



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



In the matter of:)	
)	
-----)	ISCR Case No. 17-03462
)	
Applicant for Security Clearance)	

Appearances

For Government: Julie Mendez, Esq., Deputy Chief Department Counsel
For Applicant: David B. Hanley, Esq.

04/02/2019

Decision on Remand

KATAUSKAS, Philip J., Administrative Judge:

Applicant contested the Defense Department’s intent to revoke his eligibility for access to classified information based on security concerns stemming from his problematic federal and state tax history. After a hearing and in a Decision dated September 26, 2018, I found in favor of Applicant and granted him access to classified information (Decision). The Government appealed that Decision, and based upon the Appeal Board’s December 18, 2018 Decision and on remand, as described more fully below, I find against Applicant.

Statement of the Case on Appeal

The Statement of Reasons alleged that Applicant was indebted to the federal Government on two tax liens totaling \$118,261 and one state tax lien in the amount of \$5,585.¹ Applicant admitted those allegations.² In my Decision, I found that Applicant had mitigated the state tax lien under AG ¶ 20(g) and the federal tax lien under AG ¶ 20(b).³

¹ SOR ¶ 1.

² Answer ¶ 1.

³ Appeal Board at 2-3 (App. Bd.)

The Government appealed those findings. On appeal, the Board found that the ruling on the state tax lien was based on harmless error, but the Board did not disagree that the state tax lien had been mitigated under AG ¶ 20(g).⁴

On appeal, the Board ruled that the record evidence contradicted my Decision's finding that Applicant had complied with the IRS's guidance to "keep up with current taxes." The Board observed that Applicant had "delinquent business taxes for each quarter of 2016" and was "twice delinquent" on those taxes in 2017.⁵ Finally, the Board found that it was error not to grant the Government's request under Federal Rule of Evidence 1006 for access to the data or documents underlying AE H, which was an Excel spreadsheet showing certain payments made by Applicant under an IRS installment agreement.⁶ The Board remanded the case to the Judge (1) to correct the identified errors, (2) to reopen the record to allow the parties to present additional evidence and arguments about Applicant's payment of back taxes, and (3) to issue a new decision in accordance with the Directive.⁷

Statement of the Case on Remand

In light of the Appeal Board's Decision, on remand, first, I reopened the record on January 11, 2019. Second, I ordered Applicant to produce the documents underlying AE H by January 25, 2019. Third, I allowed the parties to submit additional evidence on Applicant's payments (or lack thereof) of federal taxes. Finally, I directed the parties to submit written closing arguments: the Government by February 12, 2019, and Applicant by February 22, 2019.

Applicant timely submitted documents which I marked as AE I and AE J. AE I is a series of cancelled checks showing the total of \$72,000 paid in 2014 under an installment agreement with the IRS (\$6,000 monthly). Those are the documents underlying AE H. AE J is a series of bank statements showing Applicant's monthly electronic payments of federal payroll taxes. Those exhibits were admitted without objection.⁸

The parties timely submitted written closing arguments.⁹

⁴ App. Bd. at 4.

⁵ App Bd. at 4.

⁶ App. Bd. at 5-6.

⁷ App. Bd. at 6-7.

⁸ I also marked as Hearing Exhibit 1 (HE 1) a series of emails among the parties and me from January 9, 2019, through March 25, 2019. The Government did not submit any additional documents. Deputy Chief Department Counsel noted, however, that the Government has not asserted that Applicant failed to pay any payroll taxes. HE 1 email from Deputy Chief Department Counsel dated February 19, 2019.

⁹ The closing arguments of both parties were excellent pieces of written advocacy.

Findings of Fact

I incorporate herein by reference the findings of fact in my Decision and the summary of those findings by the Appeal Board.¹⁰ The two exhibits submitted on remand by Applicant do not change the original findings of fact.

Discussion

The Government's principal factual basis for its arguments is that Applicant remains delinquent on federal quarterly business taxes for the following time periods: December 2010, March and June 2011, September 2011, September 2015, March 2016, June 2016, September 2016, December 2016, March 2017, and June 2017. He remains delinquent in unemployment taxes for December 2013 and December 2016. Applicant remains delinquent on federal corporate taxes for December 2016. In addition, the Government observes that Applicant's total outstanding federal tax debt at the time of his installment agreement was \$109,230.¹¹

With that factual predicate, the Government argues in essence that Applicant's continued federal tax delinquencies, notwithstanding an installment agreement, do not establish that he has reformed and rehabilitated his business practices sufficiently to prevent further tax delinquencies. The Government also points out that Applicant has consistently underpaid his federal taxes from 2010 through 2017. The Government also contends that there is not "a cogent explanation showing a nexus" between his wife's illness and the late customer invoice payments and Applicant's tax delinquencies. The Government argues, therefore, that AG ¶ 20(b) does not apply.

Applicant argues to the contrary that he has negotiated diligently with the IRS for several years (since 2013) to arrange installment payment agreements. It is also noted that Applicant has, in fact, taken internal steps to prevent such delinquencies in the future. His wife, who originally was to handle administrative tasks, has stepped away from day-to-day administration. Applicant will now take over those duties. Applicant has also hired an administrative assistant to aid in the handling of those duties.

I have carefully weighed the parties' closing arguments. I disagree with the Government's contention that Applicant has not made meaningful adjustments to his business practices. To begin with, the record showed that Applicant only belatedly became aware that his wife had been unable to keep up with administrative duties due to her illness. When he learned of that issue, Applicant immediately took on the administrative duties himself. He also began negotiating with state and federal tax authorities, reaching installment agreements with both of them. He put his clients on strict

¹⁰ Decision at 2-5; App. Bd. at 2.

¹¹ Government Brief (which is not paginated) notes 23-28 citing AE D at 9 and AE E.

payment schedules. And his wife stepped away from daily administrative duties, in favor of a newly hired administrative assistant.¹²

I also disagree with the Government that there is an insufficient nexus between Applicant's tax delinquencies and his wife's illness. Having observed Applicant's testimony, it is clear that his wife's illness was only belatedly discovered by him and was serious enough for his wife ultimately to require surgery. He thus lost his 60% partner's participation in the business of a two-member LLC. This was a condition largely beyond Applicant's control. The first prong of AG ¶ 20(b) applies.

The open question is whether Applicant's modifications to his business tax practices have been responsible. The Government's strongest evidence on this point is that Applicant has consistently underpaid his federal taxes from 2010 through 2017, notwithstanding installment agreements. In the vernacular, the Government's position is that what Applicant did was "too little, too late." Or as the old saying goes, "the proof is in the pudding," and Applicant's persistent tax delinquencies are evidence that Applicant's business reforms have not proven to be sufficient. In short, the Government contends that Applicant has not acted responsibly under AG ¶ 20(b). I agree. The Appeal Board found error in my conclusion that Applicant had complied with the IRS guidance that he "keep up with current taxes."¹³ Neither of Applicant's two exhibits submitted on remand give me a factual basis to find that Applicant has kept current with his taxes.¹⁴

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
Subparagraph 1.a:	For Applicant
Subparagraphs 1.b-c:	Against Applicant

Philip J. Katauskas
Administrative Judge

¹² The Government contends that this administrative assistant "is not a financial or tax professional." I find that unpersuasive. I imagine that many Applicants file their own tax returns, without any formal tax training or experience.

¹³ App. Bd. at 4.

¹⁴ As I did in my original Decision, I considered the whole-person concept in reaching my conclusions on remand. AG ¶ 2(a)(1)-(9).

