



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



In the matter of:)
)
) ISCR Case No. 19-02824
)
Applicant for Security Clearance)

Appearances

For Government: Patricia Lynch-Epps, Esq., Department Counsel
For Applicant: *Pro se*

04/08/2022

Decision

HARVEY, Mark, Administrative Judge:

Applicant failed to file his federal and state income tax returns for tax years (TY) 2016 and 2017. Guideline F (financial considerations) security concerns are not mitigated. Eligibility for access to classified information is denied.

Statement of the Case

On November 27, 2017, Applicant completed and signed his Questionnaires for Investigations Processing or security clearance application (SCA). (Government Exhibit (GE) 1) On January 28, 2021, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a statement of reasons (SOR) to Applicant under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960); DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive) (January 2, 1992), as amended; and Security Executive Agent Directive 4, establishing in Appendix A the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AGs), effective June 8, 2017. (Hearing Exhibit (HE) 2)

The SOR detailed reasons why the DOD CAF did not find under the Directive that it is clearly consistent with the interests of national security to grant or continue a security clearance for Applicant and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked. Specifically, the SOR set forth security concerns arising under Guideline F. (HE 2) On February 8, 2021, Applicant provided his response to the SOR. (HE 3)

On April 18, 2021, Department Counsel was ready to proceed. On January 5, 2022, the case was assigned to me. On January 12, 2022, DOHA issued a notice of hearing, setting the hearing for March 4, 2022. (HE 1) His hearing was held as scheduled in the vicinity of Arlington, Virginia using the DOD Microsoft Teams video teleconference system. (*Id.*)

During the hearing, Department Counsel offered two exhibits, which were admitted without objection. (Tr. 15-16; GE 1-GE 2) Applicant did not offer any exhibits. (Tr. 11, 16) On March 14, 2022, DOHA received a transcript of the hearing. No documents were received after the hearing.

Some details were excluded to protect Applicant's right to privacy. Specific information is available in the cited exhibits and transcript.

Findings of Fact

In Applicant's SOR response, he admitted the SOR allegations in ¶¶ 1.a through 1.d. (HE 3) His admissions are accepted as findings of fact. Additional findings follow.

Applicant is a 55-year-old project manager, and he has worked for the contractor in this role for four or five years. (Tr. 6, 8; GE 1) In 1986, he graduated from high school. (Tr. 6) He attended college and has almost completed his associate's degree. (Tr. 7, 17) He served in the Navy from 1986 to 2007, and he honorably retired as a chief petty officer (E-7). (Tr. 7, 18) His Navy specialty was electrician's mate. (Tr. 7) Applicant has a 60 percent disability rating from the Department of Veterans Affairs (VA). (Tr. 33)

There is no evidence that Applicant uses illegal drugs, has engaged in criminal conduct, violated security, or has issues with excessive alcohol consumption. (GE 1) He has held a security clearance for more than 30 years. (Tr. 19) He is an outstanding member of his community. (Tr. 41)

In 1986, Applicant married, and his three children are ages 32, 34, and 35. (Tr. 8) His spouse is not employed outside their home. (Tr. 30) One of his children, her husband, and two of his grandchildren live with Applicant. (Tr. 9) His daughter and son-in-law are employed and pay Applicant \$400 monthly for household expenses. (Tr. 32)

Financial Considerations

SOR ¶¶ 1.a and 1.c allege Applicant failed to file his federal and state income tax returns for tax year (TY) 2016. SOR ¶¶ 1.b and 1.d allege Applicant failed to file his federal and state income tax returns for TY 2017.

When Applicant completed his November 27, 2017 SCA he disclosed that he had not filed his federal and state income tax returns for TY 2016, and he indicated he did not file his tax returns because he "couldn't afford to pay" his taxes. (GE 1 at 35) He estimated that he owed \$1,500, and he believed he would have the necessary funds when he received a settlement from an insurance company. (*Id.*)

On December 26, 2019, Applicant responded to DOHA interrogatories, and he disclosed that he had not filed his federal and state tax returns for TYs 2016 and 2017. (GE 2) He estimated that he owed about \$3,000 to the federal government, and he did not owe any state taxes. (*Id.*)

On February 8, 2021, Applicant responded to the SOR, and he indicated that he had “procrastinated” in filing his federal and state tax returns for TYs 2016 and 2017. (HE 3) He noted that he was in an automobile accident in September 2016 which prevented him from filing his tax returns, and he was gathering the documentation needed to file his tax returns. (*Id.*)

At his hearing, Applicant said he was out of work for about three months after the automobile accident in September 2016, and he received short-term disability payments. (Tr. 23, 26) He received \$19,000 from a lawsuit involving the accident. (Tr. 27) Applicant’s annual income from 2014 to 2019 was about \$100,000 for each of those years. (Tr. 24, 33) He filed his tax returns when due for TYs 2018 through 2020, and he received refunds. (Tr. 29; GE 2)

In 2020, Applicant’s home was flooded, and his documentation was damaged or mixed up when it was collected and moved out of his home in boxes. (Tr. 34) In 2021, his home had a fire and his papers were mixed up again when they were moved out in boxes. (Tr. 34-35) He had some deaths in his family that caused delay in the filing of his tax returns. (Tr. 33-36) He did not specify who died, when they died, or how their deaths caused him not to file his tax returns for TYs 2016 and 2017.

Around October 2021, Applicant contacted a tax return preparation service for assistance (Tr. 28-29) His tax returns do not involve itemized deductions, and he has W-2s showing his income. (Tr. 34-35) He has the funds in the bank to pay his taxes, and he intends to file his tax returns soon. (Tr. 34-35)

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information.” *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicant’s eligibility for access to classified information “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.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge’s

overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk 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. Clearance decisions must be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See Exec. Or. 10865 § 7. Thus, nothing in this decision should be construed to suggest that it is based, in whole or in part, on any express or implied determination about applicant’s allegiance, loyalty, or patriotism. It is merely an indication the applicant has not met the strict guidelines the President, Secretary of Defense, and Director of National Intelligence have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Financial Considerations

AG ¶ 18 articulates the security concern for financial problems:

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.

AG ¶ 19 includes one disqualifying condition that could raise a security concern and may be disqualifying in this case: "(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 establishes AG ¶ 19(f). Discussion of this disqualifying condition is contained in the mitigation section, *infra*.

The financial considerations mitigating conditions under AG ¶ 20 are as follows:

(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;

(f) the affluence resulted from a legal source of income; 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.

In ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013), the DOHA Appeal Board 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).

Applicant indicated four circumstances beyond his control adversely affected his finances: (1) an automobile accident in September 2016; (2) water damage to his house; (3) a fire in his house; and (4) deaths in his family. However, he does not receive full mitigating credit because he failed to prove he was unable with due diligence to file overdue tax returns for TYs 2016 and 2017. He admitted that he procrastinated in the filing of his tax returns.

Applicant failed to timely file his federal and state income tax returns for tax years (TY) 2016 and 2017. He estimated that he owed \$3,000 to the federal government for those two tax years, and he did not owe anything to the state government.

A willful failure to timely make (means complete and file with the IRS) a federal income tax return is a misdemeanor-level federal criminal offense. Title 26 U.S.C. § 7203, willful failure to file return, supply information, or pay tax, reads:

Any person . . . required by this title or by regulations made under authority thereof to make a return, keep any records, or supply any information, who willfully fails to . . . make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor

A willful failure to make return, keep records, or supply information when required, is a misdemeanor without regard to the existence of any tax liability. *Spies v. United States*, 317 U.S. 492 (1943); *United States v. Walker*, 479 F.2d 407 (9th Cir. 1973); *United States v. McCabe*, 416 F.2d 957 (7th Cir. 1969); *O'Brien v. United States*, 51 F.2d 193 (7th Cir. 1931). For purposes of this decision, I am not weighing Applicant's failure to timely file his federal income tax returns against him as crimes. In regard to the failure to timely file federal income tax returns, the DOHA Appeal Board has commented:

Failure to file tax returns suggests that an applicant has a problem with complying with well-established governmental rules and systems. Voluntary compliance with such rules and systems is essential for protecting classified information. ISCR Case No. 01-05340 at 3 (App. Bd. Dec. 20, 2002). As we have noted in the past, a clearance adjudication is not directed at collecting debts. See, e.g., ISCR Case No. 07-08049 at 5 (App. Bd. Jul. 22, 2008). By the same token, neither is it directed toward *inducing an applicant to file tax returns. Rather, it is a proceeding aimed at evaluating an applicant's judgment and reliability. Id.* 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. See, e.g., ISCR Case No. 14-01894 at 5 (App. Bd. Aug. 18, 2015). See *Cafeteria & Restaurant Workers Union Local 473 v. McElroy*, 284 F.2d 173, 183 (D.C. Cir. 1960), *aff'd*, 367 U.S. 886 (1961).

ISCR Case No. 14-04437 at 3 (App. Bd. Apr. 15, 2016) (emphasis in original). See ISCR Case No. 15-01031 at 4 (App. Bd. June 15, 2016) (citations omitted); ISCR Case No. 14-05476 at 5 (App. Bd. Mar. 25, 2016) (citing ISCR Case No. 01-05340 at 3 (App. Bd. Dec. 20, 2002)); ISCR Case No. 14-01894 at 4-5 (App. Bd. Aug. 18, 2015). The Appeal Board clarified that even in instances where an “[a]pplicant has purportedly corrected [his or her] federal tax problem, and the fact that [applicant] is now motivated to prevent such problems in the future, does not preclude careful consideration of [a]pplicant’s security worthiness in light of [his or her] longstanding prior behavior evidencing irresponsibility” including a failure to timely file federal income tax returns. See ISCR Case No. 15-01031 at 3 & n.3 (App. Bd. June 15, 2016) (characterizing “no harm, no foul” approach to an applicant’s course of conduct and employing an “all’s well that ends well” analysis as inadequate to support approval of access to classified information with focus on timing of filing of tax returns after receipt of the SOR).

In ISCR Case No. 15-01031 (App. Bd. June 15, 2016), the Appeal Board explained that in some situations, even if no taxes are owed when tax returns are not timely filed, grant of access to classified information is inappropriate. In ISCR Case No. 15-1031 (App. Bd. June 15, 2016) the applicant filed his 2011 federal income tax return in December 2013, his 2012 federal tax return in September 2014, and his 2013 federal tax return in October 2015. He received federal tax refunds of at least \$1,000 for each year. Nevertheless, the Appeal Board reversed the Administrative Judge’s decision to grant access to classified information.

In ISCR Case No. 15-06440 at 4 (App. Bd. Dec. 26, 2017) the Appeal Board reversed the grant of a security clearance, discussed how AG ¶ 20(g) applied, and noted:

The timing of the resolution of financial problems is an important factor in evaluating an applicant's case for mitigation because an applicant who begins to resolve financial problems only after being placed on notice that his clearance was in jeopardy may lack the judgment and self-discipline to follow rules and regulations over time or when there is no immediate threat to his own interests. In this case, Applicant's filing of his Federal income tax returns for 2009-2014 after submitting his SCA, undergoing his background interview, or receiving the SOR undercuts the weight such remedial action might otherwise merit.

Applicant provided some important evidence of mitigation under AG ¶ 20(g) because with the exception of TYs 2016 and 2017, he has filed all of his tax returns, and he has paid all taxes to the federal and state governments. However, under the DOHA Appeal Board jurisprudence, this is too little, too late to mitigate security concerns. He did not prove that he was unable to make greater progress sooner filing his federal and state income tax returns. Applicant failed to establish mitigation of financial considerations security concerns.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all the circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d):

(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.

Under AG ¶ 2(c), "[t]he ultimate determination" of whether to grant a security clearance "must be an overall commonsense judgment based upon careful consideration of the guidelines" and the whole-person concept. My comments under Guideline F are incorporated in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under that guideline but some warrant additional comment.

Applicant is a 55-year-old project manager, and he has worked for the contractor in this role for four or five years. He attended college and has almost completed his associate's degree. He served in the Navy from 1986 to 2007, and he honorably retired

as a chief petty officer. His Navy specialty was electrician's mate. Applicant has a 60 percent disability rating from the VA.

There is no evidence that Applicant uses illegal drugs, has engaged in criminal conduct, violated security, or has issues with excessive alcohol consumption. He has held a security clearance for more than 30 years. He is an outstanding member of his community.

Applicant has sufficient financial resources to pay his debts, including his taxes. The only area of financial irresponsibility is his history of failing to timely file his federal and state income tax returns and pay any taxes when due for TYs 2016 and 2017.

The Appeal Board's emphasis on security concerns arising from tax cases is instructive and binding on administrative judges. See ISCR Case No. 14-05794 at 7 (App. Bd. July 7, 2016) (reversing grant of security clearance and stating, "His delay in taking action to resolve his tax deficiency for years and then taking action only after his security clearance was in jeopardy undercuts a determination that Applicant has rehabilitated"). See *also* ISCR Case No. 14-03358 at 3, 5 (App. Bd. Oct. 9, 2015) (reversing grant of a security clearance, and stating "A security clearance represents an obligation to the Federal Government for the protection of national secrets. Accordingly, failure to honor other obligations to the Government has a direct bearing on an applicant's reliability, trustworthiness, and ability to protect classified information.").

In ISCR Case No. 15-03481 at 3 (App. Bd. Sept. 27, 2016), the Appeal Board reversed the favorable decision of the administrative judge in a case where the applicant filed his 2009, 2010, and 2011 tax returns in February 2014 and his 2012 tax return in August 2015 all before the SOR was issued. The applicant in that case owed less than \$1,800 in federal income taxes for those four TYs at the time of the decision. *Id.* The Appeal Board found the timing of the filing of his tax returns to be an important factor stating:

Applicant did not resolve his tax filing delinquencies until after submission of his security clearance application and after undergoing his background interview. Taking action to resolve the delinquent tax filings well after the initiation of the security clearance process undercuts a determination that those actions constitute a good-faith effort to resolve the delinquencies. *Id.* at 5.

Applicant may not have fully understood or appreciated the importance of the requirement to timely file his federal and state income tax returns in the context of his eligibility for access to classified information. However, like the applicant in ISCR Case No. 15-03481, he did not establish he was unable to make greater progress sooner in the resolution of his tax issues. His actions under the Appeal Board jurisprudence are too little, too late to fully mitigate security concerns. See ISCR Case No. 15-03481 at 5 (App. Bd. Sept. 27, 2016).

It is well settled that once a concern arises regarding an applicant's security clearance eligibility, there is a strong presumption against granting a security clearance. See *Dorfmont*, 913 F. 2d at 1401. Applicant's evidence did not overcome the *Dorfmont* presumption.

I have carefully applied the law, as set forth in *Egan*, Exec. Or. 10865, the Directive, the AGs, and the Appeal Board's jurisprudence to the facts and circumstances in the context of the whole person. Unmitigated financial considerations security concerns lead me to conclude that grant of a security clearance to Applicant is not warranted at this time.

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 through 1.d: Against Applicant

Conclusion

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

Mark Harvey
Administrative Judge