



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
) ISCR Case No: 18-00307
)
)
Applicant for Security Clearance)

For Government: Allison O'Connell, Esq., Department Counsel
For Applicant: *Pro se*

01/31/2019

Decision

DAM, Shari, Administrative Judge:

Applicant has a history of failing to file Federal and state income tax returns and failing to pay Federal taxes. He did not mitigate the resulting financial security concerns. National security eligibility for access to classified information is denied.

Statement of the Case

On June 8, 2018, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline F, Financial Considerations. Applicant answered the SOR in writing (Answer) on July 18, 2018, and requested a hearing before an administrative judge.

On October 3, 2018, the Defense Office of Hearings and Appeals (DOHA) assigned the case to me. On October 18, 2018, DOHA issued a Notice of Hearing setting the case for November 7, 2018. The case was heard as scheduled. Department Counsel offered Government Exhibits (GE) 1 through 7 into evidence. Applicant testified. He did not offer any exhibits or object to the Government Exhibits, and all exhibits were admitted.

DOHA received the hearing transcript (Tr.) on November 16, 2018. The record remained open until December 17, 2018, to give Applicant an opportunity to submit evidence. He timely submitted an email that contained relevant information and one exhibit pertinent to a state tax issue. I marked the email as Applicant Exhibit (AE) A and the document as AE B. Department Counsel had no objections to the exhibits and they are admitted into evidence.

Findings of Fact

Applicant admitted the seven allegations in the SOR. His admissions are incorporated into these findings.

Applicant is 38 years old and divorced since 2009. His seven-year-old son from that marriage lives in another state with his mother. Applicant pays child support for his son. Applicant earned an associate's degree and is working on a bachelor's degree. (Tr. 17-19)

After graduating from high school, Applicant enlisted in the Army in 1999. He served on active duty for six years. He received an honorable discharge, as a sergeant, E-5. While serving, he deployed to the Middle East for a year and served in a combat unit. (Tr. 19-22; GE 1) He has worked for defense contractors since 2005. In 2016, he started a position working as an independent contractor for another Federal agency. (Tr. 22, 32; GE 1) He was also a partner in a small company from 2010 until 2015. (Tr. 26, 31)

Applicant has a history of failing to timely file Federal income and state tax returns and pay Federal taxes. (Tr. 28) He said the tax problems began with his 2010 Federal tax return. He thought the company for whom he worked handled his taxes and filings. He learned in 2011 or 2012 that his 2010 taxes remained unfiled and he owed about \$59,000 in unpaid income taxes. He then hired an outside company to file his tax returns for that year. That company failed to perform and he subsequently hired a second company to resolve the 2010 tax issues. (Tr. 34-37)

Applicant acknowledged that his tax problems have been ongoing since tax year 2010. (Tr. 28) He testified that he had not filed his Federal tax returns for 2010, 2011, 2012, 2013, 2014, and 2015. He said he did not know what to do after he learned that the 2010 return was not filed. He admitted that he should have been more proactive in addressing the tax issues. (Tr. 46-49, 73)

Contrary to Applicant's testimony, transcripts from the IRS, dated May 2018, indicate that those six years' returns were filed, albeit not all of them were filed timely. (GE 2) The transcripts reported:

1. Applicant's 2010 return was filed in March 2014. His adjusted gross income (AGI) was \$141,666. He had an account balance of \$59,750 in unpaid taxes for this year;

2. Applicant's 2011 return was filed in November 2012. His AGI was \$136,244. He had an account balance of \$52,962 in unpaid taxes for this year;
3. Applicant's 2012 return was filed in November 2013. His AGI was \$174,783. He had an account balance of \$74,920 unpaid in taxes for this year;
4. Applicant's 2013 return was filed in March 2016. His AGI was \$193,039. He had an account balance of \$104,098 in unpaid taxes for this year;
5. Applicant's 2014 return was filed in March 2016. His AGI was \$241,567. He had an account balance of \$107,837 in unpaid taxes for this year;
6. Applicant's 2015 return was timely filed in April 2016. His AGI was \$232,239. He owed \$8,463 in unpaid taxes for this year;¹ and
7. Applicant's 2016 return was filed in May 2017. His AGI was \$85,143. He did not owe taxes for this year.²

According to the May 2018 IRS transcripts, Applicant owed \$406,030 in unpaid taxes for the above years. (GE 2) His post-hearing submission indicated that on August 25, 2018, he paid the IRS \$8,456 to resolve his 2015 tax debt. (AE A)

In response to a question about the discrepancy between his testimony that he had not filed tax returns for years 2010 through 2015, and the IRS's records indicating that he had filed them, Applicant said he "might have [filed]" but could not remember. (Tr. 53, 79-80) In a post-hearing submission, he stated the second company he hired to handle his tax returns filed the above-mentioned returns. (AE A)

Applicant testified that he owed about \$40,000 for his 2017 Federal taxes.³ To date he has paid about \$16,000 toward the 2017 tax debt (Tr. 48, 53, 62) He acknowledged that he did not make estimated quarterly tax payments in 2017 or for other years when he was an independent contractor. (Tr. 63, 73)

Applicant has filed his state income tax returns for tax years 2008 through 2017. (Tr. 54) As of December 14, 2018, he resolved a \$57,791 tax debt he owed the state for delinquent tax debts through a two-year payment plan. (Tr. 55-56; GE 3; AE B)

¹ Applicant was a W-2 employee during 2015 and his taxes were deducted from his salary and paid by his employer.

² Applicant was a W-2 employee during 2016 and his taxes were deducted from his salary and paid by his employer.

³ The SOR does not allege a security concern related to Applicant's unpaid 2017 Federal tax debt. Hence, it will not be discussed in analyzing disqualifying conditions. It may be considered in the analysis of mitigating conditions and the whole-person concept, and in an evaluation of Applicant's credibility.

In 2013 or 2014, Applicant contacted the IRS to establish a payment plan for unpaid taxes for previous years, but he never entered into one. (Tr. 43) In December 2018, he paid his 2015 Federal tax debt, but has not established a payment plan for tax years 2010, 2011, 2012, 2013, and 2014. His large unpaid Federal income tax debt remains unresolved. He admitted that he has been neglectful. (Tr. 75)

Applicant earns \$140,000 annually from his current employer. He is an independent contractor and is responsible for tax planning for the year. He said he puts about 30% of his monthly income aside for taxes. (Tr. 56-57)

Policies

This case is adjudicated 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 *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AG) effective within the DOD on June 8, 2017.

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. The following are potentially applicable in this case:

(b) unwillingness to satisfy debts regardless of the ability to do so;

(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 has a history of failing to file Federal income tax returns for tax years 2010, 2013, and 2014, despite being aware of his duty to do so. He failed to timely file state income tax returns for 2008, 2010, 2013, and 2014. He also failed to timely pay

Federal income taxes for years 2010, 2011, 2012, 2013, 2014, and 2015, despite earning a significant salary those years. 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 five conditions that could potentially mitigate those 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, 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;
- (d) the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts; 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's Federal income tax returns for 2010 to 2017 have been filed. His state income tax returns for 2008, 2010, 2013, and 2014 have also been filed and all outstanding state taxes have been resolved. Applicant continues to owe the IRS about \$380,000 for unpaid Federal taxes for years 2010 through 2014 and 2017. His failure to timely file income tax returns for several years and pay outstanding taxes continues to cast doubt on his judgment. AG ¶ 20(a) does not apply. Applicant did not provide a credible explanation for failing to timely file three years of Federal tax returns and four years of state tax returns. He admitted that he had no valid reason for not responsibly managing and paying his taxes. His tax problems were within his control. AG ¶ 20(b) does not apply.

Applicant has not participated in credit or financial counseling, and there is no evidence that his unpaid tax debt for 2010, 2011, 2012, 2013, and 2014 is paid, being paid, resolved, or under control. AG ¶ 20(c) does not apply. He has not initiated a good-faith effort to resolve his outstanding Federal tax debt for those five tax years. AG ¶ 20(d)

does not apply. He recently resolved his 2015 Federal tax debt through a payment plan. He established some mitigation under AG ¶ 20(g) as to the 2015 debt.

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 that guideline, but some warrant additional comment.

Applicant is an intelligent 38-year-old man, who honorably served in the Army for more than six years. Since 2005, he has worked for different defense contractors and currently he works for another Federal agency.

During his hearing, Applicant discussed his history of unfiled Federal and state income tax returns and unpaid taxes, although he was unable to provide accurate information about the status of his tax filings. He has resolved all alleged state income tax filings and payment issues. His Federal income tax returns from 2010 to 2017 are now filed and he has paid his 2015 Federal tax debt. However, he has a large unpaid Federal tax debt that accumulated because he did not pay estimated taxes for several years, despite earning a high salary. He recognized his responsibility to resolve that tax debt, but has taken minimal action to do so. Applicant has not established a plan to pay that debt nor has he established a record of responsibly following tax laws and managing related financial obligations. 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).⁴

The record evidence leaves me with serious 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
Subparagraphs 1.a through 1.f:	Against Applicant
Subparagraphs 1.g and 1.h:	For 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

⁴ ISCR Case No. 12-10933 at 3 (App. Bd. June 29, 2016).