



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 15-08778

Appearances

For Government: Andrew Henderson, Esq., Department Counsel

For Applicant: *Pro se*

05/05/2017

Decision

WESLEY, Roger C., Administrative Judge:

Based upon a review of the pleadings, exhibits, and testimony, I conclude that Applicant did not mitigate the security concerns regarding his financial considerations. Eligibility for access to classified information is denied.

Statement of Case

On June 14, 2016, Department of Defense (DoD) Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) detailing reasons why DoD adjudicators could not make the affirmative determination of eligibility for a security clearance, and recommended referral to an administrative judge to determine whether a security clearance should be granted, continued, denied, or revoked. The action was taken 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 (AGs) implemented by DoD on September 1, 2006.

Applicant responded to the SOR on August 22, 2016, and requested a hearing. The case was assigned to another judge in October 2016 and scheduled for hearing on January 17, 2017. Following a granted continuance, the case was reassigned to me on January 10, 2017, and rescheduled for hearing on March 9, 2017. At the hearing, the Government's case consisted of eight exhibits (GEs 1-8). Applicant relied on one witness (himself) and one exhibit (AE A). The transcript (Tr.) was received on March 20, 2017.

Procedural Issues

Before the close of the hearing, Applicant requested the record be kept open to permit him the opportunity to supplement the record with documentation of his 2011 federal tax payments. For good cause shown, Appellant was granted 21 days to supplement the record, Department Counsel was afforded two days to respond. Within the time permitted, Applicant made a request for an additional 14-day-extension, which was granted. Within the time permitted, Applicant provided a transcript from the Internal Revenue Service (IRS) covering his 2011 tax liability, filing status, and credited payments. Applicant's submission was admitted without objection as AE B.

Summary of Pleadings

Under Guideline F, Applicant allegedly (a) failed to timely file his federal and state income tax returns for tax years 2010, 2011, and 2014 and (b) incurred delinquent federal tax obligations of \$21,101 for tax year 2011. Allegedly, Applicant's delinquent federal taxes for tax year 2011 remain outstanding.

In his response to the SOR, Applicant admitted each of the allegations with explanations. He claimed he has since paid his federal and state taxes for tax years 2010 and 2011, and is working on his 2014 federal and state taxes. And he claimed his finances are currently solid with no outstanding debts and almost \$1.6 million invested in savings plans (inclusive of his 401(k) plan).

Findings of Fact

Applicant is a 63-year-old quality engineer for a defense contractor who seeks a security clearance. The allegations covered in the SOR and admitted by Applicant are incorporated and adopted as relevant and material findings. Additional findings follow.

Background

Applicant married in January 1973 and separated in June 1980 without completing formal divorce proceedings. (GEs 1-2) He remarried unofficially in January 1982 and separated from his domestic partner in September 1997. Applicant's reconciliation efforts with his partner over the ensuing 19 years were never fully successful. Nonetheless, he continued to bear financial responsibility for their children. (GEs 1-2; Tr. 37)

Applicant's domestic partner passed away in January 2017. (Tr. 37-38) He has two children from his only official marriage and two children from his domestic partnership. (GEs 1-2; Tr. 38)

Applicant earned a vocational degree from a technical institute in July 1979. (GEs 1-2) He enlisted in the Air Force in January 1973, served four years of active duty, and received an honorable discharge in January 1977. (GE 2) He has worked for his current employer since September 1977 as a quality engineer. (GE 1-2)

Applicant's finances

Applicant failed to timely file federal and state income tax returns for tax years 2010, 2011, and 2014.¹ He attributed his timely filing failures to tax problems associated with his separation from his second wife (domestic partner) in 1997, procrastination and neglect that "snowballed on him," and his commitments to helping his children establish three companies. (AE A; Tr. 41-42, 49-50) IRS records reveal that the IRS filed substitute returns for Applicant for tax years 2010, 2011, and 2014. (GE 5 and AE B)

Applicant provided no records of his voluntarily filing any of his federal and state tax returns for tax years 2010, 2011, and 2014 and expressed uncertainty over whether he or the IRS filed the returns for these tax years. (GEs 2-5; Tr. 42, 50-51) For tax years 2012 and 2013, he filed timely federal and state returns and received a \$221 refund in 2012. (GE 5)

Applicant documented his satisfaction of his \$21,101 federal tax liability for tax year 2011 through a combination of bank account levies and voluntary payments. (AE B) And he is credited with satisfying his \$225 tax liability for tax year 2013. (GE 5)

IRS tax records confirmed that the IRS levied Applicant's bank account on reported multiple occasions: in 2009 for \$5,545; in 2013 for \$5,410; and in February 2016 for \$2,411. (GEs 3-4 and AE B; Tr. 43-45) Since Applicant provided no evidence of his timely filing of his 2010 federal tax return, it is not known whether he owes any back taxes for tax year 2010, or is entitled a refund.

Besides failing to file his federal tax returns for tax years 2010, 2011, and 2014, Applicant failed to timely file his state tax returns for the same 2010, 2011, and 2014 years in issue. He provided no confirmations of his filing his state tax returns for these years. (GE 2)

¹ Applicant admitted to his failing to timely file his federal tax return for a previous tax year (2013) as well. (AE B; Tr. 39-48) This late 2013 tax return is not covered in the SOR, but may be considered and weighed for purposes of mitigation assessment; credibility; the extent of the applicant's rehabilitation; applicability of a particular provision of the Directive; or for a whole-person analysis. See ISCR Case No. 11-13664 at 5 (App. Bd. Aug. 15, 2013)

Applicant has ample resources in his retirement plans. He has \$1,422,340 in his employer's savings plans (inclusive of his 401(k) retirement plan). The balance of his credit accounts are in current status. (Applicant's response and GE 2)

Endorsements and awards

Applicant is well regarded by his employer and received an employee of the month award in December 2013. (AE A) Throughout 2016 and 2017, he received company awards recognizing his help and dedication to his employer's missions. (AE A) His awards credit his dependability and strong work ethic. (AE A)

Policies

The AGs list guidelines to be used by administrative judges in the decision-making process covering security clearance cases. These guidelines take into account factors that could create a potential conflict of interest for the individual applicant, as well as considerations that could affect the individual's reliability, trustworthiness, and ability to protect classified information. These guidelines include "[c]onditions that could raise a security concern and may be disqualifying" (disqualifying conditions), if any, and many of the "[c]onditions that could mitigate security concerns."

These guidelines must be considered before deciding whether or not a security clearance should be granted, continued, or denied. The guidelines do not require administrative judges to place exclusive reliance on the enumerated disqualifying and mitigating conditions in the guidelines in arriving at a decision. Each of the guidelines is to be evaluated in the context of the whole person in accordance with AG ¶ 2(c).

In addition to the relevant AGs, administrative judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in AG ¶ 2(a) of the AGs, which are intended to assist the judges in reaching a fair and impartial commonsense decision based upon a careful consideration of the pertinent guidelines within the context of the whole person.

The adjudicative process is designed to examine a sufficient period of an applicant's life to enable predictive judgments to be made about whether the applicant is an acceptable security risk. The following AG ¶ 2(a) factors are pertinent: (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.

Viewing the issues raised and evidence as a whole, the following individual guidelines are pertinent in this case:

Financial Considerations

The Concern: 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. 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 ¶ 18.

Burden of Proof

By virtue of the principles and policies framed by the AGs, a decision to grant or continue an applicant's security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires administrative judges to make a commonsense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a security clearance depends, in large part, on the relevance and materiality of that evidence. See *United States, v. Gaudin*, 515 U.S. 506, 509-511 (1995).

As with all adversarial proceedings, the judge may draw only those inferences which have a reasonable and logical basis from the evidence of record. Conversely, the judge cannot draw factual inferences that are grounded on speculation or conjecture.

The Government's initial burden is twofold: (1) it must prove by substantial evidence any controverted facts alleged in the SOR, and (2) it must demonstrate that the facts proven have a material bearing to the applicant's eligibility to obtain or maintain a security clearance. The required materiality showing, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a security clearance. Rather, the judge must consider and weigh the cognizable risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the evidentiary burden shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation, or mitigation. Based on the requirement of Exec. Or. 10865 that all security clearances be clearly consistent with the national interest, the applicant has the ultimate burden of demonstrating his or her clearance eligibility. "[S]ecurity-clearance determinations should err, if they must, on the side of denials." See *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

Analysis

Security concerns are raised over Applicant's history of failing to timely file federal and state tax returns for tax years 2010, 2011, 2013, and 2014, and his incurring delinquent federal taxes in the amount of \$21,101 for tax year 2011. While Applicant's overdue 2011 federal tax return has since been filed involuntarily by the IRS on behalf of Applicant, tax returns for 2010 and 2014 have not been filed to date (either voluntarily or involuntarily), based on the compiled evidence to date. While Applicant has satisfied all of his 2011 federal tax delinquency (mostly through involuntary levies), it remains unclear whether he owes any additional federal taxes for tax years 2010 and 2014. And without any evidence of his filing his state returns for tax years 2010, 2011, and 2014, it cannot be determined whether he owes any state taxes for those years as well. Applicant's tax-filing lapses and incurred delinquent federal tax debts warrant the application of three of the disqualifying conditions (DC) of the AGs: DC ¶ 19(a), "inability or unwillingness to satisfy debts," DC ¶ 19(c), "a history of not meeting financial obligations," and DC ¶ 19(g), "failure to file Federal, state, or local income tax returns as required or the fraudulent filing of the same."

Holding a security clearance involves the exercise of important fiducial responsibilities, among which is the expectancy of consistent trust and candor. Financial stability in a person cleared to access classified information is required precisely to inspire trust and confidence in the holder of the clearance. While the principal concern of a clearance holder's demonstrated financial difficulties is vulnerability to coercion and influence, judgment and trust concerns are also explicit in financial cases.

Applicant's tax filing failures (both federal and state) and accumulation of delinquent federal tax debts, merit no application of MC ¶ 20(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." Applicant provided no probative evidence of financial hardships that would justify (a) his failing to timely file his federal and state tax returns for the three years in issue, or (b) his failing to address his imputed federal tax liabilities voluntarily with the substantial resources available to him.

To date, Applicant has not voluntarily filed any of his federal tax returns for tax years 2010, 2011, and 2014 that can be verified, or provided any documentary proof of his filing his state tax returns for the same years in issue. Because he has not developed any verifiable evidence of his addressing his other back federal tax returns for 2010 and 2014 or his state returns for the same years, application of MC ¶ 20(d), "the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts," is very limited. Prospects for his obtaining the necessary filing and payment documentation in the foreseeable future are uncertain and difficult to gauge.

The timing of filing of federal and state tax returns in DOHA proceedings is critical to an assessment of an applicant's trustworthiness, reliability, and good judgment in following rules and guidelines necessary for those seeking access to classified information. See ISCR Case No. 14-06808 at 3 (App. Bd. Nov. 23, 2016); ISCR Case No. 14-01894 at 5 (App. Bd. Aug. 18, 2015) Further, Applicant's insufficient tax repayment actions of his own with the resources available to him prevent him from meeting the Appeal Board's requirements for demonstrating financial stability. ISCR Case No. 07-06482 (App. Bd. May 21 2008); see ISCR Case No. 05-11366 at 4 n.9 (App. Bd. Jan. 12, 2007)(citing ISCR Case No. 99-0462 at 4 (App. Bd. May 25, 2000)); ISCR Case No. 99-0012 at 4 (App. Bd. Dec. 1, 1999).

From a whole-person standpoint, Applicant's limited attention devoted to addressing his federal and state tax returns to date, reflect poorly on his judgment and willingness to follow IRS rules and regulations. While his Air Force military service, endorsements, and awards earned with his employer are commendable and worthy of appreciation, they are not enough to overcome security concerns associated with his history of failing to timely file his federal and state tax returns for the years in issue (i.e., 2010, 2011, and 2014) and incurring major federal tax delinquencies.

Considering all of the circumstances surrounding Applicant's tax filing and payment delinquencies, his actions to date in addressing his finances are insufficient to meet mitigation requirements imposed by the guideline governing his finances. Unfavorable conclusions are warranted with respect to the allegations covered by subparagraphs 1.a through 1.c of Guideline F.

Formal Findings

In reviewing the allegations of the SOR and ensuing conclusions reached in the context of the findings of fact, conclusions, conditions, and the factors listed above, I make the following formal findings:

GUIDELINE F (FINANCIAL CONSIDERATIONS): AGAINST APPLICANT

Subparas. 1.a-1.c:

Against Applicant

Conclusions

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue Applicant's security clearance. Clearance is denied.

Roger C. Wesley
Administrative Judge

