



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
) ISCR Case No: 18-02870
)
)
Applicant for Security Clearance)

For Government: Daniel O'Reilley, Esq., Department Counsel
For Applicant: *Pro se*

01/07/2020

Decision

DAM, Shari, Administrative Judge:

Applicant has a long history of failing to file Federal and state income tax returns and failing to pay Federal and state income taxes. 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 15, 2016, Applicant submitted a Questionnaire for National Security Positions (SF 86). On December 21, 2018, the Department of Defense (DOD) issued 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 on June 8, 2017.

Applicant answered the SOR in writing (Answer) on January 17, 2019, and requested a hearing before an administrative judge. On September 16, 2019, the Defense Office of Hearings and Appeals (DOHA) assigned the case to me. On September 23, 2019, DOHA issued a Notice of Hearing setting the case for November 12, 2019. The case was heard as scheduled. Department Counsel offered Government Exhibits (GE) 1 through 6 into evidence. Applicant testified. He offered Applicant Exhibits (AE) A and B. All exhibits were admitted. DOHA received the hearing transcript (Tr.) on November 21, 2019. The record remained open until December 6, 2019, to give Applicant an opportunity to submit exhibits AE C through G, which were identified for the record but not admitted because he did not have extra copies. He timely submitted AE C through G, and three additional exhibits that I marked as AE H, I, and J. Department Counsel had no objections to the exhibits and they are admitted into evidence.

Findings of Fact

Applicant admitted the ten allegations in the SOR. His admissions are incorporated into these findings.

Applicant is 64 years old and a high school graduate. He has been married and divorced three times. He has three children from his first marriage, whom he raised after his wife left the family. After high school, he worked for a private company for 29 years, until it closed. In 2007, he obtained a position with a defense contractor. He has continued to work as a sub-contractor for defense contractors since then and has held a security clearance since 2008. (Tr. 12, 32-36, 38)

In his 2016 SF 86, Applicant disclosed that he failed to file and pay Federal and state tax returns for 2014 and 2015. (GE 1) According to IRS documents, his tax problems began with unpaid Federal taxes for 2010 and 2011. (GE 6) He also answered interrogatories in 2018, in which he discussed his unfiled and unpaid Federal and state income taxes. (GE 2)

Applicant attributed his large tax delinquencies and financial problems to four factors: he mismanaged his income for many years; he financially supported his brother and three children for three years when his brother's wife left him; he supported his sister after her divorces; and as a sub-contractor, he failed to pay Federal and state quarterly taxes from 2010 to 2017. (Tr. 39-41, 61, 71)

Federal Income Taxes

Applicant failed to timely file Federal tax returns for tax years 2012, 2014, 2015, and 2016, as alleged in SOR ¶ 1.e. According to the Internal Revenue Service's (IRS) transcripts dated July 2018:

Applicant's 2012 return was filed in January 2015. His adjusted gross income (AGI) was \$211,486. He has an account balance of \$97,380 in unpaid taxes for this year, as alleged in SOR ¶ 1.a.

Applicant's 2014 Federal tax return was filed in November 2016. His AGI was \$172,876. He has an account balance of \$94,869 in unpaid taxes for this year, as alleged in SOR ¶ 1.c. He had obtained an extension of time to file his returns until October 2015.

Applicant's 2015 Federal tax return was filed in December 2016. His AGI was \$155,991. He has an account balance of \$72,733 in unpaid in taxes for this year, as alleged in SOR ¶ 1.d. He had obtained an extension of time to file his returns until October 2016.

Applicant had not filed his 2016 Federal tax return, as of July 2018. He had obtained an extension of time to file his return until October 2017. (GE 2 at 5-11, GE 4, 5, 6)

Applicant filed his 2016 Federal tax return in April 2019. (AE D) He filed his 2017 Federal tax return in October 2018. (AE E) He timely filed his 2018 Federal and state tax returns in April 2019. (AE F, J)

In addition to the above-described unpaid Federal taxes, Applicant is indebted to the IRS for the following tax years:

2013: Applicant owes \$94,497 for unpaid taxes, as alleged in SOR ¶ 1.b. (Answer)

2010 and 2011: Applicant owes \$127,493 for two tax liens filed in 2014 for unpaid taxes, as alleged in SOR ¶ 1.h. (GE 6)

2012 and 2013: Applicant owes \$149,654 for a tax lien filed in 2015 for unpaid taxes, as alleged in SOR ¶ 1.i. (GE 5)

2015: Applicant owes \$58,935 for a tax lien filed in 2017 for unpaid taxes, as alleged in SOR ¶ 1.j. (GE 4)

In November 2018, Applicant began making quarterly payments on his 2018 Federal taxes. He continued making quarterly payments on his 2019 Federal taxes into 2019. As of October 2019, he paid \$47,100 toward those two years. (Tr. 63-64; AE A)

On July 16, 2019, Applicant entered into an installment agreement with the IRS. As of that date, he owed \$518,749 for tax years 2010 through 2018, and agreed to begin making monthly payments of \$1,500. The first installment payment began in August 2019. He has made payments as agreed since then. (Tr. 51-52, 54, 65; AE B) In November 2019, he paid his \$2,325 outstanding tax debt owed to the IRS for 2017. (AE C)

State Income Taxes

Applicant failed to timely file his 2016 state tax return, as alleged in SOR ¶ 1.g. As of July 2018, Applicant owed his state \$53,224 for delinquent taxes for years 2012, 2013, 2014, and 2015, as alleged in SOR ¶ 1.f.

As of February 2019, Applicant owed his state \$73,086 for unpaid income taxes. That same month he entered into an installment agreement with his state to begin making monthly payments of \$1,927 on that balance. He has made those payments since then, along with quarterly tax payments of about \$3,000. He also owed the state \$404 for tax year 2017, after paying \$1,689. He paid the \$404 in July 2019. His 2017 state income taxes are resolved. (Tr. 66-67; GE 2 at 13-17, AE B)

While testifying, Applicant admitted that he did not timely file his tax returns and had no reasonable excuse for failing to do so. (Tr. 46-49) He said he was “not being attentive.” (Tr. 50) He did not know that failing to file or pay Federal and state taxes could jeopardize his security clearance. (Tr. 68) He acknowledged that he procrastinated over the years and did not diligently address his taxes and financial obligations. (Tr. 67) He candidly stated that he exhibited “poor judgement.” (Tr. 52)

Two years ago, Applicant hired a lawyer to resolve his tax debts, along with other debts. He said the lawyer was not diligent in working on his case. (Tr. 70) He said his supervisor is aware of this hearing and his tax problems. (Tr. 68-69) Two months ago, Applicant hired a debt management company to help resolve \$48,000 of credit card debt, which was not alleged in the SOR. (This debt is not considered for disqualifying purposes, but may be considered in making a credibility determination, in the application of mitigating conditions, and in my whole-person analysis.) (Tr. 36-37)

Applicant’s annual income is \$210,000. For the last ten years, his salary has generally been about \$200,000, varying by \$10,000 to \$20,000. (Tr. 45-46, 71) He now has a budget that he uses to manage his finances. He did not have or use one in the past. (Tr. 70-71)

Applicant submitted four letters of recommendation from colleagues. All compliment him on his performance and supportive attitude. They consider him to be a reliable individual and committed to his job of assisting the U.S. Army. (AE 6)

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 national security eligibility.

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 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. The following are potentially applicable in this case:

- (b) unwillingness to satisfy debts regardless of the ability to do so;
- (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 has a history of failing to file Federal income tax returns. He did not timely file returns for tax years 2012, 2014, 2015, and 2016. He failed to timely file his state income tax return for 2016. He failed to timely pay his Federal income taxes for years 2010, 2011, 2012, 2013, 2014, 2015, 2016, and 2017. As of February 2019, he owed his state \$73,086 in outstanding taxes. As of July 2019, he owed the IRS \$518,749 in outstanding taxes. 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 five conditions that could potentially mitigate those 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, 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's tax delinquencies began in 2010 and his large outstanding tax debt remains unresolved. He did not begin addressing the problems until November 2018, when he started making quarterly payments to the IRS on his 2018 tax debt. In early 2019 he negotiated installment agreements with the IRS and his state. He still owes about \$590,000 for unpaid state and Federal taxes. His history of ignoring his tax obligations raises questions about his judgment and reliability. The evidence does not establish mitigation under AG ¶ 20(a).

Applicant attributed his tax liabilities to providing financial support to two siblings for periods of time. While that may have played a role in his choice not to pay his taxes, it should not have affected his ability to file annual tax returns. He admitted that he had not responsibly managed his quarterly taxes, or timely filed returns. His tax problems resulted from decisions that were within his control for at least eight years. AG ¶ 20(b) does not apply.

Applicant did not present evidence that he participated in credit or financial counseling; however, he did recently hire a lawyer and a debt consolidation company to help with his delinquencies. There is insufficient evidence to demonstrate that his unpaid Federal and state tax liabilities are under control. The evidence establishes minimal mitigation under AG ¶ 20(c). He did not initiate a sustained good-faith effort to resolve his outstanding Federal and state tax debts until early 2019. AG ¶ 20(d) does not apply.

In February 2019, Applicant initiated an installment agreement with his state to begin paying his large tax debt. In July 2019, he initiated an installment agreement with the IRS to begin paying more than \$500,000 of outstanding Federal tax liabilities. Given that those agreements are recent and the amount of his current tax liability is significant, he did not establish mitigation under AG ¶ 20(g).

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) 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 an intelligent 64-year-old man. Since 2007, he has worked for defense contractors. During his hearing, Applicant candidly and remorsefully discussed his history of unfiled Federal and state income tax returns and his large unpaid income tax debts. He acknowledged that the tax debts accumulated because he did not pay estimated taxes for years, despite earning a high salary. He recognizes his responsibility to resolve his \$590,000 delinquent tax debt, but had taken minimal actions to do so until early 2019, despite acknowledging the two large Federal tax liens from 2014 and 2015 in his August 2016 SF 86, and answering interrogatories in August 2018. In addition, he owes about \$48,000 in credit card debt that he is attempting to address. Applicant has not established a sufficient record of responsibly following tax laws and managing related financial obligations. 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). (ISCR Case No. 12-10933 at 3 (App. Bd. June 29, 2016).

The record evidence leaves me with serious 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.j:	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