



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



In the matter of:

Applicant for Security Clearance

)
)
)
)
)

ISCR Case: 16-02856

Appearances

For Government: Benjamin R. Dorsey, Esquire, Department Counsel

For Applicant: *Pro se*

March 29, 2018

Decision

ROSS, Wilford H., Administrative Judge:

Applicant did not file his Federal or state tax returns for tax years 2010 through 2015 in a timely manner, as required. He did not submit sufficient evidence to show that the returns have now been filed. 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 April 24, 2013, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP). (Item 3.) On October 14, 2016, the Department of Defense Consolidated Adjudications Facility (DoD CAF) issued 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*, effective within the DoD after September 1, 2006.

Applicant answered the SOR on February 27, 2017, and requested that his case be decided by an administrative judge on the written record without a hearing (Answer). (Item 2.) On March 21, 2017, Department Counsel submitted the Government's written case. A complete copy of the File of Relevant Material (FORM), containing six Items, was mailed to Applicant on March 22, 2017, and received by him on April 4, 2017. 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 did not submit additional information in response to the FORM, or object to its contents. The case was assigned to me on October 1, 2017.¹

The SOR in this case was issued under the adjudicative guidelines that came into effect within the DoD on September 1, 2006. Security Executive Agent Directive (SEAD) 4, *National Security Adjudicative Guidelines* (December 10, 2016), implements new adjudicative guidelines, effective June 8, 2017. All national security eligibility decisions issued on or after June 8, 2017, are to be decided using the new *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AG), as implemented in Appendix A of SEAD 4. I considered the previous adjudicative guidelines, as well as the new AG, in adjudicating Applicant's national security eligibility, and eligibility to hold a security clearance. My decision would be the same under either set of guidelines, although this decision is issued pursuant to the new SEAD 4 AG.

Findings of Fact

Applicant is 50 years old. He is divorced. Applicant has worked for his current employer since 1994. (Item 3.)

Paragraph 1 (Guideline F, Financial Considerations)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he has failed to meet his financial obligations and is therefore potentially unreliable, untrustworthy, or at risk of having to engage in illegal acts to generate funds.

¹ Department Counsel submitted six Items in support of the SOR allegations. Items 4 and 5 are inadmissible. They are summaries of unsworn interviews of Applicant conducted by interviewers from the Office of Personnel Management on May 26, 2016; and May 21, 2013. Applicant did not adopt the summaries as his own statements, or otherwise certify them to be accurate. Under Directive ¶ E3.1.20, these Report of Investigation (ROI) summaries are inadmissible in the Government's case in chief in the absence of an authenticating witness. (See Executive Order 10865 at Section 5.) In light of Applicant's admissions, Items 4 and 5 are also cumulative. Applicant is not legally trained and might not have understood Department Counsel's FORM footnotes 1 and 2, which describe the potential admissibility of Items 4 and 5. I therefor reviewed them for any potentially mitigating information that Applicant might have thought would be considered. Any such mitigating information will be discussed later in this decision.

The SOR alleges that Applicant has failed to timely file his Federal and state tax returns for at least the tax years 2010 through 2015, as required. Applicant admitted both of the SOR allegations. (Item 1; Item 2.)

Applicant also provided the following statement on his Answer with regard to each allegation, "Steps are being taken to rectify this issue." No further information was provided in his Answer. (Item 2.)

In Section 23 of Applicant's e-QIP (Item 3) he admitted that he had not filed Federal or state taxes for years 2010 through 2012. For tax year 2010 he stated, "taxes were not filed due to lost/misplaced W-2 forms," and, "I am in the process of [gathering] info and contacting the agencies." For tax year 2011 he stated he had, "misplaced forms," and, "I am in the process of locating the forms and will contact the appropriate agencies." Finally, for 2012, he stated, "I did not file for an extension in time. I am missing info to accurately file." For that year he also stated, "Info that is missing is being located." Applicant's interview with an OPM investigator on May 21, 2013, basically tracks what he stated in Item 3. (Item 5.)

As stated, Applicant had a subsequent interview with an OPM investigator on May 26, 2016. The investigator reports on page 1 of Item 4:

Subject [Applicant] has not filed any of his federal or state income taxes since 2007. Subject contacted the IRS last year [2015] to request copies of his W2 forms from 2007 to the present. Subject received the package of forms last year; however, he now "needs to catch up." Subject plans to resolve this matter as soon as possible. He plans to have the IRS file the taxes for him; however, he has not contacted them to do so yet. Subject stated he will contact them next week. Subject filed an extension for his 2007 taxes.

Applicant did not provide any information concerning whether he actually had filed his state or Federal income tax returns, as required, for the years in question. In addition, he did not provide any information to show whether he was entitled to a refund on his taxes, or that he has paid any tax owed. Applicant provided no evidence concerning the quality of his job performance. He submitted no character references or other evidence tending to establish good judgment, trustworthiness, or reliability. I was unable to evaluate his credibility, demeanor, or character in person since he elected to have his case decided without a hearing.

Policies

When evaluating an applicant's national security eligibility, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines (AG) 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.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires, "Any 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, "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, and has the ultimate burden of persuasion as to obtaining a favorable clearance 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 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, "Any 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 *also* 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 one condition that could raise security concerns and may be disqualifying in this case:

(f) failure to file or fraudulently filing annual Federal, state, or local income tax returns or failure to pay Federal, state, or local income tax as required.

Applicant failed to timely file Federal and state tax returns, as required, for at least tax years 2010 through 2015, as alleged in the SOR. These facts establish prima facie support for the foregoing disqualifying condition, and shift the burden to Applicant to mitigate those concerns.

The guideline includes one condition in AG ¶ 20 that could mitigate the security concerns arising from Applicant's admitted failure to timely file tax returns:

(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 did not supply any documentation to show that he has filed any of his past-due tax returns. Nor did he submit any evidence to show that he has entered into a payment arrangement with the IRS or any state taxing authority, and is in compliance with such arrangements, if he had filed tax returns and owed taxes. Applicant only stated in his Answer that, "Steps are being taken to rectify this situation," without further explanation. That statement is not enough. AG ¶ 20(g) does not apply.

Applicant did not mitigate his tax issues. Guideline F is found 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 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 did not provide any additional evidence to support the contention in his Answer that the "situation is being rectified." He has known of the Government's concern over his failure to file tax returns for several years. The potential for pressure, exploitation, or duress remains undiminished. Overall, the evidence creates substantial 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 ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline F:

AGAINST APPLICANT

Subparagraphs 1.a and 1.b:

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 interest to grant Applicant national security eligibility and a security clearance. Eligibility for access to classified information is denied.

Wilford H. Ross
Administrative Judge