



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 10-03693

Appearances

For Government: Jeff A. Nagel, Esquire, Department Counsel

For Applicant: Sarah Kneisel, Esquire

June 26, 2012

Decision On Remand

MOGUL, Martin H., Administrative Judge:

On April 11, 2011, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines F and E for Applicant. 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 adjudicative guidelines (AG) effective within the Department of Defense after September 1, 2006.

On May 5, 2011, Applicant replied to the SOR (RSOR) in writing, and he requested a hearing before an Administrative Judge. I received the case assignment on June 20, 2011. DOHA issued a notice of hearing on November 22, 2011, and the hearing was convened as scheduled by Video Teleconference on December 6, 2011. The Government offered Exhibits 1 through 6, which were received without objection. Applicant testified on his own behalf and submitted Exhibits A through G at the time of hearing, which were also received without objection. I granted Applicant's request to keep the record open until December 30, 2011, to submit additional documents showing that Applicant had filed his Federal and state tax returns. No additional documents were

received. DOHA received the transcript of the hearing (Tr) on December 19, 2011. Based upon a review of the pleadings, exhibits, and the testimony of Applicant, eligibility for access to classified information is denied.

Remand Issue

On February 29, 2012, a Decision was issued in this case denying Applicant eligibility for a security clearance. In my decision, I had written that no Post Hearing documents were received. Applicant filed a timely appeal, and the Appeal Board (AB) issued its decision on May 21, 2012, which concluded that the case be Remanded. The AB held that in Applicant's appeal brief, he provided credible evidence that he submitted Post Hearing evidence, which was received by DOHA within the prescribed period of time. I had never received Applicant's Post Hearing documents before I issued my Decision. I will describe each of the Post Hearing documents that I have now received, and a determination as to their effect on this Remand Decision will be discussed below in the section titled "Effect of Post Hearing Documents."

Post Hearing Documents

Exhibit AA is a cover letter to Department Counsel from the Applicant's attorney's office, indicating they were submitting Post Hearing documents. Just to reiterate, I never received this document or any of the other Post Hearing documents until after the AB had remanded this case. Exhibit BB is a copy of Applicant's 1040 Federal tax return for tax year 2009, signed by Applicant on December 28, 2010, with additional attachments. Exhibit CC is a copy of Applicant's 1040 Federal tax return for tax year 2008, signed by Applicant on December 28, 2010, with an additional attachment. Exhibit DD is a copy of Applicant's 1040 Federal tax return for tax year 2007, signed by Applicant on December 28, 2010, with additional attachments. Exhibit EE is a copy of Applicant's 1040 Federal tax return for tax year 2006, signed by Applicant on December 28, 2010, with additional attachments. Exhibit FF is a copy of Applicant's 1040 Federal tax return for tax year 2005, signed by Applicant on December 28, 2010, with additional attachments. Exhibit GG is a copy of Applicant's 1040 Federal tax return for tax year 2004, unsigned by Applicant, with additional attachments. Exhibit HH is a copy of Applicant's 1040 Federal tax return for tax year 2003, unsigned by Applicant, with additional attachments.

Findings of Fact

After a complete and thorough review of the evidence in the record, including Applicant's RSOR, the admitted documents, and the testimony of Applicant, and upon due consideration of that evidence, I make the additional findings of fact:

Applicant is 46 years old. He is unmarried, and he has three daughters. He served in the United States Navy from 1986 to 2006, when he received an Honorable Discharge. Applicant seeks a DoD security clearance in connection with his employment in the defense sector.

Paragraph 1 Guideline F, Financial Considerations

The SOR lists nine allegations (1.a. through 1.i.) regarding financial difficulties under Adjudicative Guideline F. The allegations will be discussed below in the same order as they were listed on the SOR:

1.a. The SOR alleges that Applicant failed to file his Federal Income Tax return for tax year 2004, as required. In his RSOR, Applicant denied this allegation. At the hearing, Applicant admitted that he had not filed a Federal Income Tax return for tax year 2004 when it was due, nor did he receive an extension. He testified that he filed this return in December 2010. (Tr at 29.)

1.b. The SOR alleges that Applicant failed to file his State of Tennessee Income Tax return for tax year 2004, as required. In his RSOR, Applicant denied this allegation. At the hearing, based on evidence introduced at the hearing, the SOR allegations in 1.b., 1.d., 1.f., and 1.h., were all amended without objection, from the state of Tennessee to the state of Kentucky. Therefore, it is alleged in the amended SOR that Applicant failed to file his State of Kentucky Income Tax return for tax year 2004, as required. At the hearing, Applicant admitted that he had not filed a State Income Tax return for tax year 2004 when it was due, nor did he receive an extension. He testified that he filed this return in December 2010. (Tr at 30.)

1.c. The SOR alleges that Applicant failed to file his Federal Income Tax return for tax year 2005, as required. In his RSOR, Applicant denied this allegation. At the hearing, Applicant admitted that he had not filed a Federal Income Tax return for tax year 2005 when it was due, nor did he receive an extension. He testified that he filed this return in December 2010. (Tr at 29.)

1.d. The amended SOR alleges that Applicant failed to file his State of Kentucky Income Tax return for tax year 2005, as required. In his RSOR, Applicant denied this allegation. At the hearing, Applicant admitted that he had not filed a State Income Tax return for tax year 2005 when it was due, nor did he receive an extension. He testified that he filed this return in December 2010. (Tr at 30.)

1.e. The SOR alleges that Applicant failed to file his Federal Income Tax return for tax year 2006, as required. In his RSOR, Applicant denied this allegation. At the hearing, Applicant admitted that he had not filed a Federal Income Tax return for tax year 2006 when it was due, nor did he receive an extension. He testified that he filed this return in December 2010. (Tr at 29.)

1.f. The amended SOR alleges that Applicant failed to file his State of Kentucky Income Tax return for tax year 2006, as required. In his RSOR, Applicant denied this allegation. At the hearing, Applicant admitted that he had not filed a State Income Tax return for tax year 2006 when it was due, nor did he receive an extension. He testified that he filed this return in December 2010. (Tr at 30.)

1.g. The SOR alleges that Applicant failed to file his Federal Income Tax return for tax year 2008, as required. In his RSOR, Applicant denied this allegation. At the hearing, Applicant admitted that he had not filed a Federal Income Tax return for tax

year 2008 when it was due, nor did he receive an extension. He testified that he filed this return in December 2010. (Tr at 29.)

1.h. The amended SOR alleges that Applicant failed to file his State of Kentucky Income Tax return for tax year 2008, as required. In his RSOR, Applicant denied this allegation. At the hearing, Applicant admitted that he had not filed a State Income Tax return for tax year 2006 when it was due, nor did he receive an extension. He testified that he filed this return in December 2010. (Tr at 30.) Exhibit G shows that a state tax return was prepared for tax year 2006, but no evidence was introduced to establish that it was filed.

1.i. The SOR alleges that Applicant is indebted to the state of Tennessee in the amount of approximately \$25,000 on a child support account that has been placed in collection. In his RSOR, Applicant denied this allegation. However, at the hearing, Applicant testified that he had been court ordered to pay \$1,000 a month in child support, but since he was only paying \$600 a month, he was \$400 in arrears each month. He conceded that he had signed an agreement to pay the \$1,000 a month, even though he did not believe he could afford it, because he just wanted to get the divorce concluded. (Tr at 82-83.) This resulted in his owing the amount of approximately \$25,000 for child support. Applicant indicated that he is planning to request that the amount due each month be lowered, since he has two daughters over the age of 18. At the time of the hearing, Applicant has not yet taken any action. (Tr at 40-46.)

Applicant provided reasons for his financial difficulties. He explained that his grandfather died in 2000, and his grandmother died in 2003. He was close to both of his grandparents. Also, in 2002, he separated from his wife. As a result of these incidents, he failed to take care of his financial obligations, including filing his tax returns. Applicant testified that in 2003, after he and his wife separated, his wife filed a tax return separately. Since he had to file his own tax return, he owed more than he would have if they had filed together. (Tr at 70.) He contacted the IRS to attempt to resolve his financial situation, but he could not resolve it, as they claimed he owed them \$1,100, and he contended that he had sent them a check for that amount. When the IRS claimed they had not received the check, Applicant got frustrated and stopped attempting to resolve the financial situation with the IRS. (Tr at 48-51.)

Applicant conceded that while he was still serving in the Navy he could have had used the Navy Voluntary Income Tax service to file his taxes, but because of his bitter feelings about the IRS together with his emotional issues because of the deaths of his grandparents and his separation from his wife, he simply "didn't feel like dealing with the IRS," and he made a conscious decision not to file Federal tax returns for years 2004 through 2008. Applicant also testified that he failed to file state tax returns for the same basic reasons that he failed to file Federal tax returns. (Tr at 77.) Applicant contended that in 2010, he filed his Federal and State tax returns for years 2004 through 2009. (Tr at 29-30, 71-74.) As reviewed above, the record remained open until December 30, 2011, to allow Applicant to submit additional documents, showing that he had filed his Federal and State tax returns. Since no documents were received, I cannot conclude that Applicant has filed his Federal or state taxes for years 2004 through 2009.

Applicant testified that his current financial situation is “pretty good,” but since he gets paid in American dollars, and a number of his bills are in Japanese yen, he is losing almost \$1,000 every month. (Tr at 51.)

Paragraph 2 Guideline E, Personal Conduct

2.a. It is alleged in the SOR that in about September 2003, Applicant was questioned regarding a rape complaint that was brought against him after he met the complainant on a chat room and engaged in sexual intercourse with her at her off-base home. In his RSOR, Applicant denied this allegation. At the hearing, Applicant testified that he did indeed have sexual intercourse with the woman who is the subject of this allegation, but he contends that it was consensual as she agreed to have sex with him. An investigation was launched, but at a later date Applicant was informed by the investigator of the case that the investigation had been dropped. (Tr at 57.) Since no evidence was introduced to establish that the investigation resulted in prosecution and conviction, I do not find that this allegation has been proven adverse to Applicant.

Applicant executed a Security Clearance Application (SCA) on November 4, 2009. (Exhibit 1.) The SOR alleges that Applicant failed to provide truthful and candid answers to Question 26, subparagraphs c and j.

2.b. Question 26 c. of the SCA asks, “For the last 7 years, have you failed to pay Federal, state, or other taxes, or to file a tax return, when required by law of ordinance?” Applicant answered, “No” to this question subsection. It is alleged in the SOR that he failed to disclose that he had failed to file Federal and State income tax returns, as set forth in subparagraphs 1.a. through 1.h., as reviewed above. In his RSOR, Applicant denied this allegation.

At the hearing, Applicant testified that when he completed the SCA, it was on a Government computer, and he only had two hours to complete it. As he got near the end, he was running out of time. Applicant contended when he got to the question concerning filing taxes, he felt he was running out of time, and he did not have time to read the question fully and answer it correctly. Applicant averred that he was not trying to mislead the Government. (Tr at 57-62.)

Applicant did admit that he had completed several SCAs before the one in 2009. (Tr at 84-85.) Since this question is unambiguous and should be understandable to any person, particularly someone who has completed several previous SCAs, I find that Applicant knew or should have known that the answer to this question was “Yes,” and he should have listed the Federal and State taxes that he failed to file for years 2004 through 2008. I find that his failure to answer, “Yes” was an attempt to mislead the Government.

2.c. Question 26 j. of the SCA asks, “Have you been delinquent on court-imposed alimony or child support payments?” Applicant answered, “No” to this question subsection. It is alleged in the SOR that Applicant failed to disclose that he was

delinquent on court imposed child support payments, set forth in subparagraph 1.i., above. In his RSOR, Applicant denied this allegation.

Applicant testified that he knew he was paying \$600 a month rather than the court ordered \$1,000, but he did not believe that the excess amount should be considered as requiring an affirmative answer under this question. (Tr at 62.) I find that Applicant knew that he was paying \$400 less each month than ordered by the court, so he would have to know that he was delinquent on the total amount owed to his wife for child support. Therefore, Applicant knew or should have known that he should have answered, "Yes" to this question and indicated that he was \$25,000 in arrears, or at least that he was behind many thousands of dollars in the amount he owed for child support. I find that his failure to answer, "Yes" was an attempt to mislead the Government.

Mitigation

Applicant submitted several documents in an attempt to mitigate the concerns addressed in the SOR. These included: his resume showing his previous employment experience and knowledge (Exhibit A); a personal financial statement showing Applicant has a monthly income of \$3,032 and monthly expenses of \$2,605, (Exhibit B), a document from the Department of Human Services, showing Applicant has paid \$37,172.23 in child support (Exhibit D); and a DD Form 214, confirming that Applicant was in the Navy from 1986 to 2006. (Exhibit E.) Documents from the IRS and the State of Kentucky regarding taxes were also introduced, but these documents do not establish that Applicant made any payment for Federal or State taxes. (Exhibit F and G.)

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 useful 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 over-arching 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 "[Any 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.

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 applicant or proven by Department Counsel. . . .” The applicant has the ultimate burden of persuasion as to obtaining 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 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* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline F, Financial Considerations

The security concern relating to the guideline for Financial Considerations is 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.

The guideline notes several conditions that could raise security concerns and could potentially apply in this case. Under AG ¶ 19 (a), “an inability or unwillingness to satisfy debts” is potentially disqualifying. Similarly under AG ¶ 19 (c), “a history of not meeting financial obligations” may raise security concerns. I find that both of these disqualifying conditions apply to Applicant in this case. AG ¶ 19 (g) is also applicable for Applicant’s “failure to file annual Federal, state or local income tax returns as required.” Applicant’s failure to file his Federal and State tax returns and the money that

he still owes to the Federal Government and the State government of Kentucky, as well as the past due amount he owes for child support, are all of concern to the Government.

AG ¶ 20 provides conditions that could mitigate security concerns from financial difficulties: Under AG ¶ 20 (b), it may be mitigating where “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.” As noted above, Applicant testified that his financial problems resulted in part from the difficult circumstances of his grandfather and grandmother dying, plus his separation from his wife. However, I cannot find that Applicant has acted responsibly. He has failed to file his Federal and state tax returns for many years, and it is still not clear if they have been filed, plus he has failed to attempt to resolve his overdue child support debt. Therefore, I do not find that this potentially mitigating condition is a factor for consideration in this case.

I conclude that until Applicant has shown a good faith effort to file his Federal and state tax returns, and resolve his overdue debt both for his past taxes and his overdue child support, he has not mitigated the financial concerns of the Government.

Guideline E, Personal Conduct

The Government relies heavily on the honesty and integrity of individuals seeking access to our nation’s secrets. When such an individual intentionally falsifies material facts or fails to furnish relevant information to a Government investigator, it is extremely difficult to conclude that he nevertheless possesses the judgment, and honesty necessary for an individual given a clearance.

With respect to Guideline E, I find that Applicant was aware that he had not filed tax returns, both Federal and state, for years 2003 through 2008, and his answer to question 26 c. on the 2009 SCA was a knowing attempt to mislead the Government. He also was aware that he was in arrears on his child support payments, and his answer to question 26 j. on the SCA was a knowing attempt to mislead the Government.

In reviewing the disqualifying conditions under Guideline E, I conclude that there was “deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire” by Applicant. Therefore, I find ¶ 16 (a) applies against Applicant. I do not find that any mitigating condition under ¶ 17 is applicable. Therefore, I resolve Guideline E against Applicant.

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 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. Based on all of the reasons cited above as to why the disqualifying conditions apply and no mitigating conditions apply under Guidelines F and E, I find that the record evidence leaves me with significant questions and doubts as to Applicant's eligibility and suitability for a security clearance under the whole-person concept. For all these reasons, I conclude Applicant has not mitigated the security concerns under the whole-person concept.

Effect of Post Hearing Documents

Under Guideline F, Financial Considerations, Exhibits BB through HH do establish that Federal tax returns were prepared for Applicant for tax years 2003 through 2009. However, there is no evidence that they were ever filed with the Internal Revenue Service. Additionally, no evidence was ever submitted to show that Applicant filed or even prepared Kentucky State tax returns for tax years 2004, 2005, 2006, or 2008, as alleged in the SOR. Applicant's Post Hearing exhibits also failed to show that Applicant had in any way resolved his past due child support of approximately \$25,000.

Under Guideline E, Personal Conduct, Applicant's Post Hearing Exhibits fail to mitigate my findings that Applicant's answers to questions 26 c. and j. on the 2009 SCA were knowing attempts to mislead the Government.

Therefore, I find that nothing in Applicant's Post Hearing documents in any way changes the findings written in the initial Determination.

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:

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| Paragraph 1, Guideline F: | AGAINST APPLICANT |
| Subparagraphs 1.a. through 1.i.: | Against Applicant |

Paragraph 2, Guideline E:

AGAINST APPLICANT

Subparagraph 2.a.:

For Applicant

Subparagraphs 2.b. and 2.c.:

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.

Martin H. Mogul
Administrative Judge