



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 14-03280

Appearances

For Government: Caroline Heintzelman, Esq., Department Counsel
For Applicant: Justin G. Holbrook, Esq.

05/29/2015

Decision

HARVEY, Mark, Administrative Judge:

Applicant's statement of reasons (SOR) alleges he failed to file his federal and state income taxes from 2010 through 2012. In 2013, before he received the SOR, he filed his tax returns and paid his taxes, which amounted to about ten percent of the amounts withheld from his salary. Financial considerations concerns are mitigated. Eligibility for access to classified information is granted.

Statement of the Case

On April 3, 2013, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP) version of security clearance application (SF 86). (GE 1) On November 21, 2014, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued an SOR to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended; and the adjudicative guidelines (AG), which became effective on September 1, 2006.

The SOR alleged security concerns under Guideline F (financial considerations). (HE 2) The SOR detailed reasons why DOD could not make the preliminary affirmative finding under the Directive that it is clearly consistent with national security to grant or

continue a security clearance for Applicant and recommended referral to an administrative judge to determine whether Applicant's clearance should be granted, continued, denied, or revoked. (HE 2)

On December 5, 2014, Applicant responded to the SOR. (HE 3) On February 9, 2015, Department Counsel was prepared to proceed. On March 2, 2015, DOHA assigned the case to me. On April 13, 2015, DOHA issued a notice of the hearing, setting the hearing for May 14, 2015. (HE 1) The hearing was held as scheduled. Department Counsel offered three exhibits into evidence, and Applicant offered nine exhibits into evidence. (Tr. 13-16; GE 1-3; AE A-I) There were no objections, and I admitted all proffered exhibits into evidence. (Tr. 13, 16; GE 1-3; AE A-I) On May 22, 2015, I received the transcript of the hearing.

Findings of Fact¹

In Applicant's SOR response, he admitted the allegations in SOR ¶¶ 1.a and 1.b. Applicant also provided extenuating and mitigating information. Applicant's admissions are accepted as findings of fact.

Applicant is 32-year-old employee of a Defense contractor, who provides network engineer services. (Tr. 29; GE 1) He has access to his company's sensitive information. (Tr. 29) There are no allegations of security violations. Applicant graduated from high school and then attended college for three semesters, where he majored in computer science. (Tr. 19-20) After college, Applicant worked for a retail home improvement store for five years; for four years at several information technology companies; and for five years for his current employer. (Tr. 20-27)

In May 2013, he married. (Tr. 46; GE 1) He has never served in the military. (Tr. 55; GE 1) He does not have any children. (Tr. 55) There is no evidence of alcohol abuse, use of illegal drugs, or criminal offenses aside from his failure to timely file his tax returns.

Financial Considerations

Applicant lives within his means and does not have any delinquent debts. (Tr. 40) He has a history of financial responsibility. (Tr. 40-42)

When Applicant completed his April 3, 2013 SF 86, he disclosed that he had not filed his tax returns from 2010 to 2012. (Tr. 30; GE 1) His 2012 tax return was not due to be filed until April 15, 2013. (Tr. 31) Applicant explained why he did not timely file his tax returns. Applicant was focused on work; he was "working extremely hard" for his employer (60-80 hours a week); and he failed to take care of his personal matters, such as filing his tax returns. (Tr. 31, 48-49)

¹Some details have not been included in order to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

Applicant may have filed two tax returns late before 2010. (Tr. 51-52) Applicant's 2010, 2011, and 2012 federal and state tax returns were filed on August 20, 2013, using a commercial tax return preparation company. (Tr. 48; AE A, B, C) His 2010 through 2012 tax returns contained the following information:

Tax Years-AE	Gross Income	Federal Tax Due	Federal Tax Withheld	Federal Taxes Owed	State Tax Due	State Tax Withheld	State Taxes Owed
2010-AE A	\$65,976	\$10,338	\$9,476	\$459	\$3,560	\$3,693	\$133-Refund
2011-AE B, I	\$75,736	\$11,817	\$9,451	\$2,386	\$4,242	\$3,800	\$442
2012-AE C	\$87,320	\$15,199	\$14,460	\$739	\$5,265	\$5,839	\$574-Refund
Total	\$229,032	\$37,354	\$33,387	\$3,584	\$13,067	\$13,332	\$265-Refund

On August 23, 2012, checks were cashed for \$739, \$459, and \$2,386 resolving Applicant's federal tax debts for 2010 through 2012, and on August 29, 2012, Applicant paid \$442 resolving his state tax debt for 2011. (Tr. 33-37, 44-46; AE D, I) He filed and paid his 2013 and 2014 taxes when required. (Tr. 38-39) Applicant sincerely regrets his late filing of his tax returns from 2010 through 2012. (Tr. 39) He emphasized that he will timely file future state and federal tax returns and pay his taxes as required. (Tr. 50, 55)

Character Evidence

Two colleagues and friends and Applicant's spouse lauded his dedication, honesty, trustworthiness, and reliability. (AE F-H) Their statements support approval of his access to classified information. (AE F-H)

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, "no 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 applicant's 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 meeting the criteria contained in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied 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, 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 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 “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. See also Executive Order 12968 (Aug. 2, 1995), § 3.1. Thus, nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination about applicant’s allegiance, loyalty, or patriotism. It 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. 95-0611 at 2 (App. Bd. May 2, 1996).

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 ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his [or her] security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[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

Financial Considerations

AG ¶ 18 articulates the security concern relating to financial problems:

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

AG ¶ 19 provides one disqualifying condition that could raise a security concern and may be disqualifying in this case, “(g) failure to file annual Federal, state, or local income tax returns as required.” Applicant’s failure to timely file his 2010 through 2012 federal and state tax returns is documented in his SF 86, SOR response, and hearing record. Title 26 U.S.C. § 7203 provides:

Willful failure to file return, supply information, or pay tax.

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return, keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than \$25,000 (\$100,000 in the case of a corporation), or imprisoned not more than 1 year, or both, together with the costs of prosecution.

Applicant’s income for 2010 to 2012 was well above the Internal Revenue Service (IRS) threshold for requiring a tax payer to file a tax return. In 2012, for example, the threshold for requiring filing of a tax return for a head of household under age 65 was \$13,050. See IRS website, <http://www.efile.com/tax/do-i-need-to-file-a-tax-return/>. The Government established the disqualifying condition in AG ¶ 19(g) requiring additional inquiry about the possible applicability of mitigating conditions.

Five mitigating conditions under AG ¶ 20 are potentially applicable:

- (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;
- (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;
- (c) the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control;
- (d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts;² and

²The Appeal Board has previously explained what constitutes a good-faith effort to repay overdue creditors or otherwise resolve debts:

(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 or provides evidence of actions to resolve the issue.

The Appeal Board concisely explained Applicant's responsibility for proving the applicability of mitigating conditions as follows:

Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in security clearance decisions is that articulated in *Egan, supra*. "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." Directive, Enclosure 2 ¶ 2(b).

ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013).

AG ¶¶ 20(a), 20(c), and 20(d) apply. For the period 2010 to 2012, his federal taxes due totaled \$37,354; federal taxes withheld totaled \$33,387; net federal taxes due totaled \$3,584; state taxes due totaled \$13,067; state taxes withheld totaled \$13,332; and he received a net \$265 state tax refund. Applicant admitted responsibility for and took reasonable actions to resolve his tax issues. In 2013, he filed and paid the federal taxes for 2010 to 2012 before he received the SOR. He expressed sincere remorse and assured he will timely file and pay his federal and state taxes in the future. Based on his credible and sincere promise to timely file his tax returns, such conduct "is unlikely to recur and does not cast doubt on [Applicant's] current reliability, trustworthiness, or good judgment," and "there are clear indications that the problem is being resolved or is under control." His filing and payment of his taxes showed good faith. His efforts are sufficient to fully mitigate financial considerations security concerns.

In order to qualify for application of [the good-faith mitigating condition], an applicant must present evidence showing either a good-faith effort to repay overdue creditors or some other good-faith action aimed at resolving the applicant's debts. The Directive does not define the term "good-faith." However, the Board has indicated that the concept of good-faith "requires a showing that a person acts in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation." Accordingly, an applicant must do more than merely show that he or she relied on a legally available option (such as bankruptcy) in order to claim the benefit of [the good-faith mitigating condition].

(internal citation and footnote omitted) ISCR Case No. 02-30304 at 3 (App. Bd. Apr. 20, 2004) (quoting ISCR Case No. 99-9020 at 5-6 (App. Bd. June 4, 2001)).

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an Applicant's eligibility for a security clearance by considering the totality of the Applicant's conduct and all the circumstances. The 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.

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. 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 some warrant additional comment.

Applicant is 32 years old, and he is working for a Defense contractor providing network engineer services. He has access to his company's sensitive information. There are no allegations of security violations. There is no evidence of alcohol abuse, use of illegal drugs, or criminal offenses aside from his failure to timely file his tax returns. Applicant understands what he needs to do to establish and maintain his financial responsibility. His filing of his tax returns and payment of his taxes for 2010 to 2012 was not timely and showed bad judgment; however, his corrective action in 2013 showed good faith. His maintenance of his other accounts in current status established a "meaningful track record" of debt payment. I am confident he will continue to pay his debts, timely file and pay his taxes, and maintain his financial responsibility.

I have carefully applied the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. Financial considerations security concerns are mitigated.

Formal Findings

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline F:	FOR APPLICANT
Subparagraphs 1.a and 1.b:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

Mark Harvey
Administrative Judge