



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



In the matter of:)
)
) ISCR Case No. 24-01014
)
Applicant for Security Clearance)

Appearances

For Government: Jenny Bayer, Esquire, Department Counsel
For Applicant: *Pro se*

12/11/2024

Decision

GALES, Robert Robinson, Administrative Judge:

Applicant failed to mitigate the security concerns regarding financial considerations. Eligibility for a security clearance is denied.

Statement of the Case

On March 2, 2023, Applicant applied for a security clearance and submitted an Electronic Questionnaires for Investigations Processing (e-QIP) version of a Security Clearance Application (SF 86). On November 20, 2023, the Defense Counterintelligence and Security Agency (DCSA) Consolidated Adjudications Services (CAS) issued him a set of interrogatories. On December 29, 2023, Applicant responded to those interrogatories. On August 1, 2024, the DCSA CAS issued him a Statement of Reasons (SOR) under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended and modified; Department of Defense (DOD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended and modified (Directive); and Directive 4 of the Security Executive Agent (SEAD 4), *National Security Adjudicative Guidelines* (AG) (December 10, 2016), effective June 8, 2017.

The SOR alleged security concerns under Guideline F (Financial Considerations) and detailed reasons why the DCSA adjudicators were unable to find that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The SOR recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

In an unsworn statement, dated August 7, 2024, Applicant responded to the SOR and elected to have his case decided on the written record in lieu of a hearing. A complete copy of the Government's file of relevant material (FORM), including proposed Government Exhibits (GE), was mailed to Applicant by the Defense Office of Hearings and Appeals (DOHA) on September 26, 2024, and he was afforded an opportunity after receipt of the FORM to file objections and submit material in refutation, extenuation, or mitigation. In addition to the FORM, Applicant was furnished a copy of the Directive as well as the Adjudicative Guidelines applicable to his case. Applicant received the FORM on October 8, 2024. His response was due on November 7, 2024. Applicant chose not to respond to the FORM, for as of November 22, 2024, no response had been received. The case was assigned to me on December 6, 2024.

Findings of Fact

In his Answer to the SOR, Applicant admitted, with extensive comments, the factual allegations pertaining to financial considerations (SOR ¶ 1.a.). Applicant's admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact:

Applicant is a 46-year-old employee of a defense contractor. He has been serving as a radiographic testing (RT) inspector with his current employer since May 2022. He previously worked for another employer as a cinema general manager (November 1997 – May 2022). A 1996 high school graduate, he received a certificate of applied science in accounting from a technical college in 1997. He has never served with the U.S. military. He has never been granted a security clearance. He has never been married. He has no children.

Financial Considerations

In his SF 86, Applicant candidly reported that he had failed to file his state income tax returns for the tax years 2015 through 2019. He said that he had lost track of the years he had forgotten to file his state income tax returns because every year he files his federal income tax returns online and didn't want to pay for his state taxes. He intended to file the state returns himself, but he forgets to do so, and does not think about it until the following year when the tax season comes around. (Item 3 at 26-29)

In his response to interrogatories, Applicant stated that each year when he filed his federal income tax returns, he wanted to file his state income tax returns as well but wanted to do it himself. He would, however, get lazy or forgot until time went by and he would just let it go. He knew the state owed him money so he did not consider his failure

to file to be a big deal. He saw it as “just throwing away money.” He considered it to be “just laziness and stupidity on [his] part.” (Item 4 at 4-5) Attached to Applicant’s response to the interrogatories was a letter from the state department of taxation, dated December 21, 2023, that reported the state did not have any record reflecting that Applicant had filed state income tax returns for the tax years 2015 through 2019. (Item 4 at 7) Also attached to his response to interrogatories were Account Transcripts from the Internal Revenue Service (IRS) reflecting his taxable income for each of the tax years in issue: \$24,939 for 2015; \$26,128 for 2016; \$27,223 for 2017; \$27,379 for 2018; and \$32,519 for 2019. (Item 4 at 9-13)

In his response to the SOR, Applicant stated:

I admit that I failed to file, as requested, by the state of ..., income tax returns for years. I deny that this makes me untrustworthy. My failure to file was based off frugality and forgetfulness. I did not want to pay a fee of \$30 for a \$45 or less return for filing my state income tax. I meant to file by mail myself and forgot. After realizing I had forgotten to file I let it go because I only thought it would only mean that I was pissing away money the state owed me. Not thinking that this would harm anyone but myself.

(Item 2 at 2)

Applicant was repeatedly offered the opportunity to submit documentation to confirm that his state income tax returns for the tax years 2015 through 2019 had been filed: with his response to the interrogatories; with his Answer to the SOR; and in response to the FORM. Notably, Applicant has never stated that those specific income tax returns were filed. He only stated that “I started just filing both federal and state taxes each year and will continue to do so.” (Item 4 at 5).

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, “no one has a ‘right’ to a security clearance.” (*Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988)) As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information. The President has authorized the Secretary of Defense or his designee to grant an applicant eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” (Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.)

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the guidelines in SEAD 4. In addition to brief introductory explanations for each guideline, the guidelines list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant’s eligibility for access to classified information.

An administrative judge need not view the guidelines as inflexible, ironclad rules of law. Instead, acknowledging 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. 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 meaningful decision.

In the decision-making process, facts must be established by "substantial evidence." "Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all contrary evidence in the record." (ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1)) "Substantial evidence" is "more than a scintilla but less than a preponderance." (See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994))

The Government initially has the burden of producing evidence to establish a potentially disqualifying condition under the Directive and has the burden of establishing controverted facts alleged in the SOR. Once the Government has produced substantial evidence of a disqualifying condition, under Directive ¶ E3.1.15, the applicant has the burden of persuasion to present evidence in refutation, explanation, extenuation or mitigation, sufficient to overcome the doubts raised by the Government's case. The burden of disproving a mitigating condition never shifts to the Government. (See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005))

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 as well. It is because of this special relationship that the Government must be able to repose a high degree of trust and confidence in those 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 as to potential, rather than actual, risk of compromise of classified information. Furthermore, "security clearance determinations should err, if they must, on the side of denials." (*Egan*, at 531)

Clearance decisions must be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." (See Exec. Or. 10865 § 7) Thus, nothing in this decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant's allegiance, loyalty, or patriotism. It is merely an indication the Applicant has or has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance. 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.

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.

The guideline notes a condition that could raise security concerns under AG ¶ 19:

(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.

The SOR alleged that Applicant failed to file his state income tax returns for the tax years 2015 through 2019. As of November 22, 2024, there is no verifiable evidence that any of those income tax returns had yet been filed. Applicant was afforded multiple opportunities to submit documentation confirming that his state income tax returns have been filed, but he has repeatedly failed to submit such confirmation. AG ¶ 19(f) has been established.

The guideline also includes examples of conditions that could mitigate security concerns arising from financial difficulties under AG ¶ 20:

(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; 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.

Neither of the mitigating conditions apply. The nature, frequency, and recency of Applicant's continuing failure to conclusively resolve those delinquent state income tax

issues, despite repeated intentions to do so, make it rather easy to conclude that they were not infrequent and, considering the length of time it has taken and the issues are still unresolved, they are likely to remain unchanged in the future. Applicant attributed his financial issues essentially to frugality, laziness, and forgetfulness. It is unclear what his explanations are for his repeated failures to furnish verification and confirmation that the income tax returns have finally been filed.

An applicant who begins to resolve his or her financial problems only after being placed on notice that his or her security clearance is in jeopardy may be lacking in the judgment and self-discipline to follow rules and regulations over time or when there is no immediate threat to his or her own interests. (See, e.g., ISCR Case No. 17-01213 at 5 (App. Bd. Jun. 29, 2018); ISCR Case No. 17-00569 at 3-4 (App. Bd. Sept. 18, 2018).

Applicant completed his SF 86 in March 2023; completed his responses to the interrogatories in December 2023; the SOR was issued in August 2024; and the FORM was issued in September 2024. Each step of the security clearance review process placed him on notice of the significance of the financial issues confronting him. With respect to his unfiled state income tax returns, there is no verifiable evidence that Applicant has yet filed those income tax returns. By failing to present such evidence, he has not demonstrated the high degree of good judgment and reliability required of those granted access to classified information.

The DOHA Appeal Board has observed:

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 toward 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).

ISCR Case No. 14-04437 at 3 (App. Bd. Apr. 15, 2016). See ISCR Case No. 14-05476 at 5 (App. Bd. Mar. 25, 2016) (citing ISCR Case No. 01-05340 at 3 (App. Bd. Dec. 20, 2002)); ISCR Case No. 14-01894 at 4-5 (App. Bd. Aug. 18, 2015).

Applicant's actions, or inaction, under the circumstances cast doubt on his current reliability, trustworthiness, and good judgment. (See ISCR Case No. 09-08533 at 3-4 (App. Bd. Oct. 6, 2010).)

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 SEAD 4, App. A, ¶ 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 SEAD 4, App. A, ¶ 2(c), the ultimate determination of whether to grant a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. Moreover, I have evaluated the various aspects of this case in light of the totality of the record evidence and have not merely performed a piecemeal analysis. (See *U.S. v. Bottone*, 365 F.2d 389, 392 (2d Cir. 1966); See *also* ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006))

I have incorporated my comments under Guideline F in my whole-person analysis, and I have considered the factors in SEAD 4, App. A. There is some evidence in favor of mitigating Applicant's financial concerns. Applicant is a 46-year-old employee of a defense contractor. He has been serving as an RT inspector with his current employer since May 2022. He previously worked for another employer as a cinema general manager (November 1997 – May 2022). A 1996 high school graduate, he received a certificate of applied science in accounting from a technical college in 1997. In his SF 86, he candidly reported that he had failed to timely file his state income tax returns for the tax years 2015 through 2019. Applicant attributed his financial issues essentially to frugality, laziness, and forgetfulness.

The disqualifying evidence under the whole-person concept is simply more substantial. Applicant failed to timely file his state income tax returns for the tax years 2015 through 2019. As of the date the SOR was issued in August 2024, or his response to the FORM was due in November 2024, he has failed to say that the income tax returns had been filed, and he has failed to produce verifiable evidence to confirm they had been filed, despite repeated opportunities to do so.

Overall, the evidence leaves me with substantial questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all of these reasons, I conclude Applicant has failed to mitigate the security concerns arising from his financial considerations. See SEAD 4, App. A, ¶¶ 2(d)(1) through AG 2(d)(9).

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

Conclusion

In light of all of the circumstances presented by the record in this case, 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.

ROBERT ROBINSON GALES
Administrative Judge