



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
) ISCR Case No. 19-02972
)
Applicant for Security Clearance)

Appearances

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

02/01/2022

Decision

CERVI, Gregg A., Administrative Judge

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

Statement of the Case

Applicant submitted a security clearance application (SCA) on September 20, 2016. He completed previous SCAs in 2008 and 2011. On November 20, 2020, 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 E. 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 on June 8, 2017.

Applicant responded to the SOR on November 11 and December 14, 2020, and requested a hearing before an administrative judge. The case was assigned to me on

July 6, 2021. Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on October 28, 2021, scheduling the hearing for November 29, 2021. The hearing was rescheduled on Applicant's motion. An amended notice of hearing was issued on November 16, 2021, and the hearing was convened on December 7, 2021.

Government Exhibits (GE) 1 through 11 were admitted into evidence without objection. Applicant testified but had no exhibits to submit. The record was held open until December 31, 2021, to permit Applicant to submit documentary evidence. Applicant submitted Applicant Exhibit (AE) A, which included various financial statements, IRS payment documents, and state tax returns. DOHA received the hearing transcript on December 13, 2021.

Findings of Fact

Applicant is a 52-year-old senior systems administrator for a government contractor, employed since November 2007. He previously worked for other government contractors from 2002 to April 2004, when he was laid off. He was unemployed from April 2004 to February 2005, and again worked for government contractors from 2005 to 2007. Applicant attended college, but did not earn a degree. He has two technical diplomas from 1997 and 2019. He was married in 1997 and divorced in 2004. He again married in 2007 and divorced in 2012. He married again in 2013, and has two children (15 and 23) that do not live with him. Applicant has held a secret security clearance since 2007.

The SOR alleges under Guideline F that Applicant failed to timely file his federal and state income tax returns for tax years 2002-2006, and 2010 to 2016 (SOR ¶¶ 1.a and 1.b); that he is indebted to the IRS for tax years 2005, 2008, and 2010 to 2017 totaling about \$101,570 (SOR ¶¶ 1.c through 1.l); that he is indebted to state A on liens filed for tax years 2016 to 2018 (2 allegations) totaling about \$82,316; a home foreclosure in 2012; two medical debts (SOR ¶¶ 1.q through s); and that he filed Chapter 13 bankruptcy in 2011 with \$450,000 in liabilities, that was dismissed in September 13, 2013 for failure to make payments (SOR ¶ 1.t). The Government withdrew the Guideline E allegations at the hearing. Applicant admitted SOR allegations ¶¶ 1.a through 1.p, and 1.t, and denied allegations ¶¶ 1.q and 1.s. The Government's exhibits support the Guideline F allegations.

The record evidence shows that Applicant's finances have been a subject of inquiry by the government for several years. Applicant responded to government interrogatories regarding his finances in 2017 and 2019. He was interviewed by a government investigator in 2018. Applicant and his second spouse filed Chapter 13 bankruptcy in June 2011 after purchasing a home. The case was dismissed in September 2013. As part of the filing, he attested to the court in June 2011, that he had filed his federal income tax returns for tax years 2007 to 2010. However, the evidence shows that his TY 2010 return was filed in 2015. He stated that he did not qualify to file Chapter 13 action on his own. His property taxes ballooned and he could not meet his financial obligations. He also owed on tax debts. He claimed he made payments under the Chapter 13 repayment plan, but his spouse did not cooperate and stopped voluntary payments.

As a result, the bankruptcy was dismissed. He entered into a short-sale agreement to sell his home. There is no deficiency debt owed on the home sale.

Applicant paid child support for two children through 2017. He testified that the IRS deemed him uncollectable in 2012 or 2013, because of his \$2,000 per month child support obligations. When his oldest child turned 18 years old, Applicant's tax advocate representative requested the IRS agree to an offer in compromise, but it was denied. The IRS instead offered an installment agreement. The agreement was put in place in December 2019, and Applicant has been paying \$371 per month since then. His current agreement was renewed in November 2020. He owes the IRS between \$118,000 - \$120,000. He filed federal tax returns as follows:

2004 was filed in Jan 2009
2005 was filed in March 2012
2006 was filed in September 2008
2007 was filed in March 2008
2008 was filed in February 2009
2009 was filed in March 2010
2010 filed in December 2015
2011 filed in July 2012
2012 filed in September 2015
2013 filed in September 2015
2014 filed in November 2015
2015 filed in May 2018
2016 filed in May 2018
2017 filed in July 2018
2018 filed in August 2019

Applicant also underpaid his 2020 federal taxes by \$7,000 because his preparer did not include critical information. He testified that he did not file tax returns on time because of financial hardships and he did not have enough taxes withheld from his paycheck. Late filing of tax returns, underpayment of 2020 taxes, or other information not alleged in the SOR will not be considered for disqualifying purposes, but may be considered when making a credibility determination, in the application of mitigating conditions, and in a whole-person analysis.

Applicant testified that he lived in state A between 2004 and 2006, and from November 2011 to August 2016, and believed he filed state tax returns as required, but had to "refile" them as he could not determine the state received them. In his post-hearing submission, Applicant provided a 2019 letter from his state tax accountant, noting that Applicant asked him to prepare state tax returns "for prior years." Applicant provided unsigned and undated state tax returns for tax years 2005-2007, and 2013. He testified that he filed state tax returns for 2012 to 2015 in December 2020. He believed that his state tax obligations were covered under his IRS installment agreement, but later learned it did not. He believes he has now filed all state tax returns, but has not yet satisfied his

state tax liens. He disagrees with the amount the state claimed he owes, but he is unsure of how much he does owe.

Applicant believes he does not owe the medical debts listed in the SOR, disputed the accounts and they have been removed from his credit report. The medical debts were last reflected on his 2019 credit report, but do not appear on his 2021 credit report. He attended mandatory credit counseling in 2011 as required by the bankruptcy court, he has not received counseling assistance since.

Applicant earns about \$108,000 per year, and his spouse earns about \$89,000 per year. Despite this sizable household income, they live “paycheck to paycheck.” He has about \$936 in savings and \$259 in checking accounts. He continues to pay about \$800 per month in child support and owes for the next two years. He bought a home in 2016 with a down payment from a \$20,000 loan against his 401k retirement plan. He owed about \$40,000 in credit card accounts. He and his spouse owe about \$106,000 in student loans (Applicant has about \$6,000 of the debt). Applicant recently made home improvements and owes at least \$10,000. Applicant took vacations in 2014 to 2019 to Bahamas, Mexico (4 times), Dominican Republic, Jamaica, West Indies, and Dubai, but claims his brother paid for most of the trips as gifts.

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, testimony, and the documentary evidence in the record are sufficient to establish the 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;

(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;

(e) the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue; 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 has a long history of financial irresponsibility. He has had significant debt accumulation, failed to comply with a Chapter 13 bankruptcy payment plan, and has a history of avoidance of tax obligations to include an inability or unwillingness to comply with income tax filing requirements and payment of taxes owed. He has shown little concurrent effort to resolve his financial obligations, waiting to begin addressing them only after his security eligibility was in jeopardy.

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).

His financial problems have been longstanding and remain a concern. Although Applicant has a federal income tax repayment plan, he has sizable debts despite a long-standing work history with defense contractors and a substantial household income. His state income tax liens remain largely unaddressed, and he did not file late tax returns until after they became an issue for his security clearance. His claim that his ex-spouse did not cooperate in his Chapter 13 bankruptcy requirements ring hollow. He has shown a disregard for federal and state tax obligations. He has little in financial assets to use to pay debts. He has clearly prioritized buying a house and traveling on vacations over his financial obligations. I give mitigating credit for resolution of his small medical debts, and the time has passed since his Chapter 13 bankruptcy. However, his federal and state income tax obligations have not been sufficiently mitigated given the number of years of non-compliance and disregard.

Despite Applicant's payment plan with the IRS, I continue to have concerns about his overall financial responsibility, and willingness to comply with future income tax obligations. He earns a substantial salary, as does his spouse, and together they have a sizable household income, however, they live paycheck to paycheck with little ability to save money. However, he appears to have sufficient money to travel. Overall, Applicant's financial responsibility is questionable and he has done little on his own initiative to get a handle on his finances. Although he attended mandatory financial counseling when he filed bankruptcy in 2011, he has done nothing since.

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 history and difficulty with his ex-spouse. I remain unconvinced of

his overall financial responsibility, and his ability, intent, and desire to meet his financial obligations in the future, especially in tax compliance.

Accordingly, I conclude Applicant has not 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:	AGAINST APPLICANT
Subparagraphs 1.a-1.p:	Against Applicant
Subparagraphs 1.q-1.s:	For Applicant
Paragraph 2, Guideline E:	WITHDRAWN

Conclusion

I conclude that it is not 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 denied.

Gregg A. Cervi
Administrative Judge