



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



In the matter of:)
)
) ISCR Case No. 18-00980
)
)
Applicant for Security Clearance)

Appearances

For Government: Andrew Henderson, Esq., Department Counsel
For Applicant: Leon J. Schachter, Esq., Applicant’s Counsel

February 14, 2019

Decision

CEFOLA, Richard A., Administrative Judge:

Statement of the Case

On April 26, 2018, in accordance with DoD Directive 5220.6, as amended (Directive), the Department of Defense issued Applicant a Statement of Reasons (SOR) alleging facts that raise security concerns under Guideline F. The SOR further informed Applicant that, based on information available to the government, DoD adjudicators could not make the preliminary affirmative finding it is clearly consistent with the national interest to grant or continue Applicant’s security clearance.

Applicant answered the SOR on June 5, 2018, and requested a hearing before an administrative judge. (Answer.) The case was assigned to me on August 31, 2018. As Applicant Counsel’s firm had scheduling conflicts, the Defense Office of Hearings and Appeals (DOHA) could not issue a notice of hearing until November 2, 2018, scheduling the hearing for November 27, 2018. The hearing was convened as scheduled. The Government offered Exhibits (GXs) 1 and 2, which were admitted after Applicant authenticated GX 2. (Transcript (TR) at page 38 line 4 to page 39 line 16.) Applicant testified on his own behalf and called three witnesses to testify. Applicant

presented documents, which I marked Applicant's Exhibits (AppXs) A through H, and 11~17. DOHA received the TR on December 7, 2018.

Findings of Fact

Applicant denied the SOR allegations. After a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is a 43-year-old employee of a defense contractor. (GX 1 at pages 5 and 13.) He has been employed with the defense contractor since October of 2014. (GX 1 at page 13.) He graduated from the U.S. Naval Academy in 1999, and achieved the rank of Lieutenant Commander until his departure from active duty in 2008. (GX 1 at pages 19~29, and AppX B.) While on active duty, Applicant went to "Justice School," and was certified as "a legal officer." He has held a security clearance since 1999. (*Id.*, and TR at page 39 line 19 to page 41 line 25.)

Guideline F - Financial Considerations

1.a. and 1.b. Applicant failed to file both his Federal and state income tax returns, in a timely fashion, for tax years 2012~2016. (TR at page 28 line 20 to page 37 line 25, and at page 41 line 13 to page 48 line 20.) He was working several jobs, had some non-life-threatening health issues, and a romantic break up with his "girlfriend." (*Id.*) He avers that if he was due a refund; he was not required to file, but would forfeit any refund. (TR at page 29 lines 2~21.) In light of Applicant's education from a U.S. military academy, coupled with his attending the Naval Justice School, I find this averment not to be credible.

Applicant subsequently filed all of his delinquent tax returns in May of 2018, as evidenced by documentation of those filings. (AppXs D, H and 24~29.) It is interesting to note, that on his 2012 Federal income tax return (FITR) Applicant owed \$1,322, and on his 2014 FITR he owed \$969. (AppX D.)

Applicant's current supervisor, prior supervisor, and a co-worker testified as to Applicant good character. (TR at page 15 line 22 to page 26 line 11.) However, his current supervisor was surprised by Applicant's averment as to Applicant's lack of understanding of his responsibility to file his income tax returns. (TR at page 17 line 18 to page 18 line 6.) Applicant also submitted a favorable reference from another co-worker. (AppX C at page 5.)

Policies

When evaluating an applicant's national security eligibility, 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 and mitigating conditions, which are to be used in evaluating an applicant's national security eligibility.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, administrative judges apply the guidelines 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), the entire process is a conscientious scrutiny 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 national security eligibility 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.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.15 states the "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."

A person who applies 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.

Section 7 of Executive Order (EO) 10865 provides that adverse decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline F - Financial Considerations

The security concern relating to the guideline for Financial Considerations is set out in AG ¶ 18:

Failure 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 or sensitive information. Financial distress can also be caused or exacerbated by, and thus can be a possible indicator of, other issues of personnel security concern such as excessive gambling, mental health conditions, substance misuse, or alcohol abuse or dependence. An individual who is financially overextended is at greater risk of having to engage in illegal or otherwise questionable acts to generate funds. Affluence that cannot be explained by known sources of income is also a security concern insofar as it may result from criminal activity, including espionage.

The guideline notes several conditions that could raise security concerns under AG ¶ 19. One is potentially applicable in this case:

(f) failure to file or fraudulently filing annual Federal, state, or local income tax returns or failure to pay annual Federal, state, or local income tax as required.

Applicant failed to file five years of income tax returns in a timely fashion. The evidence is sufficient to raise this disqualifying condition.

AG ¶ 20 provides conditions that could mitigate security concerns. I considered all of the mitigating conditions under AG ¶ 20 including:

(g) the individual has made arrangements with the appropriate tax authority to file or pay the amount owed and is in compliance with those arrangements.

Although Applicant filed his delinquent income tax returns in 2018, his procrastination is troubling. He also owed on his FITRs for tax years 2012 and 2014. These debts to the Federal government were delinquent for five and three years, respectively, until his 2018 filings. He has not acted reasonably with respect to his legal obligation to file his income tax returns. Guideline F is found against Applicant.

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(d):

(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. Applicant has a laudable history of working in the defense industry and is respected by his supervisors and co-workers. He performs well at his job. However, overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the Financial Considerations security concerns.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of the Directive, are:

Paragraph 1, Guideline F:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant

Conclusion

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

Richard A. Cefola
Administrative Judge