



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



In the matter of:)	
)	
)	ISCR Case No. 20-00215
)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Daniel F. Crowley, Esq., Department Counsel
For Applicant: Leon J. Schachter, Esq., Bigley Ranish, LLP

March 23, 2021

Decision

LOKEY ANDERSON, Darlene D., Administrative Judge:

Statement of Case

On October 11, 2018, Applicant submitted a security clearance application (e-QIP). (Item 3.) On April 30, 2020, 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 in July 6, 2020. He requested that his case be decided by an administrative judge on the written record without a hearing. (Item 2.) On November 23, 2020, Department Counsel submitted the Government’s written case. A complete copy of the File of Relevant Material (FORM), containing seven exhibits, was

sent to the Applicant and received on December 8, 2020. 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 January 4, 2021, and January 11, 2012, referred to as Applicant's Exhibit A, which was admitted into evidence without objection. Applicant's Exhibit A makes an objection to Government's Item 5. Government's Item 5 is inadmissible. It will not be considered or cited as evidence against Applicant's interest in this case. It is the summary of an unsworn interview of Applicant conducted by an interviewer from the Office of Personnel Management on February 13, 2019 and March 26, 2019. Applicant did not adopt it as his own statement, or otherwise certify it to be accurate. Under Directive, ¶ E3.120, this Report of Investigation summary is inadmissible against Applicant's interest in the absence of an authenticating witness. See Executive Order 10865, § 5. In light of Applicant's admissions, Item 5 is also cumulative. The Government replied to Applicant's response to the FORM dated February 4, 2021, which was admitted without objection. DOHA assigned the case to me on February 19, 2021. Items 1 through 4 and 6 and 7 are admitted into evidence and hereinafter referred to as Government Exhibits 1 through 4 and 6 and 7.

Findings of Fact

Applicant is 57 years old. He studied Political Science, History and Spanish at a University and obtained his Bachelor degree. He then received his Juris Doctor from another University, and was selected for the American Criminal Law Review. Additional studies include post-graduate coursework in counterintelligence at the Institute of World Politics. He is a member in good standing of the bars of Maryland, the U.S. District Court of Maryland and the Federal Court of Appeals for the Fourth Circuit. He 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 a single allegation under this guideline concerning Applicant's failure to file his Federal and state income tax returns for tax years 2012, 2013, 2016, and 2017. In his answer to the SOR, Applicant admits this allegation. (Government Exhibit 2.)

Applicant admits that he procrastinated and did not file the Federal and state income tax returns in question in a timely fashion. It appears from his argument that his pride kept him from seeking help to get these income taxes filed on time. Applicant erroneously assumed that since he was an attorney, a high achiever, and a perfectionist, he should be able to figure out how to properly file his income tax returns. He submits that he had problems determining the basis for certain stocks he sold, and

since 2009, he experienced wide fluctuations in his salary while receiving self-employment income. His record keeping was disorganized causing even further frustration, and he fell behind on his income tax filings. He states that he tried and struggled to do his income taxes on his own but was not successful. He realized, at some point, that his income tax returns were not simple, but required complicated tax calculations that he was not accustomed to or sufficiently educated to perform effectively. Instead of hiring a professional tax preparer, he ignored the problem. It was not until March or April 2019, that Applicant hired an accountant to address his income tax problems. Applicant's overdue Federal and state income tax returns for tax years 2016 and 2017 were not filed until January 8 and January 13, 2020. (Applicant's Exhibits K and L, submitted with his response to the SOR.) Applicant's Federal and state income tax returns for tax years 2012 and 2013 were not filed until May 18 and May 21, 2020. (Applicant's Exhibits A and B, submitted with his response to the SOR.)

Applicant offers in mitigation that he filed his 2018 and 2019 Federal and state income tax returns on time given the extensions permitted by the taxing authorities because of the COVID pandemic. These returns were filed on May 22, 2020. (Applicant's Exhibit N, submitted with his response to the SOR.)

Character references from professional associates, friends and colleagues of the Applicant attest to his good character, trustworthiness, reliability, and ability to abide by the laws. (Applicant's Response to SOR.)

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 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 did not abide by the tax laws. He failed to file his Federal and state income tax returns for a number of years. The failure of Applicant to act in a timely manner shows a defect in character. There is no evidence in the records that provides any unusual factors or circumstances beyond his control that rendered him unable to file his taxes on time for the years in question. Nor did Applicant file an extension to accommodate circumstances which might prevent him from filing his returns on time. Applicant simply ignored the situation until it became a problem. In fact, he admitted that he should have hired a CPA sooner instead of telling himself that he could do it without help, which led to his frustration and ultimately procrastination, which has caused him nothing but needless problems. (Government Ex. 2, at page 4.) Applicant has not acted responsibly under the circumstances. There is no justification for his misconduct, or anything else in the record, to mitigate this violation of the tax laws. It is noted that Applicant is an attorney who made the choice to ignore his income tax filings until he felt his pride would allow him to seek professional assistance. This demonstrates a lack of judgment and reliability needed to be eligible for access to classified information.

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

(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 four years, namely 2012, 2013, 2016, and 2017, Applicant did not file his Federal and state income tax returns as required by law. Applicant's 2012 and 2013 income tax returns were filed after the SOR was issued. His 2016 and 2017 income tax returns were filed just several months before the SOR was issued. It is recognized that within the last two years, Applicant has taken some positive steps to correct his mistakes. He has now filed the Federal and state income tax returns in question. However, by failing to file his income tax returns in a timely fashion in the first place, Applicant imposed an undue burden on the taxing authorities, has committed a serious offense, and has been irresponsible under the law. Applicant has not demonstrated a track record of diligence and responsibility. In fact, his past record shows poor judgment, unreliability and untrustworthiness. He has failed to show that he has earned the privilege to access to classified information. None of the conditions under this guideline establish full mitigation.

Applicant submits that if a security clearance is not warranted in this case, a conditional grant of Applicant's clearance should be granted with the requirement that Applicant submit Federal and state transcripts for a reasonable number of future years and be required to prove compliance with the filing and paying of taxes. After due consideration, I find that a conditional clearance is not appropriate in this case.

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 security 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

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