



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
 [REDACTED]) ISCR Case No. 21-01527
)
 Applicant for Security Clearance)

Appearances

For Government: Ross Hyams, Esq., Department Counsel
For Applicant: *Pro se*
03/30/2022

Decision

MARINE, Gina L., Administrative Judge:

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

Statement of the Case

Applicant submitted a security clearance application (SCA) on March 9, 2018. On August 18, 2021, the Defense Counterintelligence and Security Agency Consolidated Adjudications Facility (CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guideline F. The CAF acted under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense (DOD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented by the DOD on June 8, 2017.

Applicant answered the SOR on October 1, 2021, and requested a decision based on the written record in lieu of a hearing. On November 15, 2021, the Government sent Applicant a complete copy of its written case, a file of relevant material (FORM), including pleadings and evidentiary documents identified as Items 1 through 5. He was given an opportunity to submit a documentary response setting forth objections, rebuttal, extenuation, mitigation, or explanation to the Government’s evidence. He received the

FORM on December 23, 2021, and timely submitted his response, to which the Government did not object. Applicant did not object to the Government's evidence. The case was assigned to me on March 3, 2022.

Evidentiary Matters

Items 1 and 2 contain the pleadings in the case. Items 3 through 5 are admitted into evidence. Although Item 5 was not authenticated as required by Directive ¶ E3.1.20, I conclude that Applicant waived any objection to Item 5. The Government included in the FORM a prominent notice advising Applicant of his right to object to the admissibility of Item 5 on the ground that it was not authenticated. Applicant was also notified that if he did not raise an objection to Item 5 in his response to the FORM, or if he did not respond to the FORM, he could be considered to have waived any such objection, and that Item 5 could be considered as evidence in his case. Applicant did not raise any objections in his FORM response or otherwise.

Findings of Fact

Applicant, age 33, is married with four children, ages 12, 9, 7, and 2. He received his high school diploma in 2007. He attended college from September 2007 through December 2008, without earning a degree. Applicant initially applied for a security clearance while employed as an inventory specialist by Defense Contractor A, from at least June 2015 through March 2018 (when he signed his SCA). On dates not identified in the record, he became employed by Defense Contractor B (for whom he worked at the time he received the SOR in October 2021), and then by Defense Contractor C (for whom he worked at the time he received the FORM in December 2021), who appears to be his current sponsor. He was reportedly granted a security clearance in 2015. (Items 2, 3, 4, and 6)

The SOR alleged that Applicant failed to file, as required, his personal federal and state income tax returns for tax years 2015 through 2019, and that those returns remained unfiled as of the date of the SOR (SOR ¶¶ 1.a and 1.b). In his SOR answer, Applicant denied both of the SOR allegations. (Items 1, 3)

Applicant attributed his delayed filings largely to complications involving his grandmother's estate after she passed away in April 2014. He and his brother were the sole beneficiaries and co-executors of her estate. Due to the nature of her estate, which involved multiple real estate investment properties and other assets, Applicant sought professional help to navigate the estate's administration and related tax obligations, including his own. He was advised to settle his grandmother's estate completely before filing his personal tax returns. Her estate included an investment that paid out annually and could not be closed until the payout was completed. Applicant asserted that the first accountant (Accountant A) he hired was not reliable and charged an unfair amount for work that was being completed late. Although the record did not specify for what period Accountant A was employed, Applicant had retained him or her by the time he was interviewed in August 2018 in connection his background investigation (2018 Interview). (Items 3 – 6; FORM response)

Applicant retained a second accountant (Accountant B) in about November 2020 to assist him with filing his personal and the estate's returns. He filed by mail his personal returns for tax years 2015 through 2018 on November 27, 2020, two days after receiving them from Accountant B. They were received by the state on November 30, 2020, and the IRS on December 1, 2020. He concurrently mailed the estate's returns for tax years 2017 through 2019, which were received by the IRS and the state on November 30, 2020. The record did not expressly confirm that Applicant filed his personal returns for tax years 2019 and 2020 by the end of October 2021 as he promised in his SOR answer. However, given the information provided in his FORM response, it is reasonable to conclude that those returns had been filed by the time he submitted it in January 2022. (Item 3; FORM response)

After his negative experience with Accountant A, particularly given what he considered exorbitant fees involved, Applicant and his brother chose to handle the administrative side of his grandmother's estate without professional guidance. Although he acknowledged that there was a steep learning curve, he felt that saving such a significant amount of money for each yearly accounting was a financially responsible choice. In his FORM response, he stated: "I have still maintained the estate accounting and filing required by the county," making it unclear when or if his grandmother's estate had settled. (FORM response; Item 6)

Beginning with the self-report on his SCA and continuing throughout the security clearance adjudication process, Applicant detailed his ongoing efforts to resolve his tax filing delinquencies. Although he provided some documents, his efforts to provide all relevant documents were hampered by covid-related constraints. Applicant acknowledged that he and his brother's decision to manage the accounting aspect of the estate themselves contributed to the filing delays. He stated: "there was a lot of confusion and misunderstanding as we taught ourselves how to submit the annual accounting." His attention was also divided by caring for his youngest child who was born in December 2019 with special needs, and by the strict quarantine measures his family maintained in order to protect their young children from covid. (Items 3 – 6)

Applicant does not owe any delinquent taxes or other delinquent debt. He does not live beyond his means, and the only debt he carries is a monthly car payment. In his free time, Applicant enjoys being with his wife and children, including helping his wife with their shared passion for homeschooling their children. They had been homeschooling their children pre-covid as indicated by Applicant during his 2018 Interview. (Items 3 – 6)

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." (*Egan* 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." (EO 10865 § 2)

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the AG. 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 all available and reliable information about the person, past and present, favorable and unfavorable.

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." (EO 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. ISCR Case No. 15-01253 at 3 (App. Bd. Apr. 20, 2016). 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. (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; AG ¶ 2(b))

Analysis

Guideline F: Financial Considerations

The 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. Financial distress can also be caused or exacerbated by, and thus can be a possible indicator of, other issues of personnel security concern such as excessive gambling, mental health conditions, substance misuse, or alcohol abuse or dependence. An individual who is financially overextended is at greater risk of having to engage in illegal or otherwise questionable acts to generate funds

This concern is broader than the possibility that a person might knowingly compromise classified information to raise money. It 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. (ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012)).

Applicant's failure to timely file his federal and state income tax returns for tax years 2015 through 2019 establishes the following disqualifying condition under this guideline: 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).

Having considered all of the factors set forth in AG ¶ 20 that could mitigate the concern under this guideline, I find the following relevant:

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; 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.

Applicant failed to timely file federal and state income tax returns for five consecutive years. He filed his delinquent returns for tax years 2015 through 2019 in November 2020, and for tax year 2019, by January 2022.

Applicant's decision to take on the administrative tasks associated with his grandmother's estate, regardless of whether it was financially responsible, was a choice

and not a circumstance beyond his control. However, the complexities of the estate as relates to tax obligations, Accountant A's unreliability, and the circumstances involving his youngest child and the pandemic were circumstances beyond his control. In light of those exigencies, Applicant filed his delinquent returns within a reasonable time period. It is logical to assume that these same factors underlay his delay in administering the estate and filing the estate's returns, which in turn, contributed to the delay in filing his personal returns.

Applicant may have been better served by hiring another accountant to assist him with the administrative side of his grandmother's estate, and by filing his personal returns without regard for the tax consequences associated with his grandmother's estate. However, his actions were not unreasonable or motivated by a willful violation of his legal obligations. Applicant's delay in filing the returns can reasonably be attributed circumstances unlikely to recur. He initiated action to complete his delinquent returns before his 2018 Interview, and filed returns for four of the five delinquent tax years before the SOR was issued. I have no lingering doubts about Applicant's reliability, trustworthiness, or good judgment. AG ¶¶ 20(a), 20(b), and 20(g) are established to mitigate the Guideline F concerns alleged in the SOR.

Whole-Person Concept

Under AG ¶ 2(c), the ultimate determination of whether the granting or continuing of national security eligibility is clearly consistent with the interests of national security must be an overall common sense judgment based upon careful consideration of the adjudicative guidelines, each of which is to be evaluated in the context of the whole person. An administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d):

- (1) the nature, extent, and seriousness of the conduct;
- (2) the circumstances surrounding the conduct, to include knowledgeable participation;
- (3) the frequency and recency of the conduct;
- (4) the individual's age and maturity at the time of the conduct;
- (5) the extent to which participation is voluntary;
- (6) the presence or absence of rehabilitation and other permanent behavioral changes;
- (7) the motivation for the conduct;
- (8) the potential for pressure, coercion, exploitation, or duress; and
- (9) the likelihood of continuation or recurrence.

I have incorporated my comments under Guideline F in my whole-person analysis, and I have considered the factors in AG ¶ 2(d). After weighing the disqualifying and mitigating conditions under Guideline F, and evaluating all the evidence in the context of the whole person, I conclude that Applicant has mitigated the security concerns raised by his failure to timely file federal and state tax income tax returns. Accordingly, Applicant has carried his burden of showing that it is clearly consistent with the interests of national security to grant him eligibility for access to classified information.

Formal Findings

Formal findings 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.b: For Applicant

Conclusion

I conclude that it is clearly consistent with the interests of national security to grant Applicant eligibility for access to classified information. Clearance is granted.

Gina L. Marine
Administrative Judge