



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



In the matter of:)	
)	
)	ISCR Case No. 19-03711
)	
Applicant for Security Clearance)	

Appearances

For Government: Bryan Olmos, Esq., Department Counsel
For Applicant: *Pro se*

11/01/2022

Decision

CERVI, Gregg A., Administrative Judge

This case involves security concerns raised under Guideline F (Financial Considerations). Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted security clearance applications (SCAs) on March 27, 2015 and April 23, 2021. On March 26, 2021, the Defense Counterintelligence and Security Agency Consolidated Adjudications Facility (DCSA CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guideline F. The DCSA CAF acted under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective on June 8, 2017.

Applicant answered the SOR on April 13, 2021 (Ans.), and requested a hearing before an administrative judge. The case was assigned to me on April 22, 2022. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on May 17,

2022, scheduling the hearing for June 15, 2022. The hearing was held via video teleconference, as scheduled.

Government Exhibits (GE) 1 through 3 were admitted into evidence without objection. Applicant testified but did not submit any exhibits. The record was held open until July 1, 2022, to permit Applicant to submit documentary evidence in mitigation, but he did not submit anything. DOHA received the hearing transcript on June 27, 2022.

Findings of Fact

Applicant is a 53-year-old field office administrator for a Government contractor since September 2021, and employed, mostly overseas, by various Government contractors since 2009. He served in the Army National Guard from 1986 to 2009 when he was honorably discharged. He earned a bachelor's degree in 2016. He is unmarried and has an adult son. He has never held a security clearance as a civilian.

The SOR alleges under Guideline F that Applicant failed to file Federal and state income tax returns, as required, for tax years 2003 – 2014, and tax years 2016 and 2017. (SOR ¶¶ 1.a and 1.b) He admitted both SOR allegations, and noted, “all taxes were filed in 2018.”

In December 2019, the Government sent Applicant interrogatories requesting information on his tax delinquencies. He responded that he filed Federal and state income tax returns for tax years 2003 to 2014, in August 2018, and filed income tax returns for tax years 2016 and 2017, in August 2018, although his tax transcripts show most of the delinquent returns were filed in October 2018. He indicated that for each tax year, he did not owe taxes, and that he had no outstanding Federal or state tax liabilities. He submitted Internal Revenue Service (IRS) transcripts as of December 2019, showing:

TY 2009 - return filed Oct 2018 - zero balance (inquiry for non-filing of tax return sent November 2010).

TY 2010 - return filed Oct 2018 – zero balance (inquiry for non-filing of tax return sent in November 2011).

TY 2011- return filed Oct 2018 – zero balance after paying interest and penalty; credit was transferred from another tax year (inquiry for non-filing tax return sent November 2012).

TY 2012 - return filed Oct 2018 – zero balance after credit transferred out (inquiry for non-filing tax return sent December 2013).

TY 2013 - return filed April 2014; amended return filed September 2018 – zero balance after credit transferred out to 2003 and 2004 (inquiry for non-filing tax return sent November 2014).

TY 2014 – return filed Dec 2018 – Account balance: -\$15,416 (inquiry for non-filing tax return sent October 2015).

TY 2015 – return filed March 2016 – zero balance after interest and penalty; credit transferred to 2002 and 2003 and credit transferred in from 2016 and 2017.

TY 2016 – return filed Oct 2018 – zero balance after credit transferred out to 2015.

TY 2017 – return filed Oct 2018 – zero balance after credit transferred out to 2015.
TY 2018 – return filed May 2019 – zero balance after credit transferred out to 2011.

In testimony, Applicant said he filed his past-due tax returns from 2003 to present, after he realized his security clearance eligibility was in jeopardy. He testified that he changed his withholding in about 2018. He also claimed he took action after being interviewed by a Government investigator. He said he does not owe any taxes because the IRS recovered funds via garnishment and captured subsequent tax year refunds. He said he has no credit issues, and paid off his first home before selling and purchasing another home in December 2021.

In the past, Applicant ignored his income tax filing requirements because he did not have the money to pay taxes. He prepared draft returns in 2003 to 2005, but did not file them because he did not have the money to pay the tax owed. He first took a job overseas in 2009, which complicated his ability to file tax returns. He continued overseas assignments from 2009 to present. In 2011, his bank account was temporarily frozen by the IRS because of tax delinquencies, and his pay was garnished in 2012. He said he filed his 2013 to 2015 tax returns in 2016. In 2017, he changed tax preparation companies because of alleged criminal practices of his prior preparer. Although not alleged in the SOR, Applicant's 2020 and 2021 returns were filed after the filing deadline.

Applicant did not submit evidence of state income tax return filings or any balance due, but he claimed that he filed all returns and does not owe state income taxes. After the Government's closing argument, Applicant stated:

Applicant: I just want to say I agree with Mr. Bryan 100 percent. I cannot argue the testimony that's - - on any of that . . . that he said. I'm not going to waste your guys' time because I get the feeling that no matter what I do, what I present you guys, the decision's already made. It's final. I get it. I understand. I agree that I'm the responsible one. I screwed up. I didn't pay the taxes. We're over and done with it. We can close this today. I appreciate your guys' time.

Administrative Judge: Well, hold on a minute. It's incorrect to say that the decision is done. We're here - - I'm here to hear your side and the Government's side, and to make that determination. So...

Applicant: It's done.

Administrative Judge: ...if you want to - - look, if you want to give up, that's your - - that's your decision.

Applicant: I'm done. Yes. I'll be honest with you. I'm not wasting any of you guys' - - I don't want to waste the Government time no more. You guys get paid by the taxpayers, so I don't want to waste your guys' time, so - -
(Tr. 52-53)

Despite Applicant's assertions and professed unwillingness to continue, I held the record open so that he could submit post-hearing documentation in support of his case, as discussed throughout the hearing. He indicated that his employment contract was ending, and he did not care if he was employed again as he had other opportunities. After I urged him to think about submitting something, and that there was plenty of time to do so, he said, "I've thought about it." (Tr. 53-54) He did not submit any post-hearing material.

Applicant earns about \$100,000 per year, and has about \$17,000 in bank assets. He has about \$20,000 in equity in his home, and paid for his son's college tuition and expenses. He has not attended financial counseling.

Policies

"[N]o 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 applicants 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 § 2.

National security eligibility 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, an administrative judge applies these guidelines 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 a person's stability, trustworthiness, reliability, discretion, character, honesty, and judgment. AG ¶ 1(b).

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 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.

Clearance decisions must be made "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense 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. *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, e.g., ISCR Case No. 12-01295 at 3 (App. Bd. Jan. 20, 2015).

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 burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. See, e.g., ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

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). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see, AG ¶ 1(d).

Analysis

Guideline F: Financial Considerations

The security concern under this guideline is set out 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. . . .

The relevant disqualifying condition under AG ¶ 19 is:

(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.

Applicant’s admissions, testimony, and the documentary evidence in the record are sufficient to establish the disqualifying condition above.

The following mitigating conditions under AG ¶ 20 are potentially relevant:

(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.

Applicant has a long history of failing to file Federal and state income tax returns. He stated that he filed his past-due returns when he realized it could impact his security eligibility. Security requirements include consideration of a person's judgment, reliability, and a sense of his or her legal obligations. *Cafeteria & Restaurant Workers Union, Local 473 v. McElroy*, 284 F.2d 173, 183 (D.C. Cir. 1960), *aff'd*, 367 U.S. 886 (1961). Failure to comply with Federal and/or state tax laws suggests that an applicant has a problem with abiding by well-established Government rules and regulations. Voluntary compliance with rules and regulations is essential for protecting classified information. See, e.g., ISCR Case No. 14-04437 at 3 (App. Bd. Apr. 15, 2016). By failing to file Federal and state income tax returns in a timely manner, Applicant did not demonstrate the high degree of good judgment and reliability required of persons granted access to classified information. See, e.g., ISCR Case No. 12-05053 at 4 (App. Bd. Oct. 30, 2014).

The timing of resolution of financial problems is also relevant in determining the extent to which an applicant has demonstrated mitigation. ISCR Case No. 09-07551 at 4 (App. Bd. Mar. 1, 2011). Although not alleged in the SOR, he also failed to pay income taxes when due for many years. Even though Applicant stated that his 2003-2014, and 2016 to 2017 delinquent income tax returns have been filed, he thereafter failed to comply with the filing requirements for his 2020 and 2021 returns. I have insufficient documentary evidence to conclude that his state income tax returns have been filed, and that his state tax debts are fully paid. Conduct not alleged in the SOR may be considered to decide whether a particular adjudicative guideline is applicable, to evaluate evidence of extenuation, mitigation, or changed circumstances, or as part of a whole-person analysis.

ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006). I have considered Applicant's recent failure to timely file his 2020 and 2021 tax returns when due, and his failure to pay Federal and state income taxes when due, for the limited purposes described above.

Applicant is responsible for presenting evidence to rebut, explain, extenuate, or mitigate admitted or proven facts. When given an opportunity to support his contentions, he balked. Although he has now filed all of his Federal tax returns to date, I am not convinced that he has established a track record of consistent, on-time filing of all tax returns when due, and payment of taxes owed when required. I also note that an applicant who begins to resolve his or her financial problems only after being placed on notice that his or her security clearance is in jeopardy may be lacking in the judgment and self-discipline to follow rules and regulations over time or when there is no immediate threat to his or her own interests. (See, e.g., ISCR Case No. 17-01213 at 5 (App. Bd. Jun. 29, 2018); ISCR Case No. 17-00569 at 3-4 (App. Bd. Sept. 18, 2018))

Applicant's tax issues have been longstanding and remain a continuing concern. I give mitigating credit for resolving his tax issues with the IRS, however, his repeated failure to file Federal and state income tax returns and pay taxes when due have not been sufficiently mitigated given the number of years of intentional non-compliance and disregard. I also have concerns about his overall financial responsibility and willingness to comply with future income tax obligations.

Applicant's purported failure to file tax returns when due based on his overseas assignments is not supported by the evidence. He failed to file for many years before beginning his overseas assignments, and he could have filed on his own or by use of a tax preparer despite those assignments. Although he admitted to not managing his taxes well and intentionally failing to file returns when due, he has not sought financial counseling and waited too long to utilize qualified tax preparation services. AG ¶¶ 20 (d) and (g) apply as he has now filed all income tax returns due, and appears to have paid off his Federal tax debts through IRS credits and garnishment. However, no mitigating condition fully relieves him of his overall financial irresponsibility with regard to meeting Federal and state income tax obligations on a timely basis.

Whole-Person Concept

Under AG ¶¶ 2(a), 2(c), and 2(d), the ultimate determination of whether to grant national security eligibility must be an overall commonsense judgment based upon careful consideration of the guidelines and the 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 relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d).

I considered all of the potentially disqualifying and mitigating conditions in light of the facts and circumstances surrounding this case. I have incorporated my findings of fact and comments under Guideline F in my whole-person analysis. I considered Applicant's

overseas work, military service, family responsibilities, and alleged improprieties by his tax preparer. I remain unconvinced of his overall financial responsibility, and his ability, intent, and desire to meet his financial obligations in the future, especially in tax compliance, given his history of disregard.

Accordingly, I conclude Applicant has not carried his burden of showing that it is clearly consistent with the national security interest of the United States to grant him eligibility for access to classified information.

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 and 1.b:	Against Applicant

Conclusion

I conclude that it is not clearly consistent with the national security interest of the United States to grant Applicant eligibility for access to classified information. Applicant's application for a security clearance is denied.

Gregg A. Cervi
Administrative Judge