



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



In the matter of:

Applicant for Security Clearance

)
)
)
)
)
)

ISCR Case No: 15-01701

For Government: Andre Gregorian, Esq., Department Counsel
For Applicant: *Pro se*

04/14/2017

Decision

DAM, Shari, Administrative Judge:

Applicant failed to timely file Federal income tax returns and pay delinquent debts. He did not mitigate the resulting security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On March 14, 2014, Applicant submitted a security clearance application (SF-86). On September 24, 2015, the Department of Defense (DOD) issued to Applicant a Statement of Reasons (SOR) 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 for Determining Eligibility for Access to Classified Information* effective within the DOD on September 1, 2006.

Applicant answered the SOR in writing (Answer) on December 26, 2015, and requested a hearing before an administrative judge. On May 5, 2016, the Defense Office of Hearings and Appeals (DOHA) assigned the case to another administrative judge. On August 11, 2016, DOHA issued a Notice of Hearing setting the case for September 22, 2016. At that hearing, the administrative judge ruled on three preliminary matters:

1. Department Counsel offered Government Exhibits (GE) 1 through 5 into evidence. All exhibits were admitted, except GE 2, (Report of an Interview with Applicant on July 7, 2014), to which Applicant objected because the report was not authenticated. His objection was sustained, and the exhibit was not admitted.
2. The Department moved to amend the SOR by withdrawing the allegation in ¶ 1.d. Applicant did not object and the motion was granted.
3. The Department moved to amend the SOR by adding the following allegation:

SOR ¶ 1.f. You are indebted to the Federal Government for a tax lien that was entered in October 2014 in the approximate amount of \$1,725.00. As of the date of this Statement of Reasons, the lien remains unpaid.

The motion was granted over Applicant's objection. Based on that ruling, Applicant requested that his hearing be continued to give him time to prepare a response and defense to the allegation. His request was granted, and the matter was continued to a date to be determined. DOHA received a copy of this hearing transcript on October 3, 2016.

On October 5, 2016, DOHA re-assigned the case to me. On November 15, 2016, DOHA issued a Notice of Hearing setting the case for December 6, 2016. The case proceeded as scheduled. Department Counsel again offered GE 1 through 5. All were admitted without objection from Applicant. However, based on Applicant's previous objection to GE 2 and ruling thereon, the exhibit was mistakenly admitted. Hence, my ruling on this exhibit is reversed. GE 2 is not admitted as evidence in this record and is not considered.

Applicant testified, and offered Applicant Exhibits (AE) A through C into evidence. All exhibits were admitted without objections. DOHA received the hearing transcript of this proceeding (Tr.) on December 14, 2016. The record remained open until January 6, 2017, to give Applicant an opportunity to submit additional evidence. He timely submitted AE D and E, which were admitted into evidence without objection.

Findings of Fact

Applicant admitted the allegations contained in the SOR ¶¶ 1.a, 1.b, and 1.c. He denied the allegations contained in the SOR ¶¶ 1.e and 1.f. (Answer; Tr. 7.) Those admissions are incorporated into these findings of fact.

Applicant is 39 years old and married for twelve years. He and his wife have two children. After graduating from high school in 1995, he joined the Army. He was an E-4 at the time of his honorable discharge in 1999. He held a security clearance while in the military. He then attended college and earned some college credits and certifications in telecommunications. In 2004, he started working for his current employer, a federal contractor, in a Middle Eastern country. He is a resident of that country, as legally required during his employment there. He returns to the United States every six months for a month. His wife and children resided in the country for five years before permanently returning to the United States in 2009. (Tr. 19-23, 25-26, 29.)

Prior to 2010, Applicant timely filed his Federal income tax returns. A tax consultant familiar with regulations for individuals earning money overseas prepared the returns. In 2010, the tax consultant stopped working so Applicant prepared and filed his Federal tax returns. After encountering a tax problem with the 2010 tax returns, he decided to find another tax consultant with the pertinent expertise for all future filings. (Tr. 31-32.) He was unable to locate a competent consultant until November 2016, a month before his re-scheduled hearing. (Tr. 33, 38.)

The SOR alleged that Applicant failed to file Federal tax returns for years 2011, 2012, and 2013. Applicant stated that he intended to have the tax returns filed by the end of February 2016. (Answer.) As of his December hearing, Applicant had not filed Federal tax returns for those three years, nor had he filed his 2014 and 2015 Federal tax returns.¹ (Tr. 32-33.)

Applicant brought copies of Federal tax returns for 2013, 2014, and 2015, prepared by a new tax consultant on December 6, 2016. He intended to file them after his hearing. He cannot file his 2011 and 2012 Federal tax returns until he obtains copies of W-2 earning forms for those years. He planned to visit the Internal Revenue Service (IRS) after this hearing and obtain the forms. Thereafter, he would send them to the tax consultant, who would promptly prepare Federal tax returns for 2011 and 2012. (Tr. 33-34, 51; AE A, B, C.)

Applicant attributed his failure to timely file his Federal tax returns to difficulty finding a competent tax consultant and to his belief that, because he was owed a refund, he was legally excused from filing late. (Tr. 35.) He understands now that he has a legal obligation to timely file tax returns, irrespective of anticipating a refund. (Tr. 37.)

¹ The SOR did not include an allegation related to Applicant's failure to timely file his 2014 and 2015 Federal tax returns. Hence, those facts will not be considered in analyzing the disqualifying conditions, but may be considered in the analysis of mitigating conditions, the whole-person concept, and Applicant's credibility.

In addition to alleging Applicant's failure to file Federal tax returns, the SOR alleged two delinquent debts: a \$624 charged-off retail account delinquent since September 2013, and an unpaid 2014 Federal tax lien for \$1,725. Applicant paid the \$642 delinquent debt, on December 6, 2016, the date of this hearing. (Tr. 48; GE 4, 5; AE D.) Despite having time to address the tax lien after his case was continued in September 2016 for that specific purpose, the 2014 tax lien remains unresolved. (Tr. 48-49; GE 5.)

Applicant's annual salary is over \$100,000, depending on his work. (Tr. 28.) His bills are current and he has money in retirement accounts. He has not participated in financial counseling. (Tr. 53-55.) He did not submit a budget.

Applicant's supervisor is aware of this proceeding but not the underlying Federal tax return issues. (Tr. 22.) Applicant said he has received "no less than stellar" performance evaluations over the years. (Tr. 24.) Applicant emphasized in his closing argument that he has worked for the military since 1995, except for two years, and has many accomplishments. He does not consider himself a security risk. He likes his work. (Tr. 60.)

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 and mitigating conditions, which are useful 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(a), describing 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. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

According to Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, 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, and has the ultimate burden of persuasion as to obtaining a favorable clearance 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 EO 10865 provides that an adverse decision shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.”

Analysis

Guideline F, Financial Considerations

The security concerns relating to the guideline for financial considerations are 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.

This concern is broader than the possibility that an individual might knowingly compromise classified information in order to raise money. It encompasses concerns about an individual's self-control, judgment, and other qualities essential to protecting classified information. An individual who is financially irresponsible may also be irresponsible, unconcerned, or negligent in handling and safeguarding classified information.²

AG ¶ 19 notes three disqualifying conditions that could potentially raise security concerns in this case:

- (a) inability or unwillingness to satisfy debts;
- (c) a history of not meeting financial obligations; and

² See ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012).

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

Applicant has been unwilling to timely file Federal tax returns for years 2011, 2012, and 2013, or resolve a 2014 tax lien. Until the date of this hearing, Applicant was unwilling to pay a charged-off debt that had been delinquent since September 2013. The evidence is sufficient to raise the above disqualifying conditions.

After the Government produced substantial evidence of the disqualifying conditions, the burden shifted to Applicant to produce evidence and prove mitigation of the security concerns. AG ¶ 20 sets out four conditions that could potentially mitigate financial security concerns under this guideline:

(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; and

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

Applicant's history of failing to file Federal tax returns spans five years, from 2011 through 2015, and remains ongoing. As of this hearing, he has not filed those returns or resolved a 2014 tax lien. His failure to comply with legal obligations for those years casts doubt on his current judgment and reliability. AG ¶ 20(a) does not apply.

Applicant failed to establish mitigation under AG ¶ 20(b), as there is insufficient evidence to conclude that circumstances beyond his control prevented him from timely filing Federal tax returns for 2011, 2012, 2013, 2014, and 2015. His explanation that he was unable to find a competent tax specialist until a month before his continued hearing is not credible. His belief that being owed a refund is also not a reasonable excuse for failing to file tax returns. The evidence does not establish mitigation under AG ¶ 20(c), because there is no indication that his unfiled Federal tax returns or unpaid tax lien are under control.

Applicant has not made good-faith efforts to address his unfiled Federal tax returns or pay a delinquent Federal tax lien. AG ¶ 20(d) does not apply to those allegations. Despite having sufficient funds to do so, he did not pay a delinquent retail account until the day of this hearing, which does not demonstrate a good-faith attempt to resolve debts. AG ¶ 20(d) does not apply to that debt.

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). They include the following:

- (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) 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 include 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 facts and circumstances surrounding this case. Applicant is an intelligent, articulate, 39-year-old man, who honorably served in the military for four years. Since 2004, he has successfully worked for his employer. He is dedicated to his job and serving the military. These are positive factors in this case.

However, Applicant's history of failing to file Federal tax returns precludes him from obtaining a security clearance. He acknowledged that he has not filed returns for 2011, 2012, 2013, 2014, and 2015. He also has not resolved a 2014 Federal tax lien. At this time, he has not established a record of complying with tax laws or managing financial obligations. His actions to date are insufficient to outweigh a history of non-compliance with a fundamental legal obligation to file Federal income tax returns and pay taxes. The DOHA Appeal Board has held that:

Failure to file tax returns suggests that an applicant has a problem with complying with well-established government rules and systems. Voluntary compliance with these things is essential for protecting classified information. ISCR Case No. 14-04437 at 3 (App. Bd. Apr. 15, 2016). Someone who fails repeatedly to fulfill his or her legal obligations does not demonstrate the high degree of good judgment and reliability required of

those granted access to classified information. See, e.g., ISCR Case No. 14-01894 at 5 (App. Bd. Aug. 18, 2015). See *Cafeteria & Restaurant Workers Union Local 473 v. McElroy*, 284 F.2d 173, 183 (D.C. Cir. 1960), *aff'd*, 367 U.S. 886 (1961).³

The record evidence leaves me with questions as to Applicant's eligibility and suitability for a security clearance. Applicant failed to mitigate the security concerns arising under the financial considerations guideline.

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:	AGAINST APPLICANT
Subparagraphs 1.a through 1.c:	Against Applicant
Subparagraph 1.d:	Withdrawn
Subparagraphs 1.e and 1.f:	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 or continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

SHARI DAM
Administrative Judge

³ ISCR Case No. 12-10933 at 3 (App. Bd. June 29, 2016).