



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



In the matter of:)
)
) ISCR Case No. 12-10122
)
Applicant for Security Clearance)

Appearances

For Government: Gregg A. Cervi, Esq., Department Counsel
For Applicant: *Pro se*

01/12/2016

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 June 5, 2015, 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 (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) implemented by the DOD on September 1, 2006.

Applicant responded to the SOR on July 10, 2015, and requested a hearing before an administrative judge. The case was assigned to me on August 20, 2015. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on August 21, 2015, scheduling the hearing for September 16, 2015. The hearing was convened as scheduled. Government Exhibits (GE) 1 and 2 were admitted in evidence without

objection. Applicant testified and submitted Applicant's Exhibits (AE) A through L, which were admitted without objection. DOHA received the hearing transcript (Tr.) on September 24, 2015.

Findings of Fact

Applicant is a 59-year-old employee of a defense contractor. He has worked for his current employer since at least 1996. He served in the U.S. military reserve from 1976 until he was honorably discharged in 1983. He seeks to retain his security clearance, which he has held since the 1970s. He has a bachelor's degree that was awarded in 1997. He has never married, and he has no children.¹

Applicant did not file federal and state income tax returns for tax year 2009 when they were due. He moved to a state that did not have state income taxes in 2009. He did not file federal income tax returns for tax years 2010 through 2013 when they were due.²

Applicant reported on his January 2012 Questionnaire for National Security Positions (SF 86) that he did not file his tax returns for tax years 2009 and 2010. He wrote that he "[j]ust got too busy and kept putting it off." He noted that he was "[c]urrently working on [his] 2009 taxes and then can do 2010 taxes."³

Applicant was interviewed for his background investigation in March 2012. He stated that he had not filed his tax returns because he was too busy, lazy, and disorganized. He stated that he was gathering the documents necessary to file the tax returns and that the returns would be filed within the next two weeks.⁴

Applicant filed his 2009 state income tax return and his federal income tax returns for 2009 through 2014 in about July 2015, after he received the SOR. His state tax return for 2009 indicates that he was due a refund. His 2009 federal tax return indicates that he was due a \$7,285 refund. He requested that \$6,000 of that refund be applied to his 2010 estimated tax. However, there is a three-year statute of limitations that "prevents the issuance of a refund check and the application of any credits, including overpayments of estimated or withholding taxes, to other tax years that are underpaid."⁵ The 2010 federal tax return showed that Applicant was due a refund of \$4,640. However, the return requested that \$5,000 be applied from the 2009 return.

¹ Tr. at 20-21; GE 1, 2.

² Tr. at 15; Applicant's response to SOR; GE 1, 2. The SOR only alleged that Applicant did not file income tax returns in 2009 and 2011. Any matter that was not alleged in the SOR will not be used for disqualification purposes. It may be used in the application of mitigating conditions, and in the whole-person analysis.

³ GE 1.

⁴ GE 2.

⁵ See <https://www.irs.gov/taxtopics/tc153.html>.

That \$5,000 was barred by the statute of limitations, so Applicant actually owed for 2010. He paid \$654 in September 2015 to satisfy the remaining taxes, penalties, and interest for 2010.⁶

Applicant's 2011 federal income tax return showed that he owed \$9, which does not include penalties and interest. He paid the IRS \$9. The 2012 tax return indicated that Applicant owed \$326, which he paid. He paid an additional \$211 in August 2015 to satisfy the penalties and interest. Applicant paid the IRS \$183 in July 2015 and \$161 in August 2015 to satisfy his 2013 federal taxes, penalties, and interest. He paid the IRS \$1,151 in July 2015 and \$181 in August 2015 to satisfy his 2014 federal taxes, penalties, and interest.⁷

Other than his tax issues, Applicant's finances are in good shape. He has no delinquent debts, and he has about \$600,000 in savings, investments, and retirement accounts. He stated that he did not file his tax returns due to his "own stupidity." He also admitted that he was disorganized. He realized once he completed the returns that they were not that difficult to prepare. He assured that he will file his tax returns on time in the future.⁸

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(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 access to classified information will be resolved in favor of national security."

⁶ Tr. at 15-16; Applicant's response to SOR; GE 1, 2; AE A-K.

⁷ AE A-G.

⁸ Tr. at 15-24; GE 1, 2; AE L.

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 or inability 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 information. An individual who is financially overextended is at risk of having to engage in illegal 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:

(g) failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same.

Applicant did not file federal and state income tax returns when they were due. AG ¶ 19(g) is 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; and

(c) the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control.

Applicant did not file his tax returns because he was too busy, lazy, and disorganized. He was not attempting to avoid paying his taxes; he lost more in forfeited refunds than he had to pay. However, he knew when he submitted the SF 86 in January 2012 that his unfiled returns were a problem. He wrote that he was "[c]urrently working on [his] 2009 taxes and then can do 2010 taxes." During his March 2012 interview he stated that the returns would be filed within the next two weeks. Despite those assertions, Applicant did not file any returns for tax years 2009 through 2014 until after he received the SOR.

Applicant's financial issues are recent. They continue to cast doubt on his judgment, reliability, trustworthiness, and ability to comply with laws and regulations. AG ¶ 20(a) is not applicable. AG ¶ 20(c) is partially applicable because the returns have been filed. Nonetheless, financial considerations concerns remain despite the presence of some mitigation.⁹

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(a):

(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

⁹ See ISCR Case No. 12-05053 at 4 (App. Bd. Oct. 30, 2014), in which the Appeal Board reversed the Administrative Judge's decision to grant Applicant's security clearance:

Security requirements include consideration of a person's judgment, reliability, and a sense of his or her legal obligations. 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 persons granted access to classified information. Indeed, the Board has previously noted that a person who has a history of not fulfilling their legal obligation to file income tax returns may be said not to have demonstrated the high degree of judgment and reliability required for access to classified information. (internal citation omitted)

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.

Applicant has a long and stable work history, and his finances are otherwise in excellent condition. However, he failed to comply with a fundamental legal requirement.

Overall, the record evidence leaves me with questions and doubts as to 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
Subparagraphs 1.a-1.b:	Against Applicant. ¹⁰

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.

Edward W. Loughran
Administrative Judge

¹⁰ SOR ¶ 1.b alleges that Applicant failed to file his 2009 and 2011 state tax returns. He was not required to file a 2011 state tax return. The part of the allegation related to the 2011 state tax return is concluded for Applicant.