



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



In the matter of:

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ISCR Case No. 15-06360

Applicant for Security Clearance

Appearances

For Government: Carroll J. Connelley, Esq., Department Counsel

For Applicant: *Pro se*

02/27/2018

Decision

MATCHINSKI, Elizabeth M., Administrative Judge:

Applicant and his spouse did not timely file their federal and state income tax returns for tax years 2013 and 2014. They owed back taxes for several years. Applicant has since filed his delinquent tax returns, and he has been making monthly payments to the IRS and his state tax authority, but he did not give priority to resolving his tax issues before they became an issue for his security clearance eligibility. Clearance is denied.

Statement of the Case

On July 4, 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 August 11, 2016, Applicant responded to the SOR allegations and requested a decision on the written record by an administrative judge from the Defense Office of Hearings and Appeals (DOHA). On September 18, 2017, the Government submitted a File of Relevant Material (FORM), consisting of five exhibits (Items 1-5). DOHA forwarded a copy of the FORM to Applicant and instructed him to respond within 30 days of receipt. Applicant received the FORM on September 21, 2017. He submitted a response, which was received by DOHA on October 30, 2017. On October 31, 2017, Department Counsel indicated that the Government did not object to Applicant's FORM response. On January 18, 2018, I was assigned the case to determine whether it is clearly consistent with national security to grant or continue a security clearance for Applicant. On receipt of the file, I admitted Applicant's response to the FORM as an Applicant exhibit (AE A).¹

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.²

Summary of SOR Allegations

The SOR alleges that Applicant had failed to timely file his federal income tax returns for tax years 2010 through 2015 (SOR ¶ 1.a) and his state income tax returns for tax years 2013 through 2015 (SOR ¶ 1.b). Additionally, Applicant is alleged to owe about \$20,000 to the IRS (SOR ¶ 1.c) and an undisclosed amount of delinquent state taxes (SOR ¶ 1.d). When Applicant responded to the SOR in August 2016, he admitted that he failed to file timely returns and that he owed tax delinquencies to the IRS and his state. However, he indicated that he had paid half of his federal tax debt and had arranged to pay his state tax debt in monthly installments. (Item 1.)

Findings of Fact

After considering the FORM, which includes Applicant's response to the SOR as Item 1, and Applicant's rebuttal (AE A), I make the following findings of fact.

Applicant is a 43-year-old computer software engineer with a bachelor's degree in computer science awarded in 1999. He moved to the United States in 1992 and became a naturalized U.S. citizen in September 2000 on his own application. He has been married to a U.S. native citizen since June 2002, and they have a 10-year-old son. (Items 2-3.)

¹ Applicant pre-marked the documents submitted with his response as Item A-1 through Item A-8 and Items 1 through 9.

² Application of the AGs that were in effect as of the issuance of the SOR would not change my decision in this case.

Applicant was employed as a systems architect for a company in the private sector when he purchased his home. In April 2005, he obtained a mortgage for \$331,200, to be repaid at \$3,337 per month for 30 years. In July 2007, he paid off that loan by refinancing for a 30-year mortgage loan for \$353,000, to be repaid at \$3,005 per month. Applicant fell behind more than 120 days on his mortgage payment between December 2008 and November 2009 because of a company-wide reduction in salaries. He was able to restructure his mortgage, which lowered his monthly payment by \$500 to \$600 a month to \$2,401. (Items 2, 5.)

In September 2014, Applicant left his employment of ten years for a program manager position with a federal contractor. On September 27, 2014, he completed and certified to the accuracy of a Questionnaire for National Security Position (SF 86). Applicant responded “No” to whether he had failed to file or pay federal, state, or other taxes in the past seven years, but he then explained:

My wife and I are currently paying back taxes for 2010-2012. We file on time, but not enough money was taken from our paychecks. We have always file[d] taxes together, but this year she had some difficulty gathering all the information that we needed so that we could file taxes, but was not able to get all we needed. I file[d] for an extension hoping that we could gather everything needed, but we missed our deadline. We are filing last year's taxes, even though it would be late. . . .Because we have not file[d], we do not know how much we will need to pay back the federal and state government. I am currently [in] the process of filing my 2013 taxes and I plan to pay all my [out]standing obligation using a 401k loan. (Item 2.)

On May 12, 2015, Applicant was interviewed by an authorized investigator for the Office of Personnel Management (OPM). He reportedly admitted that he did not file taxes for years 2010 through 2014 because his wife did not claim “0” on taxes. Applicant indicated that they owed \$20,000 in federal income tax delinquency, but he did not know the extent of their state income tax delinquency. Applicant asserted that the IRS was taking \$520 a month from his checking account for their federal income taxes. He planned to have their taxes “sorted out” by late May 2015. (Item 3.)

In mid-April 2016, DOHA sent interrogatories to Applicant inquiring about whether he had ever failed to file his federal and state income tax returns on time. When he responded on May 27, 2016, Applicant indicated that he had failed to timely file both his federal and state income tax returns for 2013, 2014, and 2015, but they have now been filed.³ He added, “At this point all those issue[s] have been resolved and I have all my back taxes. I will be working payment plan arrangement with the IRS.” He admitted that they owed state taxes, but he did not indicate that amount of delinquency. (Item 3.)

³ Applicant gave no date for his federal income tax filings. He erroneously gave a date of “5/27/2013” for when he filed his state income tax returns for tax years 2013, 2014, and 2015. His state returns were likely filed on May 27, 2016, which is when he submitted his federal returns.

IRS account transcripts for tax years 2013 through 2015 note a filing extension to October 15 for their return for each year. In March 2016, the IRS inquired about their missing return for tax year 2014. The IRS received Applicant's and his spouse's joint federal income tax returns for tax years 2014 and 2015 on May 27, 2016. The IRS was reporting no record of a return having been filed for 2013, but the tax transcript for that year showed account information from January 2015.⁴ Applicant and his spouse owed the IRS \$29,047 for 2014. They overpaid their federal income taxes for 2015. They had yet to fully resolve their outstanding tax liability for 2011 and 2012, although \$6,092 of their tax withholding for tax year 2015 was applied to their federal tax debt for 2011. (Item 4.)

On July 4, 2016, the DOD CAF issued an SOR to Applicant, alleging that he had failed to timely file his federal income tax returns for tax years 2010 through 2015 and his state income tax returns for tax years 2013 through 2015, and that he owed delinquent taxes to the IRS and state. In response, Applicant explained on August 11, 2016, that he had not realized "before now" that his accountant had filed his 2010 returns late. For tax year 2011, Applicant prepared the returns himself using tax software, and he had "a hard time" completing them correctly, so he filed three days late. As for tax years 2013 through 2015, Applicant explained that his spouse, who was working "as a 1099," did not set money aside to cover her income tax obligations. He felt he should not be responsible to cover her tax debt, and they did not come to an agreement about paying the back taxes until 2016. He asserted that half of his IRS debt has been paid and that he had arranged to pay his delinquent state taxes in monthly installments. (Item 1.)

In August 2016, Applicant paid \$44,000 by check to the IRS. He indicated in the memo line that the payment was for tax year 2013, although there is no documentation from the IRS showing that it was applied to that tax year. (AE A: Response, Items 2, 3.) Applicant may have obtained the funds for that payment from a 401(k) loan, given he had expressed an intention in September 2014 to pay off his tax liabilities with a 401(k) loan. He had \$45,258 in his checking account as of August 2016, but the evidence is unclear whether that was accumulated savings or borrowed funds. According to the IRS transcripts, Applicant and his spouse had adjusted gross income of \$244,711 for tax year 2014 and \$328,581 for 2015. (Item 4.)

As of September 2016, Applicant and his spouse had an installment agreement with the state to repay their tax liability (\$18,613 as of early October 2016) at \$624 per month. After payments totaling \$8,123 from September 2016 through October 2017, they owed the state \$6,759 for tax year 2013 and \$5,314 for tax year 2014.⁵ (AE A: Items 5-9.)

⁴ Applicant presented no documentation to corroborate his assertion that his delinquent return for 2013 has been filed. The check payment of \$44,000 to the IRS in August 2016 was intended for their 2013 federal taxes. This substantial tax payment tends to indicate that a return has been filed, either by Applicant or by the IRS for him in the form of a substitute return. Similarly, as of October 2017, Applicant was making payments toward his state tax liabilities for 2013 and 2014.

⁵ The state allows for online payment of the back taxes. Applicant could pay the total balance or part of the balance due. His online statement of current liability shows that he marked the option for total payment, but he presented no proof of a credit card payment.

Applicant made monthly payments of \$694 to the IRS from November 2016 through January 2017. (AE A: Items A-1, A-2, A-3). An electronic debit of \$694 was cancelled for February 2017 and a \$34 returned check fee was assessed. His checking account balance was insufficient to cover the payment. (AE A: Item A-4.) Monthly payments of \$694 in March 2017, April 2017, and June 2017 cleared his account. (AE A: Items A-5, A-6, A-7.) Applicant presented documentation of an October 2017 payment of \$694 under an installment agreement for tax year 2012. (AE A: Item A-8.) According to Applicant, there was a small gap in his payments because the installment agreement needed to be redone. (AE A: Response.)

In October 2017, Applicant indicated that his tax returns for 2010 and 2012 had been filed on time to his knowledge, while his income tax return for 2011 had been filed only three days late. Concerning his tax returns for 2013-2015, he explained that he wanted to help his spouse by filing jointly because he did not want her to bear the tax burden alone. He asserts that had he filed as single taxpayer, he would have received refunds. He indicated that he had learned an important lesson and would “never again fail to file [his] tax returns on time.” (AE A: Response.)

Applicant and his spouse filed their federal income tax return for tax year 2016 on April 15, 2017. The IRS applied \$642.13 to their taxes owed for 2011 and \$4,112.87 to their taxes owed for 2012. (AE A: Item 4.)

Character reference

A professional colleague from Applicant’s previous job became acquainted with Applicant as a company vice president while Applicant was the software programming lead for the company’s in-hour information technology team. After this vice president purchased the assets of the company and created a new corporation, he had Applicant undertake the design, implementation, and maintenance of the new firm’s primary operating software. Applicant installed the system within 90 days and provided “flawless management and update services” for the software for ten plus years. (AE A: Items 10-11.)

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(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.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that “[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the 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 set forth 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.

Evidence of late income tax return filings is firmly established only with respect to Applicant's federal and state income tax returns for 2013 and 2014. Applicant may have told the OPM investigator in May 2015 that he "did not file taxes for 2010-2014," but he had indicated on his SF 86 that his returns for 2010 through 2012 had been filed. Only the returns for 2013 and 2014 had not been filed. When asked by DOHA in April 2016 about the tax years for which he had ever failed to file a timely return, Applicant gave the years 2013, 2014, and 2015. In response to the SOR, Applicant indicated that he was unaware that his 2010 and 2012 returns had been filed late. He explained that he had filed his 2011 returns three days late. Even so, the possibility of a timely return because of an extension of the filing deadline cannot be ruled out. On his SF 86, when discussing his and his spouse's repayment of delinquent taxes for 2010 through 2012, Applicant stated, "We file on time." The Government presented no documentation showing that Applicant's income tax returns for 2010 through 2012 were untimely.

Concerning tax year 2015, the IRS transcript for that tax year indicates that Applicant's and his spouse's joint income tax return for 2015 was received on May 27, 2016. It also includes an entry dated April 8, 2016: "Extension of time to file tax return ext. Date 10-15-2016." The filing in late May 2016 was well within the extended deadline. However, Applicant failed to timely file income tax returns for 2013 and 2014. His and his spouse's joint return for 2014 was not received by the IRS until May 27, 2016. The IRS had no record of a return having been filed for 2013, but the account information was from January 2015. It is likely that Applicant filed his federal and state income tax returns for 2013 in late May 2016 with the 2014 and 2015 returns. His failure to timely comply with his income tax filing obligations for 2013 and 2014 and to pay his taxes on time for several years raises security concerns under 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."

AG ¶ 19(f), ¶ 19(a), "inability to satisfy debts," and ¶ 19(c), "a history of not meeting financial obligations," apply because of Applicant's and his spouse's delinquent tax liabilities. Applicant estimated on his SF 86 that he and his spouse owed \$20,000 in federal income taxes for tax years 2010 through 2012. He paid \$44,000 to the IRS in August 2016, reportedly for tax year 2013. They owed \$29,047 for tax year 2014. Applicant and his spouse owed delinquent state taxes of \$12,074 for 2013 and 2014 after paying \$8,123 in back taxes.

Applicant has the burden of presenting evidence of explanation, extenuation, or mitigation to overcome the security concerns raised by his noncompliance with his tax filing and tax payment obligations. The security concerns are potentially mitigated under one or more of the following conditions under 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;

(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;

(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;

(d) the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts;

(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; and

(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.

Applicant's tax issues are too recent for mitigation under AG ¶ 20(a). Applicant indicated in September 2014 that he was in the process of filing his and his spouse's joint 2013 tax returns. Their income tax returns for 2013 and 2014 were not filed until late May 2016. Their federal income tax delinquencies for 2010 and 2011 may have been paid off, given the credit transfer of \$6,092 in 2016 to their federal income tax debt for 2011. As of October 2017, they were still in an installment plan to address their federal tax liability for 2012. The \$44,000 paid in August 2016 may have substantially reduced or even satisfied in full their federal tax liability for tax year 2013. However, they still owed balances with the state of \$12,073 for tax years 2013 and 2014 and with the IRS of \$29,047 for 2014.

Applicant attributed his tax issues to his spouse being a 1099 worker who did not set aside the funds to pay her share of the taxes. He knew that he had an obligation to file timely returns and that he could have filed as a single taxpayer. However, he did not want her to bear the tax burden alone. His failure to timely file federal and state income tax returns for at least tax years 2013 and 2014 and failure to pay taxes owed when they were due for 2010 through 2014 were not outside of his control or caused by a circumstance that implicates AG ¶ 20(b).

AG ¶¶ 20(c), 20(d), and 20(g) have some applicability because of Applicant's belated filing of his delinquent tax returns and his tax payments to the IRS and state tax authority. He showed some rectification of his tax filing issues by filing his returns for 2015 and 2016 on time. Regarding tax payments, Applicant told the OPM investigator in May 2015 that the IRS was deducting \$520 a month from his checking account toward his tax

liability. He provided no proof of those payments, which would predate the issuance of his SOR. He submitted in rebuttal to the FORM evidence of federal income tax payments of \$48,858 and state tax payments of \$8,123 after he received the SOR. The Government has legitimate concerns about the timing of his tax debt payments, particularly in light of his adjusted gross income. Applicant and his spouse had an adjusted gross income of \$244,711 in 2014 and \$328,581 in 2015, so they were not without significant income to pay their taxes.

Applicant is not required to pay off all of his delinquent taxes for security clearance eligibility. See ISCR Case No. 07-06482 at 2-3 (App. Bd. May 21, 2008). 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.) The Appeal Board has long held that an applicant who fails to file timely tax returns does not demonstrate the high degree of good judgment and reliability required of persons granted access to classified information. See, *e.g.*, ISCR Case No. 14-00221 at 4 (App. Bd. Jun. 29, 2016), citing ISCR Case No. 12-05053 at 4 (App. Bd. Oct. 30, 2014). Applicant indicates that he has learned his lesson and will comply with his tax filing obligations in the future. While his timely filing of his income tax returns for 2015 and 2016 shows reform in that regard, and he has been making timely payments to the IRS and state tax authority for over a year, Applicant knew that the DOD was concerned about his tax issues in May 2015. He indicated that he would be filing his delinquent returns, but then failed to do so over the next year because of "other circumstances" not enumerated. It is also troubling from a financial standpoint that, despite his household income, the balance of his checking account was not enough to cover the IRS tax payment for February 2017. The financial considerations security concerns are not yet 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). 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.

The security clearance adjudication is not aimed at collecting an applicant's personal debts. Rather, it involves an evaluation of an applicant's judgment, reliability, and trustworthiness in light of the security guidelines in the Directive. See ISCR Case No. 09-02160 (App. Bd. Jun. 21, 2010). At the same time, Applicant can be expected to comply with such an important obligation as filing tax returns on time and paying taxes when they are due. The reason given for his noncompliance—that he had a dispute with his spouse over her failure to set aside funds and he did not feel that he should be responsible to pay all of their tax debt—reflects an unacceptable tendency to put his personal interest ahead of his legal obligation.

The Appeal Board has repeatedly held that the government need not wait until an applicant mishandles or fails to safeguard classified information before denying or revoking security clearance eligibility. See, e.g., ISCR Case No. 08-09918 (App. Bd. Oct. 29, 2009, citing *Adams v. Laird*, 420 F.2d 230, 238-239 (D.C. Cir. 1969)). 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). Based on the evidence before me, I am unable to conclude that it is clearly consistent with the national interest to grant or continue security clearance eligibility for Applicant at this time.

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:

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| Paragraph 1, Financial Considerations: | Against Applicant |
| Subparagraphs 1.a-1.b: | For Applicant |
| Subparagraphs 1.c-1.d: | Against Applicant |

Conclusion

In light of all of the circumstances, it is not clearly consistent with the national interest to grant or continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Elizabeth M. Matchinski
Administrative Judge