



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----, -----) ISCR Case No. 09-05056
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Tovah A. Minster, Esquire, Department Counsel
For Applicant: *Pro se*

July 7, 2010

Decision

WHITE, David M., Administrative Judge:

Applicant admittedly failed to file his federal and state income tax returns for tax years 2004 through 2008, without good cause. He claimed that a tax service filed these returns for him between February and April 2010, but provided no evidence to substantiate that claim, or otherwise mitigate resulting security concerns. Based upon a review of the case file, pleadings, and exhibits, eligibility for access to classified information is denied.

Applicant submitted a security clearance application (SF 86) on March 30, 2009.¹ On January 28, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, detailing security concerns under Guideline F (Financial Considerations).² 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*

¹Item 5.

²Item 1.

Clearance Review Program (January 2, 1992), as amended (Directive); and the adjudicative guidelines effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR in writing on February 21, 2010, and requested that his case be decided by an administrative judge on the written record without a hearing.³ Department Counsel submitted the Government's written case on March 25, 2010. A complete copy of the File of Relevant Material (FORM)⁴ was provided to Applicant, and he was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation within 30 days of his receipt of the FORM.

Applicant signed the document acknowledging receipt of his copy of the FORM on April 7, 2010, and returned it to DOHA. He provided a written response to the FORM on May 7, 2010, in which he made no objection to consideration of any evidence submitted by Department Counsel. On May 13, 2010, Department Counsel initialed a memorandum indicating no objection to the admissibility into evidence of the materials submitted by Applicant. I received the case assignment on May 25, 2010.

Findings of Fact

Applicant is a 51-year-old employee of a federal contractor, where he has worked since September 1995. He has no military service. This is his first application for a security clearance. He is single, with no children. Applicant earned an associate's degree in May 2006. He graduated from high school in 1977, and took a few college courses over the next several years.⁵ In his response to the SOR, he formally admitted the allegations in SOR ¶¶ 1.a through 1.h. Applicant's admissions, including his response to the SOR, and to DOHA interrogatories, are incorporated in the following findings.

Applicant disclosed, in Section 26 on his SF 86, that he failed to file a tax return when required by law or ordinance. He explained, "Taxes have always been deducted from my pay check, but I have failed to file a tax return the last several years."⁶ On May 28, 2009, he was interviewed about this and other matters by an investigator from the Office of Personnel Management (OPM). On November 5, 2009, Applicant confirmed that the investigator's summary of the interview was accurate, and offered no pertinent supplementary information. The interview summary reflected the following information provided by Applicant:

³Item 4.

⁴The Government submitted six Items in support of the SOR allegations.

⁵Item 5; Item 6.

⁶Item 5 at 30-31.

He is currently going into the 4th year of not filing his [sic] both his state and federal tax returns. He has a mental block with regard to filing taxes, which has caused him to procrastinate when it comes to filing his taxes. His taxes have always been property [sic] deducted from his earnings/pay checks. He has never owed any back taxes. He plans to, within the next 12 months, utilize the services of a tax professional/tax firm, to become current with respect the [sic] filing of his taxes.⁷

On November 5, 2009, Applicant also responded to a series of interrogatories from DOHA concerning his tax returns. He was asked individual questions concerning whether he had filed his state income tax return and his federal income tax return for each year beginning with 2005 and ending with 2008. Each question informed him that if he had filed the return, he should “provide proof of the filing, such as a receipt with a ‘stamp in’ date from” the respective tax authority. He answered “No” in response to each question, and his explanation for each failure to file was, “Procrastination.”⁸

As noted above, DOHA issued Applicant an SOR on January 28, 2010, citing his failures to file state and federal tax returns, as required, for each tax year from 2005 to 2008. In his February 21, 2010 response to the SOR, Applicant stated that he had gathered needed documentation and enlisted a tax preparation service to file his outstanding returns. He stated that he expected the filings to be completed within two weeks, and that he planned on filing his 2009 and future year tax returns in a timely fashion. Applicant provided no documentary evidence to substantiate his statements.⁹

In his response to the FORM, Applicant provided a name, address, and telephone number for a tax service that he claimed provided him tax advice and prepared his federal and state tax returns, for the years 2004 through 2009, in February 2010. He further said that all the returns were “mailed to the IRS and the state . . . before the April 15th, 2010 deadline.”¹⁰ He further reported that all returns resulted in refunds of unspecified amounts, except his 2004 state return on which he owed \$309.39. His letter stated, “(Detailed receipt from tax preparer can be provided upon request.)”¹¹ Again, Applicant failed to provide any documentary evidence to substantiate his claims.

Applicant submitted no other evidence describing his character, trustworthiness, or work performance. Department Counsel specifically commented on Applicant’s lack of “documentary evidence showing his arrangements with this tax service or proof that

⁷Item 6 at 9.

⁸Item 6 at 14-17.

⁹Item 4.

¹⁰FORM response letter of May 7, 2010.

¹¹*Id.*

the returns were filed,” in the Argument section of the FORM, and identified the need for him to submit such documentation to establish mitigation.¹² Applicant failed to provide any proof supporting his claim to have filed the delinquent tax returns in his response to the FORM, and it is his burden to obtain and provide such evidence if he wants it to be considered in mitigation. I was unable to evaluate Applicant’s credibility, demeanor, or character in person since he elected to have his case decided without a hearing.

Policies

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions (DCs) and mitigating conditions (MCs), which are to be used 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 AG ¶ 2 describing the adjudicative process. The administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶¶ 2(a) and 2(c), the entire process is a conscientious scrutiny of applicable guidelines in the context 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 the 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, “[t]he applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision.” Section 7 of Executive Order 10865 provides: “[a]ny determination under this order adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.”

A person applying for access to classified information seeks to enter 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

¹²FORM at 4-5.

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.

Analysis

Guideline F, Financial Considerations

The security concerns relating to the guideline for financial considerations are set out in AG ¶ 18:

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.

Department Counsel argued that the evidence established security concerns under three Guideline F DCs, as set forth in AG ¶ 19:

- (a) inability or unwillingness to satisfy debts;
- (c) a history of not meeting financial obligations; and
- (g) failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same.¹³

The SOR only alleges eight different failures to file federal and state annual income tax returns. It does not allege any delinquent debt, nor is there any evidence of delinquent debt concerning any of the tax years alleged in the SOR. Applicant admitted owing \$309.39 for his 2004 state income taxes, but that year was not the subject of any SOR allegation. Accordingly, there is no evidence to support application of DC 19(a) or (c). However, DC 19(g) was clearly established by Applicant's several admissions, thereby shifting the burden to Applicant to rebut, extenuate, or mitigate the resulting security concerns.

The guideline includes three conditions in AG ¶ 20 that could mitigate security concerns arising from Applicant's failure to file required income tax returns:

- (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

¹³FORM at 4.

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; and

(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.

Applicant failed to provide any evidence to corroborate his claim that he finally filed his federal and state income tax returns, for tax years 2004 through 2009, sometime between late-February and mid-April 2010. Even if he did so, however, his failure to file required tax returns up until that time (well after his receipt of the SOR and around the time he received the FORM) was recent. The failures to file were also frequent, occurring in each of the past five years. He continued to "procrastinate" until clearly faced with the imminent denial of his security clearance, and offered no evidence to suggest that such conduct is unlikely to recur. Applicant's lengthy and blatant disregard for his obligation to file annual income tax returns continues to cast doubt on his reliability, trustworthiness, and judgment, so the evidence does not support the application of MC 20(a).

Applicant attributed his failure to file tax returns to a "mental block" that caused him to "procrastinate." He offered no evidence of any condition beyond his control that led to his sustained and repeated failures to meet his obligations to federal and state tax authorities. Finally, he provided nothing to substantiate that he acted responsibly under the circumstances, so no mitigation under MC 20(b) was established.

Applicant claims to have retained a tax preparation service to assist him in filing his delinquent income tax returns, but provided no evidence to substantiate this claim. He also failed to provide evidence that the problem has been resolved or is under control. Finally, if his claims are true, the only apparent reason that he finally complied with his legal obligations in that regard was the pending denial of his security clearance. He provided no evidence to suggest that he would meet these responsibilities in the future absent such motivation. Accordingly, he failed to prove mitigation under MC 20(c).

MC 20(d) and 20(e) concern resolution or illegitimacy of delinquent debts, which were not alleged in this case. MC 20(f) deals with unexplained affluence, and likewise has no bearing on the allegations in this case. Accordingly, Applicant did not demonstrate the applicability of any MC under Guideline F.

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 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.

Under AG ¶ 2(c), 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.

I considered the potentially disqualifying and mitigating conditions in light of all relevant facts and circumstances surrounding this case. Applicant is a mature and experienced individual, who is responsible for his voluntary choices and conduct that underlie the security concerns expressed in the SOR. He offered no legitimate reason for his recurring and recent disregard of his legal obligations to file federal and state income tax returns since 2005.

Even if Applicant's claim to have recently filed all past-due returns is true, he did so only in an attempt to avoid denial of the security clearance he is seeking, and not out of any expressed sense of responsibility. Compliance under such circumstances does not demonstrate rehabilitation or make recurrence less likely. It also does little to alleviate the concerns about his reliability and willingness to abide by rules and regulations, which continue to cast doubt on his trustworthiness and ability to protect classified information. Security-related procedures require compliance without regard to whether actual compromise would result, so Applicant's failure to comply with his income tax filing obligations supports security concerns without regard to whether he owed additional tax, or was due a refund.

Overall, the record evidence creates substantial doubt as to Applicant's present eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the security concerns arising from his financial considerations.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline F: AGAINST APPLICANT

Subparagraphs 1.a through 1.h: Against Applicant

Conclusion

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

DAVID M. WHITE
Administrative Judge