



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



| | | |
|----------------------------------|---|------------------------|
| In the matter of: |) | |
| |) | |
| REDACTED |) | ISCR Case No. 21-00089 |
| |) | |
| Applicant for Security Clearance |) | |

Appearances

For Government: Daniel P. O'Reilley, Esq., Department Counsel
For Applicant: *Pro se*

05/09/2022

Decision

MATCHINSKI, Elizabeth M., Administrative Judge:

As of April 2022, Applicant had prepared but not filed his delinquent federal and state income tax returns for several consecutive tax years, including 2017 through 2019. His failure to timely comply with his tax-filing obligations is not sufficiently mitigated. Clearance eligibility is denied.

Statement of the Case

On March 9, 2021, the Defense Counterintelligence and Security Agency Consolidated Adjudications Facility (DCSA CAF) issued a Statement of Reasons (SOR) to Applicant, detailing security concerns 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 received the SOR on March 16, 2021. On March 29, 2021, he responded to the SOR allegations and requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA). On May 4, 2021, the Government indicated it was ready to proceed to a hearing. On June 14, 2021, the case was assigned to me to determine whether it is clearly consistent with the interests of national security to grant or continue a security clearance for Applicant. I received the case assignment and file on June 18, 2021.

On June 22, 2021, I informed Applicant of the possibility of a video conference hearing via the Defense Collaboration Services (DCS) system and inquired about his availability for an online hearing. When Applicant failed to respond by October 14, 2021, I notified him that I was scheduling in-person hearings during the week of November 29, 2021. Due to a schedule conflict for the December 3, 2021 date requested by Applicant, scheduling his hearing was postponed. DCS was no longer available to DOHA as of September 1, 2021, and a new program for online hearings was not yet functioning. On February 11, 2022, I informed Applicant that I was scheduling video conference hearings via Microsoft Teams. After some coordination of schedules with the parties, on February 23, 2022, I scheduled a hearing for March 25, 2022, via Microsoft Teams.

At the hearing, two Government exhibits (GE 1-2) were admitted into evidence, and Applicant testified, as reflected in a hearing transcript (Tr.) received by DOHA on April 8, 2022. I held the record open after the hearing through April 15, 2022, for Applicant to submit documentation related to his tax issues. On April 15, 2022, Applicant submitted account transcripts from the Internal Revenue Service (IRS), which were marked collectively as Applicant Exhibit (AE) A and admitted into the record without objection. On April 21, 2022, I received through Department Counsel Applicant's copies of tax returns that Applicant had prepared but not filed for tax years 2016 through 2020, which Applicant sent to Department Counsel on March 25, 2022. Applicant's tax returns were entered into evidence as AE B through F.

Findings of Fact

The SOR alleges that Applicant failed to timely file federal (SOR ¶ 1.a) and state (SOR ¶ 1.b) income tax returns for at least tax years 2017 through 2019. When Applicant answered the SOR, he admitted he had not yet filed his delinquent income tax returns. He explained that he had time constraints because of care for his elderly mother, and he had misplaced the tax paperwork needed to file his delinquent returns. He expressed a plan to submit his unfiled tax returns by June 30, 2021.

Applicant's admissions to not filing his income tax returns for tax years 2017 through 2019 are accepted and incorporated as factual findings. After considering the pleadings, exhibits, and transcript, I make the following additional findings of fact:

Applicant is a 57-year-old electrical engineer, who earned his bachelor's degree in May 1987. (GE 1; Tr. 25.) From June 1988 to 2000, he worked for a defense contractor. He was granted a secret clearance for his duties with that employer in 1989. At some time during his tenure at that company, he worked on special access programs. (Tr. 27.) In October 2004, he began working for his current employer, a laboratory that has DOD contracts. He has held a DOD secret clearance for his duties with the laboratory since September 2005. (GE 1; Tr. 26.)

Applicant was married from October 1992 to June 1997. He has no children. (GE 1; Tr. 23.) He has one brother, who is now 60 years old. (GE 1.)

To renew his clearance eligibility, Applicant completed and certified as accurate a Questionnaire for National Security Positions (SF 86) on September 30, 2020. He disclosed in response to a tax-filing inquiry that he had failed to file a return for tax years 2017, 2018, and 2019. He indicated that he owed no taxes for any of those tax years and explained that he got behind in filing for tax year 2017 and had to file a return for tax year 2017 before filing his returns for tax years 2018 and 2019. (GE 1.)

On October 21, 2020, Applicant was interviewed by an authorized investigator for the Office of Personnel Management (OPM). He acknowledged that he had not filed his federal and state income tax returns for tax years 2017, 2018, and 2019, in part due to procrastination, but also because he had misplaced or lost documents and had issues with his personal computer. He asserted that he typically was refunded about \$1,000 to \$2,000 in federal taxes, so he was certain he owed no federal income taxes for those tax years. He stated that he often underpaid his state income taxes by about \$100 to \$200 and had remitted taxes owed to the state with his returns that he had filed on time in the past. He expressed an intention to file his delinquent tax returns by the end of 2020. He indicated that he can afford to meet his financial obligations and expressed a willingness and ability to pay his debts. He added that he planned on filing his income tax returns on time in the future. (GE 2.)

As of late March 2021, Applicant had not filed federal or state income tax returns for tax years 2017, 2018, and 2019. He "let slip the deadline" for filing his returns for tax year 2017, and in preparing to complete his tax returns for tax years 2017 and 2018, he misplaced some of his tax-related papers, causing more delay leading into the 2019 tax year. He also explained that he had some "time constraints" in that he had been spending much of his free time caring for his then 95-year-old mother with dementia and behavioral issues. He averaged about three hours per day helping her in the evenings and more time on the weekends. About resolving his tax issues, he stated in response to the SOR:

To initiate a remedy for this delinquency, I have spent the past 3 weeks collecting all tax related documentation [for] the tax years 2017, 2018, and 2019. I plan to update tax forms, to the best of my ability, before meeting with a tax accountant. As we are in the last weeks of [the] 2020 tax filing season, getting an appointment with an accountant will be delayed until after

May 17, 2021. My plan is to have all prior years' tax forms submitted to the IRS by June 30, 2021, as well as the 2020 tax forms. (Answer.)

At his hearing, Applicant explained that his brother, who had his own apartment in their mother's basement, kept an eye on their mother, who had developed dementia by age 92. (Tr. 20.) Their mother had caregivers around the clock, but it was up to Applicant to arrange for the in-home care providers for his mother; manage her medications and medical appointments; and assist her at bedtime. (Tr. 24-25.)

Applicant was aware of his legal obligation to file income tax returns, but he "just pushed it aside." (Tr. 21.) As one year and then the next passed, he had two and then three years of returns to prepare when the care for his mother became more cumbersome. (Tr. 21.) Her health deteriorated from February 2021 until her death in October 2021. She was hospitalized on four separate occasions during that time span for at least a week each time. (Tr. 21.) The issues with his mother were "all-consuming." (Tr. 36.) Even so, he had some spare time to prepare his income tax returns, but he was not as organized with his tax paperwork as he would have liked, so did not get his returns done. (Tr. 32.) When he received the SOR in March 2021, he "did one sweep" for the documentation needed to file his tax returns, but then put his tax matters on hold because of his mother's hospitalization. (Tr. 38.) He received a notice from the IRS in 2021 about his obligation to file a tax return for tax year 2018. (Tr. 40-41.) It did not prompt him to file his delinquent tax returns. It occurred to him to retain the services of a tax preparer, but the issue became "the organization of all the information the accountant needed" to file his returns. (Tr. 36.)

Applicant had always prepared his income tax returns himself, using commercially-purchased tax software. (Tr. 31.) He could afford to pay a professional to prepare his income tax returns. His current annual salary exceeds \$150,000. (Tr. 36.)

Applicant filed for an extension of the filing deadline for his income tax returns for tax year 2020. He sent in \$500 each to the IRS and state with his request for an extension for 2020 in case he underpaid his income taxes. (Tr. 42.) The October 2021 extended deadline for filing passed without him filing returns for tax year 2020. (Tr. 35.) He testified that the two and then three months following his mother's death "flew by like it was nothing. It was just kind of in a daze." (Tr. 22.) He explained that he also had an issue with an apartment. On the death of his father in 2005, Applicant inherited a 1/8th interest in a six-unit apartment building that was sold in 2020. (Tr. 30-33.) He believes the accountant handling the estate filed an erroneous "K1 1065 Form" on the apartment for tax year 2020, which he brought to the accountant's attention sometime in spring 2021. He was waiting for the accountant to file the correct form. (Tr. 33-34.)

In late January 2022, Applicant began looking for his tax documents to file his delinquent tax returns. (Tr. 38.) Over the month immediately preceding his March 2022 security clearance hearing, Applicant went through four to five boxes of documents and some mail for his tax paperwork. In the process, he discovered that he had no record of having filed his federal and state income tax returns for tax year 2016, in addition to tax years 2017 through 2020. (Tr. 22, 28.) He prepared his delinquent income tax returns

within a week or so preceding his security clearance hearing. (AEs B-F; Tr. 29.) The accountant handling the apartment agreed to meet with Applicant sometime after this tax season to review the returns Applicant prepared using tax software. (Tr. 30.) The tax returns prepared by Applicant in March 2022 show the following with respect to his adjusted gross income and claimed tax refunds or underpayments for tax years 2016 through 2020:

| Tax Year | Adjusted gross income | Refund (+) or Tax underpayment (-) |
|-------------|-----------------------|------------------------------------|
| 2016 (AE B) | \$143,222 | Federal + \$970 State - \$102 |
| 2017 (AE C) | \$143,327 | Federal + \$1,039 State - \$215 |
| 2018 (AE D) | \$144,456 | Federal + \$1,114 State - \$114 |
| 2019 (AE E) | \$148,504 | Federal + \$1,822 State + \$191 |
| 2020 (AE F) | \$151,417 | Federal + \$1,830 State - \$65 |

Applicant testified that he has “no real excuse” for not catching up on his income tax returns. (Tr. 37.) As of the close of the record, Applicant had not filed his recently-prepared federal or state income tax returns for tax years 2016 through 2020. (AE A; Tr. 33.) IRS tax account transcripts show that, as of April 15, 2022, the IRS had no record of returns from Applicant for tax years 2016 through 2020. The IRS issued notices to him about his missing tax return on July 16, 2018 for tax year 2016; December 3, 2018 for tax year 2017; March 30, 2020 for tax year 2018; and March 8, 2021 for tax year 2019. The IRS received a payment of \$500 from Applicant for tax year 2020 on May 17, 2021. He was granted an extension to October 15, 2021, for his 2020 tax return but has not filed a return as of April 15, 2022. (AE A.)

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.

As of April 15, 2022, Applicant had not filed his federal and state income tax returns for tax years 2016 through 2020. His tax returns for 2021 were not yet due. Section 6012 of Title 26 of the United States Code requires the filing of an income tax return by the tax deadline if his or her gross income equals or exceeds the sum of the exemption amount plus the basic standard deduction applicable to him or her, whether or not a tax refund is expected. The tax returns Applicant prepared in March 2022 reflect that his income exceeded the threshold for filing for each of the tax years at issue, and that he overpaid his federal income taxes. State tax underpayments were minimal in amount. Even so, Guideline F security concerns are established when an individual fails to comply with his or her 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," applies because of his failure to timely file federal and state income tax returns for tax years 2017 through 2019.

Regarding tax years 2016 and 2020, the Government did not seek to amend the SOR to include those tax years. The Appeal Board has held that non-alleged conduct cannot be considered in a manner that contravenes the notice requirement of ¶ E3.1.3 of the Directive. However, it may be considered for limited purposes, such as assessing an applicant's credibility; evaluating evidence of extenuation, mitigation, or changed circumstances; considering whether an applicant has demonstrated successful rehabilitation; or providing evidence for the whole-person analysis. See ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006.) Accordingly, his failure to file tax returns for unalleged tax years is not considered in disqualification, but it is relevant in assessing reform and the whole-person evaluation.

Applicant has the burdens of production and persuasion in establishing sufficient mitigation to overcome the financial concerns raised by his noncompliance with such an important obligation as filing his 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 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; 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.

AG ¶ 20(a) cannot reasonably apply, given Applicant's ongoing failure to comply with his income tax filing obligations for several consecutive years. Applicant testified credibly about the care he provided his mother before her death. It reflects good character on his part and provides for some mitigation under AG ¶ 20(b). Yet, Applicant acknowledged that he had some spare time that could have been spent looking for the documents needed to file his taxes. The deterioration in his mother's health from February 2021 until her death in October 2021 would not explain or extenuate his failure to timely file his income tax returns for tax years 2017 through 2019, which were due before 2021. Applicant's noncompliance with his tax-filing obligations appears to have been due in significant part to his disorganization in maintaining the paperwork needed to prepare his tax returns and to his procrastination.

AG ¶ 20(b) requires that an individual act responsibly under his or her circumstances. Applicant indicated during his October 2020 PSI that he planned on filing his delinquent tax returns for 2017 through 2019 by the end of 2020. He made no effort to rectify his tax issues until 2022, despite being aware since his PSI that the unfiled returns were an issue for his security clearance eligibility. His mother's passing accounts for some of the delay, but it does not sufficiently mitigate the security concerns in light of the other factors that contributed to his failure to prepare and file his tax returns. Although he began looking for tax paperwork in late January 2022, it was likely his impending security clearance hearing that prompted him to prepare his delinquent tax returns. He failed to act responsibly with regard to complying with his tax-filing obligations.

Applicant's very belated preparation of his income tax returns is not enough to trigger full mitigation under AG ¶ 20(c) or AG ¶ 20(g). 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 asserts in mitigation that there is no evidence that he owes any delinquent taxes. His prepared returns show that he overpaid his federal income taxes, although he may be assessed penalties for late filing after he submits his tax returns. Whether or not taxes are owed, his lack of urgency in addressing his tax issues is incompatible with the judgment expected of a longtime defense-contractor employee with a secret clearance. While he is likely to submit his returns after he has them reviewed by the accountant, a promise of future compliance is not a substitute for a track record of timely returns. The financial considerations security concerns raised by Applicant's non-compliance with his tax-filing obligations for such an extended period are not adequately 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 Appeal Board has made clear that voluntary compliance with such rules and systems as those pertaining to filing returns and paying taxes is essential for protecting classified information. See, e.g., ISCR Case No. 14-05476 at 5 (App. Bd. Mar. 25, 2016). 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). Based on the evidence of record, it is not clearly consistent with the interests of national security to grant or continue security clearance eligibility for Applicant.

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-1.b:

Against Applicant

Conclusion

In light of all of the circumstances, 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.

Elizabeth M. Matchinski
Administrative Judge