



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
)
-----) ISCR Case No. 09-00918
SSN: -----)
)
Applicant for Security Clearance)

Appearances

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

March 29, 2010

Decision

WESLEY, Roger C., Administrative Judge:

Statement of Case

On September 11, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing reasons why DOHA could not make the preliminary affirmative determination of eligibility for granting a security clearance, and recommended referral to an administrative judge to determine whether a security clearance should be granted, continued, denied, or revoked. The action was taken under 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 the revised Adjudicative Guidelines (AGs) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant responded to the SOR on October 13, 2009, and requested a hearing. The case was assigned to me on November 17, 2009, and was scheduled for hearing on January 12, 2010. The hearing was convened on the scheduled date for the purpose

of considering whether it would be clearly consistent with the national interest to grant, continue, or deny, Applicant's application for a security clearance. At hearing, the Government's case consisted of seven exhibits; Applicant relied on one witness (himself) and nine exhibits. The transcript (R.T.) was received on January 26, 2010. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Procedural Rulings and Evidentiary Issues

Before the close of the hearing, Appellant requested leave to supplement the record with documented filed state and federal tax returns for 2001 and 2002. For good cause shown, Applicant was granted seven days to supplement the record. The Government was afforded two days to respond. Within the time permitted, Applicant supplemented the record with a copied cover letter listing his enclosures, a voided 2001 IRS refund check, a creditor monitoring alert related to the debt alleged in subparagraph 1.e, a checking account statement reflecting payment of the debt alleged in subparagraph 1.f, and a billing notice associated with the debt alleged in subparagraph 1.f. Applicant's submissions were admitted as exhibits J through N.

Summary of Pleadings

Under Guideline F, Applicant is alleged to (a) have filed no State A or federal tax returns for the tax years of 2000 through 2007; (b) to be indebted to State A on a tax lien for \$67,896; (c) ; to be indebted to State A on a tax lien for \$233,000; and (d) to be indebted to two consumer creditors for \$516 and \$238, respectively.

In his response to the SOR, Applicant admitted to not filing his state and federal tax returns for the years 2000 through 2007, but denied the remaining allegations without any explanations. He requested a copy of his investigative file.

Findings of Fact

Applicant is a 57-year-old quality assurance engineer of a defense contractor who seeks a security clearance. The allegations covered in the SOR and admitted to by Applicant are incorporated herein and adopted as relevant and material findings. Additional findings follow.

Applicant has never been married and has no children. He was awarded a bachelor's of science degree in industrial engineering in 1975 (see ex. 1).

Between 2000 and 2007, Applicant failed to file state and federal tax returns. His state's franchise tax board obtained judgments against him in 2003 to discharge a tax lien against him in the amount of \$233,000, and in 2004 to discharge a tax lien against him for \$67,896 (see exs. 6 and 7). Applicant has never paid anything towards the satisfaction of either state tax lien, and the tax liens remain outstanding (see exs. 4 and 5).

Applicant has never been assessed any tax liabilities or subjected to any enforcement actions by the IRS for any of the tax years (2000 through 2007), and does not know how much (if any) he might owe to the IRS at the present time for any of his prior tax years (Tr. 69-72). Although he did receive a refund check of \$3,552 from the IRS in 2001, the check does not indicate the tax year, and was subsequently voided (see ex. K).

Applicant has not made any payments to the IRS since 2000 and attributes any potential tax liability to the IRS' failure to properly calculate the differences in the cost of certain public stock he sold and what he sold the stock for following the collapse of the company in the wake of the terrorist attacks of September 2001 (see ex. 5; Tr. 74). He has never hired a tax preparer, accountant, or attorney, however, to help him with his taxes (Tr. 84-88).

Since 2002, his state's franchise tax board has garnished his wages at the rate of \$500 a week. He claims the state has recovered in excess of \$19,000 a year on its tax liens (Tr. 64), and owes him money. To date, the state has recovered over \$50,000 in garnished wages from his savings account, and over \$2,000 from his checking account (Tr. 65-67). To date, though, he has taken no action to obtain refunds for any of the monies he claims from the state (see ex. 5; Tr. 69-71).

Applicant attributes some of his filing delays to his recurrent medical problems, which cause fatigue, numbness, and stress in handling papers, and walking (Tr. 73-79). He still feels the financial repercussions of his lost company stock in a major American company (Tr. 73-74). He has no tax or payment documentation in his possession to corroborate his claims.

Besides his tax debts and filing problems, Applicant incurred two smaller consumer debts. These debts are covered by subparagraph 1.e (\$516) and 1.f (\$238). Applicant documents his payment of the creditor 1.e debt (see exs. 2, 4, and M), but not his creditor 1.f debt (see exs. 2 and N). He has no payment receipts for his creditor 1.f account (Tr. 92-93).

Applicant has a net income of around \$4,000 a month (see ex. 5). He has about \$40,000 in his savings account and \$1,500 in cash. He estimates to have about \$600,000 in his 401(k) stock portfolio and \$20,000 in home equity (ex. 5).

Afforded an opportunity to supplement the record, Applicant did not provide any character references or personnel evaluations from his employer. Potentially helpful but not available either are his performance evaluations and any awards and meritorious citations he may have earned.

Policies

The AGs list guidelines to be used by administrative judges in the decision-making process covering DOHA cases. These guidelines take into account factors that

could create a potential conflict of interest for the individual applicant, as well as considerations that could affect the individual's reliability, trustworthiness, and ability to protect classified information. These guidelines include "[c]onditions that could raise a security concern and may be disqualifying" (disqualifying conditions), if any, and many of the "[c]onditions that could mitigate security concerns." These guidelines must be considered before deciding whether or not a security clearance should be granted, continued, or denied. The guidelines do not require administrative judges to place exclusive reliance on the enumerated disqualifying and mitigating conditions in the guidelines in arriving at a decision. Each of the guidelines is to be evaluated in the context of the whole person in accordance with AG ¶ 2(c)

In addition to the relevant AGs, administrative judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in AG ¶ 2(a) of the revised AGs, which are intended to assist the judges in reaching a fair and impartial commonsense decision based upon a careful consideration of the pertinent guidelines within the context of the whole person. The adjudicative process is designed to examine a sufficient period of an applicant's life to enable predictive judgments to be made about whether the applicant is an acceptable security risk.

When evaluating an applicant's conduct, the relevant guidelines are to be considered together with the following AG ¶ 2(a) factors: (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.

Viewing the issues raised and evidence as a whole, the following adjudication policy concerns are pertinent herein:

Financial Considerations

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. AG ¶ 18.

Burden of Proof

Under the Directive, a decision to grant or continue an applicant's request for security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires administrative judges to make a commonsense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a security clearance depends, in large part, on the relevance and materiality of that evidence. As with all adversarial proceedings, the judge may draw only those inferences which have a reasonable and logical basis from the evidence of record. Conversely, the judge cannot draw factual inferences that are grounded on speculation or conjecture.

The Government's initial burden is twofold: (1) it must prove by substantial evidence any controverted facts alleged in the SOR; and (2) it must demonstrate that the facts proven have a material bearing to the applicant's eligibility to obtain or maintain a security clearance. The required showing of material bearing, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a security clearance. Rather, consideration must take account of cognizable risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the burden of proof shifts to the applicant for the purpose of establishing his or his security worthiness through evidence of refutation, extenuation or mitigation of the Government's case. Because Executive Order 10865 requires that all security clearances be clearly consistent with the national interest, "security-clearance determinations should err, if they must, on the side of denials." See *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

Analysis

Applicant is a longstanding employee of a defense contractor who failed to file state and federal tax returns over an extended period (between 2000 and 2007). While there are no federal tax liens of record, his state's franchise tax board has tax liens filed against him in excess of \$300,000. None of these liens have been discharged to date. Besides his tax liens, Applicant accumulated two small consumer debts totaling about \$700.

Security concerns are raised under the financial considerations guideline of the AGs where the individual applicant is so financially overextended as to indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, which can raise questions about the individual's reliability, trustworthiness and ability to protect classified information, and place the person at risk of having to engage in illegal acts to generate funds. Applicant's failure to file state and federal tax returns and his accumulation of state tax liens and other delinquent debts warrant the application of three of the disqualifying conditions (DC) of the Guidelines for financial considerations: ¶

DC 19(a) “inability or unwillingness to satisfy debts,” DC ¶ 19(c) “a history of not meeting financial obligations,” and DC ¶ 19(g), “failure to file annual federal, state, or local income tax returns as required or the fraudulent filing of the same.”

Applicant’s failure to file tax returns and accrual of state tax liens are for the most part unexplained. He attributes some of his failures to medical conditions and slow reactions, but cannot reconcile his actions with his ability to maintain a demanding engineering position with the same defense contractor over a 15-year period. To date, he has not been able to effectuate any repayment plans with the state’s franchise tax board that do not involve involuntary garnishment. Without filed taxed returns with both taxing jurisdictions, it is impossible to know just what Applicant owes the state and the IRS at this time.

Applicant does not provide adequate explanations either as to why he has not made more concerted earlier attempts to work out filing and payment arrangements with the state and the IRS. If, as Applicant claims, both taxing authorities owe him money, he should encounter little difficulty fashioning settlement arrangements with them.

Mitigation credit to Applicant is very limited based on his furnished proofs. Besides the one small consumer debt that he paid (creditor 1.e), Applicant has made no tangible effort to file state and federal tax returns for the years covered in the SOR (2000 through 2007), or address any of the state taxes covered by the liens filed against him by the state’s taxing authority.

Accordingly, Applicant remains delinquent in the filing of his personal state and federal tax returns for the covered years (2000 through 2007) and for back taxes owed the state for the years named in the state’s two outstanding tax liens. As a result, MC ¶ 20(a), “the behavior happened so long ago, was so infrequent, or occurred under circumstances that it is unlikely to recur and does not cast doubt on the individual’s reliability, trustworthiness, or good judgment,” cannot be applied to Applicant’s situation. MC ¶ 20 (d), “the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts,” has some limited applicability based on Applicant’s documented payment of one of his two smaller consumer creditors.

Because Applicant has not chosen to seek any counseling advice relative to his identified tax filing and tax lien delinquencies, he may not take any advantage of MC ¶ 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.” Considered together, Applicant’s efforts are not enough to warrant any more than partial application of MC ¶ 20(c).

Holding a security clearance involves the exercise of important fiducial responsibilities, among which is the expectancy of consistent trust and candor. Financial stability in a person cleared to access classified information is required precisely to inspire trust and confidence in the holder of the clearance. While the principal concern of

a clearance holder's demonstrated financial difficulties is vulnerability to coercion and influence, judgment and trust concerns are implicit in financial cases (as here).

Whole person assessment does not help Applicant to overcome the judgment lapses associated with his tax filing failures, tax debt accumulations, and his still outstanding consumer debt. His long work history with the same defense contractor is commendable and deserving of considerable praise. His failure, though, to diligently monitor and ensure timely tax filings and discharge of the outstanding state tax liens against him reflects the lack of adequate attention to meeting his tax responsibilities. Security concerns associated with Applicant's filing deficiencies and accrued state tax and consumer debts are not mitigated under the whole person concept.

Taking into account all of the facts and circumstances surrounding Applicant's tax filing deficiencies and unresolved state tax liens and the absence of any meaningful efforts to demonstrate his financial responsibility and trustworthiness in managing his finances, Applicant does not mitigate security concerns related to his proven tax filing and debt delinquencies. Unfavorable conclusions warrant with respect to the allegations covered by subparagraphs 1a through 1.d and 1.f of the SOR. Favorable conclusions warrant with respect to subparagraph 1.e.

In reaching my decision, I have considered the evidence as a whole, including each of the AG 2(a) factors enumerated in the AGs of the Directive.

Formal Findings

In reviewing the allegations of the SOR and ensuing conclusions reached in the context of the findings of fact, conclusions, conditions, and the factors listed above, I make the following formal findings:

GUIDELINE F: (FINANCIAL CONSIDERATIONS):	AGAINST APPLICANT
Subparas. 1.a through 1.d and 1.f:	Against Applicant
Subpara. 1.e	For Applicant

Conclusions

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

Roger C. Wesley
Administrative Judge

