



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



In the matter of:)
)
) ISCR Case No: 17-01933
)
)
Applicant for Security Clearance)

For Government: Adrienne M. Driskill, Esq., Department Counsel
For Applicant: *Pro se*

08/13/2018

Decision

DAM, Shari, Administrative Judge:

Applicant has a history of failing to file Federal and state income tax returns and resolving taxes. He did not refute or mitigate the resulting financial security concerns. National security eligibility for access to classified information is denied.

Statement of the Case

On October 20, 2017, the Department of Defense (DOD) issued to Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline F, Financial Considerations. 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* (AG) effective within the DOD on June 8, 2017.

Applicant answered the SOR in writing (Answer) on November 9, 2017, and requested that his case be decided by an administrative judge on the written record

without a hearing. On December 26, 2017, Department Counsel submitted the Government's written case. A complete copy of the File of Relevant Material (FORM), containing five Items, was mailed to Applicant and received by him on March 1, 2018. The FORM notified Applicant that he had an opportunity to file objections and submit material in refutation, extenuation, or mitigation within 30 days of receipt of the FORM. He did not submit additional information. On June 7, 2018, the Defense Office of Hearings and Appeals (DOHA) assigned the case to me.

Findings of Fact

Applicant admitted all allegations in the SOR, except those in SOR ¶¶ 1.e and 1.j, which he denied with explanations.

Applicant is 56 years old and has been employed by a defense contractor since 2015. He experienced sporadic employment in the prior years. He earned an associate's degree in 1987. He is married to his second wife. He has an adult child. (Item 2)

Applicant's tax problems started in 2011 when he withdrew about \$50,000 from his 401(k) to help his girlfriend resolve a financial problem. Additionally, he acknowledged that the failure to file 2012 and 2013 tax returns was the result of his procrastination. (Item 3)

In his January 2016 security clearance application (SCA), Applicant disclosed that he did not file or pay Federal income tax returns for years 2011, 2012, and 2013. He said he owed taxes on a 2011 IRA withdrawal. He stated he was negotiating a payment plan for the outstanding \$34,000 tax debt. He also disclosed that he failed to file and pay state taxes for years 2011, 2012, and 2013. He estimated he owed \$6,200 to the state and said he was making monthly payments on the debt. He also disclosed that he had owed state income taxes for 2012 in the amount of \$4,518, but paid that debt in 2014 through withdrawals from his bank account. (Item 3)

In his Answer, Applicant admitted that he failed to timely file Federal income tax returns for 2011, 2012 and 2013, and in 2016 the Federal government filed a \$33,283 lien. He provided transcripts from the IRS indicating that: he filed his 2011 return in July 2015; he filed the 2012 return in July 2015; and he filed the 2013 return in July 2015. He also submitted proof that he filed his 2014 Federal return in May 2015 (one month late) and the 2015 Federal return in May 2016 (one month late). He obtained an extension to October 2017 to file his 2016 Federal tax return. He stated that his unpaid Federal taxes are for years 2011 and 2013 and he owed about \$33,283. He said he was working on a resolution for that debt. (Item 1) He did not provide proof of the date on which he filed his 2016 Federal return, a payment plan for the unpaid Federal taxes, or evidence that he has made payments on the debt.

Applicant admitted that he failed to timely file state income tax returns for 2011, 2012, 2015, and 2016. He filed his 2011 state return in August 2014; his 2012 state return in October 2015; and his 2015 state return in November 2017. He submitted proof that

he timely made a payment on his 2016 state return and obtained an extension for filing it; however, he did not provide proof that he subsequently filed the return. His unpaid state taxes for 2011 and 2012 totaled about \$5,816 and were resolved in August 2017. (Item 3) He did not submit a budget or evidence that he has taken credit or financial counseling.

Policies

When evaluating an applicant's suitability for national security eligibility, the administrative judge must consider the AG. In addition to brief introductory explanations for each guideline, the AG list potentially disqualifying and mitigating conditions, which are useful 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.

Directive ¶ E3.1.14 requires the Government to present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.15 states 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 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 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 information.

Section 7 of Executive Order 10865 provides that an adverse decision 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* 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:

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. Financial distress can also be caused by 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 acts to generate funds. . . .

AG ¶ 19 sets out disqualifying conditions that could potentially raise security concerns. Four are potentially applicable in this case:

- (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 has a history of inability or unwillingness to timely file Federal and state income tax returns. He failed to timely pay state income taxes. He has not resolved a large Federal tax lien for 2011 and 2013. The evidence is sufficient to raise the above disqualifying condition.

After the Government produced substantial evidence of the disqualifying conditions, the burden shifted to Applicant to produce evidence and prove mitigation of the security concerns. AG ¶ 20 sets out five conditions that could potentially mitigate financial security concerns under this guideline:

(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), and the individual acted responsibly under the circumstances;

(c) the person has received or is receiving counseling for the problem and/or 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 has a history of not timely filing Federal and state income tax returns for at least four years. He also has a large outstanding Federal tax lien that was filed in 2016 for unpaid taxes for years 2011 and 2013. This ongoing behavior casts doubt on his trustworthiness and judgment. AG ¶ 20(a) does not apply. Applicant's tax problem arose in 2011 when he withdrew money from his 401(k) for his girlfriend's financial problems. That decision and his procrastination in timely filing state and Federal returns for at least four years were circumstances within his control. AG ¶ 20(b) does not apply. Applicant did not submit evidence that he participated in credit or financial counseling, and there is no evidence that his large Federal debt of about \$30,000 is under control. AG ¶ 20(c) does not apply.

Applicant provided evidence that he filed his 2011, 2012, 2013, and 2015 Federal tax returns late. Although he stated that he filed his 2016 Federal tax return after receiving an extension, he did not submit proof confirming that filing. He filed his 2011, 2012, and 2015 state returns late. He did not confirm that he timely filed his 2016 state return after receiving an extension. AG ¶ 20(d) provides minimal mitigation as to the allegations relating to failing to timely file returns. He resolved his unpaid state taxes in 2017. AG ¶ 20(d) applies to that allegation. Applicant did not provide evidence that he established a payment plan with the IRS for his 2011 and 2013 Federal tax lien and has made payments on it. AG ¶ 20(g) does not apply to that allegation.

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) 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 include 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 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 those guidelines, but some warrant additional comment.

Applicant is a 56-year-old man, who has been working for his current employer since 2015. He has been aware of his outstanding tax issues for at least six years. At this time, he has not established a record of responsibly following tax laws and managing related financial obligations. His actions to date are not sufficient to outweigh a history of non-compliance with a fundamental legal obligation to file and pay taxes, beginning in 2011 when he withdrew monies from his 401(k). 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. Aug. 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).¹

The record evidence leaves me with doubts as to Applicant's judgment and suitability for a security clearance. Applicant failed to mitigate the security concerns arising under the financial considerations guideline.

¹ ISCR Case No. 12-10933 at 3 (App. Bd. June 29, 2016).

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
Subparagraph 1.d:	Against Applicant
Subparagraph 1.e:	Against Applicant
Subparagraph 1.f:	Against Applicant
Subparagraph 1.g:	Against Applicant
Subparagraph 1.h:	Against Applicant
Subparagraph 1.i:	Against Applicant
Subparagraph 1.j:	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 a security clearance. National security eligibility for access to classified information is denied.

SHARI DAM
Administrative Judge