



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



In the matter of:)	
)	
[REDACTED])	ISCR Case No. 15-01452
)	
Applicant for Security Clearance)	

Appearances

For Government: Ross Hyams, Esq., Department Counsel
For Applicant: Ronald C. Sykstus, Esq.

01/31/2018

Decision

HESS, Stephanie C., Administrative Judge:

This case involves security concerns raised under Guideline F (Financial Considerations). Applicant failed to properly file his tax return and pay his taxes for tax year 2009. However, he has properly filed his past-due return, fully satisfied his past-due taxes, and properly filed and paid his tax obligations for all other tax years. Eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted a security clearance application (e-QIP) on February 6, 2014. On November 20, 2015, the Department of Defense (DOD) sent him a Statement of Reasons (SOR), alleging security concerns under Guideline F. The DOD acted under Executive Order (Ex. 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.

Applicant answered the SOR and requested a hearing before an administrative judge. Department Counsel was ready to proceed on June 1, 2016, and the case was assigned to me on January 24, 2017. On May 4, 2017, the Defense Office of Hearings and Appeals (DOHA) notified Applicant, through counsel, that the hearing was scheduled for May 24, 2017. I convened the hearing as scheduled. Government Exhibits (GX) 1 and 2 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibits (AX) A through G, which were admitted without objection. DOHA received the transcript (Tr.) on June 5, 2017.

The SOR was issued under the AG implemented on September 1, 2006. The DOD implemented the amended AG on June 8, 2017, while this decision was pending. This decision will be decided based on the amended AG effective June 8, 2017.

Findings of Fact

The SOR alleges that Applicant is indebted to the federal government for delinquent taxes in the approximate amount of \$17,000 for tax year 2009. In his Answer, Applicant admits this allegation, explains the circumstances of the debt, and updates the status of the debt. He disclosed the tax debt on his e-QIP, and candidly discussed the debt during his 2014 personal subject interview. (GX 1; GX 2.)

Applicant is a 53-year-old senior program engineer currently employed by a federal contractor since 2011. He served honorably for three years in the U.S. Army, and was first granted a clearance in approximately 1982. He received an associate's degree in mathematics in 1994, and a bachelor of science degree in mathematics in 2001. He and his wife married in 1984, and have two adult children. (GX 1; Tr. 17-25.)

In early 2009, Applicant took a 401(k) loan of approximately \$40,000 to perform upgrades on his home. He was scheduled to repay the loan through regular payroll deductions. In about February 2009, Applicant's then-employer lost its government contract and went out of business. Applicant was necessarily unable to repay the loan through regular payroll deductions. Applicant received notice from the manager of the 401(k) plan stating that Applicant had 60 days to repay the loan in full, or the \$40,000 would be assessed as taxable income and he would incur a 10% early withdrawal penalty. Applicant was unable to repay the loan and penalty. (Tr. 26-29.)

Applicant had always filed his own tax returns, and kept a tax file in which he placed pertinent documents throughout the year. In February 2009, after his prior employer closed, Applicant went to work for another federal contractor. In June 2009, Applicant underwent surgery, and suffered from related complications. In April 2010, Applicant

prepared his tax returns using computer-based tax-preparation software. He does not recall having received a 1099 Form from the Internal Revenue Service (IRS) for the income from the 401(k) loan, and did not file this document with his 2009 return. Applicant received a refund for tax year 2009. (Tr. 26-29.) Applicant subsequently reviewed the 2009 tax file but was unable to locate the 1099 Form. (Tr. 29.)

In approximately May 2012, the IRS reviewed Applicant's 2009 filing, and assessed additional taxes of \$14,818 and penalties and interest of \$3,267, due to the 401(k) loan, which was reclassified as income. The IRS notified Applicant of his tax liability in June 2012. (AX A.) Applicant was unable to pay the tax debt at that time. (Tr. 30.)

Within months of receiving notice from the IRS of his tax debt, Applicant was offered a foreign employment package that included a housing allowance, a 10% cost-of-living increase and what Applicant believed to be a tax benefit. Specifically, Applicant's wages were to be taxed at a lower rate while he was working abroad. Initially, Applicant anticipated a greater net income while working abroad, and expected to be able to make regular payments to the IRS to satisfy his tax debt. However, the cost of living was significantly higher than Applicant had expected. Additionally, Applicant's wife was unable to find employment, and Applicant had the ongoing responsibility of the maintenance and other costs of his home in the United States. These factors created additional strains on Applicant's finances. Applicant determined that if he kept his tax withholdings at the same level while working abroad as he had while working domestically, he would satisfy the IRS tax debt with the money he received in tax refunds. (Tr. 30-35; Tr. 45.)

Applicant timely filed his 2012 tax return, and his refund was withheld by the IRS, and applied to his tax debt. In about May 2014, Applicant contacted the IRS to discuss an installment agreement. However, the logistics of paying on an installment agreement while living outside the United States were onerous. Applicant was also concerned about his ability to maintain regular payments given his overall financial obligations. Applicant made several voluntary payments to the IRS. He also continued to maintain his tax withholdings to maximize the amount of his tax refunds. The IRS withheld Applicant's 2013, 2014, and 2015 tax refunds. (Tr. 44 to 50; Tr. 53.) His tax debt was fully satisfied in May 2016. (AX A.) Applicant has not owed any taxes since 2009, and is current on all his tax-related and other financial obligations. (Tr. 28; Tr. 34; AX A.)

Applicant's first witness met Applicant at work in approximately 1995. They have been friends since that time. He testified that Applicant was well respected by his superiors and coworkers, and recommends Applicant for a security clearance. Applicant's second witness, who served 14 years in the U.S. Army and has worked as a federal contractor since his discharge, has been friends with Applicant since the mid-1980s. He testified that Applicant's reputation in the federal contracting community is excellent. Applicant's final witness met Applicant in approximately 1983, when they were both serving in the Army. They subsequently worked together as federal contractors. The

witness testified that Applicant is very honest, and his integrity is above reproach. He further stated "I would trust him with my life." (Tr. 57-68.) Applicant routinely receives positive performance appraisals. (AX B; AX F; AX G.) Applicant's testimony was straightforward, sincere, and credible.

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, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

Eligibility for a security clearance is predicated upon the applicant's meeting the criteria contained in the AG. 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." See 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; see AG ¶ 2(b).

Analysis

Guideline F, Financial Considerations

The 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.

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

The following disqualifying conditions are potentially applicable: AG ¶ 19(a) ("inability to satisfy debts"), and AG ¶ 19(g) ("failure to file . . . annual Federal . . . income tax returns or failure to pay annual Federal . . . income tax as required.") The following mitigating conditions under this guideline are potentially applicable:

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 . . .), and the individual acted responsibly under the circumstances; and

AG ¶ 20(d): the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

Applicant's tax debt arose under unusual circumstances that were largely beyond his control. Specifically, Applicant borrowed about \$40,000 from his 401(k) for upgrades to his home, with the expectation of repaying the loan through regular payroll deductions. Unexpectedly, his employer lost its federal contract, and the company folded. Applicant was required to either fully repay the loan plus a 10% penalty for early withdrawal, or report the loan as income for tax year 2009. In preparing his own taxes, Applicant inadvertently failed to include the loan as income when filing his return, and is unable to locate the associated IRS 1099 Form. In June 2012, Applicant was notified by the IRS of his delinquent taxes and associated penalties and interest, however he was unable to pay the debt at that time.

"Good faith" means acting in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation. ISCR Case No. 99-0201, 1999 WL 1442346 at *4 (App. Bd. Oct. 12, 1999). A security clearance adjudication is an evaluation of a person's judgment, reliability, and trustworthiness. It is not a debt-collection procedure. ISCR Case No. 09-02160 (App. Bd. Jun. 21, 2010.) A person is not required to establish resolution of every debt alleged in the SOR. He or she need only establish a plan to resolve financial problems and take significant actions to implement the plan. The adjudicative guidelines do not require that a person make payments on all delinquent debts simultaneously, nor do they require that the debts alleged in the SOR be paid first. See ISCR Case No. 07-06482 at 2-3 (App. Bd. May 21, 2008).

Applicant acted in good faith by making several voluntary payments to the IRS. He formulated a plan to maintain higher than required tax withholdings, in order to be eligible for greater refunds, which would be withheld by the IRS to satisfy Applicant's tax obligation. Applicant's delinquent tax issues did not arise due to irresponsible or reckless spending, but rather initially arose due to the unanticipated closing of his employer's business. He has since acted responsibly by timely filing and paying his taxes since 2009, and fully paying his one-time delinquent tax debt. His past tax-related issue does not cast doubt on his current reliability, trustworthiness, or good judgment. AG ¶¶ 20(a), 20(d), and 20(g) apply.

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 I have also considered the following:

Applicant served honorably in the military. He is trusted and respected by his supervisors and coworkers. He was straightforward, sincere, and credible in his testimony.

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 mitigated the potential security concerns raised by his failure to file and pay taxes. Accordingly, I conclude he has carried his burden of showing that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

Formal Findings

As required by section E3.1.25 of Enclosure 3 of the Directive, I make the following formal findings on the allegations in the SOR:

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

Subparagraph 1.a:

For Applicant

Conclusion

I conclude that it is clearly consistent with the national interest to grant or continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is granted.

Stephanie C. Hess
Administrative Judge