



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



In the matter of:)
)
) ISCR Case No. 23-00614
)
Applicant for Security Clearance)

Appearances

For Government: Allison P. O’Connell, Esq., Department Counsel
For Applicant: *Pro se*

02/06/2024

Decision

HARVEY, Mark, Administrative Judge:

Guideline F (financial considerations) security concerns are not mitigated. Eligibility for access to classified information is denied.

Statement of the Case

On August 30, 2021, Applicant completed an Electronic Questionnaires for Investigations Processing or security clearance application (SCA). (Government Exhibit (GE) 1) On March 29, 2023, the 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); Department of Defense (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) On May 21, 2023, Applicant provided a response to the SOR, and he requested a hearing. (HE 3)

The SOR detailed reasons why DOHA 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 August 28, 2023,

Department Counsel was ready to proceed. On September 15, 2023, the case was assigned to me. On October 2, 2023, DOHA issued a notice setting the hearing for November 2, 2023. (HE 1) The hearing was held as scheduled on November 2, 2023, using the Microsoft Teams video teleconference system. (HE 1)

During the hearing, Department Counsel offered two exhibits into evidence, and Applicant offered five documents into evidence. (Tr. 16-18; GE 1-GE 2; Applicant Exhibit (AE) A-AE E) All proffered exhibits were admitted into evidence. (Tr. 16-18; GE 1-GE 2; AE A-AE E)

On November 13, 2023, DOHA received a copy of the transcript. The record closed on December 7, 2023. (Tr. 45) Applicant sent a post-hearing email, which I admitted as AE F.

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 and 1.b. (HE 3) He also provided mitigating information. His admissions are accepted as findings of fact.

Applicant is a 40-year-old engineering manager who has been employed by a large defense contractor since 2004. (Tr. 6-7) In 2001, he graduated from high school. (Tr. 6) In 2005, he received a bachelor's degree in a specialized type of engineering. (Tr. 6) He has not served in the military. (Tr. 7) In 2020, he married, and he has a two-year-old daughter. (Tr. 7-8)

Applicant has held a security clearance since 2005, and there is no evidence of security violations. He lived in a foreign country from November 2013 through September 2018, where he worked for his current employer. (HE 3) He worked very hard to meet his employer's requirements, and this included deployments and rotations away from his residence in the United States. (Tr. 21-22)

Financial Considerations

SOR ¶¶ 1.a and 1.b allege Applicant failed to timely file as required his federal and state income tax returns for tax years (TY) 2014 through 2020. His federal income tax returns for TYs 2019 through 2021 were filed in May 2022. His federal income tax return for TY 2022 was timely filed.

Several of the overdue tax returns were drafted several years ago; however, Applicant elected not to file them because he thought it would be better to file all of them at the same time. (Tr. 29; GE 2 at 3) He wanted his attorney to review the draft tax returns before they were filed. (Tr. 35) When he first met with a tax attorney, the attorney suggested that he not file the tax return for TY 2015, and to wait for the IRS to address

the issue. (Tr. 30-32) The IRS filed substitute returns for TYs 2014 and 2016, and determined he owed about \$79,000 for TY 2014 and about \$61,000 for TY 2016. (Tr. 32-33, 36; GE 2 at 3)

For TY 2018, the state assessed additional taxes of about \$16,000. (GE 2 at 4) However, the IRS was unaware of the taxes Applicant paid to the foreign country while he lived overseas and of the amount of state taxes he already paid. (Tr. 32; GE 2 at 4) He expected to receive a deduction for taxes paid to the foreign country. He did not feel an urgency to get his federal and state income tax returns filed because he did not believe he would owe taxes after all tax returns were correctly filed. (Tr. 30-31) Applicant conceded at the time of his hearing, and in his December 7, 2023 email, that he had not filed all federal and state income tax returns which were due for TYs 2014 through 2018. (Tr. 38) On December 7, 2023, Applicant provided the information which he summarized in the following table. (AE F)

Tax Year	Federal Income Tax Return	State Tax Return
2014	Expect zero liability – return to be prepared	TBD – return to be prepared
2015	Zero liability – finalizing updated return	Expect potential balance due of ~\$8K to [State]
2016	Zero liability – finalizing updated return	PAID – zero balance due
2017	Zero liability – finalizing updated return	Expect potential balance due of ~\$9k to [State]
2018	Expect small \$0 to \$100 balance – finalizing updated return	Expect potential balance due of ~\$5k to [State]

Applicant's exhibits submitted at his hearing provided the following information. (AE A-AE D) The adjusted gross income and taxes are rounded to the nearest thousand.

Tax Years	Adjusted Gross Income	Tax Refund (+) Tax Owed (-)	Applicant Exhibit
2019	\$127,000	\$0	A
2020	\$162,000	-\$12,000	B
2021	\$178,000	+\$1,000	C
2022	\$172,000	+\$3,000	D

Applicant paid the taxes owed for TY 2020 when he filed his federal income tax return in May 2022. (AE B) His refund for TY 2022 was transferred to address a tax debt for TY 2016, which was based on the substitute return the IRS filed. (Tr. 40-41; AE D) He said all state and federal taxes for TYs 2019 through 2022 are filed and paid. (AE F) A letter from a law firm dated November 1, 2023, indicated the law firm had agreed to work on filing Applicant's tax returns for TY 2014 through 2018. (Tr. 21-22; AE E)

Applicant is generally financially responsible. His car loan will be paid off in two months. (Tr. 20) During his time living in a foreign country, he had access to tax resources which he could have used to complete his federal and state income tax returns. (Tr. 20,

22) He was aware of his obligation to file his federal income tax returns while he was living in a foreign country. (Tr. 20, 24) He had some difficulties obtaining information about filing his state and federal income tax returns. (Tr. 21) Filing his tax returns “would then be out-prioritized by other things rather than moving forward.” (Tr. 21) He acknowledged that he did not have a good reason for his failure to timely file his tax returns. (Tr. 22, 24)

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 [or her] 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 . . . annual Federal, state, or local income tax returns . . . as required." The record establishes the disqualifying condition in

AG ¶ 19(f) requiring additional inquiry about the possible applicability of mitigating conditions. Discussion of the disqualifying condition is contained in the mitigation section, *infra*.

The financial considerations mitigating conditions under AG ¶ 20 which may be applicable in this case 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; 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.

The Appeal Board in ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013) 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 provided some important mitigating information. He had difficulty obtaining information about federal and state income taxes while working for his company overseas. He worked very hard for his employer, and this left him with less time and energy to complete federal and state tax returns. However, “[e]ven if [an applicant’s] financial difficulties initially arose, in whole or in part, due to circumstances outside his [or her] control, the [administrative judge] could still consider whether [the applicant] has since acted in a reasonable manner when dealing with those financial difficulties.” ISCR Case No. 05-11366 at 4 n.9 (App. Bd. Jan. 12, 2007) (citing ISCR Case No. 03-13096 at 4 (App. Bd. Nov. 29, 2005); ISCR Case No. 99-0462 at 4 (App. Bd. May 25, 2000); ISCR Case No. 99-0012 at 4 (App. Bd. Dec. 1, 1999)). He did not establish that he acted responsibly under the circumstances. SOR ¶ 20(b) is partially established.

Applicant failed to timely file as required his federal and state income tax returns for TYs 2014 through 2020. He gave a lower priority to completion of his tax returns than he did for his work for the defense contractor. His federal income tax returns for TYs 2019 through 2020 were filed in May 2022. Several tax earlier returns were not filed by the time of his hearing. 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 or supply information, 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 a crime. In regard to the failure to timely file his federal income tax returns, the 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).

The Appeal Board in ISCR Case No. 15-01031 (App. Bd. June 15, 2016) 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 instance, Applicant failed to timely file as required his federal and state income tax returns for TYs 2014 through 2020. Several tax returns earlier were not filed by the time of his hearing. Applying the Appeal Board’s jurisprudence, he did not prove that he was unable to make greater progress sooner in the filing of tax returns. Under all the circumstances, Applicant’s failures to timely file his federal and state income tax returns are not mitigated.

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 common-sense 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 40-year-old engineering manager who has been employed by a large defense contractor since 2004. In 2005, he received a bachelor's degree in a specialized type of engineering. He has held a security clearance since 2005, and there is no evidence of security violations. He lived in a foreign country from November 2013 through September 2018. He worked very hard to meet his employer's requirements, and this included deployments and rotations away from his residence in the United States.

The evidence against grant of a security clearance is detailed in the financial considerations section, *supra*, and this evidence is more substantial at this time than the evidence of mitigation. Applicant did not establish that he was unable to timely file his federal and state income tax returns for TYs 2014 through 2020. Several tax earlier returns were not filed by the time of his hearing. He gave a higher priority to other matters than filing his tax returns. His failure to take timely, prudent, responsible, good-faith actions from April 2015 (when his TY 2014 tax return was due) to get his tax returns timely filed to present raise unmitigated questions about his reliability, trustworthiness, and ability to protect classified information. See AG ¶ 18.

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. "[A] favorable clearance decision means that the record discloses no basis for doubt about an applicant's eligibility for access to classified information." ISCR Case No. 18-02085 at 7 (App. Bd. Jan. 3, 2020) (citing ISCR Case No.12-00270 at 3 (App. Bd. Jan. 17, 2014)).

This decision should not be construed as a determination that Applicant cannot or will not attain the state of reform necessary for award of a security clearance in the future. With more effort towards resolution of his tax issues, he may well be able to demonstrate persuasive evidence of his security clearance worthiness.

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. Applicant failed to mitigate financial considerations security concerns.

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 interests of national security of the United States to grant or continue Applicant's national security eligibility for access to classified information. Eligibility for access to classified information is denied.

Mark Harvey
Administrative Judge