



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



In the matter of:)	
)	
[NAME REDACTED])	ISCR Case No. 15-00156
)	
Applicant for Security Clearance)	

Appearances

For Government: Adrienne M. Strzelczyk, Esq., Department Counsel
For Applicant: Patrick K. Korody, Esq.

04/11/2016

Decision

MALONE, Matthew E., Administrative Judge:

Applicant failed to timely file his federal income tax returns for the 2011, 2012, and 2013 tax years. Applicant always timely filed his tax returns before 2011; he filed his past-due returns five months before the Statement of Reasons (SOR) was issued; he has timely filed his returns since 2013. It is unlikely that he will again fail to meet his income tax obligations. When assessed in the context of his entire personal and professional background, his conduct in this regard is not indicative of his overall judgment, reliability or trustworthiness. His request for a security clearance is granted.

Statement of the Case

On August 7, 2014, Applicant submitted an Electronic Questionnaire for Investigations Processing (EQIP) to renew eligibility for a security clearance required for his employment with a defense contractor. Based on the results of the ensuing background investigation, Department of Defense (DOD) adjudicators could not

determine that it is clearly consistent with the national interest for Applicant to continue to hold a security clearance.¹

On August 28, 2015, DOD issued an SOR alleging facts which raise security concerns addressed under the adjudicative guidelines² for financial considerations (Guideline F) and personal conduct (Guideline E). Applicant timely responded to the SOR (Answer) and requested a hearing. The case was assigned to me on January 8, 2016, and I convened a hearing on February 10, 2016. The parties appeared as scheduled. Department Counsel presented Government Exhibits (Gx.) 1 and 2.³ Applicant testified and presented Applicant's Exhibits (Ax.) A - D. All exhibits were admitted without objection. One witness also testified for Applicant. A transcript of the hearing (Tr.) was received on February 19, 2016.

Findings of Fact

Under Guideline F, the Government alleged that Applicant did not timely file his federal income tax returns for the 2011 - 2013 tax years (SOR 1.a - 1.c). Under Guideline E, the Government cross-alleged the Guideline F information as adverse personal conduct (SOR 2.a). In response to the SOR, Applicant admitted these allegations, and provided a statement explaining his conduct. He also provided documents showing he had filed his past-due returns and paid the taxes owed for each tax year at issue. (Answer; Tr. 6 - 7) In addition to the facts established by these exhibits and by Applicant's admissions, I make the following findings of fact.

Applicant is 49 years old. He and his wife have been married since June 1988, and they have three children between the ages of 25 and 16. He and his family have lived in the same house on the east coast of the United States since February 1992. Applicant served in the United States Navy from December 1984 until June 2006, when he retired as a chief petty officer in the Naval aviation community. In 2006, he went to work as a commercial truck driver, but quickly decided the work did not suit him and that he missed being around the military community. He was hired in March 2007 by a defense contractor for work as a technician and site manager. He has continued in this line of work ever since, and he was hired by his current employer in August 2014. (Gx. 1; Tr. 27 - 28)

The company that employed Applicant from June 2012 until August 2014 assigned him to projects that required him to be away from home for long periods of time. From 2009 until early 2011, Applicant was in charge of a project that required him

¹ Required by Executive Order 10865, as amended, and by DOD Directive 5220.6 (Directive), as amended.

² The adjudicative guidelines were implemented by the Department of Defense on September 1, 2006. These guidelines were published in the Federal Register and codified through 32 C.F.R. § 154, Appendix H (2006).

³ A copy of the October 26, 2015, letter by which Department Counsel forwarded to Applicant advance copies of Gx. 1 and 2 is included for administrative purposes only as Hearing Exhibit (Hx.) 1. (Tr. 11)

to be away from home most of the time while working 12-hour days seven days a week. When he returned, his employer asked him to take over another project away from home that would be almost as demanding even though it was not as far away. That project was intended to take no more than 60 to 90 days. It lasted a year. Basically, Applicant worked away from home about 90 percent of the time between 2009 and 2012. (Gx. 1 and 2; Tr. 29 - 34)

Applicant has had back problems since the late 1980s. While he was working on the first project away from home between 2009 and 2011, his back problems worsened. By the time he finished his second project away from home in 2012, he was nearly disabled. The everyday impact on both Applicant and his family as care givers was significant. A diagnosis in August 2012 showed he had herniated discs and degenerative joint disease in his lower back. Applicant was told he would not be able to work anymore and was advised to apply for disability benefits. Aside from receiving pain medications, Applicant was not provided any other course of treatment. Applicant then received a second opinion, which provided a less drastic (but still significant) diagnosis. In September 2012, Applicant began a course of pain management and rehabilitative treatment that has shown positive results and has allowed him to continue working, albeit, not as rigorously as before. (Answer; Ax. C; Tr. 35 - 38)

When Applicant submitted his EQIP, he disclosed he had not filed his tax returns as alleged in the SOR. He also stated that he was in the process of filing those returns and establishing repayment arrangements of taxes, penalties, and interest owed for those tax years. In October 2014, he discussed this matter with a Government investigator as part of his background investigation and reiterated his intent to resolve his past-due returns. Applicant completed that process in March 2015, when his past-due returns were filed. He also established that he has finished repaying all of his tax and penalty obligations for those years. (Answer; Gx. 1 and 2; Ax. B)

Applicant accepts full responsibility and offers no excuses for his failure to timely file his income tax returns. By way of explanation, he cited his work situation between 2009 and 2011, and his subsequent back problems as factors that disrupted his otherwise normal circumstances. He testified that he was distracted from normal obligations, including, but not limited to, his annual tax filings. Nonetheless, Applicant readily acknowledged that his failure to comply with his income tax obligations simply was due to his own procrastination. (Answer; Tr. 39 - 40, 51 - 52)

Applicant's witness and the other whole-person information he submitted show that he has a reputation for hard work and professionalism. Applicant is characterized as reliable and trustworthy. His witness and other references who know that he failed to file his taxes described Applicant as remorseful and embarrassed by his own conduct. They also are confident that he has done everything he can to file his past-due returns and avoid similar lapses in the future. Applicant's Navy service was characterized by numerous personal awards, decorations, and professional qualifications over the course of his career. (Ax. A; Ax. D; Tr. 14 - 20)

Policies

Each security clearance decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information,⁴ and consideration of the pertinent criteria and adjudication policy in the adjudicative guidelines (AG). Decisions must also reflect consideration of the factors listed in ¶ 2(a) of the guidelines. Commonly referred to as the “whole-person” concept, those 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.

The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an applicant. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information.

A security clearance decision is intended only to resolve whether it is clearly consistent with the national interest⁵ for an applicant to either receive or continue to have access to classified information. The Government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for an applicant. Additionally, the Government must be able to prove controverted facts alleged in the SOR. If the Government meets its burden, it then falls to the applicant to refute, extenuate or mitigate the Government's case. Because no one has a “right” to a security clearance, an applicant bears a heavy burden of persuasion.⁶ A person who has access to classified information enters into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability and trustworthiness of one who will protect the national interests as his or her own. The “clearly consistent with the national interest” standard compels resolution of any reasonable doubt about an applicant's suitability for access in favor of the Government.⁷

⁴ See Directive. 6.3.

⁵ See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

⁶ See *Egan*, 484 U.S. at 528, 531.

⁷ See *Egan*; AG ¶ 2(b).

Analysis

Financial Considerations

Available information is sufficient to support the SOR allegations under this guideline. The facts established reasonably raise a security concern about Applicant's finances that is addressed, in relevant part, at AG ¶ 18, as follows:

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.

More specifically, this record requires application of the disqualifying condition at AG ¶ 19(g) (*failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same*). The record also requires application of the mitigating condition at 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*). Applicant disclosed his failure to file in his EQIP. He discussed this issue with a Government investigator a month later and stated his intent to file his past-due returns as soon as possible. Within five months, all of his returns were filed and any taxes he owed were paid or were being paid through a repayment plan. Applicant's past-due tax returns were resolved before the SOR was issued, and he has shown that, aside from the three years at issue here, he has always met his tax-filing obligations. On balance, available information is sufficient to mitigate the security concerns raised by the Government's information about Applicant's finances.

Personal Conduct

Available information also reasonably raised a security concern about Applicant's judgment and reliability. That concern is expressed at 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.

More specifically, the following AG ¶ 16 disqualifying condition applies:

(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.

Applicant's failure to file his tax returns is mitigated under the guideline for financial considerations. Nonetheless, the Government must be satisfied more generally that the poor judgment underlying his conduct no longer presents a security concern. In this case, the following AG ¶ 17 mitigating conditions apply:

(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.

Applicant's failure to file was not indicative of his overall good judgment, trustworthiness, and reliability. His personal and professional circumstances have changed for the better, in that, his medical issues are largely resolved, and his current employment is not as disruptive to his personal life. He has taken full responsibility for his actions, and there is little likelihood of recurrence. Available information supports a conclusion that the security concern about Applicant's personal conduct has been mitigated.

I also have evaluated this record in the context of the whole-person factors listed in AG ¶ 2(a). Applicant is an honorably-discharged veteran and has been gainfully employed in the defense industry since 2006. He is a responsible husband and father, and he has a solid reputation in the workplace for reliability and trustworthiness. The adverse information at issue here was, within the context of his entire background, isolated and unlikely to recur. A fair and commonsense assessment of the record evidence as a whole shows Applicant's misconduct was an atypical lapse in judgment and no longer raises a security concern.

Formal Findings

Formal findings 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 - 1.c:	For Applicant

Paragraph 2, Guideline E: FOR APPLICANT

Subparagraph 2.a: For Applicant

Conclusion

In light of all of the foregoing, it is clearly consistent with the national interest for Applicant to have access to classified information. Applicant's request for a security clearance is granted.

MATTHEW E. MALONE
Administrative Judge