



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



In the matter of:)
)
)
) ISCR Case No. 16-02589
)
)
Applicant for Security Clearance)

Appearances

For Government: Bryan Olmos, Esq., Department Counsel
For Applicant: *Pro se*

01/30/2018

Decision

WESLEY, Roger C., Administrative Judge:

Based upon a review of the pleadings and exhibits, I conclude that Applicant failed to mitigate the security concerns regarding his financial considerations. Eligibility for access to classified information is denied.

Statement of Case

On November 8, 2016, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) detailing reasons why DOD adjudicators could not make the affirmative determination of eligibility for a security clearance, and recommended referral to an administrative judge to determine whether a security clearance should be granted, continued, denied, or revoked. 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 (AGs) implemented by DOD on September 1, 2006.

The Security Executive Agent, by Directive 4, *National Security Adjudicative Guidelines* (SEAD 4), dated December 10, 2016, superceded and replaced the September 2006 adjudicative guidelines (AGs). They apply to all covered individuals who require initial or continued eligibility for access to classified information or eligibility to hold a sensitive position. Procedures for administrative due process for contractor personnel continue to be governed by DOD Directive 5220.6, subject to the updated substantive changes in the AGs, effective June 8, 2017. Application of the AGs that were in effect when the SOR was issued would not affect my decision in this case.

Applicant responded to the SOR on November 25, 2016, and requested a hearing. The case was assigned to me on June 5, 2017, and scheduled for hearing on August 3, 2017. The Government's case consisted of five exhibits (GEs 1-5) Applicant relied on one witness (himself) and 11 exhibits. (AEs A-K) The transcript was received on August 15, 2017.

Procedural Issues

Before the close of the hearing, Applicant requested the record be kept open to permit him the opportunity to supplement the record with documented filing of his 2011 federal tax return. For good cause shown, Applicant was granted 14 days to supplement the record. Department Counsel was afforded seven days to respond.

Within the time permitted, Applicant supplemented the record with email explanations of his unsuccessful efforts to obtain a copy of IRS transcript of his claimed earlier filing his of 2011 tax return, a copy of his signed and dated November 2017 filing of his federal tax return for tax year 2011, and a printout from his bank account documenting automatic IRS withdrawals from his bank account covering the period of July 2016 through October 2017. Applicant's submissions were admitted without objection as AEs L-P. In an accompanying email explanation of his unsuccessful efforts to obtain an IRS transcript of 2011 covering his claimed earlier filing of his 2011 tax return, Applicant cited his calls to the IRS and the absence of any IRS assurances that they could provide his requested IRS transcript within a reasonable time. Applicant, in turn, requested that the record be closed. With Department Counsel's offered concurrence, the record closed.

Summary of Pleadings

Under Guideline F, Applicant allegedly (a) failed to timely file federal tax returns for tax years 2007, 2009-2011, and 2013; (b) incurred federal tax debts for tax years 2008 (\$17.00), 2009 (\$305); and 2010 (\$10,025); and (c) incurred a state tax debt of \$2,919. Allegedly, the timely filing of his tax returns and incurred tax debts remain in issue.

In his response to the SOR, Applicant admitted each of the allegations with explanations. He claimed he consulted both the Internal Revenue Service (IRS) and state revenue office about taxes owed and was told all back taxes owed must be paid in full. He claimed he consulted with a person claiming to be a certified public accountant (CPA) who gave him poor tax filing advice.

Applicant further claimed that he agreed to payment plans with the IRS and state tax authority, and has payments deducted monthly from his bank account by IRS and state tax authorities. And, he claimed he has substantially reduced the amount of taxes owed to both taxing authorities with his reductions.

Findings of Fact

Applicant is a 50-year-old shift supervisor for a defense contractor who seeks a security clearance. The allegations covered in the SOR and admitted by Applicant are incorporated and adopted as relevant and material findings. Additional findings follow.

Background

Applicant married in July 1987 and divorced in June 1989. (GE 1; Tr. 58-59) He has no children from this marriage. He remarried in March 1993 and divorced in August 2000. (GEs 1-2; Tr. 51-52) He has one adult child from this marriage. He remarried for the second time in April 2006 and has no children from this marriage. (GEs 1-2; Tr. 51-52). Applicant earned a high school diploma in May 1985 and has since earned some college credits. (GEs 1-2; Tr. 53) He enlisted in the Air Force in July 1992 and served five years of active duty. (GE 1; Tr. 53)

Applicant has worked for his current defense contractor employer since February 2016. (GEs 1-2) He reported unemployment between October 2015 and February 2016 and between August 2015 and September 2015. (GEs 1-2) Between April 2008 and August 2015, he worked as a police officer for a local police department. (GEs 1-2; Tr. 55-56)

Applicant's finances

Records confirm that Applicant failed to timely file his federal tax returns for tax years 2007, 2009 through 2011, and 2013. (GEs 2-3 and AEs B-D and F; Tr. 61-62) He attributed his filing lapses to unemployment, poor tax advice from a professional claiming to be a certified public accountant, and insufficient income to pay his taxes owed. (GE 2; Tr. 57-59, 74) Applicant's IRS transcripts confirm that he filed his federal tax returns for tax years 2009-2010 and 2012 in April 2013, and his 2013 tax returns in August 2014, well before he completed his electronic questionnaires for investigations processing (e-QIP) in February 2016. (GEs 1 and 4 and AEs A-F; Tr. 61-74)

Applicant's transcripts confirm that he filed both his 2008 and 2012 federal returns timely, in accordance with IRS legal requirements. (AEs A and E) Likewise, his acknowledged late filing of his 2007 federal tax return in 2012 was made well before he completed his 2016 e-QIP. (GE 2; Tr. 61-64) Applicant is credited with filing his federal tax returns for tax years 2013 through 2015 in a timely manner. (AEs F-H)

Despite Applicant's assurances that he filed his 2011 federal tax return with the group of other tax returns he filed in April 2013 (Tr. 62-63), the IRS transcript covering tax

year 2011 does not list a filing date, an account balance, or the existence of an installment agreement for tax year 2011. (GE 4 and AE D) Because Applicant could not verify his filing of his 2011 federal tax return or his completion of an installment agreement for any taxes owed for tax year 2011, he sought copies of both his 2011 tax return and 2011 installment agreement after the hearing. Advised by the IRS that it would take considerable time to obtain this information, Applicant filed a 2011 tax return with the IRS in November 2017 (reporting a \$1,255 tax due for 2011), and supplied a copy of his October 2017 bank statement documenting monthly IRS withdrawals of \$166 between July 2016 and October 2017. (AEs L-N)

To date, Applicant has not received an IRS response to his inquiries. Based on the documentation he has provided in his post-hearing submissions, it remains unclear whether he completed an installment agreement covering taxes, penalties, and interest owed for tax year 2011. The payment summary he provided for the period of July 2016 and October 2017 covers his agreed installment payments for tax year 2010 and makes no mention of tax year 2011 or any other year. (AE N)

Without more information from the IRS confirming or denying Applicant's prior filing of a 2011 tax return and completing an installment agreement for the taxes owed for tax year 2011, no favorable inferences can be drawn at this time of Applicant's filing a federal tax return and completing an installment agreement covering tax year 2011. By requesting the record be closed before receiving the requested information from the IRS covering tax year 2011, he foreclosed any remaining opportunities to present the requested information.

IRS transcripts confirm that he incurred additional tax debts to the Federal Government for delinquent taxes totaling \$17 for tax year 2008, \$305 for tax year 2009, and \$10,025 for tax year 2010. (GE 3 and AEs B-C) Applicant completed an initial installment agreement with the IRS in 2009 to cover past taxes owed for earlier years (including tax years 2007-2009). In compliance with the terms of this 2009 agreement, Applicant made monthly payments to the IRS between October 2013 and September 2016 totaling \$4,737. (GE 4; Tr. 36-38) Applicant's payments made for these covered years satisfied his compliance requirements under his 2009 installment agreement.

Applicant completed a second installment agreement with the IRS in July 2016 covering the 2010 tax year. Under the terms of his agreement, he has made monthly payments of \$166, beginning in July 2016 and running through October 2017. (GE 3 and AE C; Tr. 29-30, 71-72) A tax payment summary produced by the IRS in July 2017 credited Applicant with a reduction of his taxes owed for tax year 2010 from \$10,025 to \$9,255. (AE I) Applicant's payment history with the IRS documents his being in full compliance with his 2016 installment agreement. (AE I)

Besides owing back taxes to the IRS, Applicant became indebted to his state tax authority for owed state taxes for tax years 2005 and 2007-2014 in the total amount of \$3,205. (GEs 2 and 4 and AEs J-K; Tr. 26-27, 33-37) A state account summary documented Applicant's making \$211 monthly payments to the state between July 2015

and June 2016. (AE K) In 2015, he entered into a new installment agreement with his state's tax authority. Under the terms of this new agreement, he has made reduced monthly payments of \$150 between July 2016 and July 2017. (AE K) He has maintained his monthly payments in full compliance with his state installment agreement and has reduced the overall balance owed to the state to \$1,467. (GE 4 and AE K; Tr. 27-28, 37-38)

All of Applicant's consumer accounts are in current status. (GE 5; Tr. 75) The only other unaccounted tax debt owed by Applicant is a reported \$1,255 balance due on his recently filed 2017 federal tax return. (AE N) Without verified approval of Applicant's reported taxes due for this 2011 tax year, Applicant's reported tax due figure cannot be accepted as more than an estimate. Penalties and interest imposed on this late 2011 return by the IRS can be expected to increase the amount Applicant owes for tax year 2011 beyond whatever principle amount due is calculated by the IRS.

Policies

The SEAD 4, App. A lists guidelines to be used by administrative judges in the decision-making process covering security clearance cases. These guidelines take into account factors that could create a potential conflict of interest for the individual applicant, as well as considerations that could affect the individual's reliability, trustworthiness, and ability to protect classified information. These guidelines include conditions that could raise a security concern and may be disqualifying (disqualifying conditions), if any, and many of the conditions that could mitigate security concerns.

These guidelines must be considered before deciding whether or not a security clearance should be granted, continued, or denied. The guidelines do not require administrative judges to place exclusive reliance on the enumerated disqualifying and mitigating conditions in the guidelines in arriving at a decision. Each of the guidelines is to be evaluated in the context of the whole person in accordance with App. A. AG ¶ 2(c).

In addition to the relevant AGs, administrative judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in App. A, AG ¶ 2(d) of the AGs, which are intended to assist the judges in reaching a fair and impartial commonsense decision based upon a careful consideration of the pertinent guidelines within the context of the whole person.

The adjudicative process is designed to examine a sufficient period of an applicant's life to enable predictive judgments to be made about whether the applicant is an acceptable security risk. The following App A, AG ¶ 2(d) factors are pertinent: (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.

Viewing the issues raised and evidence as a whole, the following individual guidelines are pertinent in this case:

Financial Considerations

The Concern: Failure or inability to live within one's means, satisfy debts and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness and ability to protect classified 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 of dependence. An individual who is financially overextended is at greater risk of having to engage in illegal acts or otherwise questionable acts to generate funds. . . . AG ¶ 18.

Burden of Proof

By virtue of the principles and policies framed by the AGs, a decision to grant or continue an applicant's security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires administrative judges to make a commonsense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a security clearance depends, in large part, on the relevance and materiality of that evidence. *See United States, v. Gaudin*, 515 U.S. 506, 509-511 (1995).

As with all adversarial proceedings, the judge may draw only those inferences which have a reasonable and logical basis from the evidence of record. Conversely, the judge cannot draw factual inferences that are grounded on speculation or conjecture.

The Government's initial burden is twofold: (1) it must prove by substantial evidence any controverted facts alleged in the SOR, and (2) it must demonstrate that the facts proven have a material bearing to the applicant's eligibility to obtain or maintain a security clearance. The required materiality showing, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a security clearance. Rather, the judge must consider and weigh the cognizable risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the evidentiary burden shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation,

or mitigation. Based on the requirement of Exec. Or. 10865 that all security clearances be clearly consistent with the national interest, the applicant has the ultimate burden of demonstrating his or her clearance eligibility. “[S]ecurity-clearance determinations should err, if they must, on the side of denials.” See *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

Analysis

Security concerns are raised over Applicant’s failure to timely file his federal tax returns for tax years 20007, 2009-2011, and 2013 and accrual of federal tax debts exceeding \$10,000 and state tax debts exceeding \$2,900. Applicant’s failure to timely file federal tax returns for multiple years and his incurring of delinquent federal and state taxes for the years in issue warrant the application of four of the disqualifying conditions (DC) of the Guidelines: DC ¶¶ 19(a), “inability to satisfy debts”; 19 b), “unwillingness to satisfy debts regardless of the ability to do so”; 19(c), “a history of not meeting financial obligations”; and 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’s admitted federal tax filing lapses and his accumulation of delinquent federal and state tax debts negate the need for any independent proof. See *McCormick on Evidence*, § 262 (6th ed. 2006). Each of Applicant’s admitted delinquent federal tax returns and unresolved federal and state tax delinquencies are fully documented and create some judgment issues. See ISCR Case 03-01059 at 3 (App. Bd. Sept. 24, 2004).

Financial stability in a person cleared to protect classified information is required precisely to inspire trust and confidence in the holder of a security clearance that entitles him to access classified information. While the principal concern of a security clearance holder’s demonstrated financial difficulties is vulnerability to coercion and influence, judgment and trust concerns are implicit in cases involving debt delinquencies.

Historically, the timing of filing federal tax returns and resolving federal and state tax delinquencies are critical to an assessment of an applicant’s trustworthiness, reliability, and good judgment in following rules and guidelines necessary for those seeking access to classified information or to holding a sensitive position. See ISCR Case No. 14-06808 at 3 (App. Bd. Nov. 23, 2016); ISCR Case No. 14-01894 at 5 (App. Bd. Aug. 18, 2015). Applicant’s cited extenuating circumstances (i.e., unemployment, poor professional tax advice, and insufficient income to pay his federal and state taxes when due and payable) provide some mitigation credit for his failure to timely file his federal tax returns and address his federal and state taxes due for the tax years in issue. Based on his cited circumstances, MC ¶ 20(b), “the conditions that resulted in the financial problem were largely beyond the person’s control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation), and the individual acted responsibly under the circumstances,” has some application to Applicant’s situation

To his credit, Applicant timely filed his federal tax returns for 2008, 2012, and 2014-2015 and filed his returns for 2007, 2009-2010, and 2013 before the initiation of the security clearance application process. Applicant is also to be credited with maintaining his monthly payments in compliance with his 2016 IRS installment agreement for tax year 2010 and his state installment agreement covering the prior tax years in issue. Applicant, however, has not been able to verify his claimed earlier filing of his 2011 federal tax return or supply a copy of an installment agreement covering tax year 2011. Not until after Applicant initiated the security clearance process in January 2016 with his completion of an e-QIP did he file his 2011 (dated in November 2017) federal tax return and apply for a modified installment agreement with the IRS based on his claimed earlier filing of his 2011 tax return.

Based on Applicant's cited circumstances, the "acting responsibly" prong of MC ¶ 20(b) has only limited application and cannot excuse his past failures to timely file his tax returns for all of the covered tax years in the SOR, or at the very least before the initiation of the clearance application process, and either pay the taxes due, with accumulated penalties and interest where applicable, or complete an installment agreement with the IRS for the covered years. In these circumstances, Applicant's failure or inability to corroborate his earlier filing of his 2011 federal tax return, provide a modified IRS transcript covering tax year 2011, and demonstrate a track record of compliance with the agreement's terms precludes him from fully availing himself of the benefits of MC ¶ 20(b). See ISCR Case No. 15-06440 at 3-5 (App. Bd. Dec. 26, 2017); ISCR Case No. 05-11366 at 4 n.9 (App. Bd. Jan. 12, 2007) (citing ISCR Case No. 99-0462 at 4 (App. Bd. Nov. 29, 2005)). For similar reasons, MC ¶ 20(d), "the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts," is not available to mitigate his federal tax return filing lapses and incurring of federal tax liens (still unresolved) over an extended number of years.

Whether Applicant is entitled to the full mitigating benefits of MC ¶ 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," is unclear at this point. See ISCR Case No. 16-02246, at 2 (App. Bd. Dec. 8, 2017). Applicant provided no documentation at hearing or in permitted post-hearing submissions of his completing an installment agreement with the IRS for tax year 2011 and making more concerted long-term efforts to address his timely filing of his federal tax returns and meet his tax paying responsibilities in compliance with federal and state law.

In evaluating Guideline F cases, the Appeal Board has stressed the importance of a "meaningful track record" that includes evidence of actual debt reduction through voluntary payment of debts, and implicitly where applicable the timely filing of tax returns. ISCR Case No. 07-06482 at 2-3 (App. Bd. May 21, 2008). In Applicant's case, his late filing of his 2011 federal tax return after the initiation of the security clearance process and modest efforts in addressing his outstanding federal tax returns with the benefit of installment agreements with the IRS are not enough to warrant favorable findings and conclusions with respect to raised security concerns.

Whole-Person Assessment

Whole-person assessment is unfavorable to Applicant. He has shown insufficient progress to date in addressing his tax returns and delinquent federal taxes owed for prior years (especially tax year 2011) covered in the SOR to merit positive overall credit. What general contributions he has made to his current employer are not enough to overcome historical trust and judgment issues associated with his failure to timely file his federal tax returns over the course of several years (i.e., 2007, 2009-2011, and 2013) and his incurrence of federal tax delinquencies that are addressed for the most part by Applicant, but are still not fully resolved.

Overall, Applicant's actions to date in addressing his finances reflect too little evidence of restored financial responsibility and judgment to overcome reasonable doubts about his trustworthiness, reliability, and ability to protect classified information. See AG ¶ 18. Conclusions are warranted that his finances are insufficiently stabilized at this time to meet minimum eligibility requirements for holding a security clearance. Unfavorable conclusions are entered with respect to the allegations covered by SOR ¶ 1.a. Favorable conclusions are entered for SOR ¶¶ 1.b-1.e. Eligibility to hold a security clearance under the facts and circumstances of this case is inconsistent with the national interest.

Formal Findings

In reviewing the allegations of the SOR and ensuing conclusions reached in the context of the findings of fact, conclusions, conditions, and the factors listed above, I make the following formal findings:

GUIDELINE F (FINANCIAL CONSIDERATIONS): AGAINST APPLICANT

Subparagraph 1.a:	Against Applicant
Subparagraphs 1.b-1.e:	For Applicant

Conclusions

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue Applicant's eligibility to hold a security clearance. Clearance is denied.

Roger C. Wesley
Administrative Judge

