



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



In the matter of:)	
)	
[Redacted])	ISCR Case No.14-03625
)	
Applicant for Security Clearance)	

Appearances

For Government: Nicole A. Smith, Esq., Department Counsel
For Applicant: Rebecca C. Lawrence, Esq.

11/15/2015

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guideline F (Financial Considerations), raised by Applicant’s failure to timely file his federal and state income tax returns and the resulting tax debts. As of the date of the hearing, Applicant had filed all past-due tax returns and settled his federal and state tax debts. Eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted a security clearance application on October 18, 2012. On December 18, 2014, the Department of Defense (DOD) sent him a Statement of Reasons (SOR) alleging security concerns under Guideline F. The DOD acted under Executive Order 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 on January 27, 2015, denied all the allegations, and requested a hearing before an administrative judge. (Tr. 7.) Department Counsel

was ready to proceed on July 6, 2015, and the case was assigned to me on July 13, 2015. On July 28, 2015, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for August 26, 2015. Applicant hired an attorney on August 19, 2015, and his attorney requested that the hearing be postponed. I granted the request. On September 8, 2015, DOHA notified Applicant's attorney that the hearing was rescheduled for September 23, 2015. I convened the hearing as rescheduled. Government Exhibits (GX) 1 through 6 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibits (AX) A through K, which were admitted without objection. DOHA received the transcript (Tr.) on October 1, 2015.

Findings of Fact

Applicant is a 61-year-old employee of a federal contractor. He has worked for his current employer since January 2003. He worked for the same employer from July 1996 to October 1999, and he took a leave of absence to work as the executive director of a non-profit organization from October 1999 to January 2003.

Applicant served on active duty in the U.S. Air Force from February 1974 to October 1996, when he retired as a major. (Tr. 83.) He received a security clearance in May 1980 and held it throughout his Air Force career. While on active duty, he attended college full time for a year through the "boot strap" program and obtained a bachelor's degree in November 1979. After he returned to full-time active duty, he obtained a master's degree in business and management in 1987. (GX 2 at 8; Tr. 22-23.)

Applicant married in December 1973. He and his wife have an adult daughter. He attended marriage counseling from March to September 2000 due to difficulty communicating with his wife. He stopped attending counseling because his wife refused to participate. (GX 5 at 24; GX 6 at 2.)

When Applicant applied for a revalidation of his security clearance in July 2006, he disclosed in his SCA that he owed about \$12,000 in federal income taxes for tax year 2000 and that his wages were garnished for \$2,400 in state income taxes in 2004. (GX 5 at 28.) He told a security investigator that he failed to file his state income tax returns for four or five years, but that he was not worried because he did not owe any taxes for those years. The state's computation of \$2,400 in taxes due did not reflect deductions to which he was entitled. After he filed his state tax returns, the \$2,400 collected by garnishment was refunded. According to the investigator's summary of the interview, Applicant attributed his failures to timely file to laziness and overwork. (GX 6 at 3.) At the hearing, he disagreed that he attributed his dereliction to laziness, but he agreed that he was overworked, trying to keep the non-profit organization solvent, and trying to keep up with work when he returned to his job with a federal contractor. (Tr. 55-56.) The record evidence is sparse regarding the circumstances causing Applicant's federal tax debt in 2004, but his failures to file state tax returns and his federal tax debt did not result in a revocation of his security clearance.

From 2005 to 2009, Applicant's nephew lived with him, stole money from him, and was arrested for shoplifting. He also had two foster children living in his home. During the same time, his adult daughter attempted suicide. He did not timely file his federal and state income tax returns from 2005 to 2009, and he attributed it to family stress, depression, and a demanding job.¹ (GX 2 at 11; Tr. 80-82.)

In 2009, Applicant was diagnosed with congestive heart disease and atrial fibrillation. (Tr. 26, 58.) In November 2011, Applicant and his mother both were diagnosed with cancer. His mother passed away on April 10, 2012. In June or July 2012, Applicant began treatment, including chemotherapy and radiation, and continued treatment until 2014. His treatment was complicated because of his weakened heart condition. His treatment left him weakened, exhausted, and sometimes confused. (Tr. 26-27, 73.)

Applicant timely filed his 2010 federal and state tax returns, but he did not timely file his 2011 returns. He did not request an extension of time to file his 2011 returns, because his mother passed away five days before the due date for his 2011 returns. (Tr. 60.) The Internal Revenue Service (IRS) filed a substitute tax return on his behalf for 2011. He did not timely file his returns for 2012.

In August 2014, Applicant engaged the services of a tax professional, and he filed his 2011 federal return, reflecting that he owed \$4,793; his 2012 federal return, reflecting that he owed \$6,190; and his 2013 federal return, reflecting that he owed \$5,815. (AX D, E and F; Answer to SOR; Tr. 38-44.). His 2011 and 2012 federal income tax returns were returned because they were not signed. He resubmitted them in September 2014. (Tr. 30-31; AX B at 1; AX C at 2.) He filed his state income tax return for 2012 in October 2014. (GX 2 at 31.) He filed his past-due tax returns after he learned that he could not refinance his house until he brought his tax accounts up to date. (Tr. 31.) He filed an amended return for tax year 2011 in September 2015, removing his nephew as a listed dependent and reflecting that he owed \$4,339. (AX G; Tr.45-47.)

Applicant testified that no one in the family could have assisted with filing the federal and state taxes while he was undergoing treatment. Although he told a security investigator in June 2013 that his wife wrote the checks for federal and state taxes, he testified at the hearing that he handles the family finances. (GX 2 at 10; Tr. 58.) I interpreted his testimony as saying that he made the family financial decisions but relied on his wife to make the payments on the family debts.

¹ Applicant's failures to timely file his federal and state returns for 2000 to 2009 and his resulting tax debts were not alleged in the SOR. However, conduct not alleged in the SOR may be considered to assess an applicant's credibility; to decide whether a particular adjudicative guideline is applicable; to evaluate evidence of extenuation, mitigation, or changed circumstances; to consider whether an applicant has demonstrated successful rehabilitation; or as part of a whole-person analysis. ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006). I have considered the unalleged conduct for these limited purposes.

When Applicant was interviewed by a security investigator in June 2013, he believed he owed about \$30,000-\$35,000 in state and federal taxes for 2009 and 2010. He withdrew \$20,000 from his 401(k) retirement account to pay his taxes. (GX 2 at 10.) His federal income tax transcript reflects that he made a \$4,689 payment to the IRS on January 14, 2013; but it does not reflect what year or years to which the payment applied. For tax year 2013, Applicant made a \$2,300 payment on February 26, 2015; and a \$3,000 payment on April 20, 2015. For tax year 2012, Applicant made a \$310 payment on January 14, 2015; a \$2,300 payment on January 26, 2015; a \$3,000 payment on April 20, 2015; and a \$2,577 payment on June 15, 2015. (AX B at 2.) For tax year 2011, he made a \$6,190 payment on January 2, 2015. (AX C at 2.) In July 2015, he was notified by the IRS that he owed \$22,723 for tax year 2012. (AX H; Tr. 48.)

Between January and September 2015, Applicant made six payments to the IRS totaling about \$35,600. His Electronic Federal Tax Payment System printout reflects that his federal tax debts for tax years 2011 through 2013 have been settled. (AX I.)

Applicant's state tax debt was partially satisfied by applying tax refunds to the debt. He satisfied the remaining debt by making five payments of \$150 that began in October 2014. (GX 2 at 13-14.)

As of the date of the hearing, Applicant had not filed his federal and state returns for 2014, but he had requested an extension, because he was awaiting distribution of the assets from his mother's estate, and he was unsure whether the revenue earned from his mother's properties would affect his taxes for 2014. (Tr. 79.) However, he knew he would owe taxes for 2014, and he made a \$6,000 payment in April 2015 toward his expected tax liability. (AX J; Tr. 74.) The final accounting for his mother's estate was filed on August 2, 2015, and it reflects that he inherited \$1,000. (AX K.)

The transcript does not reflect Applicant's hesitant manner of speaking during the hearing and his long pauses before answering questions. After counsel for both sides completed their questioning of Applicant, I asked him if he still had problems with mental confusion, and he responded that he still has problems with recalling information. (Tr. 85-86.)

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 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 SOR alleges that Applicant owes about \$4,575 in federal income taxes for tax year 2012 (SOR ¶ 1.a); has not filed his federal income tax return for 2012 (SOR ¶ 1.b); has not filed his federal income tax return for 2011; and owes about \$27,354 for 2011 (SOR ¶ 1.c). It also alleges that he has not filed his state income tax return for 2012 (SOR ¶ 1.d), and owes about \$1,078 in state taxes for 2011 and 2013 (SOR ¶ 1.e).

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 information. An individual who is financially overextended is at risk of having to engage in illegal 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 documentary evidence and testimony presented at the hearing established the following disqualifying conditions under this guideline: AG ¶ 19(a) ("inability or unwillingness to satisfy debts"); AG ¶ 19(c) ("a history of not meeting financial obligations"); and AG ¶ 19(g) ("failure to file annual Federal, state, or local income tax returns 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, a business downturn, unexpected medical emergency, or a death, divorce or separation), and the individual acted responsibly under the circumstances;

AG ¶ 20(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;

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

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 or provides evidence of actions to resolve the issue.

AG ¶ 20(a) is not established. Applicant's untimely filings and tax debts are recent, frequent, and did not occur under circumstances making them unlikely to recur.

AG ¶ 20(b) is partially established. Applicant attributed his failures to timely file his federal and state income tax returns in part to his chaotic family life, i.e., communication problems with his wife and the conduct of his nephew and daughter, which were conditions largely beyond his control. He voluntarily undertook the responsibility for two foster children and the demands of his job. He has not explained why he did not address his past-due returns when he filed his federal and state returns in 2010. However, his bout with cancer and the debilitating treatment regimen from November 2011 to mid-2014, causing weakness, exhaustion, and mental confusion, were conditions beyond his control. He acted responsibly by resolving his tax problems when he sufficiently recovered from the physical and mental effects of his medical problems. He made a payment on his tax debt in January 2013, filed his past-due federal tax returns in August 2014, and filed his past-due state return in October 2014.

AG ¶ 20(c) is established. Applicant engaged the services of a tax professional, filed all his past-due returns, and satisfied his federal and state tax debts.

AG ¶ 20(d) is established. Applicant began making payments on his tax debts in January 2013, well before he received the SOR. He has complied with his federal and state payment plans, and his tax debts have been resolved.

AG ¶ 20(e) is not established. Applicant denied all the allegations in the SOR, and he disagreed with some of the IRS computations of his tax debt, but he has paid all the taxes claimed by the IRS and the state tax authorities.

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 some warrant additional comment.

Applicant was candid, sincere, and credible at the hearing. He appears to still suffer from the physical and mental consequences of his medical problems. He has served the United States for 41 years, in and out of uniform, and has held a security clearance during most of his service. Rather than being irresponsible, he has been overly responsible, taking on more than he can handle, i.e., a troubled nephew, two foster children, a struggling non-profit organization, and a demanding primary job. He has obtained professional help in dealing with his tax problems, and he appears to have learned the importance of being proactive, as evidenced by his prepayment of \$6,000 for tax year 2014.

A security clearance adjudication is not a tax-collection procedure. It is an evaluation of an individual's judgment, reliability, and trustworthiness. See ISCR Case No. 09-02160 (App. Bd. Jun. 21, 2010.) 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 tax problems. Accordingly, I conclude he has carried his burden of showing that it is clearly consistent with the national interest to continue his eligibility for access to classified information.

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-1.e:

For Applicant

Conclusion

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

LeRoy F. Foreman
Administrative Judge