



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 15-02923

Appearances

For Government: Charles C. Hale, Esq., Department Counsel
For Applicant: *Pro se*

09/13/2017

Decision

CERVI, Gregg A., Administrative Judge

This case involves security concerns raised under Guideline F (Financial Considerations). Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on July 11, 2014. On February 16, 2016, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) alleging security concerns under Guideline F.¹ Applicant responded to the SOR on March 7, 2016, and requested a hearing before an administrative judge. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on December 13, 2016, and the hearing was convened on February 2, 2017. Government Exhibits (GE) 1 through 5 were admitted in evidence without objection. Applicant testified and after the hearing, submitted Applicant's Exhibits (AE) A through L. DOHA received the hearing transcript (Tr.) on February 13, 2017.

¹ The DOD 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) implemented by the DOD on September 1, 2006.

Findings of Fact

Applicant is a 59-year-old owner and president of a company that provides security equipment and services for corporate and government clients. He married in 1981 and has five children; all adults except for an eight-year-old child. He completed two years of college work toward a degree. He does not currently hold a security clearance.

Applicant has owned his business for 27 years and has 24 employees. The business's net income for 2016 was about \$1 million, and Applicant's gross income was \$700,000. He testified that he set aside \$400,000 to pay tax obligations that year.

The SOR alleges five federal tax liens, one state tax lien, a charged-off mortgage debt, and two consumer debts, totaling approximately \$281,000. Applicant admitted all of the allegations except SOR ¶ 1.a, a state tax lien.

The state tax lien alleged in the SOR ¶ 1.a is supported by credit bureau reports (CBR) from 2014 and 2016. Applicant testified that he worked partial years in the state in question several years ago, and may have incurred an income tax obligation, but was unsure. Despite discussing the debt during the hearing, he did not provide explanatory information or post-hearing documentation showing its status. In 2012, he began paying on an installment agreement to resolve state business unemployment tax delinquencies totaling \$63,460. The current balance is \$16,087.² He is current on his personal state income tax obligations in his current state of residence.

SOR ¶¶ 1.b–1.f allege five federal tax liens. Applicant incurred substantial delinquent federal tax obligations from unpaid personal and payroll taxes. According to his testimony, his business suffered financial difficulties due to an economic downturn in 2008 and 2009. He testified that he took a reduced salary during this period, but he did not submit evidence showing his annual income.

The IRS filed liens against Applicant in 2008, 2010, and 2013. In June 2013, he entered into an agreement with the IRS to begin \$500 monthly payments toward his corporate payroll tax debt for tax years 2009 to 2012. The amount was increased September 2013 to \$1,000 per month, and in April 2014 to \$3,800 per month. As of February 2017, the balance owed on his payroll tax debt is \$97,705.

In October 2015, Applicant entered into an agreement with the IRS to repay delinquent personal income taxes for tax years 2008-2014, in the amount of \$1,643 per month. He has been making payments on these debts since November 2015. As of February 2017, the balance owed on his personal tax debt is \$136,442.

SOR ¶ 1.g alleges a business debt that was paid in January 2017, one month before the DOHA hearing. SOR ¶ 1.h alleges a second mortgage debt of \$45,650 that was opened

² The SOR did not allege the tax debt to his current state of residence. Any matter that was not alleged in the SOR will not be used for disqualification purposes. It may be considered when assessing Applicant's overall financial situation, in the application of mitigating conditions, and during the whole-person analysis.

in 2006 and became delinquent in 2011. (GE 4) Applicant testified that it was charged off in 2008, but his credit report shows it was charged off in 2011. No further information was provided to show details of the debt's status, reason for its delinquency, or efforts to resolve it before it was charged off. SOR ¶ 1.i alleges a small cell phone carrier debt. Applicant testified that he was unable to find the creditor, but his CBR (GE 5) shows the debt is held by a collection agent. Despite discussing this at the hearing, he has not shown evidence of post-hearing efforts to resolve the debt.

I found Applicant to be an intelligent, sophisticated business executive. He reported a gross income for 2016 of about \$700,000, but stated that his spouse was bemused that this amount actually reflected his income. His business does not carry debt, but he did not know its value and he did not provide documentary evidence of its earnings history or balance sheet. He owns a home valued at about \$250,000, with a mortgage balance of about \$231,597. He has about \$80,000 in savings and owns an office building that he leases out. He valued the building at about \$150,000, but did not indicate how much income it generates. He did not provide a personal financial statement nor did he indicate any use of a financial counselor to aid him with his debt obligations during economically stressed periods, however, he did employ an accountant for his business finances.

Policies

The Director of National Intelligence (DNI) issued revised adjudicative guidelines (AG) in a Security Executive Agent Directive, on June 8, 2017. My ultimate decision would be the same under either set of adjudicative guidelines.

"[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. 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 ¶ 1(d).

Analysis

Guideline F, Financial Considerations

The security concern for financial considerations 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. 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 or otherwise questionable acts to generate funds.

The guideline notes several conditions that could raise security concerns under AG ¶ 19. The following are potentially applicable in this case:

- (a) inability to satisfy debts;

- (b) unwillingness to satisfy debts regardless of the ability to do so;
- (c) a history of not meeting financial obligations; and
- (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 has a history of financial problems in his business and personal affairs. He has unpaid taxes and other unresolved delinquent debts. The evidence is sufficient to raise the above disqualifying conditions.

Conditions that could mitigate the financial considerations security concerns are provided under AG ¶ 20. The following 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, 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.

The Appeal Board concisely explained Applicant's responsibility for proving the applicability of mitigating conditions as follows:

Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security

clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in security clearance decisions is that articulated in *Egan, supra*. “Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security.” Directive, Enclosure 2 ¶ 2(b).

ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013).

No mitigating conditions fully apply. Applicant claimed his business suffered during an economic downturn, however he did not provide documentary evidence of his personal income and business balance sheet during the period. He acknowledged his delinquent debts except for a tax lien in another state. He eventually made efforts to address his current state and federal tax debts, but a significant amount is still owed.

The record established that Applicant fell behind on federal and state tax responsibilities, including failing to pay payroll taxes as required. An economic downturn that affects a business is certainly outside his control, but failing to pay payroll taxes and taxes on earned income raises the question about Applicant’s personal and corporate priorities. The negative financial information, especially with regard to delinquent tax obligations, significantly impacts Applicant’s judgment and willingness to comply with rules and regulations.

By 2016, Applicant had a gross income of \$700,000, however, he still carries \$136,000 in personal tax delinquencies and nearly \$100,000 in payroll tax delinquencies. He still owes over \$16,000 in delinquent corporate unemployment taxes, and has not addressed the \$4,505 tax lien from another state. A \$45,650 second mortgage debt that became delinquent in 2011 was charged off. No plausible explanation or evidence of efforts to resolve this debt were provided. Likewise, Applicant paid a significant 2011 publishing company debt just before the hearing, and has not shown a small cell phone carrier debt has been addressed, despite discussing it during the hearing. Based on Applicant’s past behavior with financial matters when faced with economic adversity, I am not convinced his efforts to resolve his delinquent tax issues will continue in the future as economic difficulties arise.

There is insufficient evidence for a determination that Applicant’s financial problems will be resolved within a reasonable period. I am unable to find that he acted responsibly under the circumstances, given his substantial income. His financial issues are recent and ongoing, and there is no evidence that he sought outside assistance with his financial issues or counseling. They continue to cast doubt on his current reliability, trustworthiness, and good judgment. AG ¶¶ 20(a) and (c) are not applicable. AG ¶¶ 20(b), (d), and (g) are partially applicable, but they do not completely mitigate the judgment issues raised by Applicant’s long-standing failure to comply with tax laws and to address other financial delinquencies. I find that financial considerations concerns remain despite the presence of some mitigation.

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):

(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.

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.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my comments under Guideline F in my whole-person analysis. I also considered Applicant's intelligence, business acumen, testimony, efforts to resolve tax accounts as presented, and documentary evidence he provided after the hearing. However, he shirked significant federal and state tax responsibilities for years, did not address a state tax lien or small cell carrier debt, and allowed a second mortgage to default without apparent efforts to resolve it. A publishing company debt was paid just prior to the hearing, despite it becoming delinquent in 2011. These accounts were not fully resolved over the past several years, despite earning a significant income as evidenced by his 2016 gross income.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. I conclude Applicant did not mitigate the financial considerations security concerns.

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:

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| Paragraph 1, Guideline F: | Against Applicant |
| Subparagraphs 1.a-1.i: | 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.

Gregg A. Cervi
Administrative Judge