



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



In the matter of:)
)
) ISCR Case No. 18-02309
)
)
Applicant for Security Clearance)

Appearances

For Government: Brittany White, Department Counsel
For Applicant: *Pro se*

August 29, 2019

Decision

LOKEY ANDERSON, Darlene D., Administrative Judge:

Statement of Case

On April 1, 2017, Applicant submitted a security clearance application (e-QIP). (Item 3.) On March 15, 2019, the Department of Defense Consolidated Adjudications Facility (DoD CAF) issued Applicant a Statement of Reasons (SOR), detailing security concerns under Guideline F, Financial Considerations. (Item 1.) The action was taken 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 DoD after June 8, 2017.

Applicant answered the SOR on April 11, 2019. He admitted the SOR allegations and requested that his case be decided by an administrative judge on the written record without a hearing. (Item 2.) On May 8, 2019, Department Counsel submitted the Government’s written case. A complete copy of the File of Relevant Material (FORM), containing five exhibits, was sent to the Applicant and received on May 20, 2019. The

FORM notified Applicant that he had an opportunity to file objections and submit material in refutation, extenuation, or mitigation within 30 days of his receipt of the FORM. Applicant responded to the FORM on June 13, 2019 and submitted a large packet of documents, referred to as Applicant's Exhibit A, which was admitted into evidence without objection. DOHA assigned the case to me on June 18, 2019. Items 1 through 5 are admitted into evidence and hereinafter referred to as Government Exhibits 1 through 5.

Findings of Fact

Applicant is 60 years old. He is married with three adult children. He has a Bachelor's degree. He holds the position of Chief Operating Officer with a defense contractor and is seeking to obtain a security clearance in connection with his employment.

Guideline F - Financial Considerations

The Government alleged that Applicant is ineligible for a clearance because he made financial decisions that indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which raise questions about his reliability, trustworthiness and ability to protect classified information.

The SOR identified two allegations under this guideline concerning Applicant's failure to file his Federal and state income tax returns for tax years 2008 through 2017. In his answer to the SOR, Applicant admits each of the allegations. Applicant states that he has no excuse for failing to file his income tax returns for so many years.

Applicant has been married for 34 years and has three adult children. He states that he has always met his financial obligations and has never lived beyond his means. In 2009, Applicant was one of thousands of victims effected by an elaborate, now famous, "ponzi scheme" engineered by the chairman of a large financial firm. That chairman is now in prison. Applicant had been a financial advisor at the firm from March 2009 to December 2009 with his business partners, when Federal authorities seized the firm. Applicant resigned from his position and was unemployed for the next 11 months. With his business ruined, he returned to the commercial real estate business.

Applicant failed to file his Federal income tax returns for tax years, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016 and 2017. He also failed to file his state income tax returns for tax years 2008, 2010, 2011, 2012, 2013, 2014, 2015, 2016 and 2017. He has no excuse for not timely filing his Federal and state income tax returns. In the years from 2008 to 2012, he states that he did not have any net taxable liability to the Federal government or the state. As time passed, he failed to organize himself and procrastinated on filing, which eventually snowballed into his current situation. He rationalized that since he did not owe much, if anything, to the taxing authorities, he

would get to it the next year. He found that tracking down the information after so long without filing was difficult.

In November 2016, Applicant started his current job that he understood would require a security clearance. In January 2019, Applicant filed all past-due Federal and state income tax returns. Applicant has made all payments including late filing penalties to the state. Applicant also learned that his procrastination cost him a refund he would have received for six years out of the ten that he failed to file. Applicant states that he has also filed his Federal income tax returns in question and has paid all taxes owed including penalties except for 2017, which he expected to pay in the near future. Applicant believes that his failure to file his income tax returns in a timely manner has cost him approximately \$60,000 in tax refunds.

Applicant regrets his past misconduct and is remorseful about his failure as a citizen to pay his taxes and file his income tax returns on time.

Policies

When evaluating an applicant's suitability for 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 eligibility for access to classified information.

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. 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. 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, 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." The applicant has the ultimate burden of persuasion to obtain 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 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 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 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 possibly applicable 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 is a procrastinator who did not file his state or Federal income tax returns on time from 2008 to 2017. There is no excuse for this misconduct. Applicant has not demonstrated the high degree of judgment, reliability and trustworthiness required to hold a security clearance.

The following mitigating conditions under the Financial Considerations guideline are potentially applicable under AG ¶ 20.

(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 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

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

None of the mitigating conditions are applicable here. Applicant states that he understands the importance of filing his income tax returns on time, but he has not been diligent and responsible over the years to file them. For ten years he did not file his state or Federal income tax returns. During this period, he established a pattern of failing to comply with Federal and state law that required him to do so. Just this year, he filed all of his state and Federal income tax returns in question. He states that he has also paid the back taxes owed and penalties associated with his late filings. Applicant's procrastination is no excuse for this misconduct. He waited too long to do anything and has not shown good judgment over the years. Although he has now filed his income tax returns and has paid the back taxes and penalties owed, there is no pattern of good judgment or reliability. His pattern of conduct has not demonstrated sufficient good judgment and reliability to show that he has earned the privilege to be eligible for access to classified information, or that he will continue to abide by the rules and regulations required of him while holding a security clearance.

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.

I considered the potentially disqualifying and mitigating conditions in light of all relevant facts and circumstances surrounding this case. I conclude Applicant has not mitigated the Financial Considerations concerns.

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
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 or continue Applicant's national security eligibility for a security clearance. Eligibility for access to classified information is denied.

Darlene Lokey Anderson
Administrative Judge