



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



In the matter of:)
)
) ISCR Case No. 10-01183
)
)
Applicant for Security Clearance)

Appearances

For Government: David F. Hayes, Esq., Department Counsel
For Applicant: Eric S. Montalvo, Esq.

June 30, 2011

Decision

RIVERA, Juan J., Administrative Judge:

Applicant filed his Federal and state income tax returns late for tax years 2002 through 2005. He did not file his Federal and state income tax returns for tax years 2006 through 2009. He owes a substantial amount of money to the Federal and state governments for his tax liability for all the above years. Moreover, he deliberately falsified his May 2009 security clearance application to cover his questionable behavior. Clearance denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on May 1, 2009. After reviewing the results of the ensuing background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) were unable to make a preliminary affirmative finding¹ that it is clearly consistent with the national interest to grant Applicant a security clearance.

¹ Required by Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; and Department of Defense (DOD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as revised.

On September 22, 2010, DOHA issued Applicant a Statement of Reasons (SOR), alleging security concerns under Guideline F (Financial Considerations) and Guideline E (Personal Conduct) of the adjudicative guidelines (AG).²

Applicant answered the SOR on November 23, 2010, and requested a hearing before an administrative judge. The case was assigned to me on January 25, 2011. Shortly thereafter, I granted Applicant's request for a postponement of the hearing. DOHA issued a notice of hearing on February 16, 2011, convening a hearing on March 10, 2011. At the hearing, the Government offered five exhibits (GE 1 through 5), which were received without objection. Applicant testified, presented two witnesses, and offered no exhibits. DOHA received the hearing transcript (Tr.) on March 18, 2011.

Findings of Fact

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

Applicant is a 69-year-old scientist working part-time as a consultant with a defense contractor. He requires a security clearance to perform his job. He completed his Doctorate degree in physics in 1973. Applicant married his first wife in August 1968 and they were divorced in August 1992. He has two grown daughters from this marriage. He married his second wife in June 1993, and they were divorced in September 2002. He married his current wife in September 2004.

In 1965, Applicant started working for a Government agency as a research specialist. He has worked for U.S. Government agencies and for Government contractors during most of his professional life. Specifically, from October 1990 until February 2006, he worked as a senior systems engineer for a Government agency. In 2006, he retired after 27 years of federal civil service with the pay grade of GS 14 (Step 10). He testified that he retired because he was offered a "very lucrative position" by Government contractor "A," making \$50,000 over his GS 14 pay. He worked with company A from February 2006 until December 2006.

From December 2006 until January 2009, Applicant was self-employed as a consultant and sub-contractor for Government contractors. He testified he initially was making approximately \$5,000 more than what he was making with company A. In 2008, his work hours and earnings were reduced. He has been working part-time as a consultant for his current employer, a Government contractor, since January 2009. He has not been able to work full-time because his security clearance expired. He has been forced to use his retirement and 401(k) savings to pay for his financial obligations.

² Adjudication of this case is controlled by the AGs, implemented by the DOD on September 1, 2006.

Applicant established an excellent reputation in the scientific community in his area of expertise. According to his witness, Applicant is considered to be “top notch,” “the number two scientist in his field in the United States,” “the go-to-person when ever there is a problem that needs to be resolved.” Because of his skills set, he has made unique contributions to the security of the United States. Applicant possessed high level security clearances most of his professional life. There is no evidence that he has ever compromised or caused others to compromise classified information.

In May 2009, Applicant submitted the pending SCA. In response to Section 26(k) (Financial Record), Applicant stated that in the last seven years both the Internal Revenue Service (IRS) and his state tax agency garnished his wages, bank accounts, and imposed liens on his property, causing him a financial hardship. He disclosed a tax liability dispute with the IRS, and that he had retained a tax attorney and an accountant to help him resolve the dispute. In response to Section 26(c) (asking whether he had failed to pay Federal, state, or other taxes, or to file a tax return), Applicant answered “No.” He deliberately failed to disclose that he had filed his 2002, 2003, 2004, and 2005 income tax returns late, and that he had not filed his 2006, 2007, and 2008 income tax returns. Additionally, he failed to disclose he had not paid his tax liability for all the above years.

Applicant’s background investigation revealed that he filed his 2002 Federal and state income tax returns sometime in 2010. According to his accountant’s testimony, Applicant has 2002 Federal and state tax liabilities of \$3,060 and \$667, respectively. He filed his 2003 and 2004 Federal and state income tax returns sometime in 2005. He filed his 2005 Federal and state income tax returns sometime in 2010. As of his hearing day, Applicant had not filed his 2006, 2007, 2008, and 2009 Federal and state income tax returns.

Applicant’s anticipated Federal and state tax liabilities (respectively) are as follows: for tax year 2006, \$23,307 and \$397; for tax year 2007, \$59,418 and \$10,897; for tax year 2008, \$62,718 and \$11,984; for tax year 2009, \$13,823 and \$3,275, and for tax year 2010, \$13,823 and \$1,650. Applicant did not present documentary evidence to show that he timely requested a grace period to file late his Federal or state income tax returns for any of the above tax years. Applicant’s accountant anticipates Applicant will have a total Federal tax liability of around \$400,000, including interest and penalties. Applicant does not know what his state tax liability will be. Applicant intends to dispute some of the IRS tax assessments, and then to file for a hardship discharge, or try to reach a settlement.

Applicant claimed that he did not timely file his 2002 income tax return because he did not have the money to pay his taxes or access to the documents required to file his tax return. He was going through a contentious divorce. His wife was living in their retirement home in a different state when she cleaned out all their bank accounts, maxed out their credit cards, hired a divorce attorney, and filed for divorce. He claimed he did not have access to his tax records and personal documents until 2007. Applicant was not concerned about filing late his 2002 income tax return because he believed he

did not owe any money. His practice was to allow for large deductions from his monthly earnings to minimize his ultimate tax liability. After his divorce, Applicant claimed it took him a long time to stabilize his financial situation.

In 2005-2006, Applicant helped his current wife to straighten her financial and state tax situation. She had not filed or paid her state income taxes for several years. In 2006, a state garnished significant amounts of money from Applicant's and his wife's bank accounts. He helped his wife hire a tax attorney to help her with her tax problems. He then claimed it took him two years to pay around \$50,000 to \$70,000, to cover for his wife's tax liability. Applicant initially portrayed his wife as having physical limitations resulting from a car accident, being financially incompetent, and not earning much money. Later in his testimony, Applicant stated that his wife was independently wealthy because of an insurance settlement she received. She has approximately \$600,000 in IRAs and other investments. Additionally, she is a microbiologist who worked as a college professor. Since 2005, she has worked full-time for a federal agency. According to Applicant's personal financial statements, she has been contributing over \$4,400 in net monthly earning to the household.

In 2007, Applicant hired the services of a law firm to help him file his late income tax returns and to dispute the Federal and state tax assessments. He testified that he paid \$8,000 for the legal services, but he was not satisfied with the work provided, and he did not file the late income tax returns. In February 2011, Applicant hired an accountant to help him prepare and file his late income tax returns and to settle his problems with the IRS and his state. His accountant testified that he finished Applicant's amended 2002 income tax return (filed in 2010), and completed the 2005 through 2009 income tax returns a week or two before the hearing. At his hearing, Applicant claimed he picked up all his delinquent income tax returns from the accountant the night before the hearing, but he had not filed them. Applicant promised to file them as soon as he got home that evening.

Applicant claimed that his real estate investments and financial problems also prevented him from timely filing and paying his taxes. In the 1990s, he purchased a home on an island that he now owns free and clear. He has been restoring it through the years. He purchased a house in state N in 1994-1995, that he sold in 2005, to purchase a house in state F. He has been refurbishing the house in state F to use it as a rental property. Since its purchase in 2005, he invested near \$100,000 on this house. The house is currently rented. In the early 2000s, Applicant purchased a retirement home in state C, where he intended to live with his second wife after his retirement. This property was awarded to his second ex-wife during the divorce. He purchased the home alleged in SOR ¶ 1.a in state M in October 2005.

Applicant explained he purchased the properties in states F and M during the real estate market bubble and paid top dollar for both. With the downturn of the real estate market, both properties are now appraised at less than 60 percent of what he paid for them and their respective mortgage debt. He defaulted on the mortgage for the house in state M in 2009. The bank refused to renegotiate the terms of the mortgage.

Applicant unsuccessfully attempted to sell the house through a short sale. In 2010, he offered the bank the title of the house in lieu of facing a foreclosure. He claimed that the bank accepted his terms, and that he has been making some reduced mortgage payments pending the bank's final acceptance of his offer. Applicant believes it does not make economic sense for him to continue paying the house's mortgage considering its current value.

Concerning his current financial situation, Applicant explained he is basically unemployed. Although he has been offered several jobs, he cannot work full-time because he does not have a security clearance. He has been living off his retired pay check and social security benefits. In his November 2010 personal financial statement, he indicated having a household net income of \$8,660 (\$4,300 for his monthly net income and \$4,800 for his wife's monthly net income). Their monthly expenses total \$4,848, and their monthly debt payments total \$4,801. Their monthly net remainder is \$47.

In 2008, Applicant's current wife purchased a time share vacation home for \$16,000. She pays approximately \$300 a month on the note. In 2008, Applicant and his wife took a two-week vacation to a South American country with some friends. He claimed the trip only cost him around \$2,000.

Applicant expressed remorse for his failure to timely file his income tax returns and to pay his income taxes. He promised to resolve his Federal and state income tax liability sometime in the near future. He believes that hiring a tax lawyer in 2007, and an accountant in 2011 to help him resolve his tax situation, showed a good-faith effort to resolve his tax problems. He claimed that he made an honest mistake when he failed to disclose he did not file timely income tax returns since 2001, and that he owed Federal and state taxes for eight tax years.

Policies

The President of the United States has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information. *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988). The President has authorized the Secretary of Defense to grant eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended. The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These AGs are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are

applied in conjunction with an evaluation of the whole person. An administrative judge's adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable to reach his decision.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information. Clearance decisions must be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See Exec. Or. 10865 § 7. See also Executive Order 12968 (Aug. 2, 1995), Section 3. Thus, a clearance decision is merely an indication that the Applicant has or has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. "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). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed and an applicant's security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue [his or her] security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). 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). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

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 timely file his Federal and state income tax returns for tax years 2002 through 2005. As of the day of his hearing, he had not filed his income tax returns for tax years 2006 through 2009. Including probable penalties and interest, he is indebted to the IRS for approximately \$400,000. He owes his state over \$28,000 for unpaid income taxes. Additionally, in 2009, he defaulted on his \$402,000 house mortgage. 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;” apply.

In 2007, Applicant started to take some action to resolve his Federal and state tax problems. He hired a law firm to assist him with disputing the Federal and state tax assessments and to file his late income tax returns. In February 2011, he hired an accountant to help him with the filing of his late income tax returns. As of his hearing day, he had not filed his Federal and state income tax returns for tax years 2006 through 2009. He owes the Federal and state governments a substantial amount of money in back due income taxes. He is paying a reduced mortgage payment and is in negotiations with the mortgage holder

Having considered all the financial considerations security concerns mitigating conditions set forth in AG ¶ 20, I find that none apply. Applicant’s ongoing financial and tax problems span eight years, and the evidence fails to show they developed under circumstances that are unlikely to recur. Applicant has no reasonable excuse for his failure to file his income tax returns. His behavior shows an absolute disregard for his civil and legal obligations. Applicant’s questionable behavior continues to cast doubt on his current reliability, trustworthiness, and judgment. AG ¶ 20(a) does not apply.

Applicant presented some evidence of circumstances beyond his control contributing to his inability to timely file his income tax returns and to pay his taxes, e.g., his divorce, and providing assistance to his wife to resolve her tax problems. Notwithstanding, Applicant has been gainfully employed and earning a substantial income since 1973. He bought five real estate properties since 1990, and his wife bought a time share vacation property. He has invested substantial amounts of money refurbishing some of those properties. He currently owns three real estate properties and a time share. His financial and tax problems did not stop him from taking an overseas vacation in 2008. Applicant’s financial problems are also a result of his expending beyond his financial means.

Applicant’s current period of diminished earnings or unemployment is a result of his failure to file his income tax returns and to pay his taxes, and not a circumstance beyond his control. Although he hired a law firm in 2007 and an accountant in 2011, to help him with his tax situation (he received financial counseling), he has not filed income tax returns for four tax years and he filed late five income tax returns.

Considering his age, extensive higher education, and many years of experience working for the Government, Government contractors, and possessing a security clearance, Applicant should have been more responsible and diligent in addressing his tax filing responsibilities and financial obligations. Applicant's evidence is not sufficient to show that he acted responsibly in the filing of his income tax returns, that he made good-faith efforts to resolve his income tax debt, or that he has a track record of financial responsibility. Moreover, there are no clear indications that his tax and financial problems are being resolved or are under control. AG ¶¶ 20(b), (c), and (d) do not apply. The remaining mitigating conditions are not raised by the evidence.

Guideline E, Personal Conduct

AG ¶ 15 explains why personal conduct is a security concern stating:

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.

Applicant deliberately failed to disclose in his May 2009 SCA that he: filed late Federal and state income tax returns for tax years 2002 through 2005; had not filed his Federal and state income tax returns for tax years 2006 through 2008; and that he owed a substantial amount of money to the Federal and state governments for his tax liability for all the above years.

Applicant claimed that he made an honest mistake when he failed to disclose the above information. Considering the evidence as a whole, and having observed his appearance and demeanor while testifying, I find his explanations not credible. Applicant helped his wife in 2005-2006 to resolve her tax problems by hiring a tax attorney for her and paying around \$70,000 in owed income taxes. He also hired a tax law firm in 2007, to help him with his tax problems. Since around 2006, both the Federal and state governments were garnishing his bank accounts, wages, and levying his property.

Applicant's deliberate falsification of his 2009 SCA triggers the applicability of disqualifying condition AG ¶ 16(a): "deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities."

After considering all the AG ¶ 17 mitigating conditions, I find none apply. Applicant engaged in serious misconduct when he failed to file his income tax returns and then falsified his 2009 SCA to cover his behavior. His falsification is a serious,

recent offense (felony-level).³ Furthermore, during his testimony he was not candid about his failure to file his income tax returns, the total tax liability owed, and his falsification of the SCA. His overall behavior shows questionable judgment, untrustworthiness, unreliability, lack of candor, and an unwillingness to comply with rules and regulations.

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 have incorporated in my whole-person analysis my comments on the analysis of Guidelines F and E.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant receives credit for his extensive service to his country as a scientist and for his work for government contractors.

Notwithstanding, security concerns remain. Applicant showed a complete disregard for his civil and legal obligation to file his income tax returns and to pay his income taxes. His behavior shows that he does not understand what is required of him to be eligible for access to classified information. Moreover, Applicant deliberately falsified his 2009 SCA. The record evidence fails to convince me of Applicant's suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising from his financial considerations and personal conduct.

³ See 18 U.S.C. 1001.

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 |
| Subparagraphs 1.a - 1.c: | Against Applicant |
| Paragraph 2, Guideline E: | AGAINST APPLICANT |
| Subparagraph 2.a: | 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 to Applicant. Clearance is denied.

JUAN J. RIVERA
Administrative Judge