



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



In the matter of:)	
)	
REDACTED)	ISCR Case No. 15-08204
)	
Applicant for Security Clearance)	

Appearances

For Government: Rhett E. Petcher, Esq., Department Counsel
For Applicant: Leon J. Schachter, Esq.

06/02/2017

Decision

MENDEZ, Francisco, Administrative Judge:

Applicant did not present sufficient evidence to mitigate security concerns raised by his repeated failure to timely file his income tax returns. Clearance is denied.

Statement of the Case

On June 10, 2016, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) sent Applicant a Statement of Reasons (SOR) alleging security concerns under the financial considerations guideline.¹ Applicant answered the SOR and requested a hearing to establish his eligibility for continued access to classified information.

On February 21, 2017, a date mutually agreed to by the parties, a hearing was held. Applicant testified at hearing, and the exhibits offered by the parties at hearing and post-hearing were admitted into the administrative record without objection. (Government

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.

Exhibits 1, 2, and 4; Applicant's Exhibits A – OO.)² The transcript of the hearing (Tr.) was received on February 28, 2017, and the record closed on April 3, 2017.³

Ruling on Continuance Request

On December 2, 2016, I was assigned the case and thereafter contacted the parties to schedule the hearing on a mutually agreeable date. At the time, Applicant's counsel had not filed a notice of appearance in the matter. Prehearing Guidance, ¶ 4.

On December 13, 2016, I scheduled Applicant's hearing on the date he requested, to wit: February 21, 2017. In requesting this date, Applicant eschewed a number of available hearing dates in January and early February 2017.⁴ An email, dated January 6, 2017, reflects that Applicant forwarded the hearing notice to his counsel.⁵

A week before the hearing, on February 13, 2017, Applicant's counsel made his initial appearance and requested a continuance, claiming that his client needed more time to prepare and gather documents. I determined that Applicant, who had been aware of the security concerns at issue since June 2016 and was advised of the need to submit documentary evidence before he agreed to the hearing date, had failed to establish good cause for the requested continuance. The request for the continuance was denied. However, I informed the parties that I would leave the record open after the hearing for the submission of additional documentary evidence.⁶

At hearing, Applicant submitted Exhibits A – CC and a deadline of March 22, 2017 for the submission of post-hearing documents was established. Before the deadline passed, Applicant, through his counsel, submitted additional evidence. He then submitted a final document after the deadline. All evidence submitted post-hearing was accepted and admitted into the record.⁷

² Department Counsel withdrew Exhibit 3 for identification, a summary of Applicant's security clearance interview. Accordingly, it was not considered and is not attached to the record. I overruled the Government's objection to Exhibit C, a 2015 decision by another judge in an unrelated case. Tr. 10-17. 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.").

³ Correspondence, the notice of hearing, and case management order are attached to the record as Appellate Exhibits (App. Exh.) I – III, respectively.

⁴ App. Exh. I.

⁵ App. Exh. I at 7; App. Exh. IV at 2-4.

⁶ See App. Exh. IV. See *also* Directive, Enclosure 3, ¶ E3.1.18 ("A continuance may be granted by the Administrative Judge only for good cause."); ISCR Case No. 14-03641 at 3 (App. Bd. April 17, 2015) ("There is no right to a continuance, and a party challenging the denial of a continuance has the burden of showing the Judge's denial was arbitrary or capricious.").

⁷ Applicant's post-hearing submissions were not organized or pre-marked. An index identifying each of Applicant's post-hearing exhibits was provided to the parties and is attached to the record as App. Exh. V. No objection was raised as to the accuracy of the index.

Findings of Fact

Applicant, 50, is married and holds a master's degree. He has worked as a cleared federal contractor for approximately 20 years. He submitted security clearance applications in 2009 and 2014 to maintain his clearance.

Applicant did not timely file his federal and state income tax returns for tax years 2006 – 2008 and 2010 – 2015.⁸ At hearing, he provided multiple and varied explanations for not timely filing his tax returns. He put his work and personal issues above his tax filing obligations.⁹ He also testified that he was under the misimpression that, if owed a refund, he had three years from the required filing date within which to file his tax returns.¹⁰ He went on to state that, if he owed income taxes, he understood he was required to file the tax return and would do so “[w]henver I could get the tax return done.”¹¹

On April 22, 2009, Applicant submitted a SCA. He answered “yes” to a question asking if he had “failed to . . . file a tax return, when required by law or ordinance?” He reported not filing his 2006 and 2007 income tax returns when due. He explained that his home experienced a flood in early 2009, and he was working with a tax preparer to recover the information to prepare and file the returns. He also did not timely file his 2008 federal and state income tax returns.¹²

Sometime after submitting the 2009 SCA, Applicant had a clearance interview and was asked about his unfiled tax returns. In approximately June 2009, the IRS sent Applicant correspondence inquiring about his unfiled tax return for tax year 2007. Applicant hired a tax professional and with the professional's assistance filed his 2006 through 2009 tax returns by September 2010. His tax returns for these years reflect an adjusted gross income (AGI) ranging from \$124,000 to \$136,000. Applicant never asked

⁸ The SOR alleges that Applicant did not timely file his tax returns from “*at least* 2006 through *at least* 2013.” Arguably, the italicized language placed Applicant on notice that his failure to timely file income tax returns in 2014 and 2015 was a security concern. However, I have only considered the evidence regarding Applicant's failure to timely file his 2014 and 2015 tax returns for the limited purposes of assessing mitigation, the whole-person concept, and Applicant's credibility. *Contrast with* ISCR Case No. 12-11375 (App. Bd. June 17, 2016) (non-alleged tax issues considered in a manner inconsistent with such limited purposes). See *also*, ISCR Case No. 14-05986 (App. Bd. May 26, 2017) (“To the extent any argument suggests that the Judge should have founded an adverse decision primarily on non-alleged conduct, the Board declines to contravene the Directive ¶ 4.3.1 or Executive Order 10865, SECTION 3 (1).”)

⁹ Tr. 20-23 (professional demands and work-related travel), 27-29 (ex-wife's failure to cooperate in providing necessary tax documents), 34-41 (2009 flood), 48-61 (father's death in 2010, potential identity theft issue, and wife accidentally throwing out business-related expense receipts).

¹⁰ Tr. 23-26, 33, 56-57, 62, 72-73.

¹¹ Tr. 75.

¹² Exhibit 1 at 33 (Q. 33.c), 36; Tr. 34-41. Of note, nowhere on the 2009 SCA does Applicant claim that he thought he had three years within which to file his tax returns.

his (former) tax preparer whether his (Applicant's) supposed belief that he had three years from the due date to file his tax return was correct.¹³

Applicant's former tax preparer retired in 2010, but before retiring provided Applicant a professional reference that could help Applicant prepare his tax returns in the future. Applicant decided to prepare his 2010 through 2013 tax returns on his own. He filed his 2010 through 2013 federal tax returns late. Applicant's account transcripts during this four-year period reflect that he was sent at least one notice from the IRS regarding his unfiled tax return(s). His 2010 through 2013 tax returns reflect an AGI of between \$130,000 and \$160,000. His 2013 federal tax return shows that Applicant owed federal income taxes, but Applicant claims this was caused by a minor mistake he committed in preparing the return and he intended to remedy it by filing an amended return.¹⁴

In August 2014, Applicant submitted a new SCA as part of the current clearance reinvestigation process. He again answered "yes" to the question asking if he had failed to timely file his tax returns as "required by law or ordinance."¹⁵ He provided the following explanation on his SCA for not timely filing his 2008 – 2013 tax returns:

I previously experienced a flood and all my paperwork was destroyed. I worked with IRS to obtain prior information and filed taxes for refund. My tax preparer subsequently retired, so I am in the process of obtaining a new tax preparer to get my taxes ready for me as work demands have precluded me from completing although I have historically gotten a refund, hence I have never had to pay the IRS any money that I owed.¹⁶

Applicant filed his 2011 federal tax return six months later. He filed his 2012 federal tax return about 18 months after submitting the SCA, and his 2013 federal tax return some 30 months after submitting the SCA.¹⁷

As of the hearing, Applicant had not yet filed his 2014 and 2015 federal and state income tax returns. In January 2017, or about a month before the hearing, Applicant hired a firm to help him prepare and file his late returns. He testified that he anticipated receiving a refund once he filed his 2014 tax return, because he was still claiming his 20-year-old

¹³ Tr. 38, 41-46, 63-66; Exhibits M – T. Even though Applicant was purportedly operating under a misunderstanding as to when he had to file his tax returns, while undergoing the clearance review he filed his 2009 federal income tax return by the (automatically) granted extension of October 15, 2010.

¹⁴ Tr. 38, 45-46, 63-66; Exhibit G (signed 2013 federal tax return on December 31, 2016, or six months after SOR was issued); Exhibit H (signed 2012 federal tax return on December 31, 2015); Exhibit J (signed 2011 federal tax return on December 30, 2014); Exhibit K (IRS inquiry); Exhibit L (signed 2010 federal tax return on December 30, 2013); Exhibit OO.

¹⁵ Exhibit 2 at 32.

¹⁶ Exhibit 2 at 33-35; Tr. 66-70. Applicant did not hire someone to help him prepare and file his overdue tax returns until a month before the hearing, or two and half years after submitting the SCA.

¹⁷ Exhibit G; Exhibit H; Exhibit J.

daughter, who was living with her grandparents, as a dependent. He was waiting on income documentation from his daughter as her “work status has been questionable to where I don’t know what she’s been making or not making.”¹⁸ Post-hearing, with the assistance of the new tax preparation firm, Applicant filed his 2014 – 2016 federal and state tax returns. He claimed his daughter as a dependent on his 2014 federal tax return, but still owed over \$2,000 in past-due federal income taxes. His 2016 federal income tax return reflects an AGI exceeding \$250,000.¹⁹ A personal financial statement, dated February 25, 2017, reflects that Applicant has a net monthly remainder (income after paying recurring expenses) of over \$3,500 and assets totaling over \$750,000.²⁰ Applicant’s federal and state income tax returns for 2006 – 2016 have now been filed, and any taxes owed have been paid.

Policies

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

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

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

Administrative Judges are responsible for ensuring that an applicant receives fair notice of the issues raised, has a reasonable opportunity to litigate those issues, and is not subjected to unfair surprise. ISCR Case No. 12-01266 at 3 (App. Bd. Apr. 4, 2014). In resolving the ultimate question regarding an applicant’s eligibility, an administrative judge must resolve “[a]ny doubt concerning personnel being considered for access to classified information . . . in favor of national security.” AG ¶ 2(b). Moreover, recognizing the difficulty at times in making suitability determinations and the paramount importance

¹⁸ Tr. 76.

¹⁹ Exhibit HH.

²⁰ Exhibit E.

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 history of failing to timely file his federal and state income tax returns raises 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.

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

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

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

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 tax returns or pay taxes, a basic and fundamental financial obligation of all citizens, bears a heavy burden in mitigating the financial considerations security concern.²¹ 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 concern about the person's lack of judgment and history of failing to abide by rules and regulations in failing to timely file returns or pay their taxes.²²

Applicant has repeatedly not timely filed his federal and state income tax returns. AG ¶¶ 19(c) and 19(g) apply. Although certain matters that were largely beyond his control could potentially explain a slight delay in filing returns, the record reflects that Applicant has repeatedly ignored the law by failing to timely file his tax returns. He has had the financial means to hire a tax professional to prepare and file his tax returns, but has neglected to do so until the clearance he needs to maintain his well-paying job was in jeopardy. He should have been aware that his failure to timely file his tax returns could raise a security concern after being asked about this information on two separate security clearance applications.²³ He failed to timely file his income tax returns even after the IRS sent him notices and the SOR was issued. This record evidence reflects poorly on Applicant's judgment, and his ability to follow the law and rules and regulations.

Additionally, the fact that Applicant eventually filed his tax returns and paid any outstanding tax debt is of limited mitigating value in this case. The timing of when Applicant took action to file his overdue tax returns evidences his concern about maintaining the clearance he needs to retain a federal contracting job paying him a six-figure salary, not a concern about complying in good faith with the legal obligation to file his tax returns when due. He filed his 2006 – 2008 tax returns only when it became a potential issue during his last security clearance review. After receiving a favorable adjudication, he stopped filing his tax returns for several years. Notably, Applicant did not file his 2010 tax returns until December 2013, or a few months before submitting his most

²¹ See *generally*, ISCR Case No. 14-03358 at 3 (App. Bd. Oct. 9, 2015) (Board explained the heightened security concerns raised by tax-related financial issues, as follows: "A security clearance represents an obligation to the Federal Government for the protection of national secrets. Accordingly failure to honor other obligations to the Government has a direct bearing on an applicant's reliability, trustworthiness, and ability to protect classified information.").

²² ISCR Case No. 14-05794 (App. Bd. July 7, 2016); ISCR Case No. 14-00221 (App. Bd. June 29, 2016); ISCR Case No. 15-01031 (App. Bd. June 15, 2016); ISCR Case No. 12-09545 (App. Bd. Dec. 21, 2015).

²³ At hearing, Applicant acknowledged that the SCA questions should have put him on notice as to the potential security concern raised by his failure to timely file his tax returns. See Tr. 68-70.

recent SCA. He then hired a tax preparation firm just a month before his security clearance hearing to clear up his remaining tax issues. Based on this track record, Applicant failed to demonstrate that similar security-significant issues will not recur.

Furthermore, in light of Applicant's age, educational background, and work history, as well as having an opportunity to observe his demeanor at hearing, I did not find credible his testimony that he misunderstood when he had to file his tax returns. After considering all the evidence, both favorable and unfavorable, including some of the whole-person factors noted herein, I find that Applicant failed to meet his burden of proof and persuasion. Applicant's repeated failure to follow the law regarding the timely filing of his tax returns continues to raise a concern about his ability to follow rules and regulations pertaining to the proper handling and safeguarding of classified information. ISCR Case No. 14-02930 at 3 (App. Bd. Dec. 9, 2015) ("The filing of tax returns is both a financial and a legal obligation. Applicant's admitted failure to have done so for many years is sufficient to raise a concern that he may be unwilling to follow other rules and regulations, such as those that govern the handling of classified information.")

Whole-Person Concept

Under the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of an applicant's conduct and all the relevant circumstances. An administrative judge should consider the whole-person factors listed at AG ¶ 2(a). I hereby incorporate my above analysis and highlight some additional whole-person factors.

Applicant has worked as a cleared federal contractor for approximately 20 years and testified about the essential services he provides to the Defense Department. He submitted a favorable character reference from his brother-in-law. Nonetheless, the favorable record evidence is insufficient to mitigate the serious security concerns raised by Applicant's long history of not timely filing his income tax returns. Overall, the record evidence leaves me with doubts about Applicant's present suitability for access to classified information.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline F (Financial Considerations): **AGAINST APPLICANT**

Subparagraph 1.a: **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 eligibility for continued access to classified information. Applicant's request for a security clearance is denied.

Francisco Mendez
Administrative Judge