



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



In the matter of:)	
)	
REDACTED)	ISCR Case No. 15-03303
)	
Applicant for Security Clearance)	

Appearances

For Government: Candace L. Garcia, Esq., Department Counsel
For Applicant: *Pro se*

04/28/2017

Decision

MENDEZ, Francisco, Administrative Judge:

Applicant did not present sufficient evidence to mitigate security concerns raised by his tax-related financial problems. Clearance is denied.

Statement of the Case

On November 6, 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, waived his right to a hearing, and requested a determination on the administrative (written) record.

On March 7, 2016, Department Counsel prepared a file of relevant material (FORM) and sent it to Applicant. With the FORM, Department Counsel forwarded to Applicant six exhibits that the Government offers for admission into the administrative

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.

record, including Exhibit 4, a summary of Applicant's security clearance interview. These exhibits are admitted into evidence without objection.

Applicant received the FORM on March 15, 2016, and was given 30 days to submit a response, including evidence in mitigation and extenuation. He did not submit a response within the allotted time.

On February 13, 2017, I was assigned the case. After confirming Applicant's continuing sponsorship for a clearance and recognizing the considerable amount of time and expense already expended, I reopened the record to provide him a final opportunity to submit a response.² He timely submitted a response on March 6, 2017, which was marked Exhibit A and admitted into the administrative record without objection.³

Evidentiary Ruling

DOHA proceedings are designed to provide for a full, fair, and accurate record of an applicant's security clearance eligibility.⁴ In order to achieve these goals, the Directive states that the federal rules of evidence "shall serve as a guide."⁵ Furthermore, the DOHA Appeal Board has stated that administrative judges should liberally apply the "technical rules of evidence" and err on the side of admitting relevant and reliable evidence.⁶

The Directive, however, does contain one major exception to this liberal evidentiary rule of inclusion. Specifically, pursuant to Directive, Enclosure 3, ¶ E3.1.20, a DOD personnel background report of investigation ("ROI"), including the summary a government investigator prepares of an applicant's security clearance interview, is generally inadmissible.⁷ The danger posed by an unauthenticated clearance interview, which an applicant has not affirmatively adopted as their own statement,⁸ is self-evident.

² Administrative documents, including confirmation of Applicant's continuing sponsorship for a clearance, were collectively marked Appellate Exhibit I.

³ Exhibit A consists of Applicant's March 6, 2017 e-mail; IRS statement, dated October 6, 2016 (3 pages); and Treasury Department statement, dated July 1, 2016 (1 page).

⁴ Directive, ¶¶ E3.1.19; E3.1.25. See *also*, ISCR Case No. 99-0477 (App. Bd. July 25, 2000) (overall purpose of industrial security clearance program is "a full and fair adjudication of cases on the merits.")

⁵ Directive, ¶ E3.1.19.

⁶ ISCR Case No 03-21434 at 5 (App. Bd. Feb. 20, 2007) ("the DOHA process encourages Judges to err on the side of initially admitting evidence into the record, and then to consider . . . what, if any, weight to give to that evidence."). See *also* ISCR Case No. 14-06011 (App. Bd. Dec. 9, 2015) ("The weight that a Judge assigns to evidence is a matter within his or her discretion.").

⁷ See *also* Directive, ¶ E3.1.22, prohibiting the admission of a third-party statement adverse to an applicant on a controverted issue, which arguably a summary prepared by an investigator may constitute.

⁸ See *generally* ISCR Case No. ISCR Case No. 11-13999 (App. Bd. Feb. 3, 2014); ISCR Case No. 09-06218 (App. Bd. Sep. 6, 2011) (error not to admit or fully consider summary of clearance interview that applicant adopted as his own).

An investigator, whether intentionally or negligently, may incorrectly summarize the clearance interview.⁹

At the same time, the summary of the clearance interview may contain accurate, reliable, and relevant favorable information that an applicant will want considered (or, may assume a judge will consider in the absence of an objection).¹⁰ Accordingly, it is generally an applicant who holds the proverbial “key” as to the admissibility of the summary.¹¹ An issue, however, arises when an applicant does not respond to the FORM or otherwise affirmatively indicates that they are waiving their objection to the summary’s admission into evidence.

DOHA administrative judges have treated such situations in two different ways. One set of judges excludes a summary unless an applicant explicitly waives the E3.1.20 authentication requirement,¹² while another group of judges admits the summary, finding that an applicant’s failure to raise an objection constitutes a waiver of the authentication rule.¹³ This split appears to only extend to those *pro se* applicants who elect a decision on the written record. The same concern that has led some judges to exclude interview summaries offered with a FORM does not appear to extend to *pro se* applicants who elect a hearing – whether or not such applicants are informed that they can object to a summary’s admission on authentication grounds.

⁹ See e.g. Department of Justice (DOJ) Press Release, *U.S. Investigations Services Agrees to Forego at Least \$30 Million to Settle False Claims Act Allegations*, August 19, 2015, publically available at <https://www.justice.gov/opa/pr/us-investigations-services-agrees-forego-least-30-million-settle-false-claims-act-allegations>; DOJ Press Release, *Former Background Investigator For Federal Government Pleads Guilty To Making A False Statement*, April 24, 2014, publically available at <https://www.justice.gov/usao-dc/pr/former-background-investigator-federal-government-pleads-guilty-making-false-statement-1>.

¹⁰ ISCR Case No. 15-05252 (App. Bd. Apr. 13, 2016) (judge erred in *sua sponte* excluding summary of clearance interview submitted with FORM, as applicant apparently believed the summary would be considered as she had not raised an objection).

¹¹ The Government can overcome an objection by properly authenticating the summary of the clearance interview and establishing that that the interview is otherwise admissible under the federal rules of evidence. See E3.1.20.

¹² See e.g. ISCR Case No. 15-00262 at 2 (A.J. Leonard Feb. 15, 2017) (notwithstanding explicit warning in FORM explaining to applicant that they could object to the summary’s admission, judge still excluded the summary because “I am not persuaded that a *pro se* applicant’s failure to respond to the FORM, which is optional, equates to a knowing and voluntary waiver of the authentication requirement.”). See also, ISCR Case No. 15-02643 at 2 (A.J. Noel Apr. 24, 2017) (same); ISCR Case No. 15-01554 at 2 (A.J. Hogan Feb. 24, 2016) (similar basis for exclusion).

¹³ See e.g. ISCR Case No. 14-05009 n.1 (A.J. Foreman Feb. 10, 2017) (“Department Counsel informed Applicant that he was entitled to comment on the accuracy of Item 4 [summary of clearance interview]; make corrections, additions, deletions, or updates; or object to the lack of authentication. I have treated his lack of response to the FORM as a waiver of any objections to Item 4.”). See also ISCR Case No. 14-05326 at 2 (A.J. Crean April 5, 2017) (finding waiver of authentication rule where applicant failed to respond to FORM); ISCR Case No. 12-05597 at 2 (A.J. Rivera Dec. 9, 2016) (same).

At least one Appeal Board member has expressed some concern or reservation in finding that a *pro se* applicant, who elects a decision on the written record, waives the authentication requirement when he or she fails to respond to a FORM. See ISCR Case No. 12-10933 (App. Bd. Jun. 29, 2016) (AJ Ra'anan's concurring opinion). Nevertheless, the Appeal Board in a recent unanimous decision held that a summary of a clearance interview offered with a FORM was properly admitted by a judge where: (1) the *pro se* applicant did not raise an objection to the summary's admission and (2) there was no indication the summary contained inaccurate information. ISCR Case No. 15-01807 (App. Bd. Apr. 19, 2017).¹⁴

Here, as in ISCR Case No. 15-01807, Applicant was on clear notice that he could object to the summary,¹⁵ elected not to raise an objection, and there is no indication that the summary contains inaccurate information. Additionally, Applicant's response to the FORM, where he attacks various points raised by Department Counsel, tends to corroborate the relevant information contained in the summary.¹⁶ For all these reasons, the summary of the clearance interview, Exhibit 4, is admitted into evidence.

Findings of Fact

Applicant, 72, is married with two adult-age children. He is a college graduate and was first granted a security clearance in 1967.

In September 2014, Applicant submitted a security clearance application (SCA), presumably as part of a periodic reinvestigation. In response to relevant questions about his finances, Applicant disclosed on the SCA that he had failed to file his income tax returns for several years and owed about \$55,000 in past-due taxes. He also noted that he had filed all overdue tax returns and, with the help of his accountant, was working with the IRS to resolve his past-due taxes.

A few months later, Applicant sat down with an investigator for his clearance interview. He told the investigator that his financial problems started in the mid-1990s when an economic downturn left him unable to pay the mortgages on his home and investment properties. He filed for Chapter 13 bankruptcy, but was only able to make the required plan payments for six months. He lost his home and investment properties to foreclosure. He was able to convince a friend to purchase his former home and was

¹⁴ See also ISCR Case No. 14-06781 at 3 (App. Bd. Dec. 16, 2016) (failure to raise an objection to an exhibit offered by the Government with the FORM waives it); ISCR Case No. 02-12199 at n. 6 (App. Bd. Oct. 7, 2004) ("An applicant can waive his or her objection to the admissibility of evidence even though the Directive is silent on the matter of waiver."); ISCR Case No. 08-12061 at 2 (App. Bd. Dec. 15, 2009) ("Although *pro se* applicants cannot be expected to act like a lawyer, they are expected to take timely, reasonable steps to protect their rights under the Directive. If they fail to take timely, reasonable steps to protect their rights, that failure to act does not constitute a denial of their rights.").

¹⁵ See FORM n.1.

¹⁶ ISCR Case No. 95-0817 (App. Bd. Feb. 21, 1997) (Judge erred in *sua sponte* excluding portion of an ROI that was submitted by Department Counsel as evidence with a FORM under E3.1.20, because "[n]owhere in Applicant's energetic criticisms of various portions of the FORM does he challenge the completeness, accuracy, or truthfulness of FORM Item 5 [clearance interview] or any portion of it.")

able to stay in it until the present day, paying rent to his friend. He indicates that he is now in the financial position to purchase back the home from his friend.

Applicant stopped filing his federal and state income tax returns around the time he started experiencing financial trouble in the mid-1990s. He stated during his 2014 clearance interview that he was “overwhelmed” by his financial problems and was unable to file his returns. (Exhibit 4 at 4) He informed the investigator that, starting in the 1990s, he had tax liens filed against him and his wages were garnished to satisfy past-due taxes. (Exhibit 4 at 4-5) He also told the investigator that he had filed all his overdue federal tax returns as of the date of the clearance interview and was in the process of filing his overdue state tax returns.

The SOR alleges that, in 2012 and 2013, federal tax liens totaling more than \$100,000 were filed against Applicant. These liens are listed on Applicant’s 2014 credit report, Exhibit 5. Applicant provided documentation showing that, as of July 2016, he still owed over \$28,000 in past-due taxes for the 2004 tax year. His federal tax debt for tax years 2004 – 2008 and 2014 totals over \$58,000. He presented no documentation that the federal tax liens were released, satisfied, or otherwise resolved.

Applicant was paying his past-due federal taxes through an installment agreement, which he entered into with the IRS in about October 2014 (a month after submitting his SCA). He stopped submitting the required monthly installment payments in approximately June 2016, when the IRS filed notice that it would begin garnishing a portion of his social security income to satisfy his federal tax debt.

The SOR also alleges that Applicant owes over \$500,000 for a state tax lien, which was filed against him in 2007. This state tax lien is listed on Applicant’s 2014 credit report, Exhibit 5. Applicant submitted a state court document with his Answer that reflects his state secured a \$512,000 judgment against him in August 2007 for past-due state income taxes. Applicant filed his overdue state tax returns and resolved his past-due state taxes by paying an agreed-upon settlement of less than \$7,000. He did so several months after his 2014 clearance interview.

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 ¶ E3.1.15.¹⁷

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

Applicant’s tax-related financial problems, as alleged in the SOR, raise the financial considerations security concern, which 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.

¹⁷ See *also* ISCR Case No. 15-01208 at 4 (App. Bd. Aug. 26, 2016); ISCR Case No. 11-00391 (App. Bd. Dec. 1, 2011).

In assessing Applicant's case, I considered the following pertinent disqualifying and mitigating conditions:¹⁸

AG ¶ 19(a): inability or unwillingness to satisfy debts;

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

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.

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. An administrative judge should closely examine the circumstances giving rise to an applicant's tax-related issues and his or her response to it. Furthermore, an applicant's claim of financial reform must be weighed against the overriding concerns about the individual's lack of judgment and history of not abiding by rules and regulations in failing to timely file or pay their taxes.

The disqualifying conditions listed at AG ¶¶ 19(a) and 19(c) apply. Applicant failed to establish any of the available mitigating conditions. Although matters beyond his control may have initially impacted his ability to timely file and pay his taxes, these matters occurred some 20 years ago and he has repeatedly failed to abide by his tax obligations. He failed to timely file his tax returns and pay his taxes even after tax liens, judgments, and wage garnishments were filed against him. The record evidence reflects that Applicant is unwilling or unable to comply with his lawful tax obligations and may similarly fail to abide by his security obligations.

¹⁸ Applicant's extensive history of failing to file his income tax returns and pay his taxes were not alleged in the SOR. For purposes of determining which disqualifying conditions apply, I have only considered the tax liens referenced in the SOR and the relevant circumstances leading to their filing. Matters not alleged in the SOR were only considered for the limited purpose of assessing Applicant's mitigation case and the whole-person factors set forth in AG ¶ 2(a). *Compare* ISCR Case No. 15-00216 (App. Bd. Oct. 24, 2016) (proper use of non-alleged tax debts in examining financial considerations security concerns), *with*, ISCR Case No. 12-11375 (App. Bd. June 17, 2016) (where Board held that judge improperly weighed and considered non-alleged tax issues).

Additionally, the timing of when Applicant took action to resolve his longstanding financial problems does not support a finding of positive and permanent behavioral change. Instead, the timing strongly suggests that Applicant took such remedial action as a means to gain or maintain a clearance. ISCR Case No. 10-05909 at 4 (App. Bd. Sep. 27, 2012) (“The manner and timing of debt repayment were matters that the Judge was entitled to consider. . . . The Judge concluded that the impending security clearance process was the major factor in prompting Applicant to act.”)

Furthermore, Applicant’s federal tax debt stands at over \$58,000 and includes a significant amount of back taxes from 2004. This sizeable amount of tax debt includes Applicant’s recent failure to pay his 2014 taxes when due. Applicant’s federal tax debt is about the same amount as first reported on the SCA, which Applicant submitted nearly three years ago.

In short, the circumstances under which Applicant incurred the large tax liens alleged in the SOR and the lack of a sufficient track record of voluntary compliance with his tax obligations undercuts the mitigating value of Applicant’s belated efforts to resolve his longstanding tax debts. After thoroughly considering the record evidence and the whole-person factors in AG ¶ 2(a), I find that Applicant failed to meet his heavy burden of persuasion. Overall, significant questions and doubts about Applicant’s present eligibility for (continued) access to classified information remain.

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

Subparagraphs 1.a – 1.c: Against Applicant

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 access to classified information. Applicant’s request for a security clearance is denied.

Francisco Mendez
Administrative Judge