



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



In the matter of:)	
)	
REDACTED)	ISCR Case No. 16-00551
)	
Applicant for Security Clearance)	

Appearances

For Government: Tovah Minster, Esq., Department Counsel
For Applicant: *Pro se*

10/23/2017

Decision

MATCHINSKI, Elizabeth M., Administrative Judge:

Applicant failed to timely file his federal income tax returns for tax years 2012 through 2014 due to procrastination. He claims without any corroboration that his delinquent tax returns have been filed. There is insufficient assurance that he will comply with his tax filing and tax payment obligations in the future. Clearance is denied.

Statement of the Case

On October 15, 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 November 9, 2016, Applicant answered 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 November 29, 2016, the Government submitted a File of Relevant Material (FORM), consisting of four exhibits (Items 1-4). DOHA forwarded a copy of the FORM to Applicant on November 30, 2016, and instructed him to respond within 30 days of receipt. Applicant received the FORM on December 6, 2016. He did not file a response by the January 5, 2017 deadline. On October 1, 2017, I was assigned the case to determine whether it is clearly consistent with national security to grant or continue a security clearance for Applicant.

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

Evidentiary Ruling

Department Counsel submitted as Item 3 a summary of a subject interview of Applicant conducted on November 13, 2015. The summary was part of the DOD Report of Investigation (ROI) in Applicant's case. Under ¶ E3.1.20 of the Directive, a DOD personnel background report of investigation may be received in evidence and considered with an authenticating witness, provided it is otherwise admissible under the Federal Rules of Evidence. The interview summary did not bear the authentication required for admissibility under ¶ E3.1.20.

In ISCR Case No. 15-01807 decided on April 19, 2017, the Appeal Board held that it was not error for an administrative judge to admit and consider a summary of personal subject interview in the absence of any objection to it or any indication that it contained inaccurate information. The applicant in that case had objected on appeal to the accuracy of some of the information in a FORM, but had not objected to the interview summary or indicated that it was inaccurate in any aspects when she responded to the FORM.

Unlike the applicant in ISCR Case No. 15-01807, Applicant did not submit a response to the FORM submitted in his case. However, as in ISCR Case No. 15-01807, Applicant was provided a copy of the FORM and advised of his opportunity to submit objections or material that he wanted the administrative judge to consider. In a footnote, the FORM advised Applicant of the following:

IMPORTANT NOTICE TO APPLICANT: The attached summary of your Personal Subject Interview (PSI) (Item 3) is being provided to the Administrative Judge for consideration as part of the record evidence in this

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

case. In your response to this File of Relevant Material (FORM), you can comment on whether [the] PSI summary accurately reflects the information you provided to the authorized OPM investigator(s) and you can make any corrections, additions, deletions, and updates necessary to make the summary clear and accurate. Alternatively, you can object on the ground that the report is unauthenticated by a Government witness. If no objections are raised in your response to the FORM, or if you do not respond to the FORM, the Administrative Judge may determine that you have waived any objections to the admissibility of the summary and may consider the summary as evidence in your case.

Concerning whether Applicant understood the meaning of authentication or the legal consequences of waiver, Applicant's *pro se* status does not confer any due process rights or protections beyond those afforded him if he was represented by legal counsel. He was advised in ¶ E3.1.4 of the Directive that he may request a hearing. In ¶ E3.1.15, he was advised that he is responsible for presenting evidence to rebut, explain, or mitigate facts admitted by him or proven by Department Counsel and that he has the ultimate burden of persuasion as to obtaining a favorable clearance decision. While the Directive does not specifically provide for a waiver of the authentication requirement, Applicant was placed on sufficient notice of his opportunity to object to the admissibility of the interview summary, to comment on the interview summary, and to make any corrections, deletions, or updates to the information in the report. He was advised that if he did not respond, the interview summary may be considered as evidence in his case. Applicant chose to rely solely on the record presented in the FORM, which included the information reflected in the interview summary, however disqualifying, mitigating, or exculpatory the information. I cannot presume without any evidence that Applicant failed to understand his due process rights or obligations under the Directive or that he did not want the summary of his interview considered in his case. Accordingly, I accepted Item 3 in the record, subject to issues of relevance and materiality in light of the entire record.

Findings of Fact

The SOR alleges under Guideline F that, as of October 15, 2016, Applicant had failed to file his "federal taxes" for at least tax years 2012 through 2014. When he responded to the SOR, Applicant denied the allegation but stated, "The statement was true when the original application was made. Since that application was filed all taxes have been filed."

After considering the FORM, which includes Applicant's response to the SOR allegation as Item 1, I make the following findings of fact.

Applicant is a 57-year-old college graduate with a bachelor's degree awarded in May 1996. Applicant married his current wife in December 2010. He has three adult children from his first marriage and four stepchildren. Applicant has worked for his defense contractor employer since March 1999. As of September 2015, he held the position of senior project engineer. Since March 2010, Applicant has also owned and operated a

business that provides sound and recording services in the music industry. Applicant served honorably on active duty in the U.S. military from May 1986 to July 1997. He held a DOD secret clearance for his military duties. (Items 2-3.)

On September 29, 2015, Applicant completed and certified to the accuracy of a Questionnaire for National Security Positions (SF 86). He responded "Yes" to the following tax inquiry: "In the past seven (7) years have you failed to file or pay Federal, state, or other taxes when required by law or ordinance?" and disclosed that he had not filed his federal tax returns for tax years 2012 and 2014 because of "Procrastination/level of effort." Concerning any actions taken to resolve the issue, Applicant indicated that his income withholdings well exceeded his obligation and that he was working with his accountant to get his returns filed. Applicant listed that he had been delinquent on a second mortgage on his previous home and on the first mortgage on his current home, but both issues had been resolved. Under additional comments, Applicant attributed his delinquent mortgages to several factors: leasing out his previous residence (townhouse) after he moved to his current home in 2007, tenants that failed to pay rent, costs associated with a short sale,² unplanned breaks in his spouse's employment, and having to take in his unemployed brother and nephew. He indicated that his finances were fragile, but improving in the last few months. His spouse had become employed at a much better income. His stepson was gaining some financial independence, and his nephew had moved out. His entertainment business was generating enough revenue to offset operating costs. (Item 2.)

On November 23, 2015, Applicant was interviewed by an authorized investigator for the Office of Personnel Management (OPM). Regarding his unfiled federal returns, Applicant acknowledged that he had not filed his federal income tax returns for tax years 2012, 2013, and 2014. He explained that he never got around to filing them. Because he would have received refunds, he was not in any hurry to file them. He indicated that he would file his delinquent returns with his 2015 federal tax return if he is able to get all his paperwork together. He explained that he had digital files for his taxes for those years but that his computer had crashed. Applicant did not believe that his tax issues could be a source of compromise for him. (Item 3.)

A check of Applicant's credit record on October 17, 2015 revealed that he had been seriously past due on his mortgage as of August 2011 and it was in foreclosure status at that time. However, he had been making timely monthly payments for at least two years. He was making timely payments on an \$8,495 car loan obtained in August 2013. He had recently obtained an unsecured loan of \$8,346 in August 2015. He owed two small medical debts from 2010 in collection for \$116 and \$10, but no other delinquencies. (Item 4.)

Applicant indicated on November 9, 2016, that he had not filed his federal income tax returns for tax years 2012 through 2014 as of his SF 86, but he had since filed the returns. (Item 1.) With his receipt of the FORM on December 6, 2016, Applicant was on notice that the DOD had concerns about the absence of documentation showing that he had filed his delinquent tax returns. Nothing was received from Applicant. Without evidence

² His wages had been garnished to pay the delinquency on the second mortgage for his previous residence.

of his returns, IRS transcripts, or other documentation of his taxable income and taxes withheld, it is unclear whether he owes any tax liability for tax years 2012 through 2015.

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.

The Government met its burden of establishing a *prima facie* case for disqualification because of Applicant's admitted failure to timely comply with his federal income tax filing obligation for tax years 2012 through 2014. Disqualifying condition 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."

Applicant has the burden of presenting evidence of explanation, extenuation, or mitigation to overcome the security concerns raised by his failure to comply with his income tax filing obligation. Under the AG effective for any adjudication on or after June 8, 2017, a record of tax filing delinquency may be mitigated under one or more of the following conditions under ¶ 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; 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.

Mitigating condition AG ¶ 20(a) cannot reasonably apply. He had not filed his federal income tax returns for tax years 2012 through 2014 as of his September 2015 SF 86. His noncompliance for the three tax years immediately preceding his SF 86 reflects a continuing course of conduct that raises considerable security concerns about his ability or willingness to comply with laws, rules, and regulations.

Concerning AG ¶ 20(b), on his SF 86 Applicant listed procrastination and “level of effort” as his reasons for not filing timely returns for those tax years. During his November 2015 subject interview, Applicant indicated that he would have received refunds for those tax years and so he was not in any hurry to file his returns. Applicant apparently had some tenant and family issues that adversely affected his finances between 2011 and 2013, but they would not excuse him from his legal obligation to file a timely tax return. Indeed, if he was expecting tax refunds as he claims, it would have been to his financial benefit to have filed his returns on time. There is no evidence of an unexpected circumstance outside of his control that could credibly mitigate his failure to file his federal income tax returns for three consecutive tax years.

Applicant candidly admitted that he had yet to file his income tax returns for 2012 through 2014 as of his November 2015 subject interview. Even if I accept his uncorroborated assertion that his delinquent federal income tax returns for tax years 2012 through 2014 had been filed sometime over that next year, it is difficult to conclude that the problem is being resolved or is under control under AG ¶ 20(c) or that he has complied with any tax arrangements under AG ¶ 20(g). The extent of Applicant’s outstanding federal tax liability, including any penalties and interest for late filing, is unknown. Furthermore, although not alleged, it is unclear whether he filed his state income tax returns for tax years 2012 through 2014 or whether he timely filed federal and state tax returns for tax year 2015. Applicant lives in a state that has an income tax filing and payment obligation.³ He has his own business that could well generate income. More importantly going forward, Applicant has not demonstrated that he understands his obligation to file his tax returns in a timely manner in the future whether or not his income tax withholdings exceed his tax liability.

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). With Applicant having provided no documentation establishing the filing of his delinquent income tax

³ See Title 58.1 of the Code of Virginia.

returns, there is insufficient assurance that Applicant's tax issues are being resolved and will not recur in the future. He failed to establish that the financial considerations security concerns are 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.

The security clearance adjudication 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). Having chosen to rely on the written record, it was incumbent on Applicant to provide sufficient information to supplement the record with relevant and material facts regarding his circumstances. He submitted no documentation showing that he has filed his tax returns for the three years as he asserted. Not enough is known about Applicant's current tax situation for me to conclude that he is likely to comply with his tax filing and tax payment issues in the future. 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.

Formal Finding

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

Paragraph 1, Financial Considerations:	Against Applicant
Subparagraph 1.a:	Against 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 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