



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



In the matter of:)
)
) ISCR Case No. 20-00313
)
Applicant for Security Clearance)

Appearances

For Government: Patricia M. Lynch-Epps, Esquire, Department Counsel
For Applicant: Todd A. Hull, Esquire

03/01/2022

Decision

MARSHALL, Jr., Arthur E., Administrative Judge:

Statement of the Case

On June 29, 2020, the United States Department of Defense (DOD) Consolidated Adjudication Facility (CAF) issued Applicant a Statement of Reasons (SOR) detailing concerns regarding Applicant’s eligibility for a security clearance under Guideline F (Financial Considerations). This action was taken under Executive Order 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 within the DOD on or after June 8, 2017.

In an August 27, 2020, response, Applicant addressed the allegations raised in the SOR and requested a hearing before a Defense Office of Hearings and Appeals (DOHA) administrative judge. I was assigned the case on May 31, 2021. On August 20, 2021, a notice of hearing was issued setting the matter for October 14, 2021. The hearing was convened as scheduled. The Government presented four exhibits (Exs.), which were accepted without objection as Exs. 1-4. Applicant gave testimony and offered 10 documents, accepted into the record without objection as Exs. A-J. The record was kept open through October 28, 2020, for Applicant to provide documents. On October 22, 2021, Applicant submitted three one-page documents. They were

accepted collectively as Ex. K without objection. The record was then closed. Based on the record as a whole, I find Applicant mitigated the concerns raised.

Findings of Fact

Applicant is a 51-year-old software developer who recently started working at his present place of employment. He earns approximately \$160,000 a year. He is a well-rated employee and a highly respected worker. (Exs. I-J). Applicant takes the responsibilities related to his work and his security clearance, which he has maintained without incident for 23 years, very seriously. (Tr. 21) Applicant is nearing completion of an undergraduate degree in political science. He is married. He has a teenage child who excels as a gifted student.

Applicant has received financial counseling and retained a qualified tax professional to handle both his future tax returns and related matters. (Tr. 15, 29-30) He believes he now possesses “financial literacy.” (Tr. 30) At issue are:

- Applicant’s failure to timely file federal and state income tax returns for tax years 2012-2018 (SOR allegations a-b);
- Applicant’s failure to pay delinquent federal taxes for tax years 2013, 2014, and 2015 (\$13,120) and delinquent state taxes for tax years 2013, 2015, and 2016 (\$5,972) (SOR allegations c-d); and
- Applicant’s responsibility for the balance owed on a charged off account (\$40,100) (SOR allegation e).

Attributing his tax issues and delinquent debt to a lapse in judgment and poor interpersonal communication, Applicant noted his failings on his March 2019 eQIP and during an April 2019 interview, indicating that he was working on rectifying the situation. (Tr. 20, 27, 58-59; Exs. 1-2) Having maintained a security clearance for 23 years, he knew financial responsibility and honoring his tax obligations were required. He already had begun addressing his “mistake” by December 2018. (Tr. 60) He noted, “[I]t was a lapse of judgment. I should’ve filed and I didn’t file.” (Tr. 25) Applicant consulted a lawyer, then retained a professional tax preparer to help him get his tax issues in order. Ultimately, he did not recoup refunds owed to him that were unrecoverable because they “were out of statutes of limitations. In satisfying all tax sums owed for the tax years at issue, however, he thought the situation “would balance itself out. . . .” (Tr. 25)

The SOR was issued on June 29, 2020. Applicant’s federal tax returns for tax years 2012-2015 were accepted by the appropriate tax authorities by late February and early March 2020. (Exs. B-C, K; Tr. 26, 33) He also filed his tax year 2016 federal return, with a refund issued in April 2020; federal tax returns for tax years 2017 and 2018 resulted in refunds in March 2020. (Ex. B; Tr. 26) Any owed federal taxes have been paid. (Tr. 37-38; Ex. B, Ex. K)

Applicant has completed and submitted state tax returns for tax years 2017-2018, with refunds issued by mid-March 2020. (Ex. C; Tr. 31-32) State tax returns for 2014-2015 also were accepted, but their processing was delayed due to Covid. The return for tax year 2014 was received in March 2020. (Ex. E) While the date of filing is unclear, Applicant paid state taxes for tax year 2015 in April 2020. (Ex. E, Ex. C) As of at least August 12, 2021, Applicant's state reflected his prior payment of taxes owed for tax years 2012, 2013, 2015, and 2016 (Ex. D, Ex. K; Tr. 33) Consequently, all state tax sums at issue have been paid. (Tr. 39; Exs. C-E)

By February 2019, Applicant had discovered that a home equity loan for about \$40,100 might go into default because he had somehow been paying less than the full monthly amount owed, as well as miscommunications with his wife, he asserted claims against the lender. (Tr. 44; Ex. 2 at 6) The mounting problems with this account were discussed during his April 2019 interview. (Ex. 2) The loan was ultimately defaulted and turned over to a law firm. Applicant worked with the law firm and agreed to initially pay \$1,200 a month toward the loan balance. (Tr. 41) The law firm eventually reduced to \$869 and instituted a settlement agreement indicating the settlement amount due was \$31,300.

This settlement agreement was signed in mid-June 2020, and scheduled to end by the end of May 2023. (Ex. F) After 16 timely payments, some or more exceeding the \$869 a month agreed upon, the sum had been reduced to about \$17,153 by September 2021. (Tr. 43; Ex. G) Applicant has continued to make timely payments toward the goal of satisfying the obligation. (Tr. 43)

Today, Applicant and his wife now work in concert to make sure all financial issues are in order. He drives a 12-year-old car, which he bought used and for which he since has paid in full. (Tr. 74) His wife also drives a used car. Applicant maintains a retirement savings account. He has not been on vacation in years. No longer relying on a commercial tax preparation computer program, he now relies on his new professional tax preparer. Applicant's family lives within their means. Applicant's home has significantly increased in value in the past few years. He is up to date with his federal and state tax return filings.

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

Under Guideline F, AG ¶ 18 sets forth that the security concern under this guideline is that failure or inability 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 these factors can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information. Here, the Government offered documentary evidence reflecting that Applicant had failed to timely file state and federal tax returns for multiple years, failed to pay outstanding taxes owed, and had one delinquent account. This is sufficient to invoke financial considerations disqualifying conditions:

AG ¶ 19(a): inability to satisfy debts;

AG ¶ 19(b): unwillingness to satisfy debts regardless of the ability to do so;

AG ¶ 19(c): a history of not meeting financial obligations, and

AG ¶ 19(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

Under these facts, four conditions could mitigate related security concerns:

AG ¶ 20(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;

AG ¶ 20(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;

AG ¶ 20(c) the individual has received or is receiving financial counseling for the problems 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 under control;

AG ¶ 20(d) the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts, and

AG ¶ 20(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.

While Applicant's delinquent debt is a relatively recent development, his failure to timely file multiple federal and state tax returns started several years ago. Unique circumstances did not cause these tax and financial issues, just a "mistake" and a "lapse of judgment." Consequently, neither AG ¶ 20(a) nor ¶ 20(b) applies.

Before Applicant completed his March 2019 eQIP, he had begun addressing his tax return filing issues, initially with a lawyer, then with a qualified tax professional. In the process, he received professional legal and financial counseling. He had also begun work addressing his home equity line issue. He was forthcoming about the tax issues on his March 2019 eQIP and both his tax and home equity loan situation during a follow-up interview in April 2019. By the time the SOR was issued on June 29, 2020, Applicant had filed all belated federal and state tax returns, paid all sums owed, and had made progress toward satisfying the payments due under his negotiated settlement agreement. Today, he continues to make regular and timely payments toward that debt's significantly reduced balance. There is little more for him to do. Under these facts, Applicant's successful, albeit belated, efforts raise AG ¶ 20(c), AG ¶ 20(d), and AG ¶ 20(g).

Even where tax and debt problems have been corrected and an applicant is motivated to prevent such problems in the future, the administrative judge is not precluded from considering an applicant's trustworthiness in light of longstanding prior behavior evidencing irresponsibility. See *e.g.*, ISCR Case No. 14-01984 at 5 (App. Bd. Aug. 2015). Moreover, the Appeal Board has long held that the failure to file tax returns suggests a problem with complying with well-established government rules and systems. See *e.g.*, ISCR Case No. 14-04437 (App. Bd. Apr. 15, 2016). Furthermore, the Appeal Board has determined that the timing of corrective action is an appropriate factor to consider in applying AG ¶ 20(g). See *e.g.*, ISCR Case No. 17-01382 at 4 (App. Bd. May 16, 2018) (citing ISCR Case No. 17-01807 at 3-4 (App. Bd. Mar. 7, 2018)).

Here, Applicant successfully maintained a security clearance for nearly a quarter of a century without incident. He takes full responsibility for his failure to timely file tax returns for the years at issue and for his singular delinquent debt. In so doing, he acknowledged that he understood the financial responsibilities related to the maintenance of a security clearance. He showed, however, that he self-identified his tax issues when he completed his eQIP, he displayed candor and contrition in discussing both his tax-related corrective action and mounting debt issue during his investigative interview. He successfully had addressed all these issues before the SOR was issued.

Finally, in reversing favorable clearance grants to applicants with tax issues by DOHA judges in ISCR Case No. 17-01382 (App. Bd. May 16, 2018) and ISCR Case No. 16-01211 (App. Bd. May 30, 2018), the Appeal Board noted that applicants who only begin to address their delinquent tax returns *after* having been placed on notice that their clearance may be in jeopardy may not comply with laws, rules, and regulations when their immediate interests are not imperiled. This case law is considered here and incorporated in my whole-person analysis, below.

Here, this process was not what motivated Applicant to address his financial issues. The documentary evidence indicates that he was already addressing his then existent issues before he even completed his eQIP. He discussed his growing home equity loan issue with the investigator shortly thereafter. Under all these unique facts and circumstances, I find that the security concerns raised are mitigated.

Whole-Person Concept

Under the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of his conduct and all relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d). Here, I have considered those factors with regard to this case and this Applicant.

In addition, I am mindful that, under AG ¶ 2(a), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based on careful consideration of the guidelines and the whole-person concept. My Guideline F analysis is incorporated in this whole-person analysis. Some factors in AG ¶ 2(d) were addressed under that guideline, but some warrant additional comment.

The security clearance adjudication involves an evaluation of an applicant's judgment, reliability, and trustworthiness in light of the security guidelines in the Directive. See ISCR Case No. 09-02160 (App. Bd. Jun. 21, 2010). This Applicant successfully maintained a security clearance without adverse incident for nearly 25 years. There is no evidence and no suggestion he has ever had any finance or tax-related issues in the past.

Applicant's situation is not in keeping with the rest of his past conduct. He is a highly respected and well-rated employee. He takes full responsibility for his issues, attributing them to mistake, a judgment lapse, and poor communication with his spouse. Applicant, however, successfully undertook corrective action and received appropriate counseling – legal and financial – regarding his taxes before this process was fully commenced. He kept investigators advised regarding his home equity loan situation as it arose.

Since that time, Applicant has been completely candid about both his situation and the actions he has been taking. By the time the SOR was issued, all tax returns at issue had been filed and any tax sum balances paid, and his singular delinquent account was in regular repayment with its balance substantially reduced. I have no doubts or reservations regarding Applicant's continued success in honoring his debt and using paid professionals to assure compliance with the tax laws going forward. I find concerns related to financial considerations are mitigated.

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.e:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant a security clearance. Eligibility for a security clearance is granted.

Arthur E. Marshall, Jr.
Administrative Judge