



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



In the matter of:)	
)	
[NAME REDACTED])	ISCR Case No. 11-07357
)	
Applicant for Security Clearance)	

Appearances

For Government: Braden Murphy, Esquire, Department Counsel
For Applicant: *Pro se*

12/07/2012

Decision

MALONE, Matthew E., Administrative Judge:

Applicant failed to mitigate the security concerns raised by his deliberate failure to file federal income tax returns as required between 2001 and 2009. His request for a security clearance is denied.

On March 16, 2011, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) to obtain a security clearance required for his job with a defense contractor. After reviewing the completed background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) sent interrogatories¹ to Applicant seeking to clarify or augment the information contained therein. Based on his responses to the interrogatories and the results of the background

¹ Authorized by DoD Directive 5220.6 (Directive), Section E3.1.2.2.

investigation, DOHA adjudicators were unable to find that it is clearly consistent with the national interest for Applicant to have access to classified information.²

On June 13, 2012, DOHA issued to Applicant a Statement of Reasons (SOR) alleging facts that raise security concerns addressed at Guideline F (Financial Considerations) of the adjudicative guidelines (AG).³ Applicant timely responded to the SOR and requested a decision without a hearing. On September 20, 2012, Department Counsel issued a File of Relevant Material (FORM)⁴ in support of the preliminary decision to deny Applicant's request for a clearance. Applicant received the FORM on October 3, 2012, and had 30 days to file a response to the FORM. Applicant did not respond to the FORM and the case was assigned to me on November 29, 2012.

Findings of Fact

Under Guideline F, it was alleged that Applicant did not file his federal tax returns as required for tax years 2001 through 2009 (SOR 1.a). Applicant admitted this allegation without explanation. In addition to the facts established by Applicant's admission, I have made the following findings of fact.

Applicant is 33 years old and employed as an electrician by a defense contractor. After graduating from high school and attending community college for two years, he enlisted in the U.S. Navy in 1999. He served on active duty until he was honorably discharged as a first class petty officer in 2005. Applicant previously applied for and was granted a security clearance in 2000 in connection with his military duties. From 2005 until 2010, Applicant worked for defense contractors, including his current employer, but was also unemployed for various periods. He has been steadily employed in his current job since July 2010. (FORM, Items 4 - 6)

When Applicant submitted his eQIP in 2011, he disclosed that he had not filed his federal tax returns for tax years 2001 through 2009. When asked about this by a government investigator during an April 2011 subject interview, Applicant claimed that he did not think he was required to file returns because he had made sure that sufficient taxes were deducted from his paychecks. (FORM, Items 4 and 5)

During previous periods of unemployment, Applicant supported himself through personal savings. He has no record of delinquent or past-due debt, and a personal financial statement submitted with his response to interrogatories shows that he has a positive monthly cash flow and is likely meeting all of his regular financial obligations. (FORM, Item 5)

² Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.

³ See Directive, Enclosure 2. See also 32 C.F.R. § 154, Appendix H (2006).

⁴ See Directive, Enclosure 3, Section E3.1.7. The FORM included seven documents (Items 1 - 7) proffered in support of the Government's case.

In his response to interrogatories, Applicant averred that he had filed returns for the 2007 and 2010 tax years in April 2011, and that he had mailed returns for the 2008 and 2009 tax years in April 2012. He did not provide copies of those returns, but provided IRS transcripts for his 2007 - 2010 tax year accounts showing either a refund due or no tax owed for those years. (FORM, Item 5)

Policies

Each security clearance decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information,⁵ and consideration of the pertinent criteria and adjudication policy in the adjudicative guidelines. Decisions must also reflect consideration of the factors listed in ¶ 2(a) of the new guidelines. Commonly referred to as the “whole-person” concept, those factors are:

- (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 presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an applicant. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information.

A security clearance decision is intended only to resolve whether it is clearly consistent with the national interest⁶ for an applicant to either receive or continue to have access to classified information. Department Counsel must produce sufficient reliable information on which DOHA based its preliminary decision to deny or revoke a security clearance for an applicant. Additionally, Department Counsel must prove controverted facts alleged in the SOR.⁷ If the Department Counsel meets its burden, it then falls to the applicant to refute, extenuate, or mitigate the case for disqualification.⁸

Because no one is entitled to a security clearance, an applicant bears a heavy burden of persuasion to establish that it is clearly consistent with the national interest for

⁵ Directive, 6.3.

⁶ See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

⁷ Directive, E3.1.14.

⁸ Directive, E3.1.15.

the applicant to have access to protected information.⁹ A person who has access to such information enters into a fiduciary relationship with the Government based on trust and confidence. Thus, there is a compelling need to ensure each applicant possesses the requisite judgment, reliability, and trustworthiness of one who will protect the nation's interests as his or her own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access to classified information in favor of the Government.¹⁰

Analysis

Financial Considerations

Applicant did not timely file his federal tax returns for 2001 through 2009 as required. Complying with income tax reporting is a basic financial obligation of most income-earning U.S. citizens. Failure to do so raises a security concern addressed, in relevant part, at 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.

More specifically, Applicant's conduct requires application of the disqualifying condition at AG ¶ 19(g) (*failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same*).

Of the mitigating conditions listed at AG ¶ 20, the following are pertinent to these facts and circumstances:

(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;

(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

⁹ See *Egan*, 484 U.S. at 528, 531.

¹⁰ See *Egan*; Adjudicative Guidelines, ¶ 2(b).

(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 has not established that his failure to file tax returns as required was due to events or circumstances beyond his control. Rather, he claimed, during his subject interview and in his response to interrogatories, that he did not file tax returns for those years because he knew he had paid sufficient taxes through deductions from his paychecks. He further claimed that he has filed some of the tax returns at issue. However, he has not presented copies of the filed returns. He also has not explained why he waited until after he was interviewed in April 2011, and until after he received DOHA interrogatories in 2012, to file those returns. The IRS transcripts tend to support his claim that he may actually have overpaid his taxes for some years. Nonetheless, it was incumbent on Applicant, in response to the Government's information, to establish through sufficient reliable evidence that he has filed all of the past-due tax returns, and that he has filed his tax returns as required since 2009. In short, after the Government presented information to support application of the AG ¶ 19(g) disqualifying condition, Applicant was required to show that he has corrected his past conduct and that such omissions will not recur. He failed to do so and his conduct in this regard must be viewed as recent and ongoing. The AG ¶ 20 mitigating conditions do not apply and the security concerns under this guideline remain.

Whole-Person Concept

I have evaluated the facts presented and have applied the appropriate adjudicative factors under Guideline F. I have also reviewed the record before me in the context of the whole-person factors listed in AG ¶ 2(a). Applicant is a 33-year-old veteran of the U.S. Navy who left active duty as a senior enlisted person. Aside from the SOR allegation, there is no adverse information that would undermine Applicant's suitability for a security clearance. However, his willful failure to file tax returns for nine years in a row is sufficient to disqualify him from access to classified information. Given his background, it is reasonable to assume that Applicant knew or should have known that even if he was due a refund, he was still required to file an annual return. He was afforded multiple opportunities (in response to interrogatories, the SOR, and the FORM) to mitigate the security concerns raised under this guideline, but he failed to do so. A fair and commonsense assessment of available information does not alleviate the doubts raised by Applicant's conduct. Because protection of the national interest is paramount in these determinations, those doubts must be resolved for the Government.

Formal Findings

Formal findings 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 : Against Applicant

Conclusion

In light of all available information, it is not clearly consistent with the national interest for Applicant to have access to classified information. Applicant's request for a security clearance is denied.

MATTHEW E. MALONE
Administrative Judge