



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



In the matter of:

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ISCR Case No. 12-11482

Applicant for Security Clearance

Appearances

For Government: Candace Garcia, Esq., Department Counsel

For Applicant: *Pro se*

02/06/2017

Decision

RIVERA, Juan J., Administrative Judge:

Applicant's evidence is insufficient to mitigate the financial considerations concerns raised by his failure to timely file tax returns for tax years 2004 through 2010. He failed to establish a track record of financial responsibility. Access to classified information is denied.

History of the Case

Applicant submitted a security clearance application (SCA) on March 28, 2012. After reviewing it and the information gathered during a background investigation, the Department of Defense (DOD) on July 29, 2015, issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline F (financial considerations).¹ Applicant answered the SOR on September 8, 2015 (Answer), and requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA).

The case was assigned to me on April 13, 2016. DOHA issued a notice of hearing on April 27, 2016, scheduling the hearing for May 16, 2016. The hearing was held as scheduled. Government exhibits (GE) 1 through 6, and Applicant's exhibits (AE) 1

¹ The DOD acted under Executive Order (EO) 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive) (January 2, 1992), as amended; and the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), implemented by the DOD on September 1, 2006.

through 6 were admitted into evidence without objection. AE 4-6 were received post hearing. On May 25, 2016, DOHA received the transcript of the hearing. The record closed on June 22, 2016.

Findings of Fact

In Applicant's response, he denied all the SOR allegations, except for SOR ¶ 1.c, which he did not admit or deny (but admitted part of the factual allegations), and SOR ¶ 1.e, which he admitted. He also provided extenuating and mitigating information, and disputed the total debt owed on some of his delinquent accounts. Applicant's admissions in his answer to the SOR and at the hearing are incorporated into my findings of fact.

Applicant is 53 years old. He started working for federal contractors in 2001. He has possessed a security clearance since 2002, when he worked as a security officer for a government agency. He started working for his current employer, a federal contractor, as a supervisory security specialist in 2007. Applicant has never been married, and he has no children. He completed high school and attended college for about two years, but did not earn a degree.

In 2011, Applicant's employer received a court order garnishing Applicant's wages to pay delinquent taxes and student loans. The employer notified the DOD CAF via an "Incident Report." The DOD CAF asked Applicant to submit his 2012 SCA. In response to Section 26 (Financial Record) of his 2012 SCA, Applicant disclosed that during the last seven years he had financial problems, including his failure to file and pay his federal and state taxes for tax years 2004 through 2010. Applicant explained:

Prior to 2002 I had a perfect credit when the DOT.com bubble burst I lost my job and home. From 2002 till 2004 I was without a full-time job. I started a full-time job in 2004 but the financial damage had started. I had financially struggled with the death of my sister, grandmother, and stepfather, as well as me and my mother's health deteriorating. My mother and I have been diagnosed with cancer. The past several years have been a low point of my life. This is the reason why I owe for my federal student loan, the IRS for back taxes, and a couple of creditors. I have already set up payment arrangements with the student loan (they take approx. 450 a month from my check and I am working with the IRS in resolving this matter for 2004, 2005, 2006, and 2007, 2008, 2009 and 2010 taxes owed equaling approx. 27000.00. I never financially planned for these family loses and health issues by I am stepping up to the plate to shore up my finances. I will not fail. I am determined to get through this financial hurdle.

Additionally, Applicant disclosed he was delinquent on his student loan, bank loans, and other consumer accounts. He averred that he was in contact with his creditors and had established payment agreements with most of them.

Applicant's security investigation addressed his financial problems and revealed the SOR debts, which included a delinquent property tax debt to a county, a delinquent

student loan, failure to timely file his income tax returns for 2004 through 2010, a delinquent tax debt to the IRS, and 13 small delinquent debts. Applicant's history of delinquent debt is documented in his credit reports, his SOR response, his testimony, and the record evidence. The status of his SOR debts is as follows:

SOR ¶ 1.a alleges Applicant's wages were garnished in 2011 to pay \$190.60 in delinquent property taxes to a county. Applicant paid the debt and it is resolved.

SOR ¶ 1.b alleges Applicant's wages were garnished in 2011 to pay a defaulted student loan. Applicant's documentary evidence show he rehabilitated his student loan in October 2012, and as of May 2016 his loan was in good standing.

SOR ¶ 1.c alleges Applicant failed to timely file his federal income tax returns for tax years 2004 through 2010. Applicant's documentary evidence shows that the IRS prepared substitute tax returns for Applicant for tax years 2004 and 2005 in 2008, and that he established a payment agreement in 2012. (Tr. 55, 57, AE 4-6) He failed to submit documentary evidence to show he filed income tax returns for tax years 2006 through 2010.

SOR ¶ 1.d alleges Applicant owes the IRS \$27,000 for delinquent taxes for tax years 2004 through 2010. Applicant's documentary evidence shows he has been making payments since 2012 for taxes owed for tax years 2004 and 2005. (Tr. 55, 57) As of May 2016, he owed \$2,872 for tax year 2005. He failed to submit documentary evidence showing he does not owe additional taxes for tax years 2006 through 2010.

SOR ¶ 1.e alleges a delinquent credit card debt. Applicant submitted documentary evidence to show that he started making payments in October 2015, and he had made seven \$60 payments as of his hearing date.

Concerning the debts alleged in SOR ¶¶ 1.f through 1.q, Applicant submitted documentary evidence to show that he either paid, disputed, or otherwise resolved the alleged debts starting in about February 2015.

Applicant claimed he failed to establish payment plans before his creditors sought garnishment of his wages and failed to timely file his income tax returns because he went through a difficult period in his life. He testified that dealing with his family members' health crises, deaths, and his own cancer diagnosis overwhelmed him. He could not handle the pressure, broke down, and his finances got out of control. Applicant explained that in 1998, his younger sister passed away from cancer; in 2009, his grandmother passed away; in early 2000, his mother was diagnosed with cancer (still alive as of the hearing date); his stepfather passed away in 2011; and he had a malignant tumor removed in 2006.

Additionally, Applicant explained he was unemployed from about 2002 to 2004. Although he received unemployment benefits during some of his unemployment period, his income was not sufficient to cover his living expenses and outstanding debts. At his hearing, Applicant expressed remorse for his financial problems. He admitted that

disregarding his financial obligations was a mistake and that he was wrong in doing so. Applicant is now motivated to resolve his financial situation because he is concerned that if he dies, he will leave his mother with all of his financial problems. (Tr. 58)

Applicant believes he has been making considerable improvements resolving his financial problems. His student loan is current, all the collection accounts were paid, and he has had a payment agreement with the IRS since 2012. He noted that he would need his clearance and current job to continue paying his debts. Applicant's documentary evidence shows that since 2012 he has paid the IRS \$21,313. He claimed he paid \$33,162 on other accounts, and the grand total of payments total \$54,475. He promised to resolve all of his delinquent debts, in particular those to the IRS as soon as possible.

Policies

Eligibility for access to classified information may be granted "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. The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

The AG list disqualifying and mitigating conditions for evaluating a person's suitability for access to classified information. Any one disqualifying or mitigating condition is not, by itself, conclusive. However, the AG should be followed where a case can be measured against them, as they represent policy guidance governing access to classified information. Each decision must reflect a fair, impartial, and commonsense consideration of the whole person and the factors listed in AG ¶ 2(a). All available, reliable information about the person, past and present, favorable and unfavorable, must be considered.

Security clearance decisions resolve whether it is clearly consistent with the national interest to grant or continue an applicant's security clearance. The Government must prove, by substantial evidence, controverted facts alleged in the SOR. If it does, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. The applicant bears the heavy burden of demonstrating that it is clearly consistent with the national interest to grant or continue his or her security clearance.

Persons with access to classified information enter into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability, and trustworthiness of those who must protect national interest as their own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access in favor of the Government. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; AG ¶ 2(b). Clearance decisions are not a determination of the loyalty of the applicant concerned. They are merely an indication that the applicant has or has not met the strict guidelines the Government has established for issuing a clearance.

Analysis

Financial Considerations

AG ¶ 18 articulates the security concern relating to financial problems:

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.

Applicant's history of financial problems is documented in his credit reports, his SOR response, his testimony, and the record evidence. AG ¶ 19 provides three disqualifying conditions that could raise a security concern and may be disqualifying in this case: "(a) inability or unwillingness to satisfy debts;" "(c) a history of not meeting financial obligations;" and "(g) failure to file annual Federal, state, or local income tax returns as required." The record established the disqualifying conditions in AG ¶¶ 19(a), 19(c), and 19(g), requiring additional inquiry about the possible applicability of mitigating conditions.

Five mitigating conditions under AG ¶ 20 are potentially applicable:

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

(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;

(d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts;² and

² The Appeal Board has previously explained what constitutes a "good faith" effort to repay overdue creditors or otherwise resolve debts:

In order to qualify for application of [the "good faith" mitigating condition], an applicant must present evidence showing either a good-faith effort to repay overdue creditors or some other good-faith action aimed at resolving the applicant's debts. The Directive does not define the term "good-faith." However, the Board has indicated that the concept of good-faith "requires a showing that a person acts in a way that shows reasonableness,

(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.

The Appeal Board concisely 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).

ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013).

No mitigating conditions fully apply; however, Applicant presented some important positive financial information. Because of his 2002-2004 underemployment and unemployment he lacked sufficient income to make payments and keep some debts current. Additionally, because of his relatives' medical problems and passing away, and his and his mother's health problems, Applicant neglected his financial and legal responsibilities. He failed to file his federal tax returns for tax years 2004 through 2010, and acquired a significant tax debt.

Applicant acknowledged his delinquent debts, and since 2012, he has been making payments to creditors and the IRS. He also claimed he filed all of his delinquent income tax returns, and he intends to pay his tax debts. I have credited Applicant with mitigating all the accounts alleged in the SOR except for SOR ¶¶ 1.c (failure to timely file returns for tax years 2004-2010) and 1.d (being indebted to the IRS for an undisclosed amount).

The negative financial considerations concerns are more substantial. The record established that Applicant failed to timely file his Federal tax returns for tax years 2004 through 2010. I gave Applicant the opportunity to show he had filed the tax returns for tax years 2006 through 2010, and he failed to submit documentary evidence of the filings. He also did not explain whether he filed his state tax returns for any years when he had not

prudence, honesty, and adherence to duty or obligation." Accordingly, an applicant must do more than merely show that he or she relied on a legally available option (such as bankruptcy) in order to claim the benefit of [the "good faith" mitigating condition].

(internal citation and footnote omitted) ISCR Case No. 02-30304 at 3 (App. Bd. Apr. 20, 2004) (quoting ISCR Case No. 99-9020 at 5-6 (App. Bd. June 4, 2001)).

filed his federal income tax returns. It not clear from the evidence how much Applicant owes the IRS and his state for unfiled and unpaid taxes.

Applicant's explanations and evidence fail to establish that he has a track record of financial responsibility. Moreover, the DOHA 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). See 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 [the applicant's] 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 [applicant's] longstanding prior behavior evidencing irresponsibility" including a failure to timely file federal income tax returns. See ISCR Case No. 15-01031 at 3 and note 3 (App. Bd. June 15, 2016) (characterizing "no harm, no foul" approach to an Applicant's course of conduct and employed 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).

In ISCR Case No. 15-01031 at 2 (App. Bd. June 15, 2016), the Appeal Board reversed the grant of a security clearance, and noted the following primary relevant disqualifying facts:

Applicant filed his 2011 Federal income tax return in December 2013 and received a \$2,074 tax refund. He filed his 2012 Federal tax return in September 2014 and his 2013 Federal tax return in October 2015. He received Federal tax refunds of \$3,664 for 2012 and \$1,013 for 2013.

Notwithstanding the lack of any tax debt owed in ISCR Case No. 15-01031 (App. Bd. June 15, 2016), the Appeal Board provided the following principal rationale for reversal:

Failure to comply with Federal and/or state tax laws suggests that an applicant has a problem with abiding by well-established Government rules and regulations. Voluntary compliance with rules and regulations is essential for protecting classified information. . . . By failing to file his 2011, 2012, and 2013 Federal income tax returns in a timely manner, Applicant did not demonstrate the high degree of good judgment and reliability required of persons granted access to classified information.

ISCR Case No. 15-01031 at 4 (App. Bd. June 15, 2016) (citations omitted).

Whole-Person Concept

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, and under the whole-person concept. AG ¶ 2(c). I have incorporated my comments under Guideline F in my whole-person analysis, but some warrant additional comment.

Applicant is 53 years old. He has worked for federal contractors since 2001, and he has possessed a security clearance since 2002, when he worked as a security officer. He has been working as a supervisory security specialist for his current employer since 2007. There is no evidence of security violations.

Several circumstances beyond his control may have adversely affected his finances, including his period of underemployment and unemployment, his health problems, and being overwhelmed by his family's health problems and the deaths and illnesses of his relatives. He receives credit for his efforts to resolve his financial problems since 2012. He has resolved most of the SOR financial concerns.

Notwithstanding, Applicant's evidence is insufficient to establish his financial responsibility under the circumstances. He presented no documentary evidence to show that he has filed his federal income tax returns for 2006 through 2010. Even if his failure to timely file his returns was due to circumstances beyond his control, Applicant failed to provide any reasonable explanation for his failure to file the delinquent returns since 2012. He also failed to present documentary evidence to show he is not delinquent for taxes due for tax years 2006 through 2010.

When a tax issue is involved, an administrative judge is required to consider how long an applicant waits to file his or her tax returns, whether the IRS generates the tax returns, and how long the applicant waits after a tax debt arises to begin and complete making payments.³ Applicant waited several years (until 2008) to file his 2004 and 2005

³ The recent emphasis of the Appeal Board on security concerns arising from tax cases is instructive. 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 himself and does not reflect the voluntary compliance of rules and regulations expected of someone entrusted with the nation's secrets."); ISCR Case No. 14-01894 at 2-6 (App. Bd. Aug. 18, 2015) (reversing grant of a security clearance, discussing lack of detailed corroboration of circumstances beyond applicant's

federal tax returns; he has not filed federal tax returns for tax years 2006 through 2010; and he may owe substantial state and federal tax debts for those years.

It is well settled that once a concern arises regarding an applicant's security clearance eligibility, there is a strong presumption against the grant or renewal of a security clearance. *See Dorfmont*, 913 F. 2d at 1401. Unmitigated financial considerations concerns lead me to conclude that grant of a security clearance to Applicant is not warranted at this time. Financial considerations concerns are not mitigated.

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, 1.b, and 1.e - 1.q:	For Applicant
Subparagraphs 1.c and 1.d:	Against Applicant

Conclusion

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

JUAN J. RIVERA
Administrative Judge

control adversely affecting finances, noting two tax liens totaling \$175,000 and garnishment of Applicant's wages, and emphasizing the applicant's failure to timely file and pay taxes); ISCR Case No. 12-05053 at 4 (App. Bd. Oct. 30, 2014) (reversing grant of a security clearance, noting not all tax returns filed, and insufficient discussion of Applicant's efforts to resolve tax liens). More recently, in ISCR Case No. 14-05476 (App. Bd. Mar. 25, 2016) the Appeal Board reversed a grant of a security clearance for a retired E-9 and cited applicant's failure to timely file state tax returns for tax years 2010 through 2013 and federal returns for tax years 2010 through 2012. Before his hearing, he filed his tax returns and paid his tax debts except for \$13,000, which was in an established payment plan. The Appeal Board highlighted his annual income of over \$200,000 and discounted his non-tax expenses, contributions to DOD, and spouse's medical problems. The Appeal Board emphasized "the allegations regarding his failure to file tax returns in the first place stating, it is well settled that failure to file tax returns suggest that an applicant has a problem with complying with well-established government rules and systems. Voluntary compliance with such rules and systems is essential for protecting classified information." *Id.* at 5 (citing ISCR Case No. 01-05340 at 3 (App. Bd. Dec. 20, 2002) (internal quotation marks and brackets omitted). *See also* ISCR Case No. 14-03358 at 3, 5 (App. Bd. Oct. 9, 2015) (reversing grant of a security clearance, noting \$150,000 owed to the federal government, 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.").