



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No: 15-02777

Appearances

For Government: Philip J. Katauskas, Esquire, Department Counsel

For Applicant: *Pro se*

10/31/2017

Decision

DAM, Shari, Administrative Judge:

Applicant failed to timely file Federal and state income tax returns for 2008, 2009, 2010, and 2011. He failed to timely pay required taxes for those years. He also incurred three delinquent debts during that time. Resulting security concerns were not mitigated. Based upon a review of the pleadings and exhibits, national security eligibility for access to classified information is denied.

Statement of Case

On December 18, 2012, Applicant submitted a security clearance application. (Item 5.) On April 21, 2016, the Department of Defense (DOD) issued to Applicant a Statement of Reasons (SOR), detailing security concerns under Guideline F, Financial Considerations. (Item 1.) 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 for*

Determining Eligibility for Access to Classified Information (AG), effective within the DOD after September 1, 2006.¹

Applicant answered the SOR on May 23, 2016, and requested that his case be decided by an administrative judge on the written record without a hearing. (Item 4.) On August 18, 2016, Department Counsel submitted the Government's written case. A complete copy of the File of Relevant Material (FORM), containing ten Items, was mailed to Applicant. He received the FORM on September 16, 2016. The FORM notified Applicant that he had an opportunity to file objections and submit material in refutation, extenuation, or mitigation within 30 days of his receipt of the FORM. Applicant submitted additional information in response to the FORM that I marked as Applicant Exhibit (AE) A. He did not file any objections to the FORM's contents. Department Counsel did not object to AE A. Items 1 through 10 and AE A are admitted into evidence. The Defense Office of Hearings and Appeals (DOHA) assigned this case to me on July 6, 2017.

Findings of Fact

In his answer to the SOR, Applicant denied responsibility for all allegations in SOR ¶¶ 1.a through 1.e, and offered explanations. (Item 4.)

Applicant is 57 years old and married for 33 years. He and his wife have three adult children. He served on active duty in the Air Force from 1979 to 1999, and retired with an honorable discharge. He held a security clearance while serving. He has subsequently worked for defense contractors, and continued to hold a security clearance. (Item 5; AE A.)

Applicant reported on his December 2012 security clearance application that he failed to file 2008, 2009, 2010, and 2011 Federal and state income tax returns and pay all taxes as required. He stated that his wife, who handled their taxes over the years, failed to file them for those four years and lied to him about filing them. He estimated owing between \$4,000 to \$6,000 for unpaid taxes. He said he learned of the problem when the Internal Revenue Service (IRS) placed a lien on his savings account in 2012. (Item 5.) During a background interview in January 2013 with a government investigator, Applicant discussed his tax issues. He said he was working with a tax lawyer to resolve the issues. (Item 6.)

The SOR alleged debts that became delinquent between 2009 and 2012, an unpaid state tax judgment from 2003, and the two allegations related to unfiled and unpaid Federal and state income taxes for years 2008 through 2011. (Item 1.) In his answer to the SOR, Applicant denied all allegations because he stated that he resolved them. (Item 4.)

¹I considered the previous AG, effective September 1, 2006, as well as the new AG, effective June 8, 2017. My decision would be the same under either set of guidelines.

In response to SOR ¶ 1.a, Applicant asserted that he filed his Federal income tax returns for 2008 through 2011 in 2012. He said he paid those taxes in 2016 through a withdrawal from his 401(k). He submitted a statement from his checking account, dated February 8, 2016, indicating that four payments were made to the IRS that day: \$548 (2009), \$2,579 (2010), \$5,069 (2011), and \$5,830 (2012).² (Item 4.) He stated he filed the unfiled returns for 2008 through 2011 tax returns sometime in 2012 after learning of their delinquency. He did not submit proof from the IRS stating the amount of unpaid taxes he owed for those years, the date they were paid in-full, or a copy of the installment agreement he negotiated.

In response to the unfiled and unpaid state income taxes for years 2008 through 2011, as alleged in SOR ¶ 1.b, Applicant asserted that “when we filed we owed no back taxes however, we did have to forfeit the refunds we were entitled to since it was more than three years passed.” (AE A.) He said the taxes were filed in 2012, but did not submit any information about the amount of state taxes owed and paid.

Applicant provided documentation showing that he resolved the unpaid mortgage debt of \$24,093 referenced in SOR ¶ 1.c. He submitted a 2015 Form 1099-C, stating that the debt was cancelled. This debt is resolved. In 2013, he paid the \$59 debt alleged in SOR ¶ 1.d. He also submitted evidence that in 2011 he fully resolved the \$514 state judgment filed in 2003 for unpaid taxes, as alleged in SOR ¶ 1.e. (Item 4; AE A.)

Applicant did not document financial counseling or provide budget information from which to predict his future solvency.

Policies

When evaluating an applicant’s suitability for national security eligibility, the administrative judge must consider the pertinent AG. In addition to brief introductory explanations of the security concern, the guidelines list potentially disqualifying conditions and mitigating conditions, which are to be used in evaluating an applicant’s national security eligibility.

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 overarching adjudicative goal is a fair, impartial, and commonsense decision. The entire process is a conscientious scrutiny of applicable guidelines in the context 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.

² Applicant wrote the tax year next to each payment.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that “[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the 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. I have not drawn inferences based on mere speculation or conjecture.

Directive ¶ E3.1.14 requires the Government to 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 applying for national security eligibility 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 national security eligibility. 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 or sensitive information.

Finally, as emphasized in Section 7 of Executive Order 10865, “[a]ny determination under this order adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *a/s/o* Executive Order 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information.)

Analysis

Guideline F: Financial Considerations

The security concerns relating to the guideline for financial considerations are set out in AG ¶ 18, which reads in pertinent part:

Failure 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 or sensitive information. Financial distress can also be caused or exacerbated by, and thus can be a possible indicator of, other issues of personal security concern such as excessive gambling, mental health conditions, substance misuse, or alcohol abuse or dependence. An individual who is financially overextended is at greater risk of having to engage in illegal or otherwise questionable acts to generate funds.

AG ¶ 19 describes four conditions that could raise security concerns and may be disqualifying in this case:

- (a) inability to satisfy debts;
- (b) unwillingness to satisfy debts regardless of the ability to do so;
- (c) a history of not meeting financial obligations; and
- (f) failure to file or fraudulently filing annual Federal, state, or local income tax returns or failure to pay annual Federal, state, or local income tax as required.

Applicant failed to timely file required Federal and state income tax returns for years 2008, 2009, 2010, and 2011. He failed to timely pay or resolve Federal and state taxes for those years. He had three delinquent debts, including a state tax judgment that he was unable or unwilling to resolve for a period of time. These facts establish prima facie support for the foregoing disqualifying conditions, and shift the burden to Applicant to mitigate those concerns.

The guideline includes five conditions in AG ¶ 20 that could mitigate the security concerns arising from Applicant's financial difficulties:

- (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, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances;
- (c) the individual has received or is receiving financial counseling for the problem from a legitimate and credible source, such as a non-profit credit counseling service, and there are clear indications that the problem is being resolved or is under control;
- (d) the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts; and
- (g) the individual has made arrangements with the appropriate tax authority to file and pay the amount owed and is in compliance with those arrangements.

Applicant failed to timely file and resolve Federal and state taxes for tax years 2008 through 2011. He claimed he has resolved all tax issues, but did not submit documentation from the IRS, state taxing agency, or an attorney to confirm his assertions. He failed to timely resolve three other debts, including a 2003 state judgment for unpaid taxes. He offered insufficient evidence to conclude that such problems will not recur, so mitigation was not established under AG ¶ 20(a).

Applicant asserted that his four years of unfiled and unpaid tax problems were his wife's fault or conditions beyond his control. While that argument may have been a reasonable defense for a tax year or two, it is not a credible defense for four years. He had a responsibility to file his returns each year. He did not provide evidence that he acted responsibly each year at tax time. He provided evidence that in February 2016 he made some payments to the IRS, without supporting documents to show if the balances owed for each tax year were resolved. He failed to provide an explanation for why it took four years from 2012, when he presumably learned of his delinquent tax debts, to 2016 to provide payments to the IRS. AG ¶ 20(b) does not apply. He provided evidence that he received a cancellation of debt form for his unpaid mortgage. Although this may resolve his obligation to pay the debt, it does not constitute a good-faith effort to resolve his delinquent mortgage. He failed to provide evidence of financial counseling or good-faith efforts to timely resolve all financial allegations that would demonstrate that his financial problems are under control, and establish mitigation under the AG ¶¶ 20(c) or 20(d).

Applicant did not submit evidence from the IRS documenting his payment plan or method of resolving the unpaid Federal income taxes. Nor did he submit evidence that he has been making payments on the debt over the years. Hence, there is insufficient evidence to establish mitigation under AG ¶ 20(g).

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's national security eligibility 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(d):

- (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.

According to AG ¶ 2(c), the ultimate determination of whether to grant national security eligibility must be an overall commonsense judgment based upon careful consideration of the applicable guidelines and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all pertinent facts and circumstances surrounding this case. Applicant is a mature adult, who is responsible for his decisions, including his failure to timely file and pay Federal and state taxes for years 2008 through 2011. He also did not timely resolve some state taxes, as documented by a state judgment filed in 2003 for previous unpaid taxes. Although he appears to have filed all delinquent tax returns in 2012, he failed to provide persuasive evidence that he paid and resolved the Federal and state tax issues alleged in the SOR. The potential for pressure, exploitation, or duress from his financial situation remains undiminished. Applicant's actions to date are not sufficient to outweigh a history of non-compliance with a fundamental legal obligation to file 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

Overall, the evidence creates significant doubt as to Applicant's judgment, eligibility, and suitability for a security clearance. He failed to meet his burden to mitigate the security concerns arising under the guideline for 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:

AGAINST APPLICANT

Subparagraphs 1.a and 1.b:

Against Applicant

Subparagraphs 1.c through 1.e:

For Applicant

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

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. National security eligibility for access to classified information is denied.

SHARI DAM
Administrative Judge