



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 14-01121

Appearances

For Government: Philip J. Katauskas, Esq., Department Counsel
For Applicant: *Pro se*

02/06/2015

Decision

HARVEY, Mark, Administrative Judge:

Applicant failed to file his federal and state tax returns for tax years 2010 to 2012. He failed to show sufficient progress getting his six tax returns filed. Financial considerations concerns are not mitigated. Eligibility for access to classified information is denied.

Statement of the Case

On July 11, 2013, Applicant signed an Electronic Questionnaires for Investigations Processing (e-QIP) (SF 86). (Item 6) On May 6, 2014, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a statement of reasons (SOR) to Applicant, pursuant to Executive Order 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) as revised by the Under Secretary of Defense for Intelligence on August 30, 2006, which became effective on September 1, 2006.

The SOR alleged security concerns under Guideline F (financial considerations). (Item 1) The SOR detailed reasons why DOD CAF could not make the affirmative finding under the Directive that it is clearly consistent with the national interest to grant

or continue a security clearance for Applicant and recommended referral to an administrative judge to determine whether Applicant's clearance should be granted, continued, denied, or revoked. (Item 1)

On May 6, 2014, Applicant responded to the SOR allegations, and on June 30, 2014, he sent an email waiving his right to a hearing. (Items 4, 5) A complete copy of the file of relevant material (FORM), dated October 3, 2014, was provided to him on October 21, 2014.¹ Applicant did not respond to the FORM. The case was assigned to me on February 2, 2015.

Findings of Fact²

In Applicant's SOR response, he admitted that he failed to file his federal and state tax returns for tax years 2010 to 2012. (Item 4; SOR ¶¶ 1.a and 1.b) Applicant also provided extenuating and mitigating information. Applicant's admissions are accepted as findings of fact.

Applicant is 56 years old, and he has been working in construction since 2004. (Item 6) He has not attended school in the past 10 years. (Item 6) He has never served in the military. (Item 6) He has held a top secret clearance for at least 10 years, and there are no allegations of security violations. (SOR response) He married his spouse in 1984. (Item 6) His children were born in 1981 and 1985. (Item 6) Applicant does not have any reportable criminal offenses or alcohol or drug abuse. (Item 6)

Financial Considerations

Applicant disclosed on his July 11, 2013 SF 86 that he had not filed his federal and state income tax returns from 2009 to 2012. (Item 6 at 31-33). He explained that he "moved, misplaced paperwork;" he was working on his taxes; and the "government will owe me money." *Id.*

In response to questions from an Office of Personnel Management (OPM) investigator on August 9, 2013, about his failure to file his 2009 to 2012 federal and state tax returns, Applicant provided the same explanation as on his SF 86. (Item 7)

In response to the SOR, Applicant said had filed his 2009 federal and state tax returns; however, he did not file his tax returns for tax years 2010 to 2012. He explained as follows:

My taxes got messed up when I had to move into my investment property, and try to rent my home, during the move, my paperwork got mixed up.

¹The Defense Office of Hearings and Appeals (DOHA) transmittal letter is dated October 8, 2014, and Applicant's receipt is dated October 21, 2014. The DOHA transmittal letter informed Applicant that he had 30 days after his receipt to submit information.

²Some details have not been included in order to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

My main focus was trying to survive the mess I was in. [P]aperwork got to be the last concern, when I did get back to my taxes, they were messed up even more, with grand kids running around the house, and trying to pay off my debt, the taxes again went to the bottom of the list. I don't worry about it too much, because I knew that I would be getting a refund, and I would not owe any money. (Item 4)

Applicant said his finances were "tight," and he indicated he had been "over \$100,000 upside down" on both of his houses because of the downturn in real estate prices. Nevertheless, he worked hard to insure his creditors were paid. (Item 4)

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. See also Executive Order 12968 (Aug. 2, 1995), § 3.1. Thus, nothing in this Decision should be construed to suggest that I have based this decision, 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) provides: “failure to file annual Federal, state, or local income tax returns as required” Applicant admitted that he failed to file his federal and state income tax returns for tax years 2010 to 2012. The Government established the disqualifying condition in AG ¶ 19(g), requiring additional inquiry about the possible applicability of mitigating conditions.

Four 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; and

(d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

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). In regard to federal and state income taxes, the Appeal Board has commented:

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 persons granted access to classified information. Indeed, the Board has previously noted that a person who has a history of not fulfilling their legal obligation to file income tax returns may be said not to have demonstrated the high degree of judgment and reliability required for access to classified information. See, e.g., ISCR Case No. 98-0608 at 2 (App. Bd. Jun. 27, 2000).

ISCR Case No. 12-05053 at (App. Bd. Oct. 30, 2014).

Applicant's conduct in failing to file his state and federal tax returns for tax years 2010 to 2012 does not warrant full application of any mitigating conditions. He did not provide sufficient information to establish his inability to file these tax returns. The downturn in real estate damaged his family finances and is a circumstance largely beyond his control; however, he did not act responsibly under the circumstances in regard to failing to file his state and federal tax returns for tax years 2010 to 2012

because he did not explain how the real estate downturn caused him not to file these six tax returns. He said he would not owe any additional taxes when he files his tax returns.

Applicant did not provide any documents showing how he was collecting or replacing the documents he lost or correspondence to or from the Internal Revenue Service and state tax authority to establish maintenance of contact with the tax authorities; or other evidence of progress or resolution of his tax issues for 2010 to 2012. In his July 11, 2013 SF 86, he admitted he did not file his 2009 to 2012 tax returns and said he was working on his taxes. In his SOR response, he said he filed his 2009 tax returns. His failure to prove that he has made significant steps to file his state and federal tax returns for tax years 2010 to 2012 indicates lack of judgment and responsibility. There is insufficient evidence that he was unable to make greater progress filing these six tax returns; and his problem is being resolved, is under control, and will not recur in the future. Under all the circumstances, he failed to establish mitigation of financial consideration concerns.

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 that guideline, but some warrant additional comment.

There is some evidence supporting approval of Applicant's clearance. Applicant is 56 years old, and he has been working in construction since 2004. He has held a top secret clearance for at least 10 years, and there are no allegations of security violations. Applicant does not have any reportable criminal offenses or alcohol or drug abuse.

The evidence against approval of Applicant's clearance is more substantial at this time. Applicant has acknowledged that he failed to file his state and federal tax returns for tax years 2010 to 2012. He has not provided sufficient evidence of what he has done to file the six tax returns. His failure to provide more information about his

efforts to file his tax returns shows lack of responsibility and judgment and raises unmitigated questions about Applicant's reliability, trustworthiness, and ability to protect classified information. See AG ¶ 18.

It is well settled that once a concern arises regarding an applicant's security clearance eligibility, there is a strong presumption against the grant or renewal of a security clearance. See *Dorfmont*, 913 F. 2d at 1401. Unmitigated financial considerations concerns lead me to conclude that grant of a security clearance to Applicant is not warranted at this time. This decision should not be construed as a determination that Applicant cannot or will not attain the state of reform necessary to justify the award of a security clearance in the future. At some future time, he may well be able to demonstrate persuasive evidence of his worthiness to hold a security clearance. Based on the facts before me and the adjudicative guidelines that I am required to apply, I conclude that it is not clearly consistent with the national interest to grant or reinstate Applicant security clearance eligibility at this time.

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. Financial considerations concerns are not 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:	AGAINST APPLICANT
Subparagraphs 1.a and 1.b:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Mark Harvey
Administrative Judge