



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



In the matter of:)
)
 [Redacted]) ISCR Case No. 15-06731
)
 Applicant for Security Clearance)

Appearances

For Government: Gatha Manns, Esq., Department Counsel
For Applicant: Leon J. Schachter, Esq.

08/09/2017

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guideline F (Financial Considerations). Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application on July 14, 2014. On June 7, 2016, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guideline F. The DOD CAF acted under Executive Order (Exec. Or.) 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 the DOD on September 1, 2006.¹

¹ Security Executive Agent Directive 4 (SEAD 4), was issued on December 10, 2016, revising the 2006 adjudicative guidelines. The SEAD 4 guidelines apply to all adjudicative decisions issued on or after June 8, 2017. My decision is based on the guidelines in SEAD 4, referred to in this decision as "AG." The changes resulting from issuance of SEAD 4 did not affect my decision in this case.

Applicant answered the SOR on June 29, 2016, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on August 29, 2016, and the case was assigned to me on March 1, 2017. On March 20, 2017, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for April 20, 2017. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 4 were admitted in evidence without objection. Applicant testified, presented the testimony of one witness, and submitted Applicant's Exhibits (AX) A through FF, which were admitted without objection. DOHA received the transcript (Tr.) on April 28, 2017.

Findings of Fact²

In his answer to the SOR, Applicant denied the sole allegation in the SOR, alleging that he failed to file his federal and state income tax returns for 2011 through 2014. He admitted that he filed the returns late. His admission in his answer is incorporated in my findings of fact.

Applicant is a 53-year-old senior acquisition analyst employed by defense contractors since September 2008. He served on active duty in the U.S. Air Force from October 1987 to August 2008 and retired as a lieutenant colonel. His Air Force assignments were in testing and engineering from 1987 to 1999 and in acquisition from 1999 until 2008. (AX V.) He held a security clearance in the Air Force and retained it as an employee of a defense contractor.

Applicant received a bachelor's degree in aerospace engineering in December 1986 and a master's degree in liberal arts in May 2002. In his security clearance application, he reported that he was enrolled in a master's degree program in systems engineering (GX 1 at 11.) He completed the program and received his master's degree in July 2015. (AX EE at 2.)

Applicant married in May 1999, separated in July 2007, and divorced in May 2010. When he and his ex-wife separated, he moved from the marital home, a four-level townhouse, to a one-bedroom apartment. Before the separation, he counted on his wife to keep the household organized and important documents properly filed. (AX EE.) He started moving his possessions and records when they first separated, but he had not completely moved out of the marital home until 2011, and he became increasingly disorganized as he progressed through the move. (Tr. 42, 45.) He and his ex-wife have a 14-year-old son. They have joint custody of their son and his ex-wife has primary residential custody. (GX 2 at 3.)

When Applicant submitted his security clearance return in July 2014, he disclosed that he had failed to file his federal and state tax returns for 2011 and subsequent years. (GX 1 at 36-37.) In a personal subject interview (PSI) in May 2015,

² Applicant's personal information is extracted from his security clearance application (GX 1) unless otherwise indicated by a parenthetical citation to the record.

he told an investigator that he became disorganized after his divorce due to moving from a large townhouse to a small one-bedroom apartment, and that he was busy with work, off-duty college courses, church activities, and his son's scouting and sports activities. He told the investigator that he misplaced his required tax documents and found it difficult to understand the tax laws after his marital status had changed. (GX 4 at 2.)

Applicant hired a tax preparer in early March 2015, who filed the federal and state income tax returns for tax year 2011 on March 13, 2015. The returns reflected that he was entitled to a federal refund of \$3,665 and that he owed state taxes of \$805, which he paid by credit card. (AX S and T.) He admitted that he was notified by the IRS that his returns had not been received, but he did not contact a tax preparer until at least a year had passed since the IRS notification. (Tr. 37.) He believed that he needed to file the 2011 returns before he filed returns for subsequent years. Thus, his delay in filing the 2011 returns contributed to his failure to timely file the returns for 2012, 2013, and 2014. (Tr. 37-38.) He testified that he usually had large tax refunds and believed that he was hurting only himself by filing late. (Tr. 40.)

Applicant's federal income tax transcript for tax year 2012 reflects that the IRS inquired about his failure to file in December 2013 and filed a substitute return for him in on June 30, 2014. (AX P.) Applicant mailed his federal and state returns for 2012 on April 2, 2016. They reflect that he was entitled to a federal refund of \$5,384 and that he owed \$370 in state taxes, which he paid by credit card. (AX Q; AX R.)

Applicant filed his federal and state returns for tax year 2013 on June 13, 2016. The IRS transcript reflects that the federal return was filed on July 4, 2016. (AX M.) They reflect that he was entitled to a federal refund of \$971 and that he owed \$1,459 in state taxes. (AX N; AX O.) There is no evidence in the record reflecting that he requested an extensions of time to file.

Applicant filed his federal and state returns for 2014 on August 1, 2016 (AX J.) They reflect that he owed \$951 in federal taxes and \$2,446 in state taxes. There are handwritten notations on the returns stating that he mailed them on June 24, 2016, with checks for the amounts due. (AX K; AX L.) The record does not explain the discrepancy between Applicant's handwritten notation and the IRS transcripts regarding the date of filing. There is no evidence that he requested extensions of time to file.

Applicant filed his federal and state tax returns for 2015 on August 13, 2016. The IRS transcript reflects that his return was received on September 5, 2016, and he paid a penalty for late filing. There is no evidence that he requested an extension of time to file. His returns reflect that he owed \$1,392 in federal taxes and \$2,565 in state taxes. (AX G, H; and I.) He paid the state taxes due for tax years 2012 through 2015 in in three installments during April, June, and August 2016. (AX A.) The state tax records reflect that all state taxes due had been paid as of September 27, 2016 (AX B.)

Applicant timely filed his federal and state tax returns for 2016 on March 3, 2017. They reflect that he owed \$3,681 in federal taxes and \$3,346 in state taxes. (AX C; AX F.) He paid the taxes due by direct withdrawal from a bank account. (AX D; AX E.)

Applicant testified that part of his problem with preparing his tax returns was due to his reliance on hard copy of all records. He testified that he did not use email and online accounting because of concerns about identity theft. Eventually, he realized that his reliance on paper records was not working, and he established online accounts for bank accounts and credit card accounts. He now has well-organized electronic files. Because he finds his returns complicated, he relies on a professional tax preparer. (Tr. 30-31; AX U.)

Applicant's annual performance appraisals for December 2012 through November 2015 consistently rated him as "Exceeds Standards," the highest rating. (AX W; AX X; AX Y.) He submitted affidavits from two colleagues who have known him for more than five years and interacted with him frequently (AX Z; AX AA); a neighbor who is a retired colonel in the U.S. Marine Corps and has known him for about ten years (AX DD); a friend who has known him for six years through their involvements in the Boy Scouts (AX CC; Tr. 50-54); and an ordained minister who has known him for five years and worked closely with him in children's programs, the church choir, and various other church activities (AX BB.). All the affiants are aware of his failures to timely file tax returns, and they believe that his failures do not accurately reflect his character. They regard him as a devoted father, hardworking, thoughtful, honest, reliable, and trustworthy.

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 § 2.

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, 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.” 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.

Analysis

Guideline F, Financial Considerations

The security concern under this guideline is set out in AG ¶ 18:

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. . . .

This concern is broader than the possibility that a person might knowingly compromise classified information to raise money. It encompasses concerns about a person's self-control, judgment, and other qualities essential to protecting classified information. A person 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).

Applicant denied the allegation in the SOR, but he admitted that he did not file the returns on time. His admission and the evidence of his repeated failures to timely file his federal and state income tax returns establish two disqualifying conditions under this guideline: AG ¶ 19(c) ("a history of not meeting financial obligations") and AG ¶ 19(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").

The following mitigating conditions are potentially relevant:

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;

AG ¶ 20(c): the individual has received or is receiving financial counseling for the problem from a legitimate and credible source, such as a non-profit credit counseling service, and there are clear indications that the problem is being resolved or is under control; 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.

AG ¶ 20(a) is not established. Applicant's past-due tax returns were numerous, unresolved until recently, and did not occur under circumstances making them unlikely to recur. Although Applicant testified that he has taken measures to remedy his disorderly financial practices, insufficient time has passed to establish a track record of tax compliance.

AG ¶ 20(b) is not established. Applicant's marital breakup was a condition beyond his control, but he has not acted responsibly. He separated and moved out of the marital home in 2007, but he took no significant measures to organize his records and file his returns until March 2015.

AG ¶¶ 20(c) and 20(g) are established. Applicant hired a qualified tax consultant, filed all his past-due returns, and paid the taxes due.

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(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.

I have incorporated my comments under Guideline F in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under that guideline, but some warrant additional comment.

Applicant was candid, remorseful, and credible at the hearing. He has filed his past-due returns and paid the taxes due. However, a security clearance adjudication is not a tax-enforcement procedure. It is an evaluation of an individual's judgment, reliability, and trustworthiness. The fact that Applicant has filed his past-due returns and has taken measures to prevent future tax delinquencies "does not preclude careful consideration of Applicant's security worthiness based on longstanding prior behavior evidencing irresponsibility." ISCR Case No. 12-05053 (App. Bd. Oct. 30, 2014). Furthermore, the establishment of some mitigating evidence does not compel a favorable security-clearance decision. ISCR Case No. 11-14784 (App. Bd. Jan.17, 2014). "Taking action to resolve the delinquent tax filings well after the initiation of the security clearance process undercuts a determination that those actions constitute a good-faith effort to resolve the delinquencies." ISCR Case No. 15-03481 (App. Bd. Sep. 27, 2016).

Applicant is a mature, intelligent, well-educated adult. His military service and long experience in acquisition should have made him acutely aware of the importance of financial responsibility and accountability. His failure to comply with federal and state tax laws suggests that he has a problem with abiding by well-established rules and regulations, which are essential for protecting classified information. His repeated failure to timely file his tax returns does not demonstrate the "high degree of good judgment

and reliability required of persons granted access to classified information.” ISCR Case No. 15-03481 (App. Bd. Sep. 27, 2016), *citing* ISCR Case No. 14-04437 (App. Bd. Apr. 15, 2016) and ISCR Case No. 14-01894 (App. Bd. Aug. 18, 2015).

I have considered Applicant’s devotion to his son, his involvement in his church and his community, his honorable service in the Air Force, and his outstanding performance as an employee of a defense contractor. However, I have also noted that he ignored IRS reminders about his past-due returns. In spite of his busy schedule, he found time to complete most of the requirements for a second master’s degree before devoting his attention to his past-due tax returns. The record indicates that filing the past-due tax returns held a relatively low priority in his life.

Once a concern arises regarding a person’s eligibility for access to classified information, there is a strong presumption against the grant or maintenance of a security clearance. ISCR Case No. 10-04641 at 4 (App. Bd. Sep. 24, 2013), *citing Dorfmont v. Brown*, 913 F.2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 906 (1991). Applicant has not overcome that presumption. 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 timely file his federal and state tax returns.

Formal Findings

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline F (Financial Considerations): AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

Conclusion

I conclude that it is not clearly consistent with the national security interests of the United States to continue Applicant’s eligibility for access to classified information. Clearance is denied.

LeRoy F. Foreman
Administrative Judge