



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



In the matter of:)
)
 -----) ISCR Case: 19-03003
)
 Applicant for Security Clearance)

Appearances

For Government: Jeff Nagel, Esquire, Department Counsel
For Applicant: *Pro se*

February 11, 2021

Decision

ROSS, Wilford H., Administrative Judge:

Applicant did not file his Federal or state income tax returns for tax years 2013 and 2014 in a timely manner. His 2016 Federal and state income tax returns were filed in a timely fashion. Resulting security concerns were not mitigated. Based upon a review of the pleadings, exhibits, and testimony, national security eligibility for access to classified information is denied.

Statement of Case

Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) on January 15, 2019. (Government Exhibit 1.) On March 10, 2020, the Department of Defense Consolidated Adjudications Facility (DoD CAF) issued a Statement of Reasons (SOR) to Applicant, 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; Department of Defense 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, effective within the Department of Defense on June 8, 2017.

Applicant answered the SOR on April 7, 2020, and requested a hearing before an administrative judge. (Answer.) The Government was ready to proceed on June 29, 2020. The case was assigned to me on July 10, 2020. The Defense Office of Hearings and Appeals (DOHA) issued an initial notice of hearing on September 29, 2020. After a continuance due to Covid-19, the hearing was scheduled for December 7, 2020. The hearing was convened as scheduled. The Government offered Government Exhibits 1 through 5, which were admitted without objection. Applicant testified on his own behalf and submitted Applicant Exhibits A through H, which were also admitted without objection. DOHA received the transcript of the hearing (Tr.) on January 6, 2021. Applicant requested the record remain open for receipt of additional information. On December 9, 2020; January 4, 2021; and January 12, 2021, Applicant submitted Applicant Exhibits I through P, which were also admitted without objection.

Findings of Fact

Applicant is 35 years old and single. He has a Bachelor of Science degree and has worked for his current employer since 2020. He has worked in the defense industry since 2008 and held a security clearance the majority of that time. (Government Exhibit 1 at Sections 12, 13A and 17; Tr. 6, 13.)

Paragraph 1 (Guideline F, Financial Considerations)

The Government alleged in this paragraph that Applicant is ineligible for clearance because he has failed to meet his financial obligations and is therefore potentially unreliable, untrustworthy, or at risk of having to engage in illegal acts to generate funds. Applicant admitted both SOR allegations (1.a and 1.b), with explanations.

1.a. Applicant admitted that he had not filed his Federal income tax returns in a timely manner for tax years 2013, 2014, and 2016. (In his Answer Applicant incorrectly stated 2017 instead of 2016. (Applicant Exhibit C; Tr. 23-24.))

1.b. Applicant admitted that he had not filed his state income tax returns in a timely manner for tax years 2013, 2014, and 2016. (In his Answer Applicant incorrectly stated 2017 instead of 2016. (Applicant Exhibit C; Tr. 23-24.))

In Section 26 of Applicant's e-QIP (Government Exhibit 1) Applicant admitted that he had not filed Federal or state taxes for at least tax year 2013. He further stated in the questionnaire, "It is my understanding that the taxes were not owed based on normal paycheck withholding and exemptions/credits from previous years." The questionnaire then asked what actions Applicant had taken. He stated, "No action has been taken as it

is assumed no amount is owed and only a filing is required. I intend to back-file for the applicable years as soon as possible.” (See *a/so* Tr. at 29.)

Applicant was interviewed by an investigator from the Office of Personnel Management (OPM) on February 14, 2019. During that interview Applicant was asked about his failure to file Federal or state tax returns for 2013, 2014, and 2016. The report stated, “Subject [Applicant] filed tax extensions for each year but has not filed the required follow-up. Subject did not follow up on sending in the taxes due to oversight. . . . Subject knows he is responsible for filing and will attempt to bring everything up to date by February 2019.” (Government Exhibit 2 at 2.)

Turning first to Applicant’s 2016 Federal and state tax returns. After the hearing Applicant provided documentation from the IRS and his state tax agency showing that those returns were filed in a timely fashion in 2017. (Applicant Exhibits I and P.)

With regard to his 2013 and 2014 Federal and state tax returns, Applicant admitted that he intended to file them from 2015 on, but it became too hard “because of my job duties, the amount of time I spend on the job, the amount of time I spend on travel.” In fact, Applicant’s dilatory conduct with regard to the tax returns continued even after he received the Statement of Reasons. (Tr. 24.) (See Applicant Exhibits A, B, and C; Tr. 64-65.)

According to Applicant, he finally filed his Federal 2013 and 2014 tax returns in May 2020. However, there is no confirmation from the IRS that they were actually received and Applicant did not follow up as of the date of the hearing. After the hearing Applicant submitted a written statement saying that he had contacted the IRS on December 9, 2020. He had checked their website and these two tax returns were not showing as filed. A representative allegedly told Applicant it was possible that the IRS had received them, but due to Covid-19 the returns had not yet been entered into the IRS data base. No further information was provided. (Applicant Exhibits D and O; Tr. 28-29, 52-53, 65-66.)

Applicant did not file his state 2013 and 2014 tax returns in May 2020, at the same time he allegedly filed his Federal tax returns. Rather, according to Applicant, his filing of these returns was complicated by a proposed assessment from the state. After some questioning from Department Counsel about the current status of the returns, Applicant revealed that he had not filed his state tax returns, but they were actually sitting in his car to be mailed after his hearing. (Tr. 35-36, 56-58.)

The reason for his dilatoriness was described by Applicant as follows:

Well, that’s because my - - what I intended to do here wasn’t necessarily to show that I had fully filed everything and closed everything out - - but that I was making efforts to address them, beginning with my Federal Forms and

then also with the State Form portion that I file today and then the last step would be any adjustments or priorities. (Tr. 57.)

After the hearing Applicant submitted documentation from the state tax authority showing that his 2013 and 2014 returns were received on December 10, 2020. (Applicant Exhibit P.)

Applicant's attention was also drawn to several delinquent accounts that were found on his credit report and had been outstanding for a considerable period of time. Applicant submitted evidence that he had resolved those issues after the hearing. However, once again, Applicant was dilatory in resolving these items. (Government Exhibits 3, 4, and 5; Applicant Exhibits K, L, M, N, and O; Tr. 39-45.)

Mitigation

Applicant submitted letters of recommendation for employment from former co-workers. He also submitted his evaluations from his former employer. These documents show that he is a respected person in his field of endeavor. (Applicant Exhibits E, F, and G; Tr. 30-35.)

Policies

When evaluating an applicant's national security eligibility, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines (AG) list potentially disqualifying conditions and mitigating conditions, which are to be used 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. The entire process is a conscientious scrutiny of applicable guidelines in the context 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, "Any 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. I have not drawn inferences based on mere speculation or conjecture.

Directive ¶ E3.1.14 requires the Government to 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, 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 national security eligibility. 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 or sensitive information. Finally, as emphasized in Section 7 of Executive Order 10865, “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* 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, 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 Federal, state, or local income tax as required.

Applicant failed to timely file Federal and state income tax returns, as required, for at least two years, 2013 and 2014. Applicant showed that he had filed his 2016 Federal and state tax returns in a timely fashion. These facts establish prima facie support for the foregoing disqualifying condition, and shift the burden to Applicant to mitigate those concerns.

The guideline includes conditions in AG ¶ 20 that could mitigate the security concerns arising from Applicant's failure to timely file tax returns:

(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;

(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 did not file two years of Federal and state income tax returns in a timely fashion. He has known for close to two years of the Government's concerns, but his conduct in resolving these concerns has been lackadaisical at best. He finally filed the Federal returns in May of 2020, but he was unable to provide confirmation of that fact because he did not contact the IRS until after the hearing. The state returns, which were in his car at the time of the hearing, were actually filed the next day. His testimony and written statements are replete with almost non-sensical explanations and prevarications about why he was so delinquent in filing tax returns for these two years. Applicant has virtually no track record of timely filing his tax returns. Filing the tax returns at issue did not become Applicant's priority until he literally was in the hearing room. It is simply too soon to conclude that he is a capable steward of classified information. His unwillingness to abide by income tax rules and regulations that apply to all cast doubt on his reliability and trustworthiness. Applicant did not mitigate the concerns over his income tax issues. Guideline F is found against Applicant.

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.

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 did not provide sufficient evidence to show that he would file his tax returns in a timely manner in the future. The potential for pressure, exploitation, or duress remains undiminished. Overall, the evidence creates substantial doubt as to Applicant's judgment, eligibility, and suitability for a security clearance. He failed to meet 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 Enclosure 3 of the Directive, are:

Paragraph 1, Guideline F:	AGAINST APPLICANT
Subparagraphs 1.a and 1.b:	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 national security eligibility and a security clearance. Eligibility for access to classified information is denied.

Wilford H. Ross
Administrative Judge