



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



In the matter of:)
)
 [Redacted]) ISCR Case No. 17-03024
)
 Applicant for Security Clearance)

Appearances

For Government: Aubrey De Angelis, Esq., Department Counsel
For Applicant: *Pro se*

10/10/2019

Decision on Remand

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guidelines F (Financial Considerations) and G (Alcohol Consumption). Applicant has mitigated the security concerns raised by his alcohol consumption, but he has not mitigated the security concerns raised by his financial problems. Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on December 8, 2015. On March 12, 2018, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines F and G. The DOD CAF acted under Executive Order (Exec. 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) promulgated in Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (December 10, 2016).

Applicant answered the SOR on May 4, 2018, and requested a decision on the written record without a hearing. Department Counsel submitted the Government's written case on March 8, 2019. On March 12, 2019, a complete copy of the file of relevant material (FORM) was sent to Applicant, who was given an opportunity to file objections and submit material to refute, extenuate, or mitigate the Government's evidence. He received the FORM on March 13, 2019. He requested an extension of time to respond to the FORM, and it was granted. He responded on May 10, 2019. His response was admitted in evidence as Applicant's Exhibit (AX) A, without objection. The case was assigned to me on June 6, 2019.

On June 26, 2019, I denied Applicant's request for a security clearance. Applicant appealed my decision. On September 6, 2019, the Appeal Board remanded the case, directing me to reopen the record and provide the parties an opportunity to present evidence and argument addressing the apparently conflicting information in the tax transcripts submitted by Applicant. (Appeal Board decision at page 2.)

In accordance with the Appeal Board decision, I invited Department Counsel and Applicant to submit additional evidence and written argument regarding the meaning of the transcripts submitted by Applicant for tax years 2013 through 2016. (Remand Exhibit I.) Both parties received the invitation. (Remand Exhibit II.) Department Counsel elected to not submit anything further. (Remand Exhibit III.) Applicant submitted a two-page cover letter, two pages of bank statements, and two pages of informational materials from the IRS. (Remand Exhibit IV.)

Findings of Fact

The Appeal Board noted that the 2013 Federal tax transcript submitted by Applicant contained the following entries near the top of the page:

RETURN DUE DATE OR RETURN RECEIVED DATE (WHICHEVER IS LATER)	Apr. 15, 2014
PROCESSING DATE	May 12, 2014

However, the transcript also contained the following entries further down on the page:

CODE	EXPLANATION OF TRANSACTION	CYCLE	DATE	AMOUNT
150	Tax return filed	2014705	5-12-2014	\$5,798

The apparent conflict between the first line, reflecting that the return was received on or before April 15, 2014, and the last line, reflecting that the return was filed on May 12, 2014, was the basis for the Appeal Board's decision to remand the case.

Without objection from either party, I have taken administrative notice of the portion of Section 8A of the IRS Master File Codes pertaining to Transaction Code 150, which was cited in footnote 2 of the Appeal Board decision. The relevant portion of the Master File Codes is attached to the record. (Remand Exhibit V.)

In my original decision, I interpreted the second “tax return filed” entry near the bottom of the page, below the reference to Code 150, as the actual date of filing. However, my review of the Master File Codes has convinced me that the entry on the first line is the date on which the return was due or received, whichever is later, and the second entry under Code 150 is the date on which the tax return was processed and the amount of tax due was determined. Accordingly, I have reconsidered and revised my findings of fact pertaining to the dates on which Applicant filed his federal tax returns for 2013 through 2016.

My original findings of fact regarding Applicant’s tax filings are set out below:

IRS tax transcripts reflect that Applicant’s 2013 return was filed late on May 12, 2014, and there is no indication that an extension of time was granted for this return. A six-month extension of time to file was granted for the 2014 return, and it was filed in November 2015, about a month after the due date. A six-month extension of time to file was granted for the 2015 return, and it was filed on December 5, 2016, about two months after the due date. The 2016 return was filed late on May 29, 2017, and there is no indication that an extension was granted for this return. (FORM Item 6 at 34-39.)

I have reconsidered the above findings of fact after reviewing the IRS Master File Codes pertaining to Transaction Code 150. My revised findings of fact on reconsideration, in place of the above paragraph, are as follows:

The tax transcripts for 2013 reflect that Applicant timely filed his return on April 15, 2014; that he had a six-month extension for 2014 and filed his return on October 19, 2015, four days late; that he had a six-month extension for 2015 and filed his return on October 17, 2016, two days late; and that he timely filed his 2016 return on April 15, 2017.

I adhere to and incorporate by reference the remaining findings of fact in my original decision, including the findings regarding Applicant’s two Chapter 7 bankruptcies, his tax debts, and the findings of fact regarding the allegations under Guideline G.

Policies

I adhere to and incorporate by reference the statement of policies in my original decision.

Analysis

The SOR alleges that Applicant filed a petition for Chapter 7 bankruptcy in January 2017 and received a discharge (SOR ¶ 1.a). It alleges that he failed to timely file his federal income tax returns for 2013-2016 (SOR ¶ 1.b); that he failed to timely pay the federal income taxes due for 2013, 2015, and 2016 (SOR ¶ 1.c); and that he owes delinquent taxes of \$452 for 2013, \$797 for 2015, and \$502 for 2016 (SOR ¶ 1.f). It alleges

that he failed to file regional income tax returns for 2014 through 2016 (SOR ¶ 1.d) and that he owes regional income taxes of \$740 for 2013 (SOR ¶ 1.e). The “regional” taxes alleged in the SOR were municipal taxes levied by the city in which he was residing.

The security 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. . . . An individual who is financially overextended is at greater risk of having to engage in illegal or otherwise questionable acts to generate funds. . . .

The allegations in SOR ¶¶ 1.a-1.c, 1.e, and 1.f are established by Applicant's admissions and the IRS transcripts in the FORM. The IRS transcripts reflect that the 2013 federal tax return was timely filed, the 2014 return was filed four days late, the 2015 return was filed two days late, and the 2016 return was timely filed. They also reflect that Applicant owed federal taxes for 2013, 2015, and 2016; that Applicant made a payment agreement in September 2014; and that he made 11 payments of \$26 between March 2015 and October 2016. The evidence also shows that Applicant timely filed his 2017 return, reflecting an anticipated refund of \$904, and that he timely filed his 2018 return and expected a refund.

The allegations in SOR ¶ 1.c and 1.f are duplicative, because the delinquent taxes alleged in SOR ¶ 1.f are the result of the failure to timely pay the taxes alleged in SOR ¶ 1.c. When the same conduct is alleged twice in the SOR under the same guideline, one of the duplicative allegations should be resolved in Applicant's favor. See ISCR Case No. 03-04704 at 3 (App. Bd. Sep. 21, 2005) (same debt alleged twice). Accordingly, I have resolved SOR 1.c in Applicant's favor.

Applicant's explanation that he was unaware of his obligation to file municipal tax returns, as alleged in SOR ¶ 1.d, was plausible and reasonable. However, as of the date the record closed, he had not taken any steps to file the past-due returns or resolve the delinquent municipal taxes after learning of his obligation to file the returns and pay the taxes due.

The evidence supporting the allegations in SOR ¶¶ 1.a and 1.d-1.f is sufficient to raise the following disqualifying conditions under this guideline:

AG ¶ 19(a): inability to satisfy debts;

AG ¶ 19(b): unwillingness to satisfy debts regardless of the ability to do so;

AG ¶ 19(c): a history of not meeting financial obligations; and

AG ¶ 19(f): failure to file or fraudulently filing 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;

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;

AG ¶ 20(d): the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts;

AG ¶ 20(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

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.

AG ¶ 20(a) is not established. Applicant's 2017 bankruptcy was recent, having occurred after he submitted his SCA and at about the same time as the tax delinquencies, and did not occur under circumstances making recurrence unlikely. His delinquent tax debts are numerous, recent, and were not incurred under circumstances making recurrence unlikely.

AG ¶ 20(b) is not fully established. Applicant has encountered several conditions beyond his control: a marital break-up in February 2007, unemployment from October 2007 to February 2008, inability to work due to a back injury in November 2013, and uninsured medical expenses in January 2014. He has not provided sufficient information to determine if his legal expenses were a condition beyond his control. The five-week unpaid furlough as a result of the government shutdown in December 2018-January 2019

was a condition beyond his control, which hindered any recent efforts to resolve his debts. However, Applicant's tax debts occurred before the government shutdown. Furthermore, he has not acted responsibly. He made a payment agreement and 11 payments of delinquent federal income taxes, but he has not explained why he stopped making payments on his taxes, and he took no affirmative actions after October 2016 to resolve his federal tax debt. Instead, he passively waited for the IRS to apply his refunds to unpaid taxes. He submitted no evidence of affirmative actions to resolve his delinquent municipal taxes.

AG ¶ 20(c) is not established. Applicant has not received financial counseling and his tax problems are not resolved. He has not provided sufficient information about his current income and expenses to determine if his overall financial situation is under control.

AG ¶ 20(d) is not established. Applicant's Chapter 7 discharge does not constitute a good-faith effort to resolve delinquent debts. See ISCR Case No. 11-08274 (App. Bd. May 2, 2013). When the record closed, Applicant had no payment plans in effect for his delinquent federal taxes. Instead, he relied on the IRS capture of his refunds to pay the delinquent taxes. Relying on involuntary collection of a delinquent debt does not constitute "good faith" within the meaning of this mitigating condition. See ISCR Case No. 09-5700 (App. Bd. Feb. 24, 2011). He submitted no evidence of efforts to resolve his municipal tax debt.

AG ¶ 20(e) is not established. Applicant has not disputed his federal and municipal tax debts.

AG ¶ 20(g) is not fully established. Applicant has filed all his past-due federal returns, but he has not filed his municipal tax returns or paid the municipal taxes, and he had not fully paid the past-due federal taxes as of the date the record closed. The fact that Applicant filed his federal tax returns for 2015 and 2016 a few days late does not raise significant security concerns. However, the fact that Applicant has filed his past-due federal returns does not end the inquiry. A security clearance adjudication is not a tax-enforcement procedure. It is an evaluation of an individual's judgment, reliability, and trustworthiness. The fact that Applicant has filed his past-due returns "does not preclude careful consideration of his security worthiness based on longstanding prior behavior evidencing irresponsibility." ISCR Case No. 12-05053 (App. Bd. Oct. 30, 2014). A person who fails repeatedly to fulfill his or her legal obligations does not demonstrate the high degree of good judgment and reliability required of those granted access to classified information. ISCR Case No. 15-00216 at 4 (App. Bd. Oct. 24, 2016), *citing Cafeteria & Restaurant Workers Union Local 473 v. McElroy*, 284 F.2d 173, 183 (D.C. Cir. 1960), *aff'd*, 367 U.S. 886 (1961).

The amounts of the federal and municipal tax debts are not overwhelming. Applicant's federal tax refunds may have covered all or most of his federal tax debts for 2015 and 2016. However, the modest amount of Applicant's federal and municipal tax debts raises the question, unanswered by Applicant, why he did not pay the debts sooner,

after being relieved of significant indebtedness when he received a Chapter 7 discharge in April 2017.

The Appeal Board decision noted that Applicant claimed in his appeal brief that he paid the federal tax debt before I issued my original decision, but that he submitted no evidence to support his claim. He repeated his claim in his submission on remand. My original decision was based on the evidence in the record as of the date the record closed. If Applicant subsequently paid his delinquent taxes, he may request reconsideration in accordance with Directive ¶ E3.1.37 through E3.1.39.

Guideline G, Alcohol Consumption

I adhere to and incorporate by reference the findings of fact, analysis, and conclusions in my original decision.

Whole-Person Concept

I adhere to and incorporate by reference my whole-person analysis in my original decision.

Formal Findings

I have reconsidered my findings in accordance with the Appeal Board remand. I make the following findings on the allegations in the SOR:

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

Subparagraphs 1.a and 1.d-1.f: Against Applicant

Subparagraphs 1.b and 1.c: For Applicant

Paragraph 2, Guideline G (Alcohol Consumption): FOR APPLICANT

Subparagraphs 2.a and 2.b: For Applicant

Conclusion

Upon reconsideration, I adhere to my conclusion that it is not clearly consistent with the national security interests of the United States to grant Applicant eligibility for access to classified information. Clearance is denied.

LeRoy F. Foreman
Administrative Judge