



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
) ISCR Case No. 19-03389
)
Applicant for Security Clearance)

Appearances

For Government: Carroll J. Connelley, Esq., Department Counsel
For Applicant: *Pro se*

06/16/2021

Decision

MATCHINSKI, Elizabeth M., Administrative Judge:

Applicant did not timely file his federal and state income tax returns for tax years 2014 through 2019. His filing in March 2021 of his delinquent federal and state income tax returns for tax years 2017 through 2019 does not fully mitigate the concerns for his judgment raised by his noncompliance with his tax-filing obligations for several years. Clearance eligibility is denied.

Statement of the Case

On February 14, 2020, the Defense Counterintelligence and Security Agency Consolidated Adjudications Facility (DCSA CAF) issued a Statement of Reasons (SOR) to Applicant, detailing a security concern under Guideline F, financial considerations. The SOR explained why the DCSA CAF was unable to find it clearly consistent with the national interest to grant or continue security clearance eligibility for him. The DCSA CAF took the action under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense (DOD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the *National Security Adjudicative Guidelines for*

Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position (AG) effective within the DOD on June 8, 2017.

Applicant responded to the SOR allegation on March 25, 2020, and he requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA). Referral of the case to the Hearing Office was delayed because of the COVID pandemic. On February 17, 2021, Department Counsel indicated that the Government was ready to proceed to a hearing. On February 25, 2021, the case was assigned to me to conduct a hearing to determine whether it is clearly consistent with the national security interests of the United States to grant or continue a security clearance for Applicant. I received the case assignment and file on March 4, 2021. On March 8, 2021, I informed Applicant of the possibility of an online video hearing, which he accepted on March 15, 2021. Following a successful test of the Defense Collaboration Services (DCS) system on April 2, 2021, on April 8, 2021, I issued a notice scheduling Applicant's DCS video teleconference hearing for April 29, 2021.

The online hearing was held as scheduled. Three Government exhibits (GEs 1-3) were admitted into the record without any objections. Applicant testified, as reflected in a hearing transcript (Tr.) received on May 11, 2021.

The record was held open, initially for two weeks after Applicant's hearing, for him to submit documentary evidence. On May 12, 2021, Applicant submitted two documents (AEs A-B), which were admitted into the record as exhibits without any objections. Applicant's forwarding email, which contained some representations about efforts to resolve his tax filings, was marked and accepted into evidence as AE C without any comment from the Government. In his May 12, 2021 email message, Applicant referenced a screen shot of a payment made for delinquent sales and use tax that was apparently mistakenly not attached to his email. I reopened the record to provide Applicant an opportunity to submit evidence of that payment, which was received on June 1, 2021. The document was accepted into the record as AE D without any objections.

Findings of Fact

The SOR alleges under Guideline F that, as of February 14, 2020, Applicant had not filed his federal and state income tax returns for tax years 2014 through 2018 (SOR ¶ 1.a). When he responded to the SOR, Applicant admitted the allegation without explanation. After considering the pleadings, exhibits, and transcript, I make the following findings of fact.

Applicant is a 32-year-old test analyst. He has worked for his current employer, a defense contractor, since October 2017. His current duties do not require that he hold a DOD security clearance, but having a clearance would allow him to perform work for his employer on U.S. military installations. (GE 1; Tr. 23-24.)

Before this career opportunity, he was employed or self-employed as an automobile repair technician. (GE 1; Tr. 20.) He has never married and has no children, but he has been in a cohabitant relationship with his girlfriend since May 2018. (GE 1.)

After graduating from high school, Applicant worked as a technician for a car dealership while also attending school to be an automotive technician. He graduated from his schooling in 2008 and left the employment of the car dealership voluntarily in approximately May 2009 to work for an independent garage, where he felt he could improve his skills in the trade. Due to a decline in business at the garage, Applicant was laid off in May 2012. (GE 1.)

Applicant collected unemployment from May 2012 to December 2012, when he decided to start his own automobile repair shop. For income tax purposes, he was self-employed until October 2016. (Tr. 20.) IRS publication 334, which provides tax guidance for small businesses that use schedule C (sole proprietor), indicates that tax returns are to be filed under the sole-proprietor's social security number but also that an employer identification number is required if either wages were paid to one or more employees, or the business filed pension or excise tax returns. See www.irs.gov. Section 6017 of Title 26 of the United States Code provides that a tax return is required to be filed if net earnings from self-employment are \$400 or more. Applicant provided little detail about his income and expenses while self-employed from December 2012 to October 2016, other than that he struggled financially at times. In May 2016, he decided to move to a larger shop. He felt he had outgrown his previous space and wanted to bring in a business partner. Over the next few months, Applicant struggled to keep his business afloat. He was unable to find a compatible person to share the space, and he closed his shop in October 2016. (GE 1.)

Applicant had "developed a proficient mechanical skillset," but he lost interest in working in the automotive repair industry. He was unemployed from October 2016 to May 2017 while deliberating his next career move and looking for employment in other fields of interest to him. From May 2017 to December 2017, Applicant worked as a mechanic for a limousine service at \$23 an hour. His income met or exceeded the minimum required to file income tax returns for tax year 2017. (Tr. 39-40.) He enjoyed working for the limousine service, but left voluntarily for a career opportunity with his current employer. (GE 1.)

On January 19, 2019, Applicant completed a Questionnaire for National Security Positions (SF 86). In response to a financial record inquiry into whether, in the last seven years, he had failed to file or pay federal, state, or other taxes when required by law or ordinance, Applicant reported that he had not filed his federal or state income tax returns or paid taxes owed for tax years 2014, 2015, and 2016. He stated with respect to each of those tax years:

During the years of 2013-2016, I ran my own automotive business. At first I tried to do my own taxes, but after struggling reached out to a professional. These years have still not been finalized but are being worked on currently with plans to [have] past taxes resolved in 2019. (GE 1.)

Applicant estimated on his SF 86 that he owed delinquent income taxes of \$5,000 for each of the three tax years 2014, 2015, and 2016, but he also indicated that he had partially paid his tax debts for tax years 2014 and 2015. He also reported on his SF 86 that he had not yet filed his federal and state income tax returns for tax year 2017, for which he expected refunds that he would not receive “due to [his] prior negligence.” He explained that he had not filed his income tax returns for 2017 “because [he] was worried about doing the taxes [himself] and creating an issue since [he] still had a business account open.” He added that his delinquent returns for 2017 would be resolved in 2019. (GE 1.)

On May 8, 2019, Applicant was interviewed by an authorized investigator for the Office of Personnel Management (OPM). With respect to his delinquent tax returns and taxes owed, Applicant attributed his tax issues to being a first-time business owner and not knowing how to properly prepare his returns. He stated that he retained the services of an accountant in 2015 to prepare his tax returns. He explained that he had yet to file his tax returns for tax year 2017 because he was waiting to hear from his accountant. He expressed an intent to begin paying any past-due taxes in August 2019 after hearing from his accountant. Applicant denied any possibility of recurrence because a professional was now handling his tax issues. (GE 2.)

As of September 30, 2019, Applicant had not filed his federal or state income tax returns or paid any outstanding taxes for tax years 2014 through 2018. He explained in response to DOD interrogatories that he had not filed his federal and state tax returns initially “due to not having employment and unstable income,” but that he was currently working with a tax specialist to file his returns for those tax years. He hoped to have “closure” by the end of 2019. (GE 3.)

At his hearing, Applicant explained that he had hired an accountant in 2015 to address his unfiled tax returns for tax years 2013 through 2016. (Tr. 37.) With the assistance of the accountant, Applicant filed his federal and state income tax returns for 2013 late. (Tr. 25.) He acknowledged that he had not been diligent about ensuring that his tax returns for tax years 2014 through 2016 be prepared in a timely fashion, although he had provided the accountant with documentation when asked. (Tr. 30, 35.)

Applicant did not retain professional assistance to file his tax returns for tax years 2017 through 2019, and he allowed the tax-filing deadlines to pass without making any effort to file his tax returns. He had taxes withheld from his employment earnings for those tax years, but he feared the possible consequences to him because his returns for tax years 2014 through 2016 had not been filed. He testified that he did not know what to do. (Tr. 20-21.) He did not seek any professional advice about his filing obligations, to include from the accountant handling his tax issues for tax years 2014 through 2016. (Tr. 37.)

The accountant handling Applicant’s income taxes for tax years 2014 through 2016 passed away sometime during the latter half of 2020. (Tr. 35.) Applicant had given that accountant all the paperwork that he had regarding tax years 2014 through 2016, and so he had to “start over.” (Tr. 29.) Aware that his unfiled tax returns were an issue for his security clearance eligibility, Applicant retained the services of another accountant in

January 2021. This accountant made it clear to him that he had an obligation to file his income tax returns for tax years 2017 through 2019, even though his tax returns for tax years 2014 through 2016 had not been filed. (Tr. 38-39.) With the assistance of this accountant, Applicant filed his federal and state income tax returns for tax years 2017 through 2020 in early March 2021. (AE B; Tr. 21, 25.) He requested IRS tax transcripts for tax years 2014 through 2016 under his social security number, but they did not show the information needed to file his tax returns for those tax years. (Tr. 22, 28.)

At his April 29, 2021 hearing, Applicant expressed his intention to request his tax transcripts for tax years 2014 through 2016 under his employer identification number so that he could file his delinquent tax returns. (Tr. 22, 28.) As of May 12, 2021, Applicant had requested, but not yet received, the tax transcripts for those tax years. (AE C.) He intends to file his income tax returns on time in the future. (Tr. 23.)

In March 2021, Applicant began a repayment plan to address \$5,719 in past-due state sales and use taxes from his business. (Tr. 31.) After a May 3, 2021 payment of \$169.25, his balance is \$4,411. (AE D.) Applicant received a federal income tax refund of \$1,241 and a state income tax refund of \$62 for tax year 2020. (AE A; Tr. 26.) He does not believe that he owes any outstanding income taxes for tax years 2017 and 2018. (Tr. 27.)

Policies

The U.S. Supreme Court has recognized the substantial discretion the Executive Branch has 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). When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are required to be considered in evaluating an applicant’s eligibility for access to classified information. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge’s overall adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(a), the entire process is a conscientious scrutiny of a number of variables known as the “whole-person concept.” The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that “[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security.” In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or

mitigate facts admitted by applicant or proven by Department Counsel. . . .” The applicant has the ultimate burden of persuasion to obtain a favorable security decision.

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 and endures throughout off-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 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. Section 7 of EO 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline F: Financial Considerations

The security concerns about financial considerations are articulated 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. 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. . . .

The Appeal Board explained the scope and rationale for the financial considerations security concern in ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012) (citation omitted) as follows:

This concern is broader than the possibility that an applicant might knowingly compromise classified information in order to raise money in satisfaction of his or her debts. Rather, it requires a Judge to examine the totality of an applicant’s financial history and circumstances. The Judge must consider pertinent evidence regarding the applicant’s self-control, judgment, and other qualities essential to protecting the national secrets as well as the vulnerabilities inherent in the circumstances. The Directive presumes a nexus between proven conduct under any of the Guidelines and an applicant’s security eligibility.

Applicant did not file his federal and state income tax returns when they were due for tax years 2014 through 2018, as alleged in the SOR. Although not alleged in the SOR and therefore not considered as a basis for potential disqualification but relevant in assessing reform, Applicant did not file his federal or state income tax returns on time for tax year 2019 as well. Guideline F security concerns are established when an individual fails to comply with his tax filing obligations, whether or not any taxes are owed. 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,” is established because of his failure to timely file his federal and state income tax returns for multiple consecutive tax years.

Applicant has the burden of establishing sufficient mitigation to overcome the financial concerns raised by his noncompliance with such an important obligation of his U.S. citizenship as filing income-tax returns on time. One or more of the following conditions under AG ¶ 20 may apply in whole or in part:

(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 person has received or is receiving 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

(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.

As of the issuance of the SOR in February 2020, Applicant had not filed his federal or state income tax returns for tax years 2014 through 2018. His failure to comply with his tax-filing obligation is too repeated and too recent for mitigation under AG ¶ 20(a).

AG ¶ 20(b) is also not established. Applicant’s tax-filing problems were not caused by circumstances outside of his control. His tax returns were more complicated when he had his own automotive repair business, but he procrastinated, first in hiring an accountant and then in not pressing the accountant to ensure that his delinquent returns were filed. He admits that he was “not super diligent about pushing his accountant to do something.” The death of the accountant in 2020 is an unforeseen circumstance, but it explains only the recent delay in addressing his tax filing issues for tax years 2014 through 2016. It does not

excuse his failure to file timely income tax returns for tax years 2017 through 2019. His fear of the consequences of having unfiled returns for tax years 2014 through 2016 were he to file returns for the subsequent tax years is not a mitigating circumstance under AG ¶ 20(b), given he sought no professional guidance about the tax-filing requirements, either from the accountant hired to prepare his returns for tax years 2013 through 2016, another tax professional, the IRS, or his state's tax authority.

AGs ¶¶ 20(c) and 20(g) have some applicability because Applicant filed his delinquent federal and state income tax returns for tax years 2017 through 2019 when he filed his income tax returns for 2020 in early March 2021. However, while he has also tasked his new accountant with handling his long past-due tax returns for 2014 through 2016, those tax returns have not been filed as of the close of the evidentiary record. Applicant indicated on May 12, 2021, that he has requested the documentation required to complete those returns. It is unclear when those returns will be filed.

Even where tax problems have been corrected and an applicant is motivated to prevent such problems in the future, the administrative judge is not precluded from considering an applicant's trustworthiness in light of longstanding prior behavior evidencing irresponsibility. See *e.g.*, ISCR Case No. 14-01984 at 5 (App. Bd. Aug. 2015). The Appeal Board has long held that the failure to file tax returns suggests a problem with complying with well-established government rules and systems. See *e.g.*, ISCR Case No. 14-04437 (App. Bd. Apr. 15, 2016). Moreover, the Appeal Board has reaffirmed that the timing of corrective action is an appropriate factor to consider in applying AG ¶ 20(g). See *e.g.*, ISCR Case No. 17-01382 at 4 (App. Bd. May 16, 2018) (citing ISCR Case No. 17-01807 at 3-4 (App. Bd. Mar. 7, 2018)). In reversing favorable clearance grants to applicants with tax issues by DOHA judges in ISCR Case No. 17-01382 (App. Bd. May 16, 2018) and ISCR Case No. 16-01211 (App. Bd. May 30, 2018), the Appeal Board noted that applicants who only begin to address their delinquent tax returns after having been placed on notice that their clearance may be in jeopardy may not comply with laws, rules, and regulations when their immediate interests are not imperiled. Applicant was on notice as of his January 2019 SF 86, and reminded during his May 2019 subject interview and in response to September 2019 interrogatories, that his unfiled tax returns were an issue for his clearance eligibility. There is no evidence that he took any steps at that time to file his income tax returns for tax years 2017 or 2018. The financial considerations security concerns raised by failure to timely comply with his income-tax filing obligations are only partially mitigated.

Whole-Person Concept

In assessing the whole person, the administrative judge must consider the totality of Applicant's conduct and all relevant circumstances in light of the nine adjudicative process factors in AG ¶ 2(d). Those factors are:

- (1) the nature, extent, and seriousness of the conduct;
- (2) the circumstances surrounding the conduct, to include knowledgeable participation;
- (3) the frequency and recency of the conduct;
- (4) the individual's age and maturity at the time of the conduct;
- (5) the extent to which participation is voluntary;
- (6)

the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

The analysis under Guideline F is incorporated in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under that guideline, but some warrant additional comment.

The security clearance adjudication involves an evaluation of an applicant's judgment, reliability, and trustworthiness in light of the security guidelines in the Directive. See ISCR Case No. 09-02160 (App. Bd. Jun. 21, 2010). It is understandable that Applicant felt overwhelmed about preparing his own tax returns when he had a business. While he exhibited good judgment, albeit belatedly, in seeking the assistance of a tax professional in 2015, that does not discharge him from his responsibility for thereafter ensuring that his income tax returns were prepared and filed within a reasonable time. With the assistance of the accountant, he filed only his past-due tax returns for 2013. Applicant was placed on notice by his January 2019 SF 86 and reminded during his May 2019 interview and in September 2019 interrogatories that his tax matters were of concern, and yet he made no effort to rectify his tax filings at that time. Even after the SOR was issued, he allowed the tax-filing deadline for tax year 2019 to pass without complying with his filing obligations. While Applicant expressed a sincere intention to file his tax returns on time in the future, it does not carry as much weight in reform as if he had been able to show a track record of compliance with his tax-filing obligations.

The Appeal Board has repeatedly held that the government need not wait until an applicant mishandles or fails to safeguard classified information before denying or revoking security clearance eligibility. See, e.g., ISCR Case No. 08-09918 (App. Bd. Oct. 29, 2009) (citing *Adams v. Laird*, 420 F.2d 230, 238-239 (D.C. Cir. 1969)). It is well settled that once a concern arises regarding an applicant's security clearance eligibility, there is a strong presumption against the grant or renewal of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990). Under Appeal Board precedent, an applicant who waits to address tax issues until his or her immediate interests are at stake does not show sound judgment and reliability. His failure to give priority to such an important obligation as filing tax returns required by law causes lingering doubts about his security worthiness that have not been fully mitigated.

Formal Finding

Formal finding for or against Applicant on the allegation set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, is:

Paragraph 1, Guideline F:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant

Conclusion

In light of all of the circumstances, it is not clearly consistent with the interests of national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Elizabeth M. Matchinski
Administrative Judge