



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



In the matter of:

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ISCR Case No. 16-00219

Applicant for Security Clearance

Appearances

For Government: Alison O'Connell, Esq., Department Counsel

For Applicant: *Pro se*

03/30/2018

Decision

Curry, Marc E., Administrative Judge:

Applicant failed to mitigate the financial considerations security concern generated by his delinquent income tax debt. Clearance is denied.

Statement of the Case

On October 18, 2016, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) to Applicant, detailing the security concerns under Guideline F, financial considerations, explaining why it was unable to find it clearly consistent with the national interest to grant security clearance eligibility. The DOD CAF took the action 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 for Determining Eligibility for Access to Classified Information* (AG) effective within the DOD on September 1, 2006.

On November 7, 2016, Applicant answered the SOR, admitting subparagraphs 1.c through 1.e, and denying subparagraphs 1.a and 1.f. He requested a hearing, whereupon the case was assigned to me on September 25, 2017. On December 5, 2017, the Defense

Office of Hearings and Appeals issued a notice of hearing, scheduling Applicant's case for January 10, 2018. The hearing was held as scheduled. I received five Government exhibits (GE 1 – GE 5) and 16 Applicant's exhibits (AE A -AE P). The transcript (Tr.) was received on January 19, 2018.

While this case was pending a decision, Security Executive Agent Directive 4 was issued establishing National Security Adjudicative Guidelines (AG) applicable to all covered individuals who require initial or continued eligibility for access to classified information or eligibility to hold a sensitive position. The AG supersede the adjudicative guidelines implemented in September 2006 and are effective for any adjudication made on or after June 8, 2017. Accordingly, I have adjudicated Applicant's security clearance eligibility under the new AG.

Preliminary Ruling

Although SOR pleadings need not be drafted with the specificity required for criminal pleadings, they must, at minimum, be specific enough to enable applicants to prepare a response. SOR subparagraph 1.f, which alleges a medical debt to an unidentified creditor does not meet this threshold. In light of Applicant's denial, I resolve this allegation in his favor.

Findings of Fact

Applicant is a 51-year-old married man with three adult children. He is a high school graduate and has an associate's degree in communications systems technology, earned in 1995. (Tr. 38) He is a veteran of the U.S. Air Force, serving from 1979 to 1999. He retired honorably. (Tr. 38) Since 2004, he has worked for a federal government contractor as a field engineer. (Tr. 39) He has held a security clearance since 1981. (Tr. 97)

Applicant is highly respected on the job. According to his supervisor, his attention to detail and commitment make him a valuable employee. (AE N at 9) In 2010, he received an award for outstanding performance. (AE N at 1) His most recent performance rating was exceptional. (AE N at 4-7)

Over the years, Applicant has often performed contract work in multiple states. In some years, he owed income taxes to more than one state. For example, he spent part of the time between 2001 and 2003 working in State 1, and generating taxable income. Applicant owes State 1 \$645 of delinquent income taxes from tax year 2003. (GE 4 at 3; Tr. 40) He requested that State 1 recalculate the delinquency by applying a \$286 refund, that he was scheduled to receive in 2002, to the 2003 delinquency. Because he had been late filing his 2002 return, State 1 rejected his request. (Tr. 60) The debt remains outstanding. (Tr. 59)

After performing an audit in 2007, State 2 concluded that Applicant should have filed income taxes for 2001 to 2004, and owed \$17,987 of delinquent income taxes the years in question. (AE P at 16) Applicant disputes this tax delinquency, contending that he had no

responsibility to file because he did not live in State 2 between 2001 and 2004. Applicant moved from State 2 in 2001, and his wife, with whom he historically filed joint income tax returns, remained in State 2, continuing to earn income during the years in question. Applicant also owns two properties in State 2, deriving rental income from one of them.

After receiving the notice of audit, Applicant filed State 2 income tax returns. Applicant contends, based on these returns, that State 2 actually owes him refunds for the years in question. (Tr. 89-91) Although he never received a response or a refund from State 2, he thought the matter was resolved after he had submitted the tax returns.

Applicant did not file his federal and State income tax returns on time for tax year 2014, as alleged in subparagraphs 1.c and 1.d. Consequently, State 3 entered a lien against his property for \$803, the delinquent amount owed, in January 2016, as alleged in subparagraph 1.e. By October 2016, Applicant had filed his 2014 State 3 tax return, and paid the \$803 delinquency. (AE C at 10) One month later, in November 2016, State 3 released the lien. At or about this time, Applicant filed his 2014 federal income tax. He was owed a refund of \$76. (AE D) Currently, Applicant owes State 3 approximately \$4,500 for tax years 2010 and 2016. (Tr. 71)

Subparagraph 1.g is a \$3,457 delinquency owed to the mortgage company of his rental property in State 2. (Tr. 48) Applicant is now current on the mortgage payments. (AE E)

In July 2016, Applicant filed a claim for disability compensation with the U.S. Department of Veterans Affairs (the VA) for injuries allegedly incurred while on active duty. (AE M) In January 2017, he was awarded benefits. In 2018, Applicant appealed the decision, contending that the disability ratings were too low, and challenging the VA's conclusion that several of the ailments he included in his disability application were not service related. (AE L, AE M) Applicant intends to wait until the resolution of his disability compensation appeal before addressing his delinquent income taxes. If he wins, the appeal, he will refile all of his tax returns for the past 18 years, anticipating that the higher disability rating will lower his adjusted gross income for every year since he has been retired, possibly eliminating the amount he owes. (Tr. 11)

Policies

The U.S. Supreme Court has recognized the substantial discretion the Executive Branch has in regulating access to information pertaining to national security, emphasizing that "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are required to be considered 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 overall 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 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. 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 applicant or proven by Department Counsel. . . ." The applicant has the ultimate burden of persuasion to obtain 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 the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about 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." See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Under the whole-person concept, the administrative judge must consider the totality of an applicant's conduct and all relevant circumstances in light of the nine adjudicative process factors in AG ¶ 2(a).¹

¹ The factors under AG ¶ 2(a) are as follows:

(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.

Analysis

Guideline F: Financial Considerations

The security concerns about financial considerations are set forth 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.

Applicant filed his federal and State 3 income tax returns for tax year 2014. He received a refund after his federal income tax return filing, and he paid the amount that State 3 calculated he owed, after he filed his 2014 state income tax return. I resolve subparagraph 1.c through 1.e in his favor. Applicant is now current on the mortgage for his rental property alleged in SOR subparagraph 1.g. I resolve this allegation in his favor.

Applicant's failure to pay his State 2 income tax delinquencies from 2001 to 2004 triggers the application of disqualifying conditions AG ¶ 19(a), "inability to satisfy debts," AG ¶ 19(c), "a history of not meeting financial obligations" and AG ¶ 19(f), ". . . failure to pay annual federal, state, or local income tax returns as required."

The following mitigating conditions are potentially applicable:

AG ¶ 20(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;

AG ¶ 20(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;

AG ¶ 20(d) the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts; and

AG ¶ 20(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.

Applicant's efforts to resolve the outstanding mortgage payment on his rental property and his satisfaction of the 2014 tax delinquencies are sufficient to trigger the

application of AG ¶ 20(d). Applicant contests the debt owed to State 2 and provided copies of income tax returns that he filed, in response to an audit, supporting his contention that he owes no delinquency. AG ¶ 20(e) applies.

More than ten years have elapsed since the State 2 revenue authority's audit. In that time, Applicant never followed up on the status of his dispute. His intention now is to resolve his income tax delinquencies after his disability appeal is resolved, which he asserts will retroactively lower his tax burden. This strategy assumes that the disability appeal will be resolved in Applicant's favor, and as such, is merely speculative. Moreover, any argument contesting an income tax delinquency or promising to resolve it in the future is undercut by the fact that he has incurred an additional tax delinquency since the issuance of the SOR. Under these circumstances, the application of AG ¶ 20(e) has limited probative value and none of the other mitigating conditions apply.

Whole-Person Concept

Applicant deserves credit for his 20 years of military service and his stellar performance on the job. Moreover, he has made some progress in resolving his delinquencies. However, incurring delinquent income taxes poses a security risk that is more serious than incurring commercial delinquencies, as it indicates that Applicant may "have a problem abiding by well-established rules and regulations." (ISCR Case No. 15-01031 (June 15, 2016) at 4) Consequently, the nature and seriousness of the problem, together with the length of time that the income tax delinquencies have been outstanding and their recurrent nature, outweigh the positive security significance of the favorable evidence. Under these circumstances, I conclude Applicant has failed to mitigate the security concerns.

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
Subparagraphs 1.c – 1.g:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the interests of national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Marc E. Curry
Administrative Judge