



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



In the matter of:)
)
) ISCR Case No. 21-01042
)
Applicant for Security Clearance)

Appearances

For Government: Brian Farrell, Esq., Department Counsel
For Applicant: Brittany Forrester, Esq.

02/28/2023

Decision

GARCIA, Candace Le'i, Administrative Judge:

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

Statement of the Case

On August 27, 2021, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline F (financial considerations). The action was taken 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 the adjudicative guidelines (AG) implemented by DOD on June 8, 2017.

Applicant responded to the SOR (Answer) on September 14, 2021, and he requested a hearing before an administrative judge. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on October 11, 2022, scheduling the matter for a video teleconference hearing on November 10, 2022. I convened the hearing as scheduled.

At the hearing, I admitted Government Exhibits (GE) 1 through 5 and Applicant's Exhibits (AE) A through O without objection. Applicant testified. At Applicant's request, I

kept the record open until December 8, 2022, for additional documentation. Applicant submitted documentation, which I marked and admitted as AE P through R without objection. DOHA received the hearing transcript (Tr.) on November 22, 2022.

Findings of Fact

Applicant is 60 years old. He married in 1989 and divorced in 1997. He has three adult children. He has owned his home since 2010. He earned a bachelor's degree in 1985 from a military academy, and a master's degree in 2007. He served in the U.S. military from 1985 until he honorably retired in 2008. He worked for a DOD contractor from 2008 to 2010. He was self-employed from 2010 to 2015. He worked as a general manager for an auto body shop from 2015 to 2019. He worked as a consultant for a DOD contractor since 2019. He was first granted a security clearance as a civilian in approximately 1997. (Answer; Tr. at 8-9, 33, 18-20, 22-23, 33-34, 38-39, 46-48; GE 1, 2; AE G-I, L-M)

The SOR alleged that Applicant failed to file, as required, his federal and state income tax returns for tax years (TY) 2015 through 2019, and that they remained unfiled as of the date of the SOR. (SOR ¶¶ 1.a-1.b) In his Answer, Applicant admitted, in part, and denied, in part, SOR ¶¶ 1.a and 1.b. The SOR allegations are established by Applicant's admissions, his July 2019 security clearance application (SCA), his October 2019 interview with a background investigator, and his January 2021 and June 2021 responses to interrogatories. (Answer; GE 1-3)

Applicant attributed his failure to file his TY 2015 through 2019 federal and state income tax returns to personal and professional difficulties that began in 2015, when his mother was diagnosed with cancer and his business dwindled due to sequestration. When he worked for the auto body shop, he continued to travel to the state in which his mother lived so that he could care for her. He found it difficult to manage his workload and personal responsibilities while also assembling the documentation needed to file his income tax returns--a process further complicated by his rental properties and self-employment. His tax preparer of five years also went out of business in 2016. He spent several months dealing with his mother's affairs after she lost her battle with cancer in 2016. (Tr. at 20-25, 33-34, 35-42, 46-53, 59-67, 71-73; GE 1-3)

Applicant initiated efforts in 2019 to find a new tax preparer, and he hired one in approximately October 2020. He acknowledged that he should have started these efforts sooner. His previous tax preparer untimely filed his federal and state income tax returns for TY 2015 in October 2016, before going out of business. After his current tax preparer prepared his subsequent tax income tax returns, he filed them. October 2022 IRS tax account transcripts reflect that he untimely filed his federal income tax returns for TY 2018 and 2019 in April 2022, and for TY 2016, 2017, and 2020 in October 2022. At his request, he was granted an extension to file his federal income tax return for TY 2021, and he untimely filed it in December 2022. He untimely filed his state income tax returns for TY 2016 through 2020 in March 2022, and for TY 2021 in December 2022. (Tr. at 20-25, 33-37, 40-46, 49-50, 53-58, 65-70, 75-78; AE A-D, P-R)

Tax account transcripts and Applicant's federal and state income tax returns reflect that he did not owe federal taxes and he was due a \$3,697 refund from the state tax authority for TY 2015. He had federal tax overpayments for TY 2016 and 2019. He owed \$1,174; \$16,879; \$503; and \$73,180 in federal taxes for TY 2017, 2018, 2020, and 2021 respectively. He owed \$4,452; \$3,304; \$2,206; \$15,918; \$20,422; and \$18,849 in state income taxes for TY 2016 through 2021, respectively. Prior to and simultaneous with filing his relevant income tax returns, Applicant made payments to the IRS and the state tax authority to address any outstanding taxes. In 2016 and 2017, he paid the U.S. Treasury \$6,072 and \$10,000, and he paid the state tax authority \$3,317 and \$3,000, for TY 2015 and 2016, respectively. W-2 wage and tax statements for 2016 through 2018 reflect withholdings for his federal and state income taxes. He paid the IRS \$20,000 in 2018, \$50,000 in 2020, \$47,773 and \$68,473 in 2021, and \$25,000 in 2022. He also paid the state tax authority \$15,076; \$19,176; and \$18,849 in 2022. He testified that he resolved his outstanding federal and state taxes. (Tr. at 20-25, 35-37, 40-46, 49-50, 53-58, 65-70, 73-78; GE 2-3; AE A-D, P-R)

Applicant intends to timely file his federal and state income tax returns in the future. He understands the importance of timely filing his income tax returns. Through the process of filing his delinquent returns, he developed a system for gathering all his required tax documents to provide them to his accountant in a timely manner and intends to use that system going forward. A credit bureau report from 2021 reflected that he was responsibly managing his finances and does not have any delinquent debts. As of the date of the hearing, he had not received credit counseling. (Tr. at 23-25, 56-63, 66, 70-71; GE 2, 4-5; AE E)

Nine individuals, all of whom have called Applicant a friend for 40 years since meeting as classmates at the military academy, attested to Applicant's trustworthiness, judgment, and reliability. Several of them stated that they were aware that the passing of Applicant's mother contributed to Applicant's failure to timely file his federal and state income tax returns, and that Applicant was accountable by self-reporting this information and correcting his lapse. They were confident that Applicant would meet his financial obligations in the future. Applicant received a number of certifications and awards. His employer recognized his critical contributions in 2022. He is an active member of his community. (Tr. at 19-20, 26-33; AE F, G, I, J, K, N, O)

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 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 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.”

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 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. Section 7 of Exec. Or. 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 Exec. Or. 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 . . .

The guideline notes 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 federal and state income tax returns for TY 2015 through 2019. The evidence is sufficient to raise AG ¶¶ 19(c) and 19(f).

Conditions that could mitigate the 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, 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

(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.

Conditions beyond Applicant's control contributed to his financial problems. The first prong of AG ¶ 20(b) applies. For the full application of AG ¶ 20(b), he must provide evidence that he acted responsibly under his circumstances. Prior to and simultaneous with filing his relevant income tax returns, he made estimated payments in federal and state taxes for TY 2015 and 2016 in 2016 and 2017; he had federal and state income taxes withheld from his 2016 to 2018 earnings; he made payments to the IRS in 2018, 2020, 2021, and 2022; and he made payments to the state tax authority in 2022. He made efforts to find a new accountant in 2019, and he hired one in 2020, before the SOR was issued. He acknowledged he should have done this sooner.

As of the date of the hearing, Applicant's federal and state income tax returns for TY 2015 through 2021 were filed, and he did not have any outstanding federal or state taxes. He intends to timely file his federal and state income tax returns in the future, and resolve any taxes owed. He understands the importance of timely filing his future income tax returns, and he intends to utilize the system he developed, through the process of filing his delinquent returns, for gathering all his required tax documents to provide them

to his accountant in a timely manner. Applicant's finances, to include his tax situation, are under control, and it does not continue to cast doubt on his judgment, trustworthiness, and reliability. I find that AG ¶¶ 20(a), 20(b), 20(c), 20(d), and 20(g) are established.

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. Overall, the record evidence leaves me without questions or doubts as to Applicant's eligibility and suitability for a security clearance. I conclude that Applicant mitigated the financial considerations.

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 by the record in this case, it is clearly consistent with the national interest to grant Applicant's eligibility for a security clearance. Eligibility for access to classified information is granted.

Candace Le'i Garcia
Administrative Judge