



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



In the matter of:)
)
-----) ISCR Case No. 18-01975
)
Applicant for Security Clearance)

Appearances

For Government: Benjamin Dorsey, Esquire, Department Counsel
For Applicant: *Pro se*

03/30/2020

Decision

MARSHALL, Jr., Arthur E., Administrative Judge:

Syllabus

Applicant mitigated foreign influence security concerns regarding kin in Ukraine and Russia, but his recent rehabilitative efforts regarding belated tax returns failed to mitigate financial considerations security concerns. Clearance is denied.

Statement of the Case

On September 6, 2018, the Department of Defense (DOD) Consolidated Adjudication Facility (CAF) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline F (Financial Considerations) and Guideline B (Foreign Influence). 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 adjudicative guidelines (AG) effective within the DOD on or after June 8, 2017. In a response notarized on September 29, 2018, Applicant addressed all allegations and requested a hearing before a Defense Office of Hearings and Appeals (DOHA) administrative judge. I was assigned the case on January 16, 2019.

On March 15, 2019, a notice setting the hearing for April 4, 2019, was issued. The hearing was convened as scheduled. The Government offered two exhibits (Exs.), accepted as Exs. 1-2 and three hearing exhibits (HE) accepted as HE 1-3. Applicant presented a package of seven documents, accepted without objection as Exs. A-G, gave testimony, and introduced one witness.

The parties were granted through April 16, 2019, to submit any additional materials. The government offered what has since been accepted as HE 4 on April 4, 2019. Applicant forwarded what has since been accepted into the record without objection as Exs. H-P on April 16, 2019. In the interim, the transcript of the proceeding was received on April 15, 2019. The record was then closed. The record was reopened on April 24, 2019, to accept a bound and expanded version of Exs. H-P premarked as items PHE1-PHE16 and the record was again closed. Based on the testimony, materials, and record as a whole, I find Applicant failed to mitigate security concerns.

Procedural Rulings

At the hearing, the Government requested I take administrative notice of certain facts relating to Ukraine and Russia, identified as HE 3 and HE 4. The documents provide elaboration and context for the summaries. I take administrative notice of the facts as they relate to Ukraine and Russia included in the U.S. Government reports. They are limited to matters of general knowledge, not subject to reasonable dispute.

Findings of Fact

Applicant is a 61-year-old interim team lead who has performed the same type of work with the same entity for about a year. He currently earns just over \$100,000 a year. Born and raised in the United States, Applicant has earned a bachelor's degree in statistics. Married in 2007, Applicant and his wife have three children, including one stepchild. He is committed to his spouse, who he describes as "way too cute" to divorce. (Tr. 9) His wife teaches on an hourly basis at a Russian language and studies program.

Applicant lives within his means, owns an unencumbered \$250,000 rental property yielding a monthly profit of about \$900, and maintains both a retirement and an investment account. He does not "have to dip into" either of those accounts. (Tr. 26-27) He has a mortgage balance of about \$244,000 on a property with a market value in excess of \$600,000. He pays a monthly mortgage payment on that home of \$2,000. One of his two cars has a modest monthly payment due, a payment of \$300 toward its purchase plan. He and his family are settled in their neighborhood. Applicant has not received credit counseling. (Tr. 38)

Applicant's wife has a future interest in an apartment in Ukraine owned by her 63-year-old mother. The apartment is expected to pass in equal halves to both Applicant's wife and her brother. It is believed the total value of the property is about \$25,000-\$30,000, making Applicant's wife's share worth about \$12,500-\$15,000 before taxes or fees. (PHE 14) While Applicant has not been to Ukraine since his 2007

marriage, his wife and children spent about two months there in the summer of 2018. The wife regularly spends about two months in Ukraine each summer. (Tr. 44)

Applicant's mother-in-law is a citizen and resident of Ukraine. She is a retired factory worker. She has not served in the Ukrainian or Russian military or government. Applicant's wife sends money to her mother. Applicant does not know the exact extent of his wife's current largess in terms of her payments to her mother. (Tr. 39) Before his wife started working and earning her own income, however, Applicant would send his mother-in-law about \$200 a month. (Tr. 39) This mother-in-law recently spent approximately five months in the United States with Applicant and his wife. Otherwise, Applicant has periodic exchanges with her when she Skypes or phones with Applicant's wife, exchanges that take place weekly.

Applicant's 46-year-old brother-in-law has not visited the United States. Although he is believed to still be a citizen of Ukraine, he has spent the last decade residing in Russia. (Tr. 40) His contact with Applicant is minimal, limited to birthday calls. Neither speaks the other's language. (Tr. 41) Applicant's wife speaks with her brother "no more than" once a month. (Tr. 41) This sibling has never worked for the Ukrainian or Russian government. (Tr. 48) He is a salesman for a private firm.

The father of Applicant's eldest child, who lives with Applicant and his wife in the United States, lives in Ukraine. This teen has occasional contact with her biological father when she is in Ukraine. The ex-spouse's obligation to pay child support was waived in exchange for letting the girl move to the U.S. after Applicant and his wife wed.

For tax years (TY) 2013-2017, Applicant failed to timely file Federal and state income tax returns. This failure was the result of "pure procrastination." (Tr. 30) Applicant was aware the returns had to be filed by mid-April of each year or a request for an extension had to be submitted, but his focus was elsewhere. Although he does not have a "specific record," such tax return filing failures are not new; he volunteered that earlier TY return omissions "probably occurred." (Tr. 37) When later asked whether he was testifying that he had not timely filed returns for TY 2007-2012, Applicant stated: "I'm testifying that the timely filing of taxes was inconsistent for all that. . . . There may have been on-time filings. I couldn't tell you whether there were or not." (Tr. 38)

Evidence was offered showing that the following delinquent TY returns were prepared, although only the Federal return for TY 2016 is signed by Applicant. (Ex. B) The copy of Applicant's complete Federal TY 2017 tax return is unsigned. (Ex. C) A 2018 bill for Federal taxes due for TY 2014 for \$1,235.19 was presented along with a copy of Applicant's un-transacted check in that amount. (Ex. D)

The evidence presented after the hearing are copies of a tax preparer's forms designed for electronic transmittal. No direct documentary evidence was provided showing that they were filed. The only evidence of taxes paid were copies of checks for TY 2017 state taxes owed and an April 2019 check paying his Federal obligation from 2017 (see Exs. H-P). In sum, the evidence submitted here shows:

TY 2013 – Federal return prepared in 2017 with \$841 refund; state filing presented, reflecting \$340 refund;

TY 2014 – Federal return prepared in 2018; state filing presented, reflecting \$114 refund.

TY 2015 – Federal return prepared in April 2019 showing \$2,679 owed; state filing presented, reflecting \$367 owed;

TY 2016 – Federal return prepared in April 2019; state filing presented, reflecting refund of \$1,175;

TY 2017 – Federal return prepared in April 2019 with payment of \$1,763; state filing presented, reflecting \$752 owed.

Notice

I take administrative notice of the following facts: Ukraine, formerly part of the later dismantled Union of Socialist Soviet Republics (USSR), is a republic with a semi-presidential political system. In 2014, the Ukrainian parliament approved a new government, which caused Russia to respond by seizing Ukraine's Crimean peninsula. Additional unrest occurred in 2014, involving thousands of pro-Russian protesters in eastern and southern Ukraine. In 2015, a ceasefire agreement established a *de facto* dividing line between Ukrainian government-controlled and separatist-held areas in Ukraine. (GX 5.) Relations between the countries are strained.

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. 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(c), the entire process is a conscientious scrutiny of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that any doubt concerning personnel being considered for access to classified information will be resolved in favor of national security. In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence.

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 seeking access to classified information enters into a fiduciary relationship with the Government based on trust and confidence and transcending normal duty hours. The granting of access to classified information involves a high degree of trust and confidence. Decisions include consideration of the possible risk an applicant may deliberately or inadvertently fail to safeguard such information. Decisions are in terms of the national interest and do not question the applicant’s loyalty.

Analysis

GUIDELINE F – Financial Considerations

Under Guideline F, AG ¶ 18 sets forth that the security concern under this guideline is that 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 or sensitive information.

Here, the Government offered documentary evidence reflecting that Applicant failed to timely file Federal and state tax returns and to pay taxes owed for multiple years. The issues related to the last of the tax years at issue were not settled until slightly less than a year ago (April 2019). Such facts are sufficient to invoke financial considerations disqualifying conditions:

AG ¶ 19(a) inability to satisfy debts;

AG ¶ 19(b) unwillingness to satisfy debts regardless of the inability to do so;

AG ¶ 19(c) a history of not meeting financial obligations, and

AG ¶ 19(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.

Four conditions could mitigate the finance related security concerns posed here:

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;

AG ¶ 20(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;

AG ¶ 20(c) the person has received or is receiving counseling for the problem from a legitimate and credible source, such as a non-profit counseling service, and there are clear indications that the problem is being resolved or is under control; and

AG ¶ 20(d) the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts.

As previously noted, the last of the tax years at issue were not settled until April 2019, slightly less than a year ago. Multiple years of neglect are cited with regard to failures to timely file Federal and state tax returns. Applicant freely volunteered that the tax years at issue in the SOR may only account for some of the tax years where his "pure procrastination" resulted in his failure to file Federal and state tax returns. There is no evidence of credit, financial, or tax counseling, although it appears he has used a commercial tax preparation service at times in the past.

Applicant's testimony fails to reflect a full appreciation of the legal requirement of filing taxes in a timely manner, despite acknowledging he has long known of the mid-April filing deadline for such filings. Attempts to rectify his tax filing situation at both the Federal and state levels were described, and some evidence that such tax filings were prepared and some payments were made was presented. Most of his documentation, however, is unsigned, is unsupported by a transcript or receipt that the filing was completed, or other substantiating item. Given these facts, AG ¶ 20(a)-(d) do not apply.

GUIDELINE B - Foreign Influence

The security concern relating to this guideline is set out in AG ¶ 6:

Foreign contacts and interests, including, but not limited to, business, financial, and property interests, are a national security concern if they result in divided allegiance. They may also be a national security concern if they create circumstances in which the individual may be manipulated or induced to help a foreign person, group, organization, or government in a way inconsistent with U.S. interests or otherwise made vulnerable to pressure or coercion by any foreign interest. Assessment of foreign contacts and interests should consider the country in which the foreign contact or interest is located, including, but not limited to, considerations such as whether it is known to target U.S. citizens to obtain classified or sensitive information or is associated with a risk of terrorism.

The guideline notes several conditions that could raise security concerns under AG ¶ 7. Two are potentially applicable in this case:

AG ¶ 7(a) contact, regardless of method, with a foreign family member, business or professional associate, friend, or other person who is a citizen of or resident in a foreign country if that contact creates a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion;

AG ¶ 7 (b) connections to a foreign person, group, government, or country that create a potential conflict of interest between the individual's obligation to protect classified or sensitive information or technology and the individual's desire to help a foreign person, group, or country by providing that information or technology; and

AG ¶ 7 (f) substantial business, financial, or property interests in a foreign country, or in any foreign owned or foreign-operated business that could subject the individual to a heightened risk of foreign influence or exploitation or personal conflict of interest.

Applicant has a mother-in-law and a brother-in-law who are citizens of Ukraine residing in Ukraine and Russia, respectively. Applicant's wife regularly sends money to her retired mother, a former private-sector factory worker. At her death, it is expected that Applicant's mother-in-law will leave her apartment in Ukraine to her daughter and son in 50%-50% shares. The property should net each sibling about \$12,500-\$15,000 each in inherited value before any inheritance or transfer fees are deducted. The evidence is sufficient to raise AG ¶ 7 (a)-(b). However, I noted that this future interest is minor compared to the home, family, and life Applicant's wife has in the United States. Therefore, I find AG ¶ 7 (f) inapplicable ("*substantial* business, financial, or property interests" (emphasis added)).

AG ¶ 8 provides conditions that could mitigate security concerns. I considered all of the mitigating conditions under AG ¶ 8 including:

AG ¶ 8(a) the nature of the relationships with foreign persons, the country in which these persons are located, or the positions or activities of those persons in that country are such that it is unlikely the individual will be placed in a position of having to choose between the interests of a foreign individual, group, organization, or government and the interests of the United States; and

AG ¶ 8(b) there is no conflict of interest, either because the individual's sense of loyalty or obligation to the foreign person, or allegiance to the group, government, or country is so minimal, or the individual has such deep and longstanding relationships and loyalties in the United States, that the individual can be expected to resolve any conflict of interest in favor of the U.S. interest.

Applicant's loyalties are clearly to the United States, where he was born and raised. He brought his bride to this country, where he dotes upon her, and has not himself returned to Ukraine since their 2007 marriage. In the United States, he lives in a home with his wife, their two children, and his teenage stepchild. In short, his life, family, and career are in this country. The same can be said of Applicant's spouse.

Both Applicant's mother-in-law and brother-in-law live low-profile lives. Their careers have been in non-managerial roles in the private sector with no nexus to either a foreign government, military, or faction. It is true that Applicant's wife helps support her mother financially, with past support having been established as being under \$2,500 a year. In turn, his spouse has the prospect of a future interest in Ukrainian property, although that interest appears to be worth no more than \$15,000 before taxes or fees. There is no evidence indicating Applicant or his wife find these sums attractive incentives or an inducement for any type of non-benign action. While Applicant's wife obviously cares for her mother and sibling, they do not appear to hold the same priority in the life of Applicant and his spouse as their children, home, and the life they have shared here for over a dozen years.

Whole-Person Concept

Under the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of his conduct and all relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d). Here, I have considered those factors. 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 facts and circumstances surrounding this case. I have incorporated my comments under Guidelines F and B in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under those guidelines, but some warrant additional comment.

Applicant is a 61-year-old contractor earning just over \$100,000 a year. He was raised in the United States, but married a woman from Ukraine in 2007 with whom he shares three children. While his wife has a mother and a sibling who are citizens of Ukraine and living in Ukraine and Russia, these low profile individuals have worked in the private sector and have no nexus to a foreign military or government.

A minor financial tether exists between mother and daughter. The daughter provides her mother with financial assistance, last documented as \$2,400 a year. In turn, the mother has an apartment worth \$25,000-\$30,000, a half interest in which is expected to flow to Applicant's spouse when her mother passes on. These sums do not seem significant in light of the family's income or resources, nor do the sums sent abroad appear to be more than supplemental income. In short, Applicant and his wife are more deeply tethered to the United States and their family here than to any foreign

kin or country. Given the ultimate disposition in this matter, I find foreign influence security concerns are mitigated.

Most worrisome is Applicant's somewhat cavalier attitude regarding his failure to meet his tax responsibilities and obligations. Given his blunt admission that it was "pure procrastination" that led him to be late in his Federal and state tax return filings over the years at issue, and his insouciant revelation that such lapses may also have occurred in earlier years, we appear to have a situation where "lack of judgment, or unwillingness to abide by rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect classified information." (see AG ¶ 18) Inasmuch as the last three years at issue were not fully addressed until less than a year ago, more time is needed for Applicant to demonstrate that he can meet his tax obligations in a timely and appropriate manner and reestablish his reputation for reliability and trustworthiness. I find Applicant failed to mitigate financial considerations security concerns.

Formal Findings

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

Paragraph 1, Guideline F: Subparagraphs 1.a-1.c:	AGAINST APPLICANT Against Applicant
Paragraph 2, Guideline B: Subparagraphs 2.a-2.d:	FOR APPLICANT For 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. Eligibility for access to classified information is denied.

Arthur E. Marshall, Jr.
Administrative Judge