

KEYWORD: Personal Conduct

DIGEST: Applicant did not file federal or state income tax returns for tax year 1997. The record evidence fails to establish by substantial evidence that Applicant had sufficient income requiring him to file the returns. Clearance is granted.

CASENO: 03-22469.h1

DATE: 02/02/2006

DATE: February 2, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-22469

DECISION OF ADMINISTRATIVE JUDGE

MICHAEL H. LEONARD

APPEARANCES

FOR GOVERNMENT

Stephanie C. Hess, Esq., Department Counsel

FOR APPLICANT

Charles Tucker, Jr., Esq.

SYNOPSIS

Applicant did not file federal or state income tax returns for tax year 1997. The record evidence fails to establish by substantial evidence that Applicant had sufficient income requiring him to file the returns. Clearance is granted.

STATEMENT OF THE CASE

On October 26, 2004, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) stating the reasons why DOHA proposed to deny or revoke access to classified information for Applicant.⁽¹⁾ The SOR, which is in essence the administrative complaint, alleged a security concern under Guideline E for personal conduct because Applicant did not file federal and state income tax returns for tax year 1997. Applicant replied to the SOR on December 7, 2004, and requested a hearing. He admitted not filing the returns in question, but explained he did not have a W-2 or 1099 Form for 1997 because his earnings were below the income threshold.

Department Counsel indicated she was ready to proceed on June 20, 2005, and the case was assigned to me June 27, 2005. Thereafter, a notice of hearing was issued scheduling the hearing for September 13, 2005. Applicant appeared with counsel and the hearing took place as scheduled. I left the record open to allow Applicant to submit additional documentary evidence concerning his obligation to file returns. Those matters were received on or about October 12, 2005, and admitted into the administrative record as Exhibits G and H without objection by Department Counsel. DOHA received the transcript September 27, 2005.

FINDINGS OF FACT

Applicant's admissions to the SOR allegations are incorporated herein. In addition, I make the following findings of fact:

Applicant is a 34-year-old married man employed as an analyst providing technical support to government programs. He requires a security clearance for his job.

Applicant admits not filing federal or state income tax returns for tax year 1997. He earned less than \$6,800 in gross income during the year (Applicant's testimony at 46 - 48, Exhibits A and B). For tax year 1997, a person was required to file a federal return if their gross income was \$6,800 (Exhibit G). Likewise, in Applicant's state of residence for tax year 1997, a person was required to file a return if their gross income was \$6,800 (Exhibit H).

POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's security-clearance eligibility, including disqualifying conditions (DC) and mitigating conditions (MC) for each applicable guideline. In addition, each clearance decision must be a fair and impartial commonsense decision based on the relevant and material facts and circumstances, the whole-person concept, and the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance.

A person granted access to classified information enters into a special relationship with the government. The government must be able to have a high degree of trust and confidence in those persons to whom it grants access to classified information. The decision to deny a person a security

clearance is not a determination of an applicant's loyalty.⁽²⁾ Instead, it is a determination that the applicant has not met the strict guidelines the President has established for granting a clearance.

BURDEN OF PROOF

The only purpose of a security-clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.⁽³⁾ There is no presumption in favor of granting or continuing access to classified information.⁽⁴⁾ The government has the burden of proving controverted facts.⁽⁵⁾ The U.S. Supreme Court has said the burden of proof in a security-clearance case is less than the preponderance of the evidence.⁽⁶⁾ The DOHA

Appeal Board has followed the Court's reasoning on this issue establishing a substantial-evidence standard.⁽⁷⁾ "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."⁽⁸⁾ Once the government meets its burden, an applicant has the burden of presenting evidence of refutation, extenuation, or mitigation sufficient to overcome the case against him.⁽⁹⁾ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽¹⁰⁾

As noted by the Court in *Egan*, "it should be obvious that no one has a 'right' to a security clearance," and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽¹¹⁾ Under *Egan*, Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

CONCLUSIONS

Personal conduct under Guideline E is always a security concern because it asks the central question if a person's past conduct justifies confidence the person can be trusted to properly safeguard classified information. Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.

Here, the record evidence fails to establish by substantial evidence that Applicant had sufficient income requiring him to file the returns. As a result, he was not under a lawful obligation or requirement to file federal or state income tax returns. In other words, not filing an income tax return when the tax authority does not it is perfectly lawful activity and has no security significance. In this light, I reviewed the disqualifying conditions under the guideline and conclude none apply. Guideline E is decided for Applicant.

To conclude, Applicant has met his ultimate burden of persuasion to obtain a favorable clearance decision. In reaching my decision, I considered the evidence as a whole, both favorable and unfavorable, the whole-person concept, the clearly-consistent standard, and other appropriate factors and guidelines in the Directive.

FORMAL FINDINGS

The following are my conclusions as to each allegation in the SOR:

SOR ¶ 1-Guideline E: For Applicant

Subparagraphs a - b: For Applicant

DECISION

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is granted.

Michael H. Leonard

Administrative Judge

1. This action was taken under Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).
2. Executive Order 10865, § 7.
3. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
4. ISCR Case No. 02-18663 (March 23, 2004) at p. 5.
5. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
6. *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988).
7. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
8. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
9. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.
10. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15.

