



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
) ISCR Case No. 04-11768
)
)
Applicant for Security Clearance)

For Government: Braden M. Murphy, Esquire, Department Counsel
For Applicant: *Pro Se*

April 23, 2009

Decision

DAM, Shari, Administrative Judge:

Based upon a review of the case file, pleadings, and exhibits, eligibility for access to classified information is denied.

On September 11, 2003, Applicant submitted a Security Clearance Application (SF 86). On July 22, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) 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 revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR in writing on August 18, 2008, and requested a hearing before an administrative judge. On February 27, 2009, DOHA assigned the case to me and issued a Notice of Hearing on March 10, 2009. The case was heard on

March 24, 2009, as scheduled. Department Counsel offered Exhibits (GE) 1 through 20 into evidence without objection. Applicant testified and offered Exhibits (AE) 1 through 38 into evidence without objection. At the conclusion of the hearing, I left the record open until April 10, 2009, to give Applicant an opportunity to submit additional information. Applicant timely submitted two exhibits that I marked AE 39 and 40 and admitted into the record over the objection of the Government. DOHA received the hearing transcript (Tr.) on April 2, 2009.

Procedural and Evidentiary Ruling

Administrative Notice

Department Counsel requested that I take administrative notice of 26 U.S.C. § 6011. (GE 21) Said statute sets forth the general requirements for individuals to file income tax returns. The exhibit was not admitted into evidence, but is included in the record as an Administrative Notice Exhibit. Hence, the facts administratively noticed are limited to matters of general knowledge and not subject to reasonable dispute. Applicant did not object to the Department's request, and said document was admitted for that purpose. (Tr. 36)

Findings of Fact

In his Answer to the SOR, Applicant denied the allegations contained in ¶¶ 1.a through 1.h.

Applicant is a 44-year-old married man with two young children. He has two associate degrees, one which he completed in 1996 in electrical engineering. He started working for his current employer in 1987. He is an associate engineer, earning approximately \$80,000 annually.

In September 2004, a Government investigator interviewed Applicant about statements he made on his SF 86, pertaining to a lawsuit he filed in Federal District Court, in which he asserted his right not to file income tax returns. Essentially, he believes that the salary he earns through his employment with a federal contractor does not constitute taxable income, as defined by the U.S. Constitution. (Tr. 77, 131) Hence, he is not required to file returns because he does not earn taxable income. (Tr. 77-78) He began researching this issue in 1999 and arrived at his present position by 2003. Prior to that year, he filed state and Federal returns for 1999, 2000, 2001, and 2002. However, once he completed his analysis on the matter, he filed amended returns and requested refunds for the years. He has challenged the IRS and brought suit on this issue in Federal court. He has lost both challenges. (GE 2)

In April 2003, a Federal District Court entered a Memorandum Order dismissing Applicant's case against the Federal and state governments, based on jurisdictional grounds. Applicant filed an application for habeas relief, in which he sought state and Federal income tax refunds for the calendar year 2000, arguing that he had a civil right

to deduct his earned wages from his gross income as compensation for personal services actually rendered. (GE 13)

On June 6, 2003, the Internal Revenue Service (IRS) responded to Applicant regarding documents he filed setting forth his argument that he is not required to file Federal income tax returns because he does not earn taxable income. In separate letters, referencing his previous correspondence for tax years 1999, 2000 and 2001, the IRS stated:

We have determined that the document(s) referred to above is a frivolous document. The position you have taken has no basis in law and represents a frivolous position. The tax laws are very clear and have been tested in the courts – including the Supreme Court of the United States. Claims, such as yours, have been considered and rejected repeatedly as frivolous and without merit by the federal courts. Therefore, we will not respond to future correspondence from you concerning these same issues. (GE 15)

Despite the dismissal of his law suit and notification of the IRS's position in 2003, Applicant has continued to pursue his position. The July 2008 SOR alleged that Applicant failed to file eight income tax returns, as required by law. The status of those returns is as follows:

1. Applicant filed his 2004 Federal Income Tax Return in December 2008, in order to obtain a refund. (Tr. 71) There is no evidence that he received an extension to file three years late.
2. Applicant filed his 2004 state tax return in July 2008, after learning a refund was owed to him. (Tr. 72) There is no evidence that he received an extension to file three years late.
3. Applicant has not filed his 2005 Federal Income Tax Return, nor obtained an extension of time in which to do so. (Tr. 72; 76)
4. Applicant filed his 2005 state income tax return in July 2008, in order to avoid an additional penalty and obtain a refund. (Tr. 104-105) There is no evidence that he received an extension to file this return late.
5. Applicant has not filed his 2006 Federal Income Tax Return, nor obtained an extension of time in which to do so. (Tr. 72)
6. Applicant has not filed his 2006 state income tax return, nor obtained an extension of time in which to do so. (Tr. 73)
7. Applicant has not filed his 2007 Federal Income Tax Return, nor obtained an extension of time in which to do so. (Tr. 73)

8. Applicant has not filed his 2007 state income tax return, nor obtained an extension of time in which to do so. (Tr. 73)

In a second interview in February 2008, Applicant admitted that he had not filed Federal or state income tax returns from 2004 to 2007. He continued to assert that he was not required to file them because he was not a “tax payer.” (GE 3 at 184) He has persistently requested the IRS to document and trace the history of its interpretation and definition of income. (*Id.*) He will file the outstanding returns in the future in order to obtain refunds, but is “waiting for the right time to file a refund, and . . . waiting also for anybody yet to show [him] [he has] a requirement to file.” (Tr. 103, 128) He does not intend to timely file his 2008 returns nor obtain an extension for filing. (Tr. 74)

Applicant submitted a copy of a 2002 state court opinion (filed by another individual) that specifically rejected Applicant’s arguments pertaining to his interpretation of the definition of “income.” (AE 33) When questioned about the court’s interpretation of the word, Applicant said, “The State is off base.” (Tr. 136)

Applicant provided a copy of his 2008 Performance and Development Summary that noted an acceptable rating in most categories and exceptional in a few areas. His supervisor wrote that Applicant’s “contributions continue to span a wide range of activities within the department. . . He is willing to accept a variety of assignments and always digs-in quickly to contribute.” (AE 33) Applicant’s employer and colleagues are aware of his position regarding the requirement to file income tax returns.

During his testimony, Applicant vigorously asserted his position that he has no obligation to file his returns because he does not earn income within the meaning of the constitution. He presented extensive research and detailed summaries of his analysis to support his argument. He will continue to challenge the issue. In his closing argument, he added:

No one has showed that my income is taxable and meets the definition pursuant to Section 61. I’ve provided the congressional records, the Supreme Court cases, the definitions as evidence and records that are out there that define it, and nobody’s been able to prove it otherwise. (Tr. 153)

* * *

The Department of Defense has made a claim that I earn Section 61 income, which they haven’t proven otherwise that I actually have made Section 61 income. It’s a presumption that I have, but I have seen no evidence showing proof that I have. . . . And, the Department of Defense claims that I’m an employee that’s taxable and that would be pursuant to the W4 withholding definition of “income,” and I haven’t seen any evidence showing that I’m that type of employee. And that definition is very clear to read. So pursuant to the requirements of a W4 withholding form, my

income doesn't meet it and my "employee" by definition doesn't meet that requirement. I cannot fill out a W4. [Sic] (Tr. 154-155)

In his preface to AE 39, which Applicant submitted post-hearing, he states as follows:

NOTE: What I am presenting is not some NEW discovery that I need to go in front of Congress with and I am NOT arguing the law. The laws are written correctly and I have no problem with any of them. The problem is the DOD is misunderstanding WHO I am and not paying attention to statutory "terms", congressional "definitions", and my "unalienable rights" when attempting to apply the "failure to file" statutes to me. [Sic]

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful 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 over-arching adjudicative goal is a fair, impartial and common sense 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 avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. According to Directive ¶ E3.1.15, "The 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." 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."

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 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 information.

Analysis

Guideline F, Financial Considerations

The security concerns relating to the guideline for Financial Considerations are articulated in AG ¶ 18:

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.

AG ¶ 19 sets out nine conditions that could raise security concerns, two of which may potentially be applicable in this case:

(c) a history of not meeting financial obligations; and

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

Based on the evidence, including Applicant's admissions and testimony, he deliberately failed to timely file Federal and state tax returns for the years 2004, 2005, 2006, and 2007, as legally required. The evidence is sufficient to raise the above two disqualifications. In addition to these disqualifications, the evidence raised an overall concern pertaining to Applicant's lack of judgment and willingness to abide by rules and regulations, which in turn question his reliability, trustworthiness and ability to protect classified information under this guideline.

After the Government produced substantial evidence of the disqualifications, the burden shifted to Applicant to produce evidence and prove a mitigating condition. AG ¶ 20 includes six conditions that could mitigate security concerns arising from financial difficulties:

(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, or a death, divorce or separation), and the individual acted responsibly under the circumstances;

(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;

(d) the individual initiated 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

(f) the affluence resulted from a legal source of income.

Applicant's refusal to timely file his income tax returns has been ongoing since 2004 and continues into the present. His actions are recent, not isolated, and cast doubt on his reliability, trustworthiness, and good judgment; hence, AG ¶ 20(a) cannot apply. His income tax issues are clearly within his control, such that AG ¶ 20(b) is not applicable. Although Applicant filed his 2004 Federal and state income tax returns in 2008, as well as his 2005 state return, he did not do so timely and has not filed any other return to date, as required by law. Hence, there is no evidence that the problems are being resolved, which is necessary to trigger the application of AG ¶ 20(c). Applicant disputed, in court and directly to the IRS, the legitimacy of the income tax statutes that require him to file tax returns. He lost both challenges; thus, AG ¶ 20(e) does not apply. There is no evidence to support the application of AG ¶ 20(d) or AG ¶ 20(f).

The Appeal Board articulated its general security concern in ISCR No. 94-0954 (October 16, 1995) at 3, in a similar case in which an applicant argued that he was not obligated to file income tax returns. The Board stated:

There is a nexus between Applicant's conduct and his eligibility for a security clearance. Beyond the fact that Applicant shows poor judgment by willfully engaging in criminal conduct, he believes he has the right and ability to determine on his own what laws will apply to him. Accordingly,

the Government cannot be sure he will always follow security rules if he ever begins to believe that they should not apply to him.¹

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 the circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a). They include the following:

(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 eligibility for a security clearance must include 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. Applicant is a 44-year-old married man with two children. He has successfully worked for his present employer since 1986.

In 2003, Applicant challenged the Federal and state governments' rights to require him to file income tax returns. His case was subsequently dismissed and referred to as "frivolous" in the state court. In September 2004, the Government interviewed him about the lawsuit he filed in Federal court and challenges he filed with the IRS about his 1999, 2000, 2001 and 2002 returns. In February 2008, the Government again interviewed him and learned that he had not filed income tax returns from 2004 to 2007. According to his testimony, he does not intend to timely file 2008 returns. Despite his lack of success with legal challenges and notification by the Government, twice, of its security concerns, Applicant has obstinately persisted in adhering to his position and jeopardizing his employment. His behavior and actions in this situation demonstrate serious underlying issues regarding his reliability, good judgment and willingness to abide by rules and regulations, all of which are characteristics necessary and pertinent to handling classified information.

In another more recent case, involving similar facts, the Appeal Board succinctly stated, "DOHA proceedings are not a proper forum for challenging the validity of federal

¹The SOR did not raise concerns under the guideline for Criminal Conduct in this case, but has raised general concerns under the guideline for Financial Considerations.

tax matters.” The Board further stated, “Failure to file tax returns suggest that an applicant has a problem with complying with well-established governmental rules and systems. Voluntary compliance with such rules and systems is essential for protecting classified information”. ISCR Case No. 01-05340 (December 20, 2002) at 2; See ISCR Case No. 97-0744 (November 6, 1998) at p. 3.

Overall, the record evidence leaves me with serious questions as to Applicant’s eligibility and suitability for a security clearance based on issues involving his reliability, trustworthiness, good judgment, and willingness to abide by rules and regulations. For all of the above reasons, I conclude Applicant did not mitigate the security concerns arising under financial considerations.

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

Subparagraphs 1.a through 1.h: Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly not consistent with the interests of national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

SHARI DAM
Administrative Judge