



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



In the matter of:)	
)	
[REDACTED])	ISCR Case No. 16-00469
)	
Applicant for Security Clearance)	

Appearances

For Government: Chris Morin, Esq., Department Counsel
For Applicant: *Pro se*

11/02/2017

Decision

HESS, Stephanie C., Administrative Judge:

Applicant resolved his Federal tax issues for tax years 2006 through 2010, and his other delinquent debts. However, he failed to properly file or pay his Federal taxes for tax years 2011 through 2014. Applicant did not mitigate the security concerns raised under Guideline F (Financial Considerations). Access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (e-QIP) on October 14, 2014. On May 20, 2016, the Department of Defense (DOD) sent him a Statement of Reasons (SOR), alleging security concerns under Guideline F. The DOD acted under Executive Order (E.O.) 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 DOD on September 1, 2006.

Applicant answered the SOR July 27, 2016, and requested a decision on the record without a hearing. Department Counsel submitted the Government's written case on September 26, 2016. On September 27, 2016, a complete copy of the file of relevant

material (FORM,) which included Government Exhibits (GX) 1 through 5, was sent to Applicant, who was given an opportunity to file objections and submit material to refute, extenuate, or mitigate the Government's evidence. He received the FORM on November 3, 2016, and his Response was received by the Defense Office of Hearings and Appeals (DOHA) within the allotted 30 days and admitted without objection. The case was assigned to me on August 10, 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. The outcome of this case would have been the same if decided based on the former AG.

Findings of Fact

Under Guideline F, the SOR alleges: that between 2006 and 2014, Applicant failed to file his Federal income tax returns as required for seven separate tax years; that he owed Federal taxes for tax years 2011 through 2014; that he had a \$20,231 tax lien filed against him in March 2012; that he was past due on his mortgage-loan account; and, that he was delinquent on a medical account. Applicant admits the tax lien, but denies the amount due, and denies the remaining allegations. The delinquent debts and tax lien are reflected in Applicant's credit bureau reports (CBR) dated January 2016 and October 2014. (GX 3; GX 4.)

Applicant is a 55-year-old self-employed private investigator working with defense contractors since August 2002. He has also been employed as an instructor by another defense contractor since January 2011. He served on active duty in the U.S. Marine Corps from July 1980 to July 1984, and in the Marine Corps reserve from 1984 to 1986. He has held a security clearance since approximately August 2003. He and his wife married in July 2006, separated in March 2009, and divorced in November 2011. (GX 2.)

Applicant attributes his financial problems to a combination of: increased overall expenses due to his 2006 marriage, including costs for his stepchildren's education and his wife's medical bills; a severe downturn in business; and, his subsequent separation and divorce.

Applicant denies the \$120,054 past due mortgage-loan debt alleged in SOR ¶ 1.e. When Applicant and his wife separated in March 2009, Applicant moved from the marital residence, and subsequently fell behind on the mortgage-loan payments. In May 2009, the house was flooded, causing significant damage. Additional damage occurred to the home in about December 2009, when an interior water pipe broke. Applicant's ex-wife moved out, the house was unoccupied, and the mortgage went unpaid. Applicant contacted the mortgage lender and attempted to modify the mortgage loan. The mortgage lender kept requiring Applicant to submit additional documentation, and the loan modification was never finalized. The mortgage lender sold the loan, and the new mortgage-loan holder foreclosed on the house in approximately August 2012. (Answer; GX 5.) Applicant asserts that he did not owe a deficiency balance after the foreclosure.

The past due account does not appear on the January 2015 CBR. Applicant participated in a class-action lawsuit against the mortgage-loan company, and ultimately received a settlement check for \$2,000 in October 2016. (Response.) This debt is resolved.

The SOR alleges, and Applicant denies, that he failed to file his Federal income tax returns as required for tax years 2006, 2007, 2009, and 2011 through 2014. (SOR ¶ 1.a.) This denial appears to be based on Applicant's assertion that he filed his Federal tax returns for 2006 through 2010. It is unclear when Applicant actually filed the returns, and therefore unclear as to whether or not the filing was "as required." However, the record evidence supports Applicant's assertion that he filed his 2006 through 2010 tax returns.

Applicant states that he fell behind on paying his taxes because he was self-employed and not earning enough to pay both his taxes and his other monthly financial obligations. Applicant admits that the Internal Revenue Service (IRS) entered the \$20,231 tax lien alleged in SOR ¶ 1.d against him for the combined taxes owed for tax years 2006 through 2010. However, he denies the allegation because the lien was released when Applicant entered an installment plan with the IRS and because the balance is no longer accurate. Applicant provided an IRS payment history from April 2015 to July 2016, showing monthly payments of \$400 to \$500, with the payments specifically applied to tax years 2006 through 2008. He also provided a September 2016 IRS installment agreement summary. The summary shows penalties owed for 2007, and taxes and penalties owed for 2009 and 2010, with a total remaining balance of approximately \$7,500. SOR ¶ 1.d is being resolved through Applicant's IRS installment agreement.

Applicant does not assert that he filed or paid his Federal taxes for tax years 2011 through 2014 (SOR ¶¶ 1.a and 1.b), nor is there any record evidence that establishes that he did. Applicant stated in his July 2016 Answer that, "any missing periods will be filed in August 2016, and paid ASAP." However, in his December 2016 Response, while he reasserted that he filed his 2006 through 2010 taxes, and provided additional supporting documentation, he did not address the status of his 2011 through 2014 taxes. The concern about Applicant's failure to file or pay is 2011 through 2014 taxes is not resolved.

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 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 or sensitive information. . . . An individual who is financially overextended is at risk of having to engage in illegal or otherwise questionable acts to generate funds.

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 record evidence establishes three disqualifying conditions under this guideline:

AG ¶ 19(a): inability to satisfy debts;

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 under this guideline are potentially applicable:

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, or a death, divorce or separation...) and the individual acted responsibly under the circumstances;

AG ¶ 20(e): the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute provides evidence of actions to resolve the issue; and,

AG ¶ 20(g): the individual has made arrangements with the appropriate tax authority to file or pay the amount owed it is in compliance with those arrangements.

Applicant's financial troubles arose from conditions largely beyond his control, however, he did not act responsibly regarding his failure to file and pay his Federal taxes. AG ¶ 20(b) does not apply. Applicant paid the medical debt alleged in SOR ¶ 1.c, disputed the negative entry on his CBR, and it was removed. Applicant denies owing the past-due mortgage loan alleged in SOR ¶ 1.e, and provided documentation supporting this contention. AG ¶ 20(e) applies to these debts. Applicant provided documentation supporting his assertions that he has filed and is paying his 2006 through 2010 past-due taxes which resulted in the tax lien alleged in SOR ¶ 1.d. AG ¶ 20(g) applies to the tax lien allegation.

However, Applicant has not filed or paid his taxes for tax years 2011 through 2014. Failure to file tax returns suggests that an applicant has a problem complying with well-established governmental rules and systems. Voluntary compliance with such rules and systems is essential for protecting classified and sensitive information. See e.g., ISCR Case No. 14-04437 (App. Bd. Apr. 15, 2016); ISCR Case No. 01-05340 at 3 (App. Bd. Dec. 20, 2002). A person who fails repeatedly to fulfill his or her legal obligation to file tax returns does not demonstrate the high degree of good judgment and reliability required for a grant of access to classified or sensitive information. See, e.g., ISCR Case No. 14-01894 at 5 (App. Bd. Aug. 18, 2015). Although Applicant is resolving his 2006 through 2010 Federal tax issues, his unfiled and unpaid taxes for 2011 through 2014 as alleged in SOR ¶¶ 1.a and 1.b remain a concern. None of the mitigating conditions 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(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.

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 I have also considered the following:

Applicant served honorably in the U.S. Marine Corps and has held a security clearance since 2003. He resolved the non-tax related SOR debts, and has filed and is paying his 2006 through 2010 Federal taxes. However, Applicant's failure to resolve his 2011 through 2014 tax issues has not been mitigated.

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 delinquent debts. Accordingly, I conclude he has not 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): AGAINST APPLICANT

Subparagraphs 1.a and 1.b: Against Applicant

Subparagraphs 1.c through 1.e: For Applicant

Conclusion

I conclude that it is not clearly consistent with the national interest to grant Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Stephanie C. Hess
Administrative Judge