to buy a house as an investment. Although he did not miss any mortgage payments, he eventually sold another home and moved into the investment house in order to make ends meet. He was financially overextended as he said he lost money on the investment due to market conditions at the time, and did not have funds to pay Federal income taxes. In addition, his brother's mother-in-law was his tax preparer until she retired in 2015. He did not follow up with the new preparer, and fell behind on filing his Federal income tax returns. Instead, he said that he focused on the dissolution of his relationship with the mother of his children, and rebuilding his business. He became a single father of his teenaged children in April 2017.

Applicant also stated that he paid down his \$26,000 tax debt from tax year 2010, and now owes approximately \$18,000. He referenced an IRS notice from September 2020 that he submitted with his Answer, however the IRS letter is a notification that his overpayment of 2019 taxes was applied toward his tax year 2009 tax debt, not his 2010 debt, and that he owes \$18,090 for 2009. Applicant may have confused the tax year in which he is delinquent.

In response to Government interrogatories from April 2020, Applicant noted that he had not filed his Federal income tax returns for tax years 2010, 2015, and 2018, but that he was going to file them "ASAP." He also claimed that his accountant was working on his tax returns for 2016 and 2017. In his Answer to the SOR, Applicant provided receipts for certified mailings to the IRS, with handwritten notations of his name with "2010 1040"; "2015 1040"; and "2016." He also provided an "electronic filing client status history" apparently showing a tax return electronically filed with the IRS in May 2020, but the only possible indication of the tax year involved is from a handwritten notation of "2017" at the top of the page. None of these "receipts" conclusively shows the substance of the mailings, and Applicant did not provide a copy of any completed tax returns.

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

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. . . .

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 documentary evidence in the record are sufficient to establish disqualifying conditions AG ¶¶ 19(a), (c) and (f).

The following mitigating conditions under AG ¶ 20 are potentially relevant:

- (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;
- (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;
- (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.

Applicant asserted that his tax issues arose from losses from an investment property, difficulties with a personal relationship and rebuilding a business. However, I note that Applicant has been employed by a defense contractor since 2017. Applicant has not submitted sufficient or persuasive evidence to show how his past financial and personal issues impeded his ability to file Federal income tax returns and pay taxes as required.

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 not provided persuasive evidence showing the current status of his Federal income tax filings, and any delinquent amounts owed. In addition, I have no evidence regarding Applicant's current financial status or receipt of any financial counseling. Applicant's many years of failing to file Federal tax returns when due and failure to pay taxes or arrange a repayment plan with the IRS indicate an inability or unwillingness to comply with tax laws.

Applicant's financial problems have been longstanding and remain a current concern. I am not persuaded that Applicant has a handle on his Federal tax obligations, or that he has shown sufficient financial responsibility. I remain doubtful about Applicant's current reliability, trustworthiness, good judgment, and willingness to voluntarily abide by government rules and regulations.

Whole-Person Concept

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. AG ¶¶ 2(a), 2(c), and 2(d). 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 efforts to regain control of his tax filings, and past financial difficulties. However, Applicant has not provided sufficient evidence to show reasonable resolution of the SOR concerns and his overall financial responsibility.

Accordingly, I conclude Applicant has not carried his burden of showing that it is clearly consistent with the national security interests of the United States to grant or continue 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:	AGAINST APPLICANT
Subparagraphs 1.a and 1.b:	Against Applicant

Conclusion

I conclude that it is not clearly consistent with the national security interest of the United States to grant or continue Applicant's eligibility for access to classified information. Applicant's security clearance is denied.

Gregg A. Cervi
Administrative Judge