



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



In the matter of:)	
)	
)	ISCR Case No. 16-02147
)	
Applicant for Security Clearance)	

Appearances

For Government: Andrea Corrales, Esq., Department Counsel
For Applicant: Jacob T. Ranish, Esq.

04/20/2018

Decision

KATAUSKAS, Philip J., Administrative Judge:

Applicant contests the Defense Department’s intent to revoke his eligibility for access to classified information. He failed to present sufficient evidence to explain, extenuate, or mitigate the security concern stemming from his history failing to file income tax returns. Accordingly, this case is decided against Applicant.

Statement of the Case

On December 19, 2016, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) sent Applicant a Statement of Reasons (SOR) alleging that his circumstances raised security concerns under the financial considerations guideline.¹ Applicant answered the SOR on January 12, 2017, and requested a hearing to establish his eligibility for continued access to classified information.

On March 26, 2018, a date mutually agreed to by the parties, a hearing was held. Applicant testified at the hearing. The Government offered two exhibits, which were

¹ The DOD CAF took this action under Executive Order (E.O.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive).

marked for identification as GE 1 and 2 and were admitted without objection. Applicant's Exhibits (AE) A and B were admitted without objection. The transcript of the hearing (Tr.) was received on April 4, 2018.

Procedural Issues

On December 10, 2016, the Security Executive Agent issued Directive 4 (SEAD-4), establishing a "single, common adjudicative criteria for all covered individuals who require initial or continued eligibility for access to classified information or eligibility to hold a sensitive position."² The National Security Adjudicative Guidelines (hereinafter "new adjudicative guidelines" or "AG"), which are found in Appendix A to SEAD-4, are to be used in all security clearance cases decisions issued on or after June 8, 2017.³ In light of this explicit direction (and absent lawful authority to the contrary), I have applied the new adjudicative guidelines. ISCR Case No. 02-00305 at 3 (App. Bd. Feb. 12, 2003) (security clearance decisions must be based on current DoD policy and standards).⁴ DOD CAF adjudicators reviewed this case using the previous version of the adjudicative guidelines, dated September 1, 2006, which were in effect at the time. My decision and formal findings under the revised Guideline F would not be different under the 2006 Guideline F.

At the hearing, Department Counsel moved to amend the SOR to delete the allegations of failure to timely file federal and state returns from 2006 to 2015, so that the SOR would allege only that Applicant failed to timely file federal and state returns from 2010 to 2015. Applicant's counsel did not object, and I granted the motion to amend.⁵

Findings of Fact

Applicant is 38 years old, a college graduate, unmarried, and with no children. Since March 2010, he has worked for a defense contractor.⁶

The SOR alleges that Applicant failed to timely file his federal and state income tax returns for the tax years 2006 through 2015.⁷ Applicant answered that he filed his

² SEAD-4, ¶ B, *Purpose*.

³ SEAD-4, ¶ C, *Applicability*.

⁴ See also ISCR Case No. 07-00029 at 3 (App. Bd. Dec. 7, 2007) (when the guidelines were last revised, the Board stated: "Quasi-judicial adjudications must be made within the bounds of applicable law and agency policy, not without regard to them.")

⁵ Tr. 7.

⁶ GE 1.

⁷ SOR ¶ 1.

federal and state income taxes for 2006 through 2009 on time. Applicant admitted with explanations that he did not timely file his federal and state for 2010 through 2015.⁸

Applicant testified that in September 2016 he suffered a life-threatening medical condition and had to be resuscitated. The experience made him appreciate his family and his friends at work. He did not, however, attribute that experience or any other medical reasons or other explanations for failing to timely file his 2010 to 2015 tax returns.⁹

Instead, Applicant blamed those failures to file timely on his opening of an online investment account in about 2009 or 2010. He was trying to buy some stock online. Applicant got locked out of his account and was told by the investment firm that he needed to verify his identity. So, he went to his credit union, which gave him a notarized document but said it would not prove to the investment account that he was who he claimed to be. The investment account told him he needed to go to a lawyer. At about this time, he wanted to prepare his tax returns and tried to log in to his investment account to get the proper forms for the IRS and state taxing authorities. Since taxes were routinely withheld from his paychecks, he did not anticipate owing any taxes. He did not believe, however, that he could file his returns without having the forms from the investment account. And he was not able to access those forms.¹⁰

Applicant testified about his background interview with the OPM investigator in April 2016. Applicant discussed his tax filing problem, and the investigator asked if Applicant had funded the investment account. Applicant said he had not, and he was told by the investigator that in that event, he did not need any forms from the investment account to file his tax returns. Applicant did not realize that, and within a few months of that interview, he had filed all late returns. He owed less than \$1,000 in taxes.¹¹

On cross-examination, Applicant was asked that since he was an IT specialist, why could he not access his investment account? He answered that because he was not an IT administrator for that account; only the investment firm's IT administrators could access his account. Applicant was asked whether he sought help from a tax professional or a tax preparer. He answered that he did not, even though he knew his tax returns were due on April 15 each year. He also said that lack of finances did not prevent him from seeking professional help with his taxes. Before opening the investment account, Applicant had always timely filed his tax returns since 1998.¹²

⁸ Answer.

⁹ Tr. 12, 31.

¹⁰ Tr. 13-15.

¹¹ Tr. 15-18. Applicant also testified that he attended a FDIC Lending Smart Course regarding finances and taxes, and that going forward, will file all his tax returns on time. *Id.* 18. The record does not show when Applicant attended the FDIC course, before or after he filed his late returns. The most credible inference is that Applicant attended this course sometime after his OPM interview.

¹² Tr. 24-26, 30-31.

Applicant was examined on why he failed to disclose on his security clearance application in June 2016 that he had unfiled tax returns.¹³ He said that he was under stress from filling out the security clearance application and from the job-related stress of providing IT support for over 200 individuals in his department.¹⁴

Applicant's attention was called to the summary report of his background interview in April 2016 when he told the investigator that he had been "lazy" and could not get the tax documents from his investment account.¹⁵ Applicant testified that he did not like the word "lazy," that he was tired "after work," with a work day from 4:00 AM until after 5:00 PM (including commute).¹⁶

Law and Policies

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). Individuals are eligible for access to classified information "only upon a finding that it is clearly consistent with the national interest" to authorize such access. E.O. 10865 § 2; SEAD-4, ¶ E.4.

When evaluating an applicant's eligibility for a security clearance, an administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations, the guidelines list potentially disqualifying and mitigating conditions. The guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies the guidelines in a commonsense manner, considering all available and reliable information, in arriving at a fair and impartial decision. SEAD-4, Appendix A, ¶¶ 2(c), 2(d).

Department Counsel must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.14. Applicants are responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven . . . and has the ultimate burden of persuasion as to obtaining a favorable clearance decision." Directive ¶ E3.1.15.

Administrative Judges are responsible for ensuring that an applicant receives fair notice of the issues raised, has a reasonable opportunity to litigate those issues, and is not subjected to unfair surprise. ISCR Case No. 12-01266 at 3 (App. Bd. Apr. 4, 2014).

¹³ Counsel for Applicant objected to this questioning, because it was not alleged in the SOR. I overruled that objection, on the grounds that it went to the whole-person concept and to Applicant's credibility. Tr. 28. Even though not alleged in the SOR, such matters may be considered on the issue of Applicant's credibility. See ISCR Case No. 08-09232 at 3 (Sep. 9, 2010).

¹⁴ Tr. 33-34.

¹⁵ GE 2.

¹⁶ Tr. 34-35.

In resolving the ultimate question regarding an applicant's eligibility, "[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security." SEAD-4, Appendix A, ¶ 2(b). See *also* SEAD-4, ¶ E.4. Moreover, the Supreme Court has held that officials making "security clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531.

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. 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 an applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Discussion

Guideline F, Financial Considerations

The SOR alleges that Applicant has a number of delinquent debts, which purportedly raise a security concern under Guideline F. The financial considerations security concern is explained at AG ¶ 18, which in pertinent part, states:

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. Financial distress can also be caused or exacerbated by, and thus can be a possible indicator of, other issues of personnel security concern such as excessive gambling, mental health conditions, substance misuse, or alcohol abuse or dependence.

Guideline F is not limited to a consideration of whether a person with financial issues might be tempted to compromise classified information or engage in other illegality to pay their debts. It also addresses the extent to which the circumstances giving rise to delinquent debt and other security-significant financial issues cast doubt upon a person's self-control, judgment, and other qualities essential to protecting classified information.¹⁷

In assessing Applicant's case, I considered the following potentially disqualifying and mitigating conditions:

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

¹⁷ ISCR Case No. 11-05365 at 3 (App. Bd. May. 1, 2012).

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;

AG ¶ 20(c): the individual has received or is receiving financial counseling for the problem from a legitimate and credible source, such as a non-profit credit counseling service, and there are clear indications that the problem is being resolved or is under control; 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.

A security clearance adjudication is not a debt collection or tax enforcement process. Rather, an administrative judge examines the way an applicant handles personal financial obligations to assess how they may handle their security obligations.¹⁸ "Failure to file tax returns suggests that an applicant has a problem with complying with well-established government rules and systems."¹⁹ Here, Applicant's security clearance eligibility was called into question by his history of failing to timely file his income tax returns. I conclude that disqualifying condition AG ¶ 19(f) applies. The next inquiry is whether any mitigating conditions apply.

Applicant's failure to file began with his obligation to file his 2010 tax returns in 2011. That failure continued annually until after his background interview in April 2016, when he was told that he did not need any investment account forms to file his returns. Applicant's conduct was not infrequent, nor did it occur that long ago. Therefore, AG ¶ 20(a) does not apply.

Applicant claimed that he failed to file, because he could not access his investment account for forms he believed necessary to file his returns. Even if I credit that as a circumstance largely beyond his control, the next inquiry is whether Applicant acted responsibly under those circumstances.²⁰ Confronted with this problem, however, he did nothing further to solve it. He did not seek professional help from a tax preparer or a tax

¹⁸ See generally ISCR Case No. ISCR Case No. 12-09719 at 2-3 (App. Bd. Apr. 6, 2016).

¹⁹ ISCR Case No. 01-05340 at 3 (App. Bd. Dec. 20, 2002).

²⁰ That Applicant may have been "tired after work" is not a circumstance largely beyond his control. Millions of taxpayers, many of whom may also be tired after work, are expected to comply with their annual income tax obligations. This is especially true of individuals who seek access to classified information.

advisor. And Applicant admitted that his financial situation did not prevent him from seeking such assistance. Applicant knew that his tax returns were due on April 15 of each year. He simply let each tax filing deadline go by, until he completed his security clearance application and was interviewed by an OPM investigator. This is not responsible conduct. Therefore, AG ¶ 20(b) does not apply.

Applicant attended an FDIC Lending Smart Course regarding finances and taxes. On this record it appears, however, that he did so after his background interview. Nonetheless, I give him partial, but not complete, mitigation under AG ¶ 20(c).

The record shows that once Applicant was alerted by the OPM investigator that he could file his back returns, Applicant did so, and that he owed less than \$1,000 in back taxes. Even if I credit Applicant with bringing his tax obligations up to date under AG ¶ 20(g), his history of late filing of federal and state income tax returns is not fully mitigated. Applicant “did not demonstrate the high degree of good judgment and reliability required of persons granted access to classified information.”²¹

The record raises doubts about Applicant’s reliability, trustworthiness, good judgment, and ability to protect classified information. In reaching this conclusion, I weighed the evidence as a whole and considered if the favorable evidence outweighed the unfavorable evidence or *vice versa*. I also gave due consideration to the whole-person concept.²² Accordingly, I conclude that Applicant did not meet his ultimate burden of persuasion to show that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

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 (Financial Considerations):	Against Applicant
Subparagraphs 1.a – 1.b:	Against Applicant

²¹ ISCR Case No. 12-05053 at 4 (App. Bd. Oct. 30, 2014).

²² AG ¶ 2(a)(1)-(9).

Conclusion

In light of the record as a whole, it is not clearly consistent with the national interest to grant Applicant access to classified information.

Philip J. Katauskas
Administrative Judge