



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



In the matter of:)
)
) ISCR Case No. 17-04347
)
Applicant for Security Clearance)

Appearances

For Government: Andre M. Gregorian, Esq., Department Counsel
For Applicant: *Pro se*

12/03/2018

Decision

Gregg A. Cervi, 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 May 21, 2017. On March 26, 2018, 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,

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 revised adjudicative guidelines (AG) effective on June 8, 2017.

known as the File of Relevant Material (FORM), was submitted by Department Counsel on May 7, 2018.

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, but did not submit a response. Government exhibits (GE) 1 to 5 are admitted into evidence.

Findings of Fact

Applicant is a 36-year-old engineering aid assistant employed by a defense contractor since April 2017. He was previously employed from 2007 to 2013, owned a restaurant from 2013 to 2016, was unemployed from December 2016 to February 2017 when his restaurant closed, then employed again in April 2017 to present. Applicant graduated from high school in 2000 and completed an associate's degree in 1994. He served on active duty in the U.S. Navy from 2002 to 2004. Applicant has been married since 2012. He was previously married from 2002 to 2010. He has one child. He has never held a security clearance.

The SOR alleges Applicant failed to timely file Federal income tax returns for tax years 2009, 2012-2014, and 2016. He is indebted to the IRS for approximately \$10,418 for tax year 2008; \$10,165 for tax year 2010; and \$2,328 for tax year 2011. He also failed to file state income tax returns for tax years 2008, 2012-2014, and 2016, which remain unfiled; and has five delinquent accounts placed in collection totaling approximately \$4,774. Applicant admitted the SOR allegations with explanations. All of the SOR debts are supported by substantial evidence in the record.

In his Answer to the SOR, Applicant stated that he filed the delinquent Federal income tax returns, albeit late. He provided copies of his Federal tax returns. He noted that he is waiting for the IRS to provide him with an accurate accounting of the taxes, penalties and interest due, before settling the past-due taxes. With regard to his state tax returns, he is having difficulty with filing older returns and intends to address them when the current tax return is due. Applicant provided a letter from a tax accountant claiming to be finalizing the process of solving Applicant's tax issues. SOR ¶ 1.a is resolved.

Applicant stated he paid debts listed in SOR ¶¶ 1.f and 1.i. He submitted documentation of the paid accounts. Applicant started payments on a debt listed as SOR ¶ 1.h on April 2018, and has a preauthorization for automatic monthly payments to retire the debt in 10 weeks. He noted that debts listed in SOR ¶¶ 1.g and 1.j are no longer listed on his credit report. Applicant presented sufficient evidence to show debts listed in SOR ¶¶ 1.f, 1.h, and 1.i have been or are being resolved.

Applicant stated that he did not file income tax returns when due or pay taxes owed because of forgetfulness, confusion as to the filing requirements and amount owed, and a dispute with the IRS over recognition of investment losses. Applicant did not provide documentation of debt counseling or the status of his current finances.

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

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

(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.

Applicant's tax delinquencies and other debts have been a recurring problem that have not been sufficiently addressed to show his taxes and other delinquencies are resolved and are unlikely to recur. Applicant's failure to file tax returns when due and failure to pay taxes indicates a history of poor financial decisions, and demonstrates an inability to follow laws, rules and regulations. He has not sought financial counseling, but is working with an accountant to file overdue tax returns.

Applicant's financial history does not reflect the judgment and reliability expected of a person seeking security eligibility. I have insufficient evidence of his ability or willingness to file and pay the delinquent taxes for which he is responsible. Evidence of debts aging off a credit report does not indicate a reasonable resolution of those debts. Applicant is credited with filing his late Federal tax returns and resolving some debts. Overall, I am unable to find that his financial responsibilities have been adequately addressed or that his current financial status is under control and that similar problems are unlikely to recur. No mitigating condition fully applies except as noted below.

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).² Although adverse information concerning a single criterion

² (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;

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 Federal and state tax delinquencies remain an ongoing concern. He has not shown evidence of whole-person factors sufficient to overcome the financial concerns.

Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the national security interests of the United States to grant him eligibility 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, 1.f, 1.h and 1.i:	For Applicant
Subparagraphs 1.b-1.e, 1.g, 1.j:	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

(8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.