



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



In the matter of:)	
)	
[Redacted])	ISCR Case No. 19-03359
)	
Applicant for Security Clearance)	

Appearances

For Government: Andrea Corrales, Esq., Department Counsel
For Applicant: *Pro se*

09/01/2022

Decision

FOREMAN, LeRoy F., 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 on February 26, 2018. On May 15, 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 DOD 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) promulgated in Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (December 10, 2016).

Applicant answered the SOR on May 19, 2020, and requested a decision on the written record without a hearing before an administrative judge. His answer was incomplete because he did not specifically admit or deny each of the allegations in the

SOR. He completed his answer on July 31, 2020. On November 10, 2020, he requested a hearing by an administrative judge. Department Counsel was ready to proceed on February 7, 2022. Scheduling of the hearing was delayed by the COVID-19 health precautions. The case was assigned to me on May 18, 2022. On June 6, 2022, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled to be conducted by video teleconference on June 23, 2022. I convened the hearing as scheduled. Government Exhibits (GX) 1 and 2 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibits (AX) A through I, which were admitted without objection. I kept the record open until August 10, 2022, to enable him to submit additional documentary evidence. He did not submit anything further. DOHA received the transcript (Tr.) on July 6, 2022. The record closed on August 10, 2022.

Findings of Fact

In Applicant's answer to the SOR, he admitted the allegations in SOR ¶¶ 1.a and 1.b, alleging that he failed to file his federal and state income tax returns for tax years 2010 through 2016. His admissions are incorporated in my findings of fact.

Applicant is a 34-year-old employee of a defense contractor. He worked for this employer as a shipfitter from October 2009 to April 2017, when he became a quality inspector. He was promoted to a manager position in August 2021. (Tr. 21.) He has never held a security clearance.

Applicant graduated from high school in July 2007 and attended some college courses, but he did not receive a degree. He is currently a part-time student, working toward a bachelor's degree in business management. His educational expenses are paid by his employer. (Tr. 16, 20-21.) He married in August 2014 and has two children and two stepchildren, all of whom live with him and his wife.

As a shipfitter, Applicant earned around \$40,000 per year. His pay increased to about \$60,000 to \$70,000 per year when he became a quality inspector. As a manager, he now earns about \$75,000 to \$80,000 per year. (Tr. 22-23.) Applicant's wife is a nurse, works part time, and earns \$40,000 to \$45,000 per year. (Tr. 26-27.) He estimates that their net monthly remainder after paying all expenses is about \$1,000 per month. (Tr. 29.)

Applicant and his wife own their home. They refinanced their home mortgage loan in August 2021 for \$226,000. (Tr. 30.) In March 2021, they purchased two used vehicles, model years 2005 and 2008. In April 2022, they purchased another used vehicle. (Tr. 30-31.) A credit report from June 2022 reflects no delinquent debts. (AX I.)

During an interview with a security investigator in November 2018, Applicant admitted that he made a conscious decision in 2010 to not file his income tax returns because he could not afford to pay the taxes due. (GX 2 at 8.) He told the investigator that he was working with a professional tax preparer but that the tax preparer could not help him with the tax returns for 2010 through 2013. (GX 2 at 9.) In response to DOHA

interrogatories in December 2019, Applicant admitted that he had not filed his federal income tax returns for tax years 2010 through 2015. He estimated that he owed \$1,864 for 2014 and \$845 for 2015. He stated that he had filed his federal returns for 2016, 2017, and 2018, and that he owed \$1,483 for 2016 and was entitled to refunds for 2017 and 2018. (GX 2 at 27.)

In response to the same interrogatories, Applicant stated that he had filed his state income tax return for 2010, but he provided no documentation to support his statement. He admitted he had not filed his state returns for 2011, 2012, and 2013. He provided documentation that he had filed his state returns for 2014 through 2018, but had not paid the taxes due. His documentation does not reflect when the state returns for 2014 through 2018 were filed. (GX 2 at 47.) He admitted owing state taxes of about \$1,042, and he provided documentation of a payment plan for his state taxes. (GX 2 at 43-46.) He also provided documentation that a \$719 refund was being applied to his tax debts for 2014, 2015, and 2017, leaving a balance due of \$48.73. (AX H.)

At the hearing, Applicant presented documentary evidence that he filed his 2016 federal return in April 2019, had timely filed his 2017 federal return, had filed his 2018 federal return in October 2019 after receiving an extension of time, and timely filed his 2019 federal return. (AX B-E.) He also submitted evidence that he had a payment plan in place for his federal tax debt and that his tax debt was satisfied as of June 2022. (AX A, F, and G.) He provided no evidence that he had filed his federal returns for 2010, 2011, 2012, and 2013.

Applicant attributed his failures to file his federal and state tax returns to numerous factors. He was arrested for DUI in June 2010 and then failed to appear in court in September 2010. (GX 2 at 5-6.) As a result, he incurred the cost of legal fees and higher insurance rates. His mother and stepfather broke up while he was living with them. He then lived with his grandparents from August 2010 to May 2013, when he began living with his girlfriend. (GX 1 at 8-9.) He fell behind on his debts. His car was repossessed and his pay was garnished for delinquent student loans and credit-card debts. (GX 2 at 8.) After Applicant and his wife married in 2014, his wife told him he needed to get himself together and start taking care of his obligations. (Tr. 17-19.)

Applicant testified that he and his wife were scheduled to meet with an IRS agent in mid-July 2022 regarding the federal returns that have not yet been filed. (Tr. 46.) I held the record open to enable him to submit additional documentation regarding his past-due federal returns. He did not submit any further evidence.

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.

Eligibility for a security clearance 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 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.” 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. See *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 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. See 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.

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. . . .

This concern 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).

Applicant's admissions and the evidence submitted at the hearing establishes the disqualifying condition in 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."

Although Applicant has a history of delinquent debts, including debts for federal and state income taxes, the non-tax debts were old, and his most recent credit report reflected no delinquent debts. The DCSA CAF apparently concluded that any security concerns based on those debts were mitigated, and they were not alleged in the SOR. Therefore, his history of non-tax debts may not be the basis for denying his application for a security clearance, but it may be considered to assess his credibility; to decide whether a particular adjudicative guideline is applicable; to evaluate evidence of extenuation, mitigation, or changed circumstances; to consider whether he has demonstrated successful rehabilitation; or as part of a whole-person analysis. ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006).

The following mitigating conditions are potentially applicable:

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 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; 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.

AG ¶ 20(a) is not established. Applicant's tax delinquencies are recent, frequent, and did not occur under circumstances making recurrence unlikely.

AG ¶ 20(b) is not established. Applicant's failures to timely file his federal and state tax returns were the result of his financial mismanagement and his conscious decision in 2010 to not file his tax returns.

AG ¶ 20(c) is not fully established. Applicant obtained the services of a tax professional in 2018, but his tax problems are not yet under control.

AG ¶ 20(g) is established for the years for which the returns have been filed. When Applicant responded to DOHA interrogatories in December 2019, he had not yet filed his federal returns for 2010 through 2015. He did not file his federal return for 2016 until April 2019. He provided documentation that he had filed his state returns for 2014 through 2018, but his documentation does not reflect when those state returns were filed. As of December 2019, he had not filed his state returns for 2011, 2012, and 2013.

The fact that Applicant has filed some of his past-due returns "does not preclude careful consideration of Applicant's security worthiness based on longstanding prior behavior evidencing irresponsibility." ISCR Case No. 12-05053 (App. Bd. Oct. 30, 2014). An applicant who waits until his clearance is in jeopardy before resolving debts may be lacking in the judgment expected of those with access to classified information. ISCR Case No. 16-01211 (App. Bd. May 30, 2018) 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. 15-00216 at 4 (App. Bd. Oct. 24, 2016), *citing Cafeteria & Restaurant Workers Union Local 473 v. McElroy*, 284 F.2d 173, 183 (D.C. Cir. 1960), *aff'd*, 367 U.S. 886 (1961) Applicant's belated filing of his past-due tax returns after realizing that they were an impediment to obtaining a security clearance "does not reflect the voluntary compliance of rules and regulations expected of someone entrusted with the nation's secrets." ISCR Case No. 14-05794 at 7 (App. Bd. July 7, 2016.)

Whole-Person Concept

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. In applying the whole-

person concept, an 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. 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 applied the adjudicative 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 Applicant has not mitigated the security concerns raised by repeated failures to timely file his federal and state income tax returns.

Formal Findings

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline F (Financial Considerations): **AGAINST APPLICANT**

Subparagraphs 1.a and 1.b: **Against Applicant**

Conclusion

I conclude that it is not clearly consistent with the national security interests of the United States to grant Applicant eligibility for access to classified information. Clearance is denied.

LeRoy F. Foreman
Administrative Judge