



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



In the matter of:)
)
) ISCR Case No. 17-00294
)
Applicant for Security Clearance)

Appearances

For Government: Adrienne Driskill, Esq., Department Counsel
For Applicant: Ryan Nerney, Esq.

April 12, 2018

Decision

GOLDSTEIN, Jennifer, Administrative Judge:

Applicant failed to mitigate the security concerns arising under Guideline F, Financial Considerations. His failure to timely file Federal and state income tax returns remain a concern. He mitigated the concern under Guideline E, related to his history of excessive gambling. National security eligibility for access to classified information is denied.

Statement of the Case

On March 6, 2017, 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.

Applicant answered the SOR in writing (Answer) on April 13, 2017, and admitted the allegations as stated. He requested a hearing before an administrative judge. On May 31, 2017, the Government sent Applicant an Amendment to the SOR (ASOR), adding an additional security concern under Guideline E, Personal Conduct. Applicant answered the ASOR on June 6, 2017, and denied the additional allegation. The case was assigned to me on July 5, 2017. The Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing on August 7, 2017. I convened the hearing as scheduled on September 26, 2017. The Government offered Government Exhibits 1 through 7, which were admitted without objection. Applicant testified on his own behalf, called one witness, and presented Applicant Exhibits (AE) A through Q, which were admitted. DOHA received the transcript of the hearing (Tr.) on October 10, 2017. The record was left open for the receipt of additional evidence until October 30, 2017. On October 10, 2017, AE R through AE W, were submitted. They were admitted without objection.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 decisions² 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. My decision would be the same under either set of guidelines, although this decision is issued pursuant to the new AG promulgated in SEAD 4.

Findings of Fact

Applicant is 36 years old. He is unmarried and has no children. He earned a bachelor's degree in 2005. He is currently employed by a Government contractor, for whom he has worked since September 2007. He has held a top secret security clearance since 2009. (GE 1; AE C; Tr. 27-31.)

Applicant was alleged to have failed to file state and Federal income tax returns for tax years 2011 and 2012, as required by law. Applicant filed those delinquent returns in April 2017. (AE I; AE J.) Additionally, he failed to timely file 2010, 2013, and 2014 Federal income tax returns. His 2010 Federal income tax returns were filed on November 7, 2011, after an extension to October 15, 2011 lapsed. (AE T.) His 2013 Federal income tax return was due in April 2014, but was not filed until May 2014. (AE K.) His 2014 Federal income tax return was filed on June 27, 2016. (AE K.)

¹ Due to a transmission error, the post-hearing documents were not received until April 9, 2018.

² SEAD 4 ¶ D.7 defines "National Security Eligibility" as, "Eligibility for access to classified information or eligibility to hold a sensitive position, to include access to sensitive compartmented information, restricted data, and controlled or special access program information."

Applicant attributed his failure to timely file his Federal and state tax returns to “a lot of stress that [he] had to handle with . . . the health of my -- - both my parents, my brother, and the death of my grandmother.” (AE N; Tr. 32-33.) He claimed he always filed his tax returns on time prior to 2010. He asserted that he expected to get refunds for the years he failed to file and just never got around to filing due to his stressors. (Tr. 31-37.) He has timely filed his Federal and state tax returns for tax years 2015 and 2016. (AE H; Tr. 38.) He testified that he now recognizes the importance of filing in a timely manner and signed a statement promising to file within the required time limits in the future. (AE E; Tr. 39.)

Applicant discussed his failure to file the 2011 and 2012 Federal and state income tax returns during a personal subject interview on May 21, 2015. During that interview, he claimed “that he ha[d] forgotten to complete his taxes due to his demanding work schedule and he insisted that he did not intentionally disregard paying his taxes.” (GE 2.) He promised to address his delinquent tax returns “as soon as he is able.” (GE 2.) In a second personal subject interview on July 11, 2016, Applicant admitted he “was being lazy and did not want to sit down and file his taxes.” (GE 3.) He provided no further information on his efforts to file his delinquent tax returns during that time period.

From 2010 through 2014, the same period he failed to file Federal and state income tax returns, Applicant incurred gambling losses in the approximate amount of \$94,115. (GE 6.) He testified that he started accumulating gambling losses in 2011. Prior to 2011, he did not gamble frequently. However, from 2011 to 2013 he went to a casino to gamble up to four times per month and spent a couple thousand dollars each time. (Tr. 40-43.) He testified:

I get -- I get sick even thinking about how much money that I lost and how much time was spent at the casinos. It was just a complete waste and I'm just glad that I had stopped. I had -- I'd known something about myself that I needed to change and I needed to make adjustments to -- to stop that kind of behavior before it led down to financial ruin. (Tr. 43.)

In 2013 Applicant decided to discontinue gambling at casinos, after conducting “a very harsh self-assessment of myself and the goals that I wanted and what I wanted for myself.” (Tr. 45.) He last gambled in July 2016 on a trip to Las Vegas with friends, but has not gambled at the casino where he incurred the large losses since 2014. (AE S; Tr. 46.) On June 13, 2017, Applicant signed a statement promising to never gamble again. (AE Q.)

Applicant’s budget reflects that he has a net remainder of \$2,255 after his monthly expenses are paid. (AE V.) He completed an on-line course in financial management on October 10, 2017. (AE W.) His credit reports show no delinquent accounts. (AE P; AE P.)

Applicant’s former housemate and co-worker spoke highly of Applicant during his testimony. Applicant is known to be a hard worker, and a loyal friend. (Tr. 19-21.) His direct manger, who wrote a letter of support, reflected that Applicant is a team player and

a “valuable technical asset.” (AE A.) A friend who wrote a letter of recommendation reflected that applicant is “kind, empathetic, hard-working, thoughtful, funny, and whip-smart.” Another close friend and professional colleague reflected that Applicant is “honest, loyal, and dutiful.” (AE A.) A co-worker wrote of Applicant’s passion and commitment to quality. (AE R.) His performance evaluations reflect he is a valued employee. (AE F.)

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 AG 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 AG ¶ 2 describing the adjudicative process. The administrative judge’s overarching 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. 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 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 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.

Finally, Section 7 of EO 10865 provides that adverse 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 is potentially applicable:

(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.

“Failure to comply with Federal tax laws suggests that an applicant has a problem with abiding by well-established government rules and regulations. Voluntary compliance with rules and regulations is essential for protecting classified information.” See, *e.g.*, ISCR Case No. 14-04437 at 3 (App. Bd. Apr. 15, 2016).

In the instant case, Applicant failed to file Federal and state income tax returns from 2010 to 2014 in a timely manner. His 2011 and 2012 Federal income tax returns were not filed until after receiving the SOR. His failure to comply with Federal and state tax laws raises questions about whether Applicant has demonstrated the high degree of judgment and reliability that is required for granting an individual access to classified information. 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 Applicant's 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; 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 failed to file Federal and state tax returns in a timely manner from 2010 to 2014. Although his 2010 and 2013 income tax returns were filed the month after they were due, his 2011, 2012, and 2014 tax returns were significantly delinquent. While he attributed these delinquencies to conditions beyond his control, including family illnesses and the death of his grandmother, he also admitted to an investigator that he was "lazy" about filing his tax returns. There is also evidence that during those years he gambled and lost a significant amount of money. He failed to establish that AG ¶¶ 20(a) or 20(b) fully provide mitigation of the Government's concerns.

Applicant documented that he participated in financial counseling, and provided documentation to show he filed 2015 and 2016 Federal and state income tax returns in a timely manner. However, he has not fully established that his problem is being resolved or is under control because insufficient time has passed to demonstrate a track record of timely filing tax returns, as required by law. He only chose to file his 2011 and 2012 returns after receiving the SOR on March 2017. AG ¶¶ 20(c) has not been fully established.

Applicant has now filed all of his delinquent tax returns. However, the Appeal Board has held:

The timing of the resolution of financial problems is an important factor in evaluating an applicant's case for mitigation because an applicant who begins to resolve financial problems only after being placed on notice that his clearance was in jeopardy may lack the judgment and self-discipline to

follow rules and regulations over time or when there is no immediate threat to his own interests. ISCR Case No. 15-06440 at 4 (App. Bd. Dec. 26, 2017.)

In this case, Applicant has not demonstrated the required self-discipline to hold a security clearance. His 2011 and 2012 tax returns were not filed until after receipt of the SOR, despite being placed on notice of the concerns of the Government during personal subject interviews in 2015 and 2016. He did not fully mitigate the Government's concern under AG ¶ 20(g).

Guideline E: Personal Conduct

The security concern relating to the guideline for Personal Conduct is set out in AG ¶ 15:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes. The following will normally result in an unfavorable national security eligibility determination, security clearance action, or cancellation of further processing for national security eligibility:

(a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, cooperation with medical or psychological evaluation, or polygraph examination, if authorized and required; and

(b) refusal to provide full, frank, and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

The guideline notes several conditions that could raise security concerns under AG ¶ 16. One is potentially applicable in this case:

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group. Such conduct includes:

(1) engaging in activities which, if known, could affect the person's personal, professional, or community standing.

Applicant had losses exceeding \$94,000 from gambling, incurred during the same time period that he failed to file his income tax returns. This behavior demonstrates questionable personal conduct and could subject him to vulnerability to exploitation and manipulation. The evidence is sufficient to raise this disqualifying condition.

AG ¶ 17 provides conditions that could mitigate security concerns. I considered all of the mitigating conditions under AG ¶ 17 including:

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur; and

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

Applicant last gambled in 2016, and has not excessively gambled since 2014. He testified at length about his regrets over his gambling losses from 2011 to 2014. He acknowledged that he exercised poor judgment during that time. However, his credit reports and financial statements show that he is solvent on his accounts. He completed financial counseling and maintains a monthly budget. He has matured and will not gamble again. AG ¶¶ 17(c), 17(d), and 17(e) provide mitigation.

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 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 national security eligibility 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 pertinent facts and circumstances surrounding this case. Applicant is respected by those that know him. He performs well at work. He pays his bills on time. However, his financial irresponsibility led him to ignore his legal obligation to file Federal and state income tax returns for multiple years. He continued to ignore his tax filing obligation even after being questioned about it during personal subject interviews. He ignored those obligations to file the outstanding delinquent returns for 2011 and 2012 until after the SOR was issued and he knew his employment was possibly in jeopardy. The record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the concerns under Guideline E, but failed to mitigate the security concerns arising under Guideline F.

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
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	For 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 access to classified information. National security eligibility is denied.

Jennifer I. Goldstein
Administrative Judge