



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



In the matter of:)	
)	
)	ISCR Case No. 14-01461
)	
Applicant for Security Clearance)	

Appearances

For Government: Robert J. Kilmartin, Esq., Department Counsel
For Applicant: *Pro se*

04/08/2015

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 August 21, 2014, 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 September 26, 2014, and requested a hearing before an administrative judge. The case was assigned to me on January 8, 2015. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on January 16, 2015, scheduling the hearing for February 11, 2015. The hearing was convened as scheduled. Government Exhibits (GE) 1 through 4 were admitted in

evidence without objection. Applicant testified and submitted Applicant's Exhibits (AE) A through D, which were admitted without objection. The record was held open for Applicant to submit additional information. He submitted documents that were marked AE E through I and admitted without objection. DOHA received the hearing transcript (Tr.) on February 23, 2015.

Findings of Fact

Applicant is a 60-year-old engineer for a defense contractor. He has worked for his current employer since 1998. He seeks to retain his security clearance, which he has held since the late 1970s. He has a master's degree. He married in 1976 and divorced in 1978. He does not have any children.¹

Applicant prepares his own income tax returns. His 2007 income tax return was complicated by a non-elective sale of stock options. The income from the sale was incorrectly reported twice to the IRS. It took several years for Applicant to reconcile the matter. He obtained an extension until October 15, 2008, but he did not file a federal income tax return for tax year 2007 until May 18, 2011. He filed an amended return on April 15, 2013. The amended return indicated that Applicant was due a refund of \$1,849. The IRS accepted the return and credited \$1,849 toward Applicant's 2008 taxes.² The IRS credited the refund to the 2008 taxes because the original return was filed within three years of its due date.³

Applicant did not file a federal income tax return for tax year 2008 when it was due. He admitted that he "procrastinated." He felt he would be due a refund from 2007, and it would be carried forward to his 2008 return. He stated that he "wanted to keep it clean with the carryover." He filed the 2008 return in 2013. The IRS indicated that Applicant would have been due a refund of \$3,553 if the return had been timely filed.⁴

¹ Tr. at 11, 42; GE 1.

² Tr. at 18-30, 43-44; Applicant's response to SOR; GE 2; AE A-C, E-G.

³ The IRS provides the following guidance at <http://www.irs.gov/taxtopics/tc153.html>:

There is no penalty for failure to file if you are due a refund. But, if you wait to file a return or otherwise claim a refund, you risk losing a refund altogether. An original return claiming a refund must be filed within 3 years of its due date for a refund to be allowed in most instances.

After the expiration of the three-year window, the refund statute 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. However, the statute of limitations for the IRS to assess and collect any outstanding balances does not start until a return has been filed. In other words, there is no statute of limitations for assessing and collecting the tax if no return has been filed.

⁴ Tr. at 31-39; AE D, G.

Applicant did not file federal income tax returns for tax years 2009 through 2013 when they were due.⁵ Applicant noted on his December 2013 Questionnaire for National Security Positions (SF 86) that he did not file his tax returns. He discussed his failure to file during his background interview in January 2014. He stated that in late 2013 he received a letter from the IRS requesting his 2008 income tax return. He stated that he would likely retain an attorney to address the matter. He sent the IRS estimated tax payments every year and he did not believe he owed the IRS. In July 2014, Applicant responded to DOHA interrogatories asking for tax transcripts.⁶

Applicant had not filed his federal income tax returns for tax years 2009 through 2013 as of the hearing date of February 11, 2015. The record was held open until March 11, 2015, for Applicant to submit additional documentary evidence. In a memorandum dated March 11, 2015, Applicant stated that he “filled out [his] 2009 return, and will complete the 2010, 2011, and 2012 returns within the next two weeks.” He did not provide a copy of the 2009 return. He wrote that he did not have an accountant or tax preparer assist him because his returns are always “easy.”⁷

Applicant lives a frugal lifestyle, and he has substantial assets. His assets totaled just over \$5 million. He does not believe he will owe the IRS once his tax returns are filed. He has the assets to pay the IRS if he does owe anything.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.

⁵ The SOR did not allege that Applicant failed to file his 2013 income tax return. That information will not be used for disqualification purposes. It may be used in the application of mitigating conditions and during the whole-person analysis.

⁶ Tr. at 39, 42-46; Applicant’s response to SOR; GE 1-3.

⁷ Tr. at 39; AE E.

⁸ Tr. at 40-41, 51; Applicant’s response to SOR; GE 4; AE E, H, I.

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.”

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:

(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 income tax returns when they were due for tax years 2007 through 2012. The above disqualifying condition is applicable.

Conditions that could mitigate 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, or a death, divorce or separation), and the individual acted responsibly under the circumstances; 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's 2007 income tax return was complicated by a non-elective sale of stock options. He eventually filed a return in 2011. That conduct is mitigated. He finally filed his 2008 return in 2013. That conduct is also mitigated.

Applicant knew in 2013 that his taxes were a concern to the DOD. He did not file his tax returns after he was interviewed for his background investigation, after he responded to DOHA interrogatories, or after he received the SOR. On March 11, 2015, he stated that he "filled out [his] 2009 return, and will complete the 2010, 2011, and 2012 returns within the next two weeks." He did not provide a copy of the 2009 return.

Applicant's financial issues are recent and ongoing. I am unable to determine that they are unlikely to recur. They continue to cast doubt on his judgment, reliability, trustworthiness, and ability to comply with laws and regulations. There are no mitigating conditions applicable to Applicant's failure to file his 2009 through 2012 income tax returns when they were due.⁹

⁹ See ISCR Case 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)

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 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.

I considered Applicant's long and stable work history. He is not financially overextended; he is quite wealthy. However, his failure to file his tax returns is problematic. He failed to fulfill fundamental legal requirements. I have significant concerns about his judgment, reliability, trustworthiness, and ability to comply with laws and regulations.

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:	For Applicant
Subparagraph 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 interest to continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Edward W. Loughran
Administrative Judge