



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



In the matter of:)
)
) ISCR Case No. 14-01177
)
Applicant for Security Clearance)

Appearances

For Government: Christopher Morin, Esq., Department Counsel
For Applicant: Leanne M. Innet, Esq.

09/04/2014

Decision

DUFFY, James F., Administrative Judge:

Applicant mitigated the security concerns arising under Guideline F, financial considerations. Eligibility for access to classified information is granted.

Statement of the Case

On May 5, 2014, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline F. DOD CAF took that action under Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive); and the adjudicative guidelines (AG) implemented on September 1, 2006.

The SOR detailed reasons why DOD CAF could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to continue Applicant's security clearance. On May 29, 2014, Applicant

answered the SOR and requested a hearing. On July 18, 2014, the case was assigned to me. On July 24, 2014, the Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing scheduling the hearing for August 13, 2014. The hearing was held as scheduled.

At the hearing, Department Counsel offered Government Exhibits (GE) 1 and 2, while Applicant testified, called his wife as a witness, and offered Applicant Exhibits (AE) 1 through 11. All proffered exhibits were admitted into evidence without objection. The prehearing letter sent to Applicant was marked as Hearing Exhibit (HE) 1 and Department Counsel's list of exhibits was marked as HE 2. The transcript (Tr.) of the hearing was received on August 19, 2014.

Procedural Matter

Applicant's Counsel requested that I take administrative notice of one federal and two state income tax statutory provisions. Department Counsel had no objection to that request, and it was granted. Copies of the statutory provisions were marked as HE 3-5.¹

Findings of Fact

Applicant is a 47-year-old employee of a defense contractor. He has been working for his current employer since July 1998. He graduated from high school in 1986. He served in the Air Force on active duty from 1987 to 1996 and in the Air Force Reserve from 1996 to 2008. He attained the grade of master sergeant (E-7) and received an honorable discharge. He has been married twice. He married his current wife in 2002. He has two children, ages 18 and 22. He has held a security clearance without incident since about 1987.²

The SOR alleged that Applicant failed to file his federal and state income tax returns for tax years 2008 through 2012 as required (SOR ¶¶ 1.a and 1.b). In his Answer to the SOR, Applicant admitted both allegations with explanations. His admissions are incorporated as findings as fact.³

In his Electronic Questionnaire for Investigations Processing (e-QIP) dated October 28, 2013, Applicant disclosed that he failed to file his income tax returns for tax years 2008 through 2012. In his Answer to the SOR, Applicant stated that his wife was injured in an automobile accident in 2001 and has had ten back surgeries. She operated a business as a sole proprietor and was responsible for maintaining the financial records for her business. He stated that, although she stayed abreast of the day-to-day

¹ Tr. 8-9, 58-59; HE 3-5.

² Tr. 21-27, 42, 57; GE 1; AE 1-3.

³ Applicant's Answer to the SOR.

accounting tasks for the business, she fell behind on the year-end accounting tasks due to her medical issues.⁴

In his Answer to the SOR, Applicant also provided documentation showing that he and his wife filed their 2008 through 2012 federal and state income tax returns. As reflected in the following tables, they did not owe any back taxes for those years.⁵

Federal Income Tax Returns

Tax Year	Date Filed	Refund Due
2008	5/23/14	\$2,512
2009	5/23/14	\$548
2010	4/15/14	\$7,749
2011	5/23/14	\$3,528
2012	5/23/14	\$516

State Income Tax Returns

Tax Year	Date Filed	Refund Due
2008	5/23/14	\$845
2009	5/23/14	\$537
2010	4/15/14	\$2,352
2011	5/23/14	\$1,477
2012	5/23/14	\$407

At the hearing, Applicant and his wife testified that she prepared their income tax returns. She is a lawyer with a family law practice. Her client records, which contained important tax information, are confidential, and Applicant does not have access to those records. They also testified that she had many surgeries for a back injury resulting from the 2001 automobile accident. In 2008, she had one of those surgeries and was diagnosed with a debilitating back disorder. She suffers from chronic pain that at times is crippling. She attributed the reason for her not filing the income tax returns in a timely manner to her back disorder. During the period in question, she continued to work at least part time and indicated that she placed her obligations to her clients above her obligations to file the income tax returns in a timely manner. She blamed herself for the delay in filing the income tax returns.⁶

⁴ GE 1; Applicant's Answer to the SOR.

⁵ Tr. 36-37, 63-73; AE 6a-e, 7, 8a-e; Applicant's Answer to the SOR.

⁶ Tr. 34-38, 40-44, 49-63, 77-94. Applicant's wife served on active duty in the Air Force from 1988 to 1992, in the Air National Guard from 1992 to 1996, and in the Air Force Reserve from 1996 to 2008. She attained the grade of master sergeant and was medically retired in 2008 due to her back injury. See Tr. 74-77; AE 11. Applicant testified that he lost his 2008 IRS Form W-2 that was issued by the military, had difficulty in obtaining a replacement, and indicated that was the reason for the delay in filing his 2008 tax returns. See Tr. 41-44, 48-49, 63-64.

Applicant noted that he and his wife timely filed their 2002 to 2007 income tax returns and received income tax refunds for each of those years. He claimed only one personal exemption on his IRS Form W-4 and claimed no exemptions for his state income taxes. Because he always received income tax refunds, he was not concerned that his failure to file his income tax returns for 2008 to 2012 would result in a tax deficiency for those years. Applicant's and his wife's failure to file those income tax returns in a timely manner resulted in no financial benefit to either of them and actually resulted in a financial loss because they ultimately filed beyond the deadlines for collecting some of the refunds.⁷

Applicant and his wife filed their federal and state income tax returns for 2013. They requested a filing extension for last year and filed those income tax returns on August 11, 2014, before the extensions expired. They received income tax refunds from the Federal Government and the state for 2013.⁸

Applicant testified in a forthcoming manner and was a credible witness. He testified that he will not fail to meet his income tax filing requirements in the future. He and his wife intend to hire an accountant to prepare their tax returns. If they are unable to file jointly for some reason, he intends to file as "married, filing separately" even though that filing status may increase his tax liability.⁹

For his military service, Applicant received four Air Force Achievement Medals and three Air Force Commendation Medals. He has also received nine special recognition awards from his current employer. His employer's award citations describe him as a dedicated professional.¹⁰

Policies

The President of the United States 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. *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988). The President has authorized the Secretary of Defense to grant 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. The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that "no

⁷ Tr. 27-28, 30-31, 33-36, 38, 40, 46, 64, 69, 87; AE 5.

⁸ Tr. 37-38, 55-56, 71-74; AE 9, 10.

⁹ Tr. 38-39, 57, 81-82.

¹⁰ Tr. 23-30; AE 1, 2, 3, 4a-i.

one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These AGs 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 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 unfavourable, to reach his decision.

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 of 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), Section 3. Thus, a clearance decision is merely an indication that the applicant has or 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 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

Guideline F, Financial Considerations

The security concern for financial considerations is set out in AG ¶ 18 as follows:

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 sets forth several conditions that raise potential security concerns. Applicant's admissions and the evidence presented at the hearing established one of those disqualifying conditions:

(g) failure to file annual Federal, state, or local income tax returns as required

Three 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; and

(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.

Before 2013, Applicant's, wife who is an attorney, prepared their income tax returns. She suffers from a chronic back disorder that hindered her ability to file their income tax returns. While her back disorder may be a reasonable excuse for some delays in filing of their 2008 to 2012 income tax returns, it did not justify the lengthy delays incurred in this case. AG ¶ 20(b) does not apply.

In 2014, Applicant and his wife filed their 2008 to 2012 income tax returns. They received no financial benefit from delaying the filing of those returns. Applicant credibly

testified that he will file his income tax returns as required in the future. Applicant and his wife hired an accountant to file their 2013 income tax returns. Applicant also indicated, if a situation arose in the future in which he and his wife could not timely file joint income tax returns, he would then file the tax returns as “married, filing separately.” The alleged financial problems are resolved, are unlikely to recur, and do not cast doubt on Applicant’s current reliability, trustworthiness, and good judgment. AG ¶¶ 20(a) and 20(c) apply.

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 relevant 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.

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. Some of the factors in AG ¶ 2(a) were addressed under the Guideline F analysis, but some warrant additional comment.

Applicant honorably served in the military for 21 years. He has been a valued employee in his current civilian job for over 16 years. His financial situation is stable. Overall, the record evidence leaves me with no questions or doubts about Applicant’s eligibility and suitability for a security clearance. For all these reasons, I conclude that Applicant mitigated the financial considerations security concerns.

Formal Findings

Formal findings on the allegations set forth in the SOR are:

- | | |
|---------------------------|---------------|
| Paragraph 1, Guideline F: | FOR APPLICANT |
| Subparagraphs 1.a – 1.b: | For Applicant |

Decision

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

James F. Duffy
Administrative Judge