



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



In the matter of:)
)
) ISCR Case No. 22-02188
)
Applicant for Security Clearance)

Appearances

For Government: Sekeena Farhath, Esq., Department Counsel
For Applicant: Todd A. Hull, Esq.

05/09/2024

Decision

HALE, Charles C., 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 a security clearance application on January 10, 2020. On December 12, 2023, the Department of Defense (DoD) sent him a Statement of Reasons (SOR) alleging security concerns under Guideline F. The DoD 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) promulgated in Security Executive Agent Directive 4, National Security Adjudicative Guidelines (December 10, 2016).

Applicant answered the SOR on March 6, 2023, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on March 30, 2023, and the case was assigned to me on November 6, 2023. On November 21, 2023, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for December 20, 2023. I convened the hearing as scheduled. Government Exhibits (GE) 1 through 5 were admitted in evidence without objection. Applicant testified, presented witness testimony, and offered Applicant Exhibits (AE) A through L, which were admitted without objection. DOHA received the transcript (Tr.) on January 5, 2024. Neither party requested the record remain open after the hearing. (Tr. at 122.)

Findings of Fact

In Applicant's Answer he admitted he failed to timely file Federal and state tax returns for the tax years 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, and 2021. His admissions are accepted as findings of fact.

Applicant is a 49-year-old software lead. He has worked for his sponsor since 2013 and has worked for his employer since 2004. He has held a security clearance since March 2003. (GE 1; GE 3 at 32; GE 5 at 2; Tr. at 62.) He has taken community college courses but holds no degree. (GE 1; GE 4; Tr. at 61.) He is single and has no children. (GE 1; Tr. at 60.)

Applicant failed to timely file Federal and state income tax returns for at least tax years 2013 through 2021, as required (SOR 1.a and 1.b). He testified he believed he was late on the initial return for 2013. When he did the calculations each year, he determined he did not owe any taxes and would be getting a refund, so he put it off. He never got around to filing his taxes because he figured the worst that could happen was, he would not get his refund back, and he was "okay" with that consequence. The situation "just sort of snowballed" for the next several years. (Tr. at 65.) He explained he thought he read that a person did not have to file if they were going to get a refund, but he could not recall where he got that idea from. He was not concerned about getting his refund money back because he did not need it. (Tr. at 66.)

In response to Government interrogatories Applicant provided an explanation for his failure to file his Federal and state tax returns.

It was my understanding perhaps incorrectly that if at the end of the year filings the result was getting a refund that it was not necessary unless I owed additional taxes beyond those already withheld throughout the year. My W-4 form has me taking no ded[uc]tions at all - not even myself - meaning that taxes withheld are maximized for any income I make. At the end of the year once I finally include myself as a deduction and include any additional deductions such as mortgage and local taxes it results in a substantial refund. I have no additional income other than some dividends which have yet to [exceed] taxes withheld throughout the year.

Applicant explained his calculation process further in his testimony, which he did for each tax year. (Tr. at 83-84.) He received refunds in every year but one state tax year. He had no explanation for why he did not file that state tax return, given the system he used. He stated "I think that it -- I don't remember why that one came up, why that one ended up owing because I didn't owe anything in the Federal tax. I have no idea why that particular year that, the Federal or the state required a payment." (Tr. at 99.)

Applicant told the investigator in his March 2020 security clearance interview he "had not paid" state income tax and was in the process of finding a tax consultant to help him file for all years they had discussed (2012-2018). He told the investigator he was trying to refinance his mortgage and the refinance package required proof of him filing

taxes. He told the investigator he would “contact an accountant by next week and rectify all outstanding taxes...” (GE 5 at 5; Tr. at 89.) He never refinanced his mortgage. (Tr. at 99.) He testified all the alleged tax years in SOR had been filed in March 2023. (Tr. at 67.) He supported his testimony with documentary evidence and the testimony of the certified public accountant (CPA) who prepared the returns. He hired the CPA in March 2023. (AE C; AE D; AE E; AE F; Tr. at 22-36; 81-82.) When asked about the SCA question inquiring about whether an applicant had failed to file their Federal or state taxes and why he waited until March 2023 to address the tax returns, he stated the SCA says “by law or ordinance. So, that makes me think that if it's required by law or ordinance you need to file. And I didn't think it was required because I was getting a -- in my mind I was getting a refund.” (Tr. at 86.)

Applicant completed an SCA in October 2013, in which he listed he had not filed his 2011 Federal and state income taxes. (GE 3 at 34.) He admitted that prior to 2013 he had failed to timely file his Federal and state tax returns for 2011 and 2012. (GE 3; Tr. at 92-94, 100.) In his 2013 security clearance interview he told the investigator he was delinquent in filing his taxes because he lost his W-2 and mortgage documents, and it was difficult to find the necessary documents to file his taxes for the two years in question. (GE 4 at 3.) He testified he appreciated the importance of good finances when he was trying to buy a house in 2005 and was attempting to get some of the money back in order to have a down payment on the house. (Tr. at 82.) He is financially capable of meeting his financial obligations with an estimated net worth of over \$2.2 million. (Tr. at 73; AE H; AE I.) It was not until he received the SOR and that:

[T]he idea that I was going to lose my clearance started becoming -- not a reality but a concern that because of this this other thing might happen. That's when I started to realize that something was -- that was wrong and that I needed to get, you know, professional guidance.-. . . (Tr. at 102.)

Applicant provided character statements and presented witnesses who attested to his character and exceptional work performance. His performance evaluations supported the testimony of his colleagues. (AE B; AE L.)

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 disqualifying conditions that could raise a security concern and may be disqualifying in this case: "(c) a history of not meeting financial obligations"; and "(f) failure to file or fraudulently filing annual Federal, state, or local income tax returns or failure to pay annual Federal, state, or local income tax as required." The record establishes the disqualifying conditions in AG ¶¶ 19(c), and 19(f), requiring additional inquiry about the possible applicability of mitigating conditions. Discussion of the disqualifying conditions is contained in the mitigation section, *infra*.

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

(a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment; and

(g) the individual has made arrangements with the appropriate tax authority to file or pay the amount owed and is in compliance with those arrangements.

In ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013), the DOHA Appeal Board explained Applicant's responsibility for proving the applicability of mitigating conditions as follows:

Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in security clearance decisions is that articulated in *Egan, supra*. "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." Directive, Enclosure 2 ¶ 2(b).

Applicant documented that he had recently filed his outstanding Federal and state income tax returns in March 2023, about four months after receiving the SOR and three years after he told an investigator that he "had not paid" state income taxes they had discussed, which included the alleged years of 2013 through 2018. He also told the investigator he would contact an accountant and rectify all outstanding taxes. His behavior was not infrequent, and he filed his Federal and state income tax returns only after his security clearance was in jeopardy, which casts doubt on the individual's current reliability, trustworthiness, and good judgment. AG ¶ 20(a) is not established.

AG ¶ 20(g) is not established. Applicant failed to timely file his Federal and state income tax returns for tax years 2013 through 2021. Failure to timely file Federal and state income 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). The Appeal Board has 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). His explanation that he was owed a refund in all but one year and did not believe he needed file as a result was not supported by any legal authority. His failure to ensure he was compliant with tax laws demonstrates poor judgment and lack of reliability required to be granted access to classified information. He acknowledged that on a prior SCA he had failed to file his taxes in earlier tax years as required. See ISCR Case No. 17-03049 (App. Bd. May 15, 2018) citing ISCR Case No. 14-04437 at 3 (App. Bd. Apr. 15, 2016) . 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).

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 instance, Applicant filed his overdue Federal and state income tax returns when he realized his clearance was in jeopardy. However, the Appeal Board clarified that even in instances where an "[a]pplicant has purportedly corrected [his or her] Federal [or state] tax problem, and the fact that [a]pplicant 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 pay Federal income taxes when due. 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).

Under all the circumstances, Applicant's failures to timely file his Federal and state income tax returns for tax years 2013 through 2021 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 provided strong character evidence. He admitted that he made errors; he intends to learn from those mistakes; and he promised not to repeat them. He has provided contributions to his employer and the national defense as evidenced by his past performance.

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’s failure to take timely, prudent, responsible, good-faith actions from 2013 to 2021 (when those tax returns were due) to timely file his tax returns 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 establishment of a track record of timely filing his tax returns, 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.

Charles C. Hale
Administrative Judge