



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



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| In the matter of: |) | |
| |) | |
| [Redacted] |) | ISCR Case No. 17-01498 |
| |) | |
| Applicant for Security Clearance |) | |

Appearances

For Government: Brittany Muetzel, Esq., Department Counsel
For Applicant: *Pro se*

08/24/2018

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guideline F (Financial Considerations) by Applicant's repeated failures to timely file his state income tax returns. Eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted a security clearance application on September 16, 2015, seeking to continue a security clearance that was granted in December 2005. On December 15, 2017, 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) promulgated in Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (December 10, 2016), for all adjudicative decisions on or after June 8, 2017.

Applicant answered the SOR on February 6, 2018, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on March 7, 2018, and the case was assigned to me on April 12, 2018. On May 21, 2018, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for June 12, 2018. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 4 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibit (AX) A, which was admitted without objection. I kept the record open until June 25, 2018, to enable him to submit additional documentary evidence. He timely submitted AX B through O, which were admitted without objection. DOHA received the transcript (Tr.) on June 21, 2018.

Findings of Fact¹

In Applicant's answer to the SOR, he admitted all the allegations. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 62-year-old pipe welder employed by a defense contractor since June 1974, when he graduated from high school. He married in April 1978. He and his wife have two adult children. Applicant has a 10-year-old son from another relationship.

Applicant lives in one state and works in another. The SOR alleges that he failed to timely file state income tax returns in his state of residence (SOR ¶ 1.a) and his state of employment (SOR ¶ 1.b) for tax years 2010 through 2016.

Applicant testified that he did not file his state income tax returns in either state because co-workers advised him that filing a tax return was not required if he was entitled to a refund. Applicant knew that he was entitled to refunds, and he decided to use the state tax authority as a savings bank and accumulate funds for his retirement, about three years away, and draw interest on the uncollected refunds. (Tr. 19, 25.) He has never failed to timely file his federal income tax returns, and he was entitled to refunds of federal taxes paid for all tax years from 2010 through 2017. (Tr. 37; AX H through O.)

Applicant realized that he had been given bad advice by his co-workers when he was interviewed by a security investigator in January 2017. He hired a tax professional to assist him, for a fee of \$1,100. (AX E.) All past-due returns were filed on October 25, 2017. (AX H through O.) He paid his state of residence \$268 for taxes due for tax year 2011 and \$284 for taxes due for tax year 2015. (AX B and C.) In April 2018, he paid his state of residence \$379 for taxes due for tax year 2017. (AX D.) For all other tax years, he was entitled to refunds from both states. In February 2018, he received a "letter of good standing" from his state of employment, stating that there were no outstanding assessments or delinquent notices on file. (AX A.) In June 2018, he received a "letter of

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

good standing” from his state of residence, informing him that he was in compliance for all tax years through 2017. (AX G.)

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. 15-01253 at 3 (App. Bd. Apr.20, 2016).

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. . . .

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's admissions and the documentary evidence submitted at the hearing and after the hearing establish the following potentially disqualifying conditions

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 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; 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 established. Applicant's failure to timely file state tax returns was recent and spanned seven tax years, but his gullible belief in the bad tax advice he received from co-workers was an unusual circumstance making recurrence unlikely

AG ¶ 20(g) is established. Applicant has filed all past-due returns, paid the taxes due, and is in good standing with the tax authorities of both states.

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 and applying the adjudicative factors in AG ¶ 2(d).²

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, sincere, and credible at the hearing. He has worked for defense contractors since graduating from high school and held a security clearance for most of that time. 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 "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). A person who fails repeatedly to fulfill his or her legal obligations does not demonstrate the high degree of good judgment and reliability required of those granted access to classified information. ISCR Case No. 15-00216 at 4 (App. Bd. Oct. 24, 2016), *citing Cafeteria & Restaurant Workers Union Local 473 v. McElroy*, 284 F.2d 173, 183 (D.C. Cir. 1960), *aff'd*, 367 U.S. 886 (1961). This case is unusual, in that Applicant timely filed all his federal income tax returns but was misled by bad tax advice from co-workers. As soon as he recognized his mistake, he hired a tax professional, filed all past-due returns, and paid the taxes due. His compliance with the federal tax rules and his prompt response upon

² The factors are: (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.

learning that he received bad tax advice negates a finding that he is unable or unwilling to comply with rules and regulations.

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 security concerns raised by his repeated failures to timely file state income tax returns.

Formal Findings

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

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

Subparagraphs 1.a and 1.b: For Applicant

Conclusion

I conclude that it is clearly consistent with the national security interests of the United States to continue Applicant's eligibility for access to classified information. Clearance is granted.

LeRoy F. Foreman
Administrative Judge