



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



In the matter of:)
)
) ISCR Case No. 08-09823
)
)
Applicant for Security Clearance)

Appearances

For Government: Francisco Mendez, Esquire, Department Counsel
For Applicant: *Pro se*

March 29, 2010

Decision

RIVERA, Juan J., Administrative Judge:

Applicant’s willful failure to file tax returns and to pay his income taxes shows he has a problem with complying with well-established governmental rules and systems. Voluntary compliance with such rules and systems is essential for protecting classified information. His recent effort to resolve his tax debt is not sufficient to mitigate all the security concerns raised under criminal conduct and financial considerations. Eligibility for access to classified information is denied.

Statement of the Case

On June 6, 2008, Applicant submitted his most recent security clearance application. On July 27, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to him, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as revised; and the revised adjudicative guidelines (AG) effective within DoD on September 1, 2006.

The SOR alleges security concerns under Guideline J (Criminal Conduct) and Guideline F (Financial Considerations). The SOR detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for him, and recommended referral to an administrative judge to determine whether a clearance should be granted or denied.

On August 24, 2009, Applicant responded to the SOR allegations and requested a hearing before an administrative judge. The case was assigned to me on September 21, 2009. The scheduling of the hearing was delayed because Applicant was deployed to a remote location overseas and there were no compatible teleconference (VTC) facilities available. DOHA issued a notice of hearing on November 18, 2009. The hearing was convened on November 24, 2009. Appellant participated on the VTC from a remote location overseas. I was located in Arlington, Virginia. The Government offered Government Exhibits (GE) 1 through 12. GEs 7 and 12 were admitted over Applicant's hearsay objection. Applicant testified and submitted Applicant Exhibits (AE) 1 through 12, which were admitted without objection. DOHA received the transcript of the hearing (Tr.) on December 3, 2009.

Procedural Issue

On September 29, 2009, Department Counsel and Applicant agreed to schedule the hearing on October 23, 2009. Because of difficulties finding a compatible VTC facility, the hearing was cancelled. On November 18, 2009, it was rescheduled for November 24, 2009. At his hearing, Applicant indicated he had sufficient time to prepare and was ready to proceed. He affirmatively waived his right to 15 days advance notice of the hearing.

Findings of Fact

Applicant admitted the allegations on SOR ¶¶ 2.a and 2.b. He denied SOR ¶¶ 1.a, 2.c, and 2.d. His admissions are incorporated herein as findings of fact. After a thorough review of the evidence of record, and having considered Applicant's demeanor and testimony, I make the following additional findings of fact.

Applicant is a 55-year-old electrical engineer employed by a defense contractor. He received his bachelor's degree in 1982. He has been married to his wife for 35 years. They have two adult children, ages 34 and 33.

Through the years, Applicant has worked for many government contractors and agencies. From around September 1985 until 1997, he was employed as an engineer, senior engineer, and engineering scientist for various prominent corporations. Commensurate with his employment, he held access to classified information at the secret level between 1976 and 1979. He also had access to classified information at the top secret level with access to sensitive compartmented information (TSSCI) from 1980

to 1981, and from 1983 to 1999. Apparently, he was self-employed for a short period in 1994, and from January 2000 until around April 2008.

Applicant has worked for his current employer, a government contractor from April 2008 to present. He has possessed an interim secret security clearance since April 2008. He has been deployed to a combat zone during most of his employment, and as of his hearing day, he was deployed to a combat zone. He is in charge of the operation and maintenance of weapons systems that provide protection to U.S. troops and personnel deployed to the combat zone. There is no evidence Applicant has ever compromised or caused others to compromise classified information. Nor is there any evidence that he has ever failed to follow the rules and regulations required to handle classified information.

In Applicant's June 2008 security clearance application, he indicated the United States had filed liens against him for back taxes. His background investigation addressed his financial status and included the review, among other documents, of July 2008 and May 2009, credit reports (CBRs), three security clearance applications, and excerpts of a civil suit brought against Applicant. In February 2006, the U.S. Attorney General brought suit against Applicant and his wife to reduce to judgment federal tax assessments made against them for federal income taxes, penalties, and interest.

Applicant filed his tax return for 1996, but claimed (in part) his wages were not subject to federal income taxation because compensation for labor is not taxable. He made partial payment on the taxes assessed on his 1996 wages. He also failed to file tax returns for years 1997 through 2000 (SOR ¶¶ 1.a and 2.d). Applicant argued in federal court (generally) that he did not have to file tax returns and the Internal Revenue Service (IRS) was acting without valid authority because: he was not a taxpayer, the IRS did not comply with the Paperwork Reduction Act, and the IRS did not provide him with proof of tax liability. He lost his case at the Federal District Court level, and the U.S. Fifth Circuit Court of Appeals dismissed Applicant's arguments as "frivolous."

The Fifth Circuit Court of Appeals affirmed the Federal District Court's decision (GE 10). It ruled that Applicant failed to file tax returns for the 1997 – 2000 tax years as required by law, and that he was indebted to the United States for the federal income taxes assessed against him for the 1996 – 2000 tax years, plus interest and penalties, totaling approximately \$182,480 (SOR ¶¶ 2.a and 2.b). The IRS liens filed against him were declared valid and ordered foreclosed. Applicant's three timeshare properties and his home were awarded to the United States and sold to pay his IRS liens.

At his hearing, Applicant denied SOR ¶ 1.a. He claimed that, although he did not file a tax return for years 1997 through 2000, three other documents that were filed with the IRS were the equivalent of him filing a tax return: (1) his employer providing a copy of his W-2 form to the IRS; (2) the IRS reconstruction of Applicant's 1040 to conduct his tax assessments; and (3) statements he filed with the IRS requesting a determination he was not liable for taxes. Absent documentary evidence in the form of specific citations to the law or federal cases to support his claims, Applicant's testimony alone is

insufficient to prove his claims. Moreover, the Federal District Court and the U.S. Fifth Circuit Court of Appeals concluded Applicant failed to file tax returns for the years in question as he was required to do by law, and that the federal income taxes assessed against him for the 1996 – 2000 tax years were legal.¹

Applicant admitted the two judgments in favor of the United States alleged in SOR ¶¶ 2.a and 2.b. He partially paid his 1996 assessed income tax and failed to file federal tax returns for the 1997 – 2000 tax years. He became indebted to the United States for the income taxes assessed against him, plus interests and penalties, totaling \$182,480. Applicant's real estate properties were seized, awarded to the United States, and sold to pay approximately \$82,747 towards his IRS liens. Applicant still owes around \$99,700 to the IRS.

In 2009, Applicant received an IRS Notice of Levy collecting \$308,576 for past due taxes. He believes the total amount in collection is incorrect because the IRS failed to account for the \$82,747 paid through the foreclosure and sale of his real estate properties. He wrote to the IRS seeking to settle the debt in 2009. He asked the IRS for the minimum amount it will accept in full payment. In his letter, Applicant stated that if the IRS was not willing to reduce his debt, he “may have no other alternative but to file bankruptcy to settle this debt or wait until the statute of limitations runs out which is Feb [sic] 2014” (AE 5). As of the day of his hearing, he had not received a response from the IRS. Except for the payment made as a result of the forfeiture and sale of his property, Applicant has made no other payments to the IRS.

Concerning SOR ¶ 2.c, Applicant denied he is indebted to the state of Maryland for a tax lien filed against him, because the state of limitations ran out and the debt is no longer valid. He believes the tax lien dates back to at least 1996 (or prior years); because that is the last year he lived in the state. He claimed he timely filed his state tax returns while he lived in Maryland. Applicant intends to contest the state lien on the basis that the debt is no longer valid because of the passing of the statute of limitations. He is having difficulty disputing the state lien while deployed to a combat zone. Applicant did not present documentary evidence showing he timely filed his 1996 state tax returns, or that the statute of limitations has not been tolled, and the debt (state lien) is uncollectable. Even if the statute of limitations was tolled, the passing of the statute of limitations in of itself does not automatically mitigate financial considerations concerns.²

¹ DOHA proceedings are not a proper forum for challenging the validity of a civil judgment entered against an applicant. The validity of the federal taxes (and interest and penalties) assessed against him by the IRS may be challenged; however, there is a presumption of regularity that Applicant has failed to rebut. See ISCR Case No. 00-0596 at 2-3 (App. Bd. Oct. 4, 2001); ISCR Case No. 01-05340 at 3 (App. Bd. Dec. 20, 2002) (internal citations omitted).

² The statute of limitations ends an Applicant's legal responsibility to pay the creditor after the passage of a certain amount of time, as specified in state law. Notwithstanding, within the context of the security clearance process, the passing of the statute of limitations does not automatically mitigates financial considerations concerns under AG ¶ 20(d). See ISCR Case No. 08-01122 at 4 (App. Bd. Feb. 9, 2009); ADP Case No. 06-14616 at 3 (App. Bd. Oct. 18, 2007); ISCR Case No. 07-08049 at 5 (App. Bd. Jul. 22,

Applicant filed no federal or state income tax returns for tax years 2000 through 2008. During that period, he was self-employed (performing lawn mowing services, computer repairs, and designing filters). He claimed he did not make the minimum income required to file federal tax returns. He also lived in a state that does not have income taxation. He testified he intends to file his 2009 income tax return.

Applicant repeatedly stated it has never been his intention to defraud the U.S. Government or to fail to pay anything he owes to the United States. He argued that because there is no statute that authorizes personal liability for income taxation, he cannot be liable for income taxes. He firmly believes that he is exercising his rights under the U.S. Constitution. At the same time, he is trying to look for legal solutions to settle his IRS debt.

Applicant is a proud, loyal American. He noted he has been risking his life protecting U.S. soldiers, personnel, and property in a foreign combat zone. He appears to be a dedicated, knowledgeable worker, and an asset to his employer.

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 required 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 controlling 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. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

2008); ADP Case No. 07-13041 at 5 (App. Bd. Sep. 19, 2008); ISCR Case No. 07-11814 at 2 (App. Bd. Dec. 29, 2008).

In the decision-making process, the Government has the initial burden of establishing controverted facts alleged in the SOR by “substantial evidence.”³ Once the Government has produced substantial evidence of a disqualifying condition, the burden shifts to applicant to produce evidence “to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by department counsel, and [applicant] has the ultimate burden of persuasion as to obtaining a favorable clearance decision.” Directive ¶ E3.1.15. The burden of disproving a mitigating condition never shifts to the government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

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* Executive Order 12968 (Aug. 2, 1995), Section 3.

Analysis

Guideline J, Criminal Conduct

Under Guideline J, the security concern is that criminal activity “creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations.” AG ¶ 30.

Applicant filed his tax return for 1996, but claimed his wages were not subject to federal income taxation. He made partial payment on the taxes assessed on his 1996 wages. He also willfully failed to file tax returns for years 1997 through 2000, and became indebted to the United States for \$182,480 for the federal income taxes assessed against him, plus interest and penalties. Applicant's real estate properties were seized, awarded to the United States, and sold to pay approximately \$82,747 towards his IRS liens and judgments. Applicant still owes around \$99,700 to the IRS.

³ See Directive ¶ E3.1.14. “Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the record.” ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994).

Except for the payment made as a result of the forfeiture and sale of his property, Applicant has made no other payments to the IRS.

Applicant's behavior violated Section 7203 of Title 26 of the U.S. Code (USC), and constitutes a federal offense.⁴ His behavior raises security concerns under AG ¶ 31(a) "a single serious crime or multiple lesser offenses," and AG ¶ 31(c) "allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted."

AG ¶ 32 lists four conditions that could mitigate the criminal conduct security concerns raised under AG ¶ 31:

- (a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;
- (b) the person was pressured or coerced into committing the act and those pressures are no longer present in the person's life;
- (c) evidence that the person did not commit the offense; and
- (d) there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement.

After considering all the mitigating conditions, I find that none applies. Applicant failed to file federal tax returns for years 1997 through 2000. The last offense occurred 10 years ago, however, I do not consider the offenses temporally remote because Applicant has not resolved the issues related to his failure to file his tax returns and to pay federal income taxes. He still owes the IRS a substantial sum of money. He has not made any payments towards his IRS debt, except for the sum paid as a result of the forfeiture and sale of his property. I give Applicant credit for sending the IRS a letter in 2009, attempting to settle his tax debt. Notwithstanding, considering the reasons he incurred the debt, the amount of the debt, and the period during which the debt has been outstanding, Applicant's recent effort to resolve his debt is insufficient to mitigate the concerns.

Moreover, Applicant did not file federal income tax returns for years 2000 through 2008. He claimed he was not required to file a federal income tax return for any of those tax years because his gross income was under the specific amount set by law to file a

⁴ Title 26, U.S.C., Sec. 7203, makes it a Federal misdemeanor for anyone to willfully fail to file a federal income tax return, supply information, or pay such tax when he is required to do so by the Internal Revenue laws or regulations.

tax return. In light of his past willful failure to file tax returns and to pay federal income taxes, his testimony alone is not sufficient to fully raise any of the Guideline J mitigating conditions.

During his hearing, Applicant argued the same tax protester theories he unsuccessfully raised in Federal Court justifying his failure to file tax returns and to pay income tax. Considering the totality of the circumstances, I find Applicant's evidence fails to show successful rehabilitation or remorse. I also find Applicant's behavior continues to cast doubt on his judgment. The Guideline J security concern is not mitigated.

Guideline F, Financial Considerations

Under Guideline F, the security concern is that 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 ¶ 18.

Applicant failed to file federal tax returns for years 1997 through 2000. He became indebted to the United States for the income taxes assessed against him for tax years 1997 through 2000, plus interests and penalties, totaling \$182,480. He failed to pay the assessed taxes and the IRS filed tax liens against him. The liens were foreclosed in federal court and the IRS obtained two judgments in favor of the United States (SOR ¶¶ 2.a and 2.b). Applicant's real estate properties were seized, awarded to the United States, and sold to pay approximately \$82,747 towards his IRS liens and judgments. Applicant still owes around \$99,700 to the IRS. Except for the payment made as a result of the forfeiture and sale of his property, Applicant has made no other payments to the IRS.

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Concerning SOR ¶ 2.c, Applicant denied he is indebted to the state of Maryland for a tax lien filed against him, because the state of limitations ran out and the debt is no longer valid. He believes the tax lien dates back to at least 1996 (or prior years); because that is the last year he lived in the state. He claimed he timely filed his state tax returns while he lived in Maryland. Applicant intends to contest the state lien on the basis that the debt is no longer valid because of the passing of the statute of limitations. He is having difficulty disputing the state lien while deployed to a combat zone. Applicant did not present documentary evidence showing he timely filed his 1996 (or

prior years) state tax returns, or that the statute of limitations has not been tolled and that this debt (state lien) is uncollectable.

Applicant's behavior raises disqualifying conditions under AG ¶ 19(a): "inability or unwillingness to satisfy debts;" AG ¶ 19(c): "a history of not meeting financial obligations;" and AG ¶ 19(g): "failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same."

AG ¶ 20 lists six conditions that could mitigate the financial considerations security concerns:

(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;

(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;

(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;

(d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts;

(e) the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue; and

(f) the affluence resulted from a legal source of income.

Applicant presented evidence to show that he has partially paid the judgments filed against him, and that in 2009, he attempted to settle his IRS debt. Notwithstanding, for the same reasons set forth in my discussion of the Guideline J mitigating conditions, incorporated herein, I conclude none of the Guideline F mitigating conditions apply. I find Applicant's behavior is recent, likely to recur, and that it still casts doubt on Applicant's judgment. He presented little evidence of good-faith efforts to resolve his debts. His actions cast doubt on his current judgment. Financial considerations concerns are not mitigated.

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 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.

The ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole person concept. AG ¶ 2(c).

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant is a mature man, and a good father and husband. He appears to be a competent and dedicated worker. In the past, he worked well for government contractors and held access to classified information at the TSSCI level. There is no evidence he has ever compromised or caused others to compromise classified information.

Applicant is a loyal and patriotic American. He has been deployed to a combat zone, risking his life, during most of his current employment. He is in charge of the operation and maintenance of weapons systems that provide protection to U.S. troops and personnel deployed to the combat zone. These factors show some responsibility, trustworthiness, and mitigation.

Notwithstanding, the evidence against granting a security clearance is more substantial. His willful failure to file tax returns and to pay his income taxes shows he has a problem with complying with well-established governmental rules and systems. Voluntary compliance with such rules and systems is essential for protecting classified information. His recent effort to resolve his tax debt is not sufficient to mitigate all the security concerns raised by his past behavior. He failed to file several tax returns and to take reasonable steps to address his tax obligations.

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 J:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Paragraph 2, Guideline F:	AGAINST APPLICANT
Subparagraphs 1.a - 1.d:	Against Applicant

Conclusion

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

JUAN J. RIVERA
Administrative Judge