



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



In the matter of:)
)
) ISCR Case No. 19-02583
)
Applicant for Security Clearance)

Appearances

For Government: Allison Marie, Esq., Department Counsel
For Applicant: Jerald Washington, Esq.

03/23/2022

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 November 20, 2018. On January 27, 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 on June 8, 2017.

Applicant responded to the SOR on January 15, 2021, and requested a hearing before an administrative judge. The case was assigned to me on July 6, 2021. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on November

16, 2021, scheduling the hearing for November 30, 2021. The hearing was held via video teleconference, as scheduled.

Government Exhibits (GE) 1 through 5 were admitted into evidence without objection. Applicant testified and submitted Applicant Exhibits (AE) A through P, which were admitted without objection. The record was held open until December 10, 2021, to permit Applicant to submit additional documentary evidence. Applicant submitted Applicant Exhibits (AE) Q through Y, which were admitted without objection. DOHA received the hearing transcript on December 3, 2021.

Findings of Fact

Applicant is a 43-year-old electrical engineer for a government contractor, employed since November 2018. He previously consistently worked for other companies from 2013 to 2018. He was unemployed from August to October 2013, from June to August 2010, and from June to September 2009. He earned an associate's degree in 2004 and a bachelor's degree in 2008. He served honorably in the U.S. Marine Corps from 1998 to 2003, including a deployment at sea in December 2002 and in Iraq from March to August 2003. He married in 2002 and has three children (ages 21, 19, and 2) that reside with him. He does not currently hold a security clearance.

The SOR alleges under Guideline F that Applicant failed to timely file his federal income tax returns for tax years 2012 through 2015 (SOR ¶ 1.a); is indebted to the Federal Government for unpaid income taxes for at least tax year 2012 for approximately \$14,000 (SOR ¶ 1.b); and is indebted for collection accounts totaling approximately \$2,444 (SOR ¶¶ 1.c – 1.h). Applicant admitted all of the SOR allegations, with explanations. The Government's exhibits support the Guideline F allegations.

Applicant worked as a civilian contractor in Afghanistan from 2012 to August 2013. During that period, he had poor Internet connections and telephone connectivity. He has resided in the U.S. since August 2013. While he was deployed, he provided his spouse with a "power of attorney" so that she could file their income tax returns in his absence, but she was uncomfortable with it. Applicant failed to file tax returns for tax year (TY) 2012, presumably while he was deployed, but also for TY 2013 – 2015. He testified that he believes he sought an extension to file his tax returns, but he did not complete the returns by the extension date. He noted in testimony that "honestly, I don't remember . . . why we dropped the ball on that. I honestly don't remember what the reasoning was." (Tr. p. 23)

Applicant was interviewed for his security clearance by a Government investigator in May 2019. In the interview, he stated that he had not filed his 2012 Federal income tax return because of his deployment to Afghanistan, and he needed to hire an accountant. He stated that he owed about \$6,000, and he intended to file and pay what he owed.

Applicant filed his 2012 income tax return in October 2019. In response to Government interrogatories dated November 4, 2019, he noted that he owed

approximately \$14,000 for 2012 and had not yet filed tax returns for 2013 to 2015. He testified that he was motivated to resolve his tax issues by “the notion of getting penalties, and I just need to pay. It’s just part of the due diligence and one of my responsibilities.”

In October 2019, Applicant hired an attorney to interact with the Internal Revenue Service (IRS) regarding his taxes. The IRS agreed to waive penalties for taxes owed for tax year (TY) 2012, but no repayment agreement was made with the IRS to resolve Applicant’s tax debts. Applicant eventually filed his FY 2013, 2014, and 2015 tax returns in December 2019, along with partial payments. In March 2020, he completed payments for taxes owed for TY 2014; and in May and October 2020, he made two \$500 payments toward his TY 2015 debt. In November 2020, he received an IRS notice of intent to seize (levy) his property unless he paid \$2,283 toward his TY 2015 debt. In August 2021, he paid the IRS \$2,333 toward his TY 2015 debt.

Applicant testified at the hearing that he had savings accounts containing about \$6,300; checking accounts containing about \$2,200; equity in a home and IRA/401k accounts. His household income was about \$140,000 annually. In December 2021, after the hearing in this case, he paid the IRS \$19,281 for the TY 2012 debt (substantially more than the \$14,000 he claimed he owed); \$12,511 for the TY 2013 debt; and \$603 for his TY 2020 debt. He provided a checking account statement showing a balance of \$68,665 before paying the IRS debts. It is unclear where he obtained the additional cash since his testimony on November 30, 2021.

The remaining SOR collection accounts, including a judgment debt in SOR ¶ 1.c, were settled and paid in 2020. Applicant was unable to locate the creditor for the \$88 medical collection account in SOR ¶ 1.h, however the debt no longer appears on his credit report.

Applicant provided successful performance evaluations and training and various letters of recommendation and support attesting to his honesty, professionalism, dedication, loyalty, and trustworthiness.

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 debt accumulation and 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 until his security eligibility was in jeopardy. He has not submitted sufficient or persuasive evidence to show how his service overseas significantly impeded his ability to file federal income tax returns and pay taxes as required.

The guideline 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). Failure to file tax returns suggests that an applicant has a problem with complying with well-established governmental rules and systems. Voluntary compliance with such rules and systems is essential for protecting classified information. ISCR Case No. 01-05340 at 3 (App. Bd. Dec. 20, 2002). 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. 14-01894 at 5 (App. Bd. Aug. 18, 2015).

Applicant's failure to pay 2013 and 2020 taxes when due was not alleged in the SOR and may not be an independent basis for denying his application for a security clearance. However, conduct not alleged in the SOR may be considered to decide whether a particular adjudicative guideline is applicable, to evaluate evidence of extenuation, mitigation, or changed circumstances, or as part of a whole-person analysis. ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006). I have considered Applicant's failure to timely pay his 2013 and 2020 taxes for these limited purposes.

Applicant's financial problems have been longstanding and remain a concern. I give mitigating credit for resolution of his collection accounts. However, his federal income tax obligations have not been sufficiently mitigated given the number of years of non-compliance and disregard. I also have concerns about his overall financial responsibility, and willingness to comply with future income tax obligations. Applicant may have come to the realization that timely filing and paying Federal income tax obligations is a significant responsibility, however, it has been late in coming. I am not aware that he has sought financial counseling to assist him with understanding his financial obligations and budgeting, besides his use of attorneys and accountants.

Overall, Applicant's financial responsibility is questionable, and he has a poor track record with respect to Federal income tax compliance. He had many years to resolve his tax obligations, yet allowed them to remain unresolved until his security clearance was jeopardized. Even then, he was slow to respond to the red flags raised about his tax

delinquencies since completing his SCA and during the investigation. Based on his testimony, I am not convinced he fully grasps the reality of his tax obligations or has a sufficient handle on his personal finances.

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, periods of unemployment, military and civilian service, and family responsibilities. 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.b:	Against Applicant
Subparagraphs 1.c-1.h:	For Applicant

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