



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



In the matter of:)	
)	
)	ISCR Case No. 19-00665
)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Andrew H. Henderson, Esq., Department Counsel
For Applicant: Aileen B. Xenakis, Esq.

05/11/2020

Decision

WHITE, David M., Administrative Judge:

Applicant fully mitigated the financial security concerns created by his failure to timely file Federal and state income tax returns for several years between 2011 and 2017. Based upon a review of the record as a whole, national security eligibility for access to classified information is granted.

History of Case

On July 18, 2016, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) in connection with the periodic reinvestigation of his security clearance. On April 29, 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). 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 Security Executive Agent Directive (SEAD) 4 National Security Adjudicative Guidelines (AG), which came into effect June 8, 2017.

Applicant submitted his written Answer to the SOR on May 16, 2019. He admitted the SOR allegations and requested a hearing before an administrative judge. The Defense Office of Hearings and Appeals (DOHA) assigned the case to me on July 1, 2019. DOHA issued a Notice of Hearing on August 7, 2019, setting the hearing for September 10, 2019. On that date, Department Counsel offered Government Exhibits (GE) 1 through 5 into evidence. Applicant testified, and his counsel offered Applicant Exhibits (AE) 1 through 6 into evidence. All exhibits were admitted without objection. I granted Applicant's several requests to leave the record open for submission of additional evidence until, eventually, December 9, 2019. Applicant then timely submitted AE 7 and AE 8, which were admitted without objection. DOHA received the hearing transcript (Tr.) on September 18, 2019.

Findings of Fact

Applicant is 62 years old. He earned a bachelor's degree in 1979, and began his current employment with a defense contractor in February 1998. He has successfully held Secret and Top Secret security clearances since 1984. He never served in the military or held a Federal civil service position. (GE 1; GE 2; AE 1.)

Applicant and his first wife divorced in 2001, after 21 years of marriage. He remarried in 2005, but he and his second wife separated in 2017. His wife continues to live in their primary residence with her adult special-needs daughter, and he moved into one of their investment rental properties. Applicant provides full financial support for his wife and stepdaughter, and endeavors to maintain an amicable relationship with them. His wife earns no income other than receiving state payments for support and maintenance of her daughter. (GE 1; Tr. 34-43.)

In 2011, Applicant and his wife purchased a condominium (hereafter, 'the condo') in Hawaii, where they had been vacationing as a family for several years. The purchase was arranged by Applicant's wife, and largely financed with a 50% down payment from funds that she had just received as the beneficiary of her former husband's life insurance policy. They used the condo about two weeks per year for vacations, and hired a rental agency to offer it for use by other vacationers. The condo was not a source of income for the family, since the costs of ownership significantly exceeded annual rental receipts. Because it was offered to renters, however, Applicant believed they were required to file nonresident Hawaii state income tax returns, and include the condo information when preparing their Federal returns. (GE 2; Tr. 37-41, 45-46.)

Applicant and his wife did not file Hawaii state income tax returns for 2011 through 2017 in connection with their rental of the Hawaii condo. Applicant volunteered this information in his March 14, 2019 response to DOHA financial interrogatories. He explained that he was aware of most of the expenses associated with the condo, since he paid them, but his wife exclusively dealt with the rental agency and refused to provide him or their former certified public accountant (CPA) with rental income information to use in preparing and filing those tax returns. This lack of information also led to the late filing of Applicant's Federal tax returns for 2014, 2016, and 2017. (GE 2; Tr. 36-37, 40-45.)

Applicant initially responded to his tax return preparation problems by ensuring that he had more than enough money withheld from his paychecks to cover any potential Federal tax liability. He knew that the condo lost money every year, and did not generate actual Hawaii state tax liability. More recently, he hired a new CPA who was willing and able to spend sufficient time to obtain the necessary condo information from his estranged wife. (Tr. 32-34, 46, 52.)

Applicant, with the assistance of his CPA, filed his SOR-alleged delinquent Federal income tax returns on the following dates, resulting in refunds, according to the IRS tax account records that he provided:

<u>Tax year:</u>	<u>Date return filed:</u>	<u>Total tax due and paid:</u>	<u>Refund issued by IRS:</u>
2014	July 1, 2016	\$37,085	\$11,102
2016	August 7, 2019	\$35,847	\$11,359
2017	August 7, 2019	\$34,962	\$10,653

Applicant also submitted his IRS account records for the other tax years between 2011 and 2018, which documented refunds ranging from \$5,431 to \$13,530 and totaling \$40,094. Applicant credibly affirmed that he has never intended to avoid paying his income tax liabilities, and regrets the inter-personal problems that precluded his timely filing of several returns. He chose to over-withhold large amounts each year in order to ensure that he paid his taxes in a timely fashion while personally incurring any cost associated with his return filing problems. (AE 5; Tr. 33-34, 46.)

Applicant's accountant completed researching and preparing the non-resident Hawaii income tax returns for tax years 2011 through 2018 on November 18, 2019. After he was able to obtain his wife's signature on the joint returns, Applicant filed them with the state, where they were received on November 25, 2019. The returns reflected no (zero) taxable income for any of the years involved. Applicant's state of residence does not have a state income tax. (AE 8.)

Applicant provided a family financial statement documenting a monthly remainder of \$2,195 after meeting routine liabilities and living expenses, and total assets of just under \$3 million. He also provided copies of his performance evaluations, commendations, awards, and qualifications, which document his sustained outstanding performance in increasingly demanding duties. He also provided affidavits from longtime coworkers, attesting to his excellent character, integrity, and trustworthiness. His testimony was forthright, and his concern for safeguarding national security interests was manifest. (AE 2; AE 3; AE 4; AE 6.)

Policies

When evaluating an applicant's national security eligibility, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations, each guideline lists potentially disqualifying and mitigating conditions. 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(b) and 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, pertinent, and reliable information about the person, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that any doubt concerning personnel being considered for national security eligibility 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. I have avoided drawing inferences grounded on mere speculation or conjecture.

According to Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.15 states, "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, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision."

A person who applies for national security eligibility seeks to enter 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 eligibility for access to classified information or assignment in sensitive duties. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to protect or safeguard classified or sensitive information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of protected information.

Section 7 of EO 10865 provides, "Any determination under this order adverse to an applicant shall be a determination 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 concerns relating to the guideline for financial considerations are set out in AG ¶ 18, which reads in pertinent part:

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 personal 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.

AG ¶ 19 describes one condition that could raise security concerns and may be disqualifying in this case:

(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 and his wife failed to timely file Federal income tax returns for 2014, 2016, and 2017; and non-resident Hawaii state income tax returns for 2011 through 2017. These facts establish prima facie support for the foregoing disqualifying condition, and shift the burden to Applicant to mitigate the resulting security concerns.

AG ¶ 20 includes three conditions that fully mitigate the security concerns arising from Applicant's alleged financial difficulties:

(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; 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.

Due to marital communication issues with his estranged wife, and despite his best efforts under the circumstances, Applicant was unable to obtain the rental income information concerning the Hawaii condo that he needed to timely prepare and file the delinquent tax returns cited in the SOR. He addressed this situation by ensuring that their taxes were paid on time through excess withholding from his salary. Nevertheless, he recognized the need to comply with his return-filing obligations and obtained the professional financial services of a CPA who could, and did, obtain that information and file the returns. Applicant's current financial situation is fully solvent, and there is minimal risk of future financial stress or tax-filing issues. These actions establish complete mitigation of security concerns raised by Applicant's formerly delinquent tax returns.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's national security eligibility 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.

According to AG ¶ 2(c), the ultimate determination of whether to grant national security eligibility must be an overall commonsense judgment based upon careful consideration of the applicable guidelines and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all pertinent facts and circumstances surrounding this case. Applicant is a mature adult, who has demonstrated accountability for resolving the tax return filing issues that he and his wife formerly encountered. They have now filed the formerly delinquent returns, resulting in substantial refunds. The failure to file timely returns did not, in this case, arise from or reflect irresponsibility, untrustworthiness, or unwillingness to comply with laws and regulations on Applicant's part. He demonstrated strong character and has devoted most of his adult life to successful support of critical national security objectives. Applicant provided persuasive evidence of sufficient income security to ensure solvency in the future. The potential for pressure, exploitation, or duress is minimal.

Overall, the evidence has eliminated any doubt as to Applicant's eligibility and suitability for a security clearance. He successfully met his burden to mitigate the security concerns arising under the guideline for financial considerations.

Formal Findings

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

Paragraph 1, Guideline F: FOR APPLICANT

Subparagraphs 1.a and 1.b: For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the interests of national security to grant Applicant a security clearance. National security eligibility for access to classified information is granted.

DAVID M. WHITE
Administrative Judge