



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



In the matter of:)
)
) ISCR Case No. 21-01916
)
Applicant for Security Clearance)

Appearances

For Government: John Lynch, Esq., Department Counsel
For Applicant: *Pro se*

11/15/2022

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 April 22, 2020. On September 21, 2021, 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) promulgated in Security Executive Agent Directive (SEAD) 4, *National Security Adjudicative Guidelines* (December 10, 2016).

Applicant answered the SOR on September 25, 2021, and requested a decision on the written record without a hearing. Department Counsel submitted the Government's

written case on March 17, 2022. On March 18, 2022, a complete copy of the file of relevant material (FORM) was sent to Applicant, who was given an opportunity to file objections and submit material to refute, extenuate, or mitigate the Government's evidence. He received the FORM on April 14, 2022. He did not submit any material in response to the FORM, nor did he object to the Government's exhibits. The case was assigned to me on June 16, 2022. Government Exhibits (GE) 3-5 are admitted into evidence without objection. The FORM marked the SOR and Applicant's Answer to the SOR as GEs 1 and 2, however, they are already part of the record.

Findings of Fact

Applicant is a 61-year-old information technology supervisor who has worked for a Government contractor since September 2007, and has been continuously employed at an overseas location. He has worked for various Government contractors since 2001, mostly at the same overseas location. He served in the U.S. Navy from 1979 to 1985, and was honorably discharged. He earned a bachelor's degree in 1991. He was married in 2004 and divorced in 2016. He was last granted a top-secret security clearance in 2014, and reported holding security clearance eligibility since at least 2003.

The SOR alleges under Guideline F that Applicant failed to file Federal income tax returns, as required, for tax years 2017 to 2020. (SOR ¶ 1.a) Under Guideline E, he is alleged to have falsified his 2020 SCA by failing to disclose his failure to file Federal income tax returns as alleged in SOR ¶ 1.a. (SOR ¶ 2.a) He admitted both SOR allegations with explanations. The evidence in the record supports the SOR allegations.

In his 2021 Answer to the SOR, Applicant admitted the allegations, and noted that since he has lived overseas, he has always been late filing his Federal income tax returns; often two or three years late. He said his tax preparer told him that filing late was not a problem as he has never owed the Government anything. He said he is eligible for foreign earned income exclusions; therefore, he pays no taxes. He noted that since he does not own any property or investment income, his taxes should be "super simple." He expressed that he felt "stupid" for having paid a tax preparer, but that he has a "phobia about doing taxes." He said he has collected all of the records he needs to file, and expected to file "within a week." No evidence has been submitted showing that he filed any delinquent Federal income-tax returns to date, or that he is not required to file Federal income-tax returns, or of an alternative resolution to the Government's concerns. He said he had "no excuse offered other than phobia about taxes, and believing that it didn't matter if I did not owe money to the Government." (Ans.)

In his Answer to SOR 2.a, Applicant admitted the falsification allegation, and noted that he did not fail to pay taxes since he did not owe anything, but he admitted that he did fail to file. He did not believe it was "necessary to file (or at least, not on time) if one does not owe." He noted that "unless I run into problems, I expect to have my 2017-2020 tax forms mailed off within a week," and that he will "use my professionally-prepared 2017 tax forms as a template, so hopefully I can do it right." (Ans.)

During his personal subject interview (PSI) by an investigator from the Office of Personnel Management, Applicant said he procrastinated in filing his taxes as he was scared and has a fear of filing his taxes. Applicant noted that he did not intentionally lie on his SCA about his tax filings, but he did not recall the question on his SCA and that he automatically answered “no” to each question in the financial section.

In response his May 2021 response to Government interrogatories, he said, “no taxes filed for 2017-2021 because of dread dealing with taxes, which is odd given that I have no property or investment income, or any other tax complicating things. All I have to do is send them off to my tax preparer, which I have not done.” He claimed that his tax preparer told him “if you don’t owe the Government any money, there aren’t any penalties.” He then noted, “[s]o I’m afraid I’ve become lax about doing that.” Applicant submitted no documentary evidence to show that he has filed his delinquent Federal income-tax returns.

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 condition under AG ¶ 19 is:

(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 and the documentary evidence in the record are sufficient to establish the disqualifying condition above.

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 history of failing to file Federal income-tax returns when due. In response to interrogatories and in his Answer to the SOR, he claimed to be unclear as to whether he is required to file Federal income-tax returns, pay taxes, or both. He failed to submit evidence to show that he was not required to file income-tax returns due to his foreign residency, rather he seemed to indicate that he was required to file, but intentionally failed to do so because of his phobia and fear of filing.

It is not the Government's obligation to determine Applicant's legal requirements with regard to filing U.S. income-tax returns, or to submit evidence in support of Applicant's contentions, rather he is obligated to show that he has met his income-tax filing requirements or is not required to file at all, due to his income or overseas employment. When given an opportunity to support his contentions, Applicant gave conflicting answers and offered no documentary evidence of his Federal tax status or alternative filing requirements due to his foreign residence or overseas employment. He indicated that he has filed tax returns in the past, and he uses a tax preparer to prepare his annual returns. He implied that since he does not owe Federal taxes, that he does not have to file tax returns on time, or that he is fearful about filing Federal tax returns. It is not clear why he fears filing or has a phobia with regard to Federal income-tax filings. He

has not provided evidence that he has filed past-due income-tax returns despite claiming in 2021, that he could and would file his 2017 to 2020 returns “within a week.” (Ans.)

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 and/or state 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. By failing to file Federal income-tax returns in a timely manner, Applicant did not demonstrate the high degree of good judgment and reliability required of persons granted access to classified information.

Applicant’s tax issues have been longstanding and remain a continuing concern. I am not persuaded by Applicant’s claims of advice from a tax preparer, as he has known of the Government’s concerns since his 2020 PSI and has done nothing to show that he is compliant with Federal tax filing requirements. I also have concerns about his overall financial responsibility and willingness to comply with future income-tax obligations as he stated that he failed to file his 2021 Federal income-tax return as well. (GE 4) No mitigating condition relieves him of his overall financial irresponsibility with regard to meeting Federal income-tax filing requirements on a timely basis.

Guideline E: Personal Conduct

The concern under this guideline is set out in AG ¶ 15:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual’s reliability, trustworthiness and ability to protect classified or sensitive information.

The relevant disqualifying condition under AG ¶16 is:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine national security eligibility or trustworthiness, or award fiduciary responsibilities.

Applicant’s intentional falsification of his 2020 SCA is disqualifying conduct under Guideline E. Applicant admitted to the SOR allegation in his Answer, and the documentary evidence supports the SOR. AG ¶¶ 16(a) applies.

AG ¶ 17 provides conditions that could mitigate security concerns in this case:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by advice of legal counsel or of a person with professional responsibilities for advising or instructing the individual specifically concerning security processes. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress; and

(f) the information was unsubstantiated or from a source of questionable reliability.

None of the mitigating conditions fully apply to Applicant's SCA falsification. He has not filed the past-due income tax returns for tax years 2017 to 2020, but failed to disclose that he failed to file his Federal income-tax returns for tax years 2017 to 2019 in his 2020 SCA. A simple misreading of an SCA question or a minor omission resulting from an oversight may not rise to the level to create security concerns. On the other hand, failure to exercise reasonable care in responding to questions during a clearance investigation may raise such concerns. Each case must be judged on its own facts. Directive ¶ Encl. 2, App. A ¶ 2(b).

Applicant has claimed alternatively, that he had a phobia and fear about filing Federal income-tax returns, and that his tax preparer told him that there was no "penalty" for filing late. Although Applicant claimed an ability and intent to cure his tax filing issues, he has failed to do so to date, including not filing his 2021 tax return after completing his SCA, his subject interview, and issuance of the SOR. Applicant's failure to file his 2021 Federal income tax return 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).

Applicant noted in his PSI that he did not intentionally lie on his SCA, but told the investigator that he did not recall the question on his SCA and that he automatically answered “no” to each question in the financial section. Applicant has held a security clearance since at least 2003. He has a long history of experience with completing SCAs, and knew that he had not filed years of Federal income-tax returns. His fears and phobias about filing taxes may explain his failure to disclose his tax-filing delinquencies in his SCA, but does not excuse it. I find that based on Applicant’s extensive experience working for a government contractor and submitting SCAs, he knew or should have known that he was required to be truthful in his SCA and should have disclosed his failure to file income tax returns, but knowingly failed to do so.

I am not satisfied that sufficient time has passed or that Applicant has shown that this conduct is behind him and will not recur. He did not file his 2021 Federal tax return after being put on notice of tax return delinquencies, and he has not taken positive steps to cure his 2017-2020 delinquent tax filings. His behavior continues to cast doubt on his reliability, trustworthiness, and good judgment, and he remains vulnerable to exploitation, manipulation, or duress. Nothing has been submitted to persuade me that this personal conduct security concern resulted from unintentional conduct or that it will not persist. Personal conduct security concerns are not mitigated.

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 Guidelines F and E in my whole-person analysis. I considered Applicant’s overseas work for a U.S. Government contractor and military service. Because Applicant requested a determination on the record without a hearing, I had no opportunity to evaluate his credibility and sincerity based on demeanor, or to inquire into the issues raised in the SOR. See ISCR Case No. 01-12350 at 3-4 (App. Bd. Jul. 23, 2003).

Overall, the record evidence leaves me with questions and doubts about Applicant’s eligibility and suitability for a security clearance. I have carefully applied the law, as set forth in *Egan*, Exec. Or. 10865, the Directive, the AGs, and the Appeal Board’s jurisprudence to the facts and circumstances in the context of the whole person, including

exceptions available under Appendix C of SEAD 4. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the national security interests of the United States to continue his 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
Subparagraph 1.a:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant

Conclusion

I conclude that it is not clearly consistent with the national interest to continue Applicant's eligibility for access to classified information. Clearance is denied.

Gregg A. Cervi
Administrative Judge