



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



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| In the matter of: |) | |
| |) | |
| [Redacted] |) | ISCR Case No. 13-01181 |
| |) | |
| Applicant for Security Clearance |) | |

Appearances

For Government: Melvin A. Howry, Esq., Department Counsel
For Applicant: *Pro se*

05/13/2014

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guidelines F (Financial Considerations) and E (Personal Conduct). Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on March 13, 2013. On December 12, 2013, the Department of Defense (DOD) sent him a Statement of Reasons (SOR), alleging security concerns under Guidelines F and E. The DOD acted under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented by DOD on September 1, 2006.

Applicant answered the SOR on January 22, 2014, and requested a decision on the record without a hearing. Department Counsel submitted the Government's written case on March 19, 2014. On March 25, 2014, 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 1, 2014. DOHA received no response from him by the due date of May 1, 2014. However, he responded and submitted additional documents that were received on May 6, 2014. Department Counsel did not object to the untimely submission, and it has been included in the record. The case was assigned to me on May 7, 2014.

Findings of Fact

In his answer to the SOR, Applicant admitted the allegations in ¶¶ 1.a through 1.d.¹ He denied ¶ 1.e. His admissions are incorporated in my findings of fact.

Applicant is a 71-year-old employee of a federal contractor. He has worked for his current employer since June 1985. In his response to the FORM, he stated that he has been a facility security officer (FSO) for 11 years. He served in the U.S. Marine Corps Reserve from April 1961 to April 1967, held a security clearance while in the Marines, and received an honorable discharge. Applicant married in January 1965. He and his wife have two adult children. He received a security clearance from another government agency in 1985. He received a DOD security clearance in June 1990. (GX 8 at 30.)

Applicant admitted in his answer to the SOR that he neglected to file state and federal income tax returns from 1997 to 2007, due to procrastination. He knew that his payroll deductions exceeded the taxes due for those years. Starting in 2006, he began making withdrawals from his Individual Retirement Account (IRA), in order to provide financial support to family members. The withdrawals increased his income to the point that he owed federal and state taxes. In 2010, he was notified by both state and federal tax authorities that he owed taxes as well as fines, penalties and interests for not filing timely returns. (GX 8 at 30.)

Applicant was familiar with the collection methods utilized by the Internal Revenue Service (IRS), because in 1990 the IRS had previously garnished his pay for a federal tax debt of \$24,734 from tax year 1985. (GX 4.) He did not list this tax debt or the garnishment in his SCA, because it was outside the seven-year window of the questions regarding unpaid taxes. It is not alleged in the SOR.

In response to DOHA interrogatories, Applicant submitted federal tax transcripts reflecting that he owed about \$20,830 in federal taxes for 2010; \$4,151 for 2011; and \$16,379 for 2012. The transcripts reflect that he paid \$16,138 for tax year 2011 in April 2012. They also reflect that he paid the \$20,830 due for 2010 in February 2012, but not

¹ Department Counsel moved to amend SOR ¶ 1.a to conform to the evidence by alleging that Applicant failed to timely file state and federal income tax returns from about 1997 to about 2007, instead of from about 1997 to about 2012, as originally alleged. Applicant did not object to the amendment, and I granted the motion to amend.

the penalties and interest. (GX 8 at 20-26.) His payment history reflects one additional \$1,500 payment in February 2014 on his tax debt for 2010, apparently for penalties and interest not covered by his February 2012 payment of \$20,830. (Response to FORM at 5-6.)

Applicant entered into a payment agreement with the IRS in August 2012, providing for monthly \$200 payments. (Response to FORM at 4.) His payment history reflects three \$200 payments in October 2012, December 2012, and January 2013; a \$6,000 payment in January 2013; and three \$1,000 payments in March, April, and May 2013 on his tax debt for 2011, which is now settled. He made one \$1,000 payment, nine \$1,500 payments and one \$10,000 payment on his tax debt for 2012. (Response to FORM at 5-6.) In May 2014, he received a refund of \$1,801 for overpayment of his 2012 federal income taxes. (Response to FORM at 3.)

During a personal subject interview (PSI) in April 2013, Applicant told the investigator that he believed he owed about \$1,300 in state taxes, and that he would pay them when he filed his 2012 state tax returns. (GX 8 at 31.) He was questioned about several federal tax liens that were filed and then released when the taxes were paid. He told the investigator that he did not pay much attention to the liens because he has no plans to sell his home. He also told the investigator that he has never received credit counseling, but that he is current with all his creditors and has "great credit." Finally, he told the investigator that he has learned his lesson and will never again leave tax issues or financial issues unattended. (GX 8 at 31-32.)

The evidence reflects that a state tax lien for \$1,729 was filed against Applicant in March 2013. (GX 10.) His March 2014 credit bureau report (CBR) reflects that the lien is unsatisfied. (GX 11.) He submitted no evidence that his state income taxes are resolved.

In his answer to the SOR and his response to the FORM, Applicant denied owing the \$31 medical bill alleged in SOR ¶ 1.e. However, the debt is still listed on his March 2014 CBR. (GX 11.) He presented no evidence that he had disputed the debt with the creditor, filed a dispute with the credit reporting agencies, or otherwise resolved it.

Applicant submitted a personal financial statement (PFS) in response to DOHA interrogatories in August 2013. His PFS reflects net monthly income of about \$8,550; living expenses of about \$2,438; debt payments of about \$6,928, including \$1,500 per month to the IRS; and a net monthly remainder of \$1,622. It also reflects that he has real estate valued at about \$290,000 and stocks and bonds in an IRA account worth about \$513,057. (GX 8 at 16.) He also submitted evidence that he has a 401k retirement account worth about \$405,010. (GX 8 at 18.)

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, *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 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.” See 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. 92-1106 at 3, 1993 WL 545051 at *3 (App. Bd. Oct. 7, 1993).

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; see AG ¶ 2(b).

Analysis

Guideline F, Financial Considerations

The SOR alleges that Applicant did not timely file his state and federal income tax returns from about 1997 to about 2007 (SOR ¶ 1.a as amended). It also alleges that he owes federal income taxes of \$16,378 for tax year 2012 (SOR ¶ 1.b); federal income taxes of \$3,668 for tax year 2011 (SOR ¶ 1.c); state income taxes of about \$1,729 (SOR ¶ 1.d); and a \$31 medical debt (SOR ¶ 1.e).

The concern under this guideline is set out in AG ¶ 18:

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 and regulations, all of which can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

This concern is broader than the possibility that an individual might knowingly compromise classified information in order to raise money. It encompasses concerns about an individual's self-control, judgment, and other qualities essential to protecting classified information. An individual 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 corroborating documentary evidence in the FORM establish the following disqualifying conditions under this guideline:

AG ¶ 19(a): inability or unwillingness to satisfy debts;

AG ¶ 19(c): a history of not meeting financial obligations; and

AG ¶ 19(g): failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same.

The evidence reflects that Applicant has sufficient income and financial assets to pay his debts, but that he has demonstrated unwillingness to pay them in a timely, responsible manner.

Applicant denied the medical debt alleged in SOR ¶ 1.e, but it remains on his most recent CBR. It is well settled that adverse information from a credit report will normally meet the requirement in Directive ¶ E3.1.14 that an allegation be supported by substantial evidence. ISCR Case No. 08-12184 at 7 (App. Bd. Jan. 7, 2010.) Applicant submitted no evidence of efforts to resolve the debt, dispute it, or have it removed from his credit record.

The following mitigating conditions are potentially 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, or a death, divorce or separation), and the individual acted responsibly under the circumstances;

AG ¶ 20(c): the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control;

AG ¶ 20(d): the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts; and

AG ¶ 20(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.

AG ¶¶ 20(a) and 20(b) are not established. Applicant's debts are recent, several are unresolved, and they did not arise under circumstances making them unlikely to recur. His tax debts occurred due to his procrastination, not circumstances beyond his control.

AG ¶ 20(c) is not fully established. Applicant has not sought or received counseling. The state tax lien and the medical debt are unresolved. However, he receives some credit under this mitigating condition because the evidence reflects that his federal tax debts are being resolved.

AG ¶ 20(d) is not fully established. Good faith means acting in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation. ISCR Case No. 99-0201, 1999 WL 1442346 at *4 (App. Bd. Oct. 12, 1999). A security clearance adjudication is aimed at evaluating an individual's judgment, reliability, and trustworthiness. It is not a debt-collection procedure. ISCR Case No. 09-02160 (App.

Bd. Jun. 21, 2010.) Applicant learned from his prior experience with delinquent taxes in 1990 that the IRS will aggressively pursue delinquent tax payers and would impose severe financial penalties and likely garnish his pay if he did not take prompt action.² He resolved the unpaid federal taxes alleged in SOR ¶¶ 1.b and 1.c, but payment of those debts does not end the inquiry. His failure to timely file his federal and state tax returns, which caused a significant amount of his tax debt, raises concerns about his current reliability, trustworthiness, and good judgment, and those concerns are not mitigated.

AG ¶ 20(d) is not established for the state tax lien alleged in SOR ¶ 1.d or the medical debt alleged in SOR ¶ 1.e. Applicant's March 2014 CBR reflects that they are unresolved, and he presented no evidence of efforts to resolve them.

AG ¶ 20(e) is not established. Applicant has denied the medical debt, but he produced no evidence that he has disputed it with the original creditor, the collection agency, or the credit reporting agencies.

Guideline E, Personal Conduct

The SOR cross-alleges Applicant's failure to timely file income tax returns under this guideline. 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 information. . . ." Applicant's admitted failure to comply with federal and state tax laws establishes the following disqualifying conditions under this guideline:

AG ¶ 16(c): credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information;

AG ¶ 16(d): credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that

² Applicant's delinquent taxes for 1985 and the garnishment action in 1990 were not alleged in the SOR. Conduct not alleged in the SOR may be considered to assess an applicant's credibility; to decide whether a particular adjudicative guideline is applicable; to evaluate evidence of extenuation, mitigation, or changed circumstances; to consider whether an applicant has demonstrated successful rehabilitation; or as part of a whole-person analysis. ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006). I have considered Applicant's 1985 tax debt for these limited purposes.

the person may not properly safeguard protected information. This includes but is not limited to consideration of . . . a pattern of dishonesty or rule violations; and

AG ¶ 16(e): personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as . . . engaging in activities which, if known, may affect the person's personal, professional, or community standing.

The following mitigating conditions under this guideline are potentially relevant:

AG ¶ 17(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;

AG ¶ 17(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 caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur; and

AG ¶ 17(e): the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

AG ¶ 17(c) is not established. While some of Applicant's financial delinquencies are arguably "minor" when considered individually, they raise serious concerns collectively. They are numerous and did not occur under circumstances making them unlikely to recur.

AG ¶ 17(d) is partially established, because Applicant has acknowledged his behavior. However, he has presented no evidence of positive steps to prevent recurrence, other than to assert that he has learned his lesson. He did not learn from the 1990 garnishment of his pay, and his assertion that he has now learned his lesson is not persuasive.

AG ¶ 17(e) is partially established. Applicant's resolution of the federal tax debt has reduced his vulnerability to exploitation, manipulation, or duress.

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(a):

- (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 Guidelines F and E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Because Applicant requested a determination on the record without a hearing, I have had no opportunity to evaluate his credibility and sincerity based on his demeanor. See ISCR Case No. 01-12350 at 3-4 (App. Bd. Jul. 23, 2003). He received an honorable discharge for his Marine Corps service. He has worked for his current employer and held a security clearance for almost 30 years. However, he submitted no evidence of the quality of his performance of duty or his reputation for trustworthiness and reliability. His procrastination regarding his federal and state tax obligations raises a concern that he would also procrastinate regarding other unpleasant tasks, such as self-reporting personal conduct raising security issues or reporting and correcting security issues arising in his area of responsibility as a facility security officer

After weighing the disqualifying and mitigating conditions under Guidelines F and E, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns based on financial considerations and personal conduct. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the national interest to continue his eligibility for access to classified information.

Formal Findings

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

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

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|------------------------|-------------------|
| Subparagraph 1.a: | Against Applicant |
| Subparagraphs 1.b-1.c: | For Applicant |
| Subparagraphs 1.d-1.e: | Against Applicant |

Paragraph 2, Guideline E (Personal Conduct):

AGAINST APPLICANT

Subparagraph 2.a:

Against Applicant

Conclusion

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

LeRoy F. Foreman
Administrative Judge