



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



In the matter of:)
)
) ISCR Case No. 14-02502
)
)
Applicant for Security Clearance)

Appearances

For Government: Chris Morin, Esquire, Department Counsel
For Applicant: Edward R. Leonard and Derek A. Earley,
Harrington, Foxx, Dubrow & Canter, LLP

June 2, 2015

Decision

GOLDSTEIN, Jennifer I., Administrative Judge:

Applicant failed to file both his Federal and state income tax returns for the tax year 2005. His 2009 Federal income tax return was not filed in a timely manner. The circumstances that caused Applicant’s failure to file in 2005 and a delay in filing in 2009 were unusual, and are unlikely to be repeated. These incidents do not cast doubt on Applicant’s judgment, given the unique circumstances under which they occurred. He has acted responsibly with respect to his income tax obligations since November 2013. Financial security concerns are mitigated. Eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted a security clearance application (SCA) on March 1, 2013. On July 31, 2014, the Department of Defense Consolidated Adjudications Facility (DoD CAF) issued Applicant a Statement of Reasons (SOR), detailing security concerns under Guideline F, (Financial Considerations). The action was taken under Executive

Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines effective within the Department of Defense for SORs issued after September 1, 2006.

On August 19, 2014, Applicant answered the SOR (Answer), and requested a hearing. On March 11, 2015, the Defense Office of Hearings and Appeals (DOHA) assigned Applicant's case to me. On that same day DOHA issued a hearing notice, scheduling the case for April 21, 2015. The hearing was held as scheduled. At the hearing, Department Counsel offered exhibits (GE) 1 and 2, and one Hearing Exhibit (HE) marked HE I. Applicant offered exhibits (AE) A through F into evidence. All were admitted. Applicant and two witnesses testified. The record was left open for receipt of additional documentation, and on April 30, 2015, Applicant presented four additional exhibits, marked AE G through AE J. Department Counsel had no objections to AE G through J and they were admitted. I received the hearing transcript (Tr.) on April 29, 2015.

Procedural Ruling

At the hearing, Department Counsel made a motion to amend the SOR pursuant to Directive ¶ E3.1.17, in order to conform to the evidence, by rewording SOR allegation 1.a,. Applicant had no objections to the amendment. The motion to amend was granted. (Tr. 89-91.) The allegation is amended from:

- a. You failed to file your federal income tax return as required by law for tax year ending 2005 and 2009. As of the date of this Statement of Reasons, the tax return remains unfiled.

to:

- a. You failed to file your Federal income tax return as required by law for tax year ending 2005, and failed to timely file your Federal income tax return as required by law for tax year 2009. As of the date of this Statement of Reasons, the 2005 tax return remains unfiled.

Findings of Fact

Applicant is a 63-year-old employee of a defense contractor, where he has worked for the past 13 years. Prior to working for a government contractor, he served on active duty in the Navy for 22 years. He was honorably discharged in 2002, when he retired. He has held a security clearance, without incident for approximately 33 years. He is married and has two adult children. (GE 1; AE A; AE B; Tr. 57-59.)

Applicant was alleged to have failed to file both Federal and state income tax returns for the tax year 2005. He was also alleged to have failed to file his 2009 Federal income tax return in a timely manner. Applicant admitted the allegations contained in SOR ¶¶ 1.a and 1.b, pertaining to the 2005 tax year, but denied the allegations pertaining to 2009, with explanations. His admissions are accepted as factual findings. (Answer.)

Applicant's job requires him to travel for long periods at a time. He has relied upon his wife to manage the family finances. In 2005, Applicant's son was in a car accident that aggravated a congenital condition and left him severely impaired. Applicant and his wife provided extensive care for their son throughout his rehabilitation. However, during the rehabilitation, Applicant's son was in a second car accident that further complicated his medical condition. Applicant's son's medical condition took a significant emotional and financial toll on the family. (Tr. 24-33, 35-55, 59-60.)

Applicant's wife was heavily involved in their son's care and testified that she "grew lax" in everyday obligations. She initially applied for, and was granted, an extension to file their 2005 Federal and state income tax returns late. However, when the extension expired, she never filed their 2005 Federal or state income tax returns. She testified that she lied to her husband and told him that she filed them. He was not aware of her failure to file them for several years. (Tr. 37-43, 46, 52, 61.)

Applicant's wife successfully filed their Federal and state income tax returns for 2006-2008 using Turbo Tax. However, in 2009, there was a transmission error in submitting their Federal income tax return. The state income tax return was successfully submitted through Turbo Tax, but a pin number error prevented the Federal return from being accepted. Applicant's wife testified that she initially was aware of the error, but thought she had successfully reentered and resubmitted the return. Applicant was not aware of the problem with the submission. (Tr. 46-48, 61-73.)

Applicant became aware of his wife's failure to file their 2009 Federal income tax returns in early 2013. He contacted the IRS to rectify the situation. He met with IRS representatives at a local office in November 2013. At that meeting, he attempted to file his 2005 Federal income tax return, but was told that the IRS had prepared a substitute return for him. He was not permitted to file his 2005 state tax return either. The Federal and state substitute returns allegedly showed that Applicant was due refunds for 2005, although the time allowed for Applicant to collect those refunds had lapsed. He successfully filed his 2009 Federal income tax return on November 5, 2013, as evidenced by a date stamp on his 2009 Federal tax return that he submitted into evidence. (AE G.) He was found to be indebted to the Federal government for the 2009 tax year, due to a withdrawal from retirement savings used to satisfy medical debt. Applicant's wages were garnished by the IRS to pay his debt.¹ He currently is indebted

¹ Applicant used the word "garnishment" in his testimony to describe his payments to the IRS, but described it as something he voluntarily agreed to so he could be sure that his payments were made. I find it was a voluntary garnishment or possibly an allotment from his payroll. (Tr. 71-72.)

to the IRS for approximately \$1,224. He is successfully making payments of \$100 per month to the IRS directly from his paycheck, in accordance with an installment agreement. (AE E; AE F; Tr. 46-48, 61-73.)

Applicant now monitors the family's financial status. He and his wife completed budget counseling offered by the Navy, and he has enrolled in several other financial counseling courses. Since 2013 he has actively participated in filing their joint Federal and state income tax returns, and plans to continue to actively participate in all financial decisions. He acknowledged that he is still recovering from his son's costly medical care and other health-related issues, but he is resolved to pay his bills and remain financially solvent. (Tr. 57, 74-79.)

Applicant's division manager and supervisor wrote letters recommending that he be granted a security clearance. They attested that Applicant is a faithful, valued, and trusted member of their team. (AE A; AE B.)

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 (AG) 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, these guidelines are applied in conjunction with the factors listed in AG ¶ 2 describing the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶¶ 2(a) and 2(c), the entire process is a conscientious scrutiny of applicable guidelines in the context 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 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. Under Directive ¶ E3.1.15, "[t]he 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, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision." Section 7 of Executive Order 10865 provides: "[a]ny determination under this order adverse to an applicant shall be a determination in

terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.”

A person applying for access to classified information seeks to enter 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 protect or 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.

Analysis

Guideline F, Financial Considerations

The security concerns relating to the guideline for financial considerations are set out in AG ¶ 18, which reads in pertinent part:

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 ¶ 19 describes two conditions that could raise a security concern and may be disqualifying in this case:

(c) a history of not meeting financial obligations; and

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

Applicant failed to file his 2005 Federal and state income tax returns. He filed his 2009 Federal tax return several years late, in 2013. He has a history of not meeting his legal financial obligations. The evidence is sufficient to raise the above disqualifications, thereby shifting the burden to Applicant to rebut, extenuate, or mitigate those concerns.

The guideline includes conditions in AG ¶ 20 that could mitigate security concerns arising from Applicant’s financial history, including:

(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's failure to file his 2005 Federal and state income tax returns, and the late filing of his 2009 Federal tax return occurred under unusual circumstances that are unlikely to recur, now that he is closely monitoring his family's finances. He and his wife were under a great amount of stress due to their son's accidents and resulting medical conditions. His wife failed to keep up their daily obligations, including the filing of their Federal and state income taxes for tax year 2005. She lied to Applicant and told him the 2005 returns had been filed. Applicant's 2005 Federal and state income tax returns are no longer eligible to be filed. He attempted in good faith to file them with both the Federal government and the state, but was not permitted to do so because substitute filings had been prepared and the time for amendment had expired. The late filing for 2009 occurred due to a transmission error, which was eventually rectified in 2013 when he met with IRS representatives. Applicant is engaged in financial counseling. He completed a budgeting class and is enrolled in additional financial classes to aid him in managing his family's finances. He has served in the Navy honorably, and has had a security clearance for over 30 years without incident. He is considered to be trustworthy by his management. Applicant can be trusted to continue to resolve his small remaining debt to the IRS. These circumstances are unique and do not cast doubt on Applicant's judgment. AG ¶¶ 20 (a) and 20 (c) fully apply.

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.

According to 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 pertinent facts and circumstances surrounding this case. Applicant is a 63-year-old contractor, who has held a security clearance for over 30 years without incident. According to his letters of recommendation, he is a hard-working and highly valued employee. The multiple factors that caused his failure to file his Federal and state income tax returns in 2005 and the late filing for the 2009 tax year are unlikely to recur. He has credibly demonstrated that he intends to comply with Federal and state regulations requiring the timely filing of all income tax returns. He is complying with the terms of his installment agreement to repay the IRS, and the remaining balance due is too small to create any potential for coercion or duress.

Overall, the record evidence leaves me without doubt as to Applicant's present eligibility and suitability for a security clearance. He met his burden to mitigate the security concerns arising from financial considerations.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline F:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

Jennifer I. Goldstein
Administrative Judge