



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----, -----) ISCR Case No. 05-04969
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Eric H. Borgstrom, Esquire, Department Counsel
For Applicant: *Pro Se*

January 21, 2009

Decision

WHITE, David M., Administrative Judge:

From tax years 2000 through 2004, Applicant failed to timely file all his federal income tax returns and four state income tax returns. He is now out of debt, but still has not filed his 2001 federal tax return. Based upon a review of the case file, pleadings, and exhibits, eligibility for access to classified information is denied.

Applicant submitted his electronic Questionnaire for Investigations Processing (e-QIP), on November 7, 2005. On August 12, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, detailing the security concerns under Guidelines F and E.¹ 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.

¹Item 1.

Applicant answered the SOR in writing on September 3, 2008, and requested that his case be decided by an Administrative Judge on the written record without a hearing.² Department Counsel submitted the Government's written case on September 30, 2008. A complete copy of the file of relevant material (FORM)³ was provided to Applicant, and he was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation.

Applicant signed the document acknowledging receipt of his copy of the FORM on October 13, 2008, and returned it to DOHA. He provided no further response to the FORM within the 30-day period he was given to do so, did not request additional time to respond, and made no objection to consideration of any evidence submitted by Department Counsel. I received the case assignment on December 12, 2008.

Findings of Fact

Applicant is a 63-year-old employee of a defense contractor, where he has worked as an engineer for 41 years. He held a security clearance from about May 1968, until it was revoked on November 25, 2003, when he failed to respond to a Statement of Reasons citing security concerns arising from his then-substantial delinquent debts. In his response to the present SOR, he admitted all the factual allegations in SOR ¶¶ 1.a through 1.c, concerning financial considerations, and denied the same allegations incorporated by reference in ¶ 2.a, concerning personal conduct.⁴ Applicant's admissions are incorporated in the following findings.

In 1998, Applicant opened a restaurant in partnership with his wife and a third person. The business started losing money in 2000, and became worse after the September 11, 2001 terrorist attacks. They continued operating the restaurant at a loss while unsuccessfully trying to sell it until September 2004, when they closed it. Applicant incurred substantial debts in the process, to the point that he owed five creditors a total of more than \$107,000 by August 2003. He has since repaid all of these creditors, and the formerly delinquent taxes to the state and federal governments that he had insufficient funds to pay at the time. He was able to do so through the sale of a second home, use of retirement savings and his engineering salary, and a home equity loan on his principal residence. His February 2008 credit bureau report shows no delinquent debt, one credit card with an \$869 balance, one \$6,546 auto loan with a \$170 monthly payment, and two home mortgages totaling \$371,000 with monthly payments of \$3,550. He has no intention of entering the restaurant business again.⁵

²Item 2.

³The government submitted nine items in support of the allegations.

⁴Item 2 at 1, 2; Item 3 at 25; Item 9.

⁵Item 2; Item 7; Item 8; Item 9.

Applicant filed his 2000 federal income tax return on September 25, 2002, after receiving an extension of his filing deadline until August 15, 2001. He filed his 2000 state income tax return, that was due on April 15, 2001, on February 10, 2003. He finally resolved all federal and state taxes, penalties and interest due for 2000 in October 2004.⁶

Applicant admitted, and IRS records reflect, that he has not yet filed his federal tax return for tax year 2001. He filed his state income tax return for that year, due April 15, 2002, on April 28, 2006. He has not yet addressed his federal return for 2001, but fully paid all state taxes, penalties and interest for that year in July 2007.⁷

Applicant filed his 2002 federal income tax return on April 28, 2005, and his 2002 state income tax return on April 26, 2005. Both returns were due on April 15, 2003. He finally resolved all federal and state taxes, penalties and interest due for 2002 in June 2005 and June 2006, respectively.⁸

Applicant filed his 2003 federal income tax return on May 23, 2006, and his 2003 state income tax return on April 24, 2006. Both returns were due on April 15, 2004. He finally received refunds for his 2003 federal and state taxes in October 2007 and October 2006, respectively, with no penalties or interest due for those late filings.⁹

Applicant filed his 2004 federal income tax return on December 17, 2007, after receiving an extension of his filing deadline until August 15, 2005. He filed his 2004 state income tax return, and paid state taxes due, on time. He finally resolved all federal taxes, penalties and interest due for 2004 in February 2008.¹⁰

Applicant's 2005 federal and state income tax returns were both timely filed after receiving extensions until October 15, 2006.¹¹ Similarly, his 2006 federal and state returns were both filed by the April 15, 2007 deadline.¹² Accordingly, the allegations in SOR ¶¶ 1.a through 1.c are correct, although Department Counsel's assertion in the FORM that Applicant's federal income tax returns for 2005 and 2006 were also late is incorrect and presumably based on his mistaken reading of the evidence rather than any attempt to mislead.

⁶Item 5 at 23-26; Item 6 at 2.

⁷Item 5 at 20-22; Item 6 at 2.

⁸Item 5 at 17-19; Item 6 at 3.

⁹Item 5 at 13-16; Item 6 at 3.

¹⁰Item 5 at 9-11; Item 6 at 3.

¹¹Item 5 at 5-8; Item 6 at 3.

¹²Item 5 at 1-3; Item 6 at 3.

Applicant has held many positions of significant trust and responsibility on multi-million dollar projects with his company over the years, with no disciplinary actions in connection with either classified or unclassified work.¹³ He offered no other evidence concerning his character, trustworthiness or responsibility, and I was unable to evaluate his credibility, demeanor or character in person since he elected to have his case decided without a hearing.

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 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, 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(a) and 2(c), 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 that "Any doubt concerning personnel being considered for access to classified information 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. 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. 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." Section 7 of Executive Order 10865 provides: "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."

A person applying for access to classified information seeks to enter 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

¹³Item 2 at 2.

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 concern relating to the guideline for financial considerations is set out 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.

The guideline notes several conditions that could raise security concerns. Under AG ¶ 19(g), "failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same," is potentially disqualifying. The evidence is sufficient to raise this disqualifying condition, requiring a closer examination and balancing of resulting security concerns with any potentially mitigating matters, and shifting the burden to Applicant to rebut, explain, extenuate or mitigate those concerns.

The guideline includes several conditions that could mitigate security concerns arising from financial difficulties. Under AG ¶ 20(a), disqualifying conditions may be mitigated where "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." Applicant's failures to timely file five years of federal and four years of state income tax returns as required are relatively recent and, for his 2001 federal return, is ongoing. His stated reason was his inability to pay required taxes, but at least two of those returns involved refunds. Further, the obligation to properly file tax returns is independent of the ability to pay any taxes owed. Applicant filed timely returns for 2005 and 2006, but has not proven that failure to file is unlikely to recur should he again encounter financial adversity. His conduct continues to raise concerns about his reliability, trustworthiness, and good judgment. The evidence does not support this potentially mitigating condition.

Under AG ¶ 20(b), it may be mitigating where "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." Applicant attributes his failure to file tax returns to his money-losing restaurant business and resulting debts.

Losing money in a business does not alleviate the obligation to file proper tax returns, and may indeed lower one's tax liability. Filing the returns several years late does not support a conclusion that he acted responsibly under the circumstances.

Evidence that "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" is potentially mitigating under AG ¶ 20(c). This mitigating condition is partly raised by Applicant's repayment arrangements and absence of present delinquent debt, but is not supported as a factor for significant consideration in this case because he filed so many returns so late and has still not filed his 2001 federal return. Similarly, AG ¶ 20(d) applies where the evidence shows "the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts." Applicant resolved most of his delinquent federal and state income tax debts, but failure to file timely returns raises concerns separate from the related tax, penalty and interest debts. I conclude this potentially mitigating condition has not been established with respect to AG ¶ 19(g) security concerns.

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern pertaining to personal conduct:

Conduct 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. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

AG ¶ 16 sets forth potentially disqualifying conditions, none of which are independently supported by this record according to their plain meaning. Applicant's repeated failures to file required tax returns in a timely manner are both sufficient for an adverse determination (AG ¶ 16(c)), and explicitly covered (AG ¶ 16(d)) under Guideline F. To the extent that Appellant's financial conduct involves questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations, however, it can also be considered to support security concerns under AG ¶ 15.¹⁴ His pattern and recent history of failure to timely file his federal and state income tax returns demonstrate questionable judgment and unwillingness to comply with rules requiring the reporting and satisfaction of one's tax obligations, thereby raising questions about his reliability and ability to protect classified information. For the same reasons discussed above under financial considerations, no personal conduct mitigating condition has yet been established to fully alleviate such concerns.

¹⁴ISCR Case No. 06-20964 at 4-7 (App. Bd. Apr. 10, 2008). In this case, the administrative judge found the facts to be insufficient for an adverse determination under Guideline F and the Appeal Board held that analysis of failure to file tax returns under Guideline E was also required.

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):

(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 common sense 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 mature individual who is responsible for his choices and conduct. He filed four years worth of federal and state income tax returns from one to four years late, and still has not filed his 2001 federal return. Applicant submitted only anecdotal evidence of rehabilitation or permanent behavioral change. His recent and ongoing disregard of lawful obligations creates continuing doubt about his trustworthiness and reliability. The record contains insufficient evidence about his character or responsibility to mitigate these concerns, or tending to make their continuation less likely.

Overall, the record evidence creates substantial doubt as to Applicant's present eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the security concerns arising from his financial considerations and personal conduct.

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
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant

Paragraph 2, Guideline E:

AGAINST APPLICANT

Subparagraph 2.a:

Against Applicant

Conclusion

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

DAVID M. WHITE
Administrative Judge