



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



In the matter of:)	
)	
(Redacted))	ISCR Case No. 15-08616
)	
Applicant for Security Clearance)	

Appearances

For Government: Carroll J. Connelley, Esq., Department Counsel
For Applicant: *Pro se*

06/16/2017

Decision

MATCHINSKI, Elizabeth M., Administrative Judge:

Applicant is a longtime clearance holder who failed to file timely federal and state income tax returns for tax years 2011 and 2012. His spouse was very ill at the time. He filed his delinquent tax returns in October 2015 and has shown reform by filing his income tax returns for subsequent tax years on time. Clearance is granted.

Statement of the Case

On June 16, 2016, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) to Applicant, detailing the security concerns under Guideline F, financial considerations, and explaining why it was unable to find it clearly consistent with the national interest to grant or continue security clearance eligibility for him. The DOD CAF took the action under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG) effective within the DOD on September 1, 2006.

On July 18, 2016, Applicant answered the SOR allegations and requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA). On October 28, 2016, the case was assigned to me to conduct a hearing to determine whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. On November 1, 2016, I scheduled a hearing for December 1, 2016.

I convened the hearing as scheduled. Before the introduction of any evidence, at Department Counsel's motion and with no objection from Applicant, the SOR was amended to accurately reflect the state to which Applicant was required to file income tax returns for 2011 and 2012. Three Government exhibits (GEs 1-3) and three Applicant exhibits (AEs A-C) were admitted into evidence without objection. Applicant testified, as reflected in a transcript (Tr.) received on December 13, 2016.

I held the record open for one month for post-hearing submissions from Applicant. On December 20, 2016, Applicant submitted IRS account transcripts for tax years 2011 (AE D) and 2012 (AE E) and a letter from his state department of revenue (AE F). On December 21, 2016, the Government expressed no objection to their admissibility, so I accepted the records in evidence. On December 27, 2016, Applicant submitted a monthly budget, which was marked and admitted without objection as AE G on December 30, 2016.

While this case was pending a decision, Security Executive Agent Directive 4 was issued establishing National Security Adjudicative Guidelines (AG) applicable to all covered individuals who require initial or continued eligibility for access to classified information or eligibility to hold a sensitive position. The AG supersede the adjudicative guidelines implemented in September 2006 and are effective for any adjudication made on or after June 8, 2017. Accordingly, I have adjudicated Applicant's security clearance eligibility under the new AG.¹

Findings of Fact

The amended SOR alleges under Guideline F that Applicant failed to timely file federal (SOR ¶¶ 1.a and 1.b) and state income tax returns (SOR ¶¶ 1.c and 1.d) for tax years 2011 and 2012, and that Applicant owed a \$272 charged-off debt (SOR ¶ 1.e) as of June 16, 2016. When he answered the SOR, Applicant admitted that he had forgotten to file his federal and state income tax returns for 2011 and 2012 when they were due, but he indicated that his taxes have been filed and paid. Applicant denied the delinquent debt in SOR ¶ 1.e on the basis of payment.

After considering the pleadings, exhibits, and transcript, I make the following findings of fact.

Applicant is a 50-year-old operations supervisor who has worked for a defense contractor since March 2004. (GE 1.) He served honorably on active duty in the U.S.

¹ Application of the AGs that were in effect as of the issuance of the SOR would not change my decision in this case.

military from February 1984 until he retired in March 2004. Applicant held a top-secret security clearance for his military duties until 1991, when his clearance was downgraded to the secret level. (GE 2.) Applicant's secret clearance was transferred to his defense-contractor employment. (GE 1.)

Applicant and his spouse married in July 1988. They have three grown children: a daughter born in June 1987 who is married, and two sons born in August 1989 and February 1993. They have rented their current residence since July 2004. (GE 1.)

In approximately November 2011, Applicant's spouse began experiencing medical problems that led her to miss work on and off over the next 2.5 years. She was and continues to be employed as a para-professional for a local school system. After several visits to the emergency room, her illness was properly diagnosed in July 2013 and resolved through outpatient surgery. (Tr. 22-25.) His spouse had always prepared their income tax returns. Due to her illness and the stress it caused, neither Applicant nor his spouse filed their federal and state income tax returns for 2011 and 2012 when they were due. (GEs 1, 2; Tr. 25-27.) When asked why he had not filed his delinquent returns for 2011 and 2012 in 2014 given that his spouse's medical issue had been resolved, Applicant responded that he completely forgot about them until he received a notice from the IRS that he owed taxes for 2011 and 2012. (Tr. 52.) IRS account transcripts show that the IRS issued a notice on February 11, 2013, for tax year 2011 (AE D) and on December 23, 2013, for tax year 2012. (AE E.) The IRS transcripts show no further notices or activity until October 2015, when Applicant filed the returns and paid the taxes, so it may be that Applicant learned of the tax debts in 2013. Applicant and his spouse filed their 2014 income tax returns in January or February 2015. (Tr. 52.) For 2015, they filed their federal return, if not also their state return, in February 2016. (AEs D, E.)

To renew his security clearance eligibility, Applicant completed and certified to the accuracy of a Questionnaire for National Security Positions (SF 86) on August 12, 2015. Applicant responded "Yes" to whether, in the past seven years, he had failed to file or pay federal, state, or other taxes when required by law or ordinance. Applicant indicated that he had failed to file federal and state income tax returns or pay taxes for tax years 2011 and 2012 because his spouse was ill. He reported the amount of the taxes as "\$0." Concerning any steps taken to satisfy the issue, Applicant responded that he would file and pay his taxes. In response to inquiries into any delinquency involving routine accounts, Applicant listed an \$810 credit card debt that he settled in May 2015. (GE 1.)

As of August 21, 2015, Applicant's credit record continued to report as outstanding a \$272 past-due debt that had been charged off in February 2010 (SOR ¶ 1.e). The debt information was from February 2010 on an automobile loan opened in July 2007. Applicant had satisfied in January 2012 a \$1,244 judgment from November 2010. Three credit card debts in collection, including the \$810 debt listed on his SF 86, had been settled between February 2015 and May 2015. Applicant was making timely payments on a credit card with a balance of \$2,166 and on a car loan obtained in March 2015 for \$30,663. However, he had been 30 days late 12 times, 60 days late seven times, and 90 days late 11 times in the past, including in May 2015, on the credit card account. (GE 3.)

On October 19, 2015, Applicant was interviewed by an authorized investigator for the Office of Personnel Management (OPM). Concerning his previously disclosed tax issues, Applicant expressed his intention to file his delinquent tax returns and pay his taxes for those tax years by October 29, 2015. Applicant was questioned about his settled credit card debts, which he indicated had become delinquent because he forgot to pay them. He indicated there would be no recurrence. As for the \$272 past-due debt on his credit record, Applicant surmised that it was for a car loan, but he could not recall any details. (GE 2.) Applicant filed a dispute with the creditor, who confirmed on July 14, 2016, that his account history was being reported inaccurately. (AE A.) Applicant testified that he had satisfied his loan in full. He had no explanation for why the debt had been reported as delinquent. (Tr. 39.)

On October 20, 2015, a professional tax service finished preparing Applicant and his spouse's delinquent federal and state income tax returns for tax years 2011 and 2012.² On adjusted joint gross income of \$104,149 for 2011, they owed federal income taxes of \$2,707 and state income taxes of \$739. (AE B.) On adjusted gross income of \$109,188 for 2012, they owed federal income taxes of \$1,416 and state income taxes of \$510. (AE C.) The IRS received the tax returns for 2011 and 2012 on October 26, 2015. Applicant paid the taxes owed the IRS when he submitted his delinquent returns. In December 2015 and February 2016, the IRS assessed penalties and interest totaling \$1,569 for paying and filing late for tax year 2011 and \$678 for tax year 2012. The IRS applied funds due to be refunded to them for tax year 2015 to satisfy their federal tax debts for 2011 and 2012. (AEs D, E.) Applicant's state tax liabilities were satisfied by the state intercepting his tax refund for tax year 2015 and by garnishing his wages for two pay periods. (Tr. 30-36.) By letter dated December 14, 2016, the state's tax authority confirmed that the returns for tax year 2011 and 2012 have been filed and that all taxes reported due have been paid. (AE F.)

Applicant borrowed \$25,000 from his retirement account at work in 2015 to pay some debts. He is repaying the loan at \$230 every two weeks. (Tr. 53.)

Applicant and his spouse's household budget reflects net monthly discretionary income of \$1,013 after including his retirement pay of \$1,300 and the following expenses: \$780 for miscellaneous bills; \$800 for groceries; \$1,310 for rent; \$154 in credit card payments; \$180 for oil heat and \$300 for electricity; \$240 for gasoline and \$723 in a car payment; \$100 for clothing; and \$300 for unspecified expenses. (AE G.) Applicant estimated at his hearing that he and his spouse had only \$200 or \$300 in discretionary funds at the end of each month. Apparently, they rent to own furniture at a cost of \$400 a month. (Tr. 45-46.) They also pay \$200 a month for car insurance. (Tr. 47) It is unclear whether those expenses are included in the \$780 budgeted for bills or the \$300 for "other" expenses.

² Applicant testified that he started gathering his paperwork to file his delinquent tax returns in approximately March 2015. (Tr. 52.) AEs B and C contain W-2 information from Applicant that was printed out in April 2015, so it appears that he was gathering information needed to prepare his taxes before October 2015.

Applicant had only about \$10 in checking account deposits and \$5 in savings as of late November 2016. (Tr. 45.) When asked about his history of late payments on the credit card with the largest balance, he responded, “I’ve really been trying to pay them on time. I am doing my best.” He had car problems in the past which stressed his finances. (Tr. 50-51.) Applicant has had no financial counseling. He did not believe that he needed it, although he testified that he was “starting to think [he does need counseling].” (Tr. 59.)

Policies

The U.S. Supreme Court has recognized the substantial discretion the Executive Branch has 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). When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are required to be considered 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, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge’s overall adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), 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.

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.” In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. 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 applicant or proven by Department Counsel. . . .” The applicant has the ultimate burden of persuasion to obtain a favorable security decision.

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 and endures throughout off-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 that the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information. Section 7 of EO 10865 provides that 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 EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline F, Financial Considerations

The security concerns about financial considerations are articulated in AG ¶ 18:

Failure 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 or sensitive information. Financial distress can also be caused or exacerbated by, and thus can be a possible indicator of, other issues of personnel security concern such as excessive gambling, mental health conditions, substance misuse, or alcohol abuse or dependence. An individual who is financially overextended is at greater risk of having to engage in illegal or otherwise questionable acts to generate funds. Affluence that cannot be explained by known sources of income is also a security concern insofar as it may result from criminal activity, including espionage.

Applicant candidly acknowledged on his August 2015 SF 86 that he had yet to file his federal and state income tax returns for tax years 2011 and 2012. He reported his tax debt as zero for each tax year. However, Applicant and his spouse's joint belated returns show that they underpaid their federal income taxes by \$2,707 and their state income taxes by \$739 for 2011. For 2012, they underpaid their federal taxes by \$1,416 and their state income taxes by \$510. Disqualifying condition AG ¶ 19(c), "a history of not meeting financial obligations," applies in that he had not paid the taxes when they were due. Of primary security concern in this case is Applicant's failure to comply with his income tax filing obligation, which triggers AG ¶ 19(f), "failure to file or fraudulently filing annual Federal, state, or local income tax returns or failure to pay annual Federal, state, or local income tax as required."

The Government relies on a credit report to establish that Applicant owed a past-due balance of \$272 on an old auto loan as of June 2016 as alleged in SOR ¶ 1.e. In ISCR Case No. 08-12184 at 7 (App. Bd. Jan. 7, 2010), the Appeal Board explained:

It is well-settled that adverse information from a credit report can normally meet the substantial evidence standard and the government's obligations under [Directive] ¶ E3.1.14 for pertinent allegations. At that point, the burden shifts to applicant to establish either that [he or] she is not responsible for the debt or that matters in mitigation apply.

Applicant disputed the debt with the creditor, contending that he paid the automobile loan in full. In a letter dated July 14, 2016, the creditor confirmed that Applicant's account history was reported inaccurately and that it had submitted a request to the credit bureaus to adjust the reporting of the account. AG ¶ 20(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,” is established with respect to the alleged debt in SOR ¶ 1.e.

Concerning the income tax filing and payments issues, the late filing appears to have been aberrational and caused by circumstances that are not likely to recur. See AG ¶ (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.” Applicant’s spouse handled their income tax returns, and when she became ill, neither she nor Applicant complied with this important legal obligation. However, since her condition resolved, they have filed their income tax returns on time.

AG ¶ 20(b) has some applicability in that his spouse’s illness was an unexpected circumstance. AG ¶ 20(b) provides:

(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, a death, divorce or separation, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances.

Yet, AG ¶ 20(b) also requires that an individual act responsibly. In that regard, Applicant managed to report to work on those occasions when he was not accompanying his spouse to her medical appointments. Even if I accept that he was too stressed or distracted to focus on their tax obligations when his spouse was ill, she was successfully treated in July 2013 and yet he made no attempt to file their delinquent income tax returns in 2014. He should have been reminded in early 2014 when they filed their 2013 returns that they had yet to file their 2011 and 2012 returns. It is difficult to believe that he would have forgotten about those returns.

AG ¶ 20(c), “the person has received or is receiving counseling for the problem from a legitimate and credible source, such as a non-profit credit counseling service, and there are clear indications that the problem is being resolved or is under control,” has only partial applicability in that the delinquent tax returns have been filed and the taxes paid. Applicant has shown some difficulty managing his financial affairs responsibly. Although not alleged, the evidence shows that he has a history of chronically late payments on a credit card debt, and settled other credit card debts only after they went to collections.³ As recently as 2015, he borrowed \$25,000 from his 401(k) to pay some debts. He has had no financial counseling, although he now believes that he could benefit from such counseling.

³ The DOHA Appeal Board has long held that the administrative judge may consider non-alleged conduct to assess an applicant’s credibility; to evaluate an applicant’s evidence of extenuation, mitigation, or changed circumstances; to consider whether an applicant has demonstrated successful rehabilitation; to decide whether a particular provision of the Adjudicative Guidelines is applicable; or to provide evidence for a whole-person analysis under Section 6.3 of the Directive. See, e.g., ISCR Case No. 09-07219 (App. Bd. Sep. 27, 2012). Applicant’s handling of his financial affairs generally is relevant in the whole-person evaluation.

AG ¶ 20(d), “the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts,” and AG ¶ 20(g), “the individual has made arrangements with the appropriate tax authority to file or pay the amount owed and is in compliance with those arrangements,” which pertains to tax issues specifically, are partially satisfied for the same reasons. Applicant began collecting the information needed to file his delinquent returns around March or April 2015, albeit after the IRS had notified him that he owed taxes for 2011 and 2012. He retained a professional tax service to prepare his and his spouse’s delinquent returns, and he submitted them shortly after they were prepared in October 2015. He submitted payment of their federal taxes with the returns. Penalties and interest assessed in December 2015 were paid in February 2016, when the IRS applied some of their tax refund for 2015.

Regarding his and his spouse’s delinquent state returns for tax years 2011 and 2012, Applicant satisfied AG ¶¶ 20(d) and 20(g) in part in that he filed the returns in October 2015. Tax debts of \$739 for 2011 and \$510 for 2012 were not paid with the returns. The state seized their tax refund for 2015 for the debts and then garnished his wages for the rest. Both AG ¶ 20(d) and AG ¶ 20(g) require some voluntary conduct on the part of the individual to initiate or arrange for repayment, and interception of tax refunds and garnishment by the tax authority would not qualify. The garnishment appears to have been involuntary.

Even where tax problems have been corrected and an applicant is motivated to prevent such problems in the future, the administrative judge is not precluded from considering an applicant’s trustworthiness in light of prior behavior evidencing irresponsibility. See e.g., ISCR Case No. 14-01894 at 5 (App. Bd. Aug. 2015). Applicant has demonstrated that he is likely to file his income tax returns on time in the future. There is no evidence that his returns for tax years 2013 through 2015 were filed late. Applicant testified, and IRS account transcripts appear to corroborate, that he filed his federal income tax returns for tax year 2015 in February 2016. His financial situation is of some concern. He had to borrow against his retirement to pay some debts in 2015. He testified to having net discretionary income of \$200 to \$300 each month while his household budget submitted after his hearing shows \$1,013 in excess income. The discrepancy in budget figures and lack of available funds makes it difficult to assess his financial stability. He had no savings and only \$5 in checking deposits as of early December 2016, which would suggest spending or financial support not accounted for in his budget. The credit report of record is not sufficiently recent to enable a good assessment of Applicant’s current financial situation. While it reveals a history of late payments on some accounts, it shows that Applicant settled his past-due debts in 2015 before he completed his SF 86 to renew his security clearance. Applicant could benefit from some financial counseling, but he has taken responsibility for addressing his legitimate obligations. The financial considerations security concerns are adequately mitigated.

Whole-Person Concept

In assessing the whole person, the administrative judge must consider the totality of an applicant’s conduct and all relevant circumstances in light of the nine adjudicative

process factors in AG ¶ 2(d).⁴ The analysis under Guideline F is incorporated in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under that guideline, but some warrant additional comment.

Applicant demonstrated poor judgment in failing to comply with his income tax filing and tax payment obligations for two years. His spouse's medical problems notwithstanding, he certainly was not prevented from seeking professional assistance to file their returns when his spouse was unable to handle them. The Appeal Board has long held that the failure to file tax returns suggests a problem with complying with well-established government rules and systems. See *e.g.*, ISCR Case No. 14-04437 (App. Bd. Apr. 15, 2016); ISCR Case No. 01-05340 at 3 (App. Bd. Dec. 20, 2002). It is well settled that once a concern arises regarding an applicant's security clearance eligibility, there is a strong presumption against the grant or renewal of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990.)

Yet security clearance decisions are not intended to punish applicants for past transgressions. The security clearance adjudication involves an evaluation of an applicant's current judgment, reliability, and trustworthiness in light of the security guidelines in the Directive. See ISCR Case No. 09-02160 (App. Bd. Jun. 21, 2010). Concerns that Applicant may not comply with government rules are allayed in that he has held a security clearance for years without any evidence of security violations. Also in his favor, he began gathering documentation to file his delinquent returns before he completed his SF 86, candidly disclosed his tax problems on his SF 86, and filed his delinquent income tax returns by October 29, 2015, as he had promised during his interview with the OPM investigator. I conclude that it is clearly consistent with the national interest to grant or continue Applicant's security clearance eligibility.

Formal Findings

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

Paragraph 1, Guideline F: FOR APPLICANT

Subparagraphs 1.a-1.e: For Applicant

⁴ The factors under AG ¶ 2(d) are as follows:

(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.

Conclusion

In light of all of the circumstances, it is clearly consistent with the national interest to continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is granted.

Elizabeth M. Matchinski
Administrative Judge