



ISCR Case No. 16-01561

Applicant for Security Clearance

Appearances

For Government: Ross Hyams, Esq., Department Counsel

For Applicant: *Pro se*

08/29/2018

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant failed to mitigate the security concerns under Guideline F, financial considerations. Eligibility for access to classified information is denied.

Statement of the Case

On July 1, 2016, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued to Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline F, financial considerations. The action was taken 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 (AG) effective within the DOD on September 1, 2006. On June 8, 2017, new AG were implemented and are effective for decisions issued after that date.¹

¹ I considered the previous AG, effective September 1, 2006, as well as the new AG, effective June 8, 2017. My decision would be the same if the case was considered under the previous AG.

Applicant answered the SOR on September 8, 2016, and requested a hearing before an administrative judge. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on May 18, 2017, scheduling the hearing for June 14, 2017, with another administrative judge. At the hearing, Applicant requested a continuance for more time to prepare his case. The Government objected to the continuance arguing Applicant had ample time to prepare his case. Applicant's continuance was granted over the Government's objection.

The case was assigned to me on October 2, 2017. DOHA issued a notice of hearing on October 19, 2017. I convened the hearing as scheduled on November 15, 2017. The Government offered exhibits (GE) 1 through 6. Applicant offered Applicant's Exhibits (AE) A through I. There were no objections and all of the exhibits were admitted into evidence.

Procedural Matters

In accordance with Directive ¶ E3.1.17, based on the evidence presented during the hearing, the Government moved to amend the SOR. The following allegations were submitted:

SOR ¶ 1.o: You failed to timely file, as required, your federal income taxes, for at least tax years 2014-2016.

SOR ¶ 1.p: You failed to timely file, as required, your state income taxes, for at least tax years 2014-2016.

The motion was granted. Applicant requested the hearing be continued to permit him additional time to prepare his case. His request was granted. DOHA issued a notice of hearing by video-conference on June 29, 2018, and the hearing was held as scheduled on July 18, 2018.

The Government submitted GE 7, which was admitted into evidence without objection. Applicant submitted AE J, which was admitted into evidence without objection. The record was held open until July 30, 2018, to permit Applicant additional time to submit documents, which he did. They were marked AE K through N. There were no objections and the exhibits were admitted into evidence.² DOHA received hearing transcripts on June 22, 2017, November 22, 2017, and July 26, 2018.

² Hearing Exhibit (HE) I is the Government's discovery letter. HE II is email correspondences, which includes the amended SOR allegations. HE III is email correspondence. HE IV is SOR ¶¶ 1.o and 1.p. HE V is email correspondence. HE VI is the Government's email memorandum indicating there were no objections to the evidence. All references to page numbers refer to the November 22, 2017 transcript unless otherwise noted.

Findings of Fact

Applicant admitted the SOR allegations in ¶¶ 1.a through 1.n. Testimonial evidence during the hearing supported the amendment to the SOR. Applicant later denied the allegations in SOR ¶ 1.o and 1.p. After a thorough and careful review of the pleadings, testimony, and exhibits submitted, I make the following findings of fact.

Applicant is 53 years old. He married in 1986. He has four children ages 32, 30, 25, and 10 years of age. He earned an associate's degree in 1997. He has worked for his present employer since 2010. Before then he was employed from 1995 to 2007. His company downsized, and he was laid off in 2007. He received approximately \$14,000 in severance pay (after taxes). He then experienced periods of unemployment. He was self-employed from April 2009 to August 2010, painting and doing lawn service, but his earnings were limited based on the availability of work. He collected unemployment benefits. His wife also lost her job around the same time. She went back to school to earn a degree, which she obtained in 2011. She funded her education through student loans. She participates in a program where her employer helps her pay the student loans.³

In approximately September 2009, Applicant was notified by his state that he was likely the victim of identity theft because it noticed his social security number was being used in other states. Applicant resolved the delinquent accounts that were attributed to the theft and provided documents to corroborate his actions. None of the SOR allegations are related to the theft.⁴

Applicant attributed the alleged delinquent debts to his unemployment and underemployment from 2007 to 2009. In addition, after his wife earned her degree, she moved to a different state because of her job, which required them to maintain two households. After approximately 10 months, Applicant's wife moved again, incurring additional expenses. One of their children had medical issues from 2013 to 2015, and they accumulated expenses from them. Applicant was assisting his wife financially with her moves and helping her get settled. In 2014, his wife moved back with the family, and they now have one household.⁵

Applicant attempted to address his debts with the creditors, but was unsuccessful. In June 2016, he filed Chapter 13 bankruptcy in his name only. He was behind on his mortgage at the time, but was paying what he could. Applicant has been making consistent payments to the bankruptcy trustee of the plan since 2016. The plan is for 36 months. He will complete the plan in 11 months. He was paying \$850 monthly, which was increased later to \$978 to expedite the resolution of the amount owed in arrearages on

³ Tr. 21-35.

⁴ Tr. 36-39; AE A, B, C, D, and E.

⁵ Tr. 39-45.

the mortgage. The money is automatically withdrawn from his account. The debts in the SOR are included in the bankruptcy payment plan.⁶

Applicant was questioned during his November 2017 hearing about whether he filed his federal and state income tax returns. He stated he filed an extension for his 2016 income tax returns, but failed to meet the extension's due date, and had not filed them. He explained that he still had not filed the 2016 returns because now that his wife was in the household they had to figure out whether to file jointly or married filing separately. He believed his 2014 tax return was filed by the IRS, because he received a letter from them, and it filed for him as single and zero exemptions. When asked when he last filed his federal income tax returns, he stated it was either 2013 or 2014. He did not know whether he filed his state tax returns. He stated he did not file them because he did not owe taxes. He said he attempted to complete the returns, but became confused. He stated at his November 2017 hearing that he was going to seek assistance from a tax consultant to complete them, but had not done so. He reiterated that the complexity of their tax returns was due to having two households in 2014.⁷ At his July 2018 hearing he could not recall whether he timely submitted any of the alleged federal or state tax returns.⁸

After his July 2018 hearing, Applicant provided copies of state tax returns for 2014, 2015, and 2016 that were filed on July 30, 2018. He provided a letter from an attorney along with IRS forms verifying that he filed his 2015 and 2016 federal tax returns electronically on July 30, 2018. His attorney noted that the IRS does not permit electronic tax return filings beyond three years, so Applicant provided a postal receipt showing his 2014 federal income tax return was mailed on July 31, 2018.⁹ He also provided a copy of a tax form requesting a filing extension for his 2017 federal income tax returns.¹⁰

Policies

When evaluating an applicant's national security eligibility, the administrative judge must consider the AG. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are used 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 overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c),

⁶ Tr. 45-68; GE 7; AE K.

⁷ Tr. 76-88.

⁸ July 18, 2018 transcript pages 9-14.

⁹ AE L, M, N.

¹⁰ AE J.

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. 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. Directive ¶ E3.1.15 states 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, and has the ultimate burden of persuasion as to obtaining 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 an applicant may deliberately or inadvertently fail to 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 EO 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).

Analysis

Guideline F: Financial Considerations

The security concern relating to the guideline for financial considerations is set out in AG ¶ 18:

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 personnel 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. Affluence that cannot be explained by known sources of income is also a security concern insofar as it may result from criminal activity, including espionage.

AG ¶ 19 provides conditions that could raise security concerns. The following are potentially applicable:

- (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 had numerous unresolved delinquent debts for several years. There is sufficient evidence that he failed to timely file his 2014 and 2016 federal and state income tax returns. There is sufficient evidence to support the application of the above disqualifying conditions.

The guideline also includes conditions that could mitigate security concerns arising from financial difficulties. The following mitigating conditions under AG ¶ 20 are potentially applicable:

- (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, 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 or pay the amount owed and is in compliance with those arrangements.

Applicant experienced financial difficulties when he was unemployed and underemployed from 2007 to 2009. He is resolving the delinquent debts that arose during that time through his Chapter 13 bankruptcy. However, he failed to timely file his 2014 and 2016 federal and state income tax returns. During his hearing, he could not recall whether he timely filed his 2015 federal and state tax returns. Because he repeatedly failed to timely file his income tax returns, I cannot find that his conduct is unlikely to recur. His behavior raises questions about his reliability, trustworthiness, and good judgment. AG ¶ 20(a) does not apply.

Applicant's unemployment and underemployment from 2007 to 2009 were circumstances beyond his control. His wife went back to school and lived in a different state. His child incurred numerous medical expenses between 2013 and 2015. These circumstances were also beyond his control. In 2016, Applicant filed Chapter 13 bankruptcy. His delinquent debts and past due mortgage were included in a payment plan. He has been making consistent payments since 2016 on the 36-month plan. AG ¶ 20(b) applies to the debts alleged in the SOR, as he is acting responsibly to resolve his debts. However, his failure to timely file his 2014, 2015, 2016 federal and state income tax returns were not circumstances beyond his control. Applicant's was made aware that this was an issue during his November 2017 hearing. Despite having more than seven months to rectify the issue, he did not file them until July 30, 2018, after his hearing closed and the record was held open to permit him to submit additional documents. He has not acted responsibly in regard to handling his taxes. AG ¶ 20(b) does not apply to his failure to timely file his tax returns.

Applicant received some financial counseling, which is mandatory when filing bankruptcy. He has been making consistent payments into his Chapter 13 payment plan, and there are clear indications that his financial problem regarding his debts are under control. AG ¶¶ 20(c) and 20(d) apply to the allegations in SOR ¶¶ 1.a through 1.n.

Applicant failed to timely file his 2014 and 2016 federal and state income tax returns. He was put on notice during his November 2017 hearing about the issue, but had not filed them when the hearing resumed on July 18, 2018. Subsequently, he filed all of them, except his 2014 federal income tax return, on July 30, 2018. His 2014 federal income tax return could not be filed electronically due to its age and the return was mailed on July 31, 2018. AG ¶ 20(g) does apply.

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(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.

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.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my comments under Guideline F in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under that guideline, but some warrant additional comment.

Applicant is 53 years. He experienced financial problems when he was unemployed and underemployed. He is resolving his past due mortgage and delinquent debts through Chapter 13 bankruptcy. He has been making consistent payments since 2016. He has acted responsibly in addressing his debts.

Applicant has not acted responsibly in timely filing his federal and state income tax returns. Although there is some mitigation, despite being aware of the security concerns related to his failure to file his tax returns, he did not file them until after the completion of his hearing, which resumed seven months after it started, and the record was held open. 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. August 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).¹¹

Applicant's history of non-compliance with a fundamental legal obligation to file his federal and state income tax returns raises serious security concerns. The record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability

¹¹ ISCR Case No. 12-10933 at 3 (App. Bd. June 29, 2016).

for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising under Guideline F, 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-1.n:	For Applicant
Subparagraphs 1.o-1.p:	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 security to grant Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Carol G. Ricciardello
Administrative Judge