



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 14-05168

Appearances

For Government: Gina Marine, Esq., Department Counsel
For Applicant: Jacob T. Ranish, Esq.

09/15/2015

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 November 12, 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; DOD 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 December 30, 2014, Applicant

answered the SOR and requested a hearing. On March 30, 2015, the case was assigned to me. On April 27, 2015, the Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing scheduling the hearing for May 13, 2015. The hearing was held as scheduled.

At the hearing, Department Counsel offered Government Exhibits (GE) 1 through 5, while Applicant testified, called one witness, and offered Applicant Exhibits (AE) A through N. Applicant's objection to GE 5, excerpts from IRS Publication 501, was overruled. Department Counsel's prehearing letter to Applicant was marked as Hearing Exhibit (HE) 1; her email to Applicant on May 8, 2015, was marked as HE 2; and her list of exhibits as HE 3. The record of the proceeding was left open to May 27, 2015, to provide Applicant the opportunity to present additional matters. He submitted documents that were marked as AE O through AM. All exhibits were admitted into evidence. The transcript (Tr.) of the hearing was received on May 21, 2015.

Findings of Fact

Applicant is a 33-year-old employee of a defense contractor. He has been working for his current employer since February 2013. He graduated from high school in 2000 and earned an associate's degree in 2005. He married in 2005 and has two children, ages 7 and 9. He has held a security clearance since about 2005.¹

The SOR alleged that Applicant failed to file his federal income tax returns for 2009, 2010, 2011, and 2012 (SOR ¶ 1.a) and that he had three delinquent debts totaling \$9,842 (SOR ¶ 1.b–1.d). In his Answer to the SOR, Applicant admitted two allegations (SOR ¶ 1.a and 1.d) and denied the other allegations. His admissions are incorporated as findings as fact.²

In his Electronic Questionnaire for Investigations Processing (e-QIP) dated December 17, 2013, Applicant disclosed that he failed to file his federal income tax returns for 2009, 2010, 2011, and 2012. He indicated that he had purchased a new home, was renting his previous residence, and was unsure of how to complete the required paperwork. He stated that he was working with a tax professional to ensure everything was filed. In the e-QIP, he also disclosed that he had six delinquent credit card debts. During an Office of Personnel Management (OPM) interview in March 2014, he stated that he still had not filed his delinquent tax returns and was working with his accountant to resolve that issue.³

Applicant's wife testified that she is a teacher. In 2009, she was not teaching so she could raise their two young children, but she was working part-time as a dance

¹ Tr. 30-32, 61-62, 67-71, 103; GE 1.

² Applicant's Answer to the SOR.

³ GE 1, 2.

instructor, earning about \$600 or \$700 a month. She indicated that they did not have any delinquent debts or owe any back taxes before 2009. In that year, they purchased a home for \$183,000 by obtaining two mortgage loans totaling \$202,000. They spent about \$25,000 remodeling their new home. They began renting their previous home. In early 2009, the interest rates on their credit card debts were about seven percent. By the end of 2009, the interest rates had skyrocketed to about 30 percent due to missed payments and the recession. Due to the increase in the interest rates, they were unable to make credit card payments. At that time, his wife also suffered a knee injury, was unable to work as a dance instructor for a period, and was eventually let go from that part-time job. They struggled financially and prioritized their debts. Their first priority was payment of the mortgages and then came necessary living expenses. Their attempts to work with the creditors to reduce the credit card payments were unsuccessful. They defaulted on the higher-interest credit cards. In January 2010, Applicant's wife started teaching again and, since then, she has been earning about \$36,000 annually. Focusing on living within their means and paying down their debts, their financial situation has steadily improved and stabilized.⁴

Applicant and his wife did not file their 2009, 2010, 2011, and 2012 federal income tax returns as required. Applicant's wife attributed their failure to file the 2009 federal income tax return to a combination of reasons, including the purchase of the new home, the rental of their previous home, her loss of her part-time job, and medical expenses. She indicated these events created a complicated tax-filing situation. From their research of an IRS website, they believed that, if they were owed a tax refund, they had three years to file their tax return.⁵ They also thought they could not file later-year tax returns until the earlier ones had been filed.⁶

Applicant hired an accounting firm to assist him in filing the delinquent tax returns in late 2011 or early 2012. At the time of the hearing, his federal income tax returns for 2009–2012 were filed. He thought the tax returns for 2009-2011 were mailed to the IRS in late 2014 or early 2015, but he later learned the IRS had not received them. He resubmitted those returns, and the IRS received them in March 2015. At the hearing, he

⁴ Tr. 30-39, 41, 49-53, 55-60, 63-65, 71-72, 81-82, 101-102; AE N

⁵ AE H. The "three year" period on the IRS website is not a reference to a tax return filing deadline. It is a deadline for obtaining a refund. Taxpayers forfeit refunds if they do not file their tax returns within three years of the filing deadline. See Tr. 40; GE 5; AE K.

⁶ Tr. 39-43, 65-67, 88-90; AE H. In AE R, a representative of Applicant's accounting firm stated:

[Applicant and his wife] had several years of unfiled taxes. They have rental property with depreciation and numerous deductions in years they receive rents. A tax preparer is required to carry-forward certain items to the following year when applicable and must have all available information to effect this. The IRS prohibits Preparers from knowingly filing an incomplete return in most cases. It is generally accepted practice to file taxes in order with the oldest being filed first when carryingforwards may apply. All returns were filed in order and as information was received.

stated that he had not filed his 2013 or 2014 federal income tax returns, but had submitted the necessary paperwork to the accountant for those years. In his post-hearing submission he provided documentation showing his 2013 and 2014 federal income tax returns had been filed. He submitted filing extension requests for 2013 and 2014.⁷

Pertinent information from Applicant's joint federal income tax returns is as follows:

Federal Income Tax Returns				
Tax Year	Date Filed or Rec'd	Adjusted Gross Income	Taxes Owed	Tax Refund
2009	3/12/15	\$63,728	0	\$1,557
2010	3/12/15	\$90,819	\$2,562	0
2011	3/12/15	\$84,416	\$1,443	0
2012	1/26/15	\$95,127	\$2,004	0
2013	4/30/15	\$114,007	\$4,819	0
2014	5/17/15	\$121,131	0	\$1,439

Applicant provided proof of paying the past-due taxes owed for 2010, 2011, 2012, but not for 2013. His tax refund for 2014 most likely was withheld as partial payment of his 2013 past-due taxes.⁸

Applicant submitted documentation showing the debt in SOR ¶ 1.b (\$3,648) was settled in full for \$912 in December 2014. The debt in SOR ¶ 1.c (\$2,219) was paid in December 2014. The debt in SOR ¶ 1.d was a duplicate of the debt in SOR ¶ 1.b. He also resolved other delinquent credit card debts that were not alleged in the SOR.⁹

In 2009, Applicant's annual income was about \$45,000. At the time of the hearing, his annual income was about \$77,000. He submitted a Personal Financial Statement (PSA) that reflected his total net monthly income was \$7,672, his monthly expenses were \$3,301, and his monthly debt payments were \$186, which left him a net monthly remainder of \$4,185. He had about \$20,000 in a bank account and has completed online financial counseling courses.¹⁰

⁷ Tr. 43-44, 53-58, 67, 72-74, 90-99, 103-105, 108-112; AE A, D, F, R, S, U, V, X, AD, AF. Applicant and his wife attributed the delay between hiring the accounting firm and the filing of the tax returns to him changing jobs on a number of occasions and the time it took to obtain the tax paperwork requested by the accounting firm. Applicant's extensive travel for work also made it difficult to obtain the needed tax paperwork. During this period, his wife noted that she suffered two miscarriages; one in March 2015.

⁸ Tr. 43-44, 70-75, 99-101; AE E, W, Y, Z, AA-AC, AE, AG-AM.

⁹ Tr. 75-78; AE B, C.

¹⁰ Tr. 41-43, 48-49, 62, 75-83, 86-87, 102; AE G, J.

Applicant testified that he became a foster child when he was two years old. At age 10, he was adopted by an older couple. His adopted father passed away when he was 12 years old and his adopted mother passed away when he was 14 years old. After his adopted parents passed away, he returned to foster care. At age 17, he began living on his own. He and his wife have been a couple since high school. She indicated that his first major purchase as a 17-year-old was a washer and dryer. She also indicated that he has always driven used cars, lives frugally, and is a careful steward of his money. He credibly testified that he will file his future tax return as required.¹¹

Applicant provided letters of reference from supervisors and coworkers that attest to his honesty, dependability, trustworthiness, and exceptional work ethic. He is a devoted family man who is actively involved in scouting and in his church.¹²

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 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

¹¹ Tr. 44-46, 83-86, 96-99, 105-108.

¹² Tr. 62-63; AE H, I.

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 this guideline 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.

Applicant’s admissions and the record evidence established the following disqualifying condition under AG ¶ 19:

- (a) inability or unwillingness to satisfy debts;
- (c) a history of not meeting financial obligations; and

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

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.

In 2009, Applicant and his wife experienced financial problems after purchasing a new home. Soon after that purchase, his wife was injured and unable to work at a part-time job. They struggled to meet their financial obligations and defaulted on credit card debts. Since then, they have recovered financially, paid their delinquent credit card debts, and are living within their means. Their delinquent debts are no longer a security concern. AG ¶¶ 20(b), 20(c), and 20(d) apply to their delinquent debts.

The more troubling aspect of this case is Applicant's failure to file his federal income tax returns as required for five years. He did not file those tax returns until after he received the SOR. Such a failure to follow the law raises serious security concerns. Nonetheless, I find that Applicant has rectified this problem and it is unlikely to recur. His tax filing problems arose when he was relatively young, i.e., 28 years old. He credibly testified that he misinterpreted the tax filing requirements. He believed that he had three years to file a tax return and also thought that he had to file the tax returns in chronological order. If he did not file within the three years, he believed the consequences were the loss of his refund. In 2009, he was faced with complicated tax issues such as calculating depreciation and deductions for rental property. He was not prepared to handle those tax issues and made a big mistake by not seeking professional assistance in a timely manner. He dug himself into a hole from which it took him a long time to recover. He hired an accounting firm in late 2011 or early 2012 and received financial counseling. Delays were encountered in accumulating the documents that the accountant requested. He eventually filed the delinquent tax returns

and filed his 2014 federal income tax return within the authorized time period. Applicant is now aware of the tax filing requirements, has learned a tough lesson, and is committed to filing his tax returns on time. I am convinced he will do so. AG ¶ 20(c) applies to his tax filing problems. AG ¶ 20(a) partially applies.

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 is a devoted husband and father. He is a valued employee. He has held a security clearance for many years. Applicant's financial problems are resolved and unlikely to recur. Overall, the record evidence leaves me with no questions and 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.d: 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