



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



In the matter of:)	
)	
[Redacted])	ISCR Case No. 18-00635
)	
Applicant for Security Clearance)	

Appearances

For Government: Nicole A. Smith, Esq., Department Counsel
For Applicant: Alan V. Edmunds, Esq.

01/09/2019

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guideline F (Financial Considerations) by Applicant’s repeated failures to timely file federal and state income tax returns. Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on March 1, 2017. On March 27, 2018, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guideline F, based on his failure to timely file federal and state income tax returns. 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), and the adjudicative guidelines (AG) promulgated in Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (December 10, 2016).

Applicant answered the SOR on June 15, 2018, and requested a hearing before an administrative judge. The case was assigned to an administrative judge on September

27, 2018. On September 28, 2018, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for November 7, 2018. The case was reassigned to me on October 31, 2018, and I convened the hearing as scheduled. Government Exhibits (GX) 1 through 4 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibits (AX) A through T,¹ which were admitted without objection. DOHA received the transcript (Tr.) on November 16, 2018.

Findings of Fact²

In Applicant's answer to the SOR, he admitted all the allegations. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 60-year-old engineer employed by a defense contractor. He was employed by defense contractors from June 1981 to February 2002. He worked as a civilian employee of the U.S. Navy from February 2002 to March 2008. He has worked as a program manager for a defense contractor from April 2008 until the present. He has held a security clearance since 1981.

Applicant graduated from college with a bachelor's degree in May 1981. He has completed graduate course work in metallurgical engineering but has not received a graduate degree. He married in October 1981. He and his wife have four adult children.

Applicant did not timely file his federal and state income tax returns from 2008 through 2016. He relied on his concept of a "three-year rule," under which he could file a return and receive a refund without penalty within three years of the due date for a tax return. His understanding of the "three-year-rule" was based on his own research and not on advice from a tax professional. His plan was to delay filing each year's return until he was certain that his refund from a previous year was sufficient to cover any taxes due. (Tr. 18-19, 28.)

When Applicant filed an SCA in April 2012, seeking to continue his clearance, he disclosed that he had not timely filed his federal and state income tax returns for 2008, 2009, and 2010, and that he owed a total of about \$18,361 for 2008; \$12,828 for 2009; and \$6,061 for 2010. He explained that, due to "unorganized business accounting," he did not have the required forms to support filing his returns on time. He also explained that he paid estimated taxes but had miscalculated the amount of taxes due. (GX 2 at 32-33.) During a personal subject interview (PSI) in April 2012, he told an investigator that he was concerned about the impact of the tax issues on his security clearance, that he had retained a tax consultant and a bookkeeper to assist him with his tax and returns, and that he expected to file all past-due returns by the end of May 2012. (GX 4 at 6.) He

¹ Applicant submitted AX A through Q with his answer to the SOR. He resubmitted them at the hearing, along with AX R, S, and T. (Tr. 8.)

² Applicant's personal information is extracted from his security clearance application (GX 1), his personal biography (AX B), and his personal resume (AX C), unless otherwise indicated by a parenthetical citation to the record.

testified at the hearing that all past-due returns were filed by the end of 2012, but he admitted that he did not hire someone to help him with his taxes. (Tr. 30.)

When Applicant responded to financial interrogatories from the DOD CAF in June 2014, he provided federal and state tax transcripts for 2008 through 2011. The transcripts reflected that he filed his state return for 2008 in April 2012 and federal return for 2008 in June 2012. (GX 4 at 16, 24.) He filed his state return for 2009 in July 2012 and his federal return for 2009 in August 2012. (GX 4 at 18, 29-30.) He filed his state return for 2010 in July 2012 and his federal return for 2010 in August 2012. (GX 4 at 19, 33-37.) He filed his state return for 2011 in February 2013 and his federal return for 2011 in June 2014. (GX 4 at 22, 45.) At the end of the interrogatories, he commented:

I would like to emphasize that while my returns were late, it is because I assumed I had a refund coming and there are no penalties for late personal returns. . . However, it is clear to me now that the late filings are poorly regarded from an investigation standpoint. I have hired a new tax advisor to help me keep up with the process.

(GX 4 at 8.) Notwithstanding his failures to timely file his federal and state tax returns, his security clearance was never suspended or revoked. (Tr. 36.)

When Applicant submitted his most recent SCA in March 2017, he disclosed that he had failed to timely file his federal and state income tax returns for 2010 through 2015. (GX 1 at 35-38.) In response to interrogatories from the DOD CAF in February 2018, he submitted tax transcripts reflecting that he filed his federal return for 2012 in June 2016, his federal return for 2013 in August 2016, and his federal return for 2014 in August 2016. (GX 3 at 5-8.) He submitted an account history from the state tax authority reflecting that his state returns for 2011 through 2014 had been filed. (GX 3 at 15.) He submitted copies of his federal and state returns for 2015 and 2016, along with evidence that the federal returns for 2015 and 2016 were mailed in June 2018 and the state returns for 2015 and 2016 were personally delivered to the state revenue authority in January 2018. (GX 3 at 9-14, 16-19.) At the end of these interrogatories, he commented,

Regarding reasons for my late filing, in the past since I knew I had a refund coming I would wait to file my return to make sure the following year was adequately covered with withholding, estimated taxes, or prior tax year carry over. I only offer this as my rationale as to why there were late. I did not fully appreciate the impact of delinquent returns on my clearance eligibility. It is clear to me now that the late filings are poorly regarded from a clearance standpoint. [To] help ensure timely returns going forward, I am now working with a tax preparation company in my town to help with the process. I have already met with the [name redacted] tax preparation service and discussed preparation plans for my 2017 return, which I am currently preparing and will file on time.

(GX 3 at 4.) He received an extension of time to file his federal income tax return for 2017 and filed it in July 2018. (AX T.) He filed his state income tax return, which was due on May 1, 2018, on June 9, 2018. (AX I.) The record does not reflect whether he requested and received an extension of time to file his state return for 2017.

In October 2018, Applicant executed a “Statement of Intent,” declaring his intent to never again fail to untimely file his federal and state income tax returns, and agreeing that any future failures to time file or pay taxes would be grounds to revoke his national security eligibility. (AX S.) In November 2018, Applicant hired a business-advising company to help him with tax planning and compliance. (AX R.)

Applicant’s annual salary is about \$94,000. (Tr. 16.) He testified that between 2008 and 2016, he usually received a tax refund. (Tr. 22.) He is financially secure. At the time of the hearing, he had \$2,400 in his checking account. (AX N.) In June 2018, he completed an online credit-counseling course, a budget analysis, and a financial action plan. (AX O; AX P.) As part of the budget analysis, he indicated that he has monthly income of about \$10,312; expenses of about \$9,855; and a net remainder of about \$457. (AX P.) This information was generally consistent with a personal financial statement that he submitted with his answer to the SOR. (AX M.) A credit report from June 2018 reflects no negative information. (AX Q.)

Four former and current coworkers submitted letters on Applicant’s behalf. They describe him as an outstanding mentor; a skilled, personable, dedicated, and respected engineer; and a dedicated spouse and parent. They consider him a person of high integrity and honesty, who is truthful and forthright, even under difficult or stressful conditions. (AX A.)

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.

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, 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 all available and 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 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. 15-01253 at 3 (App. Bd. Apr.20, 2016).

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.

Analysis

Guideline F, 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. . . . An individual who is financially

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

This concern is broader than the possibility that a person might knowingly compromise classified information to raise money. It encompasses concerns about a person's self-control, judgment, and other qualities essential to protecting classified information. A person who is financially irresponsible may also be irresponsible, unconcerned, or negligent in handling and safeguarding classified information. See ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012).

Applicant's admissions and the documentary evidence submitted by the parties establish the following disqualifying conditions under this guideline:

AG ¶ 19(c): a history of not meeting financial obligations; and

AG ¶ 19(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 following mitigating conditions are potentially applicable:

AG ¶ 20(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;

AG ¶ 20(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;

AG ¶ 20(d): the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts; and

AG ¶ 20(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.

AG ¶ 20(a) is not established. Applicant's tax delinquencies were numerous, recent, and did not occur under circumstances making recurrence unlikely. Applicant's repeated failures to timely file his federal and state income tax returns, after admitting in the 2012 PSI that he knew his delinquent returns raised security concerns, cast doubt on his current reliability, trustworthiness, and good judgment.

AG ¶ 20(c) is established. Applicant has received financial counseling and tax advice, and all past-due tax returns have been filed.

AG ¶ 20(d) is not applicable because failure to pay taxes was not alleged in the SOR. However, I have noted that the delinquent taxes for tax years 2008 through 2010 have been paid.

AG ¶ 20(g) is established. Applicant has filed all past-due federal and state tax returns and paid all taxes due. However, his belated resolution of his tax delinquencies does not end the inquiry. A security clearance adjudication is not a tax-enforcement procedure. It is an evaluation of an individual's judgment, reliability, and trustworthiness. The fact that Applicant has filed his past-due returns "does not preclude careful consideration of his security worthiness based on longstanding prior behavior evidencing irresponsibility." ISCR Case No. 12-05053 (App. Bd. Oct. 30, 2014). Furthermore, the establishment of some mitigating evidence does not compel a favorable security-clearance decision. ISCR Case No. 11-14784 (App. Bd. Jan.17, 2014).

Even if Applicant honestly believed that the "three-year rule" exempted him from timely filing his federal and state tax returns for 2008 through 2011, he acknowledged his obligation to file and awareness of the security implications of failing to file in the April 2012 PSI and his responses to DOD CAF interrogatories in June 2014. Yet he continued his pattern of untimely filing through tax year 2016. 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. ISCR Case No. 15-00216 at 4 (App. Bd. Oct. 24, 2016), *citing Cafeteria & Restaurant Workers Union Local 473 v. McElroy*, 284 F.2d 173, 183 (D.C. Cir. 1960), *aff'd*, 367 U.S. 886 (1961). His statement of intent to timely file his future tax returns and his timely filing of his 2017 federal return are insufficient to overcome his long history of untimely filings.

Whole-Person Concept

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. In applying the whole-person concept, an 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 and applying the adjudicative factors in AG ¶ 2(d).³

I have incorporated my comments under Guideline F in my whole-person analysis and applied the adjudicative factors in AG ¶ 2(d). After weighing the disqualifying and mitigating conditions under Guideline F, and evaluating all the evidence in the context of

³ The factors are: (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.

the whole person, I conclude Applicant has not mitigated the security concerns raised by repeated failures to timely file his federal and state income tax returns.

Formal Findings

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline F (Financial Considerations): AGAINST APPLICANT

Subparagraph 1.a:

Against Applicant

Conclusion

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

LeRoy F. Foreman
Administrative Judge