



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



In the matter of:)
)
) ISCR Case No. 15-02931
)
Applicant for Security Clearance)

Appearances

For Government: Robert J. Kilmartin, Esq., Department Counsel
For Applicant: *Pro se*

11/22/2016

Decision

COACHER, Robert E., Administrative Judge:

Applicant mitigated the financial considerations security concern. Eligibility for access to classified information is granted.

Statement of the Case

On December 6, 2015, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline F, financial considerations. The DOD acted under Executive Order (EO) 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) implemented by the DOD on September 1, 2006.

Applicant answered the SOR on February 12, 2016, and requested a hearing. The case was assigned to me on April 5, 2016. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on April 12, 2016, setting the hearing for June 15, 2016. The hearing was held as scheduled. The Government offered exhibits (GE) 1 through 6 which were admitted into evidence without objection. The

Government's discovery letter, which contained an exhibit list, was marked as a hearing exhibit (HE) I. HE II is the official Government publication from which I took administrative notice (See footnote 4). Applicant testified, but did not offer any exhibits at the hearing. The record was held open to allow Applicant to submit additional evidence. He submitted Applicant's exhibits (AE) A and B. Those exhibits were admitted without objection. DOHA received the hearing transcript (Tr.) on June 24, 2016.

Findings of Fact

Applicant is 34 years old and has worked for his current government contractor-employer since 2012. He is a high school graduate. He is single with no children. He served in the Air Force from 2001 to 2006, when he was honorably discharged. He deployed to Iraq during his service. He has held a security clearance in the past.¹

In his answer, Applicant admitted the sole allegation that he owed approximately \$95,800 for his 2009 – 2011 federal income tax debt. He explained that he worked out a payment plan with the IRS and was making payments under that plan.²

Applicant explained that from 2007 through 2011, he worked for various federal contractors at several overseas locations. His taxable income for years 2009 through 2011, respectively, was \$143,410; \$163,365; and \$74,465. While he was deployed, he hired a tax preparer located in the city where he resided. This tax preparer was recommended by some of his coworkers who were deployed with him and experienced similar income and work environments. Applicant used this tax preparer to file his 2009 through his 2011 tax returns. Initially, he received refunds from the IRS for tax year 2009 in the amount of approximately \$21,000 and for 2010 in the amount of approximately \$22,000. He expected to also receive a sizable refund for 2011, and when he did not in the expected timeframe, he contacted the IRS and was told he owed approximately \$58,000. He was shocked by this news, based upon his recent receipt of refunds.³

Applicant went back to his tax preparer for an explanation, but did not receive one. He also contacted a tax advocate firm for assistance, but again he was unsatisfied with the information. He was not working at this time and was forced to change locations and live with family members to make ends meet. He eventually hired a tax attorney to contest the IRS determination. He was informed that his tax preparer had claimed an exemption for foreign income credit that Applicant was not entitled to claim. I took administrative notice that in March 2015, the Department of Justice (DOJ) sought to enjoin this tax preparer "from preparing federal tax returns that contain or involve foreign earned income, and from promoting to others the exclusion of foreign earned

¹ Tr. at 5, 18, 33, 54; GE 1.

² Answer.

³ Tr. at 19-23; GE 2 (See taxpayer account transcripts for 2009-2011).

income.”⁴ DOJ determined from 2009 to 2012, the tax preparer prepared approximately 800 returns claiming the foreign earned income exclusion. Once Applicant was made aware of the errors made by his tax preparer by claiming the tax exemption he was not entitled to claim, he directed his tax attorney to stop contesting the IRS determination and work out a payment plan with the agency.⁵

Applicant began making \$400 monthly payments to the IRS in June 2015, before the SOR was issued. He provided documentation of those payments made electronically through his bank. Many of Applicant's coworkers who used the same tax preparer have found themselves in similar situations. Applicant recognized that ultimately it was his responsibility to insure his income tax returns were correct when he filed them. He intends to pay all his tax debt. He filed his 2012 through 2014 federal tax returns and owes no tax liability for those years. Other than his tax debt, he has no delinquent obligations. His personal financial statement reflects that he has accounted for his monthly IRS payment within his budget. He received financial counseling from his tax attorney⁶

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 that are to be 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, administrative judges apply the guidelines 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

⁴ Administrative or official notice is the appropriate type of notice used for administrative proceedings. See ISCR Case No. 05-11292 at 4 n.1 (App. Bd. Apr. 12, 2007); ISCR Case No. 02-24875 at 2 (App. Bd. Oct. 12, 2006) (citing ISCR Case No. 02-18668 at 3 (App. Bd. Feb. 10, 2004) and *McLeod v. Immigration and Naturalization Service*, 802 F.2d 89, 93 n.4 (3d Cir. 1986). Neither party objected to my noticing the facts from Hearing Exhibit (HE) II. See Tr. at 50-52.

⁵ Tr. at 27-28; GE 2 (See IRS Notice dated October 14, 2015).

⁶ Tr. at 28, 30, 32, 37, 45, 52; GE 2; AE A, B.

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 the applicant or proven by Department Counsel.” The applicant has the ultimate burden of persuasion to obtain a favorable 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 about potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that adverse 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* Executive Order 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline F, Financial Considerations

The security concern for financial considerations is set out in AG ¶ 18 as follows:

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.

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

- (a) inability or unwillingness to satisfy debts; and
- (c) a history of not meeting financial obligations.

Due to his tax preparer’s error, Applicant owed federal taxes for years 2009 to 2011. AG ¶¶ 19(a) and (c) apply.

Several 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 accrued tax liability because his tax preparer illegitimately claimed a foreign earned income exemption Applicant was not entitled to claim. This error resulted in significant tax liability for Applicant for tax years 2009 to 2011. Applicant acted responsibly when he discovered that the tax preparer had erred. He directed his tax attorney to negotiate a payment plan with the IRS. He has made monthly payments of \$400 since June 2015. He is in good standing with all his other debts and received financial counseling. He is resolving his tax debt, and that debt was due to his tax preparer's error, which is unlikely to recur. Overall, the evidence does not cast doubt on Applicant's current trustworthiness, reliability, and judgment. AG ¶¶ 20(a), 20(c), and 20(d) apply.

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.

I considered the potentially disqualifying and mitigating conditions in light of all relevant 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(a) were addressed under that guideline, but some warrant additional comment.

I considered Applicant's military service and his federal contractor service, including his overseas deployments in both circumstances. I found Applicant to be honest and candid; although somewhat gullible, about the circumstances that led to his tax issues. He took appropriate and timely action to resolve his taxes and pay his tax debt once he realized what the problem was. I find it unlikely that Applicant will find himself in a similar future situation.

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 financial considerations security concern.

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

Robert E. Coacher
Administrative Judge