



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



In the matter of:)
)
) ISCR Case No. 19-01156
)
Applicant for Security Clearance)

Appearances

For Government: Andrew H. Henderson, Esq., Department Counsel
For Applicant: Jason R. Wareham, Esq.

06/28/2022

Decision

COACHER, Robert E., Administrative Judge:

Applicant mitigated the financial considerations security concerns. Eligibility for access to classified information is granted.

Statement of the Case

On July 28, 2021, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline F, financial considerations. The DOD acted 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 implemented by DOD on June 8, 2017 (AG).

Applicant answered the SOR on August 2, 2021, and he requested a hearing before an administrative judge. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on March 21, 2022, and the hearing was convened as scheduled on April 13, 2022. The Government offered exhibits (GE) 1 through 3, which were admitted into evidence without objection. The Government’s exhibit list was

identified as hearing exhibit (HE) I and its discovery letter was marked as HE II. Applicant testified, called one witness, and offered exhibits (AE) A through J, which were admitted without objection. The record remained open until April 22, 2022, to allow Applicant to submit additional documentary evidence. He submitted AE K and L, which were admitted without objection. DOHA received the hearing transcript (Tr.) on April 20, 2022.

Findings of Fact

Applicant admitted the SOR allegations, with explanations. His admissions are incorporated into these findings of fact. After a review of the pleadings and evidence, I make the following additional findings of fact.

Applicant is a 69-year-old employee of a defense contractor. He began working at his present job in July 2004. He also has owned a home-based business since 1999 (Bus. A). He retired from the U.S. Air Force as a lieutenant colonel in 1995. He served from 1974 to 1995 as a missile officer. He holds a master's degree. He has been married for 47 years and has two adult children. (Tr. 19-21, 32, 34, 41; GE 1)

Applicant first received a security clearance when he was commissioned in the Air Force in 1974. He has since held a clearance for over forty years without incident. According to his current supervisor, Applicant handles classified information on a daily basis in a secured facility and has never had a security incident or violation. (Tr. 20, 32, 47; GE 1)

The SOR alleged Applicant failed to timely file his federal income tax returns for years 2012-2014 and 2016. It also alleged that he failed to file his state income tax returns for years 2012-2016. (SOR ¶¶ 1.a – 1.b). The basis for the allegations came to light when Applicant voluntarily admitted not filing his tax returns when he completed his August 2017 security clearance application (SCA). Those admissions establish the allegations by substantial evidence. (GE 1)

Applicant credibly explained that he failed to file his federal and state tax returns for the stated years initially because he had not kept good records for Bus. A and that caused him to delay filing his tax returns. This occurred starting with tax year 2012. He was never able to get the records together to file his 2012 returns and this then impacted the succeeding years. Everything snowballed on him after that. He stated in his 2017 SCA that he would complete and file the delinquent tax returns by September 2017. He acknowledged that he failed to meet that self-imposed deadline. During his September 2018 background interview, he told that investigator that he anticipated resolving all his tax issues by December 2018. He acknowledged that he failed to meet that self-imposed deadline because he still did not have his tax records organized. (Tr. 21z, 33-34; GE 1-2)

The status of Applicant's federal and state tax return filings is as follows:

Tax Year 2012:

Federal tax return: Between 2017 and 2019, when Applicant was gathering the necessary information to file his delinquent tax returns, he contacted the IRS and was told by a representative that he need not file his 2012 return because it was too old. Relying on that advice, when he filed the remainder of his delinquent federal returns in 2019, he did not file his 2012 return. When he realized that he needed to file his 2012 return for his security clearance, he did so in December 2021. He also paid \$3,470 toward any delinquent taxes owed, interest, and penalties. (Tr. 21-22, 24; AE A)

State tax return: Documents show that Applicant's 2012 state tax return was processed in January 2017 and that all resulting taxes, interest, and penalties owed were paid by October 2017. (GE 2)

Tax Year 2013:

Federal tax return: In April 2014, Applicant timely filed an extension to file his federal return by October 2014. He also made a \$500 estimated payment at the time he filed his extension. Applicant was unable to gather the necessary information to file his return by the October extension deadline. In May 2019, Applicant filed his 2013 federal return. He included a \$2,321 tax payment with the return. In October 2019, he paid \$1,744 in interest and penalties that he owed. (Tr. 25-26; AE B)

State tax return: Documents show that Applicant's 2013 state tax return was processed in October 2017 and that all resulting taxes, interest, and penalties owed were paid by October 2017. (GE 2)

Tax Year 2014:

Federal tax return: In April 2015, Applicant timely filed an extension to file his federal return by October 2015. He also made a \$1,500 estimated payment at the time he filed his extension. Applicant was unable to gather the necessary information to file his return by the October extension deadline. In May 2019, Applicant filed his 2014 federal return. He included a \$3,202 tax payment with the return. In October 2019, he paid the remaining amount owed for interest and penalties. (Tr. 25-26; AE C)

State tax return: Documents show that Applicant's 2014 state tax return was processed in August 2018 and that all resulting taxes, interest, and penalties owed were paid by November 2018. (GE 2)

Tax Year 2015:

Federal tax return: No federal return alleged. However, this return was filed in May 2019 and the resulting tax, interest, and penalties have all been paid. (Tr. 27; AE D)

State tax return: Documents show that Applicant's 2015 state tax return was processed in April 2017 and that all resulting taxes, interest, and penalties owed were paid by July 2017. (GE 2)

Tax Year 2016:

Federal tax return: In April 2017, Applicant timely filed an extension to file his federal return by October 2017. He also made a \$6,000 estimated payment at the time he filed his extension. Applicant was unable to gather the necessary information to file his return by the October extension deadline. In April 2019, Applicant filed his 2016 federal return. He included a \$10,085 tax payment with the return. In June 2019, he paid \$819 for interest and penalties that he owed. (Tr. 27; AE E)

State tax return: Applicant believed that he filed his 2016 state tax return at the same time he filed his 2016 federal return (in April 2019), however, he discovered that was not the case. He made a payment of \$600 towards any tax owed in April 2017. He filed his 2016 return in February 2022. (Tr. 27; GE 2; AE L)

Applicant documented that after tax year 2016, all federal and state income returns have been timely filed and all resulting taxes were timely paid. (Tr. 22, 27-28; GE 2; AE F)

Applicant has learned much from his dilatory actions in filing his taxes. He failed to act sooner to remedy his problem because he felt overwhelmed. He now has organized his self-employment business records so that the problems that created his tax-filing delay will no longer plague him. He has also received advice from a certified public accountant (CPA) concerning his tax issues. He also will most probably hire a tax professional to prepare and file his tax returns in the future. He understands government rules and regulations are important and has no problem with the U.S. tax process. He is not a tax protestor. He has the resources necessary to always be able to pay his taxes. He and his wife have combined income in excess of \$200,000. They also have retirement accounts valued over \$800,000. He has a credit score of 775 and he timely pays all of his debts. (Tr. 21, 30; AE G, K)

Applicant's immediate supervisor testified that Applicant is an excellent performer and was the top performer last year. The supervisor is aware of Applicant's tax issues and despite those, he recommends that Applicant retain his security clearance. He has no concerns about Applicant's ability to protect classified information. (Tr. 45-47)

Applicant presented statements from a former and a current coworker, both attest to his integrity, work ethic, trustworthiness, honesty, and good judgment. They are fully aware of Applicant's tax issues, but they also recommend that he retain his security clearance. The former coworker also works as a volunteer tax preparer and conveyed that Applicant's tax problem is not unique. (AE I, J)

Policies

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 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, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(a), 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.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an "applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and has the ultimate burden of persuasion to obtain a favorable security 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 that an applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that 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

AG & 18 expresses the security concern for financial considerations:

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. I have considered all of them under AG & 19 and the following potentially apply:

(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.

The evidence showed Applicant failed to timely file his federal tax returns for 2012-2014 and 2016, and his state tax returns for 2012-2016. I find the above disqualifying conditions are raised.

The guideline also includes conditions that could mitigate security concerns arising from financial difficulties. I have considered all of the mitigating conditions under AG ¶ 20 and the following potentially apply:

(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;

(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.

There is no doubt that Applicant should have responded in a timelier fashion to his tax problems. However, he has now resolved his federal and state tax-filing issues. While he waited until 2019 to file his delinquent federal returns, he began resolving his state returns in 2017, all before the issuance of the SOR. There are clear indications that his financial issues are resolved and that recurrence is unlikely because he now has a firm handle on his self-employment business records, which were the initial cause of his delayed tax return filings. He documented timely filing his 2021 federal and state tax returns. He sought professional tax assistance from a CPA and intends to use a professional tax preparer in the future. AG ¶¶ 20(a), 20(c), and 20(g) are all applicable.

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 the 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 guideline 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 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.

I considered Applicant's military service, his over 40 years of holding a security clearance without a security incident, while handling classified information on a daily basis, the recommendations from his coworkers and supervisor, and the circumstances surrounding his delay in filing his tax returns. I also considered that Applicant brought his tax issues up in his 2017 SCA and that he acknowledged making a mistake in not addressing his taxes quicker than he did. I'm convinced he will act in a timely manner with his taxes from now on, and that he will not incur tax problems in the future.

