



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



In the matter of:)
)
) ISCR Case No. 06-20189
)
)
Applicant for Security Clearance)

Appearances

For Government: James F. Duffy, Esquire, Department Counsel
For Applicant: Donald L. Schense, Esquire

January 31, 2008

Decision

HOGAN, Erin C., Administrative Judge:

Applicant submitted his Security Clearance Application (SF 86), on October 29, 2004. On November 6, 2006, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guideline F, Financial Considerations, and Guideline E, Personal Conduct for Applicant. 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.

On November 29, 2006, Applicant answered the SOR and requested a hearing before an Administrative Judge. Department Counsel was prepared to proceed on January 23, 2007. The case was assigned to another administrative judge on January 26, 2007. On January 31, 2007, the case was delayed indefinitely due to Applicant's serious health problems. On May 14, 2007, a Notice of Hearing was issued scheduling the hearing for June 12, 2007. On June 8, 2007, the hearing was cancelled due to Applicant's continuing serious health problems. The administrative judge continued the

case indefinitely until Applicant's health improved. The case was transferred to me on June 14, 2007. Applicant indicated he was healthy enough to attend a hearing in November 2007. DOHA issued a notice of hearing on November 16, 2007, and I convened the hearing as scheduled on December 19, 2007. The Government offered Government Exhibits (Gov) 1 through 6, which were admitted without objection. Applicant testified on his own behalf and submitted Applicant Exhibits (AE) A and B, which were admitted without objection. DOHA received the transcript of the hearing (Tr) on January 4, 2008. The record was held open until January 3, 2008, to allow Applicant the opportunity to submit additional matters. Applicant timely submitted AE C, which was admitted. The record closed on January 3, 2008. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Findings of Fact

Applicant is a 62-year-old resource analyst employed by a Department of Defense contractor seeking a security clearance. He has a bachelor's degree in mathematics and a master's degree in industrial engineering and operations research. (Tr at 50.) He needs six more credits to complete a master's degree in statistics. His areas of expertise are mathematics, statistics, and operations research. (Tr at 73.)

From approximately 1967 to 1977, Applicant worked as a statistician for the United States Navy. In 1977, he accepted a job with the Air Force to work in operations research. He retired from federal civilian employment in 1992 at the level of GS-15. He worked for a contractor for a year and half. In October 1994, he accepted a job as the head statistician of a state government agency in another state. His pay was the equivalent of a GS-15. In October 2004, he retired from the state agency. He started working for his current employer in November 2004. (Tr at 50-54, 58; Gov 1.) He held a security clearance from 1967 to 1994. He never had a security incident while handling classified information. (Tr at 67.)

Applicant is currently married. He has been married to his wife for 37 years but they have been separated since 1996. They have two adult sons. Applicant lives with his girlfriend. He met her when he was working for the state agency. His girlfriend moved with him back to the state where his current employer is located. Applicant supports his wife and his girlfriend. Neither work. He pays his wife's mortgage payment and provides her \$1,000 a month. His girlfriend has been his caregiver for the past year. Applicant anticipates that he will file for divorce within the next year. (Tr at 71-72.)

Over the past ten years, Applicant encountered significant health issues. In 1998, he was diagnosed with kidney failure. From 1998 through 2001, he was on dialysis. In March 2001, he lost his lower left leg due to complications from diabetes. In October 2001, he received a kidney transplant. Between 2001 and 2003, he had two stents put in. Shortly after he retired from the state in 2004, his kidney transplant failed. He has been off and on dialysis since 2005. On July 4, 2006, he had a stroke and was hospitalized for awhile. He has difficulty with lightheadedness and balance. He has

congestive heart failure. In January 2007, he had quadruple by-pass surgery. He was hospitalized for three months. Since leaving the hospital, he has recuperated in two nursing homes. He is currently on long term disability with his employer but works on unclassified projects at home. (Tr at 56-58.)

Due to his health issues, Applicant did not work for approximately seven months in 2001. In 2002-2003, he worked three quarters to full-time. In 2004, he was hospitalized for two months, and was unable to work off and on due to health issues. He was also on sick leave sporadically between 1998 to 2000. (Tr at 84-86.)

When Applicant filled out his security clearance application on October 29, 2004, he answered "No" to question 38 which reads: "Your Financial Delinquencies – 180 Days. In the last 7 years, have you ever been over 180 days delinquent on any debt(s)?" He also answered "No" in response to question 39 which reads: "Your Financial Delinquencies – 90 Days. Are you currently over 90 days delinquent on any debt(s)?" Question 43 allows an applicant to list additional general remarks. Applicant did not list anything in the general remarks section. In signing the application, Applicant certified his statements were true, complete, and correct to the best of his knowledge and belief and made in good faith. He also acknowledged that a knowing and willful false statement on the form could be punished under federal law. (Gov 1.)

On April 18, 2006, Applicant was interviewed by a USIS investigator in conjunction with his background investigation. The USIS investigator testified that she went through Applicant's security clearance application (SF 86) with him "line by line." The USIS investigator asked Applicant if his answers to questions 38 and 39 were accurate. He confirmed that the answers were correct. She did not specifically ask him about taxes. The USIS investigator asked Applicant seven concluding questions. The questions include, "Is there anything pertinent to the investigation or anything else that you would simply want me to know?"; "Is there any reason for anyone to question your honesty and integrity?"; and "Are there any reports that will be reviewed in the course of the investigation or persons interviewed that would contradict anything said or provided in the interview today?" He answered "No" to all of those questions. (Tr at 23-26; Gov 4.)

In approximately late April 2006, Applicant's wife was interviewed during the course of the investigation. She mentioned that in 2005 she had been contacted by a state Department of Revenue related to delinquent state income taxes. When she contacted Applicant about the phone call, he admitted that they were late on state and federal income taxes. Although they were separated, they still filed joint income tax returns. Based on this information, the USIS investigator contacted Applicant to have him sign a release for his Internal Revenue Service (I.R.S.) records. On May 2, 2006, he signed the release but they did not discuss his taxes at that time. (Tr at 27-29.)

Upon contacting the I.R.S., it was discovered that Applicant owed past due taxes for tax years 1999, 2000, 2001, 2002, 2003, and 2004. (SOR ¶¶ 1.e-1.j.) He did not file his 1999 income tax return until April 22, 2006. He did not file his 2000, 2001, 2002,

2003 and 2004 income tax returns until December 14, 2005. For 1999, his adjusted gross income was \$82,764 and his taxable income was \$62,214. For 2000, his adjusted gross income was \$84,626 and his taxable income was \$63,722. For 2001, his adjusted gross income was \$86,944 and his taxable income was \$64,410. For 2002, his adjusted gross income was \$97,337 and his taxable income was \$69,171. For 2003, his adjusted gross income was \$101,054 and his taxable income was \$79,542. For 2004, his adjusted gross income was \$107,178 and his taxable income was \$86,514. (Gov 5.) He owed taxes for each year. The total amount of the tax debt, including late fees and penalties was approximately \$63,954. The USIS investigator did not re-interview Applicant about his tax debts. (Tr at 29-31, 76; Gov 5; AE A.)

Applicant was aware that he had an obligation to file his federal tax returns. (Tr at 81-82.) He did not file the returns partially due to health issues. He got behind the first couple years and procrastinated. He was not well during this time period, even though he knows it is not a good excuse. (Tr at 83.) In his answer to the SOR, he states that he did not expect to owe any taxes because he had received a refund in 1998. (Answer to SOR.)

At hearing, Applicant was asked whether he filed his state income tax returns during the years he did not file federal income tax returns, ie. 1999-2004. He responded, "Yes, because I was a state worker. I thought I should." (Tr at 79.) He recalls his wife contacting him about the overdue taxes in 2005. (Tr at 80.) Shortly after, his son helped him prepare his tax returns. (Tr at 81).

Applicant testified that he did not realize that he had debts that were over 90 to 180 days delinquent when he filled out his security clearance application. (Tr at 59-60, 87.) Although he had not filed his income tax returns for tax years 1999 to 2003, he assumed he did not owe any taxes. He was not aware of the other delinquent debts. (Tr at 87.)

During his April 2006, interview with the USIS investigator, Applicant admits he answered "No" when she asked him whether he was more than 90 days and 180 days delinquent on any debts. He did not think he was delinquent on any debts. Under cross examination, he admits that he knew that he owed the I.R.S. for delinquent taxes, having filed his tax returns in December 2005. He initially claimed that he did not know what the delinquency was because they were filed after the interview with the USIS investigator. When reminded by the Government counsel that he was interviewed by the USIS investigator four months after filing his taxes, he explained that because he had filed his taxes, he thought he had taken care of the debt. He did not think of delinquent tax debts in the same fashion as delinquent bills. (Tr at 88-90.) When asked about his filing his 1999 federal income tax return four days after the interview with the USIS investigator, Applicant claimed he did not remember. (Tr at 90.)

Credit reports obtained during the investigation revealed the following delinquent debts: a \$276 medical bill turned over for collection (SOR ¶1.a); a \$125 collection account (SOR ¶1.b); a \$346 department store account that was 180 days delinquent as

of March 2006; and a \$792 credit account that was 120 days delinquent in June 2006. (Gov 2; Gov 3; Gov 6.) Applicant claims that he paid off all four debts by July or August 2006. (Tr at 61.) He provided proof that the debts alleged in SOR ¶¶ 1.c (Gov 6 at 3; AE B at 2), and 1.d (Gov 6 at 2; AE B at 2) were paid. Credit Reports dated May 24, 2007, and December 6, 2007, indicate that Applicant has approximately nine additional collection accounts related to medical bills. (Gov 6 at 2; AE B at 2.) During cross examination, Applicant admitted that the debt alleged in SOR ¶1.a was not paid. He thought that it was paid but is now working to track down the creditor. (Tr at 74-75.)

Applicant and his wife refinanced the mortgage on their home in order to pay off the federal tax debt. On October 4, 2006, Applicant paid \$63,954.76 to the I.R.S. which resolved the federal tax debt. (Tr at 64-66, 77; AE A.) He is actively working with the collection agency and the hospital to resolve the medical accounts. He has approximately \$3,500 in unresolved medical bills. (Tr at 62-63.) Aside from the medical accounts, his current financial situation is stable. (Tr at 70.) After deductions, Applicant receives \$1,500 per month from his federal government pension. He receives \$900 per month from his state government pension. (Tr at 74.)

After the hearing, Applicant submitted four character references. The president and CEO of the defense contractor Applicant works for has known Applicant for ten years and states he is “totally responsible and diligent in all matters of holding and maintaining a Top Secret clearance.” He states that Applicant has been an exemplary employee whom he places great responsibility and trust. (AE C at 2.) The Director of Business and Marketing has known Applicant since 1983. He indicates that Applicant is a personal friend who is held in very high regard by his contemporaries. He plays a valuable role with the company and should be granted a security clearance. (AE C at 3.) The Assistant Facility Officer has known Applicant since 1990. He has always found Applicant to be an honest, trustworthy and forthright individual. He recommends Applicant for a clearance. (AE C at 4.) The Team Manager of the Missile Warning Team states that Applicant is a key member of his team. The ability to use Applicant’s expertise would greatly accelerate the team’s efforts. Applicant is a dependable member of the team and the team manager does not believe that he presents a risk if he is allowed to resume his work with classified information. (AE C at 5.)

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.

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 applicant or proven by Department Counsel. . . .” The Applicant has the ultimate burden of persuasion as to obtaining 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 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.

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

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 disqualifying conditions that could raise security concerns. I find Financial Considerations Disqualifying Condition (FC DC) ¶19(a) (an inability or unwillingness to satisfy debts) and FC DC ¶ 19(c), (a history of not meeting financial obligations) apply to Applicant's case. He incurred several delinquent debts over the years to include a significant federal tax debt for tax years 1999 – 2004.

FC DC ¶19(f) (failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same) applies. Applicant admits to not timely filing his federal income tax returns for tax years 1999, 2000, 2001, 2002, 2003, and 2004. He failed to provide a sufficient excuse for not doing so. He testified that he filed his state tax returns during these years because he thought he had an obligation as a state employee. He did not fully explain why he felt no obligation to timely file and pay his federal income tax returns.

The guideline also includes examples of conditions that could mitigate security concerns arising from financial difficulties. Financial Considerations Mitigating Condition (FC MC) ¶ 20(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) is not applicable. The main concern in Applicant's case is his deliberate failure to timely file and pay his federal income tax returns. He did not file federal income tax returns over a six year period. He did not take steps to file his federal income tax returns until December 2005, one year after submitting his application for a security clearance. While Applicant paid off the tax debts in full in October 2006, concerns remain due to the significant period in which Applicant failed to file and pay his tax debts. It appears that his motivation for resolving his tax debts was in order to obtain a security clearance. His actions raise doubts about his judgment.

FC MC ¶ 20(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) applies, in part, with respect to the non tax-related delinquent debts alleged in the SOR. Many of the new debts are medical accounts which Applicant is actively working to resolve. His health problems have had some affect on his financial condition. However, his annual income increased each year. His medical absences did not reduce his income. As such FC MC ¶ 20(b) is given less weight.

FC MC ¶ 20(d) (the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts) applies. Applicant refinanced his home in order to resolve the tax debts and several delinquent debts. While, he could have resolved these debts earlier by filing and paying his federal income taxes in a timely manner, he did resolve the tax debt.

Admittedly, Applicant's health is a significant mitigating factor pertaining to the non tax-related debts. However, Applicant deliberately did not file his federal tax returns between 1999 to 2004. He did not take action to file and resolve his federal tax debt until after being hired by the defense contractor and reapplying for a security clearance. Security concerns remain under financial considerations based on Applicant's poor judgment regarding his federal income taxes. The financial considerations concern is not mitigated.

Guideline E, Personal Conduct

The security concern under personal conduct is set out in AG ¶ 15:

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.

The government established a prima facie case that Applicant deliberately falsified his security clearance application, signed by Applicant on October 29, 2004, when he answered "No" in response to question 38 and question 39. Although Applicant claims he believed that he did not owe the federal government for taxes, he was aware that he failed to file federal income taxes for tax years 1999, 2000, 2001, 2002 and 2003. His explanation that he did not consider taxes owed to be debts lacks credibility. Applicant is an intelligent and well-educated man who has a 30-year history as a statistician. It is implausible to conclude that he believed that he would owe nothing for tax years 1999-2003.

Personal Conduct Disqualifying Condition (PC DC) ¶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) applies to Applicant's omission of his delinquent tax debts (SOR ¶¶ 1.e-1.h) on his security clearance application.

PC DC ¶16(b) (deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative) applies to Applicant's deliberate failure to disclose his federal tax debts to the USIS investigator during the April 18, 2006, interview. On December 14, 2005, Applicant filed his federal income tax returns for tax years 2000, 2001, 2002, 2003 and 2004. Upon filing his tax returns, he should have been aware that he owed the I.R.S. over \$51,000 in past due taxes. Yet, when asked about delinquent debts over 90 or 180 days old, he told the investigator no. At no time during the interview, did he bring up the subject of taxes owed, even though he filed the

tax returns four months prior to the interview. In addition, Applicant did not file his federal income tax return for 1999, until April 22, 2005, four days after his interview with the USIS investigator. The information provided to the USIS investigator was, at the very least, deliberately misleading. Applicant's significant tax debts were relevant to his security clearance background investigation. It is likely that Applicant was aware that his tax debts would be an issue based on his 30 year history of holding a security clearance.

None of the Personal Conduct Mitigating Conditions (PC MC) apply to Applicant's case. PC MC 17(a) (the individual made a prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with other facts) does not apply. There is no evidence Applicant attempted to contact the USIS investigator to provide information about his delinquent tax debts. His first admission to having delinquent tax debt was in response to the SOR.

PC MC 17(b) (the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual to specifically concerning the security clearance process. Upon being made aware of the failure to cooperate or provide the information, the individual cooperated fully and truthfully) does not apply. There is no issue as to Applicant receiving improper or inadequate advice from authorized personnel or legal counsel during the security clearance process. Although he signed an I.R.S. release a few days after he was interviewed, he was not forthcoming about his I.R.S. debts with the USIS investigator when she obtained the release.

PC MC 17(c) (the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment) does not apply. Deliberately providing false information on a security clearance application and to an investigator conducting the subsequent background investigation are serious offenses. Applicant's deliberate falsifications are recent and raise questions about his reliability, trustworthiness and good judgment.

The remaining personal conduct mitigating conditions are not applicable to Applicant's case. Applicant has not mitigated the concerns raised under Personal Conduct pertaining to his deliberate falsifications during his background investigation.

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) 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. I considered Applicant's 30 year history of holding a security clearance as well as the highly favorable recommendations of his co-workers and superiors. I considered his health issues and his attempts at resolving his delinquent debts. Questions about his judgment and reliability remain pertaining to his deliberate failure to file his federal income tax returns over an extended period of time. While Applicant has suffered from serious health problems over the past ten years, timely filing his federal income tax returns were within his control. His last minute resolution of his tax debt does not mitigate this concern. Nor does it mitigate Applicant's deliberate attempt to withhold information pertaining to his delinquent tax debts on his security clearance application or during his background interview. Although not alleged in the SOR, Applicant's cohabitation with another woman while still married to his wife raises additional questions about his judgment.

Overall, the record evidence leaves me with doubts as to Applicant's eligibility for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising under 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:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	For Applicant
Subparagraph 1.e:	Against Applicant
Subparagraph 1.f:	Against Applicant
Subparagraph 1.g:	Against Applicant
Subparagraph 1.h:	Against Applicant
Subparagraph 1.i:	Against Applicant
Subparagraph 1.j:	Against Applicant

Paragraph 2, Guideline E:

AGAINST APPLICANT

Subparagraph 2.a:

Against Applicant

Subparagraph 2.b:

Against Applicant

Subparagraph 2.c:

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.

ERIN C. HOGAN
Administrative Judge