



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



In the matter of:)
)
) ISCR Case No. 22-01161
)
Applicant for Security Clearance)

Appearances

For Government: Sakeena Farhath, Esq., Department Counsel
For Applicant: [Applicant’s Wife], Personal Representative

07/24/2023

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant did not mitigate the financial considerations security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On September 9, 2022, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline F, financial considerations. Applicant responded to the SOR on September 28, 2022, and requested a hearing before an administrative judge. The case was assigned to me on April 19, 2023. The hearing convened as scheduled on June 6, 2023.

Evidentiary and Procedural Rulings

Evidence

Government Exhibits (GE) 1 through 5 were admitted in evidence without objection. Applicant testified and called his wife as a witness, but he did not submit any documentary evidence. The record was held open for Applicant to submit additional

documentary evidence. He submitted 50 pages of documents, which I have marked collectively as Applicant Exhibits (AE) A (income tax materials), B (child support materials), and C (handwritten memorandum) and admitted without objection.

SOR Amendment

Department Counsel's motion to amend SOR ¶ 1.b to reflect "tax year 2013" instead of "tax year 2016" and the amount owed from "\$5,500" to "\$1,200" was granted without objection. (Transcript (Tr.) at 40-44)

Findings of Fact

Applicant is 41 years old. He has a tenth-grade education. He married in 2006 and divorced in 2011. He married his current wife in 2019. He has a 19-year-old child and four stepchildren. (Tr. at 53, 58; Applicant's response to SOR; GE 1)

Applicant and his wife own a truck and are drivers for a company sponsoring them for a security clearance so that they can transport materials for the DOD. Applicant and his wife are independent contractors (1099 employees) for the company. His first wife managed their finances while they were married, and his current wife does the same. (Tr. at 29, 53; GE 1, 2)

Applicant has a history of tax problems, including unpaid taxes and unfiled tax returns. He filed his 2013 federal income tax return on time, and a \$496 refund was withheld and applied to a non-IRS debt. In 2015, the IRS assessed \$4,375 in additional taxes for tax year 2013 and later added penalties and interest for late payment. In February 2016, the IRS withheld \$1,244 from what would have been a refund from tax year 2015 and transferred it to his 2013 taxes. He owed about \$5,529 for 2013 before he made a \$200 payment in January 2023; two \$300 payments in April 2023; and a \$1,000 payment in May 2023. As of May 15, 2023, he owed \$3,729 in taxes, penalties, and interest for 2013. He made \$2,500 and \$1,240 payments in June 2023 to pay all taxes, penalties, and interest for 2013. (Tr. at 39-44; Applicant's response to SOR; GE 1-4; AE A, C)

Applicant has not filed federal income tax returns for tax years 2016 through 2021. He has an extension for tax year 2022. Applicant and his wife stated that they gave their documents to a tax preparer in about 2017. The tax preparer held their documents for about three years, and they thought she was filing their tax returns for them, but she was not. As truck drivers, they spend most of their time on the road, and they did not notice that his returns were not filed. When they finally realized, the tax preparer stalled them. Finally, in about 2020 or 2021, they went to her home and retrieved their documents. (Tr. at 12-14, 28-34; Applicant's response to SOR; GE 1-3)

Applicant reported his child support arrearages and his failure to file his federal income tax returns from 2017 to 2020 on a Questionnaire for National Security Positions (SF 86) that he submitted in November 2021. He wrote that his tax preparer did not file

the returns; he just got the paperwork back from her; and that he was looking for someone to file the returns. (GE 1)

Applicant was interviewed for his background investigation in January 2022. He discussed his child support arrearages and unfiled tax returns. He stated that he was still attempting to find an accountant to prepare and file his income tax returns. He hoped to have all the returns filed by the end of 2022. (GE 2)

Tax returns for truck drivers can be complicated and tedious. Applicant and his wife had a difficult time finding an accountant or tax preparer who had the requisite expertise and was willing to work on their returns. They retained a tax professional in July 2022, but their tax returns are challenging. He submitted copies of spreadsheets showing expenses for fuel, food, and lodging. It was the tax professional who informed Applicant that he owed taxes for 2013. Applicant's wife testified that she believed that at least some of the back returns had been filed. She was mistaken. The returns have not yet been filed. (Tr. at 14-21; 29-31, 35-38; Applicant's response to SOR; GE 2, 3; AE A) The tax professional wrote in July 2023:

Due to the amount of time it requires to accurately report and file their taxes it is taking our firm longer than expected to complete them. Currently our firm is diligently working on getting previous years W2's and 1099's from prior employment for both [Applicant's wife] and [Applicant]. In the meantime, we are aggressively working through the previous year's receipts and reconciling them. Our goal is to wrap up all the returns by the end of this year. Tax year 2019 is almost wrapped up, however, the previous years for [Applicant] are still being processed/worked. Thank you for your patience and understanding at this time. (AE A)

A 2016 IRS wage and tax transcript shows that \$3,320 was withheld from Applicant's wages. IRS account transcripts for 2017 through 2019 and 2022 do not report any funds withheld from pay nor any other payments. Transcripts for 2020 and 2021 were not submitted in evidence. His wife admitted that the last time they paid any federal income taxes was a "long time ago." (Tr. at 22; GE 5)

In July 2013, Applicant was ordered by the court as part of his divorce to pay \$700 monthly in child support. He did not always pay the full amount owed. In August 2022, the court determined that the total amount of child support accrued from August 1, 2013, until August 2022 was \$76,300, plus \$4,348 in interest. Applicant paid a total of \$46,807 during that period, leaving an arrearage of \$33,841. (Applicant's response to SOR; GE 1, 2, 5; AE B)

Child support records indicate that Applicant made 31 payments of \$180 (\$5,580) between May 20, 2016, and January 5, 2017; five payments totaling \$260 between February 2, 2017, and May 3, 2017; eight payments of \$183.46 (\$1,467.68), eight payments of \$189.23 (\$1,513.84), and 54 payments of \$192.69 (\$10,405.26) between May 30, 2017, and May 21, 2019; six payments totaling \$880 in October and November 2019; 63 payments of \$40 (\$2,520) between July 2020 and September 2021; 12

payments totaling \$3,050 from March 2022 through September 2022; a \$200 payment on May 4, 2023, a \$1,000 payment on May 5, 2023; and a \$500 payment on July 5, 2023. The total amount paid from May 2016 through May 2023 was \$27,376. His \$700 monthly child support obligation for seven years equals \$58,800 (\$700 x 84). (Tr. at 56-57; Applicant's response to SOR; GE 5; AE B)

Applicant and his wife stated that the child support payments were affected by COVID and not having enough work. They stated that the child support agency told him to pay whatever he could afford, which is why there were \$40 payments. His child is 19 years old and not in high school or college, so the payment for child support should cease, and all of the payments will go toward the arrearages. He asserted that he is committed to filing the back tax returns, paying whatever taxes are owed, and continuing to pay his child support. (Tr. at 26-28, 57-58; Applicant's response to SOR; AE C)

Policies

This case is adjudicated 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 (AG), which became effective on June 8, 2017.

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(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."

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 EO 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* EO 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 is potentially applicable in this case:

- (a) inability to satisfy debts;

- (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 has a history of financial problems, including unpaid taxes, unfiled tax returns, and child support arrearages. The above disqualifying conditions are applicable.

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.

Applicant did not realize he owed taxes for 2013 until his new tax professional informed him. Since that time, he has paid the balance, which was as high as \$5,529. His unpaid taxes for 2013 (SOR ¶ 1.b) are mitigated.

Applicant paid some child support, just not always the required amount, and not enough to lower the arrearages. His child is 19 years old and not in high school or college, so the payments for child support should cease, at which time all of the payments will go toward the arrearages. His child support arrearages (SOR ¶ 1.c) are in the process of being resolved and are mitigated.

The greatest concern in this case are the unfiled returns. Failure to comply with tax laws suggests that an applicant has a problem with abiding by well-established government rules and systems. Voluntary compliance with rules and systems is essential for protecting classified information. See, e.g., ISCR Case No. 16-01726 at 5 (App. Bd. Feb. 28, 2018). A person who fails repeatedly to fulfill his or her legal obligations, such as filing tax returns and paying taxes when due, 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. 17-01382 at 4 (App. Bd. May 16, 2018).

This is not a case where the returns went unfiled, but the taxes were paid by withholding from pay. IRS account transcripts for 2017 through 2019 and 2022 do not report any funds withheld from pay nor any other payments. Transcripts for 2020 and 2021 were not submitted in evidence. Applicant's wife admitted that the last time they paid any federal income taxes was a "long time ago." This begs the question if Applicant thought his income tax returns were being filed, why did he never inquire about whether he owed taxes. Applicant was either grossly negligent or intentionally indifferent. I will give him the benefit of the doubt and find him grossly negligent.

I understand that Applicant and his wife spend much of their time on the road, and their accounting and income tax returns are challenging because they have to account for every dollar spent in fuel, food, and lodging. But that is their responsibility as truck owners. Every truck owner on the road has the same challenges. The bottom line is that the returns have still not been filed, and nobody has any idea how much taxes he will owe when they are filed. There are no mitigating conditions applicable to the unfiled tax returns (SOR ¶ 1.a).

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 have incorporated my comments under Guideline F in my whole-person analysis. There are few things more American than being on the road and hauling freight in one's own truck. However, those trucks run on fuel, and the U.S. Government runs on taxes. Applicant shirked his responsibility to ensure that his tax returns were filed, and any taxes owed were paid.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. I conclude Applicant did not mitigate the financial considerations security concerns.

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: | Against Applicant |
| Subparagraphs 1.b-1.c: | For Applicant |

Conclusion

It is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Edward W. Loughran
Administrative Judge