



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



In the matter of:)	
)	
[NAME REDACTED])	ISCR Case No. 11-14540
)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Tova Minster, Esquire, Department Counsel
For Applicant: *Pro se*

08/13/2012

Decision

MALONE, Matthew E., Administrative Judge:

Applicant did not mitigate the security concerns raised by his intentional failure to file his federal income tax returns for six of the seven tax years between 2003 and 2009. He also accrued unpaid tax debts because of his failure to file his returns. His request for a security clearance is denied.

Statement of the Case

After reviewing the results of Applicant’s background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) were unable to find that it is clearly consistent with the national interest to continue Applicant’s access to classified information.¹ On March 21, 2012, DOHA issued to Applicant a Statement of Reasons

¹ Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.

(SOR) alleging facts which raise security concerns addressed in the adjudicative guideline (AG)² for financial considerations (Guideline F).

Applicant answered the SOR (Answer) on April 24, 2012, and requested a hearing. I set this matter to be heard on June 20, 2012, and the parties appeared as scheduled. For reasons more fully discussed below, I continued the hearing until July 11, 2012. DOHA received a transcript (TrA.) of the first hearing on June 27, 2012. The parties appeared at the second hearing as scheduled. The Government submitted five exhibits (Gx. 1 - 5), which were admitted without objection. Applicant testified and submitted a single exhibit (Ax. A), which was admitted without objection. DOHA received a transcript (TrB.) of the second hearing on July 19, 2012.

Procedural Issue

This hearing was held to determine Applicant's suitability for an industrial security clearance at the top secret level for his employment with a private contractor doing business with a government agency. He already has a secret-level clearance, and his most recent background investigation was initiated because his employer wanted him to have the higher level of access.

Applicant is also a government employee at a different federal. He is working for the government contractor as a second job. Applicant was hired as a government employee five years before he obtained his contractor job, and he initially received his security clearance through his work for a federal agency. He has been using that clearance for access in his contractor work.

Applicant appeared *pro se* at both hearings. As is my practice with all such applicants, I inquired about his ability to represent himself. In addition to general questions about his background (age, education, legal training, etc.), I asked if he understood the issues in his case. I also asked if he understood what the possible consequences might be if he were to fail in his efforts to obtain a top secret clearance. From his answers, it became apparent Applicant did not previously understand that, if he was not found suitable for a top secret clearance for his defense contractor job, his clearance would be revoked entirely. That also means that he would lose his clearance for his federal job. Applicant also thought that if his employer withdrew its sponsorship of his request for the higher clearance, then the adjudication of that request would end and he would continue working for the contractor (and for the government) with a secret clearance. (TrA. 4 - 15)

After hearing from both Applicant and Department Counsel, and after considering all of the circumstances, I decided *sua sponte* to continue the hearing for three weeks to give Applicant additional time to seek assistance in preparing his case fully informed of all the possible ramifications should he be unable to retain his clearance. (TrA. 15 - 20)

² The adjudicative guidelines were implemented by the Department of Defense on September 1, 2006. These guidelines were published in the Federal Register and codified through 32 C.F.R. § 154, Appendix H (2006).

I also addressed this issue with the parties at the beginning of the second hearing. On July 10, 2012, Applicant's company told Department Counsel that Applicant no longer needed a top secret security clearance, but still needed a clearance, and that the company was still sponsoring Applicant for that clearance. Nothing was presented at either hearing indicating that this matter was not properly before DOHA for hearing and final adjudication based on the investigation that ensued after his request for a top secret clearance. (Ax. A; TrB. 7 - 28)

Findings of Fact

In the SOR, the Government alleged that Applicant intentionally did not file his federal income tax returns as required for tax years 2003 and 2005 - 2009. (SOR 1.a - 1.f). It was also alleged that the Internal Revenue Service (IRS) filed a tax lien against Applicant for taxes owed for tax years 2007 - 2010 (SOR 1.g); and that Applicant owed the IRS \$4,250 for unpaid taxes from 2010 (SOR 1.h). Applicant admitted, with explanations, all of the SOR allegations except SOR 1.g, which he denied with explanation. In addition to Applicant's admissions, I make the following findings of fact.

Applicant is a 44-year-old college graduate with a degree in computer information systems. He obtained his degree in March 2008, and his transcripts showed his grades were very good to excellent. Applicant and his wife have been married since November 1993, but they separated in May 2011. They have one child, age 17, whom Applicant supports along with two stepchildren, ages 22 and 24. Applicant served in the U.S. Army from October 1989 until May 1997. (Gx. 1; Gx. 2; Gx. 4; TrB. 64 - 66, 83)

Applicant was hired as a federal employee in August 2005, and he submitted a Questionnaire for National Security Positions (QNSP) in November 2005 to obtain a secret clearance for his work. His clearance was granted in 2008. (TrB. 86 - 87) In April 2010, Applicant was hired by his contractor employer as an antivirus analyst. He works at a federal agency during the day and as a contractor in the evening. (TrB. 57 - 58)

On August 4, 2010, Applicant submitted an Electronic Questionnaire for Investigations Processing (eQIP) to obtain a top secret clearance in connection with his contractor work. In response to the 16 questions about finances in eQIP Section 26, Applicant answered "yes" to nine of them and disclosed numerous bad debts, collection accounts, and wage garnishments. He also disclosed that, as alleged in the SOR, he had not filed his federal tax returns for 2003 and 2005 - 2009. He also disclosed in his eQIP, and in subject interviews in September 2010 and January 2011, that his federal wages were being garnished at \$140 monthly to satisfy past-due taxes totaling about \$8,000 for tax years 2005 - 2009. (Gx. 1; Gx. 3)

In response to DOHA interrogatories, Applicant disclosed that he owed \$4,250 for tax year 2010 and that the IRS had a lien against him for tax years 2007 - 2010. (Gx. 4) At his hearing, he testified that he also filed his 2011 return, and that he owes about \$8,000 in taxes for that year. (TrB. 62) For his 2010 and 2011 tax returns, Applicant filed as "Married, Filing Separately." He acknowledged that this increases his tax liability and he now owes another \$8,000 for tax year 2011. (TrB. 73 - 74) Applicant also will owe

unpaid state taxes from 2003 - 2009 because of his failure to file returns in those years. (TrB. 83)

Applicant averred in his answer to the SOR and at the hearing (TrB. 59) that he has satisfied the tax lien alleged in SOR 1.g. However, he did not corroborate his claim. He also stated in his answer that he planned to work with a well-known tax attorney to resolve his unfiled returns and unpaid taxes. He did not provide any documentation of that claim, either. Applicant testified that a co-worker at his government job is helping him with his tax returns and that he expects to have his past-due returns filed soon. (TrB. 23, 78)

Policies

A security clearance decision is intended to resolve whether it is clearly consistent³ with the national interest for an applicant to either receive or continue to have access to classified information. Each decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information,⁴ and consideration of the pertinent criteria and adjudication policies in the adjudicative guidelines. Decisions must also reflect consideration of the factors listed in ¶ 2(a) of the 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, by itself, conclusive. 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. The Government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for an applicant. Additionally, the Government must be able to prove controverted facts alleged in the SOR. If the Government meets its burden, it then falls to the applicant to refute, extenuate or mitigate the government's case. Because no one has a “right” to a security clearance, an applicant bears a heavy burden of persuasion.⁵

³ See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

⁴ Directive. 6.3.

⁵ See *Egan*, 484 U.S. at 528, 531.

A person who has access to classified information enters into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability, and trustworthiness of one who will protect the national 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 in favor of the Government.⁶

Analysis

Financial Considerations

The Government presented sufficient information to support the SOR allegations that Applicant deliberately failed to file his federal income tax returns in 2003 and 2005 - 2009, that he owes the IRS at least \$4,000 in unpaid taxes, and that the IRS has a lien against him for tax years 2007 - 2010. Combined with all of the information Applicant disclosed about his recent financial problems, available information raises the security concern articulated 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, the Government’s information requires application of the disqualifying conditions at 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*).

Of the mitigating conditions listed at AG ¶ 20, I have considered the following:

(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;

⁶ See *Egan*; AG ¶ 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; and

(d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

None of these mitigating conditions at AG ¶ 19 apply. Applicant was interviewed about his taxes by government investigators as far back as September 2010. He did not take any action to correct that issue before DOHA issued interrogatories about his taxes in August 2011. Thereafter, and in the five months between his SOR response and his hearings, Applicant did not try to resolve his tax problems. He now owes the IRS as much as \$12,000 in unpaid taxes, and he will be billed for unpaid state taxes, as well. Applicant has not mitigated the security concerns raised by this record.

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). I note that Applicant is a 44-year-old Army veteran who is working two jobs to resolve other financial problems. However, this information does not outweigh the security concerns raised by Applicant's chronic disregard for his income tax obligations. His intentional failure to file his returns indicates that he may also decide not to comply with procedures for safeguarding classified information. His conduct continues to raise doubts about his suitability for access to classified information. 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

Subparagraphs 1.a - 1.h: Against Applicant

Conclusion

In light of the foregoing, it is not clearly consistent with the national interest to continue Applicant's access to classified information. Request for security clearance is denied.

MATTHEW E. MALONE
Administrative Judge