



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



In the matter of:)
)
 [REDACTED]) ISCR Case No. 15-05820
)
 Applicant for Security Clearance)

Appearances

For Government: Ross Hyams, Esq., Department Counsel
For Applicant: *Pro se*

04/10/2019

Decision

HESS, Stephanie C., Administrative Judge:

Applicant failed to mitigate the security concerns raised by his delinquent filings of his Federal and state tax returns. Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (e-QIP) on February 6, 2015. On October 13, 2017, the Department of Defense (DOD) sent him a Statement of Reasons (SOR), alleging security concerns under Guidelines F (Financial Considerations). The DOD acted under Executive Order (Ex. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented by DOD on June 8, 2017.

Applicant submitted his Answer to the SOR on November 30, 2017, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on February 21, 2018, and the case was assigned to me on March 20, 2018. On May 22, 2018, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the

hearing was scheduled for June 7, 2018. I convened the hearing as scheduled. Government Exhibits (GX) 1 and 2 were admitted into evidence without objection. Applicant testified, called one witness, and submitted Applicant's Exhibit (AX) A, which was admitted without objection. DOHA received the transcript (Tr.) on June 12, 2018.

Procedural Issues

Applicant appeared at the hearing with a personal representative. However, both Applicant and the personal representative were unfamiliar with the hearing process. It was Applicant's intention for the personal representative to testify on Applicant's behalf. We resolved this issue as follows: Both parties waived opening statements and the personal representative testified on Applicant's behalf, and then acted as Applicant's personal representative.

At the start of the hearing, Department Counsel moved to amend the SOR allegations, and further stated that he might make an additional motion at the end of the hearing. I granted Department Counsel's motion and Applicant was initially uncertain as to whether or not he was prepared to proceed with the hearing. I stated that I would leave the record open for 30 days in order to permit Applicant to more fully respond to the amended allegations and to submit additional documentation. Under these conditions, Applicant determined that he was prepared to proceed with the hearing. Department Counsel moved to amend the SOR to conform to the evidence, and I granted his motion without objection. The record remained open until July 9, 2018. Applicant timely submitted AX B through H, which included a statement addressing the SOR amendments. I admitted the additional evidence without objection.

Findings of Fact

Applicant, 56, is a senior software systems engineer currently employed by a defense contractor since April 2008. He was previously employed in the same position by defense contractors since at least 2002. Applicant worked as a Federal employee from 1988 until 1997. He earned a bachelor's degree in electrical engineering in 1985. He and his wife married in 1982 and have three adult children. He was granted his first security clearance in 1988. (GX 1.)

Under Guideline F, the SOR as amended alleges that Applicant failed to timely file his state and federal tax returns for tax years 2011 through 2016. Applicant admits the SOR allegations. The delinquent tax filings are documented in Applicant's responses to interrogatories, Answer, and documentary submissions. His admissions are incorporated in my findings of fact.

Applicant does not have any formal training in tax preparation. He prepares and files his own tax returns using tax-preparation software, due in large measure to his concern that accountants and tax preparers are likely targets of hacking. For many years, Applicant erroneously believed that if he was entitled to a refund from the IRS, he was not required to file his tax return on the annual deadline, but was instead required to file

within three years of the annual deadline or he would forfeit his refund. (GX 2; Tr. 37-38; Answer.) Applicant also stated that his state of residence withholds refunds after two years, so he historically tried to file his Federal and state taxes within two years of the deadline. (Tr. 37-38.)

Applicant attributes his late tax filings primarily to the complexity of his taxes, his misconception about filing requirements, and his efforts to maintain balance in his family and work lives. (Answer.) The issues and events that Applicant identifies as having made his tax accounting and preparation complex, and his filings and payments delinquent, are discussed more fully below.

In 2002, Applicant's wife was in a serious car accident in which she was gravely injured. She suffered from ongoing health issues for many years that required frequent medical attention. Applicant incurred significant medical costs, and itemized these on his tax returns. (GX 2; Tr. 50.) Applicant's wife's health deteriorated in 2012 and 2013, and she underwent surgery in 2014 as a result of the injuries she received in the accident. Through the years, Applicant prioritized his wife's medical care and concern over her health over preparing his tax returns. (Answer.)

In approximately 2008, Applicant started a two-pronged business venture. He purchased a used recreational vehicle (RV) with the intention of refurbishing it and reselling it. He also bought an online subscription service that was theoretically designed to permit Applicant to purchase deeply discounted vacation packages to resell. A component of the vacation-sale business was to recruit other people to purchase and sell the packages, and Applicant would receive a percentage of their sales. Applicant did not generate any reportable income from either part of the business, nor did he ever obtain a business license. (GX 2; Answer.) However, the business did generate expenses that Applicant itemized on his tax returns. Applicant did not keep business records in real time and this complicated his ability to gather information in order to timely file his tax returns. (Tr. 53-58.) Applicant officially closed the business in June 2016. (Answer.)

In tax year 2011, Applicant's then-employer issued stock options to its employees, including Applicant. Because of the way the employer issued the stock options, the value of the options was imputed to the employees as income, which necessarily increased their tax obligations. The employer sent Applicant an IRS Schedule K-1 that was incorrect. Applicant contacted the employer, which in turn contacted the IRS to amend the Schedule K-1s. It took several years for this issue to be corrected, and Applicant did not file his tax returns while the issue was pending. (GX 2.) It is unclear when the schedule K-1 was amended. Applicant sold the stocks in April 2017 and received his last Schedule K-1 in March 2017. (Tr. 63-65.)

It took Applicant approximately 440 hours to do the accounting and tax preparation for tax year 2014. Despite this large investment of time, Applicant miscalculated his tax obligation and owed approximately \$90. He filed the 2014 Federal return in July 2017, and paid the amount due in September 2017. (GX 2; Tr. 45-46; Answer.)

Applicant spoke extensively about his delinquent tax filings during his personal subject interview (PSI) in May 2015. Applicant identified tax year 2011 as the year he began having difficulty in his tax accounting and preparation in both his e-QIP and his PSI. He stated because of his difficulties filing his 2011 tax returns, he was unable to timely file 2012, 2013, and 2014. He filed his 2011 Federal return on April 21, 2015. He anticipated filing his 2013 and 2014 tax returns soon. Additionally, the IRS sent inquiries to Applicant for non-filing of tax returns in at least 2012, 2013, and 2016. (GX 2; Answer.)

Applicant signed his responses to DOHA's interrogatories on October 4, 2017. The interrogatories required Applicant to submit IRS account transcripts for tax years 2011 through 2016. Applicant stated that his 2016 state and Federal tax returns remained unfiled. However, his 2015 state and Federal returns were also unfiled. He filed his 2015 Federal return on October 10, 2017. Applicant filed for an extension for his 2016 Federal return. However, he missed the October 15, 2017, deadline and filed the return on November 24, 2017. (GX 2; Tr. 43-45; Answer.).

The instructions section of IRS Form 1040, updated annually, specifically sets forth the filing requirements for that tax year. For example, in 2011 married couples filing jointly with both spouses under the age of 65 with a gross income of at least \$20,600 were required to file a Federal return by April 18, 2016.¹ Applicant's income has exceeded the annual minimum gross income for tax years 2011 through 2016.² (Answer.) Applicant was generally entitled to receive refunds from the IRS. However, he forfeited his 2011 refund by filing the return more than three years after the filing deadline on April 21, 2015. Applicant filed automatic extensions for several tax years, but did not meet the October 15 deadlines. (GX 2; Tr. 40-43; Answer.)

Applicant filed an extension for his 2017 Federal tax return, which moved his deadline to October 15, 2018. However, Applicant's accounting and tax preparation resulted in Applicant's owing Federal tax for 2017. He was required by Federal law to submit his payment by the April 2018 filing deadline. On May 31, 2018, Applicant filed the return with a check for \$2,500 for tax payment. (AX A.) Further, this submission occurred one week after Applicant acknowledged receipt of the Notice of Hearing.³ Regarding his 2017 return, Applicant stated:

It is interesting that my 2017 "Application for Automatic Extension of Time to File" projects us receiving a \$300 refund while my actual tax filing shows us owing additional taxes. In other words, we made yet another mistake. It is a humbling lesson learned for me going forward that estimates (just like 2014) can be wrong. (AX B.)

¹ The relevant pages from 2011 1040 instructions from www.irs.gov are appended to the record as Administrative Exhibit (AD EX) IV.

² See www.irs.gov.

³ The email acknowledging receipt of the Notice of Hearing is appended to the file as AD EX II. Appellant's sheet of corrections of the transcript is amended to the file as AD EX III.

It is unclear when Applicant realized he was required to file by the IRS deadlines regardless of whether or not he was entitled to a refund, but it was at some point prior to filing his Answer on November 30, 2017. However, Applicant also stated in his Answer that his “previous security investigations revealed this same issue since [his] wife’s wreck in 2001 and since the start of [his] business in 2008.” Upon receiving the SOR, he realized that his practice of delinquent filing his tax returns could have a negative impact on his security clearance. (Tr. 67-70.)

Applicant does not owe any balance for his 2014 state tax. However, as of September 28, 2017, Applicant had not filed his 2015 and 2016 state tax returns. (Answer.) Applicant filed his 2017 state tax return on May 31, 2018. (AX A.)

Applicant thinks filing his tax returns will be simplified now that he no longer has to wait for a Schedule K-1 or incorporate the information from it into his tax calculations, but instead receives a standard employee W-2. (Tr. 66.) Applicant stated that because he was operating under the misconception that he had three years to file if he was owed a refund from the IRS, he did not think he was violating any laws. (Tr. 70.) Applicant stated several times that he remains circumspect about hiring a tax preparer or accountant out of concern that Applicant’s personal information will be hacked. His current intention is to continue preparing his own tax returns. (Tr. 64-73.) Applicant does not have any delinquent accounts or other financial issues. (AX C-AX H.) Now that Applicant is aware of the negative impact his delinquent filing of his Federal and state tax returns could have on his security eligibility, he intends to timely file all future tax returns. (Tr. 70-71.)

Applicant’s witness, a security specialist who has worked with Applicant for more than 11 years, holds a security clearance. She is aware of the SOR allegations. She testified that Applicant is trustworthy and reliable, stating that he has identified and helped to rectify several data spillages that were potentially damaging, and that he has never caused a security-related incident. (Tr. 28-31.) Applicant provided character references from his supervisor since 2003, a friend of over 30 years, a coworker since 2008, and a former coworker and friend of 28 years. Each is aware of the SOR allegations. Collectively, they stated that Applicant is a person of integrity who is skilled in his profession. Given Applicant’s character and trustworthiness, they highly recommend Applicant for continued access to classified information. (Answer.)

Policies

“[N]o one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to “control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information.” *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

Eligibility for a security clearance is predicated upon the applicant's meeting the criteria contained in the AG. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines in conjunction with an evaluation of the whole person. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available and reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Clearance decisions must be made "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. "Substantial evidence" is "more than a scintilla but less than a preponderance." See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability. See ISCR Case No. 92-1106 at 3, 1993 WL 545051 at *3 (App. Bd. Oct. 7, 1993).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Guideline F, Financial Considerations

The concern under this guideline is set out in AG ¶ 18:

Failure 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 or sensitive information.

This concern is broader than the possibility that an individual might knowingly compromise classified information in order to raise money. It encompasses concerns about an individual's self-control, judgment, and other qualities essential to protecting classified information. An individual who is financially irresponsible may also be irresponsible, unconcerned, or negligent in handling and safeguarding classified information. See ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012).

The record evidence establishes the following disqualifying condition:

AG ¶ 19(f): failure to file . . . annual Federal, state, or local income tax returns or failure to pay annual Federal, state, or local income tax as required.

The following mitigating conditions are potentially applicable:

AG ¶ 20(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;

AG ¶ 20(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, a death, divorce or separation, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances; and

AG ¶ 20(g): the individual has made arrangements with the appropriate tax authority to file or pay the amount owed and is in compliance with those arrangements.

Applicant did not timely file his Federal and state tax returns for 2011 through 2016, despite receiving extensions for many years. He did not timely pay his 2014 and 2017 tax obligations. The 2011 inaccurate tax reporting by Applicant's employer and Applicant's wife's medical expenses were conditions that were beyond Applicant's control. These

conditions added complexity to Applicant's accounting and tax preparation, which contributed to his inability to timely file his tax returns. It is understandable that Applicant wanted to maintain balance with his personal and professional lives and to prioritize his wife's care. Further, it is not unreasonable for Applicant to be concerned that his personal information could be at risk through hacking. Nevertheless, Applicant did not act responsibly under the circumstances. There are a myriad of options that Applicant could have employed to protect his personal information when using the services of a tax professional. For example, Applicant could ensure that the tax professional computed Applicant's taxes without entering his personal information. The computed tax information could then be entered by Applicant and submitted to the taxing authority.

Applicant also attributes his pattern of failing to timely file his tax returns to his misconception about his filing requirements. Applicant is college educated and has worked as a software systems engineer since at least 2002. The 1040 instructions clearly set forth the filing requirements and these requirements have applied to Applicant for all tax years in question. It is unclear exactly when Applicant fully understood that he is required to file his Federal tax return annually by the IRS deadlines established by the IRS.

Further, Applicant has been given notice that the government is concerned about timely filing of taxes by the questions asked on his 2015 e-QIP, and likely during his previous background investigations. Applicant was also questioned extensively about his failure to timely file his taxes during his May 2015 PSI. Applicant had to have understood the security concern raised by his pattern of delinquent filing his tax returns when he received DOHA's interrogatories in September 2017. The fact that Applicant filed his 2015 tax return the day after he completed his responses to interrogatories underscores the fact that Applicant understood that his failure to timely file his tax returns had security clearance implications.

However, despite having received the SOR in October 2017, Applicant did not file his 2016 Federal tax return until November 24, 2017, well after the extension deadline. He did not timely pay his 2018 Federal tax obligation. Applicant filed his 2017 return, the first return filed within an extension period, and paid his tax obligation only after receiving the hearing notice. Applicant asserted that he will timely file his future tax returns now that he is aware of the security clearance implications.

Applicant's overarching motivation for his last-minute efforts to comply with his tax-filing obligations, as well as his future promise of compliance, is protecting his security clearance. The appeal board has regularly held that "applicants who only begin to address their security-significant conduct when their personal interests are at stake may be lacking in judgment and reliability. See, e.g., ISCR Case No. 15-06707 at 3 (App. Bd. Aug. 15, 2017.)

In specifically addressing mitigating condition 20(g) in ISCR Case No. 17-01807 (App. Bd. Mar. 7, 2018), the appeal board observed:

The mere filing of delinquent tax returns or the existence of a payment agreement with an appropriate tax authority does not compel a Judge to issue a favorable decision. As with the application of any mitigating condition, the Judge must examine the record evidence and decide whether the favorable evidence outweighs the unfavorable evidence or *vice versa*. The timing of corrective action is an appropriate factor for the judge to consider in the application of [this mitigating condition]. pp 3-4.

Applicant's pattern of failing to timely file his Federal and state tax returns is recent and raises concerns about his willingness to abide by rules and regulations, and his current reliability and judgment. While many factors contributed to Applicant's failure to timely file his Federal and state tax returns for many years, he did not act reasonably under those circumstances. None of the mitigating conditions apply.

Whole-Person Concept

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. In applying the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all relevant circumstances in light of the nine adjudicative process factors listed at AG ¶ 2.

I have incorporated my comments under Guideline F in my whole-person analysis. Some of the factors in AG ¶ 2 were addressed under that guideline, but I have also considered the following:

Applicant has held a security clearance since 1988. His supervisor, coworkers, and friends highly recommend Applicant for a continued security clearance. He is a skilled professional. However, through his failure to timely file and pay his taxes, Applicant has not demonstrated the judgment and reliability required of individuals granted access to classified information.

After weighing the disqualifying and mitigating conditions under Guideline F, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns raised by his failure to timely file his tax returns taxes as required. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the national interest to grant him continued eligibility for access to classified information.

Formal Findings

As required by section E3.1.25 of Enclosure 3 of the Directive, I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline F (Financial Considerations): AGAINST APPLICANT

Subparagraphs 1.a and 1.b: Against Applicant

Conclusion

I conclude that it is not clearly consistent with the national interest to continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Stephanie C. Hess
Administrative Judge