



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



In the matter of:)	
)	
[REDACTED])	ISCR Case No. 18-00620
)	
Applicant for Security Clearance)	

Appearances

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

09/19/2018

Decision

HESS, Stephanie C., Administrative Judge:

Applicant failed to timely file his 2007 through 2012 Federal tax returns. However, his failure to timely file was due to a lack of understanding and he has since filed the returns. Eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted a security clearance application (e-QIP) on November 12, 2015. On March 29, 2018, 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) effective June 8, 2017.

Applicant received the SOR and submitted his Answer to the SOR on April 13, 2018. He requested a decision on the record without a hearing. Department Counsel submitted the Government's written case on May 16, 2018, and a complete copy of the file of relevant material (FORM), which included Government Exhibits (GX) 1 through 5,

was sent to Applicant on the same day. He was given an opportunity to file objections and submit material to refute, extenuate, or mitigate the Government's evidence. He received the FORM on May 29, 2018, 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 July 27, 2018.

Findings of Fact

The SOR alleges that Applicant failed to file his Federal income tax returns for 2007 through 2012, as required. Applicant admits that he failed to timely file his returns, but states that the returns have since been filed.

Applicant is a 56-year-old customer-relationship-management developer currently employed by a federal contractor since November 2015. He enlisted in the U.S. Navy in January 1980 and served honorably until August 1983. He served on active duty as an officer in the U.S. Navy from December 1987 until December 1997, and received a general discharge under honorable conditions. He held a security clearance for a period of time while on active duty. He received a bachelor's degree in 1987 and a master's degree in 1995. He and his wife married in 1998. (GX 1.)

Applicant lived and worked in the United Kingdom (UK) from 2006 until 2013. He paid the requisite taxes to the UK while residing there. It was not until he returned to the United States that Applicant became aware that, as a U.S. citizen, he was required to file Federal tax returns for 2007 through 2012, the tax years when he resided in the UK. Applicant did not owe any taxes for these years. Applicant experienced some delay in filing the returns because the requisite supporting documents were stored in several locations due to moving internationally and the returns themselves were complex. Applicant filed his tax returns in approximately October 2017, however, the Internal Revenue Service (IRS) did not receive the initial filings. Applicant refiled the returns in December 2017. Tax transcripts indicate that Applicant's returns for 2008 through 2012 were received by the IRS on March 2, 2018. Applicant filed the 2007 return with the other returns, but has not yet received confirmation from the IRS. (Answer; Response.) Applicant timely filed his 2013 through 2015 Federal tax returns. The record evidence does not indicate that Applicant has any other financial issues.

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 record evidence establishes the following disqualifying condition under this guideline:

AG ¶ 19(f): failure to file . . . annual Federal . . . income tax returns . . . as required.

The following mitigating condition under this guideline is potentially applicable:

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.

Applicant's failure to file his 2006 through 2012 Federal tax returns while living and working abroad was not an intentional disregard of his obligations, but instead was due to not understanding his filing requirements. Applicant filed and paid taxes in his country of residence during those years. Upon returning to the United States and learning of the filing requirements, Applicant was delayed in filing the past-due returns as a result of moving internationally and the complexity of the returns. However, he filed all of the returns prior to receiving the SOR. He did not owe any taxes for tax years 2006 through 2012. He timely filed his 2013 through 2015 returns.

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. I have considered the factors in AG ¶ 2(d) in reaching my decision.

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 timely file his tax returns. 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