



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



In the matter of:)
)
) ISCR Case No. 18-02872
)
Applicant for Security Clearance)

Appearances

For Government: Moira Modzelewski, Esq., Department Counsel
For Applicant: *Pro se*

11/07/2019

Decision

MURPHY, Braden M., Administrative Judge:

Applicant did not provide sufficient evidence to mitigate financial security concerns about two years of unfiled federal income tax returns even though the two returns have now been filed, and he owes no past-due income taxes. Applicant's eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on October 11, 2016. On December 19, 2018, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued him a Statement of Reasons (SOR) detailing security concerns under Guideline F, financial considerations. DOD CAF took this action under Executive Order (Exec. Or.) 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 Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (AG), effective June 8, 2017.

Applicant answered the SOR on January 18, 2019, and requested a hearing before an administrative judge of the Defense Office of Hearings and Appeals (DOHA). The case was assigned to me on June 14, 2019. On July 19, 2019, DOHA issued a notice scheduling the hearing for September 11, 2019.

The hearing convened as scheduled. At the hearing, Department Counsel offered Government's Exhibits (GE) 1 through 3. Applicant testified and submitted Applicant's Exhibit (AE) A. All exhibits were admitted without objection. DOHA received the hearing transcript on September 20, 2019.

Findings of Fact

Applicant admitted the sole allegation in the SOR (§ 1.a) with an explanation, and his admission and explanation are incorporated into the findings of fact. After a thorough and careful review of the pleadings and exhibits submitted, I make the following additional findings of fact.

Applicant is 53 years old. He and his wife have been married for almost 30 years. They have three grown children. Applicant graduated from high school in 1985. He has taken some college courses, but has not earned a degree. He served on active duty in the United States Air Force for 24 years, from September 1986 to October 2010, and was honorably discharged as a master sergeant (E-7). He worked briefly in the defense industry before entering federal civil service in March 2011. (GE 1; Tr. 30-31)

In 2016, Applicant began his current job as a technician with a defense contractor and clearance sponsor. He works on an air force base as a technician. He has held a security clearance for over 30 years, and is seeking to renew it. (Tr. 24, 37)

During the 2010 tax year, Applicant was deployed overseas. His son was in college. Applicant initially did not list his son as a dependent on his federal tax return because his son initially intended to file his own tax return. His son later determined that he did not make enough income to do that. Applicant did not file his 2010 tax return. (SCA; Tr. 20-22, 31-32)

Applicant disclosed on his October 2016 SCA that his 2010 federal income tax return remained unfiled. In his September 2017 background interview, he voluntarily disclosed that his 2016 federal income tax return was also unfiled. Applicant explained that he used a nationally known tax preparation software program to prepare and file his 2016 federal return. He thought he had done so in a timely way, but he was notified by the software program that the return had not been accepted by the IRS. (GE 2) The returns were also unfiled at the time Applicant responded to a November 2017 tax interrogatory from DOD CAF. (GE 3)

At his hearing, Applicant documented that he filed his 2016 federal return in January 2019, and received a small refund. He documented that he filed his 2010 federal return in April 2019. He apparently would have received an \$800 refund if the

return had not been so untimely. He does not owe any money to the IRS in past-due taxes. (AE A)

Applicant testified that by the time he revised his 2010 federal return after his son decided not to file his own return, the filing deadline had passed. He initially intended to send it in the next year (April 2012) but did not do so because by then he could not find all the relevant paperwork. He acknowledged that he did not do so out of laziness, and did not file, figuring that he would just forgo any refund he was due. (Tr. 20-22)

As to his 2016 return, Applicant testified that after he moved to his new state, he had difficulty preparing his return when he and his wife were living in different states. He prepared his return through the tax preparation software system, put in certain data from his prior year's tax return, but "it got kicked back saying it was the wrong number." (Tr. 24) He said the same thing happened even after he contacted the IRS for proper information. He said he intended to file his 2016 return along with his 2017 return but did not do so, again because of laziness. (Tr. 24-25)

AE A includes account transcripts for several tax years, including 2010 (alleged), 2012-2015 and 2018 (all filed on time), and 2016 (alleged). The account transcript for 2017 is also included. It shows that Applicant also filed his 2017 federal tax return late, in April 2019. (AE A) This additional late-filed tax return is not alleged in the SOR, but may be considered in weighing mitigation.

Applicant acknowledged that receiving the SOR was what spurred him to address his unfiled returns. He testified that he was not more prompt in doing so, in part, because "I just put it off and I put it off." (Tr. 23) In 2016, he moved to his current home state for his current job, and all his important papers were at his home, in another state on the other side of the country, which impacted his ability to prepare his return. (Tr. 23-24)

Applicant acknowledged his errors in judgment in not filing his tax returns more promptly. He accepted full responsibility and said the only reason he did not file his tax returns is because he did not owe any taxes, and expected to get a refund. His view was, "if I don't get the money from them, then no harm done." (Tr. 26) He said if the tax preparation software had indicated that he owed taxes, he would have filed them. (Tr. 35)

Applicant now has a greater understanding of the importance of filing a tax return on time as required, particularly for those who seek eligibility for access to classified information by the federal government. He testified that he was remorseful and said it will never let this happen again. (Tr. 26, 29, 37-38) All subsequent federal tax returns have been filed. (AE A; Tr. 29). He lives in a state that has no state income tax, so filing a state income tax return is not required. (Tr. 38)

Applicant loves his job, which is working on aircraft on an air force base. He says, "It's all I know how to do and it's all I want to do, and I would love to do it another 10, 15 years." (Tr. 26)

Policies

It is well established that no one has a right to a security clearance. As the Supreme Court held in "the clearly consistent standard indicates that security determinations should err, if they must, on the side of denials." *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

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. Likewise, I have not drawn 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, 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 the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible

extrapolation of potential, rather than actual, risk of compromise of classified information.

Analysis

Guideline F, Financial Considerations

The financial considerations security concern 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. . . .

The guideline sets forth several conditions that could raise security concerns under AG ¶ 19. The following conditions are potentially applicable:

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

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

The above disqualifying conditions apply. Applicant had a duty to file his annual state and Federal income tax returns in a timely manner, and the fact that he did not do so on two occasions is a security concern. As the Appeal Board has long held:

Failure to file tax returns suggests that an applicant has a problem complying with well-established governmental rules and systems. Voluntary compliance with such rules and systems is essential for protecting classified information. As we have noted in the past, a clearance adjudication is not directed at collecting debts. By the same token, neither is it directed towards inducing an applicant to file tax returns. Rather, it is a proceeding aimed at evaluating an applicant's judgment and reliability. A person 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.

ISCR Case No. 14-04437 at 3 (App. Bd. Apr. 15, 2016) (internal citations omitted).

Conditions that could mitigate financial considerations security concerns are provided under AG ¶ 20. The following are potentially applicable:

(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;

(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.

For two tax years, for two separate reasons, Applicant failed to file his federal tax returns as required. For tax year 2010, Applicant waited to see if his son, then in college, would be filing his own return, or if Applicant should claim his son as a dependent. For tax year 2016, Applicant thought he had filed his returns through a tax self-preparation software program but was notified that his tax return was not accepted.

While the origins of these two late-filed returns are different, Applicant in both instances failed to act responsibly in failing to file his federal returns on time and in failing to cure the unfiled returns until several years later. By his own admission, he was spurred to act by the SOR.

In weighing Applicant's good-faith efforts I must consider the timing of his actions. The Appeal Board has consistently held that timing of an applicant's resolution of his tax filing problems is relevant in evaluating mitigation. An applicant who resolves financial or tax problems only when his clearance might be imperiled raises questions about his willingness to follow the sometimes complex rules governing classified information when his personal interests are not at stake. ISCR Case No. 15-06440 at 4 (App. Bd. Dec. 26, 2017).

In addition, there is the matter of his 2017 federal income tax return, which Applicant also did not file until April 2019, contemporaneous with his efforts to cure the two late-filed returns alleged in the SOR. The 2017 return is not alleged, so I cannot consider it as disqualifying conduct. However, the fact that Applicant failed to act responsibly in addressing a third federal tax return, knowing that two returns were already late and were already security concerns that he disclosed on his SCA and discussed in his interview, is a factor that significantly undercuts mitigation and rehabilitation efforts in this case. Therefore, AG ¶ 20(d) does not fully apply.

Applicant's federal income tax returns are now resolved, and he did not owe any past-due taxes, nor does he owe any now. AG ¶ 20(g) therefore applies. But the case does not hinge on applicability of a single mitigating condition. In addition, the Appeal

Board has held that an applicant cannot simply adopt a position of “no harm, no foul” or “all’s well that ends well.” ISCR Case No. 14-01894 at 4-5 (App. Bd. Aug. 18, 2015).

While they are resolved, Applicant’s tax issues are also recent and not isolated. They evidence a continuing course of conduct that establishes a pattern of irresponsibility, failure to act, and, by Applicant’s own admission, laziness, in addressing his duties as a taxpayer that are particularly troubling given his profession. Given the number of tax years involved, and the fact that he waited until the SOR to take steps to cure the problem, Applicant did not establish that his issues with late-filed tax returns are unlikely to recur, and no longer cast doubt on his judgment, trustworthiness, and reliability. AG ¶ 20(a) 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 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 the facts and circumstances surrounding this case. I have incorporated my comments under Guideline F in my whole-person analysis. I credit Applicant’s long employment record in the Air Force and in the defense industry, including over 30 years with a clearance. However, he has a pattern of financial irresponsibility with respect to filing his federal income tax returns on time, as required. He did not provide sufficient evidence to mitigate the resulting financial security concerns. Overall, the record evidence leaves me with questions and doubts as to Applicant’s eligibility for access to classified information.

Formal Findings

A Formal finding for or against Applicant on the sole allegation set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, is:

Paragraph 1, Guideline F:

AGAINST APPLICANT

Subparagraph 1.a:

Against Applicant

Conclusion

In light of all of the circumstances presented, it is not clearly consistent with the interests of national security to grant Applicant continued eligibility for access to classified information. Eligibility for access to classified information is denied

Braden M. Murphy
Administrative Judge