



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



In the matter of:)
)
 REDACTED) ISCR Case No. 14-02687
)
 Applicant for Security Clearance)

Appearances

For Government: Tovah A. Minster, Esq., Department Counsel
For Applicant: Sheldon I. Cohen, Esq.

04/15/2015

Decision

MENDEZ, Francisco, Administrative Judge:

Applicant established his continued eligibility for access to classified information. He accumulated a substantial amount of delinquent debt while underemployed. After regaining full-time employment, he contacted his overdue creditors, negotiated debt repayment plans, and satisfied his debts. He hired an accountant, who prepared and filed his previously unfiled tax returns. He does not owe any delinquent tax debt. He has timely filed his tax returns and lived within his means over the past two years. He is now firmly in control of his finances and has made significant changes in his approach and manner in which he manages his finances, mitigating security concerns raised by his past financial issues. Clearance is granted.

Statement of the Case

On July 23, 2014, the Department of Defense (DOD) sent Applicant a Statement of Reasons (SOR), alleging that his conduct and circumstances raised security concerns under the financial considerations guideline (Guideline F).¹ Applicant timely

¹ This action was taken under Executive Order (E.O.) 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 implemented by DOD on September 1, 2006.

answered the SOR and requested a hearing to establish his eligibility for access to classified information (Answer).

On November 23, 2014, Department Counsel notified the Hearing Office that the Government was ready to proceed with a hearing in the case. On December 12, 2014, a notice of hearing (NOH) was issued setting the hearing for February 19, 2015. The hearing was held as scheduled. Department Counsel offered exhibits (Exh.) 1 – 3, which were admitted into evidence without objection. Applicant testified and called several character witnesses. He offered Exh. A – LL, which were also admitted without objection. The hearing transcript (Tr.) was received on February 27, 2015.

Findings of Fact

After a thorough review of the pleadings, exhibits, and transcript I make the following findings of fact:²

Applicant is a federal contractor working for another Government agency. His employment history includes a period of underemployment from 2005 to 2007. He was laid off and was only able to find sporadic work as a consultant. In 2007, he was hired as a federal contractor and has been employed full time to the present day. He has been with his current employer since 2010. He was first granted access to classified information in about 1997. (Tr. at 98-103, 124, 163-165; Exh. 1)

In 2006, after eight years of marriage, Applicant and his wife divorced because of her infidelity. Applicant gained full custody of their two children and has raised them on his own without financial support from his former wife. After the marriage ended, Applicant suffered for years from both physical and mental health issues. He disclosed his past mental health issues and counseling, which were in part related to the failure of his marriage, on his security clearance application (SCA). (Tr. at 104-134; Exh. 1; Exh. V – W; Exh. JJ)

Applicant experienced a period of financial trouble when he was only able to secure sporadic work as a consultant between 2005 and 2007. He fell behind on his mortgage and defaulted on other financial obligations, to include credit card debt he incurred trying to support himself and his two children. After regaining full-time employment in 2007, Applicant contacted his overdue creditors, negotiated payment plans, and satisfied his debts. He paid the SOR debts listed at ¶¶ 1.a through 1.e before the SOR was issued. His mortgage is current and he paid other debts not listed on the SOR. His current credit report reflects no other delinquent debts. He lives within his means, pays cash for all purchases, and does not have a credit card. He has a significant amount in savings to deal with any unexpected emergencies and contingencies. He listed his past-due debts and other financial issues on his SCA. (Tr. at 154-160, 168-169; Exh. 1 at 42-48; Exh. A – E; Exh. U)

² In reaching the above findings of fact, I have made only those reasonable inferences supported by the evidence and, where necessary, resolved any potential conflict raised by the evidence.

Applicant did not timely file his federal tax returns for tax years (TY) 2005 – 2007 and 2010 – 2011. He also did not timely file his state tax returns for TY 2005 – 2007 and 2010. In 2012, Applicant hired a firm that provides tax preparation and other tax-related services. The firm prepared all of Applicant's overdue and missing tax returns. By December 2012, the firm had filed all overdue and missing returns with the IRS and the state, except for TY 2005; because Applicant was owed a refund and the time limit to claim the refund had expired.

Applicant's untimely filed tax returns indicated a refund, except for TY 2007. The past-due amount owed for TY 2007 was satisfied with the refunds due in other years and payments made by Applicant. Applicant testified that, during the years he did not timely file his tax returns, he took no exemptions and intentionally overpaid the amount deducted from his pay in taxes. His tax advisor testified that Applicant does not owe any delinquent federal or state tax debt. Applicant, with the assistance of the tax preparation firm, has timely filed his federal and state tax returns for the past two years. As of the hearing, he had submitted all necessary documents to allow the firm to prepare and timely submit the tax returns that are due this year. He is fully satisfied with the firm and plans on using it in subsequent years to prepare and file his returns. (Tr. at 17-42, 134-144, 154, 161-163, 169-170; Exh. H – T)

Applicant also retained the tax preparation firm to resolve a \$3,600 tax lien filed by State A, where he previously resided. Applicant had mistakenly failed to file a part-year tax return when he moved from State A to State B, because he was distracted by the difficulties in his former marriage. The tax preparation firm negotiated a repayment plan with State A to resolve the lien, and Applicant has been repaying the debt. His tax advisor unequivocally states that, after the firm completes filing the part-year tax return, the refund due and the amounts already paid will fully resolve the lien and any past-due amount. (Tr. at 21-23, 150-154; Exh. F; Exh. LL)

Applicant is well regarded for his work ethic, trustworthiness, and reliability by his coworkers and friends. (Tr. at 66-96, Exh. HH – JJ) A long-time friend, who is also the chief prosecutor for her jurisdiction, testified that in her opinion Applicant's failure to file his tax returns was not a deliberate attempt to evade his tax obligations. Instead, his failure to timely file was consistent with his tendency to procrastinate and the state of his personal affairs and mindset at the time. She has witnessed dramatic changes in Applicant's outlook and overall mental health in the past few years. (Tr. at 43-66)

Policies

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). Individual applicants are only eligible for access to classified information "only upon a finding that it is clearly consistent with the national interest" to authorize such access. Executive Order (E.O.) 10865, *Safeguarding Classified Information within Industry*, § 2 (Feb. 20, 1960), as amended.

When evaluating an applicant's eligibility, an administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations, the guidelines list potentially disqualifying and mitigating conditions. The guidelines are not

inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies the guidelines in a commonsense manner, considering all available and reliable information, in arriving at a fair and impartial decision.

The Government must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.14. On the other hand, an 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.” Directive ¶ E3.1.15. An applicant has the ultimate burden of persuasion to establish their eligibility.

In resolving the ultimate question regarding an applicant’s eligibility, an administrative judge must resolve “[a]ny doubt concerning personnel being considered for access to classified information . . . in favor of national security.” AG ¶ 2(b). Moreover, “security clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531.³ However, as there is no *per se* rule requiring disqualification, a judge must decide each case based on its own merits.⁴

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. 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 an 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.⁵

Clearance decisions must be made “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” E.O. 10865 § 7. Thus, a decision to deny a security clearance amounts to a finding that an applicant, at the time the decision was rendered, did not meet the strict guidelines established for determining eligibility for access to classified information.

³ See also ISCR Case No. 07-16511 at 3 (App. Bd. Dec. 4, 2009) (“Once a concern arises regarding an Applicant’s security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance.”).

⁴ ISCR Case No. 11-12202 at 5 (App. Bd. June 23, 2014).

⁵ Security clearance determinations are “not an exact science, but rather predicative judgments about a person’s security suitability.” ISCR Case No. 01-25941 at 5 (App. Bd. May 7, 2004). An administrative judge is required to examine an individual’s past history and current circumstances to make a predictive judgment about an individual’s ability and willingness to protect and safeguard classified information. ISCR Case No. 11-12202; ISCR Case No. 11-13626 (App. Bd. Nov. 7, 2013).

Analysis

Guideline F, Financial Considerations

The potential security concern regarding an individual with financial problems is explained at 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.

Applicant's history of failing to pay his debts and timely file his tax returns raises this security concern. It also establishes the following disqualifying conditions:

AG ¶ 19(a): inability or unwillingness to satisfy debts;

AG ¶ 19(c): a history of not meeting financial obligations; and

AG ¶ 19(g): failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same.

The guideline also lists a number of conditions that could mitigate the concern. The mitigating conditions that are relevant in this case are:

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;

AG ¶ 20(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;

AG ¶ 20(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; and

AG ¶ 20(d): the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

Applicant incurred delinquent debt during a period of unstable employment. After regaining full-time employment, he contacted his creditors, negotiated repayment plans,

and satisfied the debts. Currently, Applicant lives within his means and has a firm control over his finances. The security concerns raised by the delinquent debts listed at SOR ¶¶ 1.a – 1.e are mitigated by application of AG ¶¶ 20(b), 20(c), and 20(d).

Applicant claims that his failure to timely file his federal and state tax returns for several years was caused, in part, by his inability to deal with an overwhelming amount of personal matters. However, whether considered individually or collectively, these personal matters are insufficient to mitigate the significant security concerns raised by his failure to meet a basic requirement of all citizens to file their tax returns. Of note, Applicant's conduct continued for years following his divorce. AG ¶ 20(b) does not apply to Applicant's failure to file his tax returns.⁶

Applicant, however, did meet his heavy burden in demonstrating true financial reform.⁷ In 2012, two years before the SOR was issued, he took decisive and concrete action to resolve his tax situation. He hired a reputable tax preparation firm that assisted him in preparing and filing all missing tax returns. Over the past two years, with the assistance of the tax preparation firm, Applicant has timely filed his federal and state tax returns. He is in the process of resolving a relatively minor state tax lien and, as of the February hearing, had submitted all necessary paperwork to allow the tax preparation firm to prepare and timely file his 2015 tax return. He does not have any unaddressed delinquent federal or state tax debt. Under these circumstances, Applicant's past failure to timely file his tax returns is mitigated by AG ¶¶ 20(a), 20(c), and 20(d).

Whole-Person Concept

Under the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of an applicant's conduct and all the relevant circumstances. An administrative judge should consider the nine factors listed at AG ¶ 2(a).⁸ A number of these factors have already been discussed under Guideline F, but others warrant additional comment.

Applicant has been candid about his financial issues and other pertinent background matters from the start of the security clearance process. His failure to file was not an attempt to evade his tax obligation. Instead, he was overwhelmed by personal issues after discovering his spouse's infidelity that ultimately led to divorce. Although this does not excuse Applicant's conduct, it places it in proper context in evaluating his suitability for continued access to classified information. Moreover, he

⁶ See, e.g., ISCR Case No. 11-09118 (App. Bd. Mar. 25, 2015) (notwithstanding numerous medical issues, denial of clearance was affirmed where clear evidence of financial reform was not presented).

⁷ ISCR Case No. 12-04806 (App. Bd. July 3, 2014) (grant affirmed upon proof of clear evidence of financial reform).

⁸ The non-exhaustive list of adjudicative factors are: (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.

has now changed his outlook and manner in which he handles his financial obligations, to include timely filing his tax returns. This favorable record evidence and the mitigating conditions noted herein, mitigates the security concerns raised by Applicant's past financial lapses and delinquencies. Overall, the record evidence leaves me with no questions or doubts about his current eligibility for access to classified information.

Formal Findings

Paragraph 1, Guideline F (Financial Considerations): FOR APPLICANT

Subparagraphs 1.a – 1.h: For Applicant

Conclusion

In light of the record evidence and for the foregoing reasons, it is clearly consistent with the national interest to grant Applicant continued access to classified information. Applicant's request for a security clearance is granted.

Francisco Mendez
Administrative Judge