



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
) ISCR Case No: 18-01804
)
Applicant for Security Clearance)

For Government: Nicholas Temple, Esq., Department Counsel
For Applicant: *Pro se*

04/23/2019

Decision

DAM, Shari, Administrative Judge:

Applicant has a history of failing to timely file Federal and state tax returns. He owes a Federal agency a large debt for the overpayment of benefits he received. He did not mitigate the resulting financial security concerns. National security eligibility for access to classified information is denied.

Statement of the Case

On August 20, 2018, the Department of Defense (DOD) issued to Applicant a Statement of Reasons (SOR) 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; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position (AG)* effective within the DOD on June 8, 2017.

Applicant answered the SOR in writing on October 24, 2018, and requested a hearing before an administrative judge (Answer). The Defense Office of Hearings and Appeals (DOHA) assigned the case to me on February 7, 2019. On February 12, 2019, DOHA issued a Notice of Hearing setting the hearing for February 26, 2019. The hearing was held as scheduled. Applicant waived his right to 15 days of notice of the date, time, and location of his hearing. (Transcript (Tr.) 9))

During the hearing, Department Counsel offered five exhibits. Applicant did not object to the Department's exhibits, or offer any exhibits on his own behalf. The Department's exhibits were admitted into evidence. The record remained open until March 15, 2019, to give Applicant an opportunity to submit additional documents. None were provided. DOHA received the transcript of the hearing on March 6, 2019.

Findings of Fact

Applicant admitted the three allegations contained in the SOR. He provided documents related to the allegations with his Answer.

Applicant is 58 years old and married to his wife for 30 years. He has three adult children. He has been working in the field of welding since he was 20 years old. He began his current position, as a welder, with a defense contractor two years ago. Prior to this job, he worked for private companies. (Tr. 18-21)

In May 2017, Applicant submitted an electronic Questionnaires for Investigations Processing (e-QIP). In it, he disclosed that he failed to file Federal and state tax returns for tax year 2015. He also disclosed that he owed the Social Security Administration (SSA) \$33,575 for overpayments he received for disability benefits. (GE 1) During an October 2018 interview with a government investigator, Applicant volunteered that he had not filed tax returns for 2007, 2008, 2009, and a couple other years. He stated that he had received social security disability (SSI) benefits for a couple years following hernia surgery, and owed the SSA about \$33,000 in overpayments. He said he was repaying the debt with monthly payments of \$10. (GE 5)

Applicant testified that his tax filing problems began with tax year 2007. He did not timely file those returns because he did not think he would have enough money to pay his taxes, and then he began procrastinating year after year. At some point, he thought he may be dead before he needed to pay his taxes because he had begun to use heroin. He continued to use heroin into 2010 when he sought treatment and stopped using the illegal substance. He also had cardiac surgery around the same time. (Tr. 22-23, 26) He admitted that his tax problems eventually "spiraled out of control." (Tr. 24)

Applicant began collecting disability after his 2010 surgery. He received payments during 2011, 2012, and 2013, during which time he was also working. He thought he could earn more money than the regulations permitted while on disability. Subsequently, he received notice that he owed the SSA over \$33,000. He said he established a monthly repayment plan of \$50 in 2016. That amount was reduced to \$10 a month in October

2018 after he was laid off from a position. As of October 2018, the balance was \$33,395, and his monthly payments were listed as \$10. (Tr. 27-31; Answer)

Applicant admitted that he did not timely file Federal and state income tax returns for the following years: 2007, 2008, 2010, 2011, 2013, 2015, and 2016. (Tr. 34, 39, 41, 44-49) All of those returns were filed between October and November 2018.¹ (Tr. 39, 50, 54) He has not filed Federal or state income tax returns for 2009 due to some confusion with the Internal Revenue Service (IRS), which filed a return for him and assessed unpaid taxes for 2009. (Tr. 44, 50) He timely filed tax returns for 2006, 2012, 2014, and 2017. (Tr. 45, 47, 50)

Applicant owes the IRS about \$13,000 for unpaid taxes for years: 2007, 2008, 2009, 2010, 2011, 2013, and 2016. He does not know how much he owes for 2017.² (Tr. 50-51) He recently requested a payment plan with the IRS. He offered to make monthly payments of \$100 to the IRS. He has not received a response. (Tr. 51)

Applicant owes his state department of revenue about \$475 for unpaid income taxes for the above-alleged years. He has not contacted the state to establish a payment plan, but is waiting to hear from it. (Tr. 52-54)

Policies

When evaluating an applicant's suitability for national security eligibility, the administrative judge must consider the AG. In addition to brief introductory explanations for each guideline, the AG list potentially disqualifying and mitigating conditions, which are useful 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(c), 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

¹Initially, Applicant sent his unfiled Federal tax returns to the IRS in September 2018; however, some of them were unsigned and the IRS returned them to him for his signature. He resubmitted those returns between October and November 2018. He filed his state returns at the same time.

²I have not considered for disqualifying purposes any derogatory information that was not alleged in the SOR regarding Applicant's unpaid taxes. I may consider the information when making a credibility determination, in applying the mitigating conditions, and in analyzing the whole-person concept.

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. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Directive ¶ E3.1.14 requires the Government to present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.15 states that an “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 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 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 10865 provides that an adverse decision 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 Executive Order 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information.)

Analysis

Guideline F: Financial Considerations

The security concerns relating to the guideline for financial considerations are 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. Financial distress can also be caused by 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 acts to generate funds.

AG ¶ 19 sets out disqualifying conditions that could potentially raise security concerns. Three are potentially applicable in this case:

- (a) inability to satisfy debts;
- (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 failed to timely file Federal and state income tax returns for tax years: 2007, 2008, 2009, 2010, 2011, 2013, 2015, and 2016. He incurred a debt with the SSA after receiving overpayments for his disability in 2011, 2012, and 2013, which he was not entitled to receive. That debt has a large outstanding balance and is being minimally addressed. The evidence is sufficient to raise the above disqualifying conditions.

After the Government produced substantial evidence of the disqualifying conditions, the burden shifted to Applicant to produce evidence and prove mitigation of the security concerns. AG ¶ 20 sets out four conditions that could potentially mitigate financial security concerns under this guideline:

- (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;
- (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 did not timely file Federal and state tax returns for eight years between 2007 and 2016. His failure to timely file those years until the fall of 2018 casts doubt on his current judgment and reliability. He continues to owe the SSA a large amount of money for disability payments that he was not entitled to receive. AG ¶ 20(a) minimally applies.

Applicant acknowledged that his heroin addiction and procrastination contributed to his failure to timely file tax returns. Those were circumstances within his control. He did

not provide a sufficient or credible explanation for receiving disability payments for three years while he was working. The evidence does not establish mitigation under AG ¶ 20(b).

In 2016, Applicant began repaying SSA \$50 a month for disability payments that he wrongly received between 2011 and 2013. There is no exhibit confirming the original amount owed to the SSA or documenting the payments, he said he made for two years. In October 2018, that payment amount was reduced to \$10 a month. There is no document confirming that he made those payments up to February 26, 2019, the date of the hearing. The evidence establishes minimal mitigation under AG ¶ 20(d). As of this hearing, Applicant has not entered into a payment plan for unpaid Federal and state income taxes. AG ¶ 20(g) does not 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 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 national security eligibility must include 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 facts and circumstances surrounding this case. I have incorporated my comments under Guideline F in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under that guideline, but some warrant additional comment.

Applicant is a 58-year-old man who has worked for a defense contractor for two years. Prior to obtaining this position, he had a long history of failing to file or pay Federal and state income taxes. Between September and November 2018, he filed eight years of returns. He has not established payment plans for his unpaid taxes. He said he has been making small payments to the SSA for monies that he wrongfully obtained; however, he did not provide sufficient evidence to conclude that those payments have been consistent over the years or the amount of the original debt. Applicant has not established a track record of responsibly managing taxes and other financial obligations. His history of non-

compliance with a fundamental legal obligation to file tax returns and timely pay tax debts raises security 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). 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 record evidence leaves me with doubts as to Applicant's judgment and suitability for a security clearance. Applicant failed to mitigate the security concerns arising under the financial considerations guideline.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline F:	AGAINST APPLICANT
Subparagraphs 1.a through 1.c:	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 a security clearance. National security eligibility for access to classified information is denied.

SHARI DAM
Administrative Judge

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