



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



In the matter of:)	
)	
)	ISCR Case No. 19-00021
)	
Applicant for Security Clearance)	

Appearances

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

08/14/2019

Decision

RIVERA, Juan J., Administrative Judge:

Applicant failed to file income taxes and to pay his taxes for 13 years, and he embezzled his employees “941 taxes” (Social Security, Medicare, and income taxes). He has a problem complying with well-established government rules and the law. He owes over \$2 million in delinquent federal taxes. He failed to demonstrate good judgment, reliability, and willingness to comply with the law. Clearance is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on May 10, 2017, seeking eligibility for a clearance required for his position with a federal contractor. After reviewing the SCA and the information gathered during a background investigation, the Department of Defense (DOD) issued a Statement of Reasons (SOR) on January 23, 2019, alleging security concerns under Guideline F (financial considerations). Applicant answered the SOR on February 12, 2019, and requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA).

DOHA assigned the case to me on March 26, 2019, and issued a notice of hearing on April 4, 2019, setting the hearing for May 1, 2019. At the hearing, the Government offered six exhibits (GE 1 through 6), which were admitted without

objection. Applicant testified on his own behalf, but submitted no additional evidence. I left the record open, giving Applicant the opportunity to supplement the record, but he did not submit additional documentation. DOHA received the hearing transcript (Tr.) on May 13, 2019.

Procedural Issue

At hearing, Department Counsel moved to amend the SOR to conform it to the evidence received. Applicant did not object, and I granted the motion to amend. SOR paragraph 1.b was amended to read as follows: "You failed to file and pay your Federal personal taxes as required for tax years 2004 through 2014, and tax years 2016 through 2018." (Tr. 19-20)

Findings of Fact

In his SOR answer, Applicant admitted he filed for Chapter 7 bankruptcy and was relieved of his dischargeable debts in 2015. (SOR ¶ 1.a) He denied that he failed to file federal income tax returns and to pay income taxes for tax years 2004 through 2014, and 2016. (SOR ¶ 1.b) He claimed that those tax returns were filed with the bankruptcy court as part of the bankruptcy court filing requirements. He also denied that he failed to file and pay federal business taxes as required since tax year 1995. (SOR ¶ 1.c)

Applicant admitted that he owes the Federal Government over \$2 million for delinquent business taxes (SOR ¶ 1.d); and that he is indebted to the Federal Government for three tax liens filed against him in 2008 for \$148,104 (SOR ¶ 1.e); in 2008 for \$24,185 (SOR ¶ 1.f); and in 2009 for \$4,176 (SOR ¶ 1.g). Applicant's SOR admissions, and those at the hearing, are incorporated herein as findings of fact. After a thorough review of the record evidence, I make the following additional findings of fact:

Applicant is a 61-year-old employee of a federal contractor. He graduated from high school in 1976, and attended college for some time, but did not earn a degree. He enlisted in the U.S. Navy in 1976 and served until 1982. He was discharged "for the convenience of the government," as a machinist mate fireman apprentice (E-2), after some alcohol-related misconduct. He believes that he possessed a secret clearance during his service, but he is not sure. (GE 4) This is his first application for a clearance since 1982.

Applicant married in 1983 and divorced in 1984; he married in 1984 and divorced in 1994; and he married in 1996 and divorced in 2004. He is currently living with one of his ex-wives. He has one son, age 18.

In his response to Section 26 (Financial Record) of his 2017 SCA, Applicant disclosed that he filed for Chapter 7 bankruptcy in 2015 and was relieved of his dischargeable debts that same year. He noted that part of the debt he was attempting to discharge concerned a failed business and "941 taxes," which were not subject to discharge. (IRS Form 941 is used to report income taxes, Social Security, or Medicare

withheld from employee's paychecks. It accounts for the employer's portion of Social Security or Medicare owed to his employees.) (Tr. 20) Applicant defrauded his employees, (at some point, he had 500 employees) and the U.S. Government, by withholding money from his employees' paychecks to pay their income taxes, Social Security, and Medicare, and wrongfully appropriating the employees' withholdings for his own benefit.

Applicant further claimed that his 2011 through 2014 tax returns were rejected by the IRS and he refiled them with his bankruptcy. He claimed he filed his 2015 tax return as part of the bankruptcy. He stated that he failed to file his 2016 tax return and pay his taxes, because he was "still trying to finalize bankruptcy," and that he "will set appointment with local division to file and pay". (GE 2)

During the 2018 interview, Applicant claimed he was working with the IRS, and would maintain contact with it, to resolve his tax problems. He stated that all of his financial problems were related to his 1995 failed business, and that his failure to file and pay personal income taxes were the result of him losing all of the money he invested and not having the financial means to pay his personal taxes or his business taxes. (GE 3)

The record evidence shows that Applicant failed to file federal income tax returns, and to pay his federal personal income taxes for tax years 2004 through 2014, and 2016 through 2018. He failed to file and pay federal business taxes as required since tax year 1995. He owes the Federal Government over \$2 million for delinquent taxes. Additionally, he is indebted to the Federal Government for three tax liens filed against him in 2008 for \$148,104; in 2008 for \$24,185; and in 2009 for \$4,176. (Tr. 18-22; GE 3)

Applicant claimed that he filed income tax returns for some of the tax years alleged in the SOR. However, he failed to submit documentary evidence to corroborate his claims (IRS tax transcripts for the years in question or copies of his income tax returns). Applicant testified the last time he met with IRS representatives was in 2008. (Tr. 22) He failed to submit documentary evidence of any contacts, negotiations, or payment agreements with the IRS, or of having completed any financial counseling, except for the financial counseling he received during the filing for bankruptcy. Applicant did not meet with the IRS to file and pay his delinquent tax years as he promised to do in his 2017 SCA. (Tr. 19)

Applicant claimed that he has worked in the health care and defense industry most of his life safeguarding classified information. He stated that he never had any security-related incidents or a lapse of judgment handling classified information. He believes that his personal financial issues were caused by his business problems. He considers himself a reliable person who follows rules and is able to safeguard classified information.

Concerning his tax liabilities, Applicant testified that he has exhausted all avenues of relief with the IRS and he has not been able to come to a repayment agreement. He claimed that he has paid some taxes because he has withholdings from his paycheck every pay period. He believes that he has demonstrated good-faith efforts by attempting to resolve his tax problems with the IRS. He noted that he has paid hundreds of thousands of dollars in attorney fees to resolve his tax problems until he was unable to continue paying.

Policies

The SOR was issued under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), as amended; and DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive) (January 2, 1992), as amended. The case will be adjudicated under the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AGs), applicable to all adjudicative decisions issued on or after June 8, 2017.

Eligibility for access to classified information may be granted “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. The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

The AG list disqualifying and mitigating conditions for evaluating a person’s suitability for access to classified information. Any one disqualifying or mitigating condition is not, by itself, conclusive. However, the AG should be followed where a case can be measured against them, as they represent policy guidance governing access to classified information. Each decision must reflect a fair, impartial, and commonsense consideration of the whole person and the factors listed in SEAD 4, App. A ¶¶ 2(d) and 2(f). All available, reliable information about the person, past and present, favorable and unfavorable, must be considered.

Security clearance decisions resolve whether it is clearly consistent with the national interest to grant or continue an applicant’s security clearance. The Government must prove, by substantial evidence, controverted facts alleged in the SOR. If it does, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. The applicant bears the heavy burden of demonstrating that it is clearly consistent with the national interest to grant or continue his or her security clearance.

Persons with access to classified information enter into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability, and trustworthiness of those who must protect national interest as their own.

The “clearly consistent with the national interest” standard compels resolution of any reasonable doubt about an applicant’s suitability for access in favor of the Government. “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; SEAD 4, ¶ E(4); SEAD 4, App. A, ¶¶ 1(d) and 2(b). Clearance decisions are not a determination of the loyalty of the applicant concerned. They are merely an indication that the applicant has or has not met the strict guidelines the Government has established for issuing a clearance.

Analysis

Financial Considerations

AG ¶ 18 articulates the security concern for financial problems:

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

Applicant’s history of financial problems is well documented in the record. He failed to file federal income tax returns, and to pay his federal personal income taxes for tax years 2004 through 2014, and 2016 through 2018. He failed to file and pay federal business taxes as required since tax year 1995. He owes the Federal Government over \$2 million for delinquent “941 taxes.” Additionally, he is indebted to the Federal Government for three tax liens filed against him in 2008 for \$148,104; in 2008 for \$24,185; and in 2009 for \$4,176.

AG ¶ 19 provides disqualifying conditions that raise a security concern and may be disqualifying in this case:

- (a) inability to satisfy debts;
- (b) unwillingness to satisfy debts regardless of the ability to do so;
- (c) a history of not meeting financial obligations;
- (d) deceptive or illegal financial practices such as embezzlement, employee theft, check fraud, mortgage fraud, filing deceptive loan statements and other intentional financial breaches of trust; and

(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 record established all of the above disqualifying conditions, requiring additional inquiry about the possible applicability of mitigating conditions. Six mitigating conditions under AG ¶ 20 are potentially applicable:

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

(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;

(d) the individual initiated and is adhering to 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

(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.

The Appeal Board concisely explained Applicant's responsibility for proving the applicability of mitigating conditions as follows:

Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in security clearance decisions is that articulated in

Egan, supra. “Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security.” Directive, Enclosure 2, ¶ 2(b).

ISCR Case No. 10-04641 at 4 (App. Bd. Sep. 24, 2013).

None of the mitigating conditions are sufficiently supported by the evidence and are, therefore, not applicable. AG ¶ 20(a) does not apply because Applicant failed to file and pay his 2004 through 2018 (except for tax year 2015) income tax returns and has failed to file or pay business taxes since 1995. I find his behavior ongoing, frequent, and recent.

Applicant indirectly claimed he failed to file and pay his income tax returns because of his business financial problems and his divorce. Even taking his claims at face value, he failed to establish that he was financially responsible under the circumstances. He presented no evidence of reasonable efforts to file, pay, or otherwise resolve his delinquent tax filings or to pay his exorbitant tax debt.

Applicant acknowledged that his failure to file his federal income tax returns resulted primarily from his lack of diligence. He neglected his legal obligation to timely file and pay his income tax returns for 13 years. Moreover, he defrauded his employees by withholding money from their paychecks to pay their income taxes, Social Security, Medicare, and instead he wrongfully appropriated the employees’ withholdings for his own benefit since 1995, acquiring a tax debt of over \$2 million.

“Failure to comply with federal and state tax laws suggests that an applicant has a problem with abiding to well-established Government rules and regulations. Voluntary compliance with rules and regulations is essential for protecting classified information.” ISCR Case No. 14-04437 at 3 (App. Bd. Apr. 15, 2016). This is true even if the returns have been filed. See, ISCR Case No. 15-03481 at 5 (App. Bd. Sep. 27, 2016).

Applicant repeatedly failed to file his federal income tax returns and pay his taxes. Moreover, he defrauded his employees and the Federal Government when he wrongfully appropriated the employees’ withholdings. He failed to demonstrate the high degree of good judgment and reliability required of persons granted access to classified information. See, ISCR Case No. 14-01894 at 5 (App. Bd. Sept. 27, 2016). Applicant demonstrated an absolute lack of financial responsibility. The financial considerations security concerns are not mitigated.

Whole-Person Concept

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, and under the whole-person concept. Security Executive Agent Directive (SEAD) 4, App. A, ¶¶ 2(a) and 2(d). I have incorporated my comments under Guideline F in my whole-person analysis. Some of

these factors were addressed under that guideline, but some warrant additional comment.

Applicant, 61, failed to demonstrate good judgment, reliability, or trustworthiness. His failure to file and pay his income taxes for 13 years and his embezzlement of his employees "941 taxes" since 1995, show that he has a problem complying with well-established government rules and the law. His evidence is insufficient to establish a track record of financial responsibility.

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:	AGAINST APPLICANT
Subparagraphs 1.a-1g:	Against Applicant

Conclusion

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national security interests of the United States to continue Applicant's eligibility for a security clearance. Clearance is denied.

JUAN J. RIVERA
Administrative Judge