



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



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| In the matter of: |) | |
| |) | |
| |) | ISCR Case No. 14-02695 |
| |) | |
| Applicant for Security Clearance |) | |

Appearances

For Government: Daniel F. Crowley, Esquire, Department Counsel
For Applicant: *Pro se*

04/13/2015

Decision

HENRY, Mary E., Administrative Judge:

Based upon a review of the pleadings, exhibits, and testimony, Applicant's eligibility for access to classified information is denied.

Statement of the Case

Applicant completed and certified an Electronic Questionnaire for Investigations Processing (e-QIP) on April 22, 2013. The Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) on August 7, 2014, detailing security concerns under Guideline F, Financial Considerations, and Guideline E, Personal Conduct. The action was taken under Executive Order 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 For Determining Eligibility for Access to Classified Information* (AG), implemented on September 1, 2006.

Applicant received the SOR in August 2014. His initial answer dated August 26, 2014 was not received. The SOR was resent to him on October 27, 2014. He received it on November 12, 2014. He submitted a second answer dated December 1, 2014, which was received on December 8, 2014. Applicant requested a hearing before an administrative judge with the Defense Office of Hearings and Appeals (DOHA). Department Counsel was prepared to proceed on February 7, 2015, and I received the case assignment on February 23, 2015. DOHA issued a Notice of Hearing on March 4, 2015, and I convened the hearing as scheduled on March 25, 2015. The Government offered one exhibit marked as GE 1, which was received and admitted into evidence without objection. Applicant testified. He submitted exhibits (AE) marked as AE A through AE D, which were received and admitted into evidence without objection. The record closed on March 25, 2015. DOHA received the hearing transcript (Tr.) on April 2, 2015.

Procedural Rulings

Notice

Applicant received the notice of the date, time and place of the hearing less than 15 days before the hearing. I advised Applicant of his right under ¶ E3.1.8. of the Directive to receive the notice at least 15 days before the hearing. Applicant affirmatively waived this right under the Directive. (Tr. 12)

Motions

At the hearing, Department Counsel motioned to amend allegation 1.c of the SOR to change the date from 2010 to 2009. Applicant did not object. The motion was granted. SOR allegation 1.c is amended to change the date from 2010 to 2009. (Tr. 9)

Findings of Fact

In his Answer to the SOR, Applicant admitted the factual allegations in ¶¶ 1.a - 1.c and 2.a of the SOR. His admissions are incorporated herein as findings of fact. He also provided additional information to support his request for eligibility for a security clearance. After a complete and thorough review of the evidence of record, I make the following findings of fact.

Applicant, who is 55 years old, works as a senior engineer in hardware and software development for a DOD contractor. He began his current employment two years ago. From October 2008 until February 2013, Applicant was a self-employed engineer. During part of this time, he formed his own business, and he continued to perform similar work for his clients.¹

¹GE 1; Tr. 19-20, 29.

Applicant graduated from college in December 1982 with a bachelor of science degree in electrical engineering. He and his wife married in April 1989. They have two sons, ages 23 and 15.²

Applicant filed his first income tax return in 1977. He timely filed annual federal and state income tax returns through the tax year 2013,³ except for the tax years 2009 and 2010. He has no explanation for not filing his income tax returns with the federal and state governments for these years. He recalls losing the folder with all the tax information related to his self-employment income in 2010. He has not been able to locate this folder.⁴

On April 15, 2010, Applicant filed a request for an extension of time to file his 2009 federal income tax return with the Internal Revenue Service (IRS). The IRS granted him until October 15, 2010 to file his return. He did not file his 2009 income tax return by that date. On March 15, 2011, Applicant called the IRS with a request for information about non-filing of taxes.⁵

Two days before his security clearance hearing, Applicant requested and received from the IRS a tax account transcript for the tax year 2009. Besides the extension information, the IRS transcript reflects that the IRS completed a substitute tax return on July 16, 2012. Based on the information in its records, the IRS determined Applicant's adjusted gross income for 2009 at \$82,170, his taxable income at \$72,820, and his filing status as married filing separately. The transcript reflects that the IRS received \$10,664 in taxes withheld by employers and a \$236 payment by Applicant on April 15, 2010. When asked about this payment, Applicant expressed his belief he had computed his taxes, determined he owed this additional amount of taxes, and made a payment. On April 15, 2012, the IRS transferred \$4,064 from Applicant's 2011 tax refund and applied the money to his 2009 tax account.⁶ On February 18, 2013, the IRS computed his 2009 tax liability at \$14,520 and assessed him penalties for late filing and late payment of taxes at \$1,581. On April 15, 2013, the IRS transferred \$1,140 from his 2012 income tax refund to his 2009 tax account.⁷ The tax transcript reflects that Applicant has a zero balance for his 2009 tax account. As of the hearing, he had not filed his 2009 tax return (1040 form).⁸

²GE 1; Tr. 17-18.

³At the time of the hearing, his income tax returns for the tax year 2014 were not due and not yet filed.

⁴Tr. 19-20, 24-25, 27, 29, 32, 41.

⁵AE B; Tr. 21

⁶Applicant believes this was the refund he was entitled to receive in 2012.

⁷Applicant also believes this money came from the refund he was entitled to receive in 2013.

⁸AE B; Tr. 21-23. The SOR inaccurately states that Applicant filed his 2009 tax return in 2013.

Applicant signed his 2010 1040 federal income tax return on March 23, 2015, which he indicated has been filed. On this same date, he requested and received a tax transcript from the IRS for the tax year 2010. The tax transcript indicates that a tax return had not yet been filed; that Applicant timely requested an extension of time to file his federal tax return on April 15, 2011; that the IRS has not prepared a substitute tax return; that Applicant paid \$13,000 in estimated taxes on January 21, 2011; and that his tax account had a negative balance of \$13,000. Applicant's recently prepared and submitted his 2010 tax return, which shows a total income of \$98,712, including \$47,000 from an early IRA account distribution. Applicant had \$9,567 withheld from this distribution for taxes. He paid the IRS \$22,567 in total taxes for the tax year 2010. His completed return indicated that he was entitled to a tax refund of \$9,298. He anticipates the IRS will assess him penalties and interest related to his late filing and the above refund will be applied to these assessments. He does not believe he will owe any money for the 2010 tax year.⁹

Applicant has not filed his state income tax returns for the tax years 2009 and 2010. He recently attempted to obtain the state form to file the tax returns for the tax years 2009 and 2010, but he was unable to retrieve the forms for these tax years from the state website. He submitted an electronic request for these forms shortly before the hearing. Applicant was able to access information about his state tax account, which covers his taxes for the tax years 2009 through 2013. The documentation shows that he filed his tax returns in 2011, 2012, and 2013 and that he does not owe any taxes for these years. The documentation also indicates that he did not file a tax return for the tax years 2009 and 2010 and that he does not owe any taxes to the state for either year. He does not owe any past-due taxes to the state.¹⁰

Applicant does not owe any past taxes nor does he have any past-due debts. He is current on his debts and monthly expenses. The IRS and the state have not filed tax liens against him and have not garnished his wages for past-due taxes. When asked how the government can be assured that he will timely file his taxes in the future, Applicant advised that over the last four years, he has learned how to obtain all necessary information needed to file his tax returns. He explained that one reason for his delay in complying with his 2009 and 2010 tax filing obligations was his lack of knowledge on how to resolve this problem once it started.¹¹

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

⁹AE A; AE D; Tr. 24-30.

¹⁰AE C; Tr. 30-33.

¹¹Tr. 30, 37, 39.

disqualifying conditions and mitigating conditions, which are 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 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 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, an applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." An applicant has the ultimate burden of persuasion for 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 an 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.

AG ¶ 19 describes the disqualifying conditions that could raise security concerns. I have considered all the conditions, and the following is potentially applicable:

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

Applicant had not filed his 2009 and 2010 federal and state income tax returns as of the date of the issuance of the SOR. A security concern has been established under AG ¶ 19(g).

The Financial Considerations guideline also includes examples of conditions that can mitigate security concerns. I have considered mitigating factors AG ¶ 20(a) through ¶ 20(f) and find that none of them apply.

Recently, the Appeal Board issued a decision denying an applicant's security clearance after the applicant repaid the IRS more than \$100,000 through a wage garnishment for taxes owed over a period of 10 years. In that case, the Appeal Board stated that "a person who fails repeatedly to fulfill his or her legal obligations does not demonstrate the high degree of good judgment and reliability required of persons granted access to classified information." The Appeal Board noted that a person who has a history of failing to file [emphasis supplied] income tax returns does not demonstrate a high degree of judgment and reliability required for access to classified information. See ISCR No. 12-05043 (App. Bd. Oct. 30, 2014), citing ISCR Case No. 98-0608 (App. Bd. Jun. 27, 2000).

In the instant case, Applicant failed to timely file his federal and state income tax returns for 2009 and 2010. He filed his 2010 federal tax return two days before his security clearance hearing. He has yet to file his 2009 federal tax return or his state tax returns for either year. Although he does not owe any taxes to the federal or state governments, his failure to file his tax returns even after being granted an extension of time by the IRS shows poor judgment and a lack of reliability. He has not mitigated the security concerns under Guideline F.

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 describes the disqualifying conditions that could raise security concerns. I have considered all the conditions, and the following is potentially applicable:

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of:

(3) a pattern of dishonesty or rule violations.

Applicant failed to file his federal and state income tax returns for the tax years 2009 and 2010, which constitutes a pattern of failing to follow the rules under AG ¶ 16(d) and while that factor would not on its face fully apply because it is adverse information covered under another Guideline, his conduct implicates the poor judgment concerns under AG ¶ 15.

The Personal Conduct guideline also includes examples of conditions that can mitigate security concerns. I have considered mitigating factors AG ¶ 17(a) through ¶ 17(g), and the following are potentially applicable:

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur.

Applicant is making belated efforts to address his known non-compliance with his income tax filing obligations for the tax years 2009 and 2010. He has filed his 2010 federal tax return, but not his 2009 return. He is trying to obtain the appropriate documents for filing his state tax returns for both years. While he has not timely filed his income tax returns, he does not owe either the IRS or the state any additional money for taxes in either year. Outside of these two years, Applicant has filed his income tax returns for more than 30 years. In trying to resolve the problem of lost information for his 2010 taxes, he has learned how to resolve problems related to missing information needed to file a complete tax return. I have weighed Applicant's continued procrastination to fulfill his legal obligation to timely file his income tax returns, his many years of timely filing his income tax returns, his paid taxes for 2009 and 2010, and his positive management of his income and expenses. Given the positive steps he has

taken, I conclude that AG 17(d) partially applies, but concerns persist as outlined in Guideline F.

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 an 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 He dsecurity clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. The decision to grant or deny a security clearance requires a careful weighing of all relevant factors, both favorable and unfavorable. In so doing, an administrative judge must review all the evidence of record, not a single item in isolation, to determine if a security concern is established and then whether it is mitigated. A determination of an applicant's eligibility for a security clearance should not be made as punishment for specific past conduct, but on a reasonable and careful evaluation of all the evidence of record to decide if a nexus exists between established facts and a legitimate security concern.

In reaching a conclusion, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. For over 30 years Applicant timely filed his federal and state income tax returns. Although the IRS granted his request for an extension of time to file his 2009 and 2010 federal income tax returns, he has not filed his 2009 federal tax return and only filed his 2010 federal income tax return two days before his hearing. He has not filed his delinquent state tax returns. While he does not owe federal or state income taxes, his continued failure to file his 2009 federal tax return and his state tax returns for reasons unknown continues to raise security concerns under Guidelines E and F. His continued procrastination towards this important financial legal obligation raises a concern about he will handle classified information.

Overall, the record evidence leaves me with questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the security concerns arising from his finances and personal conduct under Guidelines F and E.

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:

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| Paragraph 1, Guideline F: | AGAINST APPLICANT |
| Subparagraph 1.a: | Against Applicant ¹² |
| 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 the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

MARY E. HENRY
Administrative Judge

¹²Applicant filed his federal income tax return, but he has not filed his state income tax return.