



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



In the matter of:)
)
) ISCR Case No. 15-07314
)
Applicant for Security Clearance)

Appearances

For Government: Nicole A. Smith, Esq., Department Counsel
For Applicant: *Pro se*

05/22/2017

Decision

CERVI, Gregg A., Administrative Judge:

Applicant has not mitigated the financial considerations security concerns. Eligibility for access to classified information is denied.

Statement of the Case

Applicant completed a Questionnaire for National Security Positions (SF 86)¹ on June 4, 2014. On April 19, 2016, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline F, financial considerations.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 Guidelines for Determining Eligibility for Access to Classified Information* (AG), implemented by the DOD on September 1, 2006.

Applicant responded to the SOR on May 17, 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 May 17, 2016. The FORM was used to amend the SOR to add two additional allegations under Guideline F (SOR ¶¶ 1.e and 1.f).

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 June 17, 2016, but he did not submit evidence in mitigation or assert any objections to the Government's evidence or amended SOR. The Government's exhibits included in the FORM (Items 1 to 4) are admitted into evidence. The case was assigned to me on May 3, 2017.

Findings of Fact

The SOR alleges Applicant is indebted to the federal government on unpaid income taxes for tax years 2010, 2011 and 2014. He is also indebted on state income taxes for tax years 2011 to 2014. He owes the federal government approximately \$46,000 and state tax authorities approximately \$12,000. The SOR was amended to include allegations that Applicant failed to timely file his federal and state tax returns for tax years 2010 to 2014. Applicant did not specifically admit or deny the allegations, but provided an explanation in his Answer to the original SOR. He did not respond to the FORM, therefore did not admit, deny or offer an explanation or mitigation in response to the additional SOR allegations offered in the amendment to the SOR.

Applicant is 58 years old and has been employed by a defense contractor since 2013. He was married in 1993 and has two children. He is attending technical school. He was unemployed from July to October 2011 and June 2012 to October 2013. During this last period, he decided to become a "stay-at-home" father. When his spouse lost her job in 2010, she launched her own business.

Applicant failed to timely file his income tax returns for tax years 2010 to 2014. In Applicant's interview with an Office of Personnel Management investigator, he stated that he filed his past-due tax returns in May 2015. He claimed that his spouse handled the family finances and that she didn't file the required returns, but Applicant did not check on it. He acknowledged that he owed taxes and intended to take a line of credit to pay them in a lump-sum.

In his Answer to the SOR, Applicant provided an explanation "and not an excuse" for his tax issues. He pointed out his periods of unemployment and slow start to his spouse's business, his mother-in-law's death in 2011, and his mother's progressive illness and death in 2014. He noted that they consulted an accountant to file and pay tax obligations and paid off half of the tax debt. He also noted the remaining debt is being paid through installment agreements with the federal and state governments. In a response to interrogatories, Applicant provided several federal tax account transcripts, dated March 2016. The transcript for tax year 2010 shows an account balance of \$26,029

and an installment agreement established in October 2015. The transcript for tax year 2011 shows a balance owed of \$18,501 and an installment agreement established in October 2015, with four monthly payments following. The transcript for tax year 2012 shows Applicant made a payment with his late tax return and does not owe for this year. The transcript for tax year 2013 shows no balance due. The transcript for tax year 2014 shows \$3,179 is owed.

No documents have been provide to show that state tax returns have been filed, state taxes owed, copies of installment agreements or evidence of regular monthly payments except those reflected in the federal transcripts. Applicant did not submit evidence of financial counseling, character, or work performance.

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

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).

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 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 are potentially applicable in this case:

- (a) inability or unwillingness to satisfy debts;
- (b) a history of not meeting financial obligations; and
- (c) failure to file annual federal, state, or local income tax returns as required or the fraudulent filing of the same.

Applicant incurred long-standing delinquent tax obligations and failed to file his 2010 to 2014 federal and state tax returns when due. The evidence is sufficient to raise the above disqualifying conditions.

⁵ *Egan*, 484 U.S. at 531.

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;
- (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 and his spouse suffered periods of unemployment, started a business, and suffered personal losses from 2010 to 2015. During this period, they failed to file and pay federal and state taxes when due. Although they likely faced financial burdens throughout these years, especially during periods of unemployment, there is insufficient evidence to show how these events led to the failure to file or pay tax returns when due. Applicant asserted that he has regained control over his tax issues by filing all overdue returns, and entering into installment agreements to repay taxes owed. He has supported some of these assertions through the federal tax transcripts provided, and has shown a total of four payments on one of the installment plans. He has not shown a sufficient track record of regular monthly payments on all of the installment agreements that he claims he agreed to, and has not shown any documentary evidence of state tax returns filed or state taxes paid. His non-response to the FORM and the amended SOR allegations does nothing to support his case in mitigation.

In addition, Applicant has shown a disregard for his federal and state tax obligations, and although he has made relatively recent efforts to resolve some of them, he has not shown that his financial conditions were outside of his control and that he took timely action to resolve them before they became an obvious obstacle to obtaining a security clearance.⁶ Finally, there is no evidence that Applicant's current financial

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-

condition is sound, or that his financial problems are unlikely to recur. No mitigating conditions apply.

His overall financial responsibility and willingness to comply with rules and regulations remain a concern, and his financial condition casts doubt on his current reliability, trustworthiness, and good judgment. The evidence presented fails to show that his financial difficulties are fully under control, that he is willing and able to meet his financial obligations, or that this condition is unlikely to recur in the future.

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 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

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.").

incorporated my findings of fact and comments under Guideline F in this whole-person analysis.

Applicant has not shown sufficient evidence of progress toward resolving his federal and state tax obligations, or that his financial challenges leading to his failure to file and pay taxes when due are under control and are unlikely to recur in the future. This decision should not be construed as a determination that Applicant cannot or will not attain the state of reform necessary for award of a public trust position in the future. With a track record of behavior consistent with his obligations, he may well be able to demonstrate persuasive evidence of his suitability for a security clearance.

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
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Subparagraphs 1.a to 1.f:	Against Applicant
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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 Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Gregg A. Cervi
Administrative Judge