



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



In the matter of:)	
)	
)	ISCR Case No. 14-04752
)	
Applicant for Security Clearance)	

Appearances

For Government: Meg Foreman, Esq., Department Counsel
For Applicant: *Pro se*

03/18/2016

Decision

LYNCH, Noreen A., Administrative Judge:

On June 16, 2015, the Department of Defense (DOD) issued a Statement of Reasons (SOR) listing security concerns arising under Guideline F (Financial Considerations). The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense (DoD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG), implemented in September 2006.

Applicant timely answered the SOR¹ and requested a hearing before an administrative judge. The case was assigned to me on December 2, 2015. A notice of hearing was issued on December 16, 2015, scheduling the case for January 29, 2016. Government Exhibits (GX) 1-4 were admitted into evidence without objection. Applicant testified, and presented documents (AX A-B) for the record. The transcript was received

¹The Government made a motion to amend the SOR at the hearing to comport with the evidence. The motion was granted. The SOR was amended to insert "timely" file from 2007 until 2014.

on February 4, 2016. Based on a review of the pleadings, testimony, and exhibits, eligibility for access to classified information is denied.

Findings of Fact

In his answer to the SOR, Applicant denied the factual allegations of the SOR under Guideline F, with the exception of ¶ 1.b. He provided additional explanations.

Applicant is 58 years old. He is divorced and has two adult children. He is an engineering technologist for a government contractor. He served in the U.S. Navy from 1975 to 1980, remaining then in the inactive reserve from 1980 to 1981. Applicant has been with his current employer since 1984. He currently holds a security clearance. (GX 1)

The amended SOR contains two allegations for failing to timely file federal and state tax returns from 2007 through 2014. It also alleges an indebtedness to the Internal Revenue Service (IRS) for delinquent taxes in the amount of \$700. The last allegation is an indebtedness to the IRS for delinquent taxes in the amount of \$5,494 for tax year 2008. (GX 2 and 3)

Applicant candidly stated that he failed to submit his federal and state income tax returns in a timely manner. But he qualified that his untimely tax filings have nothing to do with his not living within his means. He stated that he has never owed any additional tax to the IRS or the state. In fact, he was adamant that he has always “overpaid tax liability” through his employer’s payroll tax withholding. (Tr. 16) Applicant noted that he had always filed timely before 2007. (Tr. 38) His initial problem was due to traveling extensively for work, and the fact that he had a problem filing in 2007 due to the status of a foreign born spouse. He requested an extension for some of the years. He stated that he was traveling so much that he thought he would just catch up on the filing eventually. He always “meant to do them” and he kept the paperwork so that one day he would file his tax returns. He also emphasized that this is the first security clearance application that specifically asked about filing taxes. (Tr. 23) He attributed some of the lack of filing to his health issues. (Tr. 23) He noted that he received bad advice from the IRS. He stated that his facility security officer (FSO) is aware of the situation.

As to the allegation in SOR 1.a, Applicant stated that he filed his 2009 through 2012 tax returns with the IRS in February 2015. He added that based on advice that the IRS gave him, he has not yet filed the 2007-2008 tax returns. He noted that since the IRS had already completed his missing returns for those years, he did not need to submit them, unless he was originally due a refund. He provided documentation that he filed the tax returns for 2009 through 2012. (AX A) However, he is still working on the 2007-2008 tax returns. He expects to complete them in a week. (Tr. 40)

As to the allegation in SOR 1.b, Applicant admitted that he had not timely filed the state tax returns (2007-2012) because he needed to complete the federal tax returns first. He is almost finished with the state tax returns and will file them in about a

week. (AX B) He wanted to submit his returns as a package rather than one year at a time. He states that he is due a refund for each year.

As to the allegation in SOR 1.c, Applicant's delinquent debt of \$700 owed to the IRS for unpaid taxes has been resolved through a garnishment. (GX 3, Tr. 42)

As to the allegation in SOR 1.d, Applicant stated that the delinquent tax debt to the IRS in the amount of \$5,494 for tax year 2008 was resolved before the SOR was received. He stated that money will be refunded to him after he submits his 2008 tax return. He noted that the IRS would not send a refund to him if he owed them money.

Applicant acknowledged at the hearing that he has not filed his 2013 or 2014 federal and state tax returns. (Tr. 40) He is aware that the law requires an annual filing unless there is an extension granted. He stated that he has three years to file them if he does not owe any money and there will be no penalty. His plan in the future is to file his 2013 tax returns soon. As to his 2014, he believes he has time to complete them without penalty.

Policies

When evaluating an applicant's suitability for a security clearance, an 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. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, they are applied in conjunction with the factors listed in the adjudicative process. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. Under AG ¶ 2(c), this process is a conscientious scrutiny of a number of variables known as the "whole-person concept." An 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 access to classified information will be resolved in favor of 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.

The U.S. Government must present evidence to establish controverted facts alleged in the SOR. 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. . . .² The burden of proof is something less than a preponderance of evidence.³ The ultimate burden of persuasion is on the applicant.⁴

A person seeking access to classified information enters into a fiduciary relationship with the Government based on 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 classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 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.”⁵ “The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”⁶ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such information.⁷ The decision to deny an individual a security clearance does not necessarily reflect badly on an applicant’s character. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense established for issuing a clearance.

Analysis

Guideline F, Financial Considerations

The security concern for financial considerations is set out in AG ¶ 18:

Failure or an 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.” It also states that “an individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

² See also ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug. 10, 1995).

³ *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

⁴ ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

⁵ See also EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information), and EO 10865 § 7.

⁶ ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

⁷ *Id.*

Applicant failed to timely file his federal and state tax returns from 2007 through 2014. The IRS garnished money for delinquent taxes. Consequently, Financial Considerations Disqualifying Conditions (FC DC) AG ¶ 19(a) (inability or unwillingness to satisfy debts), FC DC AG ¶ 19(c) (a history of not meeting financial obligations) and FC DC AG ¶ 19(g) (failure to file annual Federal, state, or local income tax returns as required or fraudulent filing of the same) apply. With such conditions raised, it is left to Applicant to overcome the case against him and mitigate security concerns.

Applicant cites to a problem in 2007 with a tax filing due to his foreign spouse status. He asked for an extension and due to extensive travel for work, he just missed the deadline. He stated that the years just went by, and he meant to file but he did not. He filed his 2009 through 2012 federal and state tax returns in February 2015. He has not yet filed his tax returns for 2013 and 2014. His actions have spanned eight years and has been ongoing. He also cited to ill health. Even after an IRS garnishment, he did not begin to file the returns. Consequently, Financial Considerations Mitigating Condition (FC MC) AG ¶ 20(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) does not apply.

Financial Considerations Mitigating Condition (FC MC) AG ¶ 20(b) (the conditions that resulted in the behavior 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) does not fully apply. As noted above, Applicant had difficulty filing in 2007 and travelled extensively for work but that might mitigate the first few years. That, however is not responsible or reasonable. His filing eight years after the fact is not responsible.

FC MC AG ¶ 20(d), (the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts) has no application. Applicant recently filed his federal and state taxes for 2007-2012. He maintains that he always received a refund, but that is not the case. The IRS garnished his wages for a time. He did not voluntarily pay the delinquent debts. FC MC AG ¶ 20(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) 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 an applicant's conduct and all the circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

- (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. As noted above, the ultimate burden of persuasion is on the applicant seeking a security clearance.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, as well as the whole-person factors. Applicant is 58 years old. He is divorced and has two adult children. He served in the U.S. Navy. He has held a security clearance for many years. He has provided for his two sons after his divorce. He has had health issues. However, he has not shown good judgment in not filing his federal and state tax returns until 2015. He still has not filed for 2013 and 2014. He understands what the law requires, but he has failed repeatedly to fulfill his legal obligation to file his tax returns.

Applicant has not met his burden of proof in this case. I have doubts about his judgment and reliability. Applicant has not mitigated the security concerns under the financial considerations guideline. Any doubts must be resolved in favor of the Government.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline F :	AGAINST APPLICANT
Subparagraphs 1.a-1.d:	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. Clearance is denied.

NOREEN A. LYNCH.
Administrative Judge