



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



In the matter of:)	
)	
SSN:)	ISCR Case No. 08-05883
)	
Applicant for Security Clearance)	

Appearances

For Government: Melvin A. Howry, Esquire, Department Counsel
For Applicant: *Pro se*

March 23, 2010

Decision

MASON, Paul J., Administrative Judge:

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

Statement of the Case

Applicant submitted his Security Clearance Application (SCA, Item 4), on September 12, 2007. On November 20, 2007, Applicant was interviewed by an investigator from the Office of Personnel Management (OPM). The subject of the interview was not filing federal or state tax returns since 1980. Applicant agreed with the contents of this interview in his interrogatory answers (Item 6) dated July 31, 2009. On October 1, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under financial considerations (Guideline F). The action was taken pursuant to 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 adjudicative guidelines (AG)

promulgated by the President on December 29, 2005, and made effective within the Department of Defense for SORs issued on or after September 1, 2006.

Applicant submitted his answer to the SOR on October 12, 2009 (Item 3). He requested a decision on the record in lieu of a hearing. A copy of the Government's File of Relevant Material (FORM), the government's evidence in support of the allegations of the SOR, was sent to Applicant on November 23, 2009. Applicant received the FORM on December 2, 2009. He provided his response to the FORM on December 7, 2009. His response consists of two federal tax form worksheets filed for the years 2007 and 2008. The case file was assigned to me on February 1, 2010.

Findings of Fact

Applicant is 61 years old. He has never been married. He has lived in Arizona since 1992. Applicant was hired permanently by his current employer (a defense contractor) in August 2007 (SCA, Item 4). He is an engineering technician. According to his SCA, he has never been investigated for a security clearance, and he has no criminal record or financial problems (*Id.*).

The SOR alleges under financial considerations (Guideline F) that Applicant failed to file federal and state tax returns between 1980 and 2007. Applicant admitted all the allegations except for SOR 1.ccc., failure to file a federal return in 2007. He also admitted he should have filed for 1995 because he earned more than \$16,000.

During his November 11, 2007, interview, Applicant admitted he filed no federal or state returns since 1980 because he earned less than \$10,000 a year during the period (Item 6, interrogatory answers, July 31, 2009 (containing his November 11, 2007-interview)), which he claims are below the minimum amount necessary to require the filing of tax returns. He claimed he was not trying to intentionally avoid paying taxes. Since 1992, Applicant has also been self-employed as a cabinetmaker in addition to other employment (SCA, Item 4). His other employment has included his current employer (a defense contractor) on an as-needed basis.

In an attached statement to his answer to the SOR (Item 3, answer to SOR), Applicant explained “. . . how and why tax returns have never been important to me and thus never filed.” He entered the work force in 1965 (Item 3). He was employed by a national appliance company, working his way up to a master technician position. He had a comfortable lifestyle. He lost that job in 1975 because of his appearance. Applicant picked avocados for a time and traveled the country with a friend. By 1977, Applicant found that he no longer had the same desires as he had earlier in his life (*Id.*). He appeared to be going through a transformation about what he considered important in life.

In 1984, he rented a garage with his girlfriend, and began to devote more time to making wood products. In 1992, Applicant began self-employment as a cabinetmaker in addition to his other employment in other jobs. He bought an old car and spent much

time at the beach. He also picked avocados and studied rattlesnakes. Also in 1992, he worked on a ranch and continued to study snakes. After some hands-on training, Applicant began working on several electrician jobs (*Id.*).

In 2005, he was offered a temporary job with his current employer. One of Applicant's previous employers told him that if he earned less than \$10,000, he owed no taxes. Since 1975, Applicant noted his earnings between \$5,000 and \$8,000 (*Id.*). In 2009, after telling a friend he earned \$16,000 in 2008, the friend urged Applicant to file a return. Applicant discovered he had overpaid the Internal Revenue Service (IRS) by \$800, and received a tax refund for that amount (*Id.*; response to FORM).

In the last paragraph of his attached statement to the SOR, Applicant indicated he was a free and honest man. He pays cash for everything and has never borrowed money (*Id.*). In his response to the FORM, Applicant indicated he had no problems with money and he had no debts.

Also attached to Applicant's answer to the SOR is a copy of his federal earnings record generated by the Social Security Administration (SSA) (Item 3). The record shows that between 1965 through 2008, his gross income was at least \$9,350 (minimum earning amount necessary to file an IRS tax return in 2009) in 1995 and 2008 (Item 3). However, because of Applicant's self-employment since 1992 during his employment at other jobs, his earning figures after 1991 must be questioned.

Item 7 (tax instructions for 2009 filing tax returns) indicates at page 7 that a taxpayer should file a return to get a refund of federal tax withheld.

In Applicant's response to the FORM dated December 7, 2007, he provided completed tax returns for 2007 and 2008. His 2007 tax return was filed in January 2008, and his 2008 tax return was filed in January 2009. His 2008 tax return reflects that he received a tax refund of approximately \$700. Aside from his stated intentions to file federal and state tax returns in the future, Applicant presented no other evidence of filing federal or state tax returns for any other years identified in the SOR (response to FORM).

Character Evidence

Applicant provided no statements or independent evidence regarding his job performance and/or reputation in the community where he lives.

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 applied in conjunction with the variables listed in 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. Reasonable 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. 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 applicant or proven by Department Counsel. . . .” The applicant has the ultimate burden of persuasion as to obtaining a favorable security decision.

Analysis

Financial Considerations

AG ¶ 18. *The Concern*. “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. Compulsive gambling is a concern as it may lead to financial crimes including espionage. Affluence that cannot be explained by known sources of income is also a security concern. It may indicate proceeds from financially profitable criminal acts.”

The disqualifying condition that is controlling in this case is AG ¶ 19(g) (*failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same*).

Everyone has a duty to file federal and state tax returns, regardless of whether they owe taxes or are entitled to a refund. The SOR alleges and Applicant admits he filed neither file federal nor state income tax returns from 1980 through 2007. Applicant’s failure to file tax returns over a 27-year period establishes disqualifying conduct under AG ¶ 19(g). His failure to file returns is aggravated by the fact he filed no returns for his self-employment business that he started in 1992. His Social Security earnings after 1991 must be questioned. Because of his continuing self-employment while working at other jobs, his taxable income could have been much more than the entries on his earnings record.

Applicant's failure to file tax returns may be mitigated by AG ¶ 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 reliability, trustworthiness, and good judgment*); AG ¶ 20 (b) (*the conditions that resulted in the financial problem were largely beyond the person's control and the individual acted responsibly under the circumstances*); AG ¶ 20(c) (*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*); and AG ¶ 20(d) (the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts).

AG ¶ 20(a) is inapplicable as Applicant's failed to file federal and state tax returns for 27 consecutive years. The pattern of conduct did not end until January 2008 when he filed his 2007 tax return. The frequency of Applicant's failure to file and the fact that he still has filed no federal or state tax returns for the other years identified in the SOR continue to cast doubt on his current reliability, trustworthiness, and good judgment.

AG ¶ 20(b) applies to unforeseen circumstances that are largely beyond the individual's control. Applicant provided no reason (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation) under this condition to support his failure to file tax returns for 27 years. Even though he may have owed no taxes for any year in question, he still should have filed tax returns.

AG ¶ 20(c) does not apply as Applicant provided no evidence he has ever had financial counseling. While Applicant has filed his federal returns for 2007 and 2008, he has not indicated whether he plans to file his federal and state tax returns for the other years listed in the SOR. Without filed returns for the other years, there are no clear indications that Applicant's financial problems are being resolved or are under control.

AG ¶ 20(d), which applies to "a good-faith effort to repay overdue creditors," does not apply either. Having weighed the adverse evidence of not filing federal and state tax returns for 27 years, Applicant's filing of federal tax returns for 2007 and 2008, coupled with his promise to file returns in the future, I conclude that Applicant presented insufficient evidence under the mitigating conditions to find his favor under the financial considerations guideline.

Whole Person Concept (WPC)

I have examined the evidence utilizing the disqualifying and mitigating conditions of the financial guideline. Even though I have resolved the guideline against Applicant, the case still must be weighed within the context of nine variables known as the whole person concept. In evaluating the relevance of an individual's conduct, the administrative judge should consider the following factors:

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 the participation was 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.

The first time Applicant failed to file his federal or state tax return was in 1981 (for tax year 1980) at the age of 32. Tax returns are always filed a year after the tax year in question. Yet for the next 27 years, Applicant filed no federal or state returns. In addition, he filed no tax returns for his self-employment that began after 1991. The fact that Applicant earned less than \$10,000 during all but two years of the period does not rise to the level of a "condition" that mitigates his duty of failing to file federal and state tax returns. Though I do not believe Applicant was trying to hide tax information from the government or that he was trying to protest payment of income taxes at the federal or state level, he had a duty to file, and he breached his duty. See, 26 United States Code § 7203.

Applicant indicated in his answer to the SOR and his response to the FORM that he is an honest man without any money problems. The absence of money problems provides no justification for his failure to file federal and state tax returns. The financial guideline is resolved against Applicant.

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 (Financial Considerations, Guideline F): AGAINST APPLICANT

Subparagraph 1.a. through 1 bbb.	Against Applicant
Subparagraph 1.ccc.	For Applicant
Subparagraph 1.ddd.	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.

Paul J. Mason
Administrative Judge