



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



In the matter of:)	
)	
)	ISCR Case No. 15-01723
)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Aubrey De Angelis, Esquire, Department Counsel
For Applicant: Ryan C. Nerney, Esquire

04/27/2017

Decision

WHITE, David M., Administrative Judge:

Applicant failed to file his 2007 through 2012 Federal income tax returns as required. Resulting security concerns were not mitigated. Based on a review of the pleadings, testimony, and exhibits, eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) on November 2, 2012. On October 1, 2015, the Department of Defense Consolidated Adjudications Facility (DoD CAF) issued a Statement of Reasons (SOR) to Applicant, detailing security concerns under Guideline F (Financial Considerations). The action was taken under Executive Order 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information*, effective within the Department of Defense after September 1, 2006.

Applicant answered the SOR in writing (Answer) on October 26, 2015, and requested a decision based on the written record, without a hearing. After receiving the File of Relevant Materials from Department Counsel, Applicant consulted with and retained his attorney who, on July 13, 2016, filed a notice of appearance and requested a hearing before an administrative judge. Department Counsel was prepared to proceed on August 11, 2016, and the case was assigned to a different administrative judge in the vicinity where Applicant was temporarily working. Applicant's counsel then requested that the hearing be relocated to the area near Applicant's permanent work location, and the case was reassigned to me on August 19, 2016. The Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing on November 17, 2016, setting the hearing date for December 6, 2016. I convened the hearing as scheduled. The Government offered Exhibits (GE) 1 through 3, which were admitted without objection. Applicant testified on his own behalf, and offered Exhibits (AE) A through K, which were also admitted without objection. I granted his request to leave the record open until January 6, 2017, to permit him to submit additional evidence. DOHA received the transcript of the hearing (Tr.) on December 16, 2016. Applicant timely submitted AE L through AE Q, which were admitted without objection, and the record closed as scheduled.

Findings of Fact

Applicant is a 35-year-old employee of a Federal contractor, where he has worked since 1999. He did not graduate from high school, and has no military service. He is divorced. He lives with his fiancée and their three children. He was granted a security clearance in 2001. (GE 1; Tr. 28, 30-31, 42.)

In his Answer, Applicant admitted the allegation, in SOR ¶ 1.a, that he failed to file his Federal income tax returns for tax years 2007 through 2012, as required.¹ Applicant's admissions, including those made during two interviews with investigators from the Office of Personnel Management (OPM), are incorporated in the following findings. (Answer; GE 2; GE 3.)

During 2001 Applicant met and began dating a woman from Thailand, while he was working for his employer on a temporary project in Japan. Before returning home when the project ended in February 2002, he traveled to Thailand for a week to vacation with the woman and meet her family. While there he met the woman's sister, with whom he started a long-distance dating relationship in 2003 after ending his relationship with the woman. From sometime in 2004 until April 2007, Applicant sent the sister \$200 to \$500 per month for her living expenses. He visited the sister in Thailand for two weeks in 2004 and for three weeks in 2005. After the 2004 visit, they maintained almost daily contact by telephone or email. (GE 3.)

¹ Although not specifically alleged in the SOR, Applicant, his counsel, and Department Counsel agreed that the words, "as required," were plainly implied and understood by all parties to be included, so formal amendment of the SOR to add that language was unnecessary. See Tr. 17-19.

In May 2007, Applicant sponsored the sister's immigration into the United States on a fiancée visa. They were married in July 2007, and he then helped her apply for permanent resident alien status. During August 2007, his wife informed him that she no longer wanted to live as a married couple, and moved across the country to live in another state. Applicant had no contact with her during or after January 2008, but believes that she was granted permanent resident status later that year. In late 2012, after more than five years had passed since the marriage ceremony, his wife filed for divorce in her new state of residence and contacted Applicant who agreed to sign the divorce papers for her. (GE 1; GE 3.)

Applicant prepared and filed his own tax returns through tax year 2006. He said that, after he sold shares of stock in 2007 to pay expenses for his wife's immigration and the marriage, he was not sure how to properly report that information on his tax return. He also claimed that the marital separation, "kind of screwed me up . . . I was probably a little bit depressed about it . . . and I'm more of a procrastinator, kind of push things off . . . the following years snowballed and I kept pushing it off." (Tr. 32.) He received numerous letters from the IRS about his failures to file returns, but chose to ignore them because he thought he had enough withheld money from his wages to cover his actual tax liabilities and did not realize failing to file returns would affect his security clearance. (GE 1; GE 2; GE 3; Tr. 32-37.)

Applicant acknowledged his failure to file required Federal income tax returns for tax years 2007 through 2011 on his November 2012 e-QIP. He said that he was looking for a tax professional to help him sort out the problem. (GE 1.) During his OPM interview in December 2012, he said that he had been in contact with an accountant and was trying to get the necessary paperwork together, including some from his wife so that he could properly file his marital status during the years involved. (GE 2.)

On or about April 10, 2013, Applicant's accountant filed his Federal income tax returns for tax years 2007 through 2012 on Applicant's behalf. They were received by the IRS on or before April 15, 2013, according to IRS account transcripts for the years involved. Contrary to his beliefs, Applicant only had sufficient withholding from his wages to cover his tax obligations during 2007 and 2008. He owed additional taxes and penalties for tax years 2009 through 2012. He fully repaid these tax debts through an IRS installment agreement, under which he paid \$200 per month from December 2013 through April 2014, and the application of his tax year 2013 refund toward the remaining balance due. Applicant timely filed his Federal tax returns for tax years 2012 through 2015, as required. (AE A; AE D through AE I; AE L through AE Q; Tr. 37-38, 55-56.)

Applicant's 2007 through 2012 Federal income tax returns falsely claimed that his filing status during those years was "single." After being given an opportunity to clarify the reason for that discrepancy, Applicant offered no further evidence on the subject. He did, however, submit a "Statement of Intent" to never fail to file his Federal or state income tax returns again, with consent to automatic revocation of his security clearance for any violation. (Tr. 69-73; AE C.)

In addition to hiring a tax accountant in 2013 to file his past-due tax returns, Applicant provided a certificate showing that he completed an internet credit counseling session on September 19, 2016, that complied with the requirements for filing a Chapter 11 bankruptcy. No debt repayment plan was prepared. He submitted letters from two coworkers describing his good character and excellent performance as a Lead Welder/Mechanic for their employer. (AE B; AE J.)

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions (DCs) and mitigating conditions (MCs), which are to be used in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in AG ¶ 2 describing the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶¶ 2(a) and 2(c), the entire process is a conscientious scrutiny of applicable guidelines in the context of a number of variables known as the whole-person concept. The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, "[t]he applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision." Section 7 of Executive Order 10865 provides: "Any determination under this order adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned."

A person applying for access to classified information seeks to enter into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of

the possible risk the applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Analysis

Guideline F, Financial Considerations

The security concerns relating to the guideline for financial considerations are set out in AG ¶ 18, which reads in pertinent part:

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.²

AG ¶ 19 describes one condition that could raise security concerns and may be disqualifying in this case:

(g) failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same.

Applicant failed to file his Federal income tax returns for tax years 2007 through 2011 as required, and has still not accurately filed them with respect to his marital status during those years. This conduct raises security concerns under this guideline, and shifts the burden to Applicant to rebut, extenuate, or mitigate those concerns.

The DOHA Appeal Board has held that:

Failure to file tax returns suggests that an applicant has a problem with complying with well-established government rules and systems. Voluntary compliance with these things is essential for protecting classified information. ISCR Case No. 14-04437 at 3 (App. Bd. Apr. 15, 2016).

² See ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012).

Someone who fails repeatedly to fulfill his or her legal obligations does not demonstrate the high degree of good judgment and reliability required of those granted access to classified information. See, e.g., ISCR Case No. 14-01894 at 5 (App. Bd. Aug. 18, 2015). See *Cafeteria & Restaurant Workers Union Local 473 v. McElroy*, 284 F.2d 173, 183 (D.C. Cir. 1960), *aff'd*, 367 U.S. 886 (1961).³

The guideline includes five conditions in AG ¶ 20 that could mitigate security concerns arising from the evidence in this case:

(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.

Applicant's conduct of security concern involved five years of disregard for his lawful income tax obligations to the Federal Government. It did not occur under unusual circumstances, and was relatively recent. He provided no plausible evidence that his disregard of tax filing obligations, as well as numerous notices from the IRS, was caused by or connected to his separation after one month of marriage to the foreign national whom he sponsored for entry and permanent resident status. His unexplained failure to report this marriage when he eventually did file the required returns supports ongoing doubt about his current reliability, trustworthiness, and judgment, and cannot be considered responsible conduct under the circumstances. AG ¶¶ 20(a) and (b) do not provide mitigation of the security concerns.

³ ISCR Case No. 12-10933 at 3 (App. Bd. June 29, 2016).

There is insufficient evidence that Applicant participated in effective financial counseling. He completed an internet credit counseling session designed for compliance with bankruptcy law, but which had no apparent relationship to noncompliance with tax obligations. His willful disregard of those obligations was too lengthy, and too recent, to justify a determination that his financial problems are under control. Thus, he failed to establish mitigation under AG ¶ 20(c).

After filing his returns for 2007 through 2012, Applicant entered into an installment payment agreement and used a subsequent refund to resolve his outstanding tax delinquencies from tax years 2009 through 2012. However, those debts were not alleged as ongoing security concerns. These actions did not establish mitigation under AG ¶ 20(d) for his failure to file the returns as required.

Applicant did not deny the SOR allegation that he failed to file his Federal income tax returns for tax years 2007 through 2012. However, the record evidence establishes that he did timely file his 2012 return, albeit with false information about his marital status. This establishes some mitigation under AG ¶ 20(e) concerning his 2012 return.

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 relevant 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.

According to 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 considered the potentially disqualifying and mitigating conditions in light of all pertinent facts and circumstances. Applicant is a mature adult. He is responsible for the choices and conduct that underlie the security concerns expressed in the SOR, involving many years of failure to file required income tax returns without credible justification. The potential for untrustworthiness, pressure, or duress is undiminished by his late filing of those returns with false marital status information. There is insufficient evidence to date suggesting that his knowing and voluntary disregard for routine obligations to the Federal

