



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 16-03904

Appearances

For Government: Nicholas Temple, Esq., Department Counsel
For Applicant: Leon J. Schachter, Esq.

06/28/2018

Decision

RIVERA, Juan J., Administrative Judge:

Applicant failed to timely file his federal and state income tax returns for five consecutive years. He failed to demonstrate good judgment, reliability, and ability to comply with the law. He has a problem complying with well-established government rules. His evidence is insufficient to establish a track record of financial responsibility. The financial considerations security concerns are not mitigated. Clearance is denied.

Statement of the Case

Applicant submitted his most recent security clearance application (SCA) on January 14, 2016, seeking the continuation of his clearance required for his position with a federal contractor. He was interviewed by a government investigator on June 14, 2016, and answered a set of interrogatories on March 1, 2017 (GE 2). After reviewing the information gathered during the background investigation, the Department of Defense (DOD) issued a Statement of Reasons (SOR) on April 21, 2017, alleging security concerns under Guideline F (financial considerations). Applicant answered the SOR on June 23, 2017, and requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA).

DOHA assigned the case to me on January 17, 2018, and issued a notice of hearing on March 9, 2018, setting the hearing for April 18, 2018. The hearing was held as scheduled. At the hearing, the Government offered two exhibits (GE 1 and 2). Applicant testified and submitted 107 pages of exhibits (AE A through RR). All exhibits were admitted without objection. DOHA received the hearing transcript (Tr.) on May 3, 2018.

Procedural Issues

At the hearing, the Government moved to amend the SOR to be in conformity with the evidence. Department Counsel moved to strike the phrase "at least," and to add the year "2016" after 2015 on both paragraphs 1.a and 1.b. Without objections, I granted the motion as requested. As a grammatical correction, a comma and the word "and" were inserted between the years "2015, and 2016."

Findings of Fact

Applicant admitted SOR allegations ¶¶ 1.a and 1.b, and submitted comments and documents in mitigation. He denied, however, that his financial issues are relevant to his ability to protect classified information and to his eligibility for a clearance. His SOR admissions, and those at the hearing, are incorporated herein as findings of fact. After a thorough review of the record evidence, I make the following additional findings of fact:

Applicant is a 59-year-old information assurance manager - senior security manager working for a federal contractor. He graduated from high school in 1977. He earned an associate's degree from a military academy in 1979, a bachelor's degree from a well-known academic institution in 1982, and a master's degree from a service post-graduate school in 1988. He married in 1982 and divorced in 1993. He has two adult children.

Applicant received a Reserve Officer Training Corps (ROTC) commission after completing his bachelor's degree, and served on active duty in the Marine Corps for over 10 years. He was honorably discharged due to a medical condition. Applicant excelled during his academic and service years receiving numerous accolades, commendations, medals and awards (honor society and fraternity memberships and dean's list). While in the service, Applicant held a top-secret clearance with access to sensitive compartmented information (SCI) between 1983 and 1991. He held eligibility for a public trust position after 2004, and a secret clearance for a period after 2007.

Applicant has been employed by the same federal contractor since 2002. Except for the security concerns raised in the SOR, there is no evidence of any other issues of concern. Applicant is an accomplished professional with specialized knowledge, excellent performance, and dedication. He provided incident-response services and computer emergency services for Fortune 100 companies. Between 2007 and early 2011, he was the IT security manager for a sensitive federal agency. In 2012, he

managed the security of one of the largest networks in the world, another federal agency. His performance evaluations indicate that Applicant “frequently exceeds expectations” and “far exceeds expectations” (role model performance). (AE A1 through A9)

Applicant testified that for many years he has served in an increasingly chaotic and hostile customer environment, diligently accomplishing his assigned work missions. He currently supervises 17 employees, but in the past supervised a staff of about 40. He has established a solid reputation as a hard-working, honest, dedicated, trustworthy employee, who cares about the security of the United States. Applicant’s references and friends do not believe that the SOR allegations are reflective of his character, patriotism, and willingness and ability to protect classified information. He also has distinguished himself with his involvement in the community and performing volunteer work for numerous church and secular organizations. His references strongly recommended his continued eligibility for access to classified information. (AE H1 through H4)

In his response to Section 26 (Financial Record) of his 2016 SCA, Applicant disclosed financial problems related to state tax assessments for tax years 2007 and 2011, his domicile determination, and incorrect withholdings by his employer for tax years 2007 through 2011.

The record evidence established that Applicant failed to timely file his federal and state income tax returns for tax years 2012 through 2016. He filed federal and state income tax returns for tax years 2012 and 2013 in March 2017. (Tr. 95, AE J1 and J2) He filed federal and state income tax returns for tax years 2014, 2015, 2016, and 2017, the day before his hearing on April 17, 2018. (Tr. 88)

Applicant testified that between 1992 and 2011, he never had any problems with timely filing his income tax returns. He filed the income tax returns in question late because of what he described were severe complications beyond his control.

In 2007, Applicant moved out of his home state (H) to work and live in state (A). He filed federal and state A income tax returns for tax years 2007 through 2011. Applicant moved back to his home state (H) in 2011. In 2012, state H asked Applicant to file an income tax return for 2009, and he was assessed for delinquent taxes, penalties, and interest. Applicant appealed the tax assessment claiming that in 2009 he was a domiciliary of state A. In 2013, Applicant lost his appeal, and he was determined to be a domiciliary of state H. In 2015, state H assessed taxes against Applicant for tax year 2011. He paid the tax year 2009 assessment in 2013, and the tax year 2011 assessment in 2015.

Applicant explained he failed to timely file his 2012 and 2013 income tax returns because of the assessments. He waited for his appeal to be decided before filing for tax years 2012 and 2013. But by the time his appeal was decided, he had other tax

complications that led him to delay filing his 2012 and 2013 income tax returns until 2017.

Between 2007 and 2011, Applicant's employer made significant mistakes with Applicant's state income tax withholdings, sometimes withholding taxes for the wrong state, or doing so in the incorrect proportions, and for the wrong periods. Applicant explained that he was working in an extremely challenging work environment and he was unable to take time from work to do his taxes. He waited until he had a break in his work schedule in 2015 to sort out his incorrect withholdings problem. Applicant was concerned about filing inaccurate tax returns and being accused of submitting false returns. He took the time to correct his withholdings problems before filing his 2012 and 2013 returns.

Applicant attributed his failure to timely file his 2014, 2015, and 2016 income tax returns to issues related to stock sales between 2014 and 2016. Applicant received stock awards every year from his employer since 2003. He started selling shares to pay for his IRS and state delinquent taxes and assessments in 2014. Applicant explained he had enormous difficulty establishing the cost basis because of stock-splits, company spin-offs, and reverse splits. Researching, gathering the information, and determining the accurate basis of his stock created a huge obstacle to his ability to file. He needed to track back how he acquired the shares to determine the tax treatment to apply to the sold shares. At his hearing, Applicant testified in excruciating detail about all the extensive work he had to go through to determine the cost basis. He believed he had a moral obligation to be as accurate and detailed as possible. He did not want to submit false tax returns. (AE CC and QQ)

Applicant testified he prepared his 2014 federal income tax return in 2017. He averred he filed the state portion of it, but did not file the federal return because he believed it was wrong. It took Applicant from 2014 until two days before his hearing to find the error. He then filed his delinquent federal and state returns. Applicant stated that he has used over 270 leave hours, plus his time during the weekends, to work on his taxes and file his late returns. I note that in 2015, he took about a two to three-week vacation to Europe.

In 2014, Applicant owed his state \$195, and in 2015, \$551. He averred the state owes him \$111 for 2016, and \$510 for 2017. He believes he will have refunds from the IRS for 2014, \$497; for 2015, \$2,500; for 2016, \$4,308; and for 2017, \$6,690. As of his hearing, the IRS had not acknowledged receipt of the delinquent tax returns.

During his June 2016 interview with a government investigator, Applicant discussed his tax problems and provided her with a copy of his 2016 tax-filing plan. However, he was unable to comply with his tax-filing plan because of the complexities of determining the cost basis for the shares he sold.

At the suggestion of his attorney, Applicant retained the services of a certified public accountant (CPA) to help him with his tax problems on May 18, 2017. Applicant

averred that the CPA told him that only Applicant could determine the cost basis of his shares because it required having knowledge of specific corporate events that only Applicant would have. The CPA offered Applicant consultation assistance, but Applicant was told only he could determine the cost basis of his shares. (Tr. 82-85)

Applicant did not seek professional tax assistance to file his tax returns before May 2018, because he did not know what to ask for. (Tr. 83) When asked why he did not provide his tax records to a professional tax preparer and have him determine the cost basis and prepare the tax returns, Applicant responded that he did not understand the sequence of events.

Applicant self-prepared his income tax returns for tax years 2012 through 2017. He explained that he did not file his 2012 and 2013 income tax returns until March 2017, because he has handling too many problems at once. (Tr. 95) He sought no professional assistance to determine the cost basis of the sold stock or to prepare his tax returns. Applicant's decision not to use the services of a professional tax preparer was not because of his lack of financial assets. He had ample savings and funds to pay for a professional tax preparer. (Tr. 89-90, and AE K)

Policies

The SOR was issued under Executive Order 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), as amended; and DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive) (January 2, 1992), as amended. The case will be adjudicated under the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AGs), applicable to all adjudicative decisions issued on or after June 8, 2017.

Eligibility for access to classified information may be granted "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended. The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch 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).

The AG list disqualifying and mitigating conditions for evaluating a person's suitability for access to classified information. Any one disqualifying or mitigating condition is not, by itself, conclusive. However, the AG should be followed where a case can be measured against them, as they represent policy guidance governing access to classified information. Each decision must reflect a fair, impartial, and commonsense consideration of the whole person and the factors listed in SEAD 4, App. A ¶¶ 2(d) and 2(f). All available, reliable information about the person, past and present, favorable and unfavorable, must be considered.

Security clearance decisions resolve whether it is clearly consistent with the national interest to grant or continue an applicant's security clearance. The Government must prove, by substantial evidence, controverted facts alleged in the SOR. If it does, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. The applicant bears the heavy burden of demonstrating that it is clearly consistent with the national interest to grant or continue his or her security clearance.

Persons with access to classified information enter into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability, and trustworthiness of those who must protect national interest as their own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access in favor of the Government. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; SEAD 4, ¶ E(4); SEAD 4, App. A, ¶¶ 1(d) and 2(b). Clearance decisions are not a determination of the loyalty of the applicant concerned. They are merely an indication that the applicant has or has not met the strict guidelines the Government has established for issuing a clearance.

Analysis

Financial Considerations

AG ¶ 18 articulates the security concern for financial problems:

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 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

Applicant's history of financial problems is documented in the record. He failed to timely file his federal and state income tax returns for tax years 2012 through 2016. He filed his 2012 and 2013 income tax returns in March 2017. He filed his 2014, 2015, and 2016 income tax returns in April 2018. He believes he is now current or is making payments on both his federal and state taxes. AG ¶ 19 provides a disqualifying condition that could raise a security concern and may be disqualifying in this case: "(f) failure to file or fraudulently filing annual Federal, state, or local income tax returns or failure to pay income tax as required." The record established the disqualifying condition, requiring additional inquiry about the possible applicability of mitigating conditions.

Six mitigating conditions under AG ¶ 20 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;

(c) the individual has received or is receiving financial 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.

The Appeal Board concisely explained Applicant's responsibility for proving the applicability of mitigating conditions as follows:

Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in security clearance decisions is that articulated in *Egan, supra*. "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." Directive, Enclosure 2, ¶ 2(b).

ISCR Case No. 10-04641 at 4 (App. Bd. Sep. 24, 2013).

Mitigating condition AG ¶ 20(a) does not apply because Applicant's failure to file his income tax returns started in 2012 and continued until 2018, when he filed his income tax returns for tax years 2014 through 2016. He failed to file his taxes for five consecutive years. Thus, his behavior was frequent.

I considered that Applicant believed he was a domiciliary of state A. He was likely surprised by the assessment levied on him by state H for his 2009 income tax return in 2011. Applicant did not have the knowledge to handle his income tax returns or to

dispute the 2011 state's assessment. He failed to exercise due diligence when he did not hire a professional tax preparer in 2012 to help him resolve his tax domicile problems. It appears that Applicant did not file his income tax returns for tax years 2012 and 2013 waiting for the outcome of his appeal. The state resolved the appeal against Applicant in 2013, but he still failed to file his income tax returns for tax years 2012 and 2013 until 2017.

Applicant testified that his employer's mistakes with his state income tax withholdings also prevented him from timely filing his tax returns. Again, Applicant failed to avail himself of the assistance of a tax professional to help him resolve his withholdings problems. Applicant explained that he was working in an extremely challenging work environment and was unable to take time from work to do his taxes. He elected to wait until he had a break in his work schedule in 2015, to sort out his incorrect withholdings problem. His priorities were not in resolving his tax problems, but in his job. I note that in 2015, Applicant took about a two to three-week vacation to Europe.

Applicant attributed his failure to timely file his 2014, 2015, and 2016 income tax returns to issues related to stock sales between 2014 and 2016. He testified he had enormous difficulty establishing the cost basis for the sold shares. He had to track back how he acquired the shares to determine the tax treatment applicable to the sold shares. Applicant testified in detail, and presented extensive documentation, about all the work he had to go through to file his tax returns. He believed he had a moral obligation to be as accurate and detailed as possible. He was concerned about filing inaccurate tax returns and being accused of submitting false income tax returns. (AE CC and QQ)

Notwithstanding, Applicant's failure to timely file his federal and state income tax returns resulted primarily from his lack of diligence. Applicant could have complied with the law by filing his tax returns on time, and indicating to the IRS and his state, that he was concerned about the accuracy of his returns and that he would file corrected returns in the near future. He was negligent by failing to seek professional assistance to help him determine the cost basis and to timely file his income tax returns. I note that even after he was advised to hire a CPA to assist him with his taxes in 2018, Applicant elected to determine on his own his shares' cost basis and to prepare and file his income tax returns.

I find Applicant failed to demonstrate financial responsibility under the circumstances. A reasonable person facing Applicant's problems would have hired a tax professional to help him resolve all of his tax problems and to file his tax returns timely. Mitigating condition AG ¶ 20(b) does not apply.

Mitigating conditions AG ¶¶ 20(c) partially applies, but it does not fully mitigate the security concerns. Applicant did not seek professional tax assistance to file his tax returns before May 2018. He briefly consulted with a CPA at the suggestion of his counsel, but ultimately he did all the work to determine the cost basis and filed his own

tax returns. Applicant testified of his telephonic contacts with the IRS when they called to inquire about his delinquent tax returns. However, Applicant presented no documentary evidence of any contacts with the IRS until 2018, or of arrangements entered with the IRS to file or pay his taxes. Applicant presented evidence showing he filed his late income tax returns in 2018. However, his evidence does not show that the filed returns have been accepted by the IRS and that his tax issues are resolved.

During his 2016 interview, and at his hearing, Applicant acknowledged that he knew he was required to file his income tax returns yearly. During his interview, he stated that he mistakenly believed that because he did not owe any money, he had not violated the law. He promised to timely file his returns and pay his taxes in the future.

Applicant neglected his legal obligation to timely file his income tax returns during an extended period. "Failure to comply with federal and state tax laws suggests that an applicant has a problem with abiding to well-established Government rules and regulations. Voluntary compliance with rules and regulations is essential for protecting classified information." ISCR Case No. 14-04437 at 3 (App. Bd. Apr. 15, 2016). This is true even if the returns have been filed. See ISCR Case No. 15-03481 at 5 (App. Bd. Sep. 27, 2016).

Applicant received credit for his recent income tax filings and payment arrangements with the IRS and his state tax authorities. Because of his recent efforts, mitigating condition AG ¶ 20(g) is raised by the facts and it applies. Notwithstanding, in light of the evidence as a whole, AG ¶ 20(g) does not mitigate the financial consideration security concerns.

Applicant's repeated failure to file his federal and state income tax returns in a timely manner does not demonstrate the high degree of good judgment and reliability required of persons granted access to classified information. See, ISCR Case No. 14-01894 at 5 (App. Bd. Sept. 27, 2016). In sum, Applicant failed to demonstrate financial responsibility. The financial considerations security concerns are not mitigated.

Whole-Person Concept

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, and under the whole-person concept. Security Executive Agent Directive (SEAD) 4, App. A, ¶¶ 2(a) and 2(d). I have incorporated my comments under Guideline F in my whole-person analysis. Some of these factors were addressed under that guideline, but some warrant additional comment.

Applicant, 59, has been employed with federal contractors since 2002, and has held a clearance intermittently since 1983. Because of his over 30 years holding a clearance, his military service, and work for federal contractors, Applicant was aware he was required to maintain his financial responsibility to be eligible for a clearance. He failed to demonstrate good judgment and reliability. His failure to timely file his tax

returns shows that he has a problem complying with well-established government rules. His evidence is insufficient to establish a track record of financial responsibility.

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 and 1.b:	Against Applicant

Conclusion

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

JUAN J. RIVERA
Administrative Judge