



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



In the matter of:)
)
) ISCR Case No. 18-00486
)
Applicant for Security Clearance)

Appearances

For Government: Ross Hyams, Esq., Department Counsel
For Applicant: *Pro se*

07/30/2018

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant failed to mitigate the security concerns under Guideline F, financial considerations. Eligibility for access to classified information is denied.

Statement of the Case

On August 31, 2016, Applicant completed an electronic Questionnaire for Investigation Processing (e-QIP). On March 5, 2018, 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 June 8, 2017.

Applicant answered the SOR on March 14, 2018, and elected to have his case decided on the written record in lieu of a hearing. Department Counsel submitted the

Government's file of relevant material (FORM), and Applicant received it on April 12, 2018. The Government's evidence is identified as Items 1 through 6. Applicant was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation within 30 days of receipt of the FORM. He provided a timely response and submitted a document marked as Applicant Exhibit (AE) A. There were no objections to any documents and they are admitted into evidence. The case was assigned to me on June 29, 2018.

Findings of Fact

Applicant admitted both allegations in the SOR. After a thorough and careful review of the pleadings and exhibits submitted, I make the following findings of fact.

Applicant is 39 years old. He is a high school graduate. He has never married and has no children. From January 2006 to April 2016, he was in business with a partner. He left the business and has been employed with his current employer since April 2016.¹

The SOR alleges Applicant failed to timely file his federal income tax returns for tax years 2009 through 2015 (¶ 1.a) and his state income tax returns for the same tax years (¶ 1.b). Applicant admitted these allegations.²

Applicant disclosed in his August 2016 e-QIP that he failed to file 2009 through 2015 federal and state income tax returns. He stated: "Didn't make more than \$10,000 and didn't file."³ In reply to the query what action he has taken, he stated: "None yet. Now that I'm not self-employed and make money, I'm going to get in touch with the State of [X] [a]nd the IRS and see what I need to do."⁴

During Applicant's October 2017 interview with a government investigator, he stated that from January 2006 to April 2016 he was a partner and owner of a business. He had a disagreement with his business partner so he chose to leave the business. His former business partner passed away in October 2017. He further stated that the reason he failed to file federal and state income tax returns for tax years 2009 through 2016 was because his business partner stated he did not earn enough money during those tax years. Applicant told the investigator that he earned approximately \$10,000 each of the tax years alleged. He believed he would have likely receive a refund for all of the tax years. He planned to call his state tax commission and the IRS by April 2018 to see what steps he needed to take regarding the tax years alleged. He did not have access to any

¹ Item 4.

² Item 3.

³ Item 4.

⁴ Item 4.

of his former business's records because his partner was deceased. He was able to live off of his earning because he was frugal and his parents provided him a residence.⁵

Government interrogatories were sent to Applicant requesting he provide state tax transcripts for the tax years 2009 through 2015. It also requested IRS tax transcripts for the same tax years. In Applicant's January 2018 response to the interrogatories, he stated: "I did not file taxes from 2009 -2015."⁶ No other information was provided.

In Applicant's response to the FORM, he stated:

My business partner was a good friend and mentor to me, I had known him since 1990 or 1991. The first year of the partnership, we each made around \$10,000 from the company. He told me that since we made below a certain amount of money, we didn't need to file taxes. The company continued that way until I left in 2016. He passed away later that year. After I got out I realized that he had been lying to me for years. I'm currently in the process of filing back taxes and getting current. I in no way tried to escape my civic duty by not filing my taxes. If I had filed, it appears, I would have received refunds. I put my trust into someone that I had looked up to most of life. I have learned from this and will get through it. I am not an untrustworthy person, but I made a bad choice in taking him at his word.⁷

Applicant did not provide any additional information about what specific actions he has taken to file his delinquent federal and state income tax returns. He did not provide information about how he determined his annual income and whether he had other sources of income during these years. He did not provide other information addressing what inquiries he made regarding his tax filing responsibilities, and whether he filed tax returns before 2009 and after 2015.⁸

Policies

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

⁵ Item 5.

⁶ Item 6.

⁷ AE A.

⁸ For tax year 2009, the minimum income required to file federal tax returns for a single person was \$9,350; 2010-\$9,350; 2011-\$9,500; 2012-\$9,750; 2013-\$9,750; 2014-\$10,000; and 2015-\$10,150. www.irs.gov.

factors listed in 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 applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable security 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.

Section 7 of EO 10865 provides that 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:

(g) 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 failed to timely file his 2009 through 2015 federal and state income tax returns. There is sufficient evidence to support the application of the above disqualifying condition.

The guideline also includes conditions that could mitigate security concerns arising from 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 admitted he failed to timely file federal and state tax returns for tax years 2009 through 2015. He attributed his failure to relying on advice from his business partner who told him if he earned less than \$10,000, he did not have to file. Applicant did not

provide evidence that his earnings were less than the minimum threshold for filing each tax year. Applicant disclosed his failure to file those tax returns on his August 2016 e-QIP. The Government subsequently requested that he provide IRS and state tax transcripts, which he did not do. In his May 2018 Form response, he indicated he was in the process of filing his delinquent tax returns, but did not provide documentary evidence to corroborate any actions he has taken to date. His tax issues are not resolved. AG ¶ 20(a) does not apply.

Applicant may have naively relied on his business partner's advice, which was somewhat beyond his control. However, at some point during those seven years he had a duty to make an independent inquiry as to his legal obligations for filing tax returns and current threshold requirements. Without additional information, such as Applicant's income for each year, other income sources, and specifically the steps he may have taken to contact the IRS and his state tax authority to resolve the delinquencies, the evidence is insufficient to establish mitigation under this mitigating condition. AG ¶ 20(b) partially applies. AG ¶ 20(g) does not apply.

It is unknown if Applicant sought financial counseling, and there are not clear indications at this time to conclude the problem is being resolved. AG ¶ 20(c) does not apply. There is no evidence to establish mitigation under AG ¶ 20(g).

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 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 eligibility for a security clearance 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 the 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 that guideline, but some warrant additional comment.

