



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



In the matter of:)
)
) ISCR Case No. 15-02506
)
Applicant for Security Clearance)

Appearances

For Government: Daniel F. Crowley, Esq., Department Counsel
For Applicant: Jessica L. Craven, Esq.

04/19/2017

Decision

MURPHY, Braden M., Administrative Judge:

Applicant has resolved any security concerns arising under Guideline F, financial considerations due to unfiled local tax returns. Applicant's eligibility for access to classified information is granted.

Statement of the Case

On March 24, 2016, 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 effective within the DOD for SORs issued after September 1, 2006.

Applicant answered the SOR on April 25, 2016, and elected to have his case decided on the written record in lieu of a hearing. On June 20, 2016, Department Counsel submitted the Government's file of relevant material (FORM). The Government submitted

documents identified as Items 1 through 5. The FORM was mailed to Applicant, and he received it on June 28, 2016. Applicant was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation. Through counsel, Applicant filed an initial FORM response on July 21, 2016. It consists of four pages of exhibits, marked Applicant's Exhibit (AE) A. On July 29, 2016, Applicant's counsel submitted an additional FORM Response, consisting of a letter from Applicant and several attachments, some with subparts, numbered 1-15. This submission is marked AE B. On October 17, 2016, Applicant, acting *pro se*, submitted an additional letter and exhibit, which is marked AE C. Applicant's exhibits are admitted into evidence without objection. Items 1 and 2 are the pleadings in the case. Items 3 through 5 are admitted into evidence without objection. The case was assigned to me on March 13, 2017.

Findings of Fact

Applicant admitted the sole SOR allegation with an explanation and documents. I have incorporated his answer and relevant comments into the findings of fact. After a thorough and careful review of the pleadings and exhibits submitted, I make the following findings of fact.

Applicant is 60 years old. He worked a federal agency and its inspector general's office from 1991 until July 2012, when he retired. He was unemployed or self-employed until April 2013. Since then, he has worked as an investigator for a federal defense contractor. Applicant is married. He and his wife have three grown children.¹

Applicant has lived for many years in City 1, State 1. The inspector general's office, where he was based beginning in 2005, is in a city in a neighboring state, City 2, State 2. He was required to pay income taxes to City 2 while he was employed in an office there.²

Applicant completed a security clearance application (SCA) in March 2014. He disclosed that between 2005 and 2012, he had failed to file and pay his City 2 income taxes. He stated that when he moved to the inspector general's office, he failed to have his employer deduct City 2 taxes from his pay. He reported that between 2008 and 2011, he had paid the past-due city taxes for all prior tax years. His City 2 taxes for tax years 2011 and 2012 remained outstanding because he could not afford to pay them. Applicant acknowledged in his SCA and in two background interviews that the matter remained unresolved.³ Applicant's failure to file these returns is alleged as SOR ¶ 1.a.

¹ Item 3.

² Answer.

³ Items 3, 4, 5.

In his Answer, Applicant explains that 2011 was a year of particular strain and turmoil for his marriage and for his daughter. Applicant, his wife and daughter entered marital and family counseling, and their inter-family relationships have since improved.⁴

When he retired in July 2012, Applicant received a lump-sum payment for his outstanding annual leave. He used that money for household and other expenses to provide for his family until his retirement pay began. Applicant was also expecting to receive a “catch-up” check of about \$7,500 once his retirement pay was calculated. He intended to pay his City 2 taxes when he received the “catch-up” check. He could not afford to pay them with other funds at the time.⁵

Applicant took no further action on his outstanding City 2 taxes until November 2015, after he confessed to friends that they remained unresolved. When his friends challenged him to act, Applicant contacted tax relief specialists. On May 31, 2016, he paid City 2 past due taxes of \$4,393 for 2011 and 2012.⁶

Applicant believed for several years that he had never received the “catch-up” check. He inquired about the matter with the U.S. Office of Personnel Management (OPM), and also sought congressional assistance, both without apparent success.⁷ In October 2016, an OPM representative reviewed his records and confirmed that, in fact, Applicant did receive his “catch up” check in November 2012, for about \$4,800. Applicant confirmed with his bank that the money was deposited at that time, though he did not notice it. Applicant clarified the record in this case by submitting the relevant documentation with his October 2016 FORM Response and expressed remorse for his errors.⁸

The Government’s evidence does not include any documents from City 2 concerning the filing responsibilities of an individual taxpayer within City 2’s jurisdiction. Applicant’s 2011 and 2012 City 2 tax returns themselves are also not in the record. Applicant’s initial FORM Response includes a July 19, 2016 e-mail from a City 2 government employee. It states in part, that:

[Applicant] paid [City 2] in full his back taxes owed for the 2011 and 2012 tax years. The City is in the process of scanning tax filings for the past year, which includes the tax forms for [Applicant]. It may be some time before

⁴ Answer

⁵ Answer, AE A.

⁶ AE A.

⁷ Items 3, 4, 5, Answer, AE A, AE B.

⁸ AE C.

[Applicant's] tax forms are scanned. When [Applicant's] forms are scanned the city will be able to provide copies of the forms.⁹

Even this e-mail does not specifically indicate that Applicant *had an affirmative duty* to file tax returns with City 2 for 2011 or 2012, even if he owed taxes for those years. The only evidence that Applicant had such a duty to file comes from Applicant himself, in his SCA, his two interviews and in his Answer.

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider 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, these guidelines are applied 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. 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, an "applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining 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 that an applicant may deliberately or inadvertently fail to safeguard classified information.

⁹ AE A.

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 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.

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.¹⁰

AG ¶ 19 provides conditions that could raise security concerns. The following is potentially applicable:

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

Applicant has consistently explained that when he joined the inspector general’s office in 2005, he failed to have his employer deduct City 2 taxes from his pay. It is not actually clear from the record whether this was actually Applicant’s responsibility, or his employer’s. When he learned several years later that he owed city taxes, he took appropriate steps to pay them. He disclosed the issue on his March 2014 SCA, and acknowledged that two tax years remained unresolved.

The Government alleges that Applicant failed to file City 2 tax returns for 2011 and 2012, and that the returns remain unfiled as of the date of the SOR. The text of the SOR

¹⁰ See ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012).

allegation, however, does not actually include the phrase “as required” (unlike the text of AG ¶ 19(g), which does). Applicant admits the allegation and acknowledges that he should have had City 2 taxes deducted from his pay beginning in 2005, when he began to work in a new office – an office located in City 2 (in a state where Applicant did not live). However, the Government presents no documentary evidence from City 2 tax authorities that Applicant was responsible for filing such a return. Notwithstanding Applicant’s admission, there is insufficient evidence to support the sole allegation in this case – that Applicant had an affirmative duty to file tax returns with City 2 each year he worked there, and that any such failure to do so constitutes a security concern.

I therefore cannot find that AG ¶ 19(g) applies to SOR ¶ 1.a. The resulting past due tax debt, of about \$4,393, was not alleged, and in any event has now been paid.

Since disqualifying conditions have not been met, it is unnecessary to address potential mitigating conditions. However, I note that Applicant disclosed the matter in some detail on his SCA, and, after seeking appropriate tax and legal advice, he has now paid the past-due taxes owed for all prior years. He no longer works in City 2. I conclude that Applicant’s circumstances are unusual and unlikely to recur, and do not cast doubt on his current reliability, trustworthiness, or good judgment. Applicant pursued appropriate counseling and acted on the advice he was given to cure the issue. There are clear indications that the matter has been resolved. If disqualifying conditions had been shown, AG ¶¶ 20(a) and (c) would apply in mitigation.

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 the 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. I have incorporated my comments under

Guideline F in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

Applicant is a 60-year-old retired federal employee. He failed to have his then-employer deduct city taxes from his pay after he changed jobs and began working out of an office in a new location in a neighboring state. He has cured the issue and paid the past-due taxes owed. Given the nature of the tax issues in this case, Applicant is unlikely to find himself in this position again, and the risk of recurrence is low. There is no known issue with either his state or federal tax filings. His local tax issues are resolved and are not a security concern. The record evidence leaves me with no questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has resolved any 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: FOR APPLICANT

Subparagraph 1.a: 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's eligibility for a security clearance. Eligibility for access to classified information is granted.

Braden M. Murphy
Administrative Judge