



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



In the matter of:)
)
) ISCR Case No. 16-00792
)
Applicant for Security Clearance)

Appearances

For Government: Robert B. Blazewick, Esq., Department Counsel
For Applicant: Eric Leckie, Esq.

01/29/2018

Decision

MURPHY, Braden M., Administrative Judge:

Applicant established that his delinquent debts originated due to circumstances beyond his control, and that he undertook good faith efforts to rectify the situation. However, he did not provide sufficient evidence to mitigate the financial security concerns about his long pattern of failing to timely file state and federal income tax returns. Applicant's eligibility for access to classified information is revoked.

Statement of the Case

Applicant submitted a security clearance application (SCA) on June 5, 2014. On December 14, 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. 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* (January 2, 1992), as amended (Directive); and the adjudicative guidelines effective within the DOD on September 1, 2006.

On December 10, 2016, the Director of National Intelligence (DNI) issued Security Executive Agent Directive 4, National Security Adjudicative Guidelines (AG). The new AGs became effective on June 8, 2017, for all adjudicative decisions on or after that date.¹ Any changes resulting from the implementation of the new AGs did not affect my decision in this case.

Applicant answered the SOR on January 6, 2017, and requested a hearing. The case was assigned to me on August 18, 2017. On October 27, 2017, a Notice of Hearing was issued scheduling the hearing for November 17, 2017, a date agreed to by the parties. The hearing convened as scheduled.

Department Counsel submitted Government's Exhibits (GE) 1 through 5, which were admitted without objection. Applicant testified and submitted Applicant's Exhibits (AE) A through H, and they were admitted without objection.² I held the record open to allow Applicant the opportunity to submit additional documentation concerning his tax returns. On December 21, 2017, Applicant submitted documents which were marked as AE G and AE H and admitted without objection.³ The record closed upon their receipt. DOHA received the hearing transcript on December 1, 2017.

Findings of Fact

Applicant admitted SOR ¶¶ 1.a-1.g and 1.i-1.l, and he denied SOR ¶ 1.h, all with explanations. His admissions are incorporated into the findings of fact. After a thorough and careful review of the pleadings and exhibits submitted, I make the following additional findings of fact.

Applicant is 53 years old. He and his wife have been married since 1994. They have four grown children. After serving in the Air Force,⁴ Applicant worked for a defense contractor for 14 years, until 2001. He left that job voluntarily to pursue his education, and he earned a bachelor's degree in 2001. Since 2003, he has worked for a defense contractor at a naval shipyard. He has held a security clearance since November 2010. (Tr. 25-26, 51-52, 56; GE 1)

On his SCA, Applicant disclosed that he had several years of unfiled state and federal income tax returns and several delinquent debts. He attributed his debts to expenses resulting from his mother-in-law's care, and to the fact that his wife lost her job. (GE 1 at 28-37)

¹ Applicant's counsel confirmed at the hearing that he had received the new AGs. (Transcript (Tr.) 6-7)

² AE A, AE B and AE C were attached to Applicant's answer.

³ Applicant's account transcripts and tax return transcripts for his federal tax returns (tax years 2005-2016) are grouped together as AE G. Documentation concerning his state tax filings (tax years 2007-2016) are grouped together as AE H.

⁴ Applicant served in the Air Force from June 1986 to January 1988. He also served four years in the Air National Guard (1988-1992). (GE 1)

Applicant's mother-in-law suffered for many years from a debilitating medical condition. She moved in with Applicant and his wife in about 1994, shortly after they were married. Her condition worsened, and they moved her to a nursing home in about 2011. Her condition took a toll on Applicant's family both emotionally and financially. Applicant's wife had to take significant time away from work to care for her mother. She also lost her job in August 2013. She was unemployed for a year. Applicant's wife was earning \$65,000 annually, and Applicant's annual salary was about \$78,000 at the time. When his wife lost her job, this had a significant impact on the family's finances. Applicant's mother-in-law died in November 2016. (Tr. 26-30, 43; AE B, AE C)

The SOR includes various consumer, medical and other debts, totaling about \$6,877 (SOR ¶¶ 1.a-1.j). The debts are corroborated by Applicant's admissions, his credit reports, and other documents in the record. (GE 2 – GE 5) All of the alleged debts have been paid, or are being paid.

SOR ¶ 1.a is a \$3,252 credit card debt in collection. Applicant made regular payments on the debt through 2016 and 2017, and had \$233 left to pay at the time of the hearing. (Tr. 34, 35, 46; AE A, AE E) SOR ¶ 1.b (\$929) and ¶ 1.c (\$794) are consumer debts in collection. SOR ¶ 1.f (\$130) is owed to a phone company. These debts have been paid. (Tr. 35-36, 38; AE E) SOR ¶¶ 1.d (\$100), 1.e (\$140), 1.g (\$82) and ¶1.h (a \$1,133 judgment) are medical debts. The smaller debts have been paid, and the judgment is being paid. (Tr. 37-40; AE A)

The remaining SOR allegations concern Applicant's repeated failure to timely file his state income tax returns for tax years 2005, 2006 and 2010-2013 (SOR ¶1.k) and federal income tax returns for tax years 2010-2013 (SOR ¶ 1.l). Applicant admitted the allegations in his Answer, but said he had filed all his returns as of March 2014.

From about 2003 to 2005, Applicant lived and worked several hours away from his home during the week. It was expensive to live in two places. (Tr. 48, 54-60) For tax years 2005 and 2006, Applicant filed his federal returns (AE G), but did not file his state income tax returns for these years. He also asserted that he would have gotten a small refund had he filed those returns. Years later, after receipt of the SOR, Applicant attempted to file those returns, but claimed the state would not accept them. (Tr. 42, 48, 54-62) Applicant did not provide corroborating documentation that the state would not accept his 2005 and 2006 state returns after the hearing. (AE H)

Applicant testified that for tax year 2009, he utilized a tax preparation service. He thought they did a poor job, since he was required to pay more than he expected. He testified that he prepared his own tax returns in 2010, and owed about \$1,800. He testified that he and his family were financially strapped and he was unable to pay what he owed. He chose not to file, figuring that he would file the next year, when he expected a refund. That did not happen. Applicant then failed to file both federal and state returns for several years. (Tr. 40-41, 49-50)

Applicant testified that he began clearing up his tax problems in 2013, and filed all his past-due returns by 2015. He said all his tax returns since 2013 have been filed on time. He made no excuses for his late filings. (Tr. 41, 50-51, 63-66)

The documentation Applicant submitted after the hearing showed that he filed his 2007 federal income tax return in late May 2008. He did not file his 2008 federal income tax return until July 2010. He filed his 2009 federal return in September 2010. He owed a small penalty for late payments each time. (AE G) Applicant did not file his 2007, 2008 and 2009 state income tax returns until between March and September 2010. He owed almost \$1,400 for tax year 2007, \$86 for tax year 2008, and was refunded about \$1,300 for tax year 2009. (AE H) These late filings were not alleged in the SOR, as they did not come to light until after the hearing.⁵

After Applicant filed these past-due tax returns in 2010, he did not file any state or federal tax returns again until late March 2015. That month, he filed his past-due state and federal income tax returns for tax years 2010, 2011, 2012 and 2013. (SOR ¶¶ 1.k, 1.l) All these returns resulted in refunds but for his 2011 federal return, for which he owed a small penalty for late payment. (AE G, AE H) Applicant testified that he was prompted to file his past-due tax returns as a result of his background interview.⁶

Applicant also documented the status of his more recent returns. He filed his 2014 state and federal returns on time, with refunds. He filed his 2015 state and federal returns in June 2016. He filed his 2016 state and federal returns on time. For all of these tax returns, he received refunds. (AE G, AE H)

Applicant testified that he now earns an annual salary of about \$88,000. His wife is now a state employee, earning about \$42,000 annually. They have a monthly budget. He documented several months of recent spending, and established that he generally has several hundred dollars left at the end of the month. (Tr. 65-69, AE F)

Applicant's work-related references attest to his integrity, moral courage, good character, work ethic, and loyalty as a team member. He has been recognized for his professional and technical expertise. He understands responsibilities of protecting classified information. He is a family man, and actively volunteers mentoring local youths. (AE D)

⁵ I cannot consider Applicant's failure to file tax returns that are not alleged in the SOR as disqualifying conduct. However, I can consider that evidence in weighing evidence of mitigation or changed circumstances, whether Applicant has demonstrated sufficient rehabilitation, under the whole person concept, and in weighing Applicant's credibility. ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006).

⁶ Tr. 41 ("I told my investigator . . . when they started doing my clearance, I explained to her everything, and then I started filing in 2014, to make sure I went back and started filing all my taxes, and got them straight.").

Policies

It is well established that no one has a right to a security clearance. As noted by the Supreme Court in *Department of the Navy v. Egan*, “the clearly consistent standard indicates that security determinations should err, if they must, on the side of denials.”⁷

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 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, these guidelines are applied 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.

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. Likewise, I have not drawn inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an “applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel and 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 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.

⁷ *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988).

Analysis

Guideline F, Financial Considerations

The security concern for financial considerations is set out 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. . . . An individual who is financially overextended is at greater risk of having to engage in illegal or otherwise questionable acts to generate funds. . . .

The guideline sets forth several conditions that could raise security concerns under AG ¶ 19. The following are potentially applicable in this case:

- (a) inability to satisfy debts;
- (c) a history of not meeting financial obligations; and
- (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 failed to file his state and federal income tax returns on time as required for several years. He also had some delinquent debts. AG ¶¶ 19 (a), (c) and (f) apply.

Conditions that could mitigate 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, a death, divorce or separation, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances;
- (d) the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts; 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.

This case has two parts: Applicant's delinquent debts and his failure to timely file federal and state income tax returns. The delinquent debts are resolved. They are attributable to two circumstances beyond his control: his mother-in-law's long term serious medical condition, and his wife's job loss. These circumstances impacted Applicant's finances and resulted in some delinquent debts. Applicant established that those debts are now largely resolved, and his finances have also significantly improved. AG ¶¶ 20(a), 20(b), and 20(d) apply to them.

On the other hand, Applicant's failure to timely file his state and federal income tax returns is extensive and long-term. Applicant filed his federal tax returns on time for tax years 2005 and 2006, but did not file his state income tax returns.

Applicant also filed late state and federal returns for tax years 2007-2009. Most of these returns were not filed until 2010. Applicant was applying for a security clearance at the time, a circumstance that likely spurred him to act. Those returns are not alleged in the SOR, and I have not considered them for disqualifying purposes.⁸

Having belatedly cured those unfilled tax returns in 2010, Applicant repeated his conduct when he failed to timely file any of his state and federal income tax returns for several more years. He did not file his state and federal returns for tax years 2010-2013 until March 2015, a time when he was again applying for a security clearance.

Applicant's unfilled tax returns are not fully attributable to circumstances beyond his control. He decided not to file his taxes when he could not pay what he owed. While this may be partly attributable to his family's dire financial straits, his decision not to file his state and federal tax returns for several years was not reasonable. AG ¶ 20(b) does not apply to them.

Failure to file tax returns suggests that an applicant has a problem with complying with well-established governmental rules and systems. Voluntary compliance with such rules and systems is essential for protecting classified information. ISCR Case No. 01-05340 at 3 (App. Bd. Dec. 20, 2002). As we have noted in the past, a clearance adjudication is not directed at collecting debts. See, e.g., ISCR Case No. 07-08049 at 5 (App. Bd. Jul. 22, 2008). By the same token, *neither is it directed towards inducing an applicant to file tax returns. Rather, it is a proceeding aimed at evaluating an applicant's judgment and reliability. Id.* A person who fails repeatedly to fulfill his or her legal obligations does not demonstrate the high degree of good judgment and reliability required of those granted access to classified information. See, e.g., ISCR Case No. 14-01894 at 5

⁸ ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006).

(App. Bd. Aug. 18, 2015); See *Cafeteria & Restaurant Workers Union Local 473 v. McElroy*, 284 F.2d 173, 183 (D.C. Cir. 1960), *aff'd*, 367 U.S. 886 (1961).

ISCR Case No. 14-04437 at 3 (App. Bd. Apr. 15, 2016) (emphasis added). See ISCR Case No. 14-05476 at 5 (App. Bd. Mar. 25, 2016); ISCR Case No. 14-01894 at 4-5 (App. Bd. Aug. 18, 2015).

Applicant has now filed most of the past-due state and federal returns alleged in the SOR. His returns from subsequent years have also been filed, either on time, or late. However, I cannot simply adopt a position of “no harm, no foul” or “all’s well that ends well.”⁹

In ISCR Case No. 14-01243 at 3 (App. Bd. Jun. 18, 2015), the Appeal Board held that timing of debt payments is relevant in evaluating an applicant's case for mitigation. As in that case, evidence suggesting that, after years of apparent inattention, Applicant was finally energized to come to terms with his overdue tax returns when his clearance might be imperiled raises questions about his willingness to follow the sometimes complex rules governing classified information when his personal interests are not at stake. See, e.g., ISCR Case No. 15-01070 at 4 (App. Bd. Mar. 9, 2016), in which the Appeal Board held that an applicant who waits until his clearance is in jeopardy before resolving debts might be lacking in the judgment expected of those with access to classified information.

Not once but twice, Applicant waited until his clearance was in jeopardy before curing several years of past due tax filings. He filed most of his 2007-2009 returns in 2010, all of them late.¹⁰ These returns are not alleged, but Applicant repeated the pattern in 2015, when, as alleged, he filed his returns for tax years 2010 through 2013. AG ¶ 20(d) does not apply.

Given this evidence, Applicant has not established good-faith compliance with his tax requirements to show that his prior tax issues are unlikely to recur or no longer casts doubt on his reliability, trustworthiness or judgment. AG ¶ 20(a) does not apply.

With respect to AG ¶ 20(g), Applicant has not mitigated the security concerns stemming from his unfiled tax returns simply by establishing that those returns have now been filed, and that tax returns from subsequent years were largely filed on time. The mere fact that Applicant made belated arrangements with appropriate tax authorities to file his returns is insufficient to apply AG ¶ 20(g). Moreover, even if AG ¶ 20(g) applied, Applicant’s eligibility for a clearance does not turn on the application of one mitigating condition.

⁹ ISCR Case No. 14-01894 at 4-5 (App. Bd. Aug. 18, 2015)

¹⁰ Applicant also filed his 2007 federal return late, but in September 2008, not in 2010.

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(d):

(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 the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my comments under Guideline F in my whole-person analysis. Applicant repeatedly failed to comply with rules and regulations in timely filing his state and federal income tax returns. Although Applicant resolved his delinquent debts, his demonstrated pattern of unwillingness to comply with his legal obligations until his eligibility for a security clearance is at stake raises serious security concerns. Those concerns are not resolved solely because Applicant has belatedly cured his tax filings. Overall, the record evidence leaves me with questions and doubts as to Applicant's continued eligibility for access to classified information.

Formal Findings

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

Paragraph 1, Guideline F:	AGAINST APPLICANT
Subparagraphs 1.a-1.j:	For Applicant
Subparagraphs 1.k-1.l:	Against Applicant

Conclusion

In light of all of the circumstances, presented by the record in this case, it is not clearly consistent with the interests of national security to grant Applicant eligibility for

continued access to classified information. Eligibility for access to classified information is revoked.

Braden M. Murphy
Administrative Judge