



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



In the matter of:)
)
) ISCR Case No. 12-00447
)
Applicant for Security Clearance)

Appearances

For Government: Julie R. Mendez, Esq. Department Counsel
For Applicant: Bradley P. Moss, Esq.

01/28/2014

Decision

ANTHONY, Joan Caton, Administrative Judge:

After a thorough review of the pleadings, testimony, and exhibits, I conclude that Applicant failed to rebut or mitigate the Government's security concerns under Guideline F, Financial Considerations. His eligibility for a security clearance is denied.

Statement of the Case

Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) on September 7, 2011. On September 3, 2013, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline F, Financial Considerations. The 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* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the DOD for SORs issued after September 1, 2006.

On October 8, 2013, Applicant filed a notarized answer to the SOR, and he elected to have a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA). The case was assigned to me on November 6, 2013,

and I convened a hearing on December 3, 2013, to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The Government called no witnesses and introduced four exhibits, which were marked Ex. 1 through 4 and entered in the record without objection.

Applicant testified and called two witnesses. He introduced 17 exhibits, which were marked as Applicant's Ex. A through Ex. Q and entered in the record without objection. At the conclusion of the hearing, Applicant requested that I leave the record open until close of business on December 17, 2013, so that he could provide additional information. The Government did not object, and I granted Applicant's request. Applicant timely filed three additional exhibits, which were marked as Ex. R, Ex. S, and Ex. T, and entered in the record without objection. When he filed his post-hearing documents, Applicant requested a second extension of time of three days, until December 20, 2013, in order to provide additional information. Department Counsel did not object to Applicant's request. On December 20, 2013, Applicant filed two additional documents, which were marked as Ex. U and Ex. V.¹ These documents were entered in the record, without objection. DOHA received the hearing transcript (Tr.) on December 11, 2013.

Findings of Fact

The SOR contains three allegations of financial conduct that raise security concerns under Guideline F, Financial Considerations (SOR ¶¶ 1.a. through 1.c.) In his Answer to the SOR, Applicant admitted the three allegations and provided additional information. Applicant's admissions are entered as findings of fact.

Applicant is 58 years old. He and his wife have been married for 25 years. They have no children. Their hobby is raising pure-bred cats. Applicant is a cat show judge. (Ex. 1; Ex. 2; Tr. 54-58, 110-111.)

Applicant graduated from college with a bachelor's degree in 1979. He developed a proficiency in information technology and computer systems, and he was hired to work in information technology by the university he had attended as an undergraduate. From approximately 1979 to 2008, he worked in information technology for various academic departments and colleges within the university. Also, for various periods of time between 1983 and October 2008, Applicant took leave from his full-time job with the university to work as a part-time information technology instructor for a private company. He traveled to various training sites to provide one or two-week training courses several times a year. When teaching the training courses in 2008,

¹ Applicant's witness list and proffered exhibits are marked as Hearing Exhibit (HE) 1. The Government's proposed exhibit list is marked as HE 2. I marked emails transmitting Applicant's first post-hearing submission of three documents, his request for an additional extension of time, and Department Counsel's notification that the Government did not object to the admission of the documents or the request for an extension of time as HE 3. I marked emails transmitting Applicant's final two post-hearing submissions and Department Counsel's notification that the Government did not object to the admission of those submissions as HE 4.

Applicant was paid \$999 per day, plus expenses. He estimated that his salary in the latter years he worked as a trainer was between \$80,000 and \$120,000 a year. (Ex. 1; Tr. 69-73, 112.)

Applicant testified that he was paid as a salaried employee by both his full-time and part-time employers during the period from 1983 to 2008. Both employers withheld money from his paychecks for Federal and state income tax. Each also provided Applicant with Wage and Earning Statements (W-2 Forms) to file with his Federal and state income tax returns. (Tr. 72-74.)

In March 2008, Applicant was laid off from his full-time university job when a new manager decided he would change to a new information technology system that did not require Applicant's expertise. In April 2008, Applicant suffered a stroke while away from home judging a cat show. He was hospitalized and treated when he returned home. A month later, in May 2008, his physician examined him and concluded that Applicant's stroke symptoms had faded and he showed marked improvement. In August 2008, Applicant health had improved enough to permit him to travel, with his wife, to Brazil, where he judged a cat show. In October and November 2008, Applicant and his wife traveled to England and Russia, where he also judged cat shows. (Ex. A; Ex. 1.)

In June 2008, Applicant filed an application with his state of residence to register a company he founded as a Subchapter S corporation. From June 2008 until October 2008, Applicant was self-employed as a consultant in his company. However, he did not file the necessary paperwork to complete his Subchapter S application. As a result, the state contacted Applicant in September 2011 and informed him that he owed approximately \$1,600 in unpaid personal income taxes for operating his business as a sole proprietorship. Applicant testified that he and his lawyer consulted with the state authorities, and, to the best of his knowledge, he no longer is responsible for the tax debt. (Ex. 2; Tr. 93-94.)

From November 2008 until June 2011, Applicant was employed as a senior software engineer with a federal contractor. He was laid off from this job when the contract under which he was employed expired. Applicant was then unemployed for one month before taking a position with his current employer. He seeks a security clearance for the first time. (Ex. 1.)

Applicant's current position requires a security clearance. He is now employed part-time by his employer as a consultant and, while the matter of his security clearance is pending, he has been assigned work that does not require access to classified information. (Tr. 34-37, 112.)

The SOR alleges at ¶ 1.a. that Applicant failed to file his Federal income tax returns for tax years 2008, 2009, 2010, and 2011. The SOR also alleges that Applicant failed to file state income tax returns in his current state of residence in tax years 2008, 2009, 2010, and 2011 (SOR ¶ 1.b.), and, in 2008 and 2009, he failed to file his state income tax returns in a state he formerly resided in. (SOR ¶ 1.c.).

In his answer to the SOR, Applicant attributed his failure to file his Federal and state income tax returns for tax years 2008 through 2011 to unemployment and suffering a stroke in 2008. He noted that these conditions were outside of his control. (Answer to SOR.)

Applicant also stated that, over a period of many years, he was “fairly consistently late” in filing his Federal and state income tax returns. When he was interviewed by an authorized investigator about his financial record in October 2011, Applicant acknowledged that he had been contacted by the Internal Revenue Service (IRS) and state taxing authorities, but he had not yet submitted the returns that they had requested. He explained that the work schedule and the paperwork associated with his part-time employment as a trainer for a private company contributed to his failure in the 1980s to file his Federal and state income taxes, as required. For a time, he engaged an accountant to help him, but when the accountant retired in the mid-1980s, Applicant did not find a satisfactory replacement. He acknowledged also that he purchased a home soon after graduating from college and rented parts of the home to tenants, further complicating his record-keeping. Consequently, from the mid-1980s until at least 2007, Applicant did not timely file his Federal and state income tax returns, as required. He testified that his authorized withholding amounts ensured him a refund each year, and he would file his returns no later than three years after they were due in order to be eligible to claim his refunds. He acknowledged that in 2009, when he was seeking approval for a home mortgage, he filed two years of returns before the three-year deadline because the mortgage lender required proof of income. (Ex. 2; Tr. 75-80, 86, 87, 110-112.)

Through testimony and documentation, Applicant established that he filed his 2008 Federal income tax return in April 2012; his 2009 Federal income tax return in 2013; his 2010 Federal income tax return in 2013; and his 2011 Federal income tax return in September 2012. He requested an extension until October 15, 2013, to file his 2012 Federal income tax return. However, he did not file his 2012 Federal return until December 2, 2013, the day before his hearing.² (Ex. 3; Ex. S; Tr. 113-119.)

Additionally, through testimony and documentation, Applicant demonstrated that he filed state income tax returns in his current state of residence as follows: tax year 2008, filed May 2012; tax year 2009, filed 2013; tax year 2010, filed 2013; and tax year 2011, filed September 2012. He also testified that he had filed his 2008 and 2009 state income taxes in his former state of residence. He provided evidence to corroborate his testimony that he filed his 2008 state income tax return in his former state of residence in 2012. (Ex. U; Ex. V; Tr. 91, 114-115.)

Applicant testified that he had filed all of his delinquent income tax returns. When asked on direct examination if he was prepared to file his 2013 Federal and state

² The SOR did not allege that Applicant failed to timely file his 2012 Federal income tax return, as required, and, accordingly, this information will not be considered as disqualifying in my Guideline F analysis. However, I will consider the information in my whole-person analysis.

income tax returns by the filing deadline in April 2014, Applicant replied, "I believe so, yes." When asked what reassurances he would give that he would do so, Applicant replied, "It has been made excessively clear to me that there are job consequences for not filing." (Tr. 104-105.)

Applicant provided a current personal financial statement. He stated that his net monthly income was \$7,931.³ His monthly expenses total \$5,387.⁴ Applicant's monthly remainder is \$2,544. Additionally, Applicant listed the following total assets: stocks, \$1,200; automobile, \$3,000; checking account, \$6,000; and, 401K and retirement accounts, \$378,023. (Ex. O.)

The managing partner of the government contracting firm that currently employs Applicant testified telephonically. The witness stated that Applicant possessed technical skills valued by the firm. He also observed that Applicant had a very keen intelligence, was a very good problem solver, and observed all the rules of the workplace. He observed that he was "baffled" when he learned of Applicant's failure to file his Federal and state income tax returns, as required. He also stated that he trusted Applicant and relied on his professional judgment. (Tr. 33-44.)

Applicant's second witness, a computer engineer, also testified by telephone. The witness stated that he knew Applicant as a fellow cat fancier. He stated that he trusted Applicant, and had given him a key to his home. (Tr. 54-65.)

Applicant also provided three letters of character reference. One letter was provided by a friend and co-worker who has known Applicant since 1989. This individual noted that Applicant was frugal and careful when purchasing authorized items on behalf of his employer. The friend also observed that Applicant always followed procedures in carrying out his work. (Ex. L.)

One of Applicant's former supervisors provided a letter of character reference. He stated that Applicant had a very good work ethic and did his job well. A friend who has known Applicant since 1991 provided a third letter of character reference. He praised Applicant as an individual who took his commitments and responsibilities to family, friends, and community very seriously. (Ex. M; Ex. N.)

Applicant denied any financial delinquencies. He has not been served with tax liens, and he has never filed for bankruptcy. (Tr. 80-82.)

In 2013, Applicant was diagnosed with Attention Deficit Disorder (ADD), and he has been prescribed medication. He believes that this condition has made it difficult for him to concentrate on long-term goals, and he has been easily distracted. (Tr. 106-108.)

³ Applicant receives a \$13,000 distribution yearly from his mother's estate. He listed this as a monthly distribution of \$1,083. (Ex.O; Tr. 102-103.)

⁴ Applicant included two debt payments in his monthly expenses: a monthly payment of \$335 on an automobile loan and a monthly payment of \$500 on a personal loan. (Ex. O.)

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, and it has emphasized that “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information.” *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant Applicant’s eligibility for access to classified information “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 and modified.

When evaluating an applicant’s suitability for a security clearance, an administrative judge must consider and apply the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are 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, the administrative judge applies these 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.” In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record.

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 applicant or proven by Department Counsel. . . .” The applicant has the ultimate burden of persuasion in seeking 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 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.

Section 7 of Executive Order 10865 provides that 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 relating to the guideline 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.

Applicant failed to file his Federal and state income tax returns, as required, for tax years 2008 through 2011. Under AG ¶ 19(g), “failure to file annual Federal, state, or local income tax returns as required” can be a matter of security concern.

Applicant has a history of failing to file, as required, his annual Federal and state income tax returns. At his hearing, he testified that his failure to timely file his income tax returns dates to the 1980s. He acknowledged that his income tax issues were sometimes complicated by multiple employers, home ownership, concerns with tenants, and illness. He also admitted that he had not sought professional assistance in preparing and filing his income taxes after his trusted accountant retired in the mid-1980s.

The Government did not allege, nor did the evidence establish, that Applicant’s failure to file his Federal and state income tax returns was willful.⁵ However, his habitual failure to file his Federal and state income tax returns does raise Guideline F security concerns about his willingness to abide by rules and regulations that bind citizens and residents who earn income in the United States. Applicant’s habitual unwillingness to follow rules for filing income tax returns in turn raises concerns about his reliability,

⁵ See 26 U.S.C ¶ 7203.

trustworthiness, and ability to follow rules and regulations necessary to protect classified information.

The guideline also includes examples of conditions that could mitigate security concerns arising from financial behavior. Several Guideline F mitigating conditions could apply to the security concerns raised by Applicant's failure to timely file his Federal and state income tax returns, as required. Unresolved financial issues might be mitigated if 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(a)) Additionally, unresolved financial behavior might be mitigated if "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(b)) Still another mitigating circumstance that might be applicable includes evidence that "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" (AG ¶ 20(c)).

Applicant has a history of failing to file his Federal and state income tax returns, as required. However, he manages his tax payments to ensure that he owes no taxes at the end of the year, and he reports receiving refunds when he files his tax returns within the three-year window that allows him to receive a refund of his overpayments. Additionally, he testified that he filed two returns before the three-year deadline in order to meet a lender's requirement for a mortgage. Clearly, Applicant has the organizational skills necessary to timely comply with rules when it is in his interest to do so.

Applicant experienced some employment and health issues in 2008. He was laid off from a job in March 2008, and, in April 2008, he suffered a stroke, for which he was treated successfully. He was subsequently able to travel to international cat shows in August, October, and November of 2008. While Applicant's negative employment and health issues had a major impact on his life, they did not establish that he was unable to file his Federal and state income tax returns in 2008 or in the following three years. Even if these events were beyond Applicant's control, he did not take a reasonable course of action and seek professional help in the preparation and filing of his Federal and state income tax returns, something he had done for a time in the 1980s. Moreover, it is worth noting that Applicant's period of unemployment ended in November 2008, when he accepted a position as a senior software engineer with a government contractor. He then had stable employment for several years.

Applicant stated that he would file his Federal and state income tax returns as required in the future. However, he has habitually ignored some of the filing rules and regulations for many years. It is too soon to tell if his failure to timely file his Federal and state income tax returns has been mitigated by positive and definite action. I conclude, therefore, that AG ¶¶ 20(a), 20(b), and 20(c) do not fully apply in mitigation to the facts of Applicant's case.

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. Applicant is a mature, intelligent, and well-educated person of 58 years. His supervisor, friends, and coworkers stated that he is hard-working and well-respected in the workplace. He does work that requires care and precision.

Applicant's failure to file his Federal and state income tax returns is long-standing habitual behavior. While he asserts he will change his behavior and make timely filings in the future, I note that, despite notice that his failure to file income tax returns as required had raised security concerns, he filed his 2012 Federal income tax return on December 2, 2013, after the expiration of an extension and the day before his security clearance hearing.

Overall, the record evidence leaves me with questions and doubts about Applicant's judgment and reliability as well as his eligibility and suitability for a security clearance. For these reasons, I conclude Applicant failed to mitigate security concerns arising under Guideline F, Financial Considerations.

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.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 grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Joan Caton Anthony
Administrative Judge