



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



In the matter of:)
)
) ISCR Case No. 15-06327
)
)
Applicant for Security Clearance)

Appearances

For Government: Daniel Crowley, Esq., Department Counsel
For Applicant: *Pro se*

06/07/2017

Decision

CERVI, Gregg A., Administrative Judge:

Applicant did not mitigate the financial considerations security concerns. The personal conduct concern was not substantiated by the evidence. Eligibility for access to classified information is denied.

Statement of the Case

Applicant completed a Questionnaire for National Security Positions (SF 86)¹ on May 16, 2013. On March 28, 2016, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines F, financial considerations, and E, personal conduct.²

¹ Also known as a Security Clearance Application (SCA).

² The action was taken under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive) (January 2, 1992), as amended; and the *Adjudicative*

Applicant responded to the SOR on July 1, 2016, and elected to have the case decided on the written record in lieu of a hearing. The Government's written brief with supporting documents, known as the File of Relevant Material (FORM), was submitted by Department Counsel on July 25, 2016. A complete copy of the FORM was provided to Applicant, who was afforded an opportunity to file objections and submit material to refute, extenuate, or mitigate the security concerns. Applicant received the FORM on August 2, 2016, but he did not respond. The Government's exhibits included in the FORM (Items 1 to 7) are admitted into evidence, except that the portion of exhibit 5 report of investigation (ROI), labeled "Investigator's Note." The case was assigned to me on May 19, 2017.

Findings of Fact

The SOR alleges Applicant failed to file his federal and state tax returns for tax years 2011 to 2014. Additionally, he is alleged to have refused to sign his "legal name" to an Internal Revenue Service (IRS) form to obtain a tax transcript as requested by an Office of Personnel Management (OPM) investigator. After the investigator reminded him of the importance of cooperating with the investigation, he signed the form "correctly" and told the investigator to complete the remainder of the form. He admitted all of the SOR allegations.

Applicant is 65 years old and has been employed by a defense contractor since 1980. He married in 1977 and divorced in 1992. He served in the Air National Guard from 1972 to 1978, and was honorably discharged. He has held a security clearance since 1980.

Applicant reported in his SCA that he did not timely file his income tax returns or pay taxes for tax years 2010, 2011 and 2012, because he did not have the money. He noted that he entered into a federal repayment plan for his 2010 taxes, but not for the other tax years or state taxes. He stated that he is in discussions with his accountant. In a June 2015 affidavit, Applicant stated that he neither filed nor paid his federal or state income taxes for tax years 2011–2014, noting that he did not have sufficient funds withheld from his pay. He noted that although he intended to discuss his tax situation with his accountant, he had not done so. He also noted that he had completed his 2010 return and repayment plan, because he paid more than the required amount. No documents were provided by Applicant to show that federal and state tax returns have been filed, the amount of taxes owed, copies of installment agreements or evidence of payments.

The Government's evidence presented in support of the Guideline E allegation is contained in an "investigator's note" appended to the ROI, following the "enhanced personal subject interview" (PSI) section. This portion of the ROI was not authenticated, nor did Applicant knowingly waive authentication.

Guidelines for Determining Eligibility for Access to Classified Information (AG), implemented by the DOD on September 1, 2006.

Applicant admitted SOR ¶ 2.a, but stated that he felt intimidated and harassed during the OPM interview. He said that he has signed his name in the same way since he was a child, but noted that the investigator did not accept it. He asserted his honesty, trustworthiness, and 36 years of distinguished service without a security breach. Of note, Applicant consistently signed his name using his first initial followed by his last name throughout the record. The record does not contain the “signed” IRS form at issue, only a blank sample.

Law and Policies

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are to be used in evaluating an applicant’s eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, administrative judges apply the guidelines in conjunction with the factors listed in the adjudicative process. The administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(a), the entire process is a conscientious scrutiny of a number of variables known as the “whole-person concept.” The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel.” The applicant has the ultimate burden of persuasion to obtain a favorable security clearance decision.³ The Supreme Court stated that the burden of proof is less than a preponderance of the evidence.⁴

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that “[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security.” It is well-established law that no one has a right to a security clearance. As noted by the Supreme Court in *Egan*, “the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.” Under *Egan*, Exec. Or. 10865, and the Directive, any

³ ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

⁴ *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988) (“it should be obvious that no one has a ‘right’ to a security clearance”); *Duane v. DOD*, 275 F.3d 988, 994 (10th Cir. 2002) (no right to a security clearance).

doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.⁵

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 the 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.

Section 7 of Exec. Or. 10865 provides that adverse decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* Exec. Or. 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline F, Financial Considerations

The security concern for financial considerations is set out in 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 guideline notes several conditions that could raise security concerns under AG ¶ 19. The following is potentially applicable in this case:

(g) failure to file annual federal, state, or local income tax returns as required or the fraudulent filing of the same.

Applicant failed to file his 2011 to 2014 federal and state taxes when due. The evidence is sufficient to raise the above disqualifying conditions.

Conditions that could mitigate the financial considerations security concerns are provided under AG ¶ 20. The following 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;

⁵ *Egan*, 484 U.S. at 531.

(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; and

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

Applicant has worked for the same government contractor since 1980. From 2010 to 2014, he claimed that he did not have enough money withheld from his pay to cover his expected taxes. He has since filed and paid his 2010 Federal taxes, but has not satisfied his 2011 - 2014 Federal or state taxes, or filed his returns.

Given Applicant's disregard for his federal and state tax obligations, and although he has made efforts to resolve his 2010 federal taxes, he has not shown that his financial conditions were outside of his control and that he took timely action to resolve his 2011 - 2014 federal and state taxes.⁶ Finally, there is no evidence that Applicant's current financial condition is sound, or that his financial problems are unlikely to recur. No mitigating conditions apply. His overall financial responsibility and willingness to comply

⁶ The recent emphasis of the Appeal Board on security and trustworthiness 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 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). 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.").

with rules and regulations remain a concern, and his financial condition casts doubt on his current reliability, trustworthiness, and good judgment.

Guideline E, Personal Conduct

The concern under this guideline is set out in AG ¶ 15:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect sensitive information. Of special interest is any failure to provide truthful and candid answers during the investigative process or any other failure to cooperate with the public trust process.

The following will normally result in an unfavorable clearance action or administrative termination of further processing for clearance eligibility: (a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, and cooperation with medical or psychological evaluations.

The investigator's note is not admissible without authentication or Applicant's informed waiver.⁷ However, the SOR allegation and Applicant's admission and written response in his answer, provide sufficient evidence to consider the allegation. The Government failed to meet its burden of production and persuasion. Applicant did not refuse to cooperate. He ultimately complied with the investigator's request to sign the form in a manner inconsistent with his usual, and presumably legal, signature. There is no evidence of a failure to cooperate with the investigation, or deliberate omission, concealment, or falsification of relevant facts. The evidence presented is insufficient to support the allegation. Therefore, I find in favor of the Applicant.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

(1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the extent to

⁷ Item 5. The investigator's note appears to be separate from the enhanced PSI, and is inadmissible without authentication or an informed waiver by Applicant, despite the PSI waiver contained in the FORM. Directive, Encl. 3.1.20.

which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. I considered all of the potentially disqualifying and mitigating conditions in light of all the evidence in favor of and against Applicant, and the facts and circumstances surrounding this case. I have incorporated my findings of fact and comments under Guidelines E and F in this whole-person analysis.

Applicant has not shown progress toward resolving his 2011–2014 federal and state tax obligations. Overall, the record leaves me with questions and doubts as to Applicant’s eligibility and suitability for a security clearance.

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:	Against Applicant
Paragraph 2, Guideline E:	For Applicant
Subparagraph 2.a:	For 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 continue Applicant’s eligibility for a security clearance. Eligibility for access to classified information is denied.

Gregg A. Cervi
Administrative Judge