



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



In the matter of:)
)
) ISCR Case No: 17-02843
)
)
Applicant for Security Clearance)

For Government: Caroline E. Heintzelman, Esq., Department Counsel
For Applicant: *Pro se*

05/25/2018

Decision

DAM, Shari, Administrative Judge:

Applicant has a history of failing to file Federal and state income tax returns and resolving tax liens. 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 September 29, 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 17, 2017, and requested a hearing before an administrative judge. On January 11, 2018, the Defense

Office of Hearings and Appeals (DOHA) assigned the case to me. On January 22, 2018, DOHA issued a Notice of Hearing setting the case for February 7, 2018. The case was heard as scheduled. Department Counsel offered Government Exhibits (GE) 1 through 5 into evidence. Applicant testified, called one witness, and offered Applicant Exhibit (AE) A into evidence.¹ All exhibits were admitted without objections. DOHA received the hearing transcript (Tr.) on February 15, 2018. The record remained open until March 2, 2018, to give Applicant an opportunity to submit additional evidence. No other exhibits were submitted.

Findings of Fact

Applicant admitted the allegation in SOR ¶ 1.a, and denied the allegations in SOR ¶¶ 1.b and 1.c. with explanations.

Applicant is 62 years old and has been married for over 35 years. He and his wife have two adult children. He worked for a Federal agency from 2000 to approximately 2012, where he held a security clearance. He started a position with a defense contractor after leaving his prior employment in 2012. (Tr. 20-22)

In June 2012 and April 2015, Applicant submitted security clearance applications (SCA). In them, he disclosed that he failed to file Federal and state tax returns for 2013 and 2014, and that Federal tax liens were filed against him in 2008 and 2009. (GE 1, GE 5) In September 26, 2017 interrogatories, he admitted that he had not filed Federal and state income tax returns for years 2013, 2014, 2015, and 2016. (GE 2)

Applicant's tax problems started in 2001 when he began a business and withdrew \$63,000 from his 401(k) to support the business. He subsequently lost the business and incurred a Federal tax penalty for the monies he withdrew. (Tr. 28-30; GE 2) The Internal Revenue Service (IRS) filed a \$63,341 tax lien in June 2005. The lien was paid in December 2009. (GE 4)

At the hearing, Applicant reiterated that he has not filed his returns for 2013, 2014, 2015, and 2016 (SOR ¶ 1.a). He attributed this problem to past marital disagreements he had with his wife which started in 2013. He and his wife subsequently separated in 2014 and reconciled in 2015. He said he has given a tax preparer all of the pertinent information, who is preparing the returns. (Tr. 24-26, 33)

In December 2008, the IRS filed a \$37,151 tax lien against Applicant (SOR ¶ 1. c). Applicant said he was making monthly payments on this debt, which he thought included multiple tax years. (Tr. 31) During an investigative interview in June 2017, Applicant said he had been making monthly payments of \$1,220 to the IRS on the debt. He said he owes about \$14,000 on the debt. (GE 2) He provided proof that he made those payments in

¹After reviewing and admitting AE A into evidence, Applicant indicated that he did not have an extra copy of this 2017 Tax Release. He requested permission to email it to me and Department Counsel after the hearing. (Tr. 15) Although the record remained open until March 2, 2018, he never provided a hard copy of the exhibit for the record.

April, May, June, July, and October 2017. (Answer) He did not provide a current transcript from the IRS confirming the status of that tax lien or the tax years that are being paid.

In August 2009, the IRS filed an \$11,346 tax lien against Applicant (SOR ¶ 1. b). This lien was for tax years 2004 and 2007. It was released in December 2017. (Tr. 30-31; AE A)

Applicant earns \$71,000 annually. He said his wife earns about the same amount or more. He has not taken credit or financial counseling, but is working with his tax preparer to resolve his financial issues. (Tr. 27-28) He did not submit a budget.

One witness testified for Applicant. He has known Applicant for over 30 years as a friend. He said Applicant is an honest person and a good father. (Tr. 16-18)

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 unwillingness to file Federal and state income tax returns, beginning in 2013 and continuing through 2016. He also failed to timely pay Federal income taxes that resulted in two tax liens, one of which is not resolved. 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 not filed Federal and state income tax returns from 2013 through 2016. His failure to do so casts doubt on his judgment. He also has an outstanding Federal tax lien that was filed in 2008. AG ¶ 20(a) does not apply. Applicant did not provide a good explanation for failing to timely file four years of tax returns or regarding his inability to responsibly manage tax liabilities. His tax problems have been within his control. AG ¶ 20(b) does not apply. Applicant has not participated in credit or financial counseling, although he said he discussed his finances with his tax preparer. There is no evidence that his unfiled tax returns or the 2008 tax lien are under control. AG ¶ 20(c) does not apply.

In December 2017, Applicant resolved an outstanding tax lien for unpaid Federal taxes for 2004 and 2007. Waiting over ten years to resolve those two tax debts does not constitute a good-faith effort to responsibly manage one's legal obligations. AG ¶ 20(d) does not provide mitigation. Applicant has not submitted sufficient evidence to document his repayment plan with the IRS for the 2008 tax lien and a record of complying with it. AG ¶ 20(g) does not apply to that lien. He did present evidence that he finished making payments to the IRS on his 2009 tax lien. AG ¶ 20(g) provides some mitigation for 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 an intelligent and articulate 62-year-old man, who has been working for his current employer since 2012 and worked for a Federal agency prior to that. During his hearing, he discussed his history of unfiled and unpaid taxes. He recognized his responsibility to resolve those issues, but has not done so. At this time, he has not established a record of responsibly following tax laws and managing related financial obligations. His actions are not sufficient to outweigh a long history of non-compliance with a fundamental legal obligation to file and pay taxes, beginning in 2001 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).²

² ISCR Case No. 12-10933 at 3 (App. Bd. June 29, 2016).

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

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:

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| Paragraph 1, Guideline F: | AGAINST APPLICANT |
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| Subparagraphs 1.a through 1.c: | Against Applicant |
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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