



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



In the matter of:)	
)	
)	ISCR Case No. 21-00018
)	
Applicant for Security Clearance)	

Appearances

For Government: Alison O’Connell, Esq., Department Counsel
For Applicant: *Pro se*

10/26/2021

Decision

CERVI, Gregg A., Administrative Judge

This case involves security concerns raised under Guideline F (Financial Considerations) and Guideline H (Drug Involvement and Substance Misuse). Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on August 3, 2020. On April 12, 2021, the Defense Counterintelligence and Security Agency Consolidated Adjudications Facility (DCSA CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines F and H. 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 April 28, 2021 (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 May 30, 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 June 8, 2021, and did not reply to the FORM, submit evidence in mitigation, or object to any documents submitted for the record. The case was assigned to me on September 8, 2021. Government Exhibits (GE) 1 through 6 are admitted into evidence.

Findings of Fact

Applicant is a 34-year-old equipment and tool designer, employed by a government contractor since 2018. He is also self-employed as a freelance industrial designer and fabricator, part-time, since 2011. Applicant received a bachelor's degree in 2017. He is unmarried and has never held a security clearance.

The SOR alleges under Guideline F that Applicant failed to report and pay federal and state income taxes for tax years 2011 to 2019, as required, on self-employment earnings between \$5,000 and \$20,000 annually (SOR ¶¶ 1.a and 1.b). Additionally, the SOR alleges under Guideline H that Applicant used marijuana on various occasions from at least 2005 to September 2019 (SOR ¶ 2.a). Applicant admitted the SOR allegations with explanations.

When Applicant completed his SCA, he disclosed that his self-employment activities included helping various people with projects "for cash under the table." He uses his roommates company name "for resume purposes," but is planning to form his own company in the near future "to become legitimate." (Item 5, p. 12, 27) Inexplicably, when asked whether in the last seven years Applicant failed to file or pay federal or state taxes when required, he answered "no," however he added a comment "however, I never claimed my side projects as income." (Item 5, p. 37)

In September 2020, Applicant was interviewed by a Government investigator. He disclosed that he never paid federal or state income tax on any of the income he received while self-employed, typically between \$5,000 and \$20,000 per year. He stated that he knew he should have claimed the money on his taxes, but chose not to report it because each job is random and he does not keep track of the amount of money he earns. Some of his undeclared earnings were for work he did for a foreign military contractor. He stated that he worked on substandard components sold to the company from his last employer, that he claims were "million dollar paperweights" because the design was not properly completed before the product was delivered. He also stated that he did not report the employment by a foreign company because he was not an "official employee," but was paid \$15,000 "under the table." (Item 6)

In his Answer to the SOR, Applicant stated that he was unaware that he was taxed in his state for "independent income." Applicant is "looking to legitimize" his side income as a business, to include "necessary trademarks, separate bank accounts, accounting software, [X] state contractor's license, and bonds," (Item 4)

In his SCA, Applicant disclosed that he possessed and used marijuana about six times in September 2019, while on a camping trip. He also stated that he used it “just after high school.” He noted that marijuana is legal in his state of residence, but not federally. During his subject interview, Applicant stated that he purchased the marijuana before the camping trip at a legal “pot shop.” The interview summary notes that Applicant was mature in his decision making and was motivated by a desire to try marijuana to see what effect it would have on him. He participated out of his own free will, and continues to associate with individuals whom use marijuana. However, he noted that he does not intend to use it in the future. The interview summary was annotated and adopted by Applicant in a subsequent interrogatory. Applicant noted in his response to the interrogatory, that he used marijuana between 2005 and 2019 “less than 10 individual occurrences of unknown date and time” with less than six of those instances during the 2019 camping trip.

In his Answer to the SOR, Applicant stated that he understands use of marijuana is illegal federally, despite being legal in his state. He does not consider himself a drug user or compelled to consume drugs. He said he intends to abstain from all drug involvement and misuse and “would be happy to sign a statement of intent as well as submit to regular drug testing if asked.” (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.” *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:

(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 disqualifying conditions AG ¶¶ 19(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 income earned while working as an independent contractor on "side jobs." He failed to adequately and plausibly explain why he ignored his federal and state tax obligations, besides stating that he did not understand his state's tax laws, and that he did not keep track of his income. I note that Applicant has been employed by a defense contractor since 2018 and received notice of this issue when he completed his SCA in 2020, but he has yet to rectify his tax delinquencies.

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 resolution of his tax delinquencies. 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 and pay federal and state taxes for his independent income indicates an inability or unwillingness to comply with tax laws.

Applicant's tax problems are 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.

Guideline H, Drug Involvement and Substance Misuse

The security concern for drug involvement and substance misuse is set out in AG ¶ 24:

The illegal use of controlled substances, to include the misuse of prescription and non-prescription drugs, and the use of other substances that cause physical or mental impairment or are used in a manner inconsistent with their intended purpose can raise questions about an individual's reliability and trustworthiness, both because such behavior may lead to physical or psychological impairment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations. Controlled substance means any "controlled substance" as defined in 21 U.S.C. 802. Substance misuse is the generic term adopted in this guideline to describe any of the behaviors listed above.

The guideline notes several conditions that could raise security concerns under AG ¶ 25. The following are potentially applicable in this case:

- (a) any substance misuse (see above definition); and
- (c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

Applicant purchased, possessed, and used marijuana less than 10 times between 2005 and 2019. AG ¶¶ 25(a) and (c) apply.

AG ¶ 26 provides conditions that could mitigate security concerns. I have considered all of the mitigating conditions, and find the following conditions as potentially applicable:

- (a) the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;
- (b) the individual acknowledges his or her drug involvement and substance misuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence, including, but not limited to:
 - (1) disassociation from drug-using associates and contacts;

(2) changing or avoiding the environment where drugs were used;

(3) providing a signed statement of intent to abstain from all drug involvement and substance misuse, acknowledging that any future involvement or misuse is grounds for revocation of national security eligibility.

Applicant has a history of minor marijuana use, typically at social gatherings. He used marijuana less than 10 times over several years, the last being in 2019 at a camping trip. It was legal under state law. Applicant noted in his Answer that he would abstain from further drug use and would sign a statement of abstinence and submit to drug tests if asked.

Applicant has established a record of compliance with federal law with respect to marijuana use since 2019. I am convinced by Applicant's assertions that he fully understands the federal law with respect to marijuana use, and has made a dedicated change of lifestyle to abstain from future use of marijuana. Mitigating conditions in AG ¶¶ 26(a) and (b) generally apply.

Applicant has mitigated his past use of marijuana and it no longer impugns his reliability, trustworthiness, and good judgment.

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 Guidelines F and H in my whole-person analysis. I conclude the Guideline H concern in Applicant's favor. However, based on his failure to file and pay income taxes as required, 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 - 1.b:	Against Applicant
Paragraph 2, Guideline H:	FOR APPLICANT
Subparagraph 2.a:	For 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