



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



In the matter of:)
)
) ISCR Case No: 17-04311
)
)
Applicant for Security Clearance)

For Government: Aubrey M. De Angelis, Esq., Department Counsel
For Applicant: *Pro se*

10/01/2018

Decision

DAM, Shari, Administrative Judge:

Applicant failed to file Federal income tax returns for three years. He did not mitigate the resulting financial security concerns. National security eligibility for access to classified information is denied.

Statement of the Case

On January 22, 2018, 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 on February 13, 2018, and requested that his case be decided by an administrative judge on the written record without a hearing

(Answer). On May 1, 2018, 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 May 14, 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. Applicant did not submit a response to the FORM or object to the Government's Items. Items 1 through 5 are admitted into evidence without objection.

Findings of Fact

Applicant admitted that he did not timely file his Federal income tax returns for 2008, 2009, and 2011. (Item 3)

Applicant is 49 years old and never married. He has worked for a defense contractor since 2012. Prior to this position, he had worked for a company for 20 years before being laid off. (Items 4, 5)

In May 2016, Applicant submitted an electronic Questionnaires for Investigations Processing (e-QIP). In it, he disclosed that he failed to file a Federal income tax return for tax year 2009 until May 2012. (Item 4)

In response to Interrogatories about his Federal tax returns, Applicant submitted IRS account transcripts, dated October 31, 2017, for tax years 2008 through 2016. Those transcripts documented that he did not timely file returns for 2008, 2009, and 2011. It indicated that the IRS filed a substitute tax return for 2009, and that he had not filed his 2008 and 2011 returns. (Item 5)

As of the date of the FORM, Applicant has not documented that he filed his 2008 and 2011 Federal tax returns. The IRS transcript for 2009 indicated that in addition to filing a substitute tax return for him in June 2011, he did not pay his \$2,548 outstanding tax debt for 2009 until May 2012.¹ Applicant submitted a prepared Federal tax return for 2011, but he did not provide proof that he filed it. Applicant timely filed Federal tax returns for tax years 2012 through 2016. (Item 5)

Applicant stated that he did not timely filing his 2008 tax return because he thought he was receiving a refund and did not think it was necessary. He did not timely file his 2011 tax return because he was looking for a job in early 2012 and overlooked his tax obligation. (Item 5)

¹The SOR did not allege Applicant's failure to timely pay his 2009 Federal taxes as a security concern. That derogatory information will not be considered as a potential disqualifying condition, but it may be considered in the analysis of mitigating conditions and the whole-person concept.

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. Two are potentially applicable in this case:

(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 failed to timely file Federal income tax returns for 2008, 2009, and 2011. The evidence is sufficient to raise the above disqualifying conditions.

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 three 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; 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 did not timely file his Federal tax returns for 2008, 2009, and 2011. The IRS filed a substitute tax return for him for tax year 2009. His failure to file casts doubt on his current judgment and reliability. He failed to pay his 2009 Federal tax liability until 2012. The fact that he timely filed subsequent tax returns for 2012 through 2016 is insufficient to outweigh his continued failure to file his Federal tax returns for 2008 and 2011. AG ¶ 20(a) minimally applies.

Applicant did not provide a legitimate explanation for failing to timely file three years of Federal tax returns. His tax problems have been within his control. AG ¶ 20(b) does not apply. There is no evidence that he filed tax returns for 2008 and 2011, or made arrangements with the IRS to do so. The IRS filed a substitute tax return for him for 2009, which is not construed as responsible behavior on Applicant's part. AG ¶ 20(g) does not apply.

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 49-year-old man, who has been working for his current employer since 2012. In January 2018, he received an SOR that notified him that his failure to timely file 2008, 2009, and 2011 Federal tax returns created security concerns. After submitting an

Answer to the SOR, he was again notified in May 2018 that his evidence failed to prove that he filed his 2008 and 2011 Federal tax returns. His non-compliance with a fundamental legal obligation to file tax returns and timely pay his 2009 tax debt is concerning. 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

The record evidence leaves me with 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:

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 national interest to grant Applicant a security clearance. National security eligibility for access to classified information is denied.

SHARI DAM
Administrative Judge

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