



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



In the matter of:)	
)	
)	ISCR Case No. 15-01031
)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Bryan Olmos, Esq., Department Counsel
For Applicant: *Pro se*

03/04/2016

Decision

WHITE, David M., Administrative Judge:

Applicant's failed to file his Federal income tax returns for 2011, 2012, and 2013 in a timely manner, but thought that would not be a problem since he was due a refund for each year. He has since filed those returns and received substantial refunds. Resulting security concerns were mitigated. Based on a review of the pleadings and exhibits, eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted a security clearance application (SF-86) on July 29, 2014.¹ On September 15, 2015, the Department of Defense Consolidated Adjudications Facility (DoD CAF) issued a Statement of Reasons (SOR) to Applicant, detailing security concerns under Guideline F (Financial Considerations).² The action was taken under Executive Order 10865, *Safeguarding Classified Information Within Industry* (February

¹Item 3.

²Item 1.

20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines that came into effect in the Department of Defense on September 1, 2006.

Applicant submitted a written response to the SOR on October 14, 2015, and requested that his case be decided by an administrative judge on the written record without a hearing.³ Department Counsel submitted the Government's written case on November 18, 2015. A complete copy of the File of Relevant Material (FORM)⁴ was received by Applicant on November 24, 2015, and he was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation within 30 days of his receipt of the FORM. Applicant submitted additional material in response to the FORM on December 18, 2015, to which Department Counsel did not object. I received the case assignment on February 17, 2016. Applicant's FORM response is admitted into evidence as Exhibit (AE) A. Items 1 through 3 and Item 5 of the FORM are admitted into evidence, without objection by Applicant. Item 4 in the FORM is a summary of Applicant's interview on September 29, 2014, prepared by an investigator from the Office of Personnel Management (OPM) for the Report of Investigation. It was not adopted by Applicant, and no witness authenticated its contents. Accordingly, it is inadmissible per Directive E3.1.20, and will not be considered in determining Applicant's security clearance eligibility.

Findings of Fact

Applicant is 58 years old. He started work as a software engineer for a defense contractor in 2014. Since 1996 he has worked for several other companies as a software engineer, with brief periods of unemployment between jobs. He has held a security clearance in connection with some of his previous work, but has not served in the military. He earned a bachelor's degree in 1993. He has never married, and has no children.⁵

In his response to the SOR, Applicant denied the allegations in ¶¶ 1.a and 1.b in part, and admitted the allegation in ¶ 1.c with an explanation. By the time of that response he had filed each of the three untimely Federal income tax returns at issue, as discussed below. He did not, however, provide corroborating evidence clarifying his tax situation with that response. Applicant freely disclosed on his SF-86 that he had not filed his 2011, 2012, or 2013 Federal tax returns in a timely manner, explaining that he had calculated that he would be owed a refund for each of those years.⁶

³Item 2.

⁴Department Counsel submitted five Items in support of the SOR allegations.

⁵Item 3.

⁶Items 2 and 3.

SOR ¶ 1.a concerns Applicant's 2011 Federal income tax return. He filed that return on December 5, 2013. He owed \$15,830 in Federal income tax for 2011, but had \$17,904 in tax withholdings. The IRS paid him a \$2,074 refund for 2011.⁷

SOR ¶ 1.b concerns Applicant's 2012 Federal income tax return. He filed that return on September 17, 2014. He owed \$7,624 in Federal income tax for 2012, but had \$11,288 in tax withholdings. The IRS paid him a \$3,664 refund for 2012.⁸

SOR ¶ 1.c concerns Applicant's 2013 Federal income tax return. He filed that return on October 8, 2015. He owed \$14,473 in Federal income tax for 2013, but had \$15,486 in tax withholdings. The IRS paid him a \$1,013 refund for 2013.⁹

In his response to the SOR, Applicant said that his "decision to delay filing was completely unrelated to any financial over-extension or unpaid debt circumstances encountered on [his] behalf. [He] delayed filing a tax return specifically due to the fact that, in each case, [he] pre-determined that [he] would receive a tax refund. The pre-determined calculation was based on [his] known tax deductions for each year." He also stated that he sincerely regrets his actions in failing to file his tax returns in a timely manner, and now understands that filing late due to an expected refund is an unacceptable practice. Accordingly, he pledged that he will file his future Federal tax returns in advance of the April 15 deadline.¹⁰

Policies

When evaluating an applicant's suitability for a security clearance, 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 (DCs) and mitigating conditions (MCs), which are to be 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 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(a) and 2(c), the entire process is a conscientious scrutiny of applicable guidelines in the context 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.

⁷AE A.

⁸AE A. His 2012 income was reduced by a period of unemployment between jobs. See Item 2.

⁹AE A.

¹⁰Item 2.

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 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. Under Directive ¶ E3.1.15, “[t]he 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.” Section 7 of Executive Order 10865 provides: “[a]ny determination under this order adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.”

A person applying for access to classified information seeks to enter 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.

Analysis

Guideline F, Financial Considerations

The security concerns under the guideline for financial considerations are set out in AG ¶ 18, which reads in pertinent part:

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. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

Department Counsel asserted, and the record evidence established, security concerns under one Guideline F DC, as set forth in AG ¶ 19:

(g) failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same.

Applicant admittedly failed to timely file his Federal income tax returns for 2011, 2012, and 2013. These facts raise prima facie security concerns under DC 19(g), and shift the burden to Applicant to rebut, extenuate, or mitigate those concerns.

The guideline includes two conditions in AG ¶ 20 that could mitigate security concerns arising from Applicant's failure to timely file his Federal tax returns for those years:

- (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; and
- (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.

Applicant was under the impression that there was nothing legally wrong with filing his income tax returns late as long as he had already paid more taxes than were owing for that year. He had already filed his 2011 return by the time he submitted his SF-86, and filed his other two returns after becoming aware that not having done so raised potential security concerns. He correctly understood that he was entitled to significant refunds for each of the years involved, and did not fail to file because he was encountering any financial difficulties. He now realizes that, even though the Government was the only beneficiary of his late filing, he should not repeat this behavior. Under these circumstances, it did not cast doubt on his reliability, trustworthiness, or good judgment, and is unlikely to recur. Furthermore, he has filed all returns in question and received the resulting refunds, thereby fully resolving the problem. Applicant established full mitigation of financial security concerns under the two above-cited MCs.

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(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.

I considered the potentially disqualifying and mitigating conditions in light of all pertinent facts and circumstances surrounding this case. Applicant is an accountable and experienced adult, who is responsible for the voluntary choices and conduct that gave rise to the security concerns expressed in the SOR. His late filing of Federal tax returns was not serious, since it merely delayed his receipt of substantial refunds for each year. He did not realize at the time that such delays would be reason for concerns by the Government. The potential for pressure, coercion, and duress from his financial situation is eliminated by his submission of all returns in question. His credible statement of intent to file timely returns in the future indicates that recurrence is unlikely. Overall, the record evidence leaves me with no doubt as to Applicant's present eligibility and suitability for a security clearance. He fully met his burden to mitigate the security concerns arising from the alleged financial considerations.

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:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

DAVID M. WHITE
Administrative Judge