



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



In the matter of:)	
)	
)	ISCR Case No. 23-01614
)	
Applicant for Security Clearance)	

Appearances

For Government: Patricia Lynch-Epps, Esq., Department Counsel
For Applicant: Todd Hull, Esq.

09/24/2024

Decision

BENSON, Pamela C., Administrative Judge:

Applicant successfully refuted the security concern raised under Guideline F (financial considerations). National security eligibility for access to classified information is granted.

Statement of the Case

On July 22, 2022, Applicant completed and signed his security clearance application (SCA). On November 9, 2023, the Defense Counterintelligence and Security Agency (DCSA) Consolidated Adjudication Services (CAS) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline F (financial considerations) and Guideline E (personal conduct). The action was taken under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense (DOD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the *National Security Adjudicative Guidelines* (AG) effective within the DOD on June 8, 2017.

On December 21, 2023, Applicant provided a response to the SOR. (Answer) He requested a hearing before an administrative judge. The case was assigned to me on

May 8, 2024. On June 28, 2024, the Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing, setting the hearing for July 16, 2024.

During the hearing, Department Counsel offered Government Exhibits (GE) 1 through 6, and Applicant provided 12 documents labeled as Applicant Exhibits (AE) A through L. All proffered documents were entered into evidence without objection. Applicant testified and called three witnesses to testify on his behalf. I held the record open for two weeks, until July 30, 2024, in the event either party wanted to submit additional documentation after the hearing. DOHA received the hearing transcript (Tr.) on July 25, 2024. No documents were offered after the hearing, and the record closed on July 30, 2024.

AMENDMENTS TO THE SOR

Department Counsel made a motion at the beginning of the hearing to amend the SOR to conform to the evidence. She requested that I strike the word “**delinquent**” from SOR ¶¶ 1.a through 1.l, and to strike the words, “You **failed to timely file federal taxes,**” from SOR ¶¶ 1.d and 1.k. She also asked that the second paragraph of the SOR (Guideline E) and the two SOR allegations cited below, SOR ¶¶ 2.a and 2.b, be withdrawn from the SOR. There were no objections, and the requested changes were made to the original SOR. (Tr. 7-9)

Findings of Fact

Applicant is 63 years old, married, and he has three adult children. He enlisted in the U.S. Marine Corps in August 1985, and he was honorably discharged in May 1990. He earned some college credits, but not enough for a college degree. Since 2009, Applicant has been working in a U.S. Embassy as a contractor employee in the Middle East in support of U.S. Armed Forces. His work site is considered by the federal government to be in a “combat or war zone.” He has held various levels of security clearances during his military service and as a federal contractor beginning in 2004. (Tr. 8, 26, 115, 121, 123; GE 1)

Applicant admitted in his Answer to having failed to pay his federal income taxes for tax years 2010, 2011, 2013, and 2015. (SOR ¶¶ 1.a-1.c, and 1.e) He denied that he *failed to file* any income tax returns (language withdrawn) but he was indebted for federal taxes for tax years 2014 and 2020. (SOR ¶¶ 1.d and 1.k.) He admitted that he was indebted to the federal government for unpaid taxes for tax years 2015 – 2019. (SOR ¶¶ 1.e, 1.f, 1.g, 1.h, and 1.j.) He denied that he was indebted to his state for unpaid taxes for tax year 2018 (SOR ¶ 1.i), and he denied that he was indebted to the federal government for unpaid taxes for tax year 2022. (SOR ¶ 1.l.) He listed that all of the allegations, as listed in the SOR, were covered under the Combat Zone Extension Provision of Internal Revenue Code (IRC) 7508 and 7508(a). His actions of not paying his federal and state taxes are permissible under law and cannot be considered a deliberate act of evasiveness. (Answer)

Financial Considerations

The SOR alleges Applicant failed to pay his 2010, 2011, 2013 through 2020, and 2022 federal income taxes. It also alleged he failed to pay state taxes for 2018. During the hearing, the Government acknowledged and recognized that the Internal Revenue Service (IRS) has provisions in the IRS Code that create an exception to meeting deadlines as it relates to the filing, paying, and other such actions for certain individuals working in designated combat zones, and that Applicant has met the criteria and chose to take advantage of this exception. Testimony during the hearing confirmed that Applicant could owe in excess of \$150,000 in federal and state taxes, which are not considered delinquent. Department Counsel stated that the security concern in this hearing was to evaluate Applicant's significant tax debt to the IRS, which continues to grow without an end date, and to determine whether he has an ability to pay this tax debt when it becomes due. (Tr. 11-12; AE K, L; GE 5, 6; Answer)

Applicant testified that he is exempt from paying any federal and state income taxes by the IRS while he is employed in a designated combat zone. He has every intention to set up a payment plan, but he cannot set up a payment plan with the IRS or state until he is out of a combat zone. He and his wife have tried on multiple occasions, but they were told by tax representatives that if Applicant is currently in a combat zone, then a payment plan was not permissible. Applicant is compliant with federal tax laws, and once he is out of a combat zone for 180 days, he is then required to initiate a payment plan. Applicant provided sufficient evidence to support his claims that he is compliant with the current tax laws. He also recently increased his tax withholdings to help reduce the amount of money that he will owe to the IRS and the state once he is required to start a repayment plan. (AE B, C, D, E, F, K, L; Tr. 150)

During the hearing, Applicant testified that he takes this financial responsibility as well as his job very seriously. He and his wife do not live an extravagant lifestyle, but they decided they would help their children with their college education so that they could start their new careers without owing student loans. They were happy to achieve this goal. He lives within his means, and he is financially responsible. He has no delinquent financial accounts. He stated that he would be willing to use the funds from either his mother's estate, or his wife's parents' estate, if necessary, to pay his deferred taxes. He is a patriot, a veteran, and a loyal government contractor. (Tr. 129, 150-155)

Applicant's security manager, also known as the company's facility security officer (FSO), testified as a witness. She stated that Applicant has been with the company since 2022, and he is considered a good employee. She reviewed his security file, and he had no prior incident reports, suspensions, or revocations. She believes there was an issue in the proper processing of his security clearance. She finds Applicant worthy of having his security clearance reinstated since he is considered a valued asset to the DOD. (Tr. 24 – 35)

Applicant's son and wife also testified as witnesses. His wife is responsible for filing their tax returns, and they have used accountants and a tax attorney over the years for assistance. They have always filed their joint federal and state tax returns on a timely

basis. The advice she has received over the years is that they are not exempt from paying taxes, but under IRC 7508, the taxes are considered deferred, with no penalties or interest accruing for the time that Applicant is serving in a combat zone. She has called the IRS on multiple occasions and verified that they are in full compliance with the tax code. She tried to arrange payment plans with the state and IRS, but she was advised that a payment plan cannot be maintained until Applicant is out of a combat zone for at least 180 days. Applicant's wife also confirmed that for tax years 2010 through 2022, her husband worked in a combat zone. It has always been their intention to arrange payment plans with the IRS and state once her husband is out of a combat zone for 180 days or more. Both Applicant's wife and oldest son testified that Applicant is honest, trustworthy, and a loyal American. (Tr. 74-89, 127; AE B, C, D, E, F) His wife stated,

My husband has dedicated the last 20 years of his life to provide for his family. He has missed so many family times, you know, special moments, holidays, birthdays, watching his children grow up. And this is a sacrifice that he has done for his family, but also for his country. If his clearance were to be taken, he would be devastated not only personally, but also career-wise. He's 63 years old. (Tr. 88)

Applicant's wife said there have been issues in the past with the IRS incorrectly coding their income tax returns. The incorrect coding does not properly reflect that her spouse is still working in a combat zone. She has hired an attorney and is considering reaching out to a tax advocate to make sure that all of the coding is correct for their income tax returns for tax years 2010 to present. (Tr. 104-106, 108)

Character Evidence

Applicant provided four letters of support from character references. One character reference appears to know Applicant from her role as a contractor supervisor of the security team. She reported that Applicant's "knowledge, skills, and abilities are amongst the highest" of his peers. The other three character references have worked with Applicant at the U.S. Embassy in the Middle East. They all attest to Applicant's trustworthiness, professionalism, and they consider him an invaluable asset to the mission. All three co-workers are aware of the stringent and extensive requirements of an individual entrusted to work in a high-threat level embassy. Nonetheless, all three of his co-workers vouch that Applicant has their highest recommendation for reinstatement of his security clearance. (AE G, H, I, J)

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 are 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 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 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. Likewise, I have not drawn 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. Under Directive ¶ E3.1.15, an "applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel and 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 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 *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Financial Considerations

AG ¶ 18 articulates the security concern for financial problems:

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 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 or otherwise questionable acts to generate funds. . . .

The guideline notes several conditions that could raise security concerns under AG ¶ 19. The following is potentially applicable in this case:

- (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.

The SOR alleges that Applicant is indebted to the federal government and the state for unpaid income taxes for the tax years 2010, 2011, 2013 through 2020, and 2022. The total amount of Applicant's legally deferred income taxes may exceed \$150,000. However, the Government must present sufficient evidence to show that a disqualifying condition is applicable in this instance. I find that the Government has been unable to meet this burden, as there is no evidence of any wrongdoing by Applicant. There is insufficient evidence to demonstrate that Applicant is unable or unwilling to arrange a payment plan to pay his legally deferred income taxes after he is no longer employed in a combat zone for 180 days. I cannot speculate whether he has the financial means to pay his deferred taxes once he is required by law to do so, but their intentions are to pay the taxes when due. He is current on all of his financial obligations, and he and his wife timely file all of their federal and state income tax returns, as required. There is no evidence Applicant is required, at this time, to pay annual or state income taxes based on IRC 7508 and 7508(a), as provided in the record. He has tried to set up payment plans in the past with the state and IRS, but he was informed that as long as he remains in the combat zone, payment plans are not permitted. Applicant follows the current tax law, and I find that he has successfully refuted the financial considerations security concerns alleged in the SOR.

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.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security 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 the facts and circumstances surrounding this case. I have incorporated my comments under Guideline F and the AG ¶ 2(d) factors in this whole-person analysis.

The Federal government must be able to repose a high degree of trust and confidence in persons granted access to classified information. In deciding whether to grant or continue access to classified information, the Federal government can take into account facts and circumstances of an applicant's personal life that shed light on the person's judgment, reliability, and trustworthiness. Furthermore, security clearance decisions are not limited to consideration of an applicant's conduct during work or duty hours. Even if an applicant has a good work record, his or her off-duty conduct or circumstances can have security significance and may be considered in evaluating the applicant's national security eligibility.

Applicant has sacrificed many years with his family to devote to his country. Since 2009 he has worked in a high-threat level embassy located in the Middle East. His peers attest to his trustworthiness and professionalism, and they consider him an invaluable asset to the mission. They highly recommend Applicant's security clearance be reinstated. I have carefully applied the law, as set forth in Egan, Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. Financial Considerations security concerns are refuted.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the amended SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline F:	FOR APPLICANT
Subparagraphs 1.a-1.i:	For Applicant
Paragraph 2, Guideline E:	WITHDRAWN
Subparagraphs 2.a and 2.b:	Withdrawn

Conclusion

In light of all of the circumstances presented by the record in this case, I conclude that it is clearly consistent with national security to grant or continue Applicant's national security eligibility. Eligibility for access to classified information is granted.

Pamela C. Benson
Administrative Judge