



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



In the matter of:)
)
) ISCR Case No. 19-02866
)
Applicant for Security Clearance)

Appearances

For Government: Jeff Kent, Esq., Department Counsel
For Applicant: *Pro se*

07/28/2022

Decision

MURPHY, Braden M., Administrative Judge:

Applicant failed to timely file his state and federal income tax returns for two tax years, 2015 and 2018. He provided sufficient evidence to mitigate the resulting security concerns under Guideline F for financial considerations. Applicant’s eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted a security clearance application (SCA) on February 21, 2017. On March 10, 2020, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant alleging security concerns under Guideline F, financial considerations. The DOD acted under Executive Order (Exec. Or.) 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 Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (AG), effective June 8, 2017.

Applicant answered the SOR on June 2, 2020, and requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA). Processing of this case was delayed significantly by the COVID-19 pandemic. The case was first assigned to another DOHA administrative judge on October 25, 2021. On April 21, 2022, DOHA issued a notice scheduling the hearing to be held in-person on May 19, 2022 at a location near where Applicant lives and works. The case was assigned to me on May 10, 2022 after the initial administrative judge became unavailable to hear the case due to a family matter.

The hearing was conducted as scheduled. Department Counsel submitted Government's Exhibits (GE) 1 through 9, which I admitted without objection. Applicant testified and submitted Applicant's Exhibits (AE) A through H, which I also admitted without objection. Applicant provided AE A – AE D with his SOR response. Note: Due to a brief power outage during the hearing, identification and admission of some of Applicant's exhibits were not recorded in the transcript. (Tr. 27) Those documents, AE D – AE H, were admitted without objection.

At the end of the hearing, I held the record open to allow Applicant the opportunity to submit additional documentation. Applicant provided his state and federal income tax returns for tax years 2014, 2015, and 2016, all from his tax preparer. Those documents were marked as AE I, AE J, and AE K, respectively, and admitted without objection. Post-hearing e-mails addressing certain facts about those tax returns (as discussed in the Facts section below) are marked as Hearing Exhibit (HE) III. DOHA received the hearing transcript on June 2, 2022. The record closed on June 8, 2022.

Findings of Fact

Applicant admitted both SOR allegations, ¶¶ 1.a and 1.b, with explanations and documentation. His admissions are incorporated into the findings of fact. After a thorough and careful review of the pleadings and evidence submitted, I make the following additional findings of fact.

Applicant is 57 years old. He has a high school diploma. He was married from 2000-2007, and has a daughter from that marriage, now 19 years old. (GE 1) Applicant works as a welder for a defense contractor on a U.S. military facility. He has never had a clearance before but needs one for base access. (Tr. 13, 28-30)

Applicant worked for defense contractor 1 from 1984 until January 2013, when he was laid off. Until about March 2015, he worked on his farm but was otherwise unemployed. He then worked as a welder for defense contractor 2, from March 2015 to February 2016. Applicant left that job because of the hours. He worked on his farm for the next year, until February 2017, but was again otherwise unemployed. In February 2017, Applicant returned to work with his long-time employer, defense contractor 1 and has continued working there. (Tr. 32-35, 57-59; GE 1)

The SOR concerns two years of state and federal unfiled income tax returns, for tax years 2015 and 2018. (SOR ¶¶ 1.a, 1.b) Applicant disclosed on his 2017 SCA that he had not filed his 2015 income tax returns. He indicated, both in his Answer and his testimony, that this was because he was unemployed at the time and was injured with no health insurance. (Tr. 30-31, 35; Answer) Applicant clarified in his testimony that it was during tax year 2016 that he was largely unemployed, not 2015. (Tr. 53-54) In 2016, his income was \$461. (Tr. 50-51; GE 2 at 20)

Applicant also acknowledged that during this period, he withdrew money from his IRA retirement account in order to support himself. He did not realize that doing so had tax implications. He said he thought his state and federal tax returns had been “taken care of” during the IRA withdrawal process. (Tr. 36-40; GE 8, GE 9)

For tax year 2015, tax records in the Government’s evidence show an extension filed by his tax preparer but no return filed subsequently. (Tr. 49; GE 2 at 19, 36) Applicant filed his 2015 state and federal returns in December 2017, through his tax preparer. (SOR ¶¶ 1.a, 1.b) He received a \$33 federal refund. His 2015 state return did not reflect either a refund or money owed. (AE J)

Applicant also did not timely file his state and federal tax returns for tax year 2018. (SOR ¶¶ 1.a, 1.b) This is documented by a December 2019 letter from the IRS that Applicant provided with an interrogatory response. (GE 2 at 37) A 2018 account transcript shows that an extension was filed in April 2019, but no return was filed. (GE 2 at 22; 37) Applicant indicated that he had mailed the returns on December 19, 2019, and that he owed \$416. (GE 2 at 11)

AE C contains a signed handwritten note from Applicant’s tax preparer explaining that “the tax return did not get transmitted when it was prepared in 2018.” (AE C) (In fact, this refers to “the 2018 tax year” not “in 2018.”) (Tr. 59-60, 64) Applicant’s 2018 tax returns were filed in May 2020, with the assistance of his tax preparer. (AE A, AE B) He paid \$416 in federal taxes (as noted previously) and received a \$231 state refund. (AE B, AE D)

Applicant has retained the same tax preparation firm for almost 40 years. (AE B through AE K; Tr. 73) This relationship predates the tax years at issue, and is also ongoing. Applicant acknowledged that he did not understand the process, and that he should have sought the advice of his tax preparer in considering what to do about his 2015 income tax returns. (Tr. 38) As to the late filings, Applicant acknowledged that he was at fault and offered no excuse for his tardiness other than being busy and “terrible with documents.” (Tr. 41-43, 78) He said that typically, “I would pile my stuff up and carry it to the tax man.” (Tr. 46)

Applicant did not provide copies of his 2015 state and federal returns at his hearing, but did so afterwards, along with returns from 2014 and 2016. (AE I, AE J, AE K) The printed copies of all of Applicant’s state returns from 2014-2016 show a “filing date” of May 24, 2022. (AE I, AE J, AE K) Thus, it would appear that all of the returns

were filed shortly after the hearing. However, on May 31, 2022, Department Counsel provided the following information in an e-mail to Applicant and myself:

I got in touch with Mr. [name redacted], the accountant. He affirmed that the [state] returns were filed concurrently with their Federal counterparts. The current date is added whenever the software he uses reprints a return.” (HE III)

On that basis, the timing of the filing of these state returns is accepted as concurrent with the federal returns for 2014-2016, as noted.

Applicant documented that his tax returns have always been prepared and filed by his longtime tax preparer. Applicant filed his 2014 state and federal tax return in January 2016. He received an \$884 federal refund and a \$508 state refund. (AE I) He filed his 2016 state and federal tax returns in May 2018. (While not alleged, these tax returns were also late, though likely due to Applicant’s medical issues and employment instability at the time). For 2016, he reported income of \$461, and received small refunds. (Tr. 50-51; GE 2 at 20; AE K) For tax year 2017, his returns were filed in July 2018, and he received a refund of \$2,711. (GE 2 at 21; Tr. 51) He received small refunds for his state and federal taxes for tax years 2019 (AE F), and 2020 (AE G), and he filed an extension for 2021 (AE H)

Credit reports from 2017 and 2018 show a few medical debts, but no other debts, and more recent credit reports, from September 2019 and April 2022, show no delinquencies. (GE 4 – GE 7) The SOR alleges no debts.

Applicant reported on a current personal financial statement that he earns \$59,000 annually in his job. He reported an extra \$10,000 in estimated income from side jobs and cattle sales from his farm. After monthly expenses and repayment on his mortgage and another loan, he reported a monthly surplus of about \$1,637. (AE E)

Policies

It is well established that no one has a right to a security clearance. As the Supreme Court has held “the clearly consistent standard indicates that security determinations should err, if they must, on the side of denials.” *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988).

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. Likewise, I have not drawn 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, 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 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.

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 sets forth several conditions that could raise security concerns under AG ¶ 19. The following are potentially applicable in this case:

(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.

Applicant failed to timely file his state and federal income tax returns for tax years 2015 and 2018. AG ¶¶ 19(c) and 19(f) both apply.

In ISCR Case No. 14-04437 at 3 (App. Bd. Apr. 15, 2016) (emphasis added), the DOHA appeal board detailed the security concern about applicants who fail to file their tax returns as follows:

Failure to file tax returns suggests that an applicant has a problem with complying with well-established governmental rules and systems. Voluntary compliance with such rules and systems is essential for protecting classified information. ISCR Case No. 01-05340 at 3 (App. Bd. Dec. 20, 2002). As we have noted in the past, a clearance adjudication is not directed at collecting debts. See, e.g., ISCR Case No. 07-08049 at 5 (App. Bd. Jul. 22, 2008). By the same token, *neither is it directed towards inducing an applicant to file tax returns. Rather, it is a proceeding aimed at evaluating an applicant's judgment and reliability. Id.* A person who fails repeatedly to fulfill his or her legal obligations does not demonstrate the high degree of good judgment and reliability required of those granted access to classified information. See, e.g., ISCR Case No. 14-01894 at 5 (App. Bd. Aug. 18, 2015); See *Cafeteria & Restaurant Workers Union Local 473 v. McElroy*, 284 F.2d 173, 183 (D.C. Cir. 1960), *aff'd*, 367 U.S. 886 (1961).

Conditions that could mitigate financial considerations security concerns are provided under AG ¶ 20. The following are potentially applicable:

(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;

(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.

Applicant disclosed on his February 2017 SCA that he had failed to file his 2015 tax returns. Those returns were filed in December 2017. He testified that his failure to file was due to employment instability and medical issues following an injury on his farm. While those issues were likely more related to the 2016 tax year, they nonetheless were a contributing factor. AG ¶ 20(b) therefore is given some consideration. Applicant acknowledged, however, that he was largely at fault for his tax issues.

While responding to a tax interrogatory in December 2019, Applicant reported that he had filed his 2018 tax returns the same month, and that he owed \$416. Those returns were filed in May 2020, in connection with Applicant's response to the SOR. He provided documentation from his longtime tax preparer indicating that his 2018 tax return were not transmitted earlier (as Applicant believed they had been).

Applicant has had the same tax preparer for many years. He utilized his tax firm to address his tax issues properly, although in some cases belatedly. However, Applicant's tax filings are being addressed responsibly through this long relationship. I give that evidence significant weight in concluding that Applicant's prior tax issues were due to unusual, explainable circumstances, were resolved in reasonably short order, and are not likely to recur in the future. Applicant also has no history of significant tax debts or other delinquencies, and his overall finances are stable. AG ¶¶ 20(a), 20(c), and 20(g) fully apply.

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 the facts and circumstances surrounding this case. I have incorporated my comments under Guideline F in my whole-person analysis.

I had the opportunity to observe Applicant's demeanor during his hearing, and found him credible. I believe he understands the importance and security significance of compliance with tax filing requirements, which is why he has retained a tax professional for so many years. His prior tax issues are resolved, and they were due to explainable, unusual circumstances. Through his tax preparer, he has a plan and mechanism in place so that he will not have tax filing issues in future years. Applicant provided sufficient evidence to mitigate the financial considerations security concerns. Overall, the record evidence leaves me with no questions or doubts as to his eligibility for access to classified information.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline F:	FOR APPLICANT
Subparagraphs 1.a-1.b:	For Applicant

Conclusion

In light of all of the circumstances presented, it is clearly consistent with the interests of national security to grant Applicant eligibility for access to classified information. Eligibility for access to classified information is granted.

Braden M. Murphy
Administrative Judge