



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----) ISCR Case No. 23-00099
)
Applicant for Security Clearance)

Appearances

For Government: Andrew H. Henderson, Esq., Department Counsel
For Applicant: *Pro se*

09/07/2023

Decision

WESLEY, ROGER C. Administrative Judge

Based upon a review of the case file, pleadings, exhibits, and testimony, Applicant did not mitigate financial consideration concerns. Eligibility for access to classified information or to hold a sensitive position is denied.

Statement of the Case

On January 24, 2023, the Department of Defense (DoD) Consolidated Central Adjudications Facility (CAF) issued a statement of reasons (SOR) to Applicant detailing reasons why under the financial considerations guideline the DoD could not make the preliminary affirmative determination of eligibility for granting a security clearance, and recommended referral to an administrative judge to determine whether a security clearance should be granted, continued, denied, or revoked. The action was taken under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960); DoD Directive 5220.6 *Defense Industrial Personnel Security Clearance Review Program*, (January 2, 1992) (Directive); and Security Executive Agent Directive 4, establishing in Appendix A the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AGs), effective June 8, 2017.

Applicant responded to the SOR on January 31, 2023, and requested that his case be resolved on the written record without a hearing. Applicant received the FORM on March 7, 2023, and he did not respond with any objections to the FORM or provide new submissions. This case was assigned to me on June 1, 2023. The Government's case consisted of 13 exhibits. The Government's exhibits were admitted as Items 1-13.

Summary of Pleadings

Under Guideline F, Applicant allegedly (a) failed to file his federal and state tax income tax returns, as required, for tax years 2012 through 2014, and pay any taxes owing; (b) filed for Chapter 7 bankruptcy relief in about May 2013 (discharged in about August 2013); and (c) filed for Chapter 7 bankruptcy relief in about June 1999 (discharged in about September 2019).

In Applicant's response to the SOR, he admitted all of the allegations with explanations. He claimed to have spoken to the Internal Revenue Service (IRS) and returned his file to the IRS without any explanation or clarification of the file he returned.. He further claimed he learned lessons from the past and has moved on in a more responsible and disciplined manner since his tax-filing incidents. He also claimed he is seeking a security clearance to better himself as an employee of the company he has worked for almost 20 years.

Findings of Fact

Applicant is a 52-year-old employee of a defense contractor who seeks a security clearance. Allegations covered in the SOR and admitted by Applicant are incorporated and adopted as relevant and material findings. Additional findings follow.

Background

Applicant married in 1993 and divorced in 2002. (Item 5). He has two children from this marriage (ages 18 and 16). (Item 5) He remarried in April 2003 and separated in April 2004. (Items 2-5) He has one adult child from this marriage. (Items 2-5) Since December 2020, he has cohabited with his girlfriend and her two children. (Item 3) Applicant earned a high school diploma in June 1988. (items 2-3) He did not report any military service. (Items 2-3)

Since March 2003, Applicant has worked for his current defense contractor as a management supervisor. (Items 2-3) He was granted a security clearance in April 2008, which was subsequently revoked in October 2008. (Items 2-3) Currently, he does not hold a security clearance. (Item 2)

Applicant's finances

Records document that Applicant did not timely file his federal and state tax returns, as required, for tax years 2012 through 2014. ((Items 2-7) Applicant attributed his tax-filing lapses to financial issues related to his child support obligations. (Items 3-

7) He confirmed his receipt of a notice from the IRS about starting a payment plan on his estimated owed back taxes in excess of \$40,000. (Item 3) In his response to the SOR, he confirmed only that he returned the file to the IRS for unstated reasons. (Item 2) Whether he ever filed federal and state tax returns and paid any taxes owed for the specified years in question is unknown.

With a lengthy history of problems with his debts (inclusive of judgments and accounts in collection), Applicant petitioned for Chapter 7 bankruptcy relief in June 1999. (Items 5-6, 8, and 13-14) He received a bankruptcy discharge in September 1999. (Items 13-14) Still faced with lingering financial problems associated with his child support obligations, Applicant petitioned again for Chapter 13 bankruptcy relief in May 2013 and was granted a discharge in August 2013. (Items 3 and 15)

To date, Applicant has failed to provide documentary proof of filing his federal and state income tax returns for tax years 2012-2014. Nor has he provided any documentary proof of paying federal and state taxing authorities for any taxes owed for the 2012-2014 tax years. Explanations of the circumstances of his failure to file timely federal and state tax returns for the years in question are limited to his expressed difficulties in dealing with his child support obligations.

Policies

By virtue of the jurisprudential principles recognized by the U.S. Supreme Court in *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988), “no one has a ‘right’ to a security clearance.” 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. Eligibility for access to classified information may only be granted “upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

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, these guidelines are applied 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, reliable information about the person, past and present, favorable and unfavorable.

The AGs list guidelines to be considered by judges in the decision-making process covering DOHA cases. These guidelines take into account factors that could create a potential conflict of interest for the individual applicant, as well as considerations that could affect the individual’s reliability, trustworthiness, and ability to protect classified information. These guidelines include conditions that could raise a security concern and may be disqualifying (disqualifying conditions), if any, and all of the conditions that could mitigate security concerns, if any.

These guidelines must be considered before deciding whether or not a security clearance should be granted, continued, or denied. Although, the guidelines do not require judges to place exclusive reliance on the enumerated disqualifying and mitigating conditions in the guidelines in arriving at a decision.

In addition to the relevant AGs, judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in ¶ 2(a) of the AGs, which are intended to assist the judges in reaching a fair and impartial, commonsense decision based on a careful consideration of the pertinent guidelines within the context of the whole person. The adjudicative process is designed to examine a sufficient period of an applicant's life to enable predictive judgments to be made about whether the applicant is an acceptable security risk.

When evaluating an applicant's conduct, the relevant guidelines are to be considered together with the following ¶ 2(d) factors: (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 of the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Viewing the issues raised and evidence as a whole, the following individual guidelines are pertinent herein:

Financial Considerations

The Concern: 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 or 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 acts or otherwise questionable acts to generate funds. . . . AG ¶ 18.

Burdens of Proof

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 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 “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See Exec. Or. 10865 § 7. See also Exec. Or. 12968 (Aug. 2, 1995), § 3.1.

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. 95-0611 at 2 (App. Bd. May 2, 1996).

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 ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his [or her] security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Security concerns are raised over Applicant’s failure to timely file his federal and state income tax returns for tax years 2012-2014 and pay any taxes owing for these years. Additional security concerns are raised over Applicant’s multiple petitions for Chapter 7 bankruptcy relief (*viz.*, 1999 and 2013). Applicant’s filing lapses and bankruptcy petitions raise trust, reliability, and judgment concerns about his current and future ability to manage his finances safely and responsibly.

Financial concerns

Applicant’s multiple tax-filing lapses warrant the application of three of the disqualifying conditions (DC) of the financial consideration guidelines. DC ¶¶ 19(a), inability to satisfy debts”; 19(c), “a history of not meeting financial obligations”; and 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,” apply to Applicant’s situation.

Applicant’s admitted tax-filing lapses and Chapter 7 bankruptcy petitions require no independent proof to substantiate them. See Directive 5220.6 at E3.1.1.14;

McCormick on Evidence § 262 (6th ed. 2006). His admitted tax-filing lapses and bankruptcy petitions are fully documented and create judgment issues over the management of his finances. See ISCR Case No. 03-01059 (App. Bd. Sept. 24, 2004).

Financial stability in a person cleared to protect classified information is required precisely to inspire trust and confidence in the holder of a security clearance that entitles the person to access classified information. While the principal concern of a security clearance holder's demonstrated difficulties is vulnerability to coercion and influence, judgment and trust concerns are implicit in cases involving delinquent debts.

Historically, the timing of addressing and resolving tax-filing and payment delinquencies are critical to an assessment of an applicant's trustworthiness, reliability, and good judgment in following rules and guidelines necessary for those seeking access to classified information or to holding a sensitive position. See ISCR Case No. 14-06808 at 3 (App. Bd. Nov. 23, 2016); ISCR Case No. 14-01894 at 5 (App. Bd. Aug. 18, 2015); ISCR Case No. 14-00221 at 2-5 (App. Bd. June 29, 2016).

Without any evidence of his timely-filed tax returns, or good cause demonstrated for any untimely filing of tax returns for tax years 2014-2015, none of the potentially available mitigating conditions are available to Applicant. In the past, the Appeal Board has consistently imposed evidentiary burdens on applicants to provide documentation corroborating actions taken to resolve financial problems, whether the issues relate to back taxes or other debts and accounts. See ISCR Case No. 19-02593 at 4-5 (App. Bd. Oct. 18, 2021); ISCR Case No. 19-01599 at 3 (App. Bd. Jan. 20, 2020).

Whole-person assessment

Whole-person assessment of Applicant's clearance eligibility requires consideration of whether his history of multiple tax-filing and payment lapses and recurrent bankruptcy petitions and discharges are fully compatible with minimum standards for holding a security clearance. While Applicant is entitled to credit for his work in the defense industry, his efforts are not enough at this time to overcome his repeated failures or inability to address his tax-filing and payment responsibilities in a timely way over the course of many years. Overall trustworthiness, reliability, and good judgment have not been established.

Based on a consideration of all of the facts and circumstances considered in this case, it is too soon to make safe predictions that Applicant will be able to undertake reasoned, good-faith efforts to mitigate the Government's financial concerns within the foreseeable future. More time is needed for him to establish the requisite levels of stability with his finances to establish his overall eligibility for holding a security clearance.

I have carefully applied the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. I conclude financial considerations

security concerns are not mitigated. Eligibility for access to classified information is denied.

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:

Guideline F (FINANCIAL CONSIDERATIONS): AGAINST APPLICANT

Subparagraphs 1.a-1.d:

Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Roger C. Wesley
Administrative Judge