



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



In the matter of:)
)
-----) ISCR Case No. 23-00458
)
Applicant for Security Clearance)

Appearances

For Government: Dan O'Reilly, Esq., Department Counsel
For Applicant: *Pro se*

01/11/2024

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 March 28, 2023, the Defense Counterintelligence and Security Agency (DCSA) Consolidated Central Adjudications Service (CAS) issued a statement of reasons (SOR) to Applicant detailing reasons why under the financial considerations guideline the DCSA CAS 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); Department of Defense (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 June 13, 2023, and requested that his case be resolved on the written record without a hearing. Applicant received the File of Relevant Material (FORM) on August 9, 2023. This case was assigned to me on November 9, 2023. The Government's case consisted of five exhibits. The Government's exhibits were admitted as Items 1-5.

Summary of Pleadings

Under Guideline F, Applicant allegedly (a) failed to file his federal and state A tax income tax returns, as required, for tax years 2017 through 2021; (b) failed to file his state B come tax returns, as required; for tax years 2019 through 2021; and (c) accumulated three delinquent consumer debts exceeding \$1,500. Allegedly, Applicant's delinquent debts have not been resolved and remain outstanding.

Under Guideline H, Applicant allegedly used marijuana with varying frequency from about June 2013 until at least March 2022. Allegedly, he used marijuana in violation of 21 U. S.C. § 802.

In Applicant's response to the SOR, he admitted all of the allegations with explanations. He claimed he did not know how to file his past tax returns and needed to contact the Internal Revenue Service (IRS) to "get paperwork to file" both his federal and state unfiled returns. He claimed, too, that he planned to file his tax returns in 2023 and determine how much he owes in back taxes. He further claimed that he was in the process of saving to pay off his listed SOR debts. Addressing the tax-filing allegations of SOR ¶ 1.c, Applicant claimed that State B had no federal tax law in the state and that he did not know how to go about filing tax returns in State B.

Findings of Fact

Applicant is a 29-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 never married but has cohabited with his fiancé since June 2018. (Items 3-4) He has two biological children and two stepchildren. (Items 3-4) Applicant reported no high school class work or earned degrees or diplomas. He did not report any military service. (Item 3)

Since June 2018, Applicant has been employed by his current employer as a technical order librarian. (GE 1) Previously, he worked for other employers in various jobs. Applicant reported brief periods of unemployment between August 2017 and January 2018 and cited work-related disputes with his supervisor over submitted paperwork as the assigned reasons for his involuntary termination from a senior living home in 2017. (Item 4) Applicant has never held a security clearance. (Item 3)

Applicant's finances

Records document that Applicant did not file his federal and state A income tax returns, as required, for tax years 2017 through 2021. (Items 2-5) While he did not file State B income tax returns for tax years 2019-2021, State B reportedly does not have state income tax-filing requirements for the years in issue. And, without a state income tax, state tax returns would not be required of State B residents.

Applicant attributed his federal and State A tax-filing lapses to his lack of federal and state tax forms for tax years 2017-2021 and time conflicts with scheduling appointments with a "live agent." (Item 3)

Pressed further by an agent of the Office of Personnel Management (OPM) in an ensuing November 2022 personal subject interview (PSI) about his tax-filing lapses, Applicant told the investigator only that he was unable to file his federal and state tax returns for tax years 2017-2021 with his Turbo tax app. (Item 4)

Applicant added that he owed the IRS approximately \$11,000 in back taxes. (Item 4) Whether he ever filed federal and State A tax returns and paid any taxes owed for the specified years in question is not documented by Applicant and cannot be credited to him without verification.

Besides his tax-filing lapses, Applicant accumulated three delinquent accounts exceeding \$1,500. (Items 3-5) The individual amounts of the debts are relatively small (none exceeding \$680), and most of them, according to Applicant, have been removed from his credit report. (Items 3-5). Still, Applicant, to date, has not addressed them in any tangible way.

Afforded an opportunity to supplement the FORM with updates about the status of his federal and state tax return filing status and payments and delinquent consumer accounts, Applicant did not provide any additional evidence or information. Nor did he provide any evidence of payment plans with any of his creditors. Neither budgets nor financial statements covering Applicant's income sources and expense allocations were furnished.

Applicant's use of illegal drugs

From about June 2013 to March 2022, Applicant used marijuana, typically "once a week to almost twice a week." (Item 3) In his November 2022 PSI, he trimmed his marijuana use to 20 to 25 times over the same eight-year timeframe (typically two hits at a time in the company of his brother).

In his PSI, Applicant assured he has not used marijuana since March 2022 and has no intention of using the substance in the future. (Item, 4) Applicant's inconsistent accounts of his marijuana use leave considerable doubts about the extent of his marijuana use and whether he at risk of resumption in the foreseeable future.

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.

Drug Involvement

The Concern: The illegal use of controlled substances, to include the misuse of prescription drugs, and the use of other substances that cause physical or mental impairment or are used in a manner inconsistent with their intended purpose can raise questions about an individual's reliability and trustworthiness, both because such behavior may lead to physical or psychological impairment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations. *Controlled substance* means any "controlled substance" as defined in 21 U.S.C. 802. *Substance misuse* is the generic term adopted in this guideline to describe any of the behaviors listed above. AG ¶ 24.

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 2017-2021, as required, and his failure to pay his estimated \$11,000 in back federal taxes owed the federal Government for these years. Additional security concerns are raised over Applicant’s accumulated delinquent debts that exceed \$1,500. Applicant’s filing lapses and accumulated delinquent accounts raise trust, reliability, and judgment concerns about his current and future ability to manage her finances safely and responsibly. Security concerns are raised as well over Applicant’s use of marijuana over an eight-year period spanning June 2013 through at least March 2022.

Financial concerns

Applicant’s multiple tax-filing lapses and accumulated delinquent debts 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 federal and State A tax-filing lapses and unresolved federal tax debt 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 debt delinquencies 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 (both tax-related and other debts) 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 documented evidence of Applicant's timely-filed federal and State A income tax returns and addressing of his delinquent tax and consumer accounts, or good cause demonstrated for his failure to earnestly address these cited judgment lapses, 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).

That previously reported delinquent debts no longer appear on an applicant's credit report are not grounds for extenuating or mitigating "a history of financial difficulties or constitute evidence of financial reform or rehabilitation." ISCR Case No. 21-00261 at 2-3 (App. Bd. June 6, 2022). Favorable conclusions are warranted only with respect to SOR ¶ 1.c. State B (along with a number of other state, exclusive of State A) does not have an authorized state income tax regime in place. Without any state income tax in place, State B does not require the filing of state income tax returns by its residents.

Drug involvement concerns

Applicant's use of marijuana from June 2013 until at least March 2022 raises additional security concerns. Applicable DCs are DC ¶¶ 25(a), "any substance misuse" and 25(c), "illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale or distribution, or possession of drug paraphernalia." Inconsistent accounts of the amounts and timing of his marijuana use during the eight months of his admitted use add further doubts about his estimates of use amounts.

Applicant's mixed estimates of the extent of his marijuana usage over the course of many years suggest potential minimizing of his marijuana usage and raise fresh questions about his level of candor in his varied accounts of his marijuana usage. Without more reliable information from Applicant about the extent of his marijuana use

over his eight years of acknowledged use, mitigation is not available to Applicant at this time. More evidence of sustained abstinence is needed to facilitate safe predictions that he is no longer a recurrence risk.

Whole-person assessment

Whole-person assessment of Applicant's clearance eligibility requires consideration of whether his history of multiple tax-filing lapses and accumulated delinquent accounts (both tax and consumer debts), and the use of federally controlled illegal substances (marijuana) are fully compatible with minimum standards for holding a security clearance. Both areas of concern have been addressed in development of the factual record in this case. Only one of the state tax regimes considered has a tax-filing requirement (State A), and for that reason the tax-filing allegations covered by SOR ¶1.c require no in-depth discussion of Applicant's failure to file his state income tax returns in State B.

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. Trust concerns are compounded by Applicant's lengthy history of marijuana use. 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 and drug involvement concerns within the foreseeable future. More time is needed for him to establish the requisite levels of stability with his finances and committed avoidance of illegal drugs 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 and drug involvement 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-b and 1.d-1.f:	Against Applicant
Subparagraph 1.c:	For Applicant

GUIDELINE H (DRUG INVOLVEMENT): AGAINST APPLICANT

Subparagraph 2.a:

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