



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



In the matter of:)
)
) ISCR Case No. 16-02238
)
Applicant for Security Clearance)

Appearances

For Government: Chris Morin, Esq., Department Counsel
For Applicant: *Pro se*

03/32/2018

Decision

TUIDER, Robert, Administrative Judge:

Applicant failed to mitigate security concerns regarding Guideline F (financial considerations). Clearance is denied.

Statement of the Case

On March 25, 2014, Applicant submitted a Questionnaire for National Security Positions (SF-86). On September 10, 2016, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (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) promulgated by the President on December 29, 2005.

The SOR alleged security concerns under Guideline F. 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, continued, denied, or revoked.

On October 3, 2016, Applicant responded to the SOR. On October 26, 2016, Department Counsel was ready to proceed. On May 26, 2017, the Defense Office of Hearings and Appeals Office (DOHA) assigned Applicant's case to me. On June 27, 2017, DOHA issued a hearing notice, setting the hearing for August 16, 2017. Applicant's hearing was held as scheduled. At the hearing, Department Counsel offered Government Exhibits (GE) 1 through 4, and Hearing Exhibits I and II, which were received into evidence without objection. Applicant testified, did not call witnesses, and did not offer any evidence. On August 24, 2017, DOHA received the hearing transcript (Tr.).

While this case was pending a decision, the Director of National Intelligence issued Security Executive Agent Directive 4, establishing *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AGs) which he made applicable to all covered individuals who require initial or continued eligibility for access to classified information or eligibility to hold a sensitive position. The new AGs supersede the September 1, 2006 AGs and are effective "for all covered individuals" on or after June 8, 2017. Accordingly, I have evaluated Applicant's security clearance eligibility under the new AGs, as required.¹

Findings of Fact

In his SOR answer, Applicant admitted all of the allegations, with explanations. Applicant's answers are incorporated as findings of fact. After a thorough review of the evidence, I make the following additional findings of fact.

Background Information

Applicant is a 54-year-old maintenance trades helper employed by a defense contractor since February 2014. Although he does not need a clearance for his current position, a clearance would allow him to work as a bus driver with access to secure areas. (GE 1; Tr. 12-14)

Applicant graduated from high school in 1982. He completed truck driving school in 2003, and completed a specialized driving school in 2012. (GE 1; Tr. 14-16) Applicant was previously married two times. His first marriage was from 1984 to 2000, and his second marriage was from 2000 to 2015. Those marriages ended by divorce. He remarried a third time in 2016 and as of his hearing had separated in June 2017. (Tr. 16-19) Applicant has three adult children and helps them financially on an as needed basis. (Tr. 19-20) His current wife does not work outside the home and is on disability. (Tr. 40)

¹ The new AGs are available at http://ogc.osd.mil/doha/5220-6_R20170608.pdf.

Financial Considerations

Applicant's SOR lists 19 allegations under this concern, which include a Chapter 13 bankruptcy filed in 2010 and dismissed that same year; failure to file Federal income tax returns for tax years 2006, 2008, 2009, and 2010; failure to file state income tax returns for tax years 2008, 2009, and 2010; a 2008 local tax lien; and a combination of delinquent debts totaling \$31,241. (SOR ¶¶ 1.a – 1.s) These allegations are established through Applicant's admissions and the Government exhibits. (SOR answer; GE 1-4)

Applicant traces his financial difficulties to 2006 when he purchased a home on a "rent to own" plan, and struggled to make the \$1,050 monthly payments. In 2008, the owner of the home failed to make the house payments, the bank foreclosed, and Applicant lost his investment. (Tr. 29-30) In 2009, Applicant moved to a different home and "struggl[ed] trying to, just trying to pay everything." (Tr. 30) Applicant stated that his Chapter 13 bankruptcy was dismissed because he was unable to afford the payments to the Trustee. He explained that his hours at work were reduced and his wife at the time had uncovered medical bills. (Tr. 21-22)

Applicant did not file his Federal income tax returns for 2006, 2008, 2009, and 2010 because he owed taxes and was unable to pay them. He knew this after a friend prepared a rough of his taxes. Applicant did file his Federal income tax return for 2007 and was owed a refund, but the IRS "grabbed some" of that refund for taxes owed for 2006. (Tr. 22-24) He claimed that he filed all of his delinquent Federal tax returns in 2012 after the IRS contacted him, but did not provide copies of those returns. Applicant realized that he was required to file his Federal income tax returns, but did not take any affirmative steps to do so. (Tr. 24-27) He testified that his tax arrearage was "somewhere between \$4 and \$5,000" and that he paid this arrearage off through a combination of direct payment, recoupment of refunds, and garnishment of his pension. (Tr. 28-29)

Applicant gave the same explanation for his failure to file his 2008, 2009, and 2010 state tax returns as he did for his failure to file his Federal tax returns, that he owed taxes and could not afford to pay them. He claimed his state tax returns were filed in 2012, but did not provide copies of those returns. (Tr. 30)

Department Counsel reviewed the status of Applicant's remaining SOR debts with him. Those debts include an automobile repossession, two telephone/cell phone bills, a medical bill, a tax lien for his "rent to own" home, an automobile for his daughter for which she was unable to make payments, and several debts Applicant did not recognize. (Tr. 31-37) Applicant stated that he hired a law firm specializing in credit repair from 2014 to 2015, but stopped using them because he could not afford the payments. He hired another credit repair firm in 2016, but "stopped using them." (Tr. 37-38) During his May 14, 2014 Office of Personnel Management Personal Subject Interview (OPM PSI), the investigator discussed Applicant's financial situation

with him in detail. At that time, Applicant provided assurances that he would research his debts and arrange to pay them if owed. (GE 4)

Applicant estimates that he earns approximately \$40,000 a year. (Tr. 20) He further estimated that after he pays all of his monthly expenses, he has a net monthly remainder of approximately \$100. (Tr. 40-41) As of his hearing, he had “nothing” in his checking account and about \$10 in his savings account. He has a 401(k) account that he borrowed \$2,000 against to make a mortgage payment and stated that he would have that loan repaid in December 2017. (Tr. 41-43) Applicant did not offer or was unable to offer a plan to regain financial responsibility. All of his SOR debts remain unpaid or unaddressed. Applicant stated this process provided him with “a wake up call about the importance of having good credit.” (Tr. 45)

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 for financial problems:

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. . . . An individual who is financially overextended is at greater risk of having to engage in illegal or otherwise questionable acts to generate funds. . . .

The Appeal Board explained the scope and rationale for the financial considerations security concern in ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012) (citation omitted) as follows:

This concern is broader than the possibility that an applicant might knowingly compromise classified information in order to raise money in satisfaction of his or her debts. Rather, it requires a Judge to examine the totality of an applicant’s financial history and circumstances. The Judge must consider pertinent evidence regarding the applicant’s self-control, judgment, and other qualities essential to protecting the national

secrets as well as the vulnerabilities inherent in the circumstances. The Directive presumes a nexus between proven conduct under any of the Guidelines and an applicant's security eligibility.

AG ¶ 19 provides three disqualifying conditions that could raise a security concern and may be disqualifying in this case: "(a) inability to satisfy debts"; "(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." The record established the disqualifying conditions in AG ¶¶ 19(a), 19(c), and 19(f), requiring additional inquiry about the possible applicability of mitigating conditions.

AG ¶ 20 lists six potential mitigating conditions:

(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 DOHA 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).

Concerning the failure to file timely Federal and state income tax returns, the DOHA Appeal Board has commented:

Failure to file tax returns suggests that an applicant has a problem with complying with well-established governmental rules and systems. Voluntary compliance with such rules and systems is essential for protecting classified information. ISCR Case No. 01-05340 at 3 (App. Bd. Dec. 20, 2002). As we have noted in the past, a clearance adjudication is not directed at collecting debts. See, e.g., ISCR Case No. 07-08049 at 5 (App. Bd. Jul. 22, 2008). By the same token, neither is it directed toward *inducing an applicant to file tax returns. Rather, it is a proceeding aimed at evaluating an applicant's judgment and reliability. Id.* A person who fails repeatedly to fulfill his or her legal obligations does not demonstrate the high degree of good judgment and reliability required of those granted access to classified information. See, e.g., ISCR Case No. 14-01894 at 5 (App. Bd. Aug. 18, 2015). See *Cafeteria & Restaurant Workers Union Local 473 v. McElroy*, 284 F.2d 173, 183 (D.C. Cir. 1960), *aff'd*, 367 U.S. 886 (1961).

ISCR Case No. 14-04437 at 3 (App. Bd. Apr. 15, 2016) (emphasis in original). See ISCR Case No. 14-05476 at 5 (App. Bd. Mar. 25, 2016) (citing ISCR Case No. 01-05340 at 3 (App. Bd. Dec. 20, 2002)); ISCR Case No. 14-01894 at 4-5 (App. Bd. Aug. 18, 2015). The Appeal Board clarified that even in instances where an "[a]pplicant has purportedly corrected [the applicant's] federal tax problem, and the fact that [applicant] is now motivated to prevent such problems in the future, does not preclude careful consideration of [a]pplicant's security worthiness in light of [applicant's] longstanding prior behavior evidencing irresponsibility" including a failure to timely file federal income tax returns. See ISCR Case No. 15-01031 at 3 and note 3 (App. Bd. June 15, 2016) (characterizing "no harm, no foul" approach to an Applicant's course of conduct and employed an "all's well that ends well" analysis as inadequate to support approval of access to classified information with focus on timing of filing of tax returns after receipt of the SOR).

In ISCR Case No. 15-01031 at 2 (App. Bd. June 15, 2016), the Appeal Board reversed the grant of a security clearance, and noted the following primary relevant disqualifying facts:

Applicant filed his 2011 Federal income tax return in December 2013 and received a \$2,074 tax refund. He filed his 2012 Federal tax return in September 2014 and his 2013 Federal tax return in October 2015. He received Federal tax refunds of \$3,664 for 2012 and \$1,013 for 2013.

Notwithstanding the lack of any tax debt owed in ISCR Case No. 15-01031 (App. Bd. June 15, 2016), the Appeal Board provided the following principal rationale for reversing the grant of a security clearance:

Failure to comply with Federal and/or state tax laws suggests that an applicant has a problem with abiding by well-established Government rules and regulations. Voluntary compliance with rules and regulations is essential for protecting classified information. . . . By failing to file his 2011, 2012, and 2013 Federal income tax returns in a timely manner, Applicant did not demonstrate the high degree of good judgment and reliability required of persons granted access to classified information.

ISCR Case No. 15-01031 at 4 (App. Bd. June 15, 2016) (citations omitted). Applicant provided proof that he “made arrangements with the appropriate tax authority to file or pay the amount owed and is in compliance with those arrangements,” and AG ¶ 20(g) applies. However, because of Applicant’s lengthy history of noncompliance with requirements to timely file tax returns, the mitigation in AG ¶ 20(g) is insufficient to alleviate financial considerations security concerns. ISCR Case No. 16-00396 at 3 (App. Bd. Aug. 15, 2017) states:

It is well established, however, that a security clearance adjudication does not turn simply on a finding that one or more of the mitigating conditions apply to the particular facts of a case. Rather, an adjudication requires the exercise of sound discretion in light of the record evidence as a whole. Thus, the presence of some mitigating evidence does not alone compel the Judge to make a favorable security clearance determination. As the trier of fact, the Judge has to weigh the evidence as a whole and decide whether the favorable evidence outweighs the unfavorable evidence, or vice versa.

In summary, no mitigating conditions fully apply. Applicant has been gainfully employed for the majority of his adult life, and he is presumed to be a mature, responsible citizen. Nonetheless, without other information suggesting his long-standing financial problems are being addressed, doubts remain about his suitability for access to classified information. Applicant did not act responsibly under the circumstances with regard to his taxes by failing to file timely his 2006, 2008, 2009, and 2010 Federal and 2008, 2009, and 2010 state tax returns. He ultimately filed

those returns in 2012. Furthermore, during a 2014 OPM PSI, Appellant provided assurances that he would research his debts and arrange to pay them if owed. Given the dim view the DOHA Appeal Board takes of failing to file Federal and state tax returns, there is little or no latitude to rule in Applicant's favor with regard to the tax issue. With regard to the remaining debts, he failed to establish that financial considerations security concerns are mitigated. Protection of the national interest is the principal focus of these adjudications. Accordingly, those doubts must be resolved against the Applicant.

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(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), "[t]he ultimate determination" of whether to grant a security clearance "must be an overall commonsense judgment based upon careful consideration of the guidelines" and the whole-person concept. My comments under Guideline F are incorporated in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under that guideline but some warrant additional comment.

Applicant is a 54-year-old maintenance trades helper employed by a defense contractor since 2014. He seeks to enhance his position within his company to secure a clearance which would allow him to drive in secure areas. There is nothing in the record that suggests he is not a good employee or law abiding member of his community. He is dedicated to his adult children as demonstrated by his willingness to help them financially on an as needed basis.

However, the evidence against granting his security clearance is more substantial. He failed to exercise a fundamental responsibility as a citizen by failing to file timely his Federal and state income tax returns, as discussed above. His financial situation is in dire straits and he appears unwilling or unable to address it. When a tax issue is involved, an administrative judge is required to consider how long an applicant waits to file his or her tax returns, whether the IRS generates the tax returns, and how long the applicant waits after a tax debt arises to begin and complete making

payments. The primary problem here is that Applicant knew that he needed to file Federal and state tax returns for a number of years and he waited until 2012 to file those tax returns after being contacted by the IRS.

I have carefully applied the law, as set forth in *Egan*, Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person.

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

Subparagraph 1.a – 1.s: Against Applicant

Conclusion

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

Robert Tuidor
Administrative Judge