



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



In the matter of:)
)
) ISCR Case No. 18-01512
)
Applicant for Security Clearance)

Appearances

For Government: Benjamin Dorsey, Esq., Department Counsel
For Applicant: Daniel P. Myers, Esq.

07/03/2019

Decision

COACHER, Robert E., Administrative Judge:

Applicant has not mitigated the financial considerations security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On October 15, 2018, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline F, financial considerations. DOD acted under Executive Order (EO) 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 effective within the Department of Defense on June 8, 2017 (AG).

Applicant answered the SOR on February 1, 2019. The case was assigned to me on April 4, 2019. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on May 1, 2019, and the hearing was convened as scheduled on May 31, 2019. The Government offered exhibits (GE) 1 and 2, which were admitted into evidence without objection. Department Counsel’s exhibit list, discovery letter, and a

copy of a DOHA Appeal Board decision (ISCR Case No. 17-01256 (August 2018)) were marked as hearing exhibits (HE) II-IV. Applicant testified and his exhibit list was marked as HE I. Applicant's hearing exhibits were identical to the attachments to his answer and, for simplicity, the markings used in the attachments are used here (Tab A-G), which I admitted without objection. Applicant's post-hearing submissions were marked as Applicant exhibits (AE) A-C and admitted without objection. DOHA received the hearing transcript (Tr.) on June 10, 2019.

Findings of Fact

Applicant admitted the SOR allegations in his declaration attached to his answer. His admissions are incorporated as findings of fact. After a review of the pleadings and evidence, I make the following additional findings of fact. (Answer, Tab D)

Applicant is 48 years old. He has worked for his current employer, a defense contractor, since 2011. He has held a security clearance since 2010. He works as a security officer for a government agency. He has a high school diploma and earned an information technology (IT) degree in 1998. He is divorced, having been married from 1999 to 2006. He has one son who is 18 and who Applicant still supports financially. Applicant served on active duty in the Army from 1990 to 1993 when he was honorably discharged. He served in the Army Reserve and National Guard from 1993 to 2003. He was honorably discharged after this service as well. (Tr. 17, 22-24; Answer, Tabs C-D)

The SOR alleged that Applicant failed to timely file federal and state income tax returns from 2010 to 2017. He admitted in his security clearance application (SCA), his security clearance interview, his response to interrogatories, his SOR answer, and his hearing testimony not timely filing his federal and state tax returns for those years. (Tr. 17; GE 1-2; Answer, Tab D)

Applicant attributed his tax problems to two factors. First, he blames his divorce in 2006, which resulted in a joint-custody arrangement for his son. Second, he claims that his work schedule changed significantly in 2011 when he took his current job. He was required to work 12-hour shifts at times and travel to duty locations on short notice. He stated that between his job demands and taking care of his child, filing his federal and state income tax returns was not a priority for him. When he completed his SCA in May 2016, he admitted not filing his state tax returns since 2010. He stated in the SCA that he would file his returns "this year." He did not file his returns in 2016. In September and December 2017, he was interviewed by a defense investigator during his background check. He admitted that he had yet to file his federal and state tax returns. He testified that he realized his not filing tax returns was a serious issue. Applicant hired a CPA to prepare his tax returns and shortly thereafter filed his 2010-2017 federal and state tax returns in June 2018, four months before his SOR was issued. He documented that he filed his 2018 federal tax return before its due date. There is no documentation to support that he filed his 2016 federal return or his 2018 state return. (Tr. 18-20, 29-31, 32-38; Answer, Tab D; GE 1-2; AE A-C)

Applicant documented that he uses a budget and that his finances are in order. He has not received financial counseling. For all the years he did not file federal and state tax returns he only owed one year of federal taxes, which he has since paid. He presented sworn declarations from a work supervisor, a coworker, and a personal friend. All stated that Applicant is trustworthy, reliable, and possesses good judgment. They recommend he retain his security clearance. (Tr. 19-21, 25; Answer, Tabs D-G)

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are 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 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. Under Directive ¶ E3.1.15, an "applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and has the ultimate burden of persuasion to obtain a favorable security decision."

A person who seeks access to classified information enters 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 that an 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.

Section 7 of EO 10865 provides that 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

AG ¶ 18 expresses the security concern for financial considerations:

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. I have considered all of them under AG ¶ 19 and the following potentially apply:

(c) a history of not meeting financial obligations; and

(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 had unfiled federal and state tax returns from 2010 to 2017. I find both the above disqualifying conditions are raised.

The guideline also includes conditions that could mitigate security concerns arising from financial difficulties. I have considered all of the mitigating conditions under AG ¶ 20 and the following potentially apply:

(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, a death, divorce or separation, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances;

(c) the individual has received or is receiving financial counseling for the problem from a legitimate and credible source, such as a non-profit credit counseling service, and there are clear indications that the problem is being resolved or is under control;

(d) the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts; and

(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.

Applicant failed to make a good-faith effort to resolve his federal and state tax issues until after he was interviewed for his background check in September and December 2017. He even stated when completing his SCA in 2016 he would file his returns that year, but he failed to do so. It is obvious that meeting his legal tax filing obligations was not a priority to Applicant. This pattern shows a lack of reliability, trustworthiness, and good judgment for someone who served in the military and has worked for a federal contractor for many years. AG ¶ 20(a) is not applicable.

Applicant's work schedule and child care demands are no different from those of millions of other working parents and are not circumstances beyond his control. Additionally, once he committed to hiring a CPA in 2018 his returns were filed almost immediately. He had the means to hire a professional to assist him with his taxes, but he failed to do so in a timely manner. AG ¶ 20(b) is not applicable.

Applicant provided evidence that his tax problems are under control. He receives some credit for eventually filing all his delinquent federal and state tax returns (although documentation is lacking for federal-2016 and state-2018). However, since it took him over eight years to do so, despite having the means to address his tax issues, good-faith efforts to pay or resolve his tax issues are lacking. AG ¶¶ 20(c), 20(d), and AG ¶ 20(g) only partially apply.

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 the circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d):

