



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



In the matter of:)
)
) ISCR Case No. 20-02715
)
Applicant for Security Clearance)

Appearances

For Government: Bryan Olmos, Esq., Department Counsel
For Applicant: *Pro se*

August 5, 2021

Decision

TUIDER, Robert, Administrative Judge:

Applicant failed to mitigate security concerns under Guideline F (financial considerations). Clearance is denied.

Statement of the Case

On October 24, 2018, Applicant submitted a Questionnaire for National Security Positions (SF-86). On January 8, 2021, the Defense Counterintelligence and Security Agency, Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline F. The SOR detailed reasons why DOD CAF was unable to find that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.

On March 17, 2021, Applicant answered the SOR and elected to have his case decided on the written record in lieu of a hearing. A complete copy of the file of relevant material (FORM), dated April 8, 2021, was provided to him by letter on April 13, 2021. Applicant received the FORM on May 5, 2021. He was afforded a period of 30 days to file objections and submit material in refutation, extenuation, or mitigation. Applicant did

not submit any evidence in response to the FORM. On July 16, 2021, the case was assigned to me. Department Counsel submitted five documents with his FORM, marked as Items 1 through 5. Items 1 through 5 are admitted into evidence.

Findings of Fact

Background Information

Applicant is a 47-year-old manufacturing engineer employed by a defense contractor since September 2015. (Item 3) He seeks a security clearance in conjunction with his current employment.

Applicant received his high school diploma in May 1992, and was awarded a bachelor's degree in August 1996. Applicant was previously married from December 2004 to April 2008, and that marriage ended by divorce. He remarried in January 2010. Applicant has a six-year-old son, and a five-year-old stepson. (Item 3)

Financial Considerations

Applicant's SOR lists three allegations: (1) that he failed to file his 2017 federal income tax return; (2) that he failed to file his 2016 federal income tax return until November 2019; and (3) that he owes the federal Government approximately \$13,000 for tax year 2016. (SOR ¶¶ 1.a – 1.c (Item 1))

These allegations are established by Applicant's October 24, 2018 SF-86; his November 26, 2020 Defense Office of Hearings and Appeals (DOHA) Response to Interrogatories, containing his April 9, 2019 Office of Personnel Management (OPM) interview; his March 17, 2021 SOR Answer in which he admitted all three allegations; and his April 3, 2021 credit report. (SOR Answer; Items 1 – 5)

Applicant self-reported that he had not filed or paid his 2016 and 2017 federal income taxes when he completed his October 24, 2018 SF-86. He claimed that he was waiting to receive \$57,000 owed to him from a contractor following a home building dispute. In total, he estimated that he owed \$25,000 in federal income taxes, adding that he paid \$1,000 for each year requesting filing extensions. (Item 3) Applicant further disclosed that he was involved in a 2016 child custody modification proceeding, and in 2017 he was sued for failure to disclose information on a 2013 home sale. (Item 3)

During his April 9, 2019 OPM interview, Applicant related that in April 2016 he contracted with a builder to build a \$565,000 house. Per the contract, the house was to be completed by December 2016. He withdrew \$57,000 from his 401k as a down payment to the contractor to begin construction of his new home. Following delays, Applicant hired an attorney in January 2017 to sue the contractor for return of his deposit. The contractor terminated the contract in August 2017. The matter was set for arbitration in December 2019. (Item 4) Applicant inferred that this issue prevented him from filing his 2016 and 2017 federal income returns, and stated that he planned to use his settlement from the lawsuit to pay his taxes. (Item 4) He further disclosed that he

had “received four or five letters from the IRS reminding him to file his taxes but did not respond to them.” Applicant claimed he was unsure what he owed, but intended to file his 2018 Federal income tax return on time. (Item 4)

In his November 26, 2020 Response to Interrogatories, Applicant claimed, “I did not file for 2016 and 2017 due to issues with builder I was trying to find ways to write off the issues we were having with them and get our money back.” (Item 4) Applicant claimed that he submitted his 2016 and 2017 tax returns together late, but that the IRS had only received his 2016 return and was still processing it. (Item 4) He stated that he would pay his 2016 taxes when the return was processed. (Item 4) Applicant’s tax transcripts show the IRS received his 2016 return in February 2020. (Item 4) However, in November 2020, the IRS requested Applicant provide additional verification of his identity. (Item 4) Applicant acknowledged that he would need to contact the IRS to address the identity theft issue. (Item 4)

Applicant further explained in his Response to Interrogatories that he had computer software problems with his 2017 income tax return, but that he would contact a tax service for assistance. He stated that he still owed the IRS “a call.” (Item 4) Applicant’s tax transcripts also reflect that Applicant was assessed penalties for failing to file timely his 2018 and 2019 income tax returns and pay the amounts due. (Item 4) He did not provide any additional information explaining the reason for these additional delayed income tax returns.

In his SOR Answer, Applicant discussed the lawsuits he was involved in and stated that he had withdrawn 401k funds to cover his attorney fees. This contradicted Applicant’s previous statement to the OPM investigator that he had withdrawn funds to invest in new construction of his home. He further stated that the litigation settled in 2019 and that he received his money back. He provided no evidence that any of these funds were used to resolve his tax debt. (Item 2)

Applicant claimed that the IRS had still not processed his 2016 income tax return, but did not detail any action he took to resolve the November 2020 IRS inquiry regarding the verification of his identity. Finally, Applicant admitted in his SOR Answer that despite his previous statements that he would take corrective action, he had still not filed his 2017 tax return. (Item 2) According to Applicant’s Personal Financial Statement, he has a net monthly remainder of \$2,283. (Item 5)

Department Counsel’s FORM discussed specific shortcomings of Applicant’s SOR answer, and emphasized long-standing DOHA case law concerning the necessity for applicants to provide mitigating documentation and the seriousness of fulfilling one’s obligations to file timely Federal income returns and pay one’s taxes. Except as discussed above, Applicant’s SOR Answer and FORM Response contained no documentation that adequately addressed this requirement.

Policies

This case is adjudicated 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 (AG), which became effective on June 8, 2017.

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 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. 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."

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 of 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

Financial Considerations

AG ¶ 18 articulates the security concern for financial problems:

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.

AG ¶ 19 provides four disqualifying conditions that could raise a security concern and may be disqualifying in this case: “(a) inability to satisfy debts;” “(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.” Based on the evidence contained in the record, AG ¶¶ 19(b) and 19(f) are applicable. Further review is necessary.

AG ¶ 20 lists six potentially mitigating conditions under these facts:

(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, 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

(e) the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue; 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.

The Appeal Board explained an applicant's responsibility to prove applicability of mitigating conditions as follows:

Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in security clearance decisions is that articulated in *Egan, supra*. (You already said this above)

ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013)

Applicant has not yet fully established any of these conditions. As noted, Applicant withdrew funds from his 401k in 2016 to invest in new home construction. With the ongoing litigation regarding that property, and knowing that he faced an additional tax burden because of his 401k withdrawal, Applicant failed to timely file his 2016 Federal income tax return. He eventually submitted this return in 2020 and claimed that he would pay the IRS whatever he owed once the return was processed. Over two years elapsed after he disclosed his tax issues in his SF-86. Applicant acknowledged in his Response to Interrogatories that he owed the IRS "a call." With no response to the IRS inquiry, it was foreseeable that the return had not been processed and payments were not made by the time Applicant submitted his SOR Answer.

Moreover, because of an apparent and ongoing computer problem, Applicant failed to file his 2017 Federal income tax return. However, he was able to file his 2018 and 2019 Federal incomes returns, albeit late with additional taxes and penalties due. Almost four years have elapsed since Applicant initially failed to meet his 2016 tax obligations. Yet instead of hiring an accountant or diligently engaging in communication with the IRS over those years, he compounded his ongoing tax problems even more by failing to file timely his Federal tax returns for 2017, 2018, and 2019.

Although Applicant filed his 2016 Federal income tax returns, his failure to file timely his tax returns and resolve delinquent tax debt preclude finding he has the good judgment and reliability needed to be cleared for access to classified information. Applicant must demonstrate that he has acted reasonably under the circumstances. The Directive cites failure to file returns as a disqualifying condition in and of itself, irrespective of whether the underlying taxes have actually been paid. (ISCR Case No. 15-03019 at 6 (App. Bd. Jul. 5, 2017))

In addition to evaluating the facts and applying the appropriate adjudicative factors under Guideline F, I have reviewed the record before me in the context of the whole-person factors listed in AG ¶ 2(d). Applicant is presumed to be a mature, responsible citizen. Nonetheless, without sufficient information, including corroborating documentation, suggesting that his long-standing financial problems are being addressed, doubts remain about his suitability for access to classified information. Protection of the national interest is the principal focus of this adjudication. Accordingly, those doubts must be resolved against Applicant.

Applicant chose to rely on the written record, but failed to submit sufficient evidence to supplement the record with relevant and material facts regarding his circumstances, articulate his position, or mitigate the financial security concerns. He failed to offer evidence of corrective action taken or provide documentation regarding his efforts to address his SOR allegations. Absent such information, financial considerations security concerns remain.

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 – 1.c:	Against Applicant

Conclusion

In light of the record as a whole, it is not clearly consistent with the national interest to grant Applicant's security clearance. National security eligibility is denied.

ROBERT TUIDER
Administrative Judge