



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
) ISCR Case No. 19-00311
)
Applicant for Security Clearance)

Appearances

For Government: Eric Price, Esq., Department Counsel
For Applicant: *Pro se*

11/13/2019

Decision

Gregg A. Cervi, Administrative Judge

This case involves security concerns raised under Guideline F (Financial Considerations). Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on March 31, 2017. On March 5, 2019, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent him a statement of reasons (SOR) alleging security concerns under Guideline F. The DOD CAF acted under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; and DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive). The Adjudicative Guidelines (AG) were revised effective June 8, 2017, and apply herein. Applicant answered the SOR on April 30, 2019, and requested a hearing.

The case was assigned to me on July 8, 2019. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on August 19, 2019, scheduling the

hearing for September 10, 2019. The hearing was convened as scheduled. Government Exhibits (GE) 1 through 4 were admitted in evidence without objection. Applicant testified and submitted Applicant Exhibit (AE) A, containing several tax-payment documents and character letters. AE A was admitted in evidence without objection. DOHA received the hearing transcript (Tr.) on September 18, 2019.

Findings of Fact

Applicant is a 40-year-old information technology support technician, sponsored by a defense contractor since January 2019. He will begin working for the contractor only if he receives a security clearance. He graduated from high school in 1997 and has completed some college credits. He is single and has no children. Applicant enlisted in the U.S. Air Force in 1998, and was discharged in 2001 with a general discharge under honorable conditions. Applicant held a security clearance from 1998 to 2016.

The SOR alleges Applicant failed to file federal income tax returns for tax years 2005, and 2007 to 2009 (SOR ¶ 1.a); he failed to timely file federal income tax returns for 2006, 2010, 2011, and 2013 to 2015 (SOR ¶ 1.b); and he is indebted to the Federal Government for delinquent taxes for tax years 2010 totaling \$30,252 (SOR ¶ 1.c); 2011 totaling \$47,295 (SOR ¶ 1.d); 2015 totaling \$15,317 (SOR ¶ 1.e); and 2016 totaling \$13,075 (SOR ¶ 1.f).

In his Answer to the SOR, Applicant admitted to not filing his 2007 tax return when due, but stated that he filed his 2007 to 2012 tax returns in 2013. Applicant admitted that tax returns for 2006, 2010, 2011, and 2013 to 2015 were not filed when due, with explanations. Finally, Applicant admitted having federal tax debts for tax years 2010, 2011, 2015, and 2016, but stated that he has entered into a monthly installment repayment plan with the IRS and has made payments since November 2017.

Applicant deployed overseas as a civilian contractor to: Qatar from 2003 to 2005; Kuwait from 2005-2009; Spain (on a North Atlantic Treaty Organization (NATO) contract) from 2009 to 2012; and Afghanistan from 2014 to 2017. He contends that he was entitled to delay his federal income tax filings and payments while he was deployed to a “combat zone,” and did not have to file tax returns or make tax payments until 180 days after his last day in the combat zone, with additional adjustments based on the date he entered the combat zone. It is generally understood that this IRS rule applies to certain civilian contractors working in support of U.S. military operations in “combat zones.” Qatar, Kuwait, and Afghanistan are considered “combat zones” for purposes of the IRS rule.

Applicant did not provide documentary evidence showing that this IRS provision applied to his particular deployments, the specific dates that his tax returns would have been due under the rule, or whether he filed applicable tax returns within the allowable period. Assuming the rule applied to Applicant’s last qualifying deployment to Kuwait in 2009, it appears he would have been required to file his “delayed” federal income tax returns, and pay taxes owed, within the 180-day deadline after leaving Kuwait. Although Applicant never filed his 2005 federal income tax return, he filed his 2006 tax return in

November 2010, which may have been within the filing deadline (and paid the tax owed over the phone in June and December 2007 after receiving an IRS notice and speaking with an IRS employee on the phone). His tax returns for tax years 2007 to 2012 were filed in 2013 after returning from Spain. It appears that these tax return filings were outside the “combat zone” exclusion period permitted by the rule as there is no evidence that work for NATO in Spain qualifies for the “combat zone” or other exclusion.

Applicant deployed to Afghanistan in 2014 and returned in 2017, and filed tax returns for 2013 to 2016, in 2017. Again, he may have filed within the IRS “combat zone” exclusion rule, but did not make that clear in testimony or evidence submitted. Of note, Applicant’s IRS transcripts for tax years 2008, 2010, 2011, and 2015 show penalties were assessed, *inter alia*, for filing tax returns after their normal due dates. (GE 3)

In 2006, Applicant called the IRS from Kuwait to ask about when he was required to file tax returns. In testimony, he relayed a vague recollection of the conversation, but recalled that he had a 90 day extension and did not have to file a tax return until he returned to the United States as long as he did not owe any tax. He claimed that he made a rough estimate as to how much tax was being withheld from his pay, and what he might owe. He held the same understanding for tax years 2007 to 2009. When Applicant moved to Spain in 2009, he claimed that he was given conflicting information by a NATO official and the IRS, and said; “I heard – more or less, I heard what I wanted to hear,” that he had a similar “combat zone” exclusion delay while working in Spain under a NATO contract. (Tr. 40) Applicant took responsibility for not inquiring further, and acknowledged that he made a mistake, partially due to depression after his father passed away in 2010, partially from ignorance, and because he “stopped caring.” (Tr. 41-42) While overseas, Applicant traveled extensively for personal pleasure to several countries in Europe, the Middle East, and South America.

Applicant hired a tax consultant in July 2013, who told him the IRS would only be interested in the previous six years and not to be concerned with filing the tax year 2005 return as he did not owe anything that year. Applicant filed his tax year 2007 to 2012 returns with that consultant. He hired another tax consulting group in 2017 who filed returns for tax years 2013 to 2017.

Applicant did not pay his federal income taxes when due, for tax years 2010, 2011, 2015, and 2016. Applicant testified that he earned about \$120,000 per year while in Afghanistan and had very low expenses. He noted that he helped family members with expenses, but he could not account for how much money he gave away. He spent hundreds of thousands of dollars earned in Afghanistan on personal travel and hosting friends. (Tr. 70-76) Applicant admitted that he did not properly plan to pay his tax obligations, and when he returned from Afghanistan in 2017, he used the savings he had accumulated to pay for his living expenses while seeking a job. (Tr. 67) As of October 2018, he owed over \$105,000 in unpaid taxes, penalties, and interest. Applicant entered into a payment plan with the IRS, and agreed to pay \$75 per month, beginning in November 2017. He has made the required monthly payments.

Applicant's character letters note his integrity, honesty, work ethic, and positive character traits. Applicant testified that he currently earns over \$120,000 in pay and veteran's benefits, has about \$12,000 in savings, and about \$10,000 in a 401K retirement fund. He has not had any financial counseling since leaving active duty.

Law and Policies

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to "control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865 § 2.

National security eligibility is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines in conjunction with an evaluation of the whole person. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider a person's stability, trustworthiness, reliability, discretion, character, honesty, and judgment. AG ¶ 1(b).

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Clearance decisions must be made "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. *Egan*, 484 U.S. at 531. "Substantial evidence" is "more than a scintilla but less than a preponderance." *See v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability. *See, e.g.*, ISCR Case No. 12-01295 at 3 (App. Bd. Jan. 20, 2015).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. See, e.g., ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see, AG ¶ 1(d).

Analysis

Financial Considerations

The security concern under this guideline is set out in AG ¶ 18:

Failure 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 or sensitive information. . . .

The relevant disqualifying conditions under AG ¶ 19 include:

- (a) inability to satisfy debts;
- (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’s admissions and the evidentiary record are sufficient to establish the disqualifying conditions above.

The following mitigating conditions under AG ¶ 20 are potentially relevant:

- (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, 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;

(e) the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue; 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 tax issues arose from his work in combat zones from 2003 to 2009, and 2014 to 2017, which presumably allowed him to invoke an IRS rule allowing him to delay the filing of tax returns and payment of taxes owed after leaving the combat zone. Applicant failed to file tax returns when due, and pay taxes when owed.

Applicant did not file his 2005 federal income tax return, and well after the deadline, his tax consultant told him not to. He filed his 2006 tax return in November 2010, which may have been within the filing deadline (and paid the tax owed over the phone in June and December 2007 after receiving an IRS notice and speaking with an IRS employee on the phone). His tax returns for tax years 2007 to 2012 were filed in 2013 after returning from Spain, seemingly outside the "combat zone" delay rule. He deployed to Afghanistan in 2014 and returned in 2017, and filed tax returns for 2013 to 2016, in 2017. Again, he may have filed some of these within the IRS "combat zone" delay rule, but did not make that clear in testimony or evidence submitted. Of note, Applicant's IRS transcripts for tax years 2008, 2010, 2011, and 2015 show penalties were assessed, *inter alia*, for filing tax returns after the due dates.

Applicant did not pay his federal income taxes when due, for tax years 2010, 2011, 2015, and 2016. He entered into a repayment plan with the IRS in 2017, and has been paying \$75 per month under that plan. As of October 2018, he owed over \$105,000 in unpaid taxes, penalties, and interest. Although Applicant earned a substantial income while overseas, he spent his money on personal travel and entertainment, as well as helping his family members, rather than paying his federal income taxes. He admitted that he did not plan properly for his tax obligations, and when he returned from

Afghanistan in 2017, he used the savings he had accumulated to pay living expenses while seeking a job.

The DOHA Appeal Board has long held:

Security requirements include consideration of a person's judgment, reliability, and a sense of his or her legal obligations. *Cafeteria & Restaurant Workers Union, Local 473 v. McElroy*, 284 F.2d 173, 183 (D.C. Cir. 1960), *aff'd*, 367 U.S. 886 (1961). Failure to comply with federal tax laws suggests that an applicant has a problem with abiding by well-established government rules and regulations. Voluntary compliance with rules and regulations is essential for protecting classified information. See, e.g., ISCR Case No. 14-04437 at 3 (App. Bd. Apr. 15, 2016).

Applicant's lack of financial responsibility with regard to tax obligations shows a history of financial irresponsibility. His financial problems have been longstanding and remain a current concern. I am not convinced he has overcome his propensity to spend his income on personal entertainment at the expense of his federal tax obligations. Applicant has shown that he could have contacted the IRS, even while overseas, to request guidance, and he twice retained tax consultants to assist him. Applicant could have sought knowledgeable guidance on filing tax returns while deployed, and after returning from deployments, but chose to largely ignore the issue. I am not convinced that similar behavior will not recur, and he continues to carry a substantial debt to the IRS despite some personal savings and substantial income.

Overall, I believe Applicant preferred to remain willfully ignorant of his tax obligations while enjoying extensive personal travel and spent the money he should have saved to pay his taxes. Based on the record presented, I am unable to conclude that Applicant's financial problems are under control or are unlikely to recur. Applicant is credited for eventually filing all outstanding tax returns and entering into an IRS tax repayment plan under AG ¶ 20 (g). However, that mitigating credit does not eliminate the security concerns raised by Applicant's overall financial irresponsibility as it relates to filing and paying federal income taxes when required. I remain doubtful about Applicant's current reliability, trustworthiness, good judgment, and willingness to voluntarily abide by government rules and regulations.

Whole-Person Concept

Under AG ¶¶ 2(a), 2(c), and 2(d), the ultimate determination of whether to grant national security eligibility must be an overall commonsense judgment based upon careful consideration of the guidelines and the 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). Although adverse information concerning a single criterion may not be sufficient for an unfavorable eligibility determination, the individual may be

found ineligible if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility, or unstable behavior. AG ¶ 2(e).

I considered all of the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my findings of fact and comments under Guideline F in my whole-person analysis. Applicant's personal difficulties and assignments overseas do not overcome his history of financial irresponsibility and willful ignorance of his federal tax obligations.

Accordingly, I conclude Applicant has not carried his burden of showing that it is clearly consistent with the national security interests of the United States to grant him eligibility for access to classified information.

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
Subparagraph 1.a and 1.b:	For Applicant
Subparagraphs 1.c - 1.f:	Against Applicant

Conclusion

I conclude that it is not clearly consistent with the national security interest of the United States to grant Applicant eligibility for access to classified information. Clearance is denied.

Gregg A. Cervi
Administrative Judge