



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



In the matter of:

ISCR Case No. 17-00236

Applicant for Security Clearance

Appearances

For Government: Caroline Heintzelman, Esq., Department Counsel
For Applicant: David Green, Esq. and Lawrence Ward, Esq.
Dorsey & Whitney, LLP

06/14/2018

Decision

WHITE, David M., Administrative Judge:

Applicant failed to timely file his 2012 and 2014 Federal income tax returns, as required. He has since resolved all formerly outstanding tax issues, and demonstrated his financial solvency. Resulting security concerns were not mitigated. Based upon evaluation of the testimony, pleadings and exhibits, national security eligibility is denied.

History of Case

On February 17, 2016, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP). On March 13, 2017, the Department of Defense Consolidated Adjudications Facility (DoD CAF) issued Applicant a Statement of Reasons (SOR) alleging 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 effective within the DoD after September 1, 2006.

Applicant answered the SOR in writing on April 7, 2017 (Answer), and requested a hearing before an administrative judge. The Defense Office of Hearings and Appeals (DOHA) assigned the case to me on May 17, 2017. DOHA issued a Notice of Hearing on July 11, 2017, setting the hearing for July 26, 2017. On that date, Department Counsel offered Government Exhibits (GE) 1 through 3 into evidence. Applicant testified, and offered Exhibits (AE) A through D into evidence. All exhibits were admitted without objection except GE 2, which is an unsworn summary of Applicant's October 17, 2016 interview prepared by an Office of Personnel Management (OPM) investigator as part of the OPM Report of Investigation. Applicant objected to the admissibility of GE 2 under Directive ¶ E3.1.20 and, in the absence of an authenticating witness, GE 2 was not admitted. I granted requests by the parties to leave the record open until August 9, 2017, to permit submission of additional evidence. DOHA received the hearing transcript (Tr.) on August 2, 2017. Neither party submitted additional evidence after the hearing, and the record closed as scheduled.

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*, implemented new adjudicative guidelines that came into effect on June 8, 2017. All national security eligibility determinations 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 promulgated 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. This decision is issued pursuant to, and cites, the new AG; but my decision would be the same under either set of guidelines.

Findings of Fact

Applicant has been employed by a Federal contractor since May 2012, and applied for a security clearance in connection with that work. The SOR contained the single allegation that Applicant failed to file his Federal income tax returns for tax years 2012 and 2014, as required. Applicant admitted the allegation, with explanations. (Answer.)

Applicant is 32 years old and married for the second time. He shares custody of his nine-year-old daughter with his first wife. He was honorably discharged in April 2009 after a four-year active duty enlistment in the Marine Corps, and again in April 2013 after completing his inactive reserve commitment. He has never held a security clearance. (Answer; GE 1; Tr. 12, 56-57.)

Applicant and his first wife separated, pending divorce, around the time he began his current employment in mid-2012. Their decree of dissolution was granted and filed effective July 29, 2013. Applicant knew that the divorce was pending in April 2013, when his 2012 Federal income tax return was due. He said that he did not file that return because he did not have the necessary income documents from his former

employer, was not certain which marital status to elect when filing, was too involved time-wise and financially in the divorce to seek help from the tax preparation company he had used previously, and had too many other demands on his time and attention to get it done. He did not request an extension of time to file. He said that the employer for whom he worked during the first five months of 2012 later asked him to pay a fee for a replacement W-2 statement, so he unsuccessfully attempted to obtain a free copy from the Internal Revenue Service (IRS). (Answer; Tr. 68-76, 87-89.)

Applicant said that he timely filed his Federal income tax return for 2013, with the assistance of a national tax preparation company. He informed the company that he had failed to file for tax year 2012, and engaged their services to help him correct that situation. However, he said that he was too busy with other activities in his life to attend follow-up appointments with the company or provide them with the necessary documentation to file his 2012 return. He also failed to file his return for tax year 2014 because he was very busy and did not schedule an appointment the company so they could prepare it for him. He testified that his 2015 and 2016 returns were timely filed.¹ (Answer; Tr. 70-74, 86-94, 101-102.)

On his February 2016 e-QIP, Applicant disclosed that he had failed to file his Federal income tax returns for 2012 and 2014. He said that he had been in consultation with the national tax preparation company about filing for those periods, for which they suggested he was likely due a small refund.² He certified on the e-QIP that each of those returns, "will be filed with 2015 taxes." (GE 1 at 37.) His 2015 return indicates that it was "Self-Prepared," and contains a total of 80 pages with numerous attached Forms and Schedules relating to his claims for various tax credits. (Answer Exhibit 7.) During his October 2016 OPM interview, he said that he had not yet filed his 2012 or 2014 returns, but that he would file them soon. He explained to the interviewer that he had not filed them because he was busy, did not make it the priority that he should have, and just didn't take the time to do it. (Tr. 95-100.)

Applicant signed the receipt for the SOR on March 20, 2017. He completed and signed his 2012 and 2014 Federal income tax returns on April 5, 2017, and mailed them to the IRS on April 6, 2017.³ Each of these returns comprised three total pages. The 2012 return reflected a small refund due, for which the three-year claim period had expired. His 2014 return reflected \$728 in unpaid taxes, for which amount he submitted a check. (Answer Exhibits 4 through 6.) On July 1, 2017, Applicant received notice from the IRS, stating that he owed an additional \$317.87 for Failure-to-file and Failure-to-pay penalties and interest charges in connection with his 2014 Federal income taxes. He mailed another check to the IRS for that amount the following day. (AE B.)

¹ Applicant's wife filed their 2016 joint return listing Applicant as her spouse. (Answer Exhibit 8.)

² Applicant said he based this conclusion on the absence of IRS payment demand letters. (Tr. 72.)

³ Applicant filed this 2012 return without the income information from his previous employer, the absence of which he said delayed his earlier timely filing of the return. On June 19, 2017, after finally obtaining the pertinent W-2 form, he filed an amended 2012 return and included a \$592 check to cover the related additional taxes. (AE A.)

Applicant received a 30% VA disability rating for his active duty service, comprising 10% each for a leg injury, potential hearing loss, and potential Post-Traumatic Stress Disorder (PTSD). He presented no evidence of a PTSD diagnosis, but underwent 22 sessions of counseling with a licensed marriage and family therapist between June 2012 and September 2013. These sessions started when his wife moved out to begin their marital separation and ended shortly after their divorce was final. Applicant said he sought the counseling to assist with communication and adjustment difficulties in his marriage around that time. No evidence established a causal connection between Applicant's attendance at these counseling sessions, or his underlying emotional concerns, and his ability to fulfill his responsibilities. He was successfully performing at work and attending evening classes at a community college during the same period. (AE C; AE D; Tr. 48-49, 56, 63-67, 85-86, 90.)

Applicant's financial situation is now stable and solvent. He has substantial savings from the equity he obtained after selling his former home, and has no outstanding delinquent debts that might form a basis for pressure or duress. (Answer; Tr. 81-83, 102-105.)

Two supervisors who have worked with Applicant throughout his current employment testified to his good character, responsibility, and excellent performance. He has received regular raises and promotions into increasingly responsible supervisory positions, and performed well. (Tr. 38-56.)

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 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. Directive ¶ E3.1.15 says that 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 *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 annual Federal, state, or local income tax as required.

Applicant did not timely file his 2012 or 2014 Federal income tax returns as required. These facts establish prima facie support for the foregoing disqualifying condition, and shift the burden to Applicant to mitigate the resulting security concerns.

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

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

Applicant's failure to file the tax returns in question initially occurred in 2013 and 2015, but continued until the day before he submitted his Answer to the SOR in April 2017. This lengthy pattern of disregard for an important Federal legal requirement suggests that it would have continued absent the imminent pending threat to his request for a clearance. His belated filing of the two three-page returns does not, accordingly, demonstrate current reliability, trustworthiness, or improved judgment in the absence of such a threat. Mitigation under AG ¶ 20(a) was not established.

Applicant asserted that he failed to file the returns in question because he was undergoing marital separation and divorce; sought counseling from a marriage and family therapist for his post-service adjustment and marital problems; was missing a W-2 from a prior employer; and was busy with work, school, and child-custody issues related to his divorce. Those issues were contemporaneous with his failure to file the 2012 return, but he did not establish a causal link between them and his failure to file that return until April 2017. None of those factors were either contemporaneous or causally linked to his failure to file the 2014 return. To the contrary, Applicant failed to file the two tax returns in question because he chose to spend his time in other ways and to disregard this Federal legal requirement until continuing to do so directly jeopardized his clearance request. This timing diminishes the good-faith nature of his belated effort to resolve his tax problems, and the mitigating effect of his belated compliance with the tax authority's requirements. Under the past several years of Appeal Board precedent, Applicant failed to establish sufficient mitigation under AG ¶¶ 20(b), (c), (d), or (g). This precedent most recently includes ISCR Case No. 16-01211 (App. Bd. May 30, 2018), which involved an older, and pre-SOR-resolved, failure to meet income tax obligations by a retired career military officer with a lengthy history of honorable service and successful compliance with all security procedures.

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. Recent Appeal Board precedent, as noted above, establishes a very high bar for mitigation of failure to file income tax returns.

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 accountable for his decisions and the prioritization choices that led to his failure to file two Federal income tax returns, as required. He otherwise demonstrated strong character, and honorably served for four years in U.S. Marine Corps combat units. His

performance and dedication at work have been excellent, and he is recently remarried with a stable family situation. Applicant has no history of significant delinquent debt. He demonstrated sufficient resources and income security to ensure solvency in the future. The potential for pressure, exploitation, or duress is minimal, since the formerly delinquent returns are now filed and all taxes, interest, and penalties have been paid. His most recent two Federal income tax returns were timely filed.

Overall, the evidence is nearly sufficient to eliminate any doubt as to Applicant's eligibility and suitability for a security clearance created by his failure to file two Federal income tax returns in a timely manner. However, recent decisions granting clearances to equally or more worthy applicants, by numerous administrative judges who met and evaluated the applicants in person, have been regularly reversed for abuse of discretion and/or for reaching conclusions that were not within the realm of reasonable disagreement. Despite the recent promulgation of new mitigating condition 20(g) explicitly addressing this situation, and strong evidence concerning pertinent whole-person factors, I cannot resolve the resulting doubt in Applicant's favor while according required deference to DOHA Appeal Board precedent. Accordingly, Applicant 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 the Directive, are:

Paragraph 1, Guideline F:

AGAINST APPLICANT

Subparagraph 1.a:

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

DAVID M. WHITE
Administrative Judge