



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



In the matter of:)
)
) ISCR Case No. 14-06554
)
Applicant for Security Clearance)

Appearances

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

07/06/2015

Decision

DUFFY, James F., Administrative Judge:

Applicant failed to mitigate security concerns under Guidelines F (financial considerations) and Guideline E (personal conduct). Clearance is denied.

Statement of the Case

On April 18, 2014, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP). Based on a review of Applicant's e-QIP and the ensuing investigation, Department of Defense (DOD) adjudicators issued Applicant a Statement of Reasons (SOR) on January 26, 2015, 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*, dated January 2, 1992, as amended (Directive); and the adjudicative guidelines (AG) implemented on September 1, 2006. The SOR alleged security concerns under Guidelines F and E.

On February 17, 2015, Applicant answered the SOR and elected to have his case decided on the written record in lieu of a hearing. On March 26, 2015, Department

Counsel prepared a File of Relevant Material (FORM) that contained documents marked as Items 1 through 4. On April 29, 2015, Applicant received a copy of the FORM and was given 30 days from its receipt to submit objections or supply additional information. He did not submit a response to the FORM. The case was assigned to me on June 19, 2015.

Findings of Fact

Under Guideline F, the SOR alleged that Applicant failed to file his federal and state income tax returns for 2008 (SOR ¶ 1.a) and that he had seven delinquent debts totaling about \$8,086 (SOR ¶¶ 1.b-1.h). SOR ¶ 1.a was cross-alleged as the sole Guideline E allegation (SOR ¶ 2.a). In his Answer to the SOR, Applicant admitted each allegation with the exception of the \$314 debt in SOR ¶ 1.g. His admissions are incorporated as findings of fact.¹

Applicant is a 42-year-old employee of a defense contractor. He has been working for that contractor since May 2014. He has not served in the military. He attended college for about six years, but has not yet received a degree. He is married and has three children, ages 7, 16, and 17, and a stepchild, age 25. He is seeking a security clearance for the first time.²

SOR ¶¶ 1.a and 2.a – failure to file federal and state income tax returns for 2008. In his e-QIP, Applicant reported continuous employment in various jobs since September 2000. He indicated that he failed to file his 2008 federal and state income tax returns before the deadline and continued delaying the filing of those returns. He planned to file those returns the following year, but forgot to do so. Since then, he had not thought about filing those returns until he was required to submit his e-QIP in April 2014. The record contains no evidence that he has filed those returns.³

The IRS advises taxpayers that “Regardless of your reason for not filing a required return, file your tax return as soon as possible.” Penalties may be imposed for failing to file a tax return as required or failing to pay taxes as required. “[T]he statute of limitations for the IRS to assess and collect any outstanding balances does not start until a return has been filed. In other words, there is no statute of limitations for assessing and collecting tax if no return has been filed.”⁴

¹ Item 1.

² Items 2, 3.

³ Items 1, 2, 3.

⁴ See <http://www.irs.gov/taxtopics/tc153.html> and <http://www.irs.gov/uac/Failure-to-File-or-Pay-Penalties:-Eight-Facts>.

SOR ¶ 1.b-1.c and 1.e-1.h – six collection accounts totaling \$1,751. These consist of four medical accounts, a cable television account, and a telecommunications account. Two of the medical bills were incurred when an ambulance took him to an emergency room because he was experiencing chest pains. He provided no documentation showing that any of these debts were being paid or otherwise resolved. He denied the cable television account (SOR ¶ 1.g), claiming he never had an account with the listed company. He provided no documentation that he has disputed the debt in SOR ¶ 1.g.⁵

SOR ¶ 1.d – collection account for \$6,335. This debt is for a motor scooter. In his e-QIP, Applicant stated that he could not afford to purchase this item, but he did so against his wife's wishes. He indicated that he could not make the first payment, and the scooter was eventually repossessed. He also stated that he had not attempted to satisfy this debt because he could not afford to make the payments.⁶

Applicant provided no evidence that he received financial counseling. He did not provide a monthly budget. It is unknown whether he has any discretionary income remaining each month after payment of his expenses.

Policies

The President of the United States 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. *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988). The President has authorized the Secretary of Defense to grant 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. The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These AGs 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 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, in reaching a decision.

⁵ Items 1, 2, 3, 4.

⁶ Items 1, 2, 3, 4.

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 of 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), Section 3. Thus, a clearance decision is merely an indication that the Applicant has or 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 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

Guideline F, Financial Considerations

The security 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).

Applicant admissions and the record evidence established three disqualifying conditions in AG ¶ 19:

- (a) inability or unwillingness to satisfy debts;
- (c) a history of not meeting financial obligations; and
- (g) failure to file annual Federal, state, or local income tax returns as required

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; and
- (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.

None of the mitigating conditions are established. Applicant still has not filed his 2008 federal and state income tax returns. His delinquent debts are ongoing. The medical expenses were incurred due to conditions beyond his control, but he provided no evidence showing that he has acted responsibly in addressing those debts. Insufficient evidence was presented to conclude his financial problems are unlikely to

recur. No evidence was presented that he received financial counseling. He provided no documentation showing he has a legitimate basis for disputing any debts. His financial problems continue to cast doubt on his current reliability, trustworthiness, and good judgment.

Guideline E, Personal Conduct

The security concern for this guideline is set out in AG ¶ 15:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

AG ¶ 16 describes two conditions that could raise a security concern and may be disqualifying in this case:

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information; and

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as engaging in activities which, if known, may affect the person's personal, professional, or community standing

Applicant failed to file his 2008 federal and state income tax returns as required. Such a failure reflects an unwillingness to comply with rules and may affect his personal, professional, or community standing. Both of the above disqualifying conditions apply.

Two mitigating conditions under AG ¶ 17 are potentially applicable:

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the

stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur.

For the reasons discussed under Guideline F above, I find that none of the Guideline E mitigating conditions apply to Applicant's failure to file his 2008 federal and state income tax returns.

Whole-Person Concept

In the adjudication process, an administrative judge must carefully weigh a number of variables known as the whole-person concept. Available information about the applicant as well as the factors listed in AG ¶ 2(a) should be considered in reaching a determination.⁷ In this case, I gave due consideration to the information about Applicant in the record and concluded the favorable information, including the mitigating evidence, does not outweigh the security concerns at issue. Applicant failed to meet his burden of persuasion. His handling of his financial problems leaves me with doubts as to his current eligibility to access classified information. Following the *Egan* decision and the "clearly consistent with the national interest" standard, doubts about granting Applicant's eligibility for a security clearance must be resolved in favor of national security.

Formal Findings

Formal findings as required by Section E3.1.25 of Enclosure 3 of the Directive are:

Paragraph 1, Guideline F:	Against Applicant
Subparagraphs 1.a – 1.h:	Against Applicant
Paragraph 2, Guideline E:	Against Applicant
Subparagraph 2.a:	Against Applicant

⁷ The adjudicative process factors listed at AG ¶ 2(a) are as follows:

(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.

Decision

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Clearance is denied.

James F. Duffy
Administrative Judge