



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



In the matter of:)	
)	
REDACTED)	ISCR Case No. 12-11075
)	
Applicant for Security Clearance)	

Appearances

For Government: Eric H. Borgstrom, Esq., Department Counsel
For Applicant: *Pro se*

08/08/2016

Decision

MENDEZ, Francisco, Administrative Judge:

Applicant did not mitigate security concerns raised by his failure to timely file his federal and state tax returns. Notwithstanding the presence of some favorable information, Applicant failed to meet his heavy burden of persuasion for continued access to classified information. Clearance is denied.

History of the Case

On August 26, 2015, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) sent Applicant a Statement of Reasons (SOR) alleging that his circumstances raised security concerns under the financial considerations guideline.¹ Applicant answered the SOR and requested a hearing to establish his continued eligibility for access to classified information (Answer).

¹ This action was taken under Executive Order (E.O.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the Adjudicative Guidelines (AG) implemented by the Department of Defense on September 1, 2006.

On November 6, 2015, the Defense Office of Hearings and Appeals (DOHA) issued a notice scheduling Applicant's hearing for December 8, 2015. Applicant's request for a continuance was granted by the previous judge assigned to the case, and the hearing was rescheduled for June 8, 2016.²

At hearing, Department Counsel offered Government exhibits (Gx.) 1 – 4. Applicant testified and offered exhibits (Ax.) A and B. At Applicant's request, I kept the record open to provide him the opportunity to submit additional evidence. He timely submitted Ax. C and D. All exhibits were admitted without objection. The hearing transcript (Tr.) was received on June 15, 2016, and the record closed on June 24, 2016.

Findings of Fact

Applicant, who is in his early 60s, has a master's degree in computer science. He has been with his current employer and held a security clearance since 2002. His supervisor, who has known Applicant for approximately eight years, submitted a reference letter noting that, in his experience, Applicant is "detail oriented" and "adheres to all rules defined by his position." (Ax. C)

In May 2012, as part of the periodic reinvestigation process, Applicant submitted a security clearance application (SCA). In response to questions regarding his financial history, Applicant disclosed that he had not filed his 2010 federal and state tax returns. He stated on the SCA that he forgot to file the returns after the extension to file had expired and, in preparing to file his 2011 tax returns, uncovered that he had not filed his previous years' returns. (Gx. 1 at 24)

A month later, in June 2012, Applicant was interviewed by a background investigator. Applicant further explained that the reason he forgot to file his 2010 tax returns was due to extensive travel for work and also related to dealing with the aftermath of a hurricane, which left him without power for some time. He also told the investigator that he hoped to file his 2010 tax returns within a month or so. (Gx. 4 at 3-4)

Applicant did not file his 2010 and 2011 state and federal tax returns until the fall of 2015, after the SOR was issued. At hearing, he further disclosed that he had also not timely filed his 2012 – 2014 tax returns. He filed the overdue 2012 – 2014 tax returns around the same time he filed his 2010 and 2011 returns. (Tr. 18, 25; Ax. A) In response to Department Counsel's questions, Applicant admitted that the SOR prompted him to file his overdue tax returns. (Tr. 34)

Applicant testified that he understood he had a legal obligation to file his tax returns. (Tr. 26). Applicant claimed, for the first time at hearing, that his failure to timely file his 2010 tax return was originally caused by not receiving one of his W-2s from his employer. (Tr.18) In response to Department Counsel's question as to why he had

² Prehearing scheduling correspondence, the notices of hearing, and case management order are attached to the record as Hearing Exhibits (Hx.) I – III, respectively.

failed to remedy his overdue tax filing after the 2012 background interview, Applicant stated:

I honestly can't - - can't explain that . . . Quite honestly, I figured the IRS would come and - - and, you know, basically do an audit on me and force the issue. (Tr. at 26)

Applicant's tax returns reflect that his adjusted gross income (AGI) in 2010 was approximately \$127,000 and \$147,000 in 2011. The returns also reflect that Applicant would have received refunds totaling over \$5,000 each of those years, but he forfeited the refunds when he filed the returns more than three years after they were due. (Ax. D) Applicant presented documentation reflecting a balance of over a million dollars in his savings and investment accounts. (Ax. B) After the SOR was issued, he retained the services of a large, well known tax preparation firm. Applicant states that the firm prepared and filed his overdue 2010 – 2014 federal and state tax returns. Applicant provided unsigned 2010 and 2011 tax returns, which were admitted as Ax. A.

Applicant has received two to three notices from the IRS indicating that they have not received his 2014 tax return. He received the latest IRS notice regarding his missing 2014 tax return in late April or early May 2016. Applicant took no action to resolve this issue before his June 2016 security clearance hearing and it is unclear, as of the close of the record, whether this new tax issue was resolved post-hearing. Applicant states that he timely filed his 2015 federal and state tax returns. (Tr. 27-31, 36)

Policies

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). Individual applicants are eligible for access to classified information "only upon a finding that it is clearly consistent with the national interest" to authorize such access. E.O. 10865 § 2.

When evaluating an applicant's eligibility for a security clearance, an administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations, the guidelines list potentially disqualifying and mitigating conditions. The guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies the guidelines in a commonsense manner, considering all available and reliable information, in arriving at a fair and impartial decision.

Department Counsel must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.14. Applicants are responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven . . . and has the ultimate burden of persuasion as to obtaining a favorable clearance decision." Directive ¶ E3.1.15.

Administrative Judges are responsible for ensuring that an applicant receives fair notice of the issues raised, has a reasonable opportunity to litigate those issues, and is not subjected to unfair surprise. ISCR Case No. 12-01266 at 3 (App. Bd. Apr. 4, 2014). In resolving the ultimate question regarding an applicant's eligibility, an administrative judge must resolve "[a]ny doubt concerning personnel being considered for access to classified information . . . in favor of national security." AG ¶ 2(b). Moreover, recognizing the difficulty at times in making suitability determinations and the paramount importance of protecting national security, the Supreme Court has held that "security clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk an applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Analysis

Guideline F, Financial Considerations

The security concern under this guideline is explained at AG ¶ 18:

Failure or inability 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 information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

The financial considerations security concern is not limited to a consideration of whether an individual with financial problems might be tempted to compromise classified information or engage in other illegality to pay their debts. It also addresses the extent to which an individual's delinquent debts cast doubt upon their judgment, self-control, and other qualities essential to protecting classified information.³

Applicant's failure to timely file his 2010 and 2011 federal and state income tax returns raises the financial considerations security concern. The record evidence also establishes the following financial considerations disqualifying conditions:

AG ¶ 19(c): a history of not meeting financial obligations; and

³ ISCR Case No. 11-05365 at 3 (App. Bd. May. 1, 2012).

AG ¶ 19(g): failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same.

An applicant who fails to timely file or pay his or her taxes, a basic and fundamental financial obligation of all citizens, bears a heavy burden in mitigating the financial considerations security concern.⁴ An administrative judge should closely examine the circumstances giving rise to an applicant's tax-related financial issues and his or her response to it. Furthermore, an applicant's claim of reform must be weighed against the overriding concerns about the individual's lack of judgment and history of failing to abide by rules and regulations regarding their tax obligations.⁵

The guideline lists a number of conditions that could mitigate the financial considerations security concern. I considered all the mitigating conditions, including the following:

AG ¶ 20(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;

AG ¶ 20(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, or a death, divorce or separation), and the individual acted responsibly under the circumstances;

AG ¶ 20(c): the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control; and

AG ¶ 20(d): the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

None of the mitigating conditions apply. Applicant's failure to file his 2010 and 2011 tax returns were not due, in whole or in part, to matters beyond his control. He had the financial means to hire a professional to prepare and file his returns, but elected not to until his failure to file placed his security clearance in jeopardy. Applicant's belated resolution of his tax situation does not mitigate the serious security concerns raised by his failure to timely file his 2010 and 2011 tax returns in light of: (a) the timing of when Applicant filed the overdue returns, (b) his subsequent failure to timely file his 2012 –

⁴ See *generally*, ISCR Case No. 14-03358 at 3 (App. Bd. Oct. 9, 2015) (Board explained the heightened security concerns raised by tax-related financial issues, as follows: "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.").

⁵ ISCR Case No. 14-05794 (App. Bd. July 7, 2016); ISCR Case No. 14-00221 (App. Bd. June 29, 2016); ISCR Case No. 15-01031 (App. Bd. June 15, 2016); ISCR Case No. 12-09545 (App. Bd. Dec. 21, 2015).

2014 returns, and (c) implausible explanations for failing to timely file.⁶ Based upon this record evidence, I am not convinced that similar issues will not recur after the current security clearance review passes.

Additionally, Applicant's testimony that he was waiting until the IRS audited him to resolve his overdue tax situation raises significant concerns about his continued suitability for access to classified information. Specifically, Applicant's testimony raises a concern that he would not report a security violation or issue until confronted with the matter. To his credit, Applicant voluntarily disclosed the adverse information about his delinquent tax filings, even after becoming aware that his failure to timely file placed his clearance in jeopardy.⁷ Such honesty generally tends to mitigate concerns about an individual's ability to self-report potential security issues.

However, the mitigating value to be attached to Applicant's self-disclosure of the adverse tax information is undercut by his shifting explanations for failing to timely file. Notably, he never mentioned in his SCA or during the background interview that the purported cause for his late filing was a supposed missing W-2. Even if I credit Applicant's recent explanation for why he was initially unable to timely file his 2010 returns, he then waited over five years to file the overdue returns. In the intervening five years, Applicant repeatedly failed to comply with his tax obligations. Accordingly, I find that Applicant's self-reporting of the adverse tax information is insufficient to mitigate the overriding security concerns raised by his failure to timely file his tax returns.

In conclusion, Applicant did not mitigate concerns about his judgment, reliability, and willingness to follow rules and regulations raised by his failure to timely file his tax returns. After considering all the evidence, both favorable and unfavorable, including the whole-person factors discussed herein, I find that Applicant failed to meet his burden in mitigating the financial considerations security concerns.

Whole-Person Concept

Under the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of an applicant's conduct and all the relevant circumstances. An administrative judge should consider the nine factors listed at AG ¶ 2(a). I have considered all the record evidence, including that

⁶ See ISCR Case No. 14-00221 at 3-4 (judge erred in finding that applicant's resolution of tax situation mitigated overriding concerns regarding applicant's judgment, reliability, and ability to follow rules and regulations raised by his or her failure to timely file tax returns, especially since part of applicant's motivation for resolving issue was to maintain clearance). See *also* ISCR Case No. 15-01031 (judge erred by not adequately addressing overriding security concerns raised by an applicant who fails to timely file their tax returns and relying solely on the resolution of the tax situation in finding concerns mitigated).

⁷ But for Applicant's self-disclosures, the extent of his adverse tax situation would likely not have been known to the Government. DOD adjudicators relied on the dated information Applicant divulged in 2012, without apparently trying to gather more timely and accurate information before issuing the SOR in 2015. The record is silent as to the more than three-year delay between Applicant submitting his SCA and the issuance of the SOR.

Applicant has held a clearance for nearly 15 years without apparent issue and is held up by his supervisor as a model employee. Notwithstanding this and other favorable record evidence, Applicant failed to meet his heavy burden of persuasion for continued access to classified information. Over the course of several years, he repeatedly and routinely failed to abide by the obligation of all citizens to file his tax returns, raising concerns that he would treat his security obligations in a similar fashion. Applicant's history of not complying with his tax obligations raises continuing concerns about his judgment and reliability. Overall, the record evidence leaves me with doubts about his present suitability for continued 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 (Financial Considerations)	AGAINST APPLICANT
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Subparagraph 1.a:	Against Applicant
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Conclusion

In light of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant continued access to classified information. Applicant's request for a security clearance is denied.

Francisco Mendez
Administrative Judge