



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



In the matter of:)	
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SSN: -----)	ISCR Case No. 06-26675
)	
)	
Applicant for Security Clearance)	

Appearances

For Government: James F. Duffy, Esquire, Department Counsel
For Applicant: Pro Se

February 26, 2008

Decision

MALONE, Matthew E., Administrative Judge:

On February 24, 2006, Applicant submitted an application to renew the security clearance required for his employment with a defense contractor. After reviewing the results of the ensuing background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) were unable to make a preliminary affirmative finding² that it is clearly consistent with the national interest to grant Applicant's request. On July 13, 2007, DOHA issued to Applicant a Statement of Reasons (SOR) alleging facts

¹ The Statement of Reasons incorrectly lists Applicant's first name as "-----."

² Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.

which raise security concerns addressed in the Revised Adjudicative Guidelines (AG)³ under Guideline E (personal conduct).

On October 3, 2007, Applicant responded to the SOR and requested a hearing. The case was assigned to me on November 2, 2007, and I scheduled a hearing to be held on December 14, 2007. The parties appeared as scheduled. The government presented ten exhibits (Gx. 1 - 10).⁴ Applicant testified in his own behalf and submitted one exhibit (Ax. A). DOHA received the transcript (Tr.) on January 4, 2008. I left the record open to allow Applicant time for a post-hearing submission. On January 7, 2008, I received information from Applicant which has been included in the record as Ax. B. Based upon a review of the case file, pleadings, exhibits, and testimony, Applicant's request for a security clearance is granted.

Procedural Issues

As originally issued, the SOR alleged under Guideline E that Applicant deliberately made false statements to the government through a Questionnaire for National Security Positions (QNSP) dated February 24, 2006. Specifically, it was alleged he lied when he answered "no" to QNSP question 23, which is purported to have elicited information about his arrest record, thus omitting the fact he was charged in March 2003 with assault and battery. (SOR ¶ 1.a). The government further alleged Applicant lied when he answered "no" to QNSP question 27, which is purported to have elicited information regarding whether Applicant had any tax liens against him in the preceding seven years, thus omitting the fact he had a federal tax lien against him. (SOR ¶ 1.b)⁵ Finally, the government alleged Applicant lied when he answered "no" to QNSP question 28, which is purported to have elicited information about whether Applicant owed any debts greater than 180 days past due in the last seven years, or whether he was then more than 90 days past due on any debt, thus omitting again the fact he had a federal tax lien against him. (SOR ¶ 1.c)

On October 30, 2007, Department Counsel moved to amend the SOR by adding an additional allegation under Guideline E as follows:

1.d You falsified material facts on a Questionnaire for National Security Positions, you caused to be transmitted on or about February 24, 2006, in

³ Adjudication of this case is controlled by the Revised Adjudicative Guidelines, approved by the President on December 29, 2005, which were implemented by the Department of Defense on September 1, 2006. Pending official revision of the Directive, the Revised Adjudicative Guidelines supercede the guidelines listed in Enclosure 2 to the Directive, and they apply to all adjudications or trustworthiness determinations in which an SOR was issued on or after September 1, 2006.

⁴ Applicant objected to Gx. 4 because the documents therein are nearly illegible. I overruled his objection because I am able to read enough of the documents to determine they are summaries of Applicant's federal tax accounts for tax years 1987 through 1993. The information in Gx. 4 gives a detailed accounting of the basis for the tax liens documented in Gx. 2. However, the detail in Gx. 4 was not essential to my findings of fact here.

⁵ The allegation did not specify when the lien was filed.

response to "Section 28. Your Financial Delinquencies. a. In the last 7 years, have you been over 180 days delinquent on any debt(s)?; b. Are you current over 90 days delinquent on any debt(s)?" You deliberately failed to disclose that you were indebted to the Internal revenue Service for back taxes, interest and penalties for tax years 1998, 1999, and 2002, totaling approximately \$2,050 in July 2006.

The motion also proposed adding a second paragraph containing allegations under Guideline F as follows:

2. Guideline F: 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. Available information raising this concern shows that:

a. You failed to file your Federal Income Tax Returns for tax years 1989, 1990, and 1991, and filed late your Federal Income Tax Returns for tax years 1987, 1988, 1992, and 1993.

b. On July 19, 1994, the Internal Revenue Service filed a federal tax lien against you for the approximate amount of \$33,069.54 for tax years 1987 through 1992. As of July 3, 2007, this debt had not been paid.

c. You filed late your Federal Income Tax Returns for tax years 1998, 1999, and 2000.

d. You are indebted to the Internal Revenue Service in the approximate amount of \$849.14 for tax years 1998 through 2000. As of July 9, 2007, this debt had not been paid.

Applicant did not respond to the motion before the hearing. At hearing, he did not object to the motion, which I granted as submitted.

Findings of Fact

Applicant denied the original allegations under Guideline E (Tr., 16 - 17) He also denied the new allegation in SOR ¶ 1.d, but admitted the new allegations in SOR ¶¶ 2.a through 2.d. (Tr., 17 - 24). After a thorough review of the pleadings, transcript, and exhibits, I make the following findings of fact.

Applicant is 58 years old and has worked as a painter for defense contractor at a U.S. Navy shipyard since 1972. After he finished high school, he served in the U.S. Navy from 1970 until 1972. Applicant has been married to his current wife since 2002. A previous marriage ended in divorce around 1986. (Gx. 1, Gx. 5)

Applicant did not file federal income tax returns as required in 1989, 1990, and 1991. He also filed his returns late for tax years 1987, 1988, 1992, 1993, 1998, 1999, and 2000.

On July 19, 1994, the Internal Revenue Service (IRS) filed a lien against Applicant for unpaid taxes in tax years 1987 through 1992. The tax debt totaled \$33,069.54. (Gx. 2) At one time, Applicant also owed \$2,050.20 for tax years 1998, 1999, and 2000, but he entered into a repayment agreement with the IRS (Gx. 6). His debt to the IRS from those tax years is now \$1,155.16 for tax year 1999 only. (Gx. 7) The second page of Gx. 2 notes that, unless the IRS were to renew, within 10 years, its claims underlying the lien, the lien would be released. The 1994 lien expired in March 2007 (Gx. 7), but there is no information about whether the lien was renewed. The IRS has stated that, aside from the \$1,155.16 owed for tax year 1999, he is "in compliance with all filing requirements through 2005." (Gx. 7)⁶ Applicant has also received small refunds from his past tax year filings. (Ax. B)

Applicant has held a security clearance for most of his adult life, starting with his service in the Navy. During a previous investigation to renew his clearance, Applicant was interviewed by a government investigator in May 1994. Applicant reported at that time he had not filed his tax returns since 1986. At the time of the interview, he had contacted the IRS and was waiting to complete an arrangement to file his returns and pay an estimated \$7,000 in federal and state taxes. (Gx. 5)

Applicant's most recent background investigation began when a Questionnaire for Sensitive Positions (SF 86) was submitted on or about February 24, 2006. Gx. 1 is a copy of the electronic summary of that questionnaire. Applicant's signature is on an attached signature page taken from a Questionnaires for Investigations Processing (e-QIP). The summary of the SF 86 does not reflect the actual questions Applicant answered when he submitted his application. Rather, the document contains abbreviated terms indicating what the question addressed. For example, where a question asked for information about whether there were any arrests in the last seven years for offenses not listed elsewhere, the form lists only "23F - LAST 7 YRS, ADDITIONAL CHARGES?" There is no language explaining the need to list arrests even if the charges were dismissed, or listing the availability of a limited statutory exception to the reporting requirement. In sum, Gx. 1 contains none of the language cited in SOR ¶¶ 1.a - 1.d.

In March 2003, Applicant was arrested and charged with assault and battery on a spouse after neighbors called the police about an argument he was having with his wife. The charge was dismissed after his wife testified in his behalf. (Tr., 56 - 57) The arrest was not reflected in Gx. 1. Applicant explained he thought he did not have to list the arrest because the charges were dismissed. (Tr., 65 - 66) Nor was the unpaid tax lien listed in Gx.1; however, under a section of the questionnaire entitled "SUBJECT'S

⁶ In response to DOHA interrogatories on April 20, 2007, Applicant attached a handwritten letter purported to be from a representative of the IRS. At hearing, Department Counsel stated he had contacted the author and verified the authenticity of the letter as a communication from an IRS representative. (Tr., 41).

COMMENTS,” it was noted that Applicant is “PAYING ON TAXES YEAR 2000 - \$175 PER MONTH.”

Policies

Each security clearance decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information, and consideration of the pertinent criteria and adjudication policy in the Revised Adjudicative Guidelines (AG).⁷ Decisions must also reflect consideration of the factors listed in ¶ 2(a) of the new guidelines.⁸ The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an applicant. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information. In this case, the pleadings and the information presented by the parties require consideration of the security concerns and adjudicative factors addressed under Guideline E (personal conduct) at AG ¶ 15 and Guideline F (financial considerations), at AG ¶ 18.

A security clearance decision is intended to resolve whether it is clearly consistent with the national interest⁹ for an applicant to either receive or continue to have access to classified information. The government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for an applicant. Additionally, the government must be able to prove controverted facts alleged in the SOR. If the government meets its burden, it then falls to the applicant to refute, extenuate or mitigate the government’s case. Because no one has a “right” to a security clearance, an applicant bears a heavy burden of persuasion.¹⁰ A person who has access to classified information enters into a fiduciary relationship with the government based on trust and confidence. The government, therefore, has a compelling interest in ensuring each applicant possesses the requisite judgement, reliability and trustworthiness of one who will protect the national interests as his or her own. The “clearly consistent with the national interest” standard compels resolution of any reasonable doubt about an applicant’s suitability for access in favor of the government.¹¹

⁷ Directive. 6.3.

⁸ Commonly referred to as the “whole person” concept, these factor are:(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.

⁹ See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

¹⁰ See *Egan*, 484 U.S. at 528, 531.

¹¹ See *Egan*; Revised Adjudicative Guidelines, ¶ 2(b).

Analysis

Personal Conduct.

The security concern about Applicant's personal conduct, as expressed in AG ¶ 15, is that "[c]onduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information." Applicant denied the allegations in SOR ¶¶ 1.a, 1.b, 1.c, and 1.d that he intentionally falsified his security questionnaire. The government was thus required to present information to prove those controverted issues of fact.¹² These SOR allegations cite specific questions and quote the language of each one. The document presented in Gx. 1 does not contain any of that language. Nor does Gx. 1 appear to be a QNSP as alleged, and the signature pages included in Gx 1 are from two other forms, neither of which is a QNSP. In short, there is no proof that Applicant answered the questions quoted in SOR ¶¶ 1.a - 1.d. Without that information, I cannot conclude he certified his answers to those questions were true and correct to the best of his knowledge.

In the alternative, the remarks section of Gx. 1 notes monthly payments for back taxes, thus providing the government with notice of Applicant's tax problems. Further, I found plausible Applicant's explanation that he did not think he was required to list his assault and battery arrest because the charges were dismissed.

Based on the foregoing, the information presented in support of SOR ¶ 1, as amended, does not prove Applicant acted with the intent required by AG ¶16(a) (*deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities*). Accordingly, I resolve Guideline E in favor of the Applicant.

Financial Considerations.

Under Guideline F, "[f]ailure 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." (AG ¶ 18) The government alleged Applicant failed to file taxes either on time or at all for several years between 1987 and 2000. As a result, Applicant was subject to a tax lien filed in July 1994 for unpaid taxes totaling \$33,069.54 for tax years 1987 through 1992. It was also alleged that Applicant owes \$849.14 for tax years 1998 through 2000. The government presented sufficient information to support the SOR ¶ 2 allegations. These facts require consideration of the disqualifying condition listed in AG ¶¶ 19(a) (*inability or unwillingness to satisfy debts*), 19(c) (*a history of not meeting*

¹² Directive, E3.1.14.

financial obligations), and 19(g) (failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same).

The record also warrants consideration of the mitigating condition listed in AG ¶ 20 (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*). Available information shows that, as of the hearing, Applicant owed \$1,155.16 for tax year 1999 only, the tax lien was released, he had resolved all of his past filing requirements, was making payments on his remaining tax debt, and had even received some refunds for past tax years. On balance, the security concerns raised by the government's information are mitigated.

Whole Person Concept.

I have evaluated the facts presented in this record and have applied the appropriate adjudicative factors, pro and con, under Guidelines F and E. I have also reviewed the record before me in the context of the whole person factors listed in ¶ AG 2(a).¹³ Applicant is 58 years old and has spent the past 32 years in the same job. He has held a security clearance for all or most of that time, apparently without incident. Applicant is a high school graduate who, while he did not attend to his filing requirements as he should, has now corrected his past tax problems. That the lien was not renewed is somewhat of a double-edged sword. Ideally, he would take action to repay it, but that would revive the IRS claim. However, because the IRS has chosen not to further pursue its claim, it is no longer something which might cause Applicant to engage in illegal acts to resolve.

On balance, Applicant did not engage in fraudulent behavior to avoid paying his taxes, and he is likely to timely file his tax returns in the future. A fair and commonsense assessment¹⁴ of all available information shows that the Applicant's finances and personal conduct do not present an unacceptable risk should he be granted access to classified information.

Formal Findings

Formal findings 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 E:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	For Applicant

¹³ See footnote 8, *supra*.

¹⁴ See footnote 7, *supra*.

Paragraph 2, Guideline F:

FOR APPLICANT

Subparagraph 2.a:

For Applicant

Subparagraph 2.b:

For Applicant

Subparagraph 2.c:

For Applicant

Subparagraph 2.d:

For Applicant

Conclusion

In light of all of the foregoing, it is clearly consistent with the national interest to continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is granted.

MATTHEW E. MALONE
Administrative Judge