



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



In the matter of:)	
)	
)	ISCR Case No. 21-02855
)	
Applicant for Security Clearance)	

Appearances

For Government: Brittany White, Esq., Department Counsel
For Applicant: *Pro se*

07/24/2023

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant failed to mitigate the security concerns under Guideline F, financial considerations. Eligibility for access to classified information is denied.

Statement of the Case

On June 23, 2022, the Department of Defense (DOD) issued to Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline F, financial considerations. The action was taken under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense (DOD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the DOD on June 8, 2017.

Applicant answered the SOR on June 28, 2022, and he requested a hearing before an administrative judge. The case was assigned to me on May 8, 2023. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on May 18, 2023, scheduling the hearing for June 29, 2023. I convened the hearing as scheduled. The

Government offered exhibits (GE) 1 and 2, and Applicant offered Applicant Exhibits (AE) A through G. There were no objections to any exhibits and they were admitted into evidence. The record was held open until July 14, 2023, to permit Applicant an opportunity to provide additional documents he wanted considered. He provided AE H and I. There were no objections, they were admitted in evidence, and the record closed. DOHA received the hearing transcript (Tr.) on July 13, 2023.

Procedural Matter

In accordance with the Directive and based on Applicant's testimony, I amended the SOR to add tax years 2020, 2021, and 2022 to ¶ 1.a. I also amended the SOR to add tax years 2021 and 2022 to ¶ 1.c. There were no objections. (Tr. 33-34)

Findings of Fact

Applicant admitted all of the allegations in SOR. After a thorough and careful review of the pleadings, testimony, and exhibits submitted, I make the following findings of fact.

Applicant is 42 years old. He is a high school graduate and enlisted in the military in 1998 and was honorably discharged in 2013. He deployed to both Afghanistan and Iraq and served multiple combat tours. He was unemployed for about nine months after his discharge and has been steadily employed since March 2014. He married in 2005 and is separated from his wife. They have one child. He held a security clearance while in the military and has held once continuously since approximately 2015. (Tr. 15-21, 41-42; GE 1)

Applicant completed a security clearance application in August 2020. In it he disclosed he failed to file his 2015 through 2019 federal income tax returns. For tax years 2015 and 2016 he said he could not recall why he failed to file them. For tax years 2017 through 2020 he said he did not file his tax returns because he had not filed the prior year. For all tax years, he stated he was waiting to receive a hard copy of his W-2 income form from his ex-employer. (Tr. 39-40; GE 1)

Applicant provided tax transcripts for tax years 2015, 2016, 2017, 2018, 2019 and 2020. The following information is reflected in those documents.

2015-income tax return filed August 2021 and tax debt of \$1,817 paid in January 2023. (AE A)

2016-income tax return filed August 2021 and tax debt of \$1,470 paid in August 2022. (AE B)

2017-no return filed. (AE C)

2018-income tax return filed August 2021 and tax payment made in September 2021 in the amount of \$2,637. It appears from the transcript a refund of \$229 was issued later. (AE D)

2019-income tax return filed August 2021 and a \$202 refund issued. (AE E)

2020-income tax return filed August 2021 and refund issued. (AE F)

Applicant was interviewed by a government investigator in September 2020. In the interview they discussed his failure to file his federal and state income tax returns from 2015 through 2019. He told the investigator he did not realize he failed to file his income tax returns until he completed his SCA. He misplaced his W-2 forms and was waiting for his former employer to provide them so he could complete the returns. (GE 2)

Applicant completed government interrogatories in March 2022. He disclosed he had filed his 2018, 2019, and 2020 federal and state tax returns in August 2021. (GE 2)

Applicant testified that he procrastinated in filing his federal and state income tax returns. He was always busy and forgot to file, and then he did not realize he had not filed his tax returns until he completed his SCA. He said he had to gather his investment documents and then he would have complete lapses in focusing on filing the delinquent returns. He would then tell himself he would complete them later and then forgot about them. He admitted he had no excuses for his failure to file his federal and state income tax returns. He was aware of his responsibility to file his income tax returns on time. He hired an accountant to help him file his delinquent returns. (Tr. 22-23, 35, 51)

Applicant explained that once he began the process to file the delinquent returns, they were delayed because those returns older than three years old could not be filed electronically. He credibly testified that he filed his 2017 federal income tax return with the other returns but it has not yet been processed on the IRS website. At the time of his hearing, he testified that he did not know if he owed taxes for 2017. (Tr. 23-26, 36-40)

Applicant testified that he filed his state returns when he filed his federal income tax returns for 2015 through 2020. He said he received two to three refunds that were deposited into his bank account, but he does not know for what year or if he owed for any years. (Tr. 26-28)

At his hearing, Applicant was asked if he had filed his 2021 and 2022 federal and state income tax returns. He testified that he had not yet filed them. He testified that he received a notice from his accountant prior to the April filing due date reminding him of his obligation to file his income tax returns. He said he saw the email reminder but never followed up on it. Applicant said that in March 2023 his laptop and hard drive were stolen. He had investment information on it that he needed to file his returns. This would not have impacted his ability to timely file his 2021 federal and state income tax returns. It may have impacted his ability to file his 2022 returns that were due in April. He did not file an

extension to file his 2022 federal or state income tax returns. Applicant's filing status is "head of household." He testified that when he was in the military, it was drilled into him to get his tax returns filed. He was aware of his responsibility to timely file and pay his taxes. (Tr.25, 28-34, 37-39, 43-51)

Applicant provided a payment activity statement from the IRS dated June 28, 2023. It stated that in January 2023 Applicant made a balance payment of \$1,817 for tax year 2015; for tax year 2017, in August 2022, a balance payment was made of \$1,470; and in September 2021 for tax year 2018 a balance payment was made of \$2,637. (AE G)

Post-hearing, Applicant provided a document from a tax service showing that he was due refunds for tax years 2021 and 2022 for both federal and state taxes. It appears the tax returns were transmitted and accepted by the IRS on July 18, 2023. It did not appear they had been processed yet. (AE H, I)

Policies

When evaluating an applicant's national security eligibility, the administrative judge must consider the AG. 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(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." 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 avoided drawing 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. Directive ¶ E3.1.15 states 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 as to obtaining 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 as to 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

The security concern relating to the guideline 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.

AG ¶ 19 provides conditions that could raise security concerns. The following is potentially applicable:

(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 taxes as required.

Applicant failed to timely file his 2015 through 2022 federal and state income tax returns. He failed to timely pay his federal taxes for tax year 2018 in the amount of \$1,763. There is sufficient evidence to support the application of the above disqualifying condition.

The guideline also includes conditions that could mitigate security concerns arising from financial difficulties. The following mitigating conditions under AG ¶ 20 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.

Applicant provided evidence that he paid his 2018 federal income taxes in 2021. He filed his delinquent 2015-2020 federal income tax returns in August 2021. He credibly testified that he filed his state income tax returns for tax years 2015-2020 at the same time he filed his late federal income tax returns. Post-hearing, it appears he filed his 2021 and 2022 federal and state income tax returns in July 2023 and potentially is due refunds. AG ¶ 20(g) applies.

After completing his SCA in August 2020, discussing his late tax returns with the government investigator in September 2020, and completing government interrogatories in March 2022, Applicant again failed to timely file his 2021 and 2022 federal and state income tax returns. He also was notified by his accountant that his income tax filings were due. Procrastination, being busy, and then forgetting are not legitimate explanations for his conduct. Applicant's conduct is frequent, and the evidence supports it may recur. It casts doubt on his reliability, trustworthiness, and good judgment. No evidence was presented to show his failing to timely file his tax returns was beyond his control. There is no evidence of financial counseling. Applicant paid his 2018 federal tax debt. He received refunds for some tax years. Despite some mitigation, it is insufficient to mitigate Applicant's continuing conduct and disregard for his legal responsibilities. None of the remaining mitigating conditions 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 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 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. Some of the factors in AG ¶ 2(d) were addressed under that Guideline, but some warrant additional comment.

I considered Applicant's military service and participation in combat operations. Applicant had not timely filed his federal or state income tax returns from 2015 to 2022. Despite being aware of his legal responsibility even after filing the delinquent returns alleged in the SOR, he repeated his conduct and failed to timely file for the two most recent years.

The DOHA Appeal Board held in ISCR Case No. 12-10933 at 3 (App. Bd. June 29, 2016):

Someone 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. August 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).

The record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising under Guideline F, 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: AGAINST APPLICANT

Subparagraph 1.a-1.c: 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 security to grant Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Carol G. Ricciardello
Administrative Judge