



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



In the matter of:)
)
) ISCR Case No. 17-03784
)
)
Applicant for Security Clearance)

Appearances

For Government: Aubrey M. De Angelis, Esq., Department Counsel
For Applicant: *Pro se*

06/04/2018

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) certified on January 14, 2016. On November 14, 2017, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guideline F.¹ Applicant answered the SOR and elected to have the case decided on the written record in lieu of a hearing. The Government's written brief with supporting documents, known as the File of Relevant Material (FORM), undated, was submitted by Department Counsel.

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 on June 8, 2017.

A complete copy of the FORM was provided to Applicant, who was afforded an opportunity to file objections and submit material to refute, extenuate, or mitigate the security concerns. Applicant received the FORM on February 6, 2018, and submitted a response. The Government's exhibits included in the FORM (Items 1 to 9) and Applicant's response to the FORM are admitted into evidence. The case was assigned to me on April 12, 2018.

Findings of Fact

Applicant is a 46-year-old electrical technician employed by a defense contractor since 2004. He graduated from high school in 1989 and honorably served in the U.S. Air Force from 1991 to 1995. He married in 1997 and has one child. He currently holds a DOD security clearance.

The SOR alleges nine financial allegations, including a Federal tax lien filed in 2008 for \$37,935; a state tax lien filed in 2013 for \$5,324; delinquent Federal taxes for 2009 (\$4,473), 2010 (\$5,134), 2011 (\$23,978), 2013 (\$5,344), and 2014 (\$8,929); a 2016 wage garnishment for unpaid state taxes for \$9,750; and a 2001 Chapter 7 bankruptcy, filed in July 2001 and dismissed in October 2001. Applicant admitted all of the allegations with explanations, except he denied the Federal tax lien, claiming it is not on his credit report, and denied the state tax wage garnishment noting the debt was to be paid in full by the end of 2017.

In his 2016 SCA, Applicant noted that he is indebted to the IRS for unpaid Federal taxes of about \$42,100, for tax years 2009–2014. He explained that his spouse was receiving workers' compensation, household finances were tight, and he needed to adjust his employer's withholding so he would not owe as much in taxes in the future. At that time, Applicant noted that he arranged an IRS payment plan.

In his Answer to the SOR, Applicant noted that he bought a house a year and a half ago, and is back on track and paying all bills on time. He stated he will pay off the state tax obligation by the end of the year, and that he is on an IRS installment agreement to repay \$600 per month for tax years 2010, 2011, 2013, and 2014. He stated the 2009 IRS debt and the 2010 debt would be paid off by the end of 2017.

Applicant provided evidence in his response to the FORM, that his state tax debts have been paid and that he has a zero balance for tax years 2000-2016. He also showed that from December 2017 to January 2018, he paid the IRS a total of \$10,247 for 2009 and 2010 tax debts.² As of February 2018, he still owed the IRS \$38,299 for unpaid taxes for tax years 2011, 2013, and 2014. He did not provide a copy of an IRS installment agreement or an installment payment history, except as noted above. Applicant provided Federal tax transcripts in response to DOHA interrogatories. They show for tax years 2005 and 2006 that a lien was entered in 2008 for unpaid taxes, and that Applicant filed his tax returns both years, incurring interest and penalty charges for late payments. The

² \$600 was paid in December 2017 (Item 3); the remainder was paid in January 2018 (FORM Response).

transcripts note an installment agreement entered in 2016. For tax years 2005 and 2006, the IRS “wrote off” nearly \$14,000 in debts in August 2017, and canceled the installment agreement. Applicant’s employer noted in a security clearance incident history report that in July 2016, Applicant disclosed that he set up a “wage garnishment” in May 2016 with state tax authorities to permit a deduction from his wages to repay \$9,750 in delinquent state taxes.³

Applicant’s 2016 and 2017 credit reports shows the Federal and State tax liens. Applicant provided a 2018 credit report that does not show any tax liens, and reflects that his payments are current on all consumer accounts. Applicant’s personal financial statement shows a monthly net remainder of \$2,116, but it does not reflect any payments to the state or Federal tax authorities. It also shows savings and investments valued at about \$186,000. In addition to his salary, Applicant receives military disability pay and a 401k survivor benefit.

Law and 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 § 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

³ Item 5.

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

Financial Considerations

The security concern under this guideline 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. . . .

The relevant disqualifying conditions under AG ¶ 19 include:

- (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 . . . pay annual Federal, state, or local income tax as required.

Applicant's admissions and the documentary evidence supporting the SOR allegations are sufficient to establish the above disqualifying conditions.

The following mitigating conditions under AG ¶ 20 are potentially relevant:

(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

(f) the individual has made arrangements with the appropriate tax authority to file or pay the amount owed and is in compliance with those arrangements.

Applicant's claimed financial distress that led to the tax debts and 2001 bankruptcy filing have not been established. He noted his spouse received workers' compensation, presumably because of a workplace injury, and tight financial conditions, with improper withholding from his pay to cover taxes owed resulting in nonpayment of taxes. He has not established with particularity, when or how these conditions arose, and how they prevented him from satisfying his tax obligations. Debts listed in SOR ¶¶ 1.a, 1.b, 1.g, and 1.h have been paid, but well after they were incurred and after the SOR was issued. Payments of state and some Federal tax debts amounted to delayed action and was too little, too late. Applicant has long been aware of his tax debts. The evidence shows an IRS installment agreement was terminated in 2017 and the IRS "wrote off" sizable debts. The complete picture of his efforts over the years to resolve his tax debts is largely absent from the record. Despite his sizable savings and investments, and his ability to purchase a home, Applicant failed to take timely action to address his debts, and did not provide sufficient evidence of a payment history or progress toward tax debt resolution. His poor

financial status dates back to at least 2001 when he filed Chapter 7 bankruptcy, and he did not sufficiently explain the circumstances of the filing or its dismissal the same year.

Applicant's financial history is replete with irresponsible handling of his taxes, and his financial status was in jeopardy as far back as 2001. Despite a long employment history, Applicant's failure to comply with the tax laws for several years and his unconvincing explanations for his failures, raise significant concerns that Applicant may be lacking in the judgment expected of those who enter into a fiduciary duty with the U.S. for the protection of national secrets. The DOHA Appeal Board has noted in the past that a person who fails repeatedly to fulfill his or her legal obligations, such as paying taxes when due, 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. 15- 06707 at 3 (App. Bd. Aug. 15, 2017). Despite recent efforts to repay overdue tax debts, the record does not support full application of any mitigating condition.

Whole-Person Concept

Under AG ¶¶ 2(a), 2(c), and 2(d), the ultimate determination of whether to grant national security eligibility must be an overall commonsense judgment based upon careful consideration of the guidelines and the 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). Although adverse information concerning a single criterion may not be sufficient for an unfavorable eligibility determination, the individual may be found ineligible if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility, or unstable behavior. AG ¶ 2(e).

I considered all of the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my findings of fact and comments under Guideline F in my whole-person analysis. Applicant's financial condition remains an ongoing concern, and his past practices with regard to tax obligations have been unacceptable. He has not shown sufficient efforts to resolve his tax liabilities before they became a security clearance issue, and his recent payments were not timely. Applicant's financial irresponsibility with regard to tax obligations, despite full employment since 2004 and previous military service, has not reflected the judgment and reliability expected of a person entrusted with 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, 1.b, 1.g, and 1.h:	For Applicant
Subparagraph 1.c – 1.f, and 1.i:	Against Applicant

Conclusion

I conclude that it is not clearly consistent with the national security interests of the United States to grant Applicant eligibility for access to classified information. Clearance is denied.

Gregg A. Cervi
Administrative Judge