



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



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| In the matter of: |) | |
| |) | |
| |) | ISCR Case No. 23-02849 |
| |) | |
| Applicant for Security Clearance |) | |

Appearances

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

05/01/2024

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 January 5, 2024, 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; 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 January 29, 2024. He elected to have his case decided on the written record in lieu of a hearing. Department Counsel submitted the Government's file of relevant material (FORM), and Applicant received it on February 15, 2024. He was afforded an opportunity to file objections and submit material in refutation,

extenuation, or mitigation within 30 days of receipt of the FORM. The Government's evidence is identified as Items 2 through 7 (Item 1 is the SOR). Applicant provided a response to the FORM. He affirmed the accuracy of the personal subject interview and did not have any corrections. (Item 7) He provided documents that are marked as Applicant Exhibits (AE) A through E. There were no objections to any of the exhibits offered in evidence. Items 2 through 7 and AE A through E are admitted in evidence. The case was assigned to me on April 24, 2024.

Findings of Fact

Applicant admitted the SOR allegation in ¶ 1.a with an explanation and denied ¶ 1.b. His admissions are incorporated into the findings of fact. After a thorough and careful review of the pleadings and exhibits submitted, I make the following findings of fact.

Applicant is 50 years old. He earned a bachelor's degree in 1996 and a master's degree in 2011. He married in 1997 and has three children. He has worked for his present employer, a federal contractor, since March 2020.

In December 2022, Applicant completed a security clearance application (SCA). In it he disclosed that he failed to file state and federal income tax returns "on occasion." He stated, "In all cases, taxes had been withheld by my employer per routine practice and we are anticipating a refund when we do file - we do not owe any outstanding income taxes." He reported that he failed to file 2019, 2020, and 2021 federal income tax returns. He stated regarding each tax year, "Because we estimated getting a [refund] rather than owing, it wasn't a priority." He anticipated his refund to be approximately \$3,000 for each year. He said that other than estimating the amount of the refund he would receive he had not taken any action because he had not needed the money to make it a priority. (Item 3)

In January 2023, Applicant was interviewed by a government investigator as part of his background investigation. He was asked about his failure to file his 2019, 2020 and 2021 federal income tax returns. He told the investigator he did not feel the need to file his tax returns on time because he was entitled to a tax refund, and he was not in immediate need of the refunds. He said he has changed his behavior and will now file his federal income tax returns on time each year moving forward. He planned to file his delinquent federal income tax returns for 2019, 2020, 2021 when he filed his 2022 federal income tax return later in the year in April 2023. (Item 7)

Applicant provided a response to Government interrogatories on July 25, 2023. He provided IRS tax transcripts for tax years 2017 through 2022. He was asked to provide the details regarding his failure to timely file his tax returns. He stated, "We have set up our tax deductions in such a manner as to ensure that we receive a refund rather than owing taxes. Receiving these returns has not been a financial priority." (Item 4)

Applicant was asked to provide any other information that would be helpful. He stated, "It is absolutely not our intent to deprive any governmental agency of the funds

due to them. We have consistently erred on the side of overpaying rather than underpaying and have completed our tax paperwork in the intervening time to verify this is the case.” (Item 4)

Applicant’s IRS tax transcript dated April 25, 2023, reports for tax year 2017 that he filed his federal income tax return in August 2019, which was past the due date. The tax transcript dated April 25, 2023, reports for tax year 2018 that he filed his tax return in August 2019, past the due date. The tax transcript dated June 27, 2023, reports for tax year 2019 that no return was filed. The tax transcripts for tax years 2020 and 2021, dated April 25, 2023, report that no tax returns were filed. The tax transcript dated June 27, 2023, for tax year 2022 reports that no tax return was filed. (Item 4)

I have not considered derogatory information that was not alleged in the SOR for disqualifying purposes. However, I may consider it in the application of the mitigating conditions and in my whole person analysis.

In Applicant’s SOR answer from January 2024, he stated his 2019 federal income tax return was submitted on July 15, 2023, prior to the SOR. His documents show he and his wife signed the returns on July 5, 2021, but did not mail them to the IRS until July 15, 2023. He further stated that although his 2020, 2021, and 2022 federal income tax returns were not filed prior to the SOR, they have since been filed. He provided documents to show his 2020, 2021, and 2022 federal income tax returns were signed on July 27, 2023, or July 28, 2023, but were not mailed to the IRS until January 29, 2024. He provided no explanation for the additional delay in filing the returns. (Item 2; AE C)

The SOR alleged Applicant failed to timely file his 2019 through 2022 federal income tax returns (¶ 1.a) and his 2019 state income tax return (¶ 1.b). He denied he failed to timely file his state return. He stated in his SOR answer, “Although the 2019 [state name] state income tax return was filed late, it was filed and the debt discharged on June 29, 2023; prior to the Statement of Reasons.” He provided documents to show it was filed on the date he stated and the tax, which was minimal, was paid. (Item 2)

In his response to the FORM, Applicant stated that his past failure to timely file income tax returns was because he did not need the refunds that were owed to him. He said he hoped this demonstrated that his decisions were not motivated by animus towards the government or a financial disability that could be used to pressure him. He said he understands that he did not make correct decisions, and he will correct them in the future. He provided a copy of his latest tax return for tax year 2023 that was timely filed. He is committed to complying in the future. (AE A)

Policies

When evaluating an applicant’s suitability for national security eligibility, the administrative judge must consider the adjudicative guidelines (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.

This concern is broader than the possibility that an individual might knowingly compromise classified information in order to raise money. It encompasses concerns about an individual's self-control, judgment, and other qualities essential to protecting classified information. An individual who is financially irresponsible may also be irresponsible, unconcerned, or negligent in handling and safeguarding classified information. See ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012).

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 tax as required.

Applicant failed to timely file his 2019 through 2022 federal income tax returns and his 2019 state income tax return. The above disqualifying condition applies.

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 persons 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; 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 has a history of not filing his income tax returns on time. He rationalized his actions because he calculated that he would be receiving refunds. He disclosed his failure to timely file his federal tax returns in his December 2022 SCA but provided no indication that he intended to resolve the issue. He indicated that because he was to presumably receive a refund, it was not a priority. He was interviewed by a government investigator in January 2023, and he told the investigator that he intended to file his delinquent tax returns when he completed his 2022 federal income tax returns in April 2023. He said he had changed his behavior and would file his tax returns timely in the future.

Applicant did not change his behavior as evidenced by his failure to file his 2022 federal income tax return in April 2023, when it was due. Instead, he filed his 2019 federal income tax return in July 2023 and did not file his 2020, 2021, and 2022 returns until January 29, 2024, after he promised they would be filed. He failed to file his 2019 state tax return, which he owed a minimal amount, until June 2023. His conduct reflects a pattern of not complying with the law, rules, and regulations, despite being on notice of the seriousness of his conduct. Although, his returns are now filed and AG ¶ 20(g) applies, it is insufficient to mitigate the security concerns raised by Applicant's repeated disregard for following rules and regulations.

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.

The DOHA Appeal Board has held that:

Failure to file tax returns suggests that an applicant has a problem with complying with well-established government rules and systems. Voluntary compliance with these things is essential for protecting classified information. ISCR Case No. 14-04437 at 3 (App. Bd. Apr. 15, 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). ISCR Case No. 12-10933 at 3 (App. Bd. June 29, 2016).

Applicant has not met his burden of persuasion. The record evidence leaves me with serious 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:

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| Paragraph 1, Guideline F: | AGAINST APPLICANT |
| Subparagraphs 1.a-1.b: | 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