



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No.15-02979

Appearances

For Government: Alison O'Connell, Esq., Department Counsel
For Applicant: *Pro se*

04/12/2017

Decision

LYNCH, Noreen, A., Administrative Judge:

The Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant alleging security concerns arising under Guideline F (Financial Considerations). The SOR was dated November 17, 2015. The action was taken under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the Adjudicative Guidelines (AG) implemented in September 2006.

Applicant timely answered the SOR and requested a decision based on the written record in lieu of a hearing. Department Counsel submitted a File of Relevant Material (FORM), dated March 10, 2016.¹ Applicant received the FORM on March 16, 2016. Applicant responded to the FORM. The case was assigned to me on February

¹The Government submitted six items for the record.

15, 2017. Based on a review of the case file, eligibility for access to classified information is denied.

Findings of Fact

In his answer to the SOR, Applicant admitted both SOR allegations, and provided explanations for the allegations under Guideline F (Financial Considerations).

Applicant is a 65-year-old civil engineer for a defense contractor. He served on active duty in the military (U.S. Air Force) from 1974 to 2002, when he retired, receiving an honorable discharge. He is married and has a daughter. He obtained an undergraduate degree in civil engineering in 1972, and obtained his master's degree in 1977. Applicant has worked for his current employer since 2013. He completed a security clearance application in September 2014. He has held a security clearance since the beginning of his military service.² (Item 5)

Financial Considerations

The SOR alleges that Applicant failed to timely file and pay his federal income tax returns for at least tax years 2009 through 2013 and that he failed to timely file and pay his state income tax returns for at least tax years 2008 through 2013. (Item 1)

In his answer to the SOR, Applicant stated that the tax returns for the federal and the state had been resolved. (Item 4) In his interview with a government investigator in 2014, Applicant stated that he had no reason for not filing other than he just did not get around to it. (Item 5) He noted that sometimes he asked for extensions, but he also missed the deadline for the extensions occasionally.

At the time of Applicant's security clearance application in 2014, he had not yet filed the income tax returns, but he assured authorities that he would have the issue resolved by September 2014. (Item 5) This did not occur. When Applicant responded to the allegations initially, he stated that he filed his federal tax obligations for tax years 2009 through 2013 and all of his state tax obligations for tax years 2008 through 2013. (Item 4) However, he submitted no copies of his tax returns for the relevant years, or tax account transcripts or any other documentation from the IRS or the state showing that the returns have been filed and whether he owed any money. In his answer to SOR, he admitted that he did not file his 2014 federal and state tax returns. (Item 4)

Applicant noted that he filed an extension for tax year 2014 because he had an estimated refund due from the federal government. He did not note any other extensions that had been filed. He apologized for his actions and stated that he understood the seriousness of the offenses. He believed that since he has been a respected and faithful servant to the DOD for over 41 years and the fact that he served in the Air Force as an officer for almost 28 years, the whole-person concept would merit

²Applicant referred to his tours of duty abroad and deployments to many countries. He noted that he had many clearances and was awarded an Airman's Medal in 1990. He was injured in one of the rescue missions.

a favorable resolution of his case. (Answer to SOR) He emphasized that he could not file his state tax returns without filing his federal returns first. He noted that he worked with the IRS but gave no details. He stated that most of the years he was due a refund and he has paid the interest and penalties as appropriate.

On his 2014 security clearance application, Applicant noted many trips that he has taken over the years to countries abroad for volunteer activities or for tourism. He traveled in 2009, 2011, and 2014. He noted in his answer that he did not complete his 2014 tax returns timely because he was visiting his daughter and family in another state, but would file the returns when he returned in 2016. (Item 4 at 2)

In response to the FORM, Applicant submitted the state and federal tax returns for the years in question and he submitted a copy of his credit report showing a score of 842 out of 850. He notes this shows he is financially sound. (Attachment 19, Response to FORM)

Applicant certified and presented documentation that he has now filed all federal and state income tax returns and paid all necessary taxes with penalties. He has also filed his returns for 2014 and 2015. He points to no fraudulent filing. He noted that in 2013, he increased his monthly withholding for federal tax from his Air Force retirement pay so that taxes would be paid on time.

As to SOR allegation 1.a, Applicant filed his 2008 federal tax return in January 2011. He had an extension but missed the deadline. For tax year 2009, the return was filed in 2012, and Applicant paid the additional tax and interest. He again missed the extension deadline. For tax year 2010, he filed in 2014, again missing the extension deadline and paying interest and penalty. For tax year 2011, Applicant filed in 2013; for tax year 2012, he filed in 2014; for tax year 2013, he filed in 2015 and paid his tax as there was no penalty or interest; for tax year 2014, he filed in 2016; for tax year 2015, he filed in 2016. (Attachments 1-8)

As to SOR allegation 1.b, Applicant filed his 2008 state tax return in 2011, paying additional taxes and missing his extension deadline; he filed his 2009 state tax return in 2012, and paid the additional tax and penalty. Applicant filed his 2010 state tax income return in 2014; he filed his 2011 state tax return in 2014, and paid all that was required; tax year 2012 return was filed in 2014 and he received a refund. Applicant filed his state income tax return for tax year 2013 in 2015 and received a refund. For tax year 2014 and 2015, Applicant filed in 2016 and received a refund. (Attachments 9-16)

Applicant provided six letters from colleagues who speak highly of him. Each letter attests to his leadership skills and excellent judgment. Some of the people have known him professionally since 2002. A colleague wrote that Applicant has handled protected information over the years without incident. Applicant is described as loyal, reliable, and trustworthy. He was noted for his attention to detail and able to follow procedural guidelines. Applicant noted that he told each person who recommended him for a security clearance that he had failed to file his federal and state income tax returns for the noted years and was embarrassed. (Attachments 20-26)

Applicant relies on the whole-person concept for mitigation in his case. He also point to his excellent credit scores. He submits that the letters of reference attest to his character and trustworthiness. (Response to FORM)

Applicant clearly stated that he has no legitimate reason such as unemployment, illness, or bankruptcy or any plausible reason for not filing his federal and state tax returns in a timely manner. He noted that he has a much better appreciation of the impact of filing late and will never jeopardize his clearance in the future. He noted that he has been forthright and has no one to blame but himself. However, he emphasized that his career and past behavior handling classified information would ensure that he would never again file in an untimely fashion. He finally notes that some of the tax returns were filed before the issuance of the SOR.

Policies

When evaluating an applicant's suitability for a security clearance, an 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. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, they are applied in conjunction with the factors listed in the adjudicative process. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. Under AG ¶ 2(c), this process is a conscientious scrutiny of a number of variables known as the "whole-person concept." An 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.

The Government must present evidence to establish controverted facts alleged in the SOR. 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. . . ."³ The burden of proof is something less than a preponderance of evidence.⁴ The ultimate burden of persuasion is on the applicant.⁵

³ See also ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug. 10, 1995).

⁴ *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

⁵ ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

A person seeking access to classified information enters into a fiduciary relationship with the Government based on 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 classified information. Such decisions entail a certain degree of legally permissible extrapolation of 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.”⁶ “The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”⁷ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such information.⁸ The decision to deny an individual a security clearance does not necessarily reflect badly on an applicant’s character. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense established for issuing a clearance.

Analysis

Guideline F, Financial Considerations

AG ¶ 18 expresses the security concern pertaining to financial considerations:

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 over-extended is at risk of having to engage in illegal acts to generate funds. Compulsive gambling is a concern as it may lead to financial crimes including espionage. Affluence that cannot be explained by known sources of income is also a security concern. It may indicate proceeds from financially profitable criminal acts.

AG ¶ 19 describes conditions that could raise a security concern and may be disqualifying:

(a) inability or unwillingness to satisfy debts;

⁶ See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information), and EO 10865 § 7.

⁷ ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

⁸ *Id.*

(b) indebtedness caused by frivolous or irresponsible spending and the absence of any evidence of willingness or intent to pay the debt or establish a realistic plan to pay the debt;

(c) a history of not meeting financial obligations;

(d) deceptive or illegal financial practices such as embezzlement, employee theft, check fraud, income tax evasion, expense account fraud, filing deceptive loan statements, and other intentional financial breaches of trust;

(e) consistent spending beyond one's means, which may be indicated by excessive indebtedness, significant negative cash flow, high debt-to-income ratio, and/or other financial analysis;

(f) financial problems that are linked to drug abuse, alcoholism, gambling problems, or other issues of security concern;

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

(h) unexplained affluence, as shown by a lifestyle or standard of living, increase in net worth, or money transfers that cannot be explained by subject's known legal sources of income; and

(i) compulsive or addictive gambling as indicated by an unsuccessful attempt to stop gambling, "chasing losses" (i.e. increasing the bets or returning another day in an effort to get even), concealment of gambling losses, borrowing money to fund gambling or pay gambling debts, family conflict or other problems caused by gambling.

The Government produced credible evidence to establish that Applicant did not pay or timely file his federal and State tax returns from at least 2008 to 2013. Applicant does not deny the allegations. Consequently, the evidence is sufficient to raise disqualifying conditions ¶¶ 19(a), 19(c), and 19(g)

AG ¶ 20 provides conditions that could mitigate the security concerns:

(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;

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

(e) the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue; and

(f) the affluence resulted from a legal source of income.

Applicant had no plausible reason for not timely filing his federal and state tax returns for many years. He is now up to date and does not owe any money to the federal government or state for taxes. However, he filed for extensions and then consistently missed the deadline. He took trips and put off filing his tax returns because he stated that he could address that when he returned home. He has been steadily employed and has ignored his responsibility as a citizen. He admits that he is embarrassed and that it will never occur again. He believes that his career and excellent credit mitigate the issues. I do not agree. None of the mitigating conditions apply in this 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 an 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. As noted above, the ultimate burden of persuasion is on the applicant seeking a security clearance.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, as well as the whole-person factors. I have noted Applicant's excellent credit status and his service in the military. He has

excellent references and no incidents that have occurred with handling classified information.

Applicant is 65 years old. He served in the U.S. Air Force and retired with an honorable discharge. He has worked as a contractor for many years. He is sorry that this situation occurred, but he believes that under the whole-person concept, he has mitigated the issues.

Applicant is an educated man and knows what is required regarding his tax obligations. He intentionally did not file his federal and state tax returns or pay taxes for many years. He has finally filed the returns and owes no money. He has filed for 2014 and 2015. I have doubts about his judgment. Any doubts must be resolved in favor the Government.

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.b: 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 a security clearance. Clearance is denied.

NOREEN A. LYNCH
Administrative Judge