



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 15-02211

Appearances

For Government: Tovah Minster, Esq., Department Counsel

For Applicant: *Pro se*

02/23/2016

Decision

HARVEY, Mark, Administrative Judge:

Applicant's statement of reasons (SOR) alleges he failed to file and pay his state and federal tax debts for tax year 2011. In March 2013, he filed his state tax return. He received a refund after filing his 2011 state tax return. The Internal Revenue Service (IRS) wrote in a tax transcript that in May 2013, he filed his federal income tax return, and he enclosed a payment of \$262. Financial considerations concerns are mitigated. Access to classified information is granted.

History of the Case

On January 15, 2013, Applicant completed and signed an Electronic Questionnaires for Investigations Processing (e-QIP) (SF 86). (Item 2) On September 30, 2015, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued an SOR to Applicant pursuant to Executive Order (Exec. Or.) 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 detailed reasons why the DOD CAF made a preliminary decision to deny or revoke Applicant's eligibility for access to classified information. Specifically, the SOR set forth security concerns arising under the financial considerations guideline.

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On October 30, 2015, Applicant responded to the SOR, and he waived his right to a hearing. (Item 2) On December 9, 2015, Department Counsel completed the File of Relevant Material (FORM). On December 16, 2015, Applicant received the FORM. Applicant provided an undated response to the FORM. Applicant did not object to the Government's evidence. On January 20, 2016, Department Counsel stated she had no objection to the Applicant's FORM response. On February 17, 2016, the case was assigned to me. The Government's case consisted of five exhibits. (Items 1-5)

Findings of Fact¹

In Applicant's SOR response, he said he filed his 2011 state and federal taxes in 2013. He also provided extenuating and mitigating information. Applicant's admissions are accepted as findings of fact.

Applicant is a 32-year-old security officer, who has been employed by the same company since 2010.² He is seeking a security clearance. In 2002, he received a high school diploma, and he briefly attended college. In 2003, he joined the Army. After basic Army training, he went into the Army Reserve. From January 2006 to May 2007, he was on active duty, and he was deployed outside the United States. From May 2007 to May 2009, he was on active duty in the Army. From June 2009 to present, he served in the Army Reserve. He is a sergeant. He has never been married, and he does not have any children. There is no evidence of any security violations, alcohol abuse, or use of illegal drugs.

Financial Considerations

When Applicant completed his January 15, 2013 SF 86, he disclosed that he had not filed his 2011 federal and state income tax returns. (Item 2) He said he intended to file the returns, and pay any taxes due in February 2013. (Item 2) He did not disclose any other financial delinquencies, and his credit reports show all accounts as either paid or "pays as agreed." (Items 3, 4) There is no evidence of financial counseling.

In his SOR response, Applicant explained that he filed and paid his 2011 state and federal income taxes late because of erroneous advice he received from a friend, who suggested he file his 2011 and 2012 state and federal income taxes at the same time. He did not provide any supporting documentation. The FORM emphasized the absence of supporting documentation to corroborate payment of his taxes. (FORM at 3)

In his FORM response, Applicant provided a 2011 state income tax return indicating he overpaid his state income taxes by \$752. He requested application of his 2011 tax refund to any state tax due for 2012.

¹Some details have been excluded in order to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

²The source for the information in this paragraph is Applicant's January 15, 2013 Electronic Questionnaires for Investigations Processing (e-QIP) (SF 86). (Item 2)

In his FORM response, Applicant also provided an IRS account transcript for tax year 2011. It showed that the IRS received his 2011 federal income tax return on April 8, 2013, and he enclosed a payment of \$262. The IRS recalculated his 2011 taxes, and on April 7, 2014, the IRS paid Applicant \$167 as a refund for his overpayment.

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. Thus, nothing in this decision should be construed to suggest that it is based, 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 his [or 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 one disqualifying condition that could raise a security concern and may be disqualifying in this case. AG ¶ 19(g) reads, "failure to file annual Federal, state, or local income tax returns as required" Applicant's failure to timely file and pay his 2011 federal and state income taxes is documented in his SF 86, SOR response, and FORM response. He did not file and pay his taxes "as required," and he owed a small debt to the federal government that was not timely paid. The Government established the disqualifying condition in AG ¶ 19(g), requiring additional inquiry about the possible applicability of mitigating conditions.

Five 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;³ 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.

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).

AG ¶¶ 20(a), 20(c), and 20(d) apply. Applicant filed and paid his 2011 federal and state taxes in 2013, which was late. He realized he made a mistake, and he promised that it will not recur. He filed his 2011 tax returns before receiving the SOR. Applicant did not reveal any conditions largely beyond his control that caused him not to timely file his tax returns, and he did not describe any financial counseling. Applicant's current credit reports show no past due or currently negative accounts. His failure to timely file

³The Appeal Board has previously explained what constitutes a "good faith" effort to repay overdue creditors or otherwise resolve debts:

In order to qualify for application of [the "good faith" mitigating condition], an applicant must present evidence showing either a good-faith effort to repay overdue creditors or some other good-faith action aimed at resolving the applicant's debts. The Directive does not define the term "good-faith." However, the Board has indicated that the concept of good-faith "requires a showing that a person acts in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation." Accordingly, an applicant must do more than merely show that he or she relied on a legally available option (such as bankruptcy) in order to claim the benefit of [the "good faith" mitigating condition].

(internal citation and footnote omitted) ISCR Case No. 02-30304 at 3 (App. Bd. Apr. 20, 2004) (quoting ISCR Case No. 99-9020 at 5-6 (App. Bd. June 4, 2001)).

his 2011 federal and state tax returns “occurred under such circumstances that it is unlikely to recur and does not cast doubt on the [Applicant’s] current reliability, trustworthiness, or good judgment.” His finances are under control. His actions show sufficient effort, good judgment, trustworthiness, and reliability. Financial considerations security concerns are mitigated.

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.

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 have incorporated my comments under Guideline F in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under Guideline F, but some warrant additional comment.

The rationale for approving Applicant’s clearance is more substantial than the reasons for denying his clearance. Applicant is a 32-year-old security officer, who has been employed by the same company since 2010. From 2003 to present, he served in the Army, mostly in the Army Reserve. He was deployed overseas for 15 months. There is no evidence of any security violations, alcohol abuse, use of illegal drugs, or criminal conduct.

Applicant acted responsibly under the circumstances. All of his debts are in current status. He filed and paid his 2011 federal and state taxes in 2013, which was late, raising some security and judgment concerns. He realized he made a mistake; he took corrective action; and he assured that it will not recur. He understands that he needs to pay his debts, including his taxes, and the conduct required to retain his security clearance. His efforts at debt resolution as shown in his credit reports have established a “meaningful track record” of debt re-payment. See ISCR Case No. 07-06482 at 2-3 (App. Bd. May 21, 2008). I am confident he will maintain his financial responsibility.

I have carefully applied the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. I conclude financial considerations security concerns are mitigated, and eligibility for access to classified information is granted.

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: FOR APPLICANT

Subparagraphs 1.a and 1.b: For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

MARK HARVEY
Administrative Judge

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