



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



In the matter of:

)
)
)
)
)

ISCR Case No. 16-03722

Applicant for Security Clearance

Appearances

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

For Applicant: *Pro se*

01/19/2018

Decision

MATCHINSKI, Elizabeth M., Administrative Judge:

Applicant did not timely file his federal and state income tax returns for tax years 2013, 2014, and 2015. He misinterpreted advice from the Internal Revenue Service (IRS) and believed he had three years to file his returns if entitled to refunds. Applicant filed his delinquent returns in 2017, and he is likely to comply with tax-filing deadlines in the future. Clearance is granted.

Statement of the Case

On December 29, 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 SOR explained why it was unable to find it clearly consistent with the national interest to grant or continue his access eligibility to classified information. 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 January 23, 2017, Applicant answered the SOR allegations and requested a decision on the written record without a hearing. On March 24, 2017, he requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA). On May 2, 2017, the case was assigned to an administrative judge, who scheduled a hearing for June 20, 2017.

While this case was pending a hearing, the Director of National Intelligence (DNI) issued Security Executive Agent Directive 4 establishing new National Security Adjudicative Guidelines (AG) applicable to all covered individuals who require national security eligibility or eligibility to hold a sensitive position effective for any adjudication made on or after June 8, 2017. On June 2, 2017, Applicant was advised that his security clearance eligibility would be adjudicated under the new AG. On June 20, 2017, a continuance was granted at Applicant's request to give him additional time to prepare for his hearing in light of the new AG.

On August 10, 2017, the case was transferred to me to conduct a hearing. On October 12, 2017, I scheduled a hearing for November 14, 2017. At the hearing, I advised Applicant that I would be adjudicating his security clearance eligibility under the new AG.¹ Three Government exhibits (GEs 1, 3-4) and three Applicant exhibits (AEs A-C) were admitted into evidence without objection. The Government offered as GE 2 a report of subject interview, but then withdrew the document. Applicant testified, as reflected in a transcript (Tr.) received on November 24, 2017.

I held the record open for one month after the hearing for Applicant to submit additional documentation. On December 6, 2017, Applicant submitted an email with an attached letter from his accountant. The document was admitted without objection as AE D.

Findings of Fact

The SOR alleges that Applicant failed to timely file his federal (SOR ¶ 1.a) and state (SOR ¶ 1.b) income tax returns for tax years 2013, 2014, and 2015, and that he had not filed his delinquent returns as of late December 2016. In a detailed response, Applicant denied the allegations, asserting that he was within his rights, the law, and time guidelines for filing his returns. However, he also indicated that he was working with his accountant to file his returns and obtain his tax refunds. After considering the pleadings, exhibits, and transcript, I make the following findings of fact.

Applicant is a 57-year-old senior mechanic, who has worked for his defense-contractor employer since December 1978. He has held a top secret clearance since approximately July 2001. He has an associate degree awarded in February 2006. (GE 1; Tr. 50.)

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

Applicant and his ex-wife were married from 1981 to 1992. After their divorce, he became a single parent to their daughter born in 1985. His ex-wife has not been in their daughter's life. Applicant's daughter has disabilities and currently is a stay-at-home mom for her son born in 2012. (GE 1; Tr. 38.) Applicant's daughter and grandson do not live with him, but Applicant provides for them financially. (Tr. 50.)

At age 14 months, Applicant's grandson began to have serious medical issues. He has required ongoing doctor visits, medical testing, and treatment with prescription medications. (Tr. 38-39, 41-42.) His illness first surfaced when Applicant's income tax returns for 2013 were due. Although Applicant had his returns professionally prepared, it was his responsibility to gather the documentation needed to file his returns, and he was focused on caring for his grandson. (Tr. 51-52.) Applicant contacted the IRS and also his state tax authority about his income tax return. He explained his situation and indicated that he expected a tax refund. Applicant testified that he was told by the IRS and his state tax authority that he had three years after the tax return filing deadline in which to file his tax return. (Tr. 37, 40-41, 65, 70.) Applicant's accountant told him that he had to file his returns within three years or would lose any refund due him (AE D), which Applicant took as confirmation that he had three years to file his returns. (Tr. 80.)

The IRS sent Applicant a copy of IRS Publication 1, revised September 2012, which states in part:

If you were due a refund but you did not file a return, you generally must file your return within 3 years from the date the return was due (including extensions) to get that refund. (AE A.)

For Applicant, it reinforced his belief that he had three years from April 2014 in which to file his income tax return for tax year 2013. He did not read the provision as giving him a legal remedy for his refund without penalty even if he did not comply with the tax filing deadline. (Tr. 46.)

Applicant did not file his federal or state income tax returns when they were due for tax years 2014 and 2015. (GE 1.) Applicant's explanation is that he had three years to file and that had been led to believe from his accountant that he had to file his delinquent return for 2013 before he could file for subsequent tax years. Applicant's accountant indicates that he suggested to Applicant to file his returns "one year at a time as they cleared and he received his refund." (AE D.) Believing he had until April 15, 2017, to file his returns for tax year 2013, Applicant denies he deliberately disregarded his tax-filing obligation. (Tr. 47-48, 55.) Applicant had received some notices from the IRS about missing returns, but when he contacted the IRS, he explained that he was owed refunds and would be filing his returns with the assistance of his accountant. He indicated that the IRS representative told him he would be fine as long as he was due a refund. (Tr. 70-72.)

On May 9, 2016, Applicant completed and certified to the accuracy of a Questionnaire for National Security Positions (SF 86). Applicant responded affirmatively to a financial record inquiry concerning whether, the last seven years, he had failed to file or

pay federal, state, or other taxes when required by law or ordinance. Applicant indicated that he owed no delinquent taxes, but he also stated, “I failed to file 2013, 2014, 2015. I have up to three years to file and I am in the process of filing them now.” (GE 1.)

In response to DOD CAF interrogatories, Applicant admitted on November 3, 2016, that he had not yet filed his federal and state income tax returns for tax years 2013, 2014, and 2015. He reiterated that he owed no back taxes because he had sufficient withholding from his income plus extra withheld every week for taxes. He added in explanation:

I’m working with my accountant and will be filing each year—one at a time. When that is done I will receive a large refund for each year. I’m in process and have up to 3 years to file. No extension is required. (GE 3.)

IRS account transcripts submitted by Applicant show that he filed his federal income tax returns in March 2017 for 2013, in May 2017 for 2014, and in June 2017 for 2015 and 2016. He overpaid his federal income taxes by \$18,270 in 2013, \$15,342 in 2014, \$17,061 in 2015, and \$16,252 in 2016. (GE 4.) Applicant testified that he had filed his state income tax returns for tax years 2013 through 2016 when he filed his federal tax return. (Tr. 64.) He did not provide the transcripts showing the filing dates. His state’s Department of Revenue Services reports that, as of October 2017, his income tax returns had been filed for the taxable years 2013 through 2016, and that it had no record of outstanding income tax liability. (AEs B-C.) Applicant recalls having received state income tax refunds of “a couple thousand dollars a year.” (Tr. 66.)

When asked to explain his late filing in June 2017 for his 2016 federal and state income tax returns, Applicant responded that he had three years, until April 2020, to file his returns for that tax year. Additionally, his income tax returns for previous years had to be filed before he could file for 2016. (Tr. 58.) The IRS account transcript for 2016 shows that his return for 2016 was received by the IRS five days after his 2015 tax return. (GE 4.) Applicant expressed his intention to file his income tax returns by the April deadline each year, now that he understands the tax deadline for filing applies even if he is entitled to a refund. (Tr. 68, 85.)

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 articulated in AG ¶ 18:

Failure to live within one’s means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual’s reliability, trustworthiness, and ability to protect classified or sensitive information. Financial distress can also be caused or exacerbated by, and thus can be a possible indicator of, other issues of personnel security concern such as excessive gambling, mental health conditions, substance misuse, or alcohol abuse or dependence. An individual who is financially overextended is at greater risk of having to engage in illegal or otherwise questionable acts to generate funds. Affluence that cannot be explained by known sources of income is also a security concern insofar as it may result from criminal activity, including espionage.

Applicant did not comply with the filing deadlines for submitting timely federal and state income tax returns for tax years 2013 through 2015. Under both federal and state law, Applicant was required to file his income tax returns on or before the 15th day of April following the close of the calendar year. That obligation exists independent of any tax overpayment for which Applicant has a legal right to file a claim for refund within three years of the date the tax return is due.² Applicant did not handle his tax matters in a way that exhibits sound judgment and responsibility when he did not file his tax returns for 2013 through 2015 until 2017. 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,” applies.

Applicant has the burden of presenting evidence of explanation, extenuation, or mitigation to overcome the security concerns raised by his repeated failure to comply with the tax-filing deadlines. The following mitigating conditions under AG ¶ 20 may apply:

(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.

Applicant’s failure to comply with his income tax filing obligation persisted from 2014 until 2017. It is too recurrent and too recent for mitigation under AG ¶ 20(a). AG ¶ 20(b) has only minimal applicability in this case. Applicant’s grandson began having serious medical issues around the time that Applicant’s income tax returns for 2013 were due. However, the inordinate delay in his tax compliance was not due to circumstances outside of his control.

AG ¶¶ 20(c) and 20(g) apply in that Applicant filed his delinquent income tax returns between March 2017 and June 2017. He intends on filing his income tax returns on time in

² The date for filing income tax returns is set forth in 26 U.S.C. § 6072 and Conn. Gen. Stat. § 12-645. The respective provision allowing three years to file a claim for tax overpayment is set forth in 26 U.S.C. § 6511 and Conn. Gen. Stat. § 12-732.

the future. Even where tax problems have been corrected and an applicant is motivated to present such problems in the future, the administrative judge is not precluded from considering an applicant's trustworthiness in light of longstanding 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 the failure to file tax returns suggests a problem with complying with well-established government rules and systems. See *e.g.*, ISCR Case No. 14-04437 (App. Bd. Apr. 15, 2016.)

IRS advice on which Applicant reportedly relied merely states the taxpayer's legal right to a refund of taxes overpaid. It does not provide for a three-year extension of the tax filing deadline. Applicant's accountant told him that he had to file his return within three years of the due date or he would lose any refund due him, which is not the same as telling Applicant that he had a legal right to a three-year extension of the filing deadline. Yet I am persuaded that Applicant did not willfully disregard his income tax filing obligations. Applicant indicated on his SF 86 in May 2016 and in response to interrogatories in November 2016 that he had three years to file his tax returns. He persisted in that belief even at his hearing until it was explained to him that the legal claim to his refund did not extend the deadline for filing his return. Applicant filed his federal and state income tax returns for tax year 2013 in March 2017, within three years from the April 2014 due date for that return. Applicant filed his returns for 2014, 2015, and 2016 sequentially over the next few months under advice from his accountant to file them one year at a time. Both the IRS and state tax authority confirm that Applicant owes no delinquent taxes. Applicant's belated compliance with his tax filing obligation is not condoned, but it is not likely to reoccur. Applicant is not likely to jeopardize his longtime defense contractor employment by failing to timely file his income tax returns in the future.

Whole-Person Concept

In the whole-person evaluation, 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).³ Some of the factors in AG ¶ 2(d) were addressed under Guideline F, but some warrant additional comment.

Applicant is a longtime defense-contractor employee with no evidence of any security infractions or violations. When unable to meet his tax-filing deadline for tax year 2013, he contacted the IRS and state tax authorities. He mistook a representation that he had three years to claim his refund as an extension of the tax filing deadline. It is well

³ 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.

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). At the same time, security clearance decisions are not intended as punishment for past wrongdoing, but rather involve an assessment of future risk that one may not properly handle or safeguard classified information. Applicant is seen as likely to comply with tax deadlines in the future. He had no record of late filing before he contacted the IRS in 2014 about filing his income tax return for 2013. For the reasons noted above, I find that it is clearly consistent with the national interest to continue Applicant's 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: FOR APPLICANT

Subparagraphs 1.a-1.b: For Applicant

Conclusion

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

Elizabeth M. Matchinski
Administrative Judge