



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



In the matter of:)
)
) ISCR Case No. 22-02096
)
Applicant for Security Clearance)

Appearances

For Government: Alison O’Connell, Esq., Department Counsel
For Applicant: *Pro se*

02/08/2024

Decision

HOGAN, Erin C., Administrative Judge:

Applicant did not file his 2017 and 2018 federal and state income tax returns because he believed he did not have to file his returns. Once he realized his mistake during his security clearance investigation, he immediately hired an accountant and filed his state and federal income tax returns. He received refunds for both years. The security concerns raised under Guideline F, Financial Considerations, are mitigated. Eligibility for access to classified information is granted.

Statement of the Case

On May 16, 2019, Applicant completed and signed his Electronic Questionnaires for Investigations Processing (e-QIP). (Government Exhibit (GE) 1) On February 15, 2023, the Department of Defense Counterintelligence and Security Agency Consolidated Adjudication Services (DCSA CAS) issued a statement of reasons (SOR) to Applicant under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960); DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive) (January 2, 1992), as amended; and Security Executive Agent Directive 4, establishing in Appendix A the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AGs), effective June 8, 2017.

The SOR detailed reasons why DCSA CAS did not find under the Directive that it is clearly consistent with the interests of national security to grant or continue a security clearance for Applicant and recommended referral to an administrative judge to

determine whether a clearance should be granted, continued, denied, or revoked. Specifically, the SOR set forth security concerns arising under Guideline F, Financial Considerations. On March 1, 2023, Applicant responded to the SOR and requested a hearing before an administrative judge. On March 21, 2023, Department Counsel was ready to proceed. The case was assigned to me on August 15, 2023. On November 7, 2023, DOHA issued a notice of hearing, setting the hearing for December 6, 2023. The hearing was held as scheduled via video-teleconference.

During the hearing, Department Counsel offered four exhibits, GE 1 - 4, which were admitted without objection. Applicant offered one exhibit which was admitted as Applicant Exhibit (AE) A, without objection. The record was initially held open until December 20, 2023, to allow Applicant to submit additional exhibits. He was granted several continuances until February 2, 2024. He did not submit documents. On December 18, 2023, DOHA received a transcript (Tr.) of the hearing. The record closed on that date.

Some details were excluded to protect Applicant's right to privacy. Specific information is available in the cited exhibits and transcript.

Findings of Fact

In Applicant's SOR response, he admitted both allegations in the SOR. His admissions are accepted as findings of fact. Additional findings follow.

Applicant is a 32-year-old employee of a defense contractor seeking to obtain a security clearance. He has worked for his current employer since February 2019. This is his first time applying for a security clearance. He is a high school graduate and has some college credits. He is single and has no children. (Tr.13-14; GE 1)

Financial Considerations

The SOR alleges that Applicant failed to file his Federal Income tax returns for tax years 2017 and 2018, (SOR ¶ 1.a) and failed to file his state income tax returns for tax years 2017 and 2018. (SOR ¶ 1.b)

Applicant admits to not filing his federal and state income tax returns for 2017 and 2018. He believed that he was not required to file them because his income was below the amount required to file income tax returns. He also mistakenly believed he did not have to file if he had refunds. He admits he should have researched the issue before deciding not to file his federal and state income tax returns for 2017 and 2018. (Answer to SOR; Tr. 20-21; Gov 2; Gov 3)

During his security clearance background investigation, Applicant answered several interrogatories about his tax filing history. (GE 2; GE 3) At the time of completing the interrogatories, he was not sure whether he filed his federal and state income tax returns for 2017 and 2018. He cooperated during the investigation and asked if there were further steps he needed to take to resolve the issue. He provided proof that his

federal income tax returns were filed for tax years 2015, 2016, 2019, 2020, and 2021. (GE 2 at 5; GE 3 at 6-10)

In February 2023, Applicant received the SOR. He became aware that he was required to file his federal and state income tax returns for 2017 and 2018. He immediately hired an accountant to help him file his income tax returns. He completed and filed his 2017 and 2018 federal income tax returns on March 20, 2023. He received refunds for each tax year. He provided proof that both his 2017 and 2018 federal and state income tax returns were sent via Fed Ex to the Internal Revenue Service (IRS) and the state department of taxation. (AE A) He testified that the Internal Revenue Service (IRS) accepted his returns but advised him that he would not receive the refunds because he waited more than three years to file his tax returns. After 2018, he has filed his federal and state income tax returns on a timely basis. He does not owe any tax debts to the IRS or the state department of taxation. (Tr. 22-27)

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, Secretary of Defense, and Director of National Intelligence 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 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

Guideline F, Financial Considerations

AG ¶ 18 expresses the security concern for financial considerations:

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. Financial distress can also be caused or exacerbated by, and thus can be a possible indicator of, other issues of personnel security concern such as excessive gambling, mental health conditions, substance misuse, or alcohol abuse or dependence. An individual who is financially overextended is at greater risk of having to engage in illegal or otherwise questionable acts to generate funds. Affluence that cannot be explained by known sources of income is also a security concern insofar as it may result from criminal activity, including espionage.

The guideline notes several conditions that could raise security concerns under AG ¶ 19. The following applies in this case:

(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.

AG ¶ 19(f) applies because Applicant failed to file his federal and state income tax returns for tax years 2017 and 2018.

The guideline also includes conditions that could mitigate security concerns arising from financial difficulties. I have considered all of the mitigating conditions under AG ¶ 20 and the following apply:

(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; 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.

AG ¶ 20(a) applies because although Applicant failed to file his federal and state income tax returns for 2017 and 2018, he held the mistaken belief that he did not have to file his income tax returns for those years. Once he learned that this was incorrect, he hired an accountant and filed the tax returns within a month. Applicant also timely filed his federal and state income tax returns from 2019 to present. The conduct occurred under circumstances that make it unlikely to recur. It does not cast doubt on his current reliability, trustworthiness and good judgment.

AG ¶ 20(g) applies. Upon learning that he needed to file his 2017 and 2018 state and federal income tax returns, Applicant took steps to file them in a timely manner. He received refunds for each tax year. His failure to file was based on a mistaken belief that he was not required to file his income tax returns for those tax years. He will not make that mistake in the future as evidenced by his timely filing of income tax returns for subsequent tax years.

Applicant met his burden of proof to mitigate the concerns raised under financial considerations.

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(d):

(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), "[t]he ultimate determination" of whether to grant a security clearance "must be an overall commonsense judgment based upon careful consideration of the guidelines" and the whole-person concept. My comments under Guideline F are incorporated in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under those guidelines but some warrant additional comment.

I considered Applicant's favorable employment with his current employer since February 2019. I considered that Applicant was in his 20s during 2017 and 2018, when he mistakenly believed that he was not required to file his federal and state income tax returns. He is now older and more mature. Upon learning of his mistake, he hired an accountant to prepare his 2017 and 2018 federal and state income tax returns. The returns were filed within a month. After 2018, he has timely filed his federal and state income tax returns. Applicant's failure to file his federal and state income tax returns for tax years 2017 and 2018 was an anomaly due to his mistaken belief he was not required to file returns.

The security concerns raised under Financial Considerations are mitigated.

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 – 1.b: For Applicant

Conclusion

In light of all of the circumstances in this case, it is clearly consistent with the interests of national security to grant or continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is granted.

Erin C. Hogan
Administrative Judge