



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
 [REDACTED]) ISCR Case No. 19-02453
)
 Applicant for Security Clearance)

Appearances

For Government: Gatha Manns, Esq., Department Counsel
For Applicant: *Pro se*
03/31/2021

Decision

HESS, Stephanie C., Administrative Judge:

Applicant did not mitigate the Guideline F (Financial Considerations) security concerns raised by his failure to timely file and pay his Federal income taxes for multiple years and by a Federal tax lien entered against him in 2010. Access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (e-QIP) on May 7, 2016. On December 13, 2019, the Department of Defense (DOD) sent him a Statement of Reasons (SOR), alleging security concerns under Guideline F. The DOD acted under Executive Order (E.O.) 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 answered the SOR on May 16, 2020, and requested a decision on the record without a hearing. Department Counsel submitted the Government’s written case on October 19, 2020. On October 21 2020, a complete copy of the file of relevant material (FORM), which included Government Exhibits (GX) 1 through 6, was sent to Applicant, who was given an opportunity to file objections and submit material to refute, extenuate,

or mitigate the Government's evidence. The Defense Office of Hearings and Appeals (DOHA) transmittal letter is dated October 21, 2020, and Applicant's receipt is dated December 3, 2020. The DOHA transmittal letter informed Applicant that he had 30 days after receiving it to submit information. He did not file a response. The DOHA transmittal letter and receipt are appended to the record as Administrative Exhibit (Admin. Ex.) 1. The case was assigned to me on March 18, 2021.

Findings of Fact

Under Guideline F, the SOR alleges that Applicant is indebted for a \$5,735 Federal tax lien for tax year 2007 entered in 2010; failed to timely file his Federal tax returns for tax years 2007 and 2010 through 2012 and those returns remain unfiled; and failed to timely file his Federal tax returns for 2009 and 2015 through 2017. Applicant denies the tax lien stating that the IRS withheld subsequent refunds to satisfy the lien (SOR ¶ 1.a). He admits that he has not filed his outstanding tax returns (SOR ¶ 1.b) and that he filed his other returns late (SOR ¶ 1.c). Applicant disclosed the derogatory tax information on his e-QIP and discussed it during his personal subject interview (PSI) and in his responses to DOHA's interrogatories. (GX 3; GX 4.) His admissions are incorporated in my findings of fact.

Applicant, 49, is an audio-visual technician working for a defense contractor since June 2013. He graduated from high school in 1989. He enlisted in the U.S. Army in February 1992, but received a general discharge under honorable conditions in May 1992 for pre-existing medical condition. He has never been married and has an adult daughter. This is his first application for a security clearance. (GX 3.)

There is no personal income tax in the state where Applicant lives. In his PSI, Applicant stated that he did not file or pay his Federal income tax for 2007, which resulted in the \$5,735 lien that was entered in 2010 (SOR ¶ 1.a), because he did not have the money to do so. In his Answer, he stated his 2013 through 2016 and a portion of his 2017 tax refunds were used to satisfy the lien. He provided documentation from the IRS showing that he received an \$869 refund for 2017.

Applicant began experiencing overall financial difficulties after losing his job in 2009. He owned and operated his own business between April 2009 and June 2013 and did not have the money to pay his taxes. He fell behind on his mortgage-loan payments and his home was ultimately sold in a foreclosure sale. The lender cancelled the loan-balance debt and issued Applicant an IRS Form 1099-C Cancellation of Debt in the amount of \$26,156 in 2012. Applicant was required to claim this amount as income on his 2012 tax return. (GX 3.)

On his May 2016 e-QIP, Applicant stated that he had contacted the IRS to set up a payment plan for the then still outstanding lien balance. In order to enter a repayment plan, the IRS required Applicant to file his 2010 through 2012 returns and gave him until June 3, 2016, to file. He did not meet the deadline. During his August 2016 PSI, Applicant stated that he was trying to obtain the necessary documents to file his delinquent returns.

In his May 2020 Answer, he stated that he had gathered the necessary documents and was preparing the returns to mail to the IRS as soon as possible. The record does not contain any evidence that Applicant has filed his 2010 through 2012 tax returns.

Applicant admits that he did not timely file his 2009 and 2015 through 2017 tax returns (SOR ¶ 1.c), stating that he mistakenly believed he was only required to file by the April 15th deadline if he owed money. He also stated that he now timely files his tax returns.

Applicant's current financial status is stable. He is current on his ongoing financial obligations including his mortgage loan, automobile loan, and a credit-card account. His recent CBR shows numerous "paid and closed" accounts. (GX 5; GX 6.)

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 or sensitive information. . . . An individual who is financially overextended is at risk of having to engage in illegal or otherwise questionable 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 establishes the following disqualifying conditions:

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

AG ¶ 19(f): failure to file . . . annual Federal . . . income tax returns or failure to pay annual Federal . . . 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(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; 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 began experiencing overall financial difficulties following the loss of his job in 2009 and during the subsequent almost four-year period of self-employment. He lost his home to foreclosure and did not have the money to pay his taxes for 2011 through 2013. While these circumstances were largely beyond his control, Applicant did not act responsibly. He did not fulfill the requirements necessary to obtain a repayment plan with the IRS. Nor has he filed the 2011 through 2013 income tax returns despite his claims that they are completed. Applicant's financial issues are recent, ongoing, and unresolved. He did not make a good-faith effort to resolve the 2010 tax lien, which was satisfied by the IRS's retaining Applicant's refunds for several years. Despite his awareness of the Government's concerns about his unfiled tax returns since at least his 2016 PSI, he has not taken the necessary steps to bring himself into good standing with the IRS.

Applicant's failure to timely file and pay his Federal taxes while aware that the Government was concerned about this conduct since at least 2016 raises concerns about his willingness to abide by rules and regulations, and about his reliability, trustworthiness, and good judgment. None of the mitigating conditions 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(a).

I have considered the factors in AG ¶ 2(a) and incorporated my comments under Guideline F in my whole-person analysis. 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 not mitigated the security concerns raised by his failure to comply with Federal tax filing and payment requirements. Accordingly, I conclude he has not 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): **AGAINST APPLICANT**

Subparagraphs 1.a through 1.c: **Against Applicant**

Conclusion

I conclude that it is not clearly consistent with the national interest to grant Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Stephanie C. Hess
Administrative Judge