



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



In the matter of:)
)
 [Name redacted]) ISCR Case No. 22-01659
)
 Applicant for Security Clearance)

Appearances

For Government: Sakeena Farhath, Esq., Department Counsel
For Applicant: *Pro se*

09/28/2023

Decision

HOGAN, Erin C., Administrative Judge:

Applicant failed to timely file his federal and state income tax returns for tax years 2016 to 2020. Guideline F (financial considerations) security concerns are not mitigated. Eligibility for access to classified information is denied.

Statement of the Case

On October 28, 2020, Applicant completed and signed his Questionnaires for Investigations Processing or security clearance application (SCA). (Government Exhibit (GE) 1) On September 28, 2022, the Department of Defense Counterintelligence and Security Agency, (DCSA) Consolidated Adjudication Services (CAS) 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.

The SOR detailed reasons why the DCSA CAS 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, Financial

Considerations. On November 30, 2022, Applicant responded to the SOR and requested a hearing before an administrative judge.

On January 18, 2023, Department Counsel was ready to proceed. On June 14, 2023, the case was assigned to me. On July 18, 2023, DOHA issued a notice of hearing, setting the hearing for August 17, 2023. The hearing was held as scheduled using a video-teleconference system.

During the hearing, Department Counsel offered five exhibits, Government Exhibits (Gov) 1 - 5, which were admitted without objection. Applicant offered 11 exhibits which were admitted as Applicant Exhibits (AE) A - K, without objection. The record was held open until August 31, 2023, to allow Applicant to submit additional exhibits. He timely submitted two documents which were admitted as AE L - M, without objection. On August 25, 2023, DOHA received a transcript of the hearing. The record closed on August 31, 2023.

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

Procedural Issue

During the hearing, the Government moved to amend SOR ¶ 2.a pursuant to Directive paragraph E3.1.17, as follows:

b. You are indebted to the Federal government for unpaid taxes for tax year 2017 in the approximate amount of \$3,637.02. As of the date of the Statement of Reasons, the taxes remain unpaid.

The amendment was approved without objection.

Findings of Fact

In Applicant's SOR response, he denied the allegation in SOR ¶ 1.a and admitted the allegation in SOR ¶ 2.a. His admissions are accepted as findings of fact. Additional findings follow.

Applicant is a 42-year-old employee of a defense contractor seeking to maintain a security clearance. He has held a security clearance since 2006. He started at his current employer in July 2023. He worked for several other contractors prior to his current position. He is a high school graduate and has some college credits. He married in 2014, but separated from his spouse in 2016. He has no children. (Tr. 22-24; Gov 1)

Financial Considerations

The SOR alleges Applicant failed to timely file, as required, his state and Federal income tax returns for tax years 2016 to 2020. (SOR ¶ 1.a: Gov 1 at 73-74; Gov 2) Applicant is also alleged to owe the Federal government, Internal Revenue Service (IRS),

approximately \$3,637.02 (initially \$8,121) for unpaid taxes for tax year 2017. (SOR ¶ 1.b: Gov 2 at 13-14) Applicant disclosed on his SCA, dated October 28, 2020, that he had not filed federal and state income tax returns for tax years 2016, 2017, 2018, and 2019. (Gov 1, Section 26, at 73-74) On December 29, 2021, he provided additional information about the status of his federal and state tax returns in response to DOHA Interrogatories. In his response he indicated he had not filed his state income tax returns for tax years 2016 – 2020, because he was waiting for his federal tax returns to be completed. He did not want to create a financial hardship by owing both at the same time. He also provided copies of federal tax transcripts for tax years 2017, 2018, 2019 and 2020. (Gov 2)

In his response to the SOR, Applicant claims that he filed his taxes through tax year 2021. He said the IRS has a severe back log. The last update he received from the IRS was that tax years 2016 - 2018 were processed. They are working on the 2019 taxes and cannot process later years until it is complete. Applicant states the tax debt incurred in 2017 should be resolved once the refunds from unprocessed tax returns are applied to the debt. If he still owes taxes after the income tax returns are processed, he will be able to pay the balance. (Answer to SOR)

During the hearing, Applicant admitted to being aware that federal income tax returns were required to be filed by April 15th of each year. He states he stopped filing his federal and state income tax returns in 2016 because he was going through a difficult period during his separation from his spouse. He did not handle things responsibly. His failure to timely file his federal and state income tax returns created a bigger problem. He had difficulty finding his W-2s. (Tr. 25-26)

Applicant started to file his late income tax returns on his own in 2020, after he submitted his SCA. Some of the returns were accepted. Some were not. The IRS found issues with the 2019 federal income tax return so he had to amend his return. In February 2023, he hired a tax professional to help with amending his 2017 and 2019 federal and state income tax returns. He believes once his amended 2017 federal income tax return is processed, the balance of taxes owed for 2017 will be completely resolved or significantly reduced. Applicant owed \$8,121.02 in unpaid taxes for tax year 2017. Refunds from tax years 2018, 2020, and 2021 were applied to the 2017 tax debt. The current balance owed for the 2017 tax debt is \$3,637.02 (Tr. 20-21, 36-38; AE H; AE I)

On June 23, 2023, Applicant entered into a repayment agreement with the IRS for the 2017 federal tax debt. He agreed to a monthly payment of \$161 via direct deposit until the debt is resolved. He made his first payment on August 1, 2023. He will pay it off sooner when the refund from his 2019 tax return is applied to the 2017 federal tax debt. (Tr. 26-31, AE J) Once his amended 2017 federal income tax return is processed and accepted, he believes he will receive a refund of \$4,011.

The current status of the federal and state income tax returns and any balances owed are as follows:

2016 Federal and State Income Tax Returns: Applicant filed his 2016 federal income tax return on June 14, 2021. He does not owe a balance for tax year 2016. (AE

B) The status of the 2016 state income tax return is unknown. Applicant testified that all state income tax returns are complete with the exception of tax year 2017. He did not provide documents showing the 2016 state income tax return was filed and resolved. (Tr. 38-41)

2017 Federal and State Income Tax Returns: The IRS initially filed a substitute tax return on March 2, 2020. The total balance owed plus interest and penalties was \$8,121.50. (Gov 2) On February 4, 2021, Applicant filed an amended 2017 income tax return. (AE C) At the time of the hearing, the balance was reduced to \$3,637.02 due to refunds from other tax years being applied to the 2017 tax debt. On August 23, 2023, Applicant filed a second amended federal income tax return for 2017 with the help of a tax professional. The amended return indicates Applicant is owed a refund of \$4,011 for tax year 2017. (AE L at 5-6) Applicant completed his 2017 state income tax return on August 23, 2023. He believes he will receive a refund of \$259. (AE L at 3-4)

2018 Federal and State Income Tax Returns: Applicant filed his 2018 federal income tax return on August 16, 2021. The IRS account transcript indicates he received a refund of \$3,793, which was applied to the 2017 federal tax debt. (AE D) The status of Applicant's 2018 state income tax return is unknown. Applicant testified that all state income tax returns are complete with the exception of tax year 2017. He did not provide documents showing the 2018 state income tax return was filed and resolved. (Tr. 38-41)

2019 Federal and State Income Tax Returns: Applicant requested the status of his 2019 federal income tax return on August 2, 2023. The IRS contacted him indicating they are unable to process the 2019 tax transcript at the present time. (AE H) A summary of Applicant's account balance with the IRS for tax years 2018 to 2022, indicates he owes nothing for 2019. (AE I) After the hearing, Applicant provided a duplicate copy of his 2019 federal income tax return, which he signed on January 17, 2023. Applicant is owed a refund of approximately \$1,440. (AE L at 7-16). He also provided a copy of his 2019 state income tax return which he signed on January 17, 2023. He is owed a state income tax refund of \$140 for tax year 2019. Even though the 2019 state and federal tax returns were signed, it is not clear that they were filed. (Tr. 32-33; AE L at 17-20)

2020 Federal and State Income Tax Returns: Applicant's 2020 federal income tax return was sent to the IRS on January 23, 2023. The 2020 IRS transcript indicates he filed his 2020 federal income tax return on February 20, 2023. He received a refund of \$1,967, which was transferred to tax year 2017. (Tr. 34; Gov 4 at 27; AE E) The state accepted Applicant's 2020 income tax return on January 28, 2023. He received a state income tax refund of \$125 for tax year 2020. (Gov 4 at 25)

Applicant provided his federal income tax returns for tax years 2021 and 2022. These are not alleged in the SOR. This information will not be considered for disqualifying purposes. They will only be considered under matters of extenuation and mitigation, assessment of credibility, and under the whole-person factors.

2021 Federal and State Income Tax Returns: Applicant filed his 2021 federal income tax return on February 20, 2023. He received a refund of \$1,032, which was

applied to his 2017 federal tax debt. (Tr. 34; AE F) The 2021 federal income tax return was sent to the IRS on January 23, 2023. (Gov 5 at 28) The 2021 state income tax return was sent to the state on January 27, 2023. Applicant owes a \$65 balance for his 2021 state income taxes. (Gov 5 at 8 - 22) Applicant made a payment of \$77.76 to the state comptroller for tax year 2021 on August 9, 2023. (AE A)

2022 Federal and State Income Tax Returns: Applicant filed his 2022 federal income tax return on June 5, 2023. The IRS account transcript indicates he owes a balance of \$174.90. (AE G; AE I) The status of Applicant's 2022 state income tax return is unknown. He made a payment of \$57.49 to the state comptroller on August 15, 2023, for tax year 2022. It is not clear whether the balance owed is paid off. (Tr. 35; AE K)

Applicant provided a personal financial statement on December 23, 2021. His net monthly income was approximately \$6,307. His monthly expenses were approximately \$3,800. His monthly net remainder was about \$2,507. (Gov 2 at 9) These numbers have likely changed because Applicant's current annual salary is \$150,800. (Tr. 24)

Applicant provided documentary proof that he filed his state income tax returns for tax years 2017, 2019, and 2020. He did not provide documentary proof that his state income tax returns were filed for tax years 2016 and 2018. The record was held open to allow him to contact the state comptroller's office to acquire documentation about the status of his state income tax returns for the years in question. Applicant claims the state would only provide the information about his state income tax returns verbally over the phone. He claims they said the only year that was outstanding was tax year 2017. He recently filed this return and is expected to receive a refund. (AE M at 1)

Character Evidence

Applicant provided two letters from close friends. Ms. H has known Applicant for the past 31 years. She attests to Applicant's honest and upstanding character. He has always been there to support her during difficult moments. She is a single mother and Applicant has provided a positive role model for her three children. He has donated his time to take part in her church's activities such as helping with food drives and delivering meals to the elderly during the COVID-19 pandemic. Ms. H personally witnessed the toll the dissolution of his 14-year marriage/relationship took on him. Applicant struggled to get back on his feet emotionally. She states Applicant is not one to cheat, evade or scam the system. He has a high level of integrity. (AE M at 2-3)

Mr. B. has known Applicant for several years. He notes Applicant's financial background has helped their annual community project every fall. Between September and December, their group sponsors over 125 families who are in the foster care system. In December, they provide gifts and a holiday party for children in foster care. Applicant uses his financial analyst skills to formulate a budget every year. Applicant contributes to the success of the project and has refused to accept any payment for his contributions. He also tutors children between the ages of 4 and 7 on reading and spelling. (AE M at 4)

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

Guideline F, Financial Considerations

AG ¶ 18 expresses the security concern for financial considerations:

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. Affluence that cannot be explained by known sources of income is also a security concern insofar as it may result from criminal activity, including espionage.

The guideline notes several conditions that could raise security concerns. I have considered all of them under AG ¶ 19 and the following potentially applies:

(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 failed to timely file his federal and state income tax returns for tax years 2016 – 2020. He owes approximately \$3,637 in federal income taxes for tax year 2017. AG ¶ 19(f) applies.

The guideline also includes conditions that could mitigate security concerns arising from financial difficulties. I have considered all of the mitigating conditions under AG ¶ 20 and the following potentially apply:

(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; 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 admits he stopped filing his federal and state income tax returns in 2016 because he had a difficult time dealing with his marital separation. This is considered a circumstance beyond his control. AG ¶ 20(b) partially applies. However, it is given less weight because I cannot conclude Applicant acted responsibly under the circumstances. He neglected to timely file and pay his federal and state income taxes for more than four years. He was aware he was required to file them on an annual basis, but neglected to do so. It is noted that while he filed federal income tax returns for tax years 2021 and 2022, both returns were filed late.

AG ¶ 20(g) applies with respect to Applicant's federal income returns for tax years 2016 through 2020. He filed his federal income tax returns in 2021. They were late, but they were filed. The IRS contacted him about issues with his 2019 federal income tax return in December 2021. He had not resolved these issues at the date of the hearing. After the hearing, he consulted a professional tax preparer who helped him prepare amended returns for 2017 and 2019. Applicant entered into a repayment plan related to his 2017 federal tax debt. He made his first payment on August 1, 2023. The 2017 tax debt has been reduced by applying his federal tax refunds for tax years 2018, 2020, and 2021 to the debt. Applicant is confident the debt will be resolved once the refund for tax year 2019 is applied to the balance owed for the 2017 tax year.

Applicant did not provide documentary proof that his state income tax returns were filed for tax years 2016 and 2018. The record was held open to allow him to contact the state comptroller's office to acquire documentation about the status of his state income tax returns for the years in question. Applicant claims the state would only provide status about his state income tax returns verbally over the phone. He claims they said the only year that was outstanding was tax year 2017. He recently amended this return and is expected to receive a refund. Absent corroborating documentary evidence, this is not sufficient for me to conclude that all the state income tax returns have been filed.

Applicant receives some credit for finally filing his federal and state tax returns (with the exception of his 2016 and 2018 state income tax returns), however, any credit is minimized by his extended delay in filing those returns. The DOHA Appeal Board has held that failure to comply with tax laws suggests that an applicant has a problem with abiding by well-established government rules and systems. Voluntary compliance with rules and systems is essential for protecting classified information. *See, e.g.,* ISCR Case No. 16-01726 at 5 (App. Bd. Feb. 28, 2018). A person who fails repeatedly to fulfill his or her legal obligations, such as filing tax returns and paying taxes when due, 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. 17-01382 at 4 (App. Bd. May 16, 2018).

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.

In this case, Applicant did not file his late federal and state income tax returns until after he submitted his SCA. He did not mitigate the financial considerations security concerns raised by his failure to timely file his federal and state income tax returns.

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 those guidelines but some warrant additional comment.

Applicant is highly regarded by his friends. He is given credit for disclosing his federal and state tax issues on his October 2020 security clearance application. He volunteers in the community. He has sufficient financial resources to pay his debts, including his taxes. The only area of concern under financial considerations is his history of failing to timely file his federal and state income tax returns for tax years 2016 through 2020.

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 tax years 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. 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).

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 and 1.b: 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.

Erin C. Hogan
Administrative Judge