



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



In the matter of:

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ISCR Case No. 15-01982

Applicant for Security Clearance

Appearances

For Government: Andre Gregorian, Esq., Department Counsel

For Applicant: Sheldon I. Cohen, Esq.

08/31/2016

Decision

RIVERA, Juan J., Administrative Judge:

Applicant's ability to timely file his tax returns was adversely affected, to some extent, by circumstances beyond his control. Notwithstanding, he failed to show financial responsibility when he failed to file his tax returns for five consecutive years and acquired a substantial tax debt to the IRS and his state. Eligibility for access to classified information is denied.

History of the Case

Applicant submitted a security clearance application (SCA) on October 22, 2012. After reviewing it and the information gathered during a background investigation, the Department of Defense (DOD) was unable to make an affirmative decision to grant Applicant's eligibility for a clearance. On October 17, 2015, the DOD issued Applicant a Statement of Reasons (SOR) alleging security concerns under Guideline F (financial considerations).¹ Applicant answered the SOR on November 17, 2015 (Answer), and requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA).

¹ The DOD acted under Executive Order 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.

The case was assigned to me on March 3, 2016. DOHA issued a notice of hearing on March 15, 2016, scheduling the hearing for April 7, 2016. Applicant's hearing was held as scheduled. Government exhibits (GE) 1 through 4 and Applicant's exhibit (AE) 1 (comprised of Tabs A through X) were admitted into evidence without objection. Applicant objected to the admissibility of GE 5, because it is an unauthenticated extract of an investigative report. GE 5 and 6 were marked and made part of the record, but were not considered as evidence. On April 21, 2016, DOHA received the transcript of the hearing.

Findings of Fact

Applicant admitted that he failed to timely file his federal and state tax returns for tax years 2007 through 2011, and stated that as of the date of the SOR (October 2015) the tax returns had been filed. (SOR ¶¶ 1.a and 1.b) He denied he was indebted to the Government for around \$30,769 for a 2013 tax lien filed against him. (SOR ¶ 1.c) His SOR and hearing admissions are incorporated herein as findings of fact. After a thorough review of the record evidence, and having observed Applicant's demeanor while testifying, I make the following additional findings of fact:

Applicant is a 49-year-old employee of a federal contractor. He was awarded his bachelor's degree in May 1989. He has been married 18 years and has four children of this marriage.

Between 1989 and 1996, Applicant worked as a civilian employee for a federal agency and possessed a security clearance. He then worked for private companies and his clearance was not needed. He started working for federal contractors in 2004, his clearance was reinstated in 2005, and it has been continued to present. One of Applicant's businesses holds a facility security clearance. He has been working as a systems engineer for his current employer, a federal contractor, since April 2012. There are no allegations or evidence of any rule or security violations.

Concerning his failure to timely file his federal and state tax returns, Applicant explained that in March 2000, he and a partner started an information technology consulting business, which he ran until late 2012. The consulting business operated through two Schedule S-corporations. Applicant explained that although he, his wife, and his partner were ultimately responsible for the businesses taxes, preparing the tax documents required special expertise that neither he or his wife had. Applicant hired an accountant to help him incorporate the businesses and to file his businesses' and personal taxes. He did not have any problems with the accountant for tax years 2000 through 2006, and he timely filed those years' tax returns.

Between 2006 and 2007, Applicant had problems with his accountant's performance. The accountant failed to do his job and did not prepare Applicant's business and personal tax returns, and the accountant did not return to Applicant his documents when he requested them in 2007. Applicant claimed that even though he tried many times, he was unable to find an accountant willing to reconstruct his delinquent tax year records from 2007 until 2011. As a result, he failed to timely file his federal and state income tax returns for tax years 2007 through 2011. I note that Applicant lives in the second largest

city in his state with a population of about 532,000 (around the 30-34 largest city in the United States). The city hosts several top-rank universities. During his testimony Applicant also alluded to receiving suggestions from friends or acquaintances of accountants that he could have hired to help him file his taxes.

Applicant filed his federal tax returns for tax year 2007 and 2008 in 2013; tax year 2009, in 2012; tax year 2010, in 2014; tax year 2011, in 2013; tax year 2012, in 2014; tax year 2013, in March 2014; and tax year 2014, in April 2015. Only the tax returns for tax years 2013 and 2014 were timely filed. (Tr. 67-68, AE 1 (Tabs A-D, R-X))

Applicant's adjusted gross income for tax year 2008 was \$155,270; for tax year 2009, was \$178,321; for tax year 2010, was \$231,154; for tax year 2011, was \$52,303; for tax year 2012, was \$295,556; for tax year 2013, was \$191,163; for tax year 2014, was \$145,228. Applicant claimed he was entitled to tax refunds for some tax years between 2008 through 2011, and those refunds were applied to his IRS debt. (AE 1, Tabs A-D) In 2012, Applicant withdrew approximately \$35,000 from his retirement account to pay part of his IRS debt. Applicant filed his state tax returns for tax years 2008 through 2011 in December 2013. In March 2016, Applicant entered into a payment agreement with his state to pay \$9,258 (\$600 a month), starting in April 2016, for a 2012 tax liability.

The IRS entered a \$30,769 tax lien against Applicant in 2013, for taxes owed for tax years 2007 and 2009. After Applicant filed his delinquent tax returns, the IRS released the federal tax lien in February 2014. (AE 1, Tab E) Applicant retained a tax attorney to help him determine his and his businesses' tax liabilities and to negotiate payment agreements. As of 2015, Applicant owed the IRS around \$30,000 for several tax years. In 2015, Applicant entered into an installment agreement with the IRS to pay \$850 monthly, starting in August 2015, to satisfy a tax debt of about \$22,100. In March 2016, Applicant and his wife entered into another payment agreement with the IRS to pay \$1,000 a month, starting in March 2016, to pay taxes owed for tax years 2011 and 2012 (apparently around \$10,000). (AE 1, Tab F)

Applicant noted he established the payment agreements with the IRS and his state before he received the October 2015 SOR. He testified that he wanted to resolve his financial problems with the IRS and his state as soon as possible. Applicant noted he has taken steps to avoid filing his tax returns late in the future. He established a record keeping system, hired the services of an accountant, and provides the data to this accountant during quarterly meetings to ensure the timely filing of tax documents. He is also making timely estimated quarterly payments calculated based on the businesses revenues. He retained the services of a payroll company to pay his businesses' payroll and deduct his employees' taxes from their paychecks.

Applicant presented the testimony of two references. The co-owner of Applicant's company has known and worked with Applicant since 1989. During that time, no one has questioned Applicant's integrity. He believes Applicant is a man of his word who seeks to do the right thing, and exceeds in accomplishing his mission requirements. Applicant is thorough in executing security procedures. He is aware of the responsibilities that go

along with possessing a clearance, and participates in security training and education regularly. Applicant is also a dedicated family man.

Applicant's second reference has known and worked with Applicant for about nine years. In his opinion, Applicant's honesty, character, and integrity are beyond reproach. Both references have utmost confidence in Applicant's ability to safeguard classified information. They recommended Applicant's eligibility for a clearance without reservations.

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

Under Guideline F, the security concern is that 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. (AG ¶ 18)

This concern is broader than the possibility that an individual might knowingly compromise classified information in order to raise money. It encompasses concerns about an individual's self-control, judgment, and other qualities essential to protecting classified information. An individual who is financially irresponsible may also be irresponsible, unconcerned, or negligent in handling and safeguarding classified information.

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" Applicant admitted that he failed to timely file his federal and state tax returns, and he owes state and federal income taxes. The Government 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

²The Appeal Board has previously explained what constitutes 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.

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).

Considering the evidence as a whole, I find that no mitigating conditions apply. There is no evidence to show that in the past, Applicant was financially irresponsible and failed to timely file and pay his taxes. Notwithstanding, Applicant failed to timely file his tax returns from 2007 through 2011, and acquired a substantial debt to the IRS and his state.

Applicant presented some mitigating information. He had problems with his accountant who stopped doing his job in 2006-2007, and failed to return to Applicant his business documents until 2007. Applicant explained that because he had two Schedule S corporations, he did not have the knowledge to do his own accounting and could not prepare the required tax documents to submit his income tax returns. Applicant also claimed that although he tried numerous times, he could not find an accountant to work for him. After he hired his current accountant in 2011, it took her about two years to prepare his income tax returns.

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, 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)).

Applicant's first accountant problems could be considered, in part, as unusual circumstances beyond Applicant's control that caused or contributed to Applicant's financial problems.

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).

Applicant has demonstrated increased maturity and financial responsibility. His documentary evidence established that he has filed his past-due tax returns, and his 2013 and 2014 tax returns were filed on time. Applicant withdrew money from his retirement account to pay some of his tax debt in 2012. He retained the services of a tax attorney, has worked diligently to ascertain his delinquent tax obligations, and established payment arrangements with the IRS and his state. He also retained the services of an accountant and established procedures to avoid the late filing of tax returns in the future.

Notwithstanding these positive developments, I find Applicant failed to show financial responsibility when he failed to file his tax returns for five consecutive years. Applicant's claim that he was unable to find an accountant to work for him between 2006-2007 and 2011 is not credible. He lives in the second largest city in his state, with a population of about 532,000 (around the 30-34 largest city in the United States), which

hosts several universities. Also, during his testimony he alluded to receiving suggestions from friends of acquaintances of accountants that he could have hired to help him file his taxes. Applicant also could have filed incomplete tax returns and informed the IRS and his state that the returns were incomplete and that amended tax returns would be forthcoming. He failed to show financial responsibility and the financial considerations concerns are not mitigated.

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. Some of the factors in AG ¶ 2(a) were addressed under Guideline F, but some warrant additional comment.

Applicant is a 49-year-old employee of a federal contractor and entrepreneur. He has been married 18 years and has four children. Between 1989 and 1996, Applicant worked as a civilian employee for a federal agency and possessed a security clearance. He then worked for private companies and had no need for a clearance. He started working for federal contractors in 2004, his clearance was reinstated in 2005, and it has been continued to present. There are no allegations or evidence of any rule or security violations. Applicant has an excellent reputation for following rules and regulations and for being trustworthy, honest, and exercising good judgment.

Applicant failed to timely file his federal and state tax returns from 2007 through 2011, and acquired a substantial debt to the IRS and his state. His history of failing to file and to pay his federal and state income taxes when due raises unresolved financial considerations security concerns.³ When an issue of delinquent taxes is involved, an administrative judge is required to consider how long an applicant waits to file his-her tax returns, whether the IRS generates the tax returns, and how long the applicant waits after a tax debt to arise to begin and complete making payments.⁴ The primary problem here

³See 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.”).

⁴See 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 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

is that Applicant failed to timely file and pay his taxes. He failed to establish that he was responsible for his financial affairs and resolving his tax debts.

I have carefully applied the law, as set forth in *Egan*, Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. 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 and 1.b:	Against Applicant
Subparagraph 1.c:	For Applicant

Conclusion

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

JUAN J. RIVERA
Administrative Judge

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)).