



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



In the matter of:)
)
) ISCR Case No. 15-04474
)
)
Applicant for Security Clearance)

Appearances

For Government: Jeff Nagel, Esquire, Department Counsel
For Applicant: *Pro se*

March 7, 2017

Decision

MOGUL, Martin H., Administrative Judge:

On March 18, 2016, the Department of Defense (DoD) issued a Statement of Reasons (SOR) detailing the security concerns under Guideline F for Applicant. The action was taken under Executive Order 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG), effective within the Department of Defense for SORs issued after September 1, 2006.

On April 13, 2016, Applicant replied to the SOR (RSOR) in writing, and he requested a hearing before an Administrative Judge (AJ). The case was assigned to this AJ on June 13, 2016. DOHA issued a notice of hearing on June 13, 2016, and the hearing was held as scheduled on July 19, 2016.

At the hearing, the Government offered Exhibits 1 through 5, which were admitted into evidence without objection. Applicant testified on his own behalf and submitted Exhibits A through G, which were also admitted without objection. DOHA received the transcript of the hearing (Tr) on July 27, 2016. Based upon a review of the

pleadings, exhibits, and the testimony of Applicant, eligibility for access to classified information is denied.

Findings of Fact

After a complete and thorough review of the evidence in the record as described above, and upon due consideration of that evidence, I make the following findings of fact:

Applicant is 58 years old. He is married, and he and his wife have two adopted daughters. Applicant received a Bachelor's degree in Mechanical Engineering in 1980, and a Masters degree in Mechanical Engineering in 1988. He served in the United States Navy for 15 and a half years until October 31, 1995, and he received an Honorable Discharge. He is employed by a defense contractor as an Operations Engineer, and he is seeking a DoD security clearance in connection with his employment in the defense sector.

Guideline F, Financial Considerations

The SOR lists three allegations (1.a. through 1.c.) regarding financial difficulties, specifically failure to file Federal and state income tax returns, and a delinquent debt, under Adjudicative Guideline F. The SOR debts will be discussed below in the same order as they were listed on the SOR:

1.a. The SOR alleges that Applicant failed to file his Federal tax returns for tax years 2009 through 2013, when required; and as of the date of the SOR, he had filed Federal tax returns for tax years 2009, 2010, and 2011, but he had not filed Federal tax returns for tax years 2012 and 2013. Applicant admitted this allegation on his RSOR, and he wrote that he had submitted his Federal tax return for 2012 to his tax accountant and his 2013 Federal tax return is almost ready to be submitted to his tax accountant.

Applicant submitted Exhibit A, which shows when he filed all of his past Federal and State A and B tax returns:

2008 tax returns were filed: Federal, State A and State B on December 21, 2011;
2009 tax returns were filed: Federal and State A on January 25, 2013; State B on April 16, 2013;
2010 tax returns were filed: Federal on January 25, 2013; State A and State B on April 16, 2013;
2011 tax returns were filed: Federal and State B on February 19, 2013; State A on April 16, 2013;
2012 tax returns were filed: Federal, State A and State B on April 25, 2016;
2013 tax returns were filed: Federal, State A and State B on July 12, 2016;

Exhibit A does not show that tax returns were filed for tax years 2014 or 2015. Applicant testified that he has not yet filed his Federal tax returns for tax years 2104 or

2015, but he expects to file his 2014 Federal tax return by August 15, 2016. He expects to file his 2015 Federal tax return by October 15, 2016. (Tr at 27.)

Applicant testified that he became late in filing his tax returns because he was “just getting behind with my wife’s business records and stuff like that, and then starting in 2008 when we adopted the children it was taking up a lot of my time trying to help them with school and so on like that. At that time I was semi-retired. I worked for my wife, managed her office. I did some engineering work on the side.” He also indicated that he fell behind supplying the information to a tax preparer regarding his wife’s business, and as he fell further behind it just got more difficult to catch up. (Tr at 29-31.)

1.b. The SOR alleges that Applicant failed to file his State A tax returns for tax years 2009 through 2013, when required; and as of the date of the SOR, he had filed state tax returns for tax year 2010, but he had not filed state tax returns for tax years 2009, and 2011 through 2013. Applicant denied this allegation on his RSOR, and he wrote that he had filed his state A tax returns for tax years 2009, 2010, and 2011. He wrote that he had not filed State A tax returns for tax years 2012 and 2013.

Applicant testified that he was required to file state tax returns for two states since he was living and earning income in State A, and he received additional income as part of a family trust from State B. (Tr at 34-35.) As reviewed above, Applicant did file his State A and State B tax returns for tax years 2009 through 2013, but they were all filed long after they were due. Applicant testified at the hearing that he had not yet filed his State A or State B tax returns for tax years 2014 or 2015. (Tr at 41.)

1.c. The SOR alleges that Applicant owes State A \$997 for delinquent state taxes, a penalty and interest for state tax year 2010. Applicant denied this allegation on his RSOR, and he wrote that he had paid \$997 on April 16, 2013, and he paid an additional amount of \$263.56 for penalty and interest on July 4, 2013. Applicant testified that he has paid this debt, and Attachment 6 of Applicant’s RSOR establishes that this debt has been paid. (Tr at 37-40.) I find that Applicant has resolved this debt.

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 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 describing the adjudicative process. The administrative judge’s over-arching 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, the 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. . . .” The applicant has the ultimate burden of persuasion as to obtaining a favorable clearance decision.

A person who applies for access to classified information seeks to enter 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 adverse 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.

The guideline notes several conditions that could raise security concerns and could potentially apply in this case. Under AG ¶ 19(a), “an inability or unwillingness to satisfy debts,” is potentially disqualifying. Similarly under AG ¶ 19(c), “a history of not meeting financial obligations,” may raise security concerns. Because Applicant did pay the one delinquent debt listed on the SOR, I do not find that these disqualifying conditions apply to Applicant in this case. However, AG ¶ 19(g), “failure to file Federal, state or local income tax returns as required,” is applicable and controlling in this case as Applicant failed to file timely Federal, State A, and State B tax returns for several years, from 2009 through 2013. While those tax returns have now been filed, at the time of the hearing, Applicant had not filed his Federal, State A or State B tax returns as required for tax years 2015 and 2016.

AG ¶ 20 provides conditions that could mitigate security concerns from financial difficulties. Because Applicant failed to file his Federal and state tax returns when they were due for 5 tax years, and because he has still not filed his Federal and state tax returns for tax years 2014 and 2015, I do not find that any mitigating condition is applicable in this case. As has been addressed by the Appeal Board, late tax filing is not automatically mitigating. I considered Applicant’s failure to act responsibly for several years. Even though he has now filed many of the tax returns, it was long after they were due, and the returns for two years have still not been filed. Therefore, I find Guideline F against Applicant.

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 access to a classified position 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. Based on all of the reasons cited above as to why the disqualifying condition is applicable and controlling, I find that the record evidence leaves me with significant questions and doubts as to Applicant’s eligibility and suitability for a security clearance under the whole-person concept. For all these

reasons, I conclude Applicant has not mitigated the security concerns under the whole-person concept.

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
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Subparagraphs 1.a. - 1.b.:	Against Applicant
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Subparagraph 1.c.:	For Applicant
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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.

Martin H. Mogul
Administrative Judge