



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



In the matter of:)
)
) ISCR Case No. 15-00563
)
Applicant for Security Clearance)

Appearances

For Government: Tara R. Karoian, Esq., Department Counsel
For Applicant: *Pro se*

11/16/2016

Decision

TUIDER, Robert J., Administrative Judge:

Applicant mitigated security concerns under Guideline E (personal conduct), but failed to mitigate security concerns under Guideline F (financial considerations). Clearance is denied.

Statement of the Case

On January 13, 2014, Applicant submitted a Questionnaire for National Security Positions (SF-86). On July 1, 2015, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued an SOR to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended; and the adjudicative guidelines (AG), which became effective on September 1, 2006.

The SOR alleged security concerns under Guidelines F and E. The SOR detailed reasons why the DOD CAF was unable to find that it is clearly consistent

with the national interest to grant a security clearance for Applicant, and it recommended that his case be submitted to an administrative judge for a determination whether his clearance should be granted or denied.

On July 27, 2015, Applicant responded to the SOR. On January 6, 2016, Department Counsel was ready to proceed. On March 7, 2015, DOHA assigned Applicant's case to me. On May 26, 2016, the Defense Office of Hearings and Appeals (DOHA) issued a hearing notice, setting the hearing for June 22, 2016. Applicant's hearing was held as scheduled.

At the hearing, Department Counsel offered Government Exhibits (GE) 1 through 5, which were received into evidence without objection. Applicant testified, did not call any witnesses, and offered Applicant Exhibit (AE) A, which was received into evidence without objection. I held the record open until July 29, 2016, to afford the Applicant an opportunity to submit additional evidence. Applicant timely submitted AE B through G, which were received into evidence without objection. On July 5, 2016, DOHA received the hearing transcript (Tr.).

Findings of Fact

Applicant denied all of the SOR allegations with explanations. After a thorough review of the record, I make the following findings of fact.

Background Information

Applicant is a 42-year-old information technology specialist employed by a defense contractor since January 2011. He seeks a security clearance to enhance his position within his company. In addition to his job with a defense contractor, Applicant has also been a self-employed information specialist since January 2009. (Tr. 15-17; GE 1)

Applicant graduated from high school in May 1992. He did not pursue higher education beyond high school. (Tr. 17-18; GE 1) Applicant was married from July 1997 to November 1999, and that marriage ended by divorce. He remarried in July 2002. Applicant has three adult stepchildren. His wife does not work outside the home. Applicant did not serve in the U.S. armed forces. (Tr. 18-22)

Financial Considerations

The financial concerns in this case hinge on a sole allegation of unpaid state taxes. Specifically, Applicant's state tax authority filed a \$86,258 tax lien against him in June 2009 for unpaid taxes from a former business he owned.

(SOR ¶ 1.a) In his SOR answer, Applicant denied this allegation claiming that he had previously addressed his tax arrearages when he and his then lawyer appeared before the state tax board in 2000 and he believed, “this matter was cleared after the board review.” (SOR answer) However, according to state court records as of the hearing date, the tax lien is still valid and remains on Applicant’s January 2014 and December 2014 credit reports. (Tr. 29; GE 3, GE 4)

Applicant’s tax problems stem from purported unpaid state taxes while he was a convenience store owner during the timeframe of 1996 to 1999. Some weeks after Applicant and his then lawyer appeared at the 2000 hearing, Applicant received a telephone call from his lawyer advising him the state tax board “found the discrepancies and that they [were] taking care of it (back taxes) and that we didn’t owe anything.” Based on this telephone conversation, Applicant assumed the matter was resolved. However, as a result of these proceedings, he not only learned that he still owed state taxes, but also his original tax debt had increased substantially as a result of penalties and interest. Applicant also discovered that the lawyer who represented him at the tax board hearing had passed away in September 2011 and the files from his case were unavailable. (Tr. 22-26, 28, 32-34, 40-41)

Applicant testified that in 2004, he started a computer-related business and received a state tax identification number stating, “if I had a judgment against me that wasn’t wavered, then how did I get another sales tax ID?” (Tr. 27; AE A) Applicant claimed that he received no documentation that a lien was placed on his home in 2009. (Tr. 27)

Applicant contacted his state tax board “several times” requesting documentation and was advised, “this (case) dates back so far that they don’t have the record and they went through a new system” and “[s]ome that said we don’t even show that you came to the Board hearing, or Review Board hearing.” (Tr. 29-30, 41-43) Applicant was unable to obtain copies of the minutes from his tax board hearing stating, “[s]o I’m kind of in limbo.” Additionally, Applicant has sought his state senator’s assistance, but this avenue has not rendered any relief to date. (Tr. 30) According to the evidence, Applicant’s state tax debt remains unpaid and is mounting. Applicant challenged the tax lien on his credit report and the state tax board verified their claim as recently as 2015. (Tr. 30-31, 34-40, 44; GE 2 – 4)

Post-hearing, Applicant submitted a letter dated July 26, 2016 from the widow-attorney of his former attorney. She advised that she had taken over her late husband’s law practice after his death on September 1, 2011. She stated that she searched her late husband’s files and was unable to find anything relating to Applicant. She surmised this may be due to a fire that occurred “some months

prior to his death, or that the file had been closed many years prior to his death.” (AE B) Applicant also submitted documents from his state tax board dated September 7, 2000 that confirmed the state tax board’s decision that Applicant owed back taxes as well as a copy of the state tax lien filed on June 19, 2009 against him in the amount of \$86,258.73. (AE B-G)

Apart from this outstanding state tax lien, Applicant’s financial situation is very solid. He has no financial hardships and is “blessed beyond belief.” However, if the lien is determined to be valid, he is not in a position to pay it off especially taking into account the original amount owed has increased substantially as a result of interest and penalties. (Tr. 38)

Personal Conduct

When Applicant completed his January 2014 SF-86, he failed to list his June 2009 \$86,248 state tax lien when asked whether he had a lien placed against his property for failing to pay taxes or other debts in the past seven years. (SOR ¶ 2.a) Applicant credibly testified that he first became aware of this tax lien during his February 24, 2014 Office of Personnel Management Personal Subject Interview (OPM PSI). Applicant stated that he was “floored” when the investigator informed him that he had a pending state tax lien. As noted, Applicant stated that he was granted a state business license in 2004 and no lien had been placed on a house he had built before 2009. (Tr. 31-32, 37)

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, “no 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 applicant’s 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 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 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* Executive Order 12968 (Aug. 2, 1995), § 3.1. Thus, nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination about applicant’s allegiance, loyalty, or patriotism. It 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. 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 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

Financial Considerations

AG ¶ 18 articulates the security concern relating to financial problems:

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.

AG ¶ 19 provides two disqualifying conditions that could raise a security concern and may be disqualifying in this case: "(a) inability or unwillingness to satisfy debts;" and "(c) a history of not meeting financial obligations." In ISCR Case No. 08-12184 at 7 (App. Bd. Jan. 7, 2010), the Appeal Board explained:

It is well-settled that adverse information from a credit report can normally meet the substantial evidence standard and the government's obligations under [Directive] ¶ E3.1.14 for pertinent allegations. At that point, the burden shifts to applicant to establish either that [he or] she is not responsible for the debt or that matters in mitigation apply. (internal citation omitted). Applicant's history of delinquent debt is documented in his credit reports and in the evidence presented.

The evidence establishes the disqualifying conditions in AG ¶¶ 19(a) and 19(c) requiring additional inquiry about the possible applicability of mitigating conditions.

Five financial considerations mitigating conditions under AG ¶¶ 20 are potentially applicable:

(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, or a death, divorce or

separation), and the individual acted responsibly under the circumstances;

(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;

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

(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.

Considering the record evidence as a whole, I conclude none of the five financial considerations mitigating conditions are fully applicable to explain, extenuate, or mitigate the security concern. The available information shows that 2009 state tax lien in question has been validated as recently as 2015 and remains a concern.

With that said, a security clearance case is not aimed at collecting debts or enforcing tax laws.¹ Rather, the purpose is to evaluate an applicant's judgment, reliability, and trustworthiness consistent with the security guidelines in the Directive.

Personal Conduct

Applicant credibly stated when he completed his SF-86 he believed his problems with the state tax board were resolved. He had retained a lawyer to represent him at the state tax board and his lawyer advised him the matter was resolved. Applicant believed that his tax problems were behind him. He opened a new business and was given a state tax identification number after his purported tax delinquency and built a new home. Applicant first became aware of the 2009 tax lien filed against him during his February 2014 OPM PSI.

As noted, his efforts to resolve his tax problems to date have been unsuccessful. He was candid and forthright at his hearing about his tax problems. I conclude Applicant's alleged falsification of his SF-86 is unsubstantiated. Although he provided false information on his January 2014 SF-86, AG ¶ 17(f) fully applies. The falsification allegations are not substantiated. I am satisfied he

¹ ISCR Case No. 09-02160 (App. Bd. Jun. 21, 2010).

did not deliberately and intentionally fail to disclose his delinquent debts with intent to deceive.² I find “For Applicant” in the Findings section of this decision with respect to SOR ¶ 2.

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 the circumstances. The 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.

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. AG ¶ 2(c). The discussion in the Analysis section under Guidelines F and E is incorporated in this whole-person section. However, further comments are warranted.

Applicant is a 42-year-old information technology specialist employed by a defense contractor since January 2011. He is a law-abiding citizen and a

²The Appeal Board has cogently explained the process for analyzing falsification cases, stating:

(a) when a falsification allegation is controverted, Department Counsel has the burden of proving falsification; (b) proof of an omission, standing alone, does not establish or prove an applicant’s intent or state of mind when the omission occurred; and (c) a Judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning the applicant’s intent or state of mind at the time the omission occurred. [Moreover], it was legally permissible for the Judge to conclude Department Counsel had established a prima facie case under Guideline E and the burden of persuasion had shifted to the applicant to present evidence to explain the omission.

ISCR Case No. 03-10380 at 5 (App. Bd. Jan. 6, 2006) (citing ISCR Case No. 02-23133 (App. Bd. June 9, 2004)).

productive member of society. There is no evidence to suggest that he is not current on his day-to-day expenses.

However, I am unable to overlook a substantial and long-standing state tax lien that appears to be valid from the available evidence. Applicant's testimony described an unfortunate series of events that included his appearance at the state tax board in 2000 in which he believed that his tax problems were resolved. Applicant's efforts to retrieve records from his state tax board have netted negative results. His efforts to challenge the validity of the state tax lien on his credit report were met with equally negative results. Applicant also contacted the widow-attorney of his former attorney, and she was unable to locate any records that would corroborate his version of events. As noted, I am unable to ignore this ongoing state tax debt that continues to accrue interest and penalties. Regrettably, after weighing the disqualifying and mitigating conditions, and all the facts and circumstances, in the context of the whole-person, I conclude he has not mitigated the financial considerations security concerns.

I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my careful consideration of the whole-person factors and supporting evidence, my application of the pertinent factors under the adjudicative process, and my interpretation of my responsibilities under the adjudicative guidelines. For the reasons stated, I conclude he is not eligible 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

Subparagraphs 1.a: Against Applicant

PARAGRAPH 2, GUIDELINE E: FOR APPLICANT

Subparagraph 2.a: For Applicant

Conclusion

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

ROBERT J. TUIDER
Administrative Judge