



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



In the matter of:)
)
) ISCR Case No. 07-08070
)
)
Applicant for Security Clearance)

Appearances

For Government: Braden M. Murphy, Esquire, Department Counsel
For Applicant: *Pro Se*

March 11, 2009

Decision

DAM, Shari, Administrative Judge:

Based upon a review of the case file, pleadings, and exhibits, eligibility for access to classified information is granted.

On October 12, 2006, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP), in reapplication for a Secret security clearance. On June 23, 2008, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline F (Financial Considerations) and Guideline E (Personal Conduct). 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 revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR on or about August 4, 2008, and waived his right to a hearing. In accordance with Paragraph E3.1.7 of the Additional Procedural Guidance at Enclosure 3 of DoD Directive 5220.6, Department Counsel requested a hearing. (Hearing Exhibit 1) DOHA assigned the case to me on December 5, 2008, and issued a Notice of Hearing on January 7, 2009. The case was heard on January 28, 2009 as scheduled. Department Counsel offered Exhibits (GE) 1 through 9 into evidence without objection. Applicant testified, called one character witness and offered exhibits (AE) A through D into evidence without objection. At the conclusion of the hearing, I left the record open until February 13, 2009, to give Applicant an opportunity to submit additional information. On February 12, 2009, Applicant submitted an exhibit that I marked as AE E and admitted into the record without objection from the Government. DOHA received the hearing transcript (Tr.) on February 6, 2009.

Findings of Fact

Applicant denied the allegations contained in Paragraphs 1 and 3 of the SOR.¹

Applicant is 56 years old and married. He has four adult children. He earned a Bachelor of Science in Electrical Engineering in 1974 and has worked for a federal contractor for the past 35 years. He is a senior manager for a weapons program. Applicant held a Secret clearance since 1974, except for a three-year period from 1997 until 2000, when it was administratively revoked, while he was going through the re-investigation process and he failed to promptly supply information. (Tr. 9; 38)

Applicant has lived in several states over the years. From 1981 until 1994, he lived in Georgia. From September 1994 to August 1997, he lived in California. From September 1997 to May 2000, he lived in Georgia. He returned to California in June 2000 and lived there until September 2001. He moved to Missouri in October 2001, where he currently resides.

Paragraph 1(a) of the SOR alleged: "You are indebted to the State of California as the result of your failure to file your personal income tax returns for 1993 through 2001, resulting in a tax lien in the approximate amount of \$14,286. As of May 11, 2008, \$9,975 remains to be paid and you have yet to file a return for 2001."

Applicant did not reside in California in 1993. He filed his 1994 return on April 17, 1995, the 1995 return on April 15, 1996, the 1996 return on April 15, 1997, and the 1997 return on April 15, 1998. He did not reside in California in 1998 or 1999. He filed a part-time resident 2000 return on August 15, 2001. He filed his 2001 return on August 16, 2007, six years late. He failed to file it timely for several reasons. Due to geographic transfers in his employment in 2000 and 2001, he bought and sold two homes and used monies from his 401(k), along with a large transfer bonus for one of the purchases. His employer changed the payroll deduction system around this time, generating multiple

¹The SOR incorrectly numbered the second paragraph as Paragraph 3, and not as Paragraph 2.

W-2 forms, some of which contained errors that had to be corrected.² In addition to the complications with the W-2 forms and additional taxes owed because of a bonus and 401(k) withdrawal, he had difficulty calculating his taxes and gathering the information. After filing the 2001 return in 2007, he received a tax bill for \$4,500 that he paid in July 2008. He subsequently received another notification from California that he owed an additional \$1,500 that he paid in January 2009. The 2008 tax lien was released on January 8, 2009. All matters are resolved. He admitted that he should have sought help with the 2001 complicated return and filed it much sooner. (Tr. 39-49; AE C)

Paragraph 1(b) of the SOR alleged: "You failed to file your federal tax returns for years 1993 through 1999. As a result the IRS filed a lien against you in the approximate amount of \$5,706, which was satisfied and released in 2004, only after the IRS applied your tax refunds from years 2000 to 2003 as an offset."

Applicant filed his 1993 federal return on February 14, 1994, his 1994 return on April 17, 1995, the 1995 return on April 15, 1996, the 1996 return on April 15, 1997, the 1997 return on April 15, 1998, and the 1998 return on April 15, 1999. (AE A) All of these were timely filed. (Tr. 50-54; AE D; Response: Attachment 3) Department Counsel acknowledged that the allegations filed under Paragraph 1(b) were incorrectly alleged as the returns were filed well before the issuance of the SOR. (Tr. 54; 95)

Paragraph 1(c) of the SOR alleged: "You failed to file your personal income tax return with the State of Georgia for tax years 1987 through 1992."

Applicant filed his 1987 Georgia return on November 15, 1991, and his 1988 and 1989 returns on June 20, 1999. All three of these were late. He was entitled to receive refunds for each of those years, but did not because of the late filings. He admitted the late filings, and attributed the delay to moving during that period, his daughter's illness, financial over-extension, potential foreclosure problems, all of which resulted in tax liabilities that he could not pay.³ In addition, he had not timely filed his federal taxes for the years 1987, 1988 and 1989, further exacerbating the situation.⁴ Because he anticipated receiving a refund from the state for those years, he procrastinated. He acknowledges his error. He timely filed his 1990, 1991 and 1992 state returns. (AE D; Response: Attachment 4) All matters relating to the tax returns for these six years are resolved. (Tr. 54-62)

Paragraph 1(d) of the SOR alleged: "You failed to file your federal tax returns with the I.R.S. for tax years 2005 and 2006, owing approximately \$6,577 including interest and penalties. As of March 8, 2008 this debt has not bene [sic] paid."

Applicant filed his 2005 federal return on April 16, 2006. He paid \$7,575 on July 15, 2006, and made an additional payment of \$274 in May 2007. This year is resolved.

²Applicant noted these problems in his January 2000 Statement of Subject. (GE 6)

³Applicant noted these problems in his January 1997 Statement of Subject. (GE 3)

⁴He filed his federal 1987, 1988 and 1989 tax returns in November 1991.

He filed his 2006 federal return on August 14, 2007, after receiving an extension. He made the \$6,566 final payment on the taxes on August 1, 2008. This year is resolved. (Response: Attachment 5; Tr. 63-66)

Applicant timely filed his 2007 state and federal returns. He later received a \$2,000 refund from the state. On January 14, 2009, the IRS notified him that he had an outstanding tax liability of \$2,113 on his 2007 taxes. He admitted that he should have sought help with the complicated return. In accordance with an installment payment plan he negotiated with the IRS, he mailed a \$500 check to the government on January 28, 2009, reducing that tax balance to about \$1,650.⁵

From 1987 until 2007, Applicant was required to file yearly state and federal tax returns for a total of 40 returns. All of those returns were timely filed, except eight returns: his 1987, 1988 and 1989 federal tax returns were filed in November 1991; his 2001 federal return was filed in November 2003; his 1987 Georgia return was filed in November 1991; his 1988 and 1989 Georgia returns were filed in June 1999; and his 2001 California return was filed in August 2007. All state and federal taxes owed for those twenty years are resolved. (AE E)

Applicant admitted that he previously had problems filing his returns on time and owing sizeable amounts of money to the Government at tax time. In order to correct that problem and prevent its recurrence, he has increased the amount of money withheld from his paycheck by an additional \$7,200 annually. (Tr. 70-72; 86; AE E) That additional withholding should cover any tax shortage at the end of future tax years. (Tr. 87-88)

Applicant's net monthly income is \$8,170. (AE E). His expenses are about \$8,040, including payments on two mortgages, a car loan, and six credit cards, leaving about \$130 per month, according to his August 2007 budget. (Response: Attachment 3) The budget does not contain the \$500 monthly installment payment for his 2008 tax liability, which will be paid in three months. However, it appears that he is able to pay that based on the payments he made in December 2008 and January 2009. He and his wife have a budget established for the next three years that will track their expenses, spending, and promote savings. (Tr. 91-92)

Applicant's immediate supervisor testified. He currently supervises about 150 people and a \$400 billion program. He has held a Secret clearance for 24 years. He has known Applicant for seven years and is aware of his tax issues. He has "found [Applicant] to be a dependable, reliable, trustworthy, a morally and ethically sound who possess impeccable character and integrity." (Tr. 27) He has no reservation in recommending him for a security clearance. (Tr. 27)

Applicant presented his case in a very organized and detailed manner. He spent a great deal of time gathering documents since the SOR was issued, and he appears to

⁵ The SOR does not contain any allegations pertaining to 2007.

have a comprehensive understanding of the situation, as well as his finances. He realizes the importance of complying with tax filing requirements and monitoring his withholding monies. Throughout his testimony, he was candid, remorseful and embarrassed by this situation. (Tr. 93-94)

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the revised 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(a), 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 "[a]ny 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.

Directive ¶ E3.1.14 requires the Government to 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 security decision." 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."

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.

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.

AG ¶ 19 describes a condition that could raise a security concern and maybe be disqualifying in this case:

(g) failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same.

Applicant failed to timely file his federal tax returns for the years 1987, 1988, 1989, and 2001. He also failed to timely file state returns for 1987, 1988, 1989, and 2001. The evidence is sufficient to raise this potentially disqualifying condition.

After the Government produced substantial evidence of those two disqualifications, the burden shifted to Applicant to produce evidence and prove mitigation of the resulting security concern. AG ¶ 20 includes six conditions that could mitigate security concerns arising under this guideline:

(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;

(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;

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

(e) the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue; and

(f) the affluence resulted from a legal source of income.

AG ¶ 20(a) cannot apply because Applicant filed a state 2001 tax return in August 2007, which is too recent to trigger the application of this condition, given his previous history of late filings. Although there were certain circumstances that arose in the late 1980's and again in 2000 to 2001, which complicated his tax situation, none of them justified the late filings. Hence, AG ¶ 20(b) does not apply. He presented evidence indicating that he is addressing the situation and that there are "clear indications that the problem is being resolved or is under control," warranting the application of AG ¶ 20(c). He has also paid all previously owed taxes, such that AG ¶ 20(d) is applicable. The record evidence does not support the application of AG ¶ 20(e) or AG ¶ 20(f).

Guideline E, Personal Conduct

The security concern pertaining to the guideline for Personal Conduct is set out in AG ¶ 15:

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.

AG ¶ 16 describes a condition that could raise a security concern and maybe disqualifying in this case:

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of:

- (1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or other government protected information;
- (2) disruptive, violent, or other inappropriate behavior in the workplace;
- (3) a pattern of dishonesty or rule violations; and,
- (4) evidence of significant misuse of Government of other employer's time or resources.

Based on the evidence, Applicant's failure to file state and federal tax returns in 1987, 1988, 1989, and 2001 demonstrate a pattern of poor judgment and rule violations, sufficient to raise the above disqualification.

AG ¶ 17 describes a condition that could mitigate the disqualification raised in this case:

- (d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur.

Applicant acknowledged his behavior and is remorseful. He has increased the amount of his monthly withholding taxes, in order to prevent a similar problem from arising in the future. He and his wife have also established a long-range budget that will help them maintain financial responsibility and avoid additional late tax filing problems. The above mitigating condition is applicable to his previous pattern of failure to timely file tax returns.

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). They include the following:

- (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 include 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. Applicant is a 56-year-old man, who has a 35-year successful work history with his employer. He began experiencing personal and financial difficulties from 1987 through 1989, and again in 2000 and 2001, attributable to family issues, financial over-extension, and geographical transfers. From 1987 to 2007, he filed eight tax returns significantly late. He filed the other 32 tax returns, required during that period, within the legal time limits. He understands the underlying reasons for the late filings and takes full responsibility for his actions. He admitted that he should have sought help with the complicated returns, and I suspect he will in the future, if necessary. With his new budget, he should be able to avoid similar payment problems, given the amount of money he earns. He was a candid and credible witness. His supervisor is aware of the issues and continues to strongly support him. There is minimal potential for exploitation or likelihood of a recurrence.

Overall, the record evidence leaves me without questions as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the security concerns arising under financial considerations and personal conduct.

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:	FOR APPLICANT
Subparagraphs 1.a through 1.d:	For Applicant
Paragraph 3, Guideline E: ⁶	FOR APPLICANT
Subparagraph 3.a:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the interests of national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

SHARI DAM, Administrative Judge

⁶ This Paragraph should have been numbered "2" and not "3."