



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



In the matter of:)
)
) ISCR Case No. 09-05361
)
)
Applicant for Security Clearance)

Appearances

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

December 29, 2010

Decision

GOLDSTEIN, Jennifer I., Administrative Judge:

Applicant has not mitigated Financial Considerations and Personal Conduct security concerns created by his failure to file his state and Federal tax returns. Eligibility for access to classified information is denied.

Statement of the Case

On June 9, 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. The action was taken under Executive Order (EO) 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 adjudicative guidelines (AG) effective for cases after September 1, 2006.

Applicant answered the SOR on July 16, 2010, and requested a hearing before an administrative judge. The case was assigned to me on September 22, 2010. DOHA issued a notice of hearing on September 30, 2010, and the hearing was convened as

scheduled on November 9, 2010. The Government offered Exhibit (GE) 1 through 11, which were admitted without objection. The Government also presented copies of 26 U.S.C.S. § 7203, and a state Revenue and Tax Code § 19701, marked I and II, for administrative notice. Notice was taken of these two statutes. The Applicant testified on his own behalf. The record was held open for Applicant to submit additional information until close of business December 6, 2010. Applicant submitted Applicant Exhibit (AE) A through AE J, which were admitted without objection. DOHA received the transcript of the hearing (Tr.) on November 19, 2010.

Procedural Ruling

At the hearing on November 9, 2010, Department Counsel made a motion to amend the SOR, in order to conform to the evidence, by adding ¶¶2 and 2.a. pursuant to Directive ¶ E3.1.17. The proposed amendment was served upon Applicant by Department Counsel on or about October 18, 2010. Applicant returned the proposed amendment to Department Counsel on or about October 30, 2010, with the word “deny” written across it. At hearing, Applicant had no objections to the amendment and the motion to amend was granted. (Tr. 16-17.) Accordingly, the SOR was amended, as follows:

2. Guideline E: Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual’s reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process. Available information raising this concern shows that:

a. As of September 30, 2009, you failed to file Federal and state income tax returns, as required, for tax years 2005, 2006, 2007, and 2008.

Findings of Fact

Applicant denied all of the SOR allegations. After a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is a 62-year-old employee of a defense contractor. He has worked as a government contractor for the past 33 years and has held a security clearance the entire time. Applicant served in the Army from 1969 to 1971 and achieved the rank of Specialist 4th Class. He has been married for the past 22 years and has three children, ages 21, 20, and 17. He possesses a bachelor’s degree in computer science. (GE 6; Tr. 47-48, 62.)

As alleged in the SOR ¶ 1.a. and admitted in testimony, Applicant’s wages were garnished in approximately July 1997 by a state government. Applicant failed to file his state income tax return for 1995. As a result, the state calculated he owed \$8,183 based on his gross earnings. Applicant had paid approximately \$2,000 through a payroll

deduction and the state garnished approximately \$6,000 from his pay. After the garnishment was completed, Applicant filed his state tax return for 1995 and received a refund of \$6,955.13 in 1998. Applicant explained that he failed to file his state tax returns in 1995, 1996, and early 1997 because he was working in another state and had difficulties collecting the documents he needed to file in a timely manner. He requested extensions to permit a late filing, but the extensions lapsed. (GE 1; GE 2; GE 3; GE 4; Tr. 39-44, 51-55.)

At hearing, Applicant admitted that the allegation contained in 1.b. was factual. His wages were in fact garnished again for the tax years 2005 and 2006 by the state for \$3,841 and \$6,000, respectively. (GE 5; Tr. 44, 55.)

Applicant claims he filed his 2005, 2006, and 2007 Federal and state tax returns on or about October 5, 2010, after the filing of the SOR. He did not produce copies of the filed returns. At the time of the hearing, his 2008 Federal and state tax returns were being prepared by his accountant, but had not yet been filed. A post hearing exhibit indicated that his 2008 returns were filed approximately November 26, 2010. His 2009 Federal and state tax returns had not been filed at the time of the hearing and although he sent the material to his accountant to prepare the 2009 tax filings, they still had not been filed at the close of the record. (AE A; AE B; AE C; Tr. 44-46, 56-57.)

Applicant explained that he had failed to file his 2005-2009 Federal and state income tax returns because he had difficulties gathering the necessary documentation due to work assignments out of town, and because his wife suffers from depression and requires frequent hospitalization. Again, he requested extensions to permit late filing, but the extensions lapsed without filing the necessary documentation. Despite these explanations, he admitted that he was on notice that his failure to file his Federal and state tax returns was of concern to the Government since his subject interview with an investigative agent on February 26, 2009. In that interview, he indicated he would be filing his Federal returns for 2005 through 2007 in March of 2009. He did not follow through on this statement and admitted during testimony that "I guess I sat on my hands." (GE 8; AE D; AE E; Tr. 57-66.)

Applicant's credit reports and financial statements reflect that he is current on all of his financial obligations. He has approximately \$674,369 in his savings plan and another \$39,756 in an investment account. (GE 7; GE 9; GE 10; AE F; AE G.)

Applicant presented evidence that he is a valued employee. In 2008, Applicant was the recipient of the President's Award at his company and in 2010, he was named a Technical Fellow. A letter from his chief engineer indicated "there has never been any reason for me to doubt [Applicant's] integrity, either personal or financial." (AE H; AE I; AE J; Tr. 48-49.)

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 and mitigating conditions, 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, administrative judges apply the guidelines in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching 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.

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 the applicant or proven by Department Counsel." The applicant has the ultimate burden of persuasion to obtain a favorable security decision.

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 EO 10865 provides that adverse 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* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline F, Financial Considerations

The security concern for Financial Considerations is set out in AG ¶ 18, as follows:

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.

The guideline notes several conditions that could raise security concern under AG ¶ 19. One is potentially applicable in this case:

(g) failure to file annual Federal, state or local income tax returns as required or fraudulent filing of the same.

Applicant has a history of not filing his Federal and state income tax returns. As a result of not filing his 1995 tax returns, he was subject to a state garnishment. He corrected his behavior and filed in 1998. However, in 2005-2009, he again failed to file his income tax returns as required. The Government established the disqualifying conditions in AG ¶ 19(g). Further inquiry about the applicability of mitigating conditions is required.

Two Financial Considerations Mitigating Conditions under AG ¶ 20 are potentially applicable:

(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; and

(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.

Applicant has not acted responsibly, or in a timely manner, to attempt to resolve his failures to file his income tax returns. After his 1998 filing to resolve the 1995 tax year, he again chose to ignore the law and failed to file for tax years 2005 through 2009. He testified that he filed his Federal and state tax returns for 2005, 2006, and 2007 in October of 2010, but he failed to substantiate this with documentation. He has filed 2008 returns, but had not filed for 2009 at the close of the record. Applicant's failure to

file his Federal and state income tax returns demonstrate a continuing course of conduct that does not warrant application of AG ¶ 20(a).

Applicant claims his failure to file his Federal and state income tax returns was due to his constant travel out of state for work and due to his wife's medical condition. While Applicant may need to travel for extended periods of time out of state, that is the nature of his position and it does not mitigate his inattention to his legal obligations to file Federal and state income tax returns. Further, although his wife suffers from debilitating depression, she has had this condition for an extended period of time. During that time, he was able to stay current on his other financial obligations, as evidenced by his good credit. Additionally, he has known since at least February 2009 that his failure to file his Federal and state income tax returns was a concern to the Government, and he failed to take any actions on his taxes until over a year-and-a-half later. AG ¶ 20(b) is only partially mitigating.

Guideline E, Personal Conduct

The security concern relating to the guideline for Personal Conduct is set out in AG ¶ 15:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying conditions are potentially applicable:

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information; and

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing, or (2) while in another country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group.

Applicant's failure to file his Federal and state tax returns as outlined above indicate that he has questionable judgment and is unwilling to comply with rules and regulations. The Government established the disqualifying conditions in AG ¶¶ 16(c) and 16(e).

AG ¶ 17 provides conditions that could mitigate security concerns. The following are potentially applicable:

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur.

Applicant's failure to file Federal and state tax returns is a serious offense that has occurred numerous times in Applicant's recent past. In fact, at the close of the record, he still had not filed his 2009 tax returns. Applicant has not demonstrated that this behavior is unlikely to recur or that he has taken positive steps to avoid repeating this behavior in the future. No mitigating conditions apply.

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 the facts and circumstances surrounding this case. I have incorporated my comments

under Guidelines F and E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

Applicant is well respected by his chief and has received some prestigious awards from his employer. However, he has failed to show that he is responsible with respect to filing his Federal and state tax returns and his Personal Conduct.

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the Financial Considerations and Personal Conduct security concerns.

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 F:	AGAINST APPLICANT
Subparagraph 1.a.:	For Applicant
Subparagraph 1.b.:	For Applicant
Subparagraph 1.c.:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a.:	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.

Jennifer I. Goldstein
Administrative Judge