

KEYWORD: Personal Conduct; Criminal Conduct

DIGEST: Applicant failed to file federal and state income tax returns for eight consecutive tax years. He offered no justification for his conduct. Security concerns based on personal conduct and criminal conduct are not mitigated. Clearance is denied.

CASENO: 05-02125.h1

DATE: 01/31/2006

DATE: January 31, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 05-02125

DECISION OF ADMINISTRATIVE JUDGE

LEROY F. FOREMAN

APPEARANCES

FOR GOVERNMENT

Jeff A. Nagel, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant failed to file federal and state income tax returns for eight consecutive tax years. He offered no justification for his conduct. Security concerns based on personal conduct and criminal conduct are not mitigated. Clearance is denied.

STATEMENT OF THE CASE

On September 9, 2005, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its decision to not grant a security clearance to Applicant. This action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified (Directive). The SOR alleges security concerns under Guidelines E (Personal Conduct) and J (Criminal Conduct). Under Guideline E, it alleges Applicant failed to file his federal and state income tax returns for eight consecutive tax years from 1997 through 2004. SOR ¶ 1.a. alleges his failure to file federal returns, and ¶ 1.b. alleges failure to file state returns. Under Guideline J, it alleges each failure to file tax returns violated federal and state law. SOR ¶¶ 2.a. through 2.h. allege violations of 26 U.S.C. § 7203, and ¶¶ 2.i. through 2.p. allege violations of state law.

Applicant answered the SOR in writing on October 25, 2005, admitted all the allegations, and elected to have the case decided on the written record in lieu of a hearing. Department Counsel submitted the Government's written case on November 4, 2005. A complete copy of the file of relevant material (FORM) was provided to Applicant, and he was afforded an opportunity to file objections and submit material to refute, extenuate, or mitigate the disqualifying conditions. Applicant received the FORM on November 18, 2005. He did not submit any additional information. The case was assigned to me on January 6, 2006.

PROCEDURAL RULING

As part of the Government's submission, Department Counsel moved to amend the SOR ¶¶ 2.i. through 2.p., by correcting the citation of the state law allegedly violated by Applicant. Applicant received the motion to amend as part of the FORM and did not object. As part of this decision, I have granted the motion to amend the SOR as requested by Department Counsel.

FINDINGS OF FACT

Based on the entire record, including Applicant's admissions in his answer to the SOR, I make the following findings of fact:

Applicant is a 43-year-old engineer for a defense contractor. He is married and has three children. He has worked for his current employer since August 2002. He received a security clearance in March 1990.⁽¹⁾

Applicant admitted he did not file federal and state income tax returns for eight consecutive tax years from 1997 through 2004.⁽²⁾ On February 8, 2005, after being telephonically contacted by a security investigator, he hired a licensed financial planner to gather the necessary documentation and file his tax returns. In an interview on February 10, 2005, he told the security investigator he had not filed his returns because of a combination of lost or misplaced records and problems he and his wife were having in managing their finances. He told the investigator he did not believe he owed any taxes and his only excuse for not filing was "it became easier to do nothing and to try and ignore the problem" as he fell further behind. He also told the investigator he has a good income and there were no "overriding financial reasons" for not filing his tax returns.⁽³⁾ As of June 23, 2005, the financial planner had requested copies of documents from the Internal Revenue Service in order to prepare and file Applicant's tax returns.⁽⁴⁾ There is no evidence in the record showing any of the returns have yet been filed.

POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has "the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified. Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3.

The Directive sets forth adjudicative guidelines for determining eligibility for access to classified information, and it lists the disqualifying conditions (DC) and mitigating conditions (MC) for each guideline. Each clearance decision must be a fair, impartial, and commonsense decision based on the relevant and material facts and circumstances, the whole person concept, and the factors listed in the Directive ¶¶ 6.3.1 through 6.3.6.

In evaluating an applicant's conduct, an administrative judge should consider: (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 applicant's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent 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. Directive ¶¶ E2.2.1.1 through E2.2.1.9.

The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the government must establish, by substantial evidence, conditions in the personal or professional history of the applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. "[T]he Directive presumes there is a nexus or rational connection between proven conduct under any of the Criteria listed therein and an applicant's security suitability." ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996) (quoting DISCR Case No. 92-1106 (App. Bd. Oct. 7, 1993)).

Once the government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002); *see* Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* Directive ¶ E2.2.2.

CONCLUSIONS

Guideline E (Personal Conduct)

Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the applicant may not properly safeguard classified information. Directive ¶ E2.A5.1.1. "A pattern of dishonesty or rule violations" is a disqualifying condition (DC 5) under this guideline. Directive ¶ E2.A5.1.2.5. Applicant's repeated failures to file income tax returns violated 26 U.S.C. § 7203, as well as the comparable provisions of his state's tax laws. I conclude DC 5 is established.

Applicant has offered no mitigating circumstances to justify his conduct. After evaluating all the evidence in the context of the whole person, I conclude he has not mitigated the security concern based on personal conduct.

Guideline J (Criminal Conduct)

A history or pattern of criminal activity creates doubt about an applicant's judgment, reliability, and trustworthiness. Directive ¶ E2.A10.1.1. A disqualifying condition under this guideline may be based on allegations or an applicant's admission of criminal conduct, whether or not charged (DC 1). Directive ¶ E2.A10.1.2.1. A single serious crime or multiple lesser offenses may also be disqualifying (DC 2). Directive ¶ E2.A10.1.2.2. Applicant's admitted failure to file his federal and state tax returns establishes DC 1 and DC 2.

Criminal conduct can be mitigated by showing it was not recent (MC 1), an isolated incident (MC 2), or there is "clear evidence of successful rehabilitation" (MC 6). Directive ¶¶ E2.A10.1.3.1., E2.A10.1.3.2., E2.A10.1.3.6. *See also* Directive ¶ E2.2.1.3. (frequency and recency of conduct). The issues under both C 1 and MC 6 are whether there has been a significant period of time without any evidence of misconduct, and whether the evidence shows changed circumstances or conduct.

Applicant's tax delinquencies have continued until the present and involved an eight-year course of conduct. Thus, I conclude MC 1 and MC 2 are not established. MC 6 also is not established because he has no "track record" of tax compliance. "Only with the passage of time will there be a track record that shows whether a person, through actions and conduct, is willing and able to adhere to a stated intention to refrain from acting in a way that the person has acted in the past." ISCR Case No. 97-0727, 1998 DOHA LEXIS 302 at *7 (App. Bd. Aug. 3, 1998).

After considering the disqualifying conditions and the lack of mitigating conditions, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concern based on criminal conduct.

FORMAL FINDINGS

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

Paragraph 1. Guideline E (Personal Conduct): AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: Against Applicant

Paragraph 2. Guideline F (Criminal Conduct): AGAINST APPLICANT

Subparagraph 2.a.: Against Applicant

Subparagraph 2.b.: Against Applicant

Subparagraph 2.c.: Against Applicant

Subparagraph 2.d.: Against Applicant

Subparagraph 2.e.: Against Applicant

Subparagraph 2.f.: Against Applicant

Subparagraph 2.g.: Against Applicant

Subparagraph 2.h.: Against Applicant

Subparagraph 2.i.: Against Applicant

Subparagraph 2.j.: Against Applicant

Subparagraph 2.k.: Against Applicant

Subparagraph 2.l.: Against Applicant

Subparagraph 2.m.: Against Applicant

Subparagraph 2.n.: Against Applicant

Subparagraph 2.o.: Against Applicant

Subparagraph 2.p.: Against Applicant

DECISION

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant a security clearance. Clearance is denied.

LeRoy F. Foreman

Administrative Judge

1. FORM Exhibit 4 at 1, 3, 7.

2. FORM Exhibit 3.

3. FORM Exhibit 8 at 1, 3.

4. FORM Exhibit 6 at 4.