



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
 [REDACTED]) ISCR Case No. 18-02828
)
 Applicant for Security Clearance)

Appearances

For Government: Bryan J. Olmos, Esq., Department Counsel
For Applicant: Patrick K. Korody, Esq.

10/04/2019

Decision

HESS, Stephanie C., Administrative Judge:

Applicant mitigated the financial considerations concerns raised by his failure to timely file his 2011, 2012, and 2014 through 2016 Federal tax returns as required. Eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted a security clearance application (e-QIP) on October 17, 2017. On February 8, 2019, the Department of Defense (DOD) sent him a Statement of Reasons (SOR), alleging security concerns under Guideline F (Financial Considerations). The DOD acted under Executive Order (Ex. 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 by DOD on June 8, 2017.

Applicant submitted his Answer to the SOR on February 21, 2019, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on March 22, 2019, and the case was assigned to me on April 8, 2019. On June 7, 2019, the

Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for June 27, 2019. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 3 were admitted into evidence without objection. Applicant testified, called two witnesses, and Applicant's Exhibits (AX) A through J were admitted without objection. I left the record open until July 11, 2019, to enable Applicant to submit additional documentary evidence. He timely submitted AX K and AX L, which I have admitted without objection. DOHA received the transcript (Tr.) on July 18, 2019.

Findings of Fact

Applicant is a 55-year-old project manager currently employed by a defense contractor since April 2016. He received his associate's degree in 1984 and his bachelor's degree in 2011. He and his wife married in 2004 and have two children, one of whom is an adult. This is Applicant's first application for a security clearance. (GX 1.)

Under Guideline F, the SOR alleges that Applicant failed to timely file his Federal tax returns for 2011, 2012, and 2014 through 2016. He admits this allegation and his admission is incorporated in my findings of fact.

Between 1984 and 2011, Applicant timely filed his tax returns as required. In 2011, Applicant experienced several unusual events. He and a partner started a new company. The nature of the business initially required Applicant and his partner to fund the company and the day-to-day operations out-of-pocket. Applicant's partner kept the books for the company. Additionally, Applicant's boat was stolen and he was required to create a loss statement to file his taxes. Further, Applicant exercised stock options from a previous employer. (Tr. 34-36.) Finally, Applicant moved from one state to another and rented out his house. (Tr. 51.) All of these issues complicated Applicant's ability to secure the necessary information and documentation for completing his tax return and he failed to timely file his 2011 tax return in 2012. This failure to file in 2012, combined with increased travel demands and Applicant's extensive volunteering commitments with his church and his community, snowballed and Applicant failed to timely file his 2012 tax return. He timely filed his 2013 tax return in 2014. (Tr. 53-54; Tr. 64-69.)

Applicant began reconciling his past-due tax returns in 2015, and filed his 2011 tax return in January 2015. (GX 3; AX D.) However, this effort was short-lived and Applicant failed to timely file his 2014, 2015, and 2016 tax returns. Applicant does not make any excuses for his failure to timely file his tax returns for several years, but he primarily attributes his conduct to prioritizing his work, family, and volunteer work over organizing his paperwork. Additionally, Applicant's tax return preparation was complicated by his expenses and income from his consulting business. (Tr. 71-73; Tr. 80.)

After meeting with the investigator during his background investigation, Applicant realized that not only was it his obligation to timely file his tax returns, but that his failure to do so could have a negative impact on his ability to be granted a security clearance. (Tr. 80.) He filed his 2016 tax return in April 2018 and his 2014 tax return in May 2018. He was entitled to refunds for these two years. Applicant filed his 2015 tax return in

October 2018 and completed paying his past-due taxes and penalties on March 5, 2019. (GX 3; AX E.) Applicant's most complex tax return was for 2012, which he filed in January 2019. He was initially entitled to a refund for 2012, but filed too late to receive it. (GX 3; AX L.) Applicant now fully understands that timely filing of his tax returns must be a priority. He timely filed his 2017 and 2018 tax returns. (AX E.) Applicant will timely file all future tax returns. He has significantly reduced his volunteering commitments, in part, to create more time for focusing on his personal affairs. (Tr. 72.)

Applicant is a committed and valued employee who has received outstanding performance evaluations. (AX A.) His coworker, in recommending Applicant for a security clearance, testified that Applicant is a mentor to new employees and is trustworthy, dedicated, and honest. (Tr. 24-26.) Applicant's neighbor of five years and fellow neighborhood-board member testified about Applicant's dedication to the time-consuming volunteer work of serving as a board member, and stated that he has a reputation of being honest and reliable. (Tr. 29-31.) His supervisor of two years highly recommends Applicant for a security clearance and characterizes him as trustworthy and reliable. (AX K.) His pastor, neighbor, and friend, who are aware of Applicant's prior tax issues, collectively view Applicant as honest, trustworthy, and credible and recommend him for a security clearance. (AX B.) Applicant was remorseful, candid, and credible while testifying.

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, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

Eligibility for a security clearance is predicated upon the applicant's meeting the criteria contained in the AG. 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.” See 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 ¶ 2(b).

Analysis

Guideline F, Financial Considerations

The concern under this guideline is set out in AG ¶ 18:

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....

This concern is broader than the possibility that an individual might knowingly compromise classified information in order to raise money. It encompasses concerns about an individual’s self-control, judgment, and other qualities essential to protecting classified information. An individual 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).

The record evidence establishes disqualifying conditions AG ¶ 19(c): a history of not meeting financial obligations, and AG ¶ 19(f): failure to file . . . 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(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.

Applicant's failure to timely file his tax returns for 2011 through 2016, with the exception of 2013, was due to unique circumstances that are unlikely to recur, and does not cast doubt on his current reliability, trustworthiness, or good judgment. Specifically, Applicant's preparation of his 2011 tax return was complicated by a number of unusual events. Once his 2011 filing was late, he then failed to timely file for several years. Applicant acknowledges that his failure to prioritize preparing and filing his past-due tax returns over his volunteering commitments does not justify his past conduct. However, Applicant began his effort to reconcile his past-due returns in 2015 and had filed all his past-due returns prior to receiving the SOR in February 2019. Applicant fully paid his past-due taxes for 2015, the only year that he was not entitled to a refund, in March 2019.

"Good faith" means acting in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation. ISCR Case No. 99-0201, 1999 WL 1442346 at *4 (App. Bd. Oct. 12, 1999). A trustworthiness adjudication is an evaluation of an individual's judgment, reliability, and trustworthiness. It is not a debt-collection procedure. ISCR Case No. 09-02160 (App. Bd. Jun. 21, 2010.)

Applicant does not make any excuses for his failure to timely file his tax returns and now fully understands the consequences of such conduct. He has established a track record of timely filing since 2017 and will continue to do so in the future. AG ¶¶ 20(a), 20(d) and 20(g) apply.

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. An administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d).

I have incorporated my comments under Guideline F in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under that guideline, but have also considered the following:

Applicant prioritized his family and his volunteering commitments in his church and community over managing his personal affairs. He is remorseful and now fully recognizes that timely filing his tax returns must be a priority and has made changes in his lifestyle to a lot more time for his personal affairs. He is a valued employee and is well respected in his community.

After weighing the disqualifying and mitigating conditions under Guideline F, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns raised by his past financial issues. Accordingly, I conclude he has carried his burden of showing that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

Formal Findings

As required by section E3.1.25 of Enclosure 3 of the Directive, I make the following formal findings on the allegations in the SOR:

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

Subparagraph 1.a:

For Applicant

Conclusion

I conclude that it is clearly consistent with the national interest to grant Applicant's eligibility for a security clearance. Eligibility for access to classified information is granted.

Stephanie C. Hess
Administrative Judge