



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



In the matter of:)	
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)	ISCR Case No. 12-00608
Applicant for Security Clearance)	

Appearances

For Government:
Melvin A. Howry, Esquire, Department Counsel

For Applicant:
Amy Broderick, Esquire
Claery & Green, LLP

January 31, 2014

DECISION

ROSS, Wilford H., Administrative Judge:

Applicant submitted his Electronic Questionnaire for Investigations Processing (e-QIP), on December 26, 2006. (Government Exhibit 1.) On July 24, 2013, the Department of Defense issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines F (Financial Considerations) and E (Personal Conduct) concerning 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 on September 1, 2006.

Applicant answered the SOR in writing on August 22, 2013, and requested a hearing before an administrative judge. Department Counsel was prepared to proceed on September 12, 2013. This case was assigned to me on September 23, 2013. The

Defense Office of Hearings and Appeals (DOHA) issued notices of hearing on October 16, 18, and 21, 2013. I convened the hearing as scheduled on November 20, 2013. The Government offered Government Exhibits 1 through 8, which were admitted without objection. Applicant submitted Applicant Exhibits A through C, which were admitted without objection, and testified on his own behalf. Applicant asked that the record remain open for the receipt of additional documents. DOHA received the transcript of the hearing (Tr.) on December 2, 2013. Applicant timely submitted Applicant Exhibits D through K, which were all admitted without objection. Based upon a review of the pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Findings of Fact

Applicant is 50 and married. He is employed by a defense contractor at an overseas location. For ease of discussion the Guideline F allegations (Paragraph 2) will be discussed first.

Paragraph 2 (Guideline F, Financial Considerations)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he is financially overextended and therefore potentially unreliable, untrustworthy, or at risk of having to engage in illegal acts to generate funds. Applicant admitted all the allegations in the SOR under this Paragraph. Those admissions are findings of fact. He also submitted additional information to support his request for a security clearance.

Applicant has been employed overseas by various defense contractors, but in the same position since 1996, a total of 17 years. (Tr. 26; Government Exhibit 1 at Section 11.) Applicant failed to file his Federal tax returns, and pay taxes due, for the tax years 2000, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, and 2010 in a timely fashion.

Applicant gave two basic reasons for his failure to timely file ten years of tax returns. First, in his Answer, Applicant appears to say that since his overseas income was subject to the foreign earned income tax exclusion he did not have to file any tax returns, since he did not think he had any income. Second, in his testimony, Applicant stated, "Procrastination, Your Honor. Plain and simple. I have a problem on occasion with procrastination and in this particular case I just let it get worse and worse and the obvious outcome are these proceedings and my life savings having been taken by the IRS as fair payment and their estimate for the taxes that I owe them." (Tr. 47-48.) (See Tr. 69-71.)

As a result of his failure to file the 2000, 2002, 2003, 2005, 2006 and 2007 tax returns, the IRS filed a Federal tax levy against Applicant for taxes, interest and penalties in the amount of \$789,746.07 in May 2011. The lien concerning those tax years was released in August 2012. (Government Exhibit 4 at 21.) Applicant submitted

evidence showing that the IRS actually recouped \$756,553.04 from Applicant by means of attaching investment accounts he had in the United States, as well as garnishing his pay for a year. (Tr. 31-33, 41-44; Applicant Exhibits D, E, F, G, H, and K.)

Applicant provided evidence that he has filed his 2007 through 2012 tax returns. (Applicant Exhibits C, I, and J; Tr. 52-53, 59-62.) The evidence is mixed, but it appears that Applicant has not yet filed his tax returns for years 2000, 2002, 2003, 2004, 2005, and 2006. (Tr. 31-32, 47-48, 53.)

Applicant knew of his tax problems in the 2007-2008 time frame. This is according to his testimony, and information from the IRS. (Tr. 39, 55.) He indicated that he retained a tax preparer at some unspecified time to help him with his tax problems. He was unhappy with them, then hired his current tax preparer in 2011. However, it took until 2013 for Applicant to provide the preparer with the information he required to file the tax returns that have been filed. (Tr. 75-77.)

Applicant's Account Transcript from the IRS reveals some information of relevance for several tax years:

2007 - In December 2008 the IRS began questioning Applicant about his non-filing of the 2007 tax return. It appears that a tax return for that year was actually filed in March 2010. Applicant paid a levy for back taxes for this year on a monthly basis from August 2011 to August 2012. (Applicant Exhibit J at 2-5.)

2008 - In December 2009 the IRS began questioning Applicant about his non-filing of the 2008 tax return. The tax return was filed on November 20, 2013, same day as the hearing. (Applicant Exhibit J at 6-7.)

2009 - In December 2010 the IRS began questioning Applicant about his non-filing of the 2009 tax return. The tax return was filed in July 2011. The additional tax for this year was paid through a combination of withholding, transfers of credits for other tax years, and reduced or removed interest and penalties. (Applicant Exhibit J at 8-9.) Applicant eventually received a tax refund of \$27.14. (Applicant Exhibit I.)

2010 - In December 2011 the IRS began questioning Applicant about his non-filing of the 2010 tax return. The tax return was filed in August 2013. Applicant's \$16,378 refund was transferred to help pay his 2009 taxes. (Applicant Exhibit J at 10-11.)

2011 - In June 2013 the IRS began questioning Applicant about his non-filing of the 2011 tax return. The return was filed on September 2, 2013, and Applicant received a refund. (Applicant Exhibits I, and J at 12-13.)

2012 - Applicant filed this tax return on July 15, 2013. Applicant's refund of \$11,996 was transferred to help pay his 2009 taxes. (Applicant Exhibit J at 14-15.)

Also relevant and material to this discussion is the fact that Applicant has been in a tax dispute with a state since receiving a tax notice in July 2012. Applicant talked to the state taxing authorities in approximately September 2013 and reached a resolution, which required him to send the state a copy of his 2010 Federal tax return. As of the date of the hearing he had not sent the return stating, "I just haven't got to it yet, sir." (Government Exhibit 4 at 16-17; Tr. 34-38.)

Paragraph 1 (Guideline E - Personal Conduct)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he has made false statements to the Department of Defense during the clearance screening process. Applicant denied the sole allegation under this paragraph.

Applicant submitted a security clearance questionnaire signed by him on December 26, 2006. (Government Exhibit 1.)¹ Sections 28.a. and 28.b. ask Applicant whether he has been over 180 days delinquent on any debt over the seven years before the date the questionnaire is signed, or is currently over 90 days delinquent on any debt. Applicant answered both questions, "No." The Government maintains that these were false answers as Applicant knew, or should have known, that he had tax liabilities for tax years 2000, and 2002 through 2005.² Applicant maintains, "I believe I was under the impression that I would have been receiving returns from my taxes and that I didn't actually owe the Government money." (Tr. 56-57.) The only available information shows that the earliest Applicant was assessed taxes was for the 2002 and 2003 tax years. That date is given as June 25, 2007, as per the "Certificate of Release of Federal Tax Lien" filed by the IRS. (Government Exhibit 4 at 21.) Given all the available information, I find that the Government has not shown that Applicant made a knowing and willing falsification of Government Exhibit 1. Paragraph 1 is found for Applicant.

Mitigation

Applicant submitted several letters of reference from people who work with him. (Applicant Exhibit B.) Applicant is described as a man who is "talented and conscientious," "forthright and honest," and a person who is "beyond reproach and doubt." The writers believe he can be trusted with sensitive information, and has successfully managed a multi-million dollar budget.

¹Allegation 1.a. of the SOR uses the date May 1, 2007, because there is a statement on Government Exhibit 1, "Certified at 2007-05-01." However, there is no evidence that Applicant did the certification on that day. Accordingly, the December 26, 2006 date is used as it is more accurate. The SOR is amended to conform with the evidence. (Directive, Additional Procedural Guidance, paragraph E3.1.17.) (Tr. 16-17, 57-58.)

²The SOR uses the 2007 tax year as the end date for the falsification. However, neither the 2006 or 2007 tax returns were due as of the date the questionnaire was signed in December 2006.

Policies

Security clearance decisions are not made in a vacuum. 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 as appropriate 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 AG ¶ 2 describing 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. In addition, the administrative judge may also rely on his or her own common sense, as well as knowledge of the law, human nature, and the ways of the world, in making a reasoned 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 the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance 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. Security clearance decisions include, by necessity, consideration of the possible risk that 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.

Finally, as emphasized in Section 7 of Executive Order 10865, "Any determination under this order adverse to an applicant shall be a determination 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

Paragraph 1 (Guideline E - Personal Conduct)

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

Conduct involving questionable judgment, lack of candor, dishonesty or unwillingness to comply with rules or 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.

As stated above, I find that there is insufficient evidence to show that Applicant made a false statement on his December 2006 security clearance questionnaire. Paragraph 1 is found for Applicant.

Paragraph 2 (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. 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. Finally, AG ¶ 19(g), “failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same.” Applicant has a long history of not filing his tax returns in a timely fashion, which resulted in the Government taking over \$750,000 from Applicant. The evidence is sufficient to raise these potentially disqualifying conditions.

The guideline also includes examples of conditions that could mitigate security concerns arising from financial difficulties. Under AG ¶ 20(a), the disqualifying condition may be mitigated where “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.” Applicant failed

to file ten years of Federal tax returns in a timely fashion for no good reason. While the most recent returns have been filed, several in 2013, the oldest returns have not yet been filed. Applicant does not have a track record of filing his tax returns in a timely fashion. This mitigating condition has minimal application.

AG ¶ 20(b) states that the disqualifying conditions may be mitigated 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.” This situation was certainly within Applicant’s control, as he himself admits. This mitigating condition does not have application in this case.

AG ¶ 20(d) states it can be mitigating where, “the individual has initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.” It appears Applicant is now current on his Federal tax responsibilities. Once again, it has to be emphasized that it took the Government filing a tax levy and attaching all of Applicant’s investments, as well as his pay for a year, to do this. This mitigating condition also has minimal application.

Applicant appears to be an excellent worker, well respected at his job. He is also, by his own account, a procrastinator. A more than ten year failure to file Federal tax returns in a timely fashion must be weighed against the fact that, literally at the last minute, his most recent tax returns have been filed and his tax liabilities resolved. In making this determination it must also be stated that Applicant had no good reason for failing to resolve a very small state tax dispute.

In conclusion, Applicant asks us to trust that he will no longer procrastinate with regards to his taxes, when there is virtually no history of his being timely. I cannot do so at the present time. I cannot find that “there are clear indications that the problem is being resolved or is under control,” as is required by AG ¶ 20(c). Paragraph 2 is found 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 relevant circumstances. 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. The administrative judge must 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.

I considered the potentially disqualifying and mitigating conditions in light of all the relevant facts and circumstances surrounding this case. The discussion under Guidelines F applies here as well. Applicant has a long history of not filing his Federal tax returns in a timely fashion, with adverse consequences to him. Applicant's conduct with regards to his finances was not mitigated.

Under AG ¶ 2(a)(3), his conduct is recent and continuing. I cannot find that there have been permanent behavioral changes under AG ¶ 2(a)(6). Accordingly, I also cannot find that there is little to no potential for pressure, coercion, exploitation, or duress (AG ¶ 2(a)(8)); or that there is no likelihood of continuation or recurrence (AG ¶ 2(a)(9)).

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 security concerns arising from his financial situation. Accordingly, the evidence supports denying his request for a security clearance.

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

WILFORD H. ROSS
Administrative Judge