



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



In the matter of:)
)
) ISCR Case No. 14-01609
)
Applicant for Security Clearance)

Appearances

For Government: John Bayard Glendon, Esq., Department Counsel
For Applicant: *Pro se*

06/04/2015

Decision

RIVERA, Juan J., Administrative Judge:

Applicant failed to timely file his federal income tax returns for tax years 2010 through 2012. His evidence is insufficient to show that he has a track record of financial responsibility, that he does not have a current financial problem, or that his financial problem is being resolved or is under control. He failed to mitigate the Guideline F security concerns. Clearance is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on November 5, 2013. On June 25, 2014, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued Applicant a Statement of Reasons (SOR) alleging security concerns under Guideline F (financial considerations).¹ Applicant answered the SOR on September 30, 2014, and elected to have his case decided on the written record.

¹ DOD acted under Executive Order 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive) (January 2, 1992), as amended; and the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), implemented by the DOD on September 1, 2006.

A copy of the Government's file of relevant material (FORM), dated March 11, 2015, was provided to him by transmittal letter on that same date. Applicant received the FORM on March 23, 2015. He was allowed 30 days to submit any objections to the FORM and to provide material in extenuation and mitigation. Applicant did not respond to the FORM or submit any information.

Procedural and Evidentiary Issues

In the FORM, the Government offered as evidence a summary of Applicant's interview (PSI) with an Office of Personnel Management (OPM) investigator conducted on January 16, 2014. (Item 4) The Government noted that Item 4 had not been authenticated, and acknowledged that the document was subject to an objection on that ground. (Directive, Enclosure 3, ¶ E3.1.20 (An ROI may be received with an authenticating witness provided it is otherwise admissible))

The Government invited Applicant to correct, add, revise, delete, or update the information in Item 3, or to object. The FORM warned Applicant that "if no objections are raised in your response to the FORM, or if you do not respond to the FORM, the Administrative Judge may determine that you have waived any objections to the admissibility of the summary and may consider the summary as evidence in your case." (Footnote 1, pg. 2)

Applicant received the FORM on March 23, 2015. He did not provide a response to the FORM, and submitted no corrections, clarifying comments, or rebuttal. He did not object to the FORM or to Item 4.

The Supreme Court has explained that "waiver is the intentional relinquishment or abandonment of a known right." *Kontrick v. Ryan*, 540 U.S. 443, 458, n. 13 (2004) (quoting *United States v. Olano*, 507 U.S. 725, 733 (1993)). I presume Applicant read the FORM and elected not to submit a response or objection. When evidence is submitted in a case, an Applicant is expected to object to the evidence, if there is a reason to do so, and he or she believes the evidence weighs against his or her position. As a general statement of the law, failure to object to consideration of evidence results in waiver.

There is no requirement that Department Counsel discuss the benefits or merits of making a rights' election. Indeed, Applicant may have relied upon Department Counsel's inclusion of Item 4 in the record, and he may have wanted that evidence considered.

Applicant's election not to object may have been better "informed" if Department Counsel's advice in the FORM had included the specific comment that: if the Applicant elects to object to consideration of the OPM PSI (Item 4), it will not be accepted as evidence in his case.

Because there was no explicit warning that he had a “right” to exclusion of the OPM PSI (Item 4), I will not consider any information in Item 4 that weighs against approval or reinstatement of Applicant’s security clearance in this case. See Directive ¶ E3.1.20; ISCR Case No. 11-13999 (App. Bd. Feb. 3, 2014) (explaining that an OPM PSI is inadmissible unless properly authenticated).

Findings of Fact

Applicant admitted the SOR allegation. His admission is incorporated as a finding of fact. After a review of the record evidence, I make the following additional findings of fact:

Applicant is a 51-year-old infrastructure technical support specialist employed by a government contractor. He graduated from high school in 1982. He married his first spouse in 1990 and divorced in 1994. He has been married to his current spouse since 1997, and he has a step-son, age 25.

According to his 2013 SCA, the DOD granted Applicant eligibility for a public trust position on an unspecified date. His employment record shows that from 2002 to December 2008 and from February to May 2009, he was either self-employed as an independent technology consultant or worked as an independent contractor. During May 2005 to December 2008, Applicant was only partially employed. He was unemployed from December 2008 to February 2009 and from May 2009 to January 2010. During these periods of unemployment and underemployment, Applicant was supported by his wife who was fully employed. He worked as a company operations manager from January 2010 to February 2012. He was hired by his current employer, a government contractor, in February 2012.

Applicant disclosed in Section 26 (Financial History) of the 2013 SCA that he failed to file federal income tax returns for tax years 2010 through 2012. He stated that he had no reasons for his failure to file his federal income tax returns. Later, he stated that he and his wife forgot to file their federal income tax returns. He believed that the tax withholding for those years would be sufficient to satisfy any tax owed. He stated that he and his wife were currently working with a certified public accountant (CPA) to file their delinquent income tax returns.

The SOR alleges, and Applicant admitted, that he failed to file federal income tax returns for tax years 2010 through 2012. He claimed that he filed the delinquent federal income tax returns in December 2013. He also claimed that he mailed the IRS a check for \$3,000, and was waiting for the IRS response to set up a payment plan. Applicant submitted no documentary evidence to support his claims.

Applicant provided no information about his current earnings and financial position. He did not provide any information about his and his wife’s monthly incomes, their monthly expenses, and whether their current income is sufficient to pay their

current day-to-day living expenses and debts. There is no information to indicate whether he participated in financial counseling or whether he follows a budget.

Policies

Eligibility for access to classified information may be granted “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. The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

The AG list disqualifying and mitigating conditions for evaluating a person’s suitability for access to classified information. Any one disqualifying or mitigating condition is not, by itself, conclusive. However, the AG should be followed where a case can be measured against them, as they represent policy guidance governing access to classified information. Each decision must reflect a fair, impartial, and commonsense consideration of the whole person and the factors listed in AG ¶ 2(a). All available, reliable information about the person, past and present, favorable and unfavorable, must be considered.

Security clearance decisions resolve whether it is clearly consistent with the national interest to grant or continue an applicant’s security clearance. The Government must prove, by substantial evidence, controverted facts alleged in the SOR. If it does, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. The applicant bears the heavy burden of demonstrating that it is clearly consistent with the national interest to grant or continue his or her security clearance.

Persons with access to classified information enter into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability, and trustworthiness of those who must protect national interest as their own. The “clearly consistent with the national interest” standard compels resolution of any reasonable doubt about an applicant’s suitability for access in favor of the Government. “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; AG ¶ 2(b). Clearance decisions are not a determination of the loyalty of the applicant concerned. They are merely an indication that the applicant has or has not met the strict guidelines the Government has established for issuing a clearance.

Analysis

Guideline F, Financial Considerations

Under Guideline F, the security concern is that 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. (AG ¶ 18)

Applicant's failure to timely file his federal income tax returns for three consecutive tax years, raises the applicability of the following financial considerations disqualifying conditions: AG ¶ 19(a) "inability or unwillingness to satisfy debts," AG ¶ 19(c) "a history of not meeting financial obligations," and AG ¶ (g) "failure to file annual federal, state, or local income tax returns as required or the fraudulent filing of the same."

AG ¶ 20 lists five conditions that could mitigate the financial considerations security concerns:

- (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;
- (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;
- (d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts; and
- (e) the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue.

None of the financial considerations mitigating conditions apply. Applicant provided no reason for his failure to timely file his federal income tax returns. Additionally, he provided no documentary evidence to show that he filed the delinquent tax returns in December 2013, that he made any payments to the IRS, or of any efforts

to establish a payment plan. He also failed to submit documentary evidence of the extent of his debt to the IRS if any.

Furthermore, Applicant provided little information about his and his wife's current earnings and financial position. He did not provide any information about their monthly income, monthly expenses, and whether their current income is sufficient to pay their current day-to-day living expenses and debts. There is no information to show that he participated in financial counseling or that he follows a budget. The available information is insufficient to establish clear indications that he does not have a current financial problem, or that his financial problem is being resolved, or is under control.

Whole-Person Concept

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, and under the whole-person concept. AG ¶ 2(c). I have incorporated my comments under Guideline F in my whole-person analysis.

Applicant failed to submit evidence to show that he has a track record of financial responsibility, that he does not have a financial problem, or that his financial problem is being resolved or is under control. He failed to mitigate the Guideline F 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

Conclusion

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant eligibility for a security clearance to Applicant. Clearance is denied.

JUAN J. RIVERA
Administrative Judge