



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



In the matter of:)
)
-----) ISCR Case: 19-02654
)
Applicant for Security Clearance)

Appearances

For Government: Aubrey De Angelis, Esquire, Department Counsel
For Applicant: *Pro se*

September 10, 2021

Decision

ROSS, Wilford H., Administrative Judge:

Applicant has filed all of his Federal income tax returns for tax years 2011 through 2018. Applicant’s dilatoriness was due to confusion regarding rules on Americans working overseas, rather than an intent to avoid taxes. Resulting security concerns were mitigated. Based upon a review of the pleadings, exhibits, and testimony, national security eligibility for access to classified information is granted.

Statement of Case

Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) on June 18, 2018. (Government Exhibit 1.) On May 14, 2020, the Department of Defense Consolidated Adjudications Facility (DoD CAF) issued a Statement of Reasons (SOR 1) to Applicant, detailing security concerns 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 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, effective within the Department of Defense on June 8, 2017.

Applicant submitted an answer to the SOR dated May 28, 2020, and requested a hearing before an administrative judge. (Answer 1.) On July 31, 2020, Department Counsel submitted an Amendment to the Statement of Reasons to Applicant. (SOR 2.) Applicant submitted a written response to SOR 2 on October 20, 2020. (Answer 2.)

The Government was ready to proceed on July 31, 2020. The case was assigned to me on August 11, 2020. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on March 17, 2021. The hearing was convened as scheduled on April 12, 2021. The Government offered Government Exhibits 1 through 3, which were admitted without objection. Applicant testified on his own behalf and offered Applicant Exhibits A and B, which were admitted without objection. DOHA received the transcript of the hearing (Tr.) on April 26, 2021. Applicant requested the record remain open for receipt of additional information. On April 28, 2021, Applicant submitted Applicant Exhibit C, which was also admitted without objection. The record then closed.

Findings of Fact

Applicant is 54 years old and separated. He has a high school education and is employed by a defense contractor as a Site Manager. He is a retired master gunnery sergeant (E-9) in the Marine Corps. (Government Exhibit 1 at Sections 13A, 15, and 17; Applicant Exhibit C at 4-5; Tr. 39-40.)

Paragraph 1 (Guideline F, Financial Considerations)

The Government alleged in this paragraph that Applicant is ineligible for clearance because he has failed to meet his financial obligations and is therefore potentially unreliable, untrustworthy, or at risk of having to engage in illegal acts to generate funds. Applicant denied all the allegations in both SOR 1 and SOR 2. He also submitted additional information to support the granting of national security eligibility.

Specifically, the Government alleged in SOR 1 that Applicant had not filed his 2011 through 2018 Federal tax returns as of the date of the SOR, May 14, 2020. Applicant denied this allegation, stating in Answer 1 that he had filed all of the subject returns in 2019.

Applicant retired from the Marine Corps in 2011 and began working overseas as a contractor. All or most of the salaries of Americans who are working and living full-time overseas are exempt from Federal taxes. The maximum Foreign Earned Income Exclusion rose from \$92,900 in 2011 to \$103,900, which covered all of his post-retirement income from the defense contractor, as shown in his tax documents. Such a situation

does not, however, obviate the requirement to timely file a tax return every year, or to pay taxes on his retirement pay, which is subject to withholding. Even though his wages were not taxable, Applicant's employer withheld Federal taxes at the zero exemptions rate, which meant that the largest amount of withholding would be withdrawn. Applicant mistakenly believed that the fact his wages were not taxable meant that he did not have to file a return. Applicant discussed this erroneous belief with a Government investigator from the Office of Personal Management (OPM) on June 25, 2019. He later testified, "I kind of looked at it as a savings account, to be honest with you. When I needed it, I could get it." (Government Exhibit 2; Tr. 25-27.)

On September 12, 2019, Applicant was contacted by a Department Counsel (DC) from DOHA. That DC asked Applicant if he had filed his tax returns from years 2011 through 2017. Subsequent to that initial email DC and Applicant continued to communicate through the remainder of 2019. In an email dated September 16, 2019, DC stated, "Because it appears OPM may have given you some inaccurate information regarding this issue [Applicant's unfiled tax returns]. I'm going to delay further processing of your file for a brief period to permit you to address the situation." (Applicant Exhibit A.)

Applicant subsequently stated to DC in an email dated November 20, 2019, that he had filed all the required returns. The last email that Applicant had in his possession is dated December 17, 2019. In that email he stated to DC, "I have been checking on my status at least every other day and all that I can tell you is that I was told that it could take 6 weeks before I hear anything back since I had to do a paper return." (Applicant Exhibit A.)

Government submitted two subsequent emails between Applicant and DC. Applicant emailed DC on December 30, 2019, stating that he still had not received any new information from the IRS, but he had filed all the required tax returns. DC responded on December 31, 2019, asking Applicant to scan and email him all of the documentation Applicant had sent to the IRS. (Government Exhibit 3.) Applicant stated that he never received this email. (Answer 2; Tr. 15-16.)

Turning to the specific tax years at issue:

IRS records dated April 14, 2021, show that Applicant's 2011 Federal tax return was "received for processing" on December 30, 2019. Those records further show that after applying various credits Applicant had no balance owed for that year. This documentation also resolves the allegation in SOR 1.b that Applicant owed \$805.31 for that tax year. (Applicant Exhibits B at 1, C at 6-7; Tr. 23-24, 27-28.)

IRS records dated April 14, 2021, show that Applicant's 2012 Federal tax return was "secured" on December 30, 2019. Those records further show that after applying various credits Applicant had no balance owed for that year. In fact, the records show Applicant received a refund. This documentation also resolves the allegation in SOR 1.c

that Applicant owed \$20,153.53 for that tax year. (Applicant Exhibits B at 2-3 and 9, C at 8-10; Tr. 29.)

IRS records dated April 14, 2021, show that Applicant's 2013 Federal tax return was received for processing on December 30, 2019. Those records further show that after applying various credits Applicant had no balance owed for that year. (Applicant Exhibits B at 4, C at 12-13; Tr. 31.)

IRS records dated April 14, 2021, show that Applicant's 2014 Federal tax return was "secured" on January 2, 2020. Those records further show that after applying various credits and transfers Applicant had no balance owed for that year. This documentation also resolves the allegation in SOR 1.d that Applicant owed \$1,255.50 for that tax year. (Applicant Exhibits B at 5, C at 16-17; Tr. 32-33.)

IRS records dated April 14, 2021, show that Applicant's 2015 Federal tax return was received for processing on December 27, 2019. Those records further show that after applying various credits Applicant had no balance owed for that year. In fact, Applicant received a refund for that year. (Applicant Exhibits B at 6, C at 18-19; Tr. 31.)

IRS records dated March 20, 2021, show that Applicant's 2016 Federal tax return was received for processing on November 25, 2019. Those records further show that after this return was examined and various credits applied Applicant had a credit balance owed to him of \$8,216, for that year. According to Applicant he has yet to receive this money. (Applicant Exhibits B at 7, C at 20-21; Tr. 30, 33.)

IRS records dated April 14, 2021, show that Applicant's 2017 Federal tax return was filed on January 6, 2020. Those records further show that Applicant had a credit of \$7,837 for that year transferred out to his 2012 taxes. (Applicant Exhibits B at 8, C at 22; Tr. 33-35.)

IRS records dated April 14, 2021, show that Applicant's 2018 Federal tax return was filed on December 30, 2019. Those records further show that Applicant had a credit of \$7,287 for that year transferred out to his 2012 taxes. (Applicant Exhibits B at 9, C at 24-25; Tr. 33-35.)

Applicant has been in discussions with the IRS about his 2019 and 2020 taxes. Applicant stated that he is ready and able to file those tax returns once the IRS has concluded their work with his old tax returns and finished sending him any money that is owed to him, which the IRS stated would be by the end of May 2021. He also stated that dealing with the IRS has been difficult because of the pandemic. Applicant further indicated that he believed he would receive a substantial refund for 2019 and 2020. Finally, Applicant stated that he would sure to timely file his returns in the future so as to avoid this confusion. (Tr. 35-38, 40-41.)

Policies

When evaluating an applicant's national security eligibility, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines (AG) list potentially disqualifying conditions and mitigating conditions, which are to be used in evaluating an applicant's national security eligibility.

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. 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.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires, "Any 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. I have not drawn inferences based on mere speculation or conjecture.

Directive ¶ E3.1.14 requires the Government to 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 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 national security eligibility. 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 or sensitive information. Finally, as emphasized in Section 7 of Executive Order 10865, "Any 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." 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, which reads in pertinent part:

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. Financial distress can also be caused or exacerbated by, and thus can be a possible indicator of, other issues of personal 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 or otherwise questionable acts to generate funds.

AG ¶ 19 describes one condition that could raise security concerns and may be disqualifying in this case:

(f) failure to file or fraudulently filing annual Federal, state, or local income tax returns or failure to pay Federal, state, or local income tax as required.

Applicant failed to timely file Federal income tax returns, as required, for tax years 2011 through 2018. These facts establish *prima facie* support for the foregoing disqualifying conditions and shift the burden to Applicant to mitigate those concerns.

The guideline includes one condition in AG ¶ 20 that could mitigate the security concerns arising from Applicant's failure to timely file tax returns:

(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 had been delinquent in filing his tax returns due to confusion over the requirement to do so since he lived and worked overseas. Applicant also had a good-faith, but mistaken, belief that if he did not owe taxes he did not have to file a tax return. As stated, Department Counsel contacted Applicant in September 2019 and informed him of the requirement to file his past tax returns, and that he might have received improper information from OPM. At that point Applicant got to work and filed all of his delinquent tax returns by the end of 2019. Through a breakdown in communication Applicant did not forward the information to DC. The facts show that Applicant had filed all of his tax returns months before the date of the SOR. Once his current situation with the IRS is concluded and he has received all the money he is owed, Applicant indicated a credible intent to not

allow this situation to recur in the future. Applicant fully mitigated the concerns over his income tax return issues. Guideline F is found for Applicant.

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) 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.

According to AG ¶ 2(c), the ultimate determination of whether to grant national security eligibility must be an overall commonsense judgment based upon careful consideration of the applicable 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 provided sufficient evidence to show that he has resolved his tax issues, and that they will not recur in the future. The potential for pressure, exploitation, or duress has been resolved. Overall, the evidence does not create substantial doubt as to Applicant's judgment, eligibility, and suitability for a security clearance. Applicant has met his burden to mitigate the security concerns arising under the guideline for 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

Subparagraphs 1.a through 1.d:

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 national security eligibility and a security clearance. Eligibility for access to classified information is granted.

Wilford H. Ross
Administrative Judge