



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



In the matter of:)
)
) ISCR Case No. 17-00584
)
)
Applicant for Security Clearance)

Appearances

For Government: Robert B. Blazewick, Esq., Department Counsel
For Applicant: *Pro se*

03/06/2018

Decision

MURPHY, Braden M., Administrative Judge:

Applicant failed to file annual state and federal income tax returns on time, as required, for a ten-year period from tax years 2007-2016. He did not mitigate the resulting financial security concerns. Applicant's eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on January 2, 2016. On June 17, 2017, 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.¹

¹ 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 Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (AG), effective June 8, 2017.

Applicant answered the SOR on July 5, 2017, and requested a hearing. The case was assigned to me on October 16, 2017. On October 26, 2017, a Notice of Hearing was issued scheduling the hearing for November 16, 2017. On November 9, 2017, the hearing date was rescheduled to November 15, 2017, a date to which Applicant consented.² The hearing convened on that date.

Government's Exhibits (GE) 1 through GE 3 were admitted without objection. Applicant testified and submitted Applicant's Exhibits (AE) A through J, which were admitted without objection. I held the record open to allow Applicant the opportunity to submit additional documentation. He subsequently submitted AE K through AE U, all of which were admitted without objection.³ The record closed on January 12, 2018. DOHA received the hearing transcript on November 30, 2017.

Findings of Fact

Applicant admitted SOR ¶¶ 1.a, 1.b, and 1.c, and denied SOR ¶ 1.d, all with explanations.⁴ 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 44 years old. He and his wife have been married for 11 years. They have two daughters, ages 7 and 11. Applicant earned his bachelor's degree in electrical engineering in 1998 and earned a master's degree in business administration (MBA) in 2006. Since 1998, Applicant has worked for a defense contractor at a naval shipyard. He currently holds a security clearance, most recently granted in 2011. (Tr. 14, 23-25, 46, 85-86; GE 1)

In a May 2017 interrogatory response, Applicant indicated that he had failed to timely file his state and federal income tax returns for tax years 2007-2016. Applicant provided IRS account transcripts for tax years 2011 and 2012. He included documentation from the IRS indicating that, as of November 2016, the IRS had no record that he had filed his federal income tax returns for tax years 2013, 2014 and 2015. When he submitted his May 2017 interrogatory response, Applicant indicated that by that time, he had filed all his past-due income tax returns, but for his 2016 income tax returns, which were in process. He also indicated that he no longer owed any state or federal past-due income taxes. Other than for tax years 2011 and 2012, he provided no supporting documentation. (GE 2)

² Tr. 7-9.

³ Some of Applicant's post-hearing exhibits are either partially or wholly duplicative of documents already admitted during the hearing. (AE O-AE T) For completeness, all of them are marked and admitted.

⁴ The documents Applicant included with his Answer are AE A through AE F.

The first two SOR allegations concern Applicant's state and federal income tax returns for tax years 2007-2016, all of which were filed late. (SOR ¶¶ 1.a, 1.b) Federal income tax returns are generally due on or before April 15 of the year following the tax year at issue.⁵ The state income tax return filing deadline for Applicant's home state is generally May 1.⁶

Applicant filed his 2007 state and federal income tax returns in October 2008. Two years later, in October and November 2010, he filed his state and federal income tax returns for tax years 2008 and 2009. (AE L, AE M)

For tax years 2007 and 2008, he received state and federal refunds. For tax year 2009, Applicant owed about \$1,700 in federal income taxes. He paid that debt in August 2011. For tax year 2009, he initially owed \$1,212 in state taxes, but that debt has since been resolved. (AE L, AE M)

For tax years 2010, 2011, 2012 and 2013, Applicant habitually filed his state and federal income tax returns four years late (in April 2014, 2015, 2016 and 2017, respectively). He filed his state and federal income tax returns for tax years 2014 and 2015 in April and May 2017 (three years late and two years late, respectively). Applicant filed his 2016 state and federal income tax returns in July 2017 (about three months late). (AE L, AE M) Several of these tax filings were prompted by the Interrogatory, as he acknowledged at hearing. (Tr. 68-69; GE 2)

Applicant's 2010 federal tax transcript reflects that he requested an extension on April 15, 2011, but he did not file that income tax return for three years, until April 2014. A \$4,452 credit was later transferred to his 2011 taxes. (AE M) Applicant received a \$747 refund for his 2010 state income taxes. (AE L)

Applicant's 2011 federal tax account transcript reflected that in May 2014 (a month after he filed his 2010 federal income tax return), the IRS filed a substitute tax return on his behalf for the 2011 tax year. He was issued a \$13,577 federal tax assessment. (AE M) This led to the federal garnishment of his wages. He also had a \$7,453 in unpaid state income taxes for the same tax year. (SOR ¶¶ 1.c, 1.d) (GE 1 at 28; GE 2; GE 3)

After Applicant filed his 2011 income tax returns and was credited with appropriate deductions and credits, his tax assessments were recalculated and the garnishments were cancelled. He was issued a federal refund of more than \$11,000 in August 2015, and was due a state refund of \$1,031. (Tr. 37-45; GE 1 at 28; GE 2; AE B, AE C, AE D, AE F, AE L-AE Q)

⁵ See <https://www.irs.gov/filing/individuals/when-to-file>.

⁶ See [https://tax.\[Name of Applicant's Home State\].gov/when-to-file](https://tax.[Name of Applicant's Home State].gov/when-to-file).

For tax years 2012-2015, Applicant received refunds for both his state and federal income tax returns. (AE L, AE M) In October 2017, Applicant paid \$121 to the IRS in assessed penalties and interest for filing his 2016 federal return after the due date. He owed no further balance. (AE M) Applicant initially owed \$5,203 in state taxes for 2016, though this figure was later adjusted. (AE G, AE L) He submitted documentation from the IRS and state tax authorities reflecting that as of October 30, 2017, he owed no past-due federal or state income tax debt. (AE G)

Applicant's January 2016 SCA contained the following question:

Taxes: In the past seven (7) years, have you failed to file or pay Federal state, or other taxes when required by law or ordinance?⁷

In response, Applicant disclosed that he had failed to timely file his 2011 federal tax returns. He indicated that the U.S. Internal Revenue Service (IRS) filed a return on his behalf. Applicant then indicated that he filed his 2011 federal return in April 2014, a date "which was still before the filing deadline," he said. (GE 1 at 28).

Applicant did not disclose on his SCA that he had failed to file his 2011 state income tax return, though the amount he disclosed (\$7,453) was the state tax garnishment. He did not disclose that he had other unfiled state or federal income tax returns at that time (for tax years 2012, 2013 and 2014). He did not disclose that during the past seven years (back to January 2009), he had filed several other income tax returns late (tax years 2008, 2009, and 2010). (GE 1 at 28) (Tr. 56-58)

Both before and during his hearing, Applicant asserted a belief that the section of the federal tax code concerning a three-year "limitation on credit or refund"⁸ allowed him three years to file his income tax returns if he expected a refund. (Tr. 36-37, 47-48; GE 1 at 28; GE 2 at 8, 18-19) Applicant also had concluded, incorrectly, that he could operate in a similar manner with his state income tax returns, though he was not able to cite to a state law or regulation allowing him to do so. (Tr. 51-53)

However, Applicant also testified, "I did know I was supposed to file taxes on an annual basis." (Tr. 36; see *also* Tr. 48, 80) Applicant testified that he was "positive" that he filed all of his tax returns no more than three years late. (Tr. 74) In fact, for several years (2010-2013), he actually filed his state and federal income tax returns four years late. (AE L, AE M) He also testified that he did not prepare income tax returns each year to verify that he was due a tax refund. (Tr. 49-50)

Applicant disclosed on his SCA that from 2003 to 2015, he also ran a janitorial and cleaning franchise. He testified that he was responsible for submitting the tax

⁷ GE 1 at 28.

⁸ Applicant cited 26 U.S.C. § 6511. (Tr. 48)

returns for the business.⁹ He did not file the business's tax returns on time from 2007 to 2015. (Tr. 76-77; GE 2 at 4) He testified that he filed his business returns when he filed his past-due personal income tax returns. He said he carried over business losses to his personal tax returns. (Tr. 77-79) Though Applicant's IRS account transcripts are in the record, his tax returns are not.

Applicant used a tax preparer for his business. He acknowledged that she "definitely" told him about the annual tax filing deadlines, as well as about the penalties he could incur for not filing his tax returns on time. (Tr. 79) Applicant testified, "I did know I was supposed to file my taxes on an annual basis." (Tr. 36, 48, 80) He also indicated that he would do so in the future. (Tr. 82-91; Answer)

Applicant also noted during his testimony that he owns real estate. (Tr. 76) In his November 2016 background interview, he stated that his assets include eight rental properties worth about \$600,000 (with a debt or mortgage balance of \$440,000). (GE 2 at 18) The details about these properties, including their tax implications, were not explored at hearing.

Applicant earns an annual salary of about \$90,000 in his job at the shipyard. His wife is in the social work field. He indicated that he and his wife are financially stable. (Tr. 87-88)

Applicant volunteers in his community as a coach and tutor. (Tr. 23-25; GE 1 at 11; AE A) Co-workers and friends attested consistently to his reliability, honesty, trustworthiness, and to his leadership skills. (AE A)

Policies

It is well established that no one has a right to a security clearance. As the Supreme Court noted 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."¹⁰

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

⁹ Tr. 76. ("It was a franchise, so [the central franchise office] would just send you paperwork, or send you the money via check, and then you are responsible for doing your taxes.")

¹⁰ *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988).

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.

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. 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. . . .

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

(c) a history of not meeting financial obligations; and

(f) failure to file . . . annual Federal, state, or local income tax returns or failure to pay annual Federal, state, or local income tax as required.

Applicant failed to timely file his annual state and federal income tax returns for 10 years, from 2007 to 2016, as required. AG ¶ 19(f) applies. In 2015, his wages were garnished by state tax authorities and the IRS after they filed past-due tax returns on his behalf. Though he later filed those returns and the garnishments were ultimately resolved, AG ¶ 19(c) nonetheless applies.

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.

Applicant has been employed in the defense industry, and has held a security clearance, for about 20 years. He has an MBA, and owns numerous rental properties. Until 2015, he also ran his own janitorial and cleaning service. He utilized a tax preparer for his businesses, and he acknowledged that she reminded him about the annual tax filing requirements and deadlines. For 10 years, as recently as for tax year 2016, Applicant consistently filed his state and federal personal income tax returns late.¹¹ He has essentially no current track record of compliance with tax filing requirements.

¹¹ I cannot consider Applicant's failure to timely file his business tax returns as disqualifying conduct, since that is not alleged in the SOR. However, I can consider that conduct in weighing 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).

Applicant initially claimed that he had a right under the federal tax code to file his federal income tax returns three years after the annual deadline as long as he was due a refund. This was wrong, as was his assumption that he had a similar right under state law. As the Appeal Board has noted, Applicant's argument "regarding the three-year statute of limitation for claiming a tax refund is unfounded. The three-year statute of limitation is not a grant of a filing extension, but only a limitation on filing a refund."¹² Additionally, Applicant also filed several of his income tax returns more than three years late. He also did not prepare annual income tax returns to verify whether he was due a refund. Perhaps most tellingly, he also repeatedly acknowledged at hearing that he knew he had to file his income tax returns on an annual basis.

All of this evidence leads to the conclusion that Applicant's pattern of repeated non-compliance with annual income tax filing requirements was due to his repeated and knowing disregard for rules and regulations, and for his responsibilities as a taxpayer under the law. AG ¶ 20(b) does not apply.

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 (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).¹³

It is also appropriate to consider the fact that Applicant was not fully candid on his January 2016 SCA in disclosing his unfiled returns. He addressed only tax year 2011, noting that his wages had been garnished. At the time, however, he had several other years of unfiled state and federal income tax returns, several of which were not resolved until later in 2016, or in 2017. The fact that Applicant significantly under-reported the true extent of his unfiled tax returns undercuts the credibility of his

¹² ISCR Case No. 12-11375 at 4-5 (App. Bd. Jun. 17, 2016) (citing and discussing 26 U.S.C. § 6511)

¹³ 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).

testimony, his assertions that he will file his tax returns in a timely manner in the future, and of his overall willingness to follow rules and regulations.¹⁴

In ISCR Case No. 15-06440 at 4 (App. Bd. Dec. 26, 2017), the Appeal Board held that timing of an applicant's resolution of his tax filing problems is relevant in evaluating an applicant's case for mitigation. An applicant who resolves financial or tax problems only 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. Here, Applicant filed his 2011 state and federal income tax returns after his wages were garnished by the IRS and state tax authorities. He filed several of his tax returns in April and May 2017, following receipt of an interrogatory.

The garnishments (SOR ¶¶ 1.c and 1.d) related to a single tax year and were quickly resolved once Applicant filed the income tax returns at issue. However, since they also relate directly to Applicant's overall pattern of conduct, I therefore cannot mitigate those allegations solely because the debts are resolved.

Similarly, given both the length and recency of his track record, Applicant has not established that his tax issues are unlikely to recur, or that they no longer cast doubt on his current reliability, trustworthiness, and good judgment. AG ¶ 20(a) does not apply.

Applicant has now filed the past-due state and federal returns alleged in the SOR. He documented that he owes no outstanding past-due state or federal taxes. However, he repeatedly filed his tax returns late, and often several years late. I cannot simply adopt a position of "no harm, no foul" or "all's well that ends well."¹⁵ Applicant has not established a track record of steady, timely, good-faith compliance with the requirements to file annual state and federal income tax returns. AG ¶ 20(d) therefore does not apply. Similarly, the mere fact that Applicant made belated arrangements with appropriate authorities to file his income tax 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.

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):

¹⁴ ISCR Case No. 15-06440 at 5 (App. Bd. Dec. 26, 2017). Applicant's lack of candor on his SCA about the full extent of his tax issues was not alleged in the SOR, but I can consider that evidence in weighing his credibility. ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006).

¹⁵ ISCR Case No. 14-01894 at 4-5 (App. Bd. Aug. 18, 2015)

(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. I credit Applicant's long career in the defense industry. He also provides value to his community as a volunteer coach and tutor. Applicant was also remorseful for his misconduct. However, I cannot ignore the record evidence of his consistent failure to timely file his annual state and federal income tax returns over a ten-year period. Overall, the record evidence leaves me with questions and doubts as to 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: **AGAINST APPLICANT**

Subparagraphs 1.a-1.d: 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 access to classified information. Eligibility for access to classified information is denied.

Braden M. Murphy
Administrative Judge