



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



In the matter of:)	
)	
)	ISCR Case No. 14-01373
)	
Applicant for Security Clearance)	

Appearances

For Government: Daniel F. Crowley, Esq., Department Counsel
For Applicant: Ryan C. Nerney, Esquire

10/02/2015

Decision

HEINY, Claude R., Administrative Judge:

Applicant contests the Department of Defense’s (DoD) intent to deny his eligibility for a security clearance to work in the defense industry. He failed to file his federal income tax returns for tax years 2007, 2008, 2010, and 2011 in a timely manner. All the returns are now filed, and he has mitigated the financial considerations security concerns. Clearance is granted.

History of the Case

Acting under the relevant Executive Order and DoD Directive,¹ on May 12, 2014, the DoD issued a Statement of Reasons (SOR) detailing financial considerations security concerns. DoD adjudicators could not find that it is clearly consistent with the

¹ 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 (AG) effective within the DoD on September 1, 2006.

national interest to grant or continue Applicant's security clearance. On June 6, 2014, Applicant answered the SOR and requested a hearing. On April 16, 2015, I was assigned the case. On April 29, 2015, the Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing for the hearing convened on May 8, 2015.

At the hearing, Government's Exhibits (Ex) 1 through 4 and Applicant's Exhibits A through P were admitted without objection. Applicant testified at the hearing. The record was held open to allow Applicant to submit additional information. Three documents, Ex. Q – S, were admitted without objection. On May 18, 2015, DOHA received the hearing transcript (Tr.).

Findings of Fact

In Applicant's Answer to the SOR, he acknowledged he had not filed federal income tax returns for tax years 2007, 2008, 2010, and 2011. In Applicant's Response to the SOR, he stated in April 2013, he filed the federal tax returns for the years in question. I incorporate Applicant's admissions as facts. After a thorough review of the pleadings, exhibits, and testimony, I make the following additional findings of fact:

Applicant is a 48-year-old security officer who has worked for a defense contractor since January 2013 and seeks to obtain a security clearance. (Tr. 41) From August 1986 through September 1991, he honorably served on active duty in the U.S. Air Force. (Ex. 1, Ex. M) From August 1990 through February 1991, he served in support of Operation Desert Shield/Storm. (Ex. M) He separated as an airman first class (E-3). (Ex. A, G, L, M, Tr. 25)

Friends, coworkers, and supervisors state Applicant is highly professional, trustworthy, courteous, honest, reliable, dedicated, capable, dependable, hardworking, and a "man of deep integrity and honesty." (Ex. H, P) Applicant displays a positive attitude, volunteers for extra duties, is willing and able to help coworkers, and has gone above and beyond what was expected of him. (Ex. P)

In January 2013, when Applicant completed his Electronic Questionnaires for Investigations Processing (e-QIP), he indicated he had not filed his 2007, 2008, 2010, and 2011 federal income tax returns. (Ex. 1) He indicated he was working with a tax service to file the returns.

From February 2012 until January 2013, Applicant was unemployed. (Ex. 1, Tr. 39) From February 2010 through February 2012, he was working for a federal contractor and living in Kosovo. (Ex. 1, 2, C) He received a certificate of appreciation for his work. (Ex. G) From November 2008 through February 2010, he was unemployed and living with his parents in the United States. (Ex. 2, Tr. 43) From November 2007 through November 2008, he resided in Kosovo working for a federal contractor. (Ex. 1, 2) During this period, he was employee of the month and also received a certificate of appreciation for his duty performance. (Ex. N) From November 2005 through November

2007, he was unemployed and living in the United States. (Tr. 35) During his unemployment, he never received unemployment compensation. (Tr. 35)

Applicant was not required to file a federal tax return for tax year 2007. For tax year 2007, the federal tax code required all single individuals under the age of 65 with a gross income of \$8,750 or more were required to file a federal tax return. (Ex. 4) His adjusted gross income (AGI) for 2007 was \$5,045. (Item E) Since his income was less than the filing threshold, his only reason to file would be to claim a refund of any amounts withheld from his salary. (Tr. 36) For 2007, approximately \$500 had been withheld from his salary. (Ex. E)

For tax year 2008, Applicant's \$58,000 salary was earned overseas and, as such, was excluded under the foreign earned income exclusion (IRS Form 2555). Because of the exclusion, he had no taxable income and owed no federal tax. For tax year 2009, he was unemployed the entire year and owed no taxes.

For tax year 2010, Applicant's salary was approximately \$31,000 earned overseas, which was again excluded from federal taxation by the foreign earned income exclusion. He therefore had no taxable income and owed no federal tax. For tax year 2011, his salary was approximately \$60,000, again excluded under the foreign earned income exclusion. (Ex. S) For tax year 2012, his salary was approximately \$20,000, of which approximately half was excluded under the foreign earned income tax exclusion. His taxable income was approximately \$1,000 on which he owed approximately \$142. On April 13, 2013, he paid his federal tax. (Ex. 3, R) For tax year 2013, he was issued a \$1,317 federal tax refund. (Ex. 3, C, Tr. 45) For tax year 2014, he received a \$1,082 federal tax refund. (Ex. I, Tr. 46)

In 2007, while residing overseas, Applicant's coworkers told him he did not make enough money to have to file a federal tax return. (Tr. 27) Relying on this advice, he did not file his 2007, 2008, 2010, and 2012 federal returns. (Tr. 27) A more correct interpretation of the IRS tax code was that his foreign earned income was excluded from taxation, which is different than not having to file. In 2012, when he learned the advice he received was incorrect, he hired a tax company specializing in overseas expatriate taxes. (Tr. 27)

Applicant has now filed all of his federal tax returns, owes no past-due tax, and intends to file all future returns in a timely manner. (Tr. 30)

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which must be considered 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 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 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.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." The applicant has the ultimate burden of persuasion to obtain 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 the applicant may deliberately or inadvertently fail to safeguard 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 (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 *a/so* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline F, Financial Considerations

Adjudicative Guideline (AG) ¶ 18 articulates the security concerns relating to financial problems:

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.

Additionally, an individual who is financially irresponsible may also be irresponsible, unconcerned, negligent, or careless in properly handling and safeguarding classified information. Behaving responsibly or irresponsibly in one aspect of life provides an indication of how a person may behave in other aspects of life.

A person's relationship with his or her creditors is a private matter until evidence is uncovered demonstrating an inability or unwillingness to repay debts as agreed. Absent substantial evidence of extenuating or mitigating circumstances, an applicant with a history of serious or recurring financial difficulties is in a position of risk that is inconsistent with holding a security clearance. An applicant is not required to be debt free, but is required to manage their finances to meet their financial obligations.

Applicant failed to file his federal income tax return for four tax years. Disqualifying Conditions AG ¶ 19(g), "failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same," apply.

Three financial considerations 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;

(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; and

(d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

Applicant failed to file his federal income tax returns for four tax years. He was working overseas and received incorrect advice that he was not required to file returns because his income was exempt from taxation. Even though he owed no tax, he still had a duty to file his returns. His foreign earned income was excluded under the foreign earned income exclusion (IRS Form 2555). When he discovered he was required to file returns even though his income was excluded, he did so.

The mitigating condition listed in AG ¶ 20(a) applies. Applicant has filed returns for the tax years listed in the SOR and all other tax years. His non filing occurred under circumstance unlikely to recur. When overseas, he relied on the incorrect advice of

other U.S. citizens working overseas. When he learned the advice was incorrect, he filed the returns. It is unlikely he will fail to file his tax returns in the future now that he knows what is required when working overseas. His actions do not cast doubt on his current reliability, trustworthiness, or good judgment.

The mitigating condition listed in AG ¶ 20(c) applies because the matter has been resolved. He has filed his returns and resolved the matter. He owed no Federal tax after filing his returns and received federal income tax refunds for tax years 2013 and 2014. The mitigating condition listed in AG ¶ 20(d) applies because he has filed his returns. However, there was no effort to repay overdue creditors because no federal tax was owed.

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.

Applicant was working overseas and relied on advice from others working overseas that he was not required to file tax returns. He was required to file returns even though all of his foreign earned income qualified for an exclusion from federal income tax. When he learned of the incorrect information, he filed his federal returns.

The issue is not simply whether all his debts are paid—it is whether his financial circumstances raise concerns about his fitness to hold a security clearance. (See AG ¶ 2(a)(1)) In this case, there was never a tax debt only a duty to file, which he failed to do until he realized he had to file. Overall, the record evidence leaves me without questions or doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the security concerns arising from his financial considerations.

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, Financial Considerations: FOR APPLICANT

Subparagraph 1.a: 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 a security clearance. Eligibility for access to classified information is granted.

CLAUDE R. HEINY II
Administrative Judge