



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 17-00768

Appearances

For Government: Benjamin R. Dorsey, Esq., Department Counsel
For Applicant: *Pro se*

04/18/2018

Decision

MATCHINSKI, Elizabeth M., Administrative Judge:

Applicant had not filed his federal income tax returns for tax years 2010 through 2015 or his state income tax returns for tax years 2002 through 2015 by June 2017. He retained a professional tax service to assist him in preparing his delinquent returns in June 2017, but they have not yet been filed. Clearance is denied.

Statement of the Case

On May 1, 2017, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) to Applicant, detailing the security concerns under Guideline F, financial considerations, and explaining why it was unable to find it clearly consistent with the national interest to grant or continue security clearance eligibility for him. 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 June 14, 2017, Applicant responded to the SOR allegations and requested a decision on the written record by an administrative judge from the Defense Office of Hearings and Appeals (DOHA). On July 24, 2017, the Government submitted a File of Relevant Material (FORM), consisting of six exhibits (Items 1-6). DOHA forwarded a copy of the FORM to Applicant and instructed him to respond within 30 days of receipt. Applicant received the FORM on September 8, 2017. There is no indication that he responded to the FORM. On December 15, 2017, I was assigned the case to determine whether it is clearly consistent with national security to grant or continue a security clearance for Applicant.

While this case was pending a decision, Security Executive Agent Directive 4 was issued establishing National Security Adjudicative Guidelines (AG) applicable to all covered individuals who require initial or continued eligibility for access to classified information or eligibility to hold a sensitive position. The AG supersede the adjudicative guidelines implemented in September 2006 and are effective for any adjudication made on or after June 8, 2017. Accordingly, I have adjudicated Applicant's security clearance eligibility under the new AG.¹

Evidentiary Ruling

Department Counsel submitted as Item 5 a summary of a subject interview of Applicant conducted on August 11, 2016.² The summary was part of the DOD Report of Investigation (ROI) in Applicant's case. Under ¶ E3.1.20 of the Directive, a DOD personnel background report of investigation may be received in evidence and considered with an authenticating witness, provided it is otherwise admissible under the Federal Rules of Evidence. The interview summary did not bear the authentication required for admissibility under ¶ E3.1.20.

In ISCR Case No. 16-03126 decided on January 24, 2018, the Appeal Board held that it was not error for an administrative judge to admit and consider a summary of personal subject interview where the applicant was placed on notice of her opportunity to object to consideration of the summary; the applicant filed no objection to it; and there is no indication that the summary contained inaccurate information. In this case, Applicant was provided a copy of the FORM and advised of his opportunity to submit objections or material that he wanted the administrative judge to consider. In a footnote, the FORM advised Applicant of the following:

IMPORTANT NOTICE TO APPLICANT: The attached summary of your Personal Subject Interview (PSI) (Item 4) [sic] is being provided to the Administrative Judge for consideration as part of the record evidence in this

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

² Also included in Item 5 are investigator reports of subsequent contacts with Applicant: by telephone on October 26, 2016, and in person on December 1, 2016. The FORM does not identify these contacts as items for inclusion in the record so I have not considered them.

case. In your response to this File of Relevant Material (FORM), you can comment on whether the PSI summary accurately reflects the information you provided to the authorized OPM investigator(s) and you can make any corrections, additions, deletions, and updates necessary to make the summary clear and accurate. Alternatively, you can object on the ground that the report is unauthenticated by a Government witness and the document may not be considered as evidence. If no objections are raised in your response to the FORM, or if you do not respond to the FORM, the Administrative Judge may determine that you have waived any objections to the admissibility of the summary and may consider the summary as evidence in your case.

Concerning whether Applicant understood the meaning of authentication or the legal consequences of waiver, Applicant's *pro se* status does not confer any due process rights or protections beyond those afforded him if he was represented by legal counsel. He was advised in ¶ E3.1.4 of the Directive that he may request a hearing. In ¶ E3.1.15, he was advised that he is responsible for presenting evidence to rebut, explain, or mitigate facts admitted by him or proven by Department Counsel and that he has the ultimate burden of persuasion as to obtaining a favorable clearance decision. While the Directive does not specifically provide for a waiver of the authentication requirement, Applicant was placed on sufficient notice of his opportunity to object to the admissibility of the interview summary, to comment on the interview summary, and to make any corrections, deletions, or updates to the information in the report.

Applicant is a high school graduate, who served in the United States military for 13.5 years and has been employed as a field engineer for a succession of defense contractors since April 2001. He can reasonably be held to have understood the footnote, and he did not respond to the FORM. In the absence of any objections or indication that the interview summary contains inaccurate information, I accepted Item 5 in the record, subject to issues of relevance and materiality in light of the entire record.

Summary of SOR Allegations

The SOR alleges that Applicant had failed to timely file his federal income tax returns for tax years 2010 through 2015 (SOR ¶ 1.a) and his state income tax returns for tax years 2002 through 2015 (SOR ¶ 1.b). (Item 1.) Applicant admitted the allegations but explained that he has worked abroad since April 2001 as a civilian contractor and qualified for the Foreign Earned Income Tax Exclusion, and that his income has been consistently under the income limit set by the exclusion. Yet, he also indicated that his failure to timely file tax returns had more to do with his "personal laziness and procrastination and the knowledge that filing would cause a refund of the taxes that had been withheld." (Item 2.)

Findings of Fact

After considering the FORM, which includes Applicant's response to the SOR as Item 2, I make the following findings of fact.

Applicant is a 48-year-old high school graduate who has worked abroad as a field engineer for a succession of defense contractors since April 2001. He served honorably in the U.S. military from September 1987 to February 2001. He has held a Top Secret security clearance since 1988. (Items 3-4.)

Applicant was married from April 1992 to May 2000. At the time of their divorce, he and his spouse were residing in state X, where he was stationed with the U.S. military. Applicant rented an apartment in state X from June 2000 to April 2001, when he moved abroad for his employment in the defense industry. (Item 4.)

To renew his security clearance eligibility, Applicant completed and certified to the accuracy of a Questionnaire for National Security Positions (SF 86) on October 29, 2010. In response to a financial record inquiry concerning any failure in the last seven years to pay federal, state, or other taxes, or to file a tax return when required by law or ordinance, Applicant indicated that he had received refunds totaling \$30,000 from the IRS after he filed his delinquent tax returns for tax years 2002 through 2009, and he expected to receive additional refunds. He explained in part:

I failed to file Federal Income Tax Returns for Tax years 2002-2009 due to my misunderstanding of my tax status. Since I have become aware of my error, I have contacted a tax attorney (listed as the agency handling the case) and his company has filed my delinquent returns with the IRS. Since the filing of my returns, I have received three checks from the IRS (each covering an individual year, where taxes were deducted from my paycheck, that due to my subsequent tax filings, were found to be over-pays), and expect to receive more.

Applicant gave a date of April 2010 for when his federal tax issues had been resolved. Regarding his state income taxes, Applicant explained that state X had garnished his wages to recover \$3,000 in state-assessed income taxes. The IRS filed substitute returns, and state X taxed him based on the "incorrect information contained in the 'absentia' returns," which failed to account for his income's "tax-free" status. (Item 4.) Applicant's Top Secret clearance eligibility was renewed in May 2011 on the basis that he had resolved his outstanding tax issues and was current. (Item 6.)

On an SF 86 completed on August 3, 2016, to renew his security clearance eligibility, Applicant responded affirmatively to an inquiry concerning any failure to file returns or pay federal, state, or other taxes in the last seven years. Applicant disclosed that he had failed to timely file his federal income tax returns for taxes years 2002 through 2015. The IRS filed income tax returns for him for tax years 2002 through 2009. After he filed his delinquent returns for tax years 2002 through 2009, he received refunds because all of income is "Tax-free due to the Foreign Earned Income Exclusion." Applicant explained that he was in the process of contacting the same tax attorney who assisted him in filing those returns for the purpose of filing his income tax returns for tax years 2010 through 2015. He reiterated that all of his income was tax free because of the foreign earned income exclusion. Concerning his state income tax filings, Applicant disclosed that

he had not filed his state X returns for tax years 2002 through 2015. He indicated that he was seeking a certified tax attorney in state X to handle the filing of all of his delinquent state X tax returns. He estimated that he overpaid his state X income taxes for 2002 through 2015 by \$10,000. (Item 3.)

On August 11, 2016, Applicant was interviewed by an authorized investigator for the Office of Personnel Management (OPM). Concerning his income tax issues, Applicant related that he filed his federal income tax returns for tax years 2002 through 2009 but not for tax years 2010 through 2015 because of "laziness." Applicant expressed an intention to file his federal income tax returns for those tax years in September 2016. Regarding his state income taxes, Applicant explained that he has to pay taxes to state X because it was his last known residence in the United States before going abroad for work in 2001. He had not yet filed his state X income tax returns for tax years 2002 through 2015, but he expressed a plan to file them in September 2016. He expected state tax refunds of approximately \$10,000. He knew of no penalties having been assessed against him by the IRS or state X because of his failure to file his returns. He asserted that he would try to timely file his tax returns in the future. (Item 5.)

On May 7, 2017, the DOD CAF issued a SOR to Applicant because of his failure to file federal income tax returns for tax years 2010 through 2015 and state X income tax returns for tax years 2002 through 2015. After Applicant received the SOR, he contacted a certified accounting firm in state X to assist him with the preparation of his delinquent returns. On June 13, 2017, the accounting firm advised Applicant that it would prepare his federal income tax returns for tax years 2010 through 2016. Additionally, because Applicant has been assigned overseas for work, the accounting firm would determine his state residency status and prepare state tax returns for 2010 through 2016 for his state of residence. The accounting firm advised Applicant that it would advise him of any filing requirements for other tax years if it was determined that he should have filed returns. Applicant was informed that it was his responsibility to inform the firm of his state-filing obligations and his duty to file his federal and state tax returns. About his claim of entitlement to the Foreign Earned Income Exclusion, Applicant was advised that, although under the law the Foreign Earned Income Exclusion remains valid unless revoked, the IRS could find that he revoked the election because of his failure to file a tax return when required. Applicant engaged the services of the accounting firm at an hourly fee ranging from \$105 to \$275 depending on the staff time required to prepare his returns. The accounting firm estimated that it would cost him about \$600 for each tax year. (Item 2.)

On July 14, 2017, Applicant admitted in response to the SOR that he had not yet filed his delinquent federal and state X income tax returns. He indicated that his failure to file his tax returns "has more to do with [his] personal laziness and procrastination and the knowledge that filing would cause a refund of the taxes that had been withheld," which he acknowledged were not valid reasons for his noncompliance with his tax-filing obligations. Applicant provided a copy of his retainer agreement for the accounting firm as evidence that he was working on resolving his tax issues. (Item 2.) Applicant did not respond to the FORM, so the current status of his tax filings is not in evidence.

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 set forth 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 has a long history of noncompliance with his tax-filing obligations starting with tax year 2002. After the IRS filed returns for him that were inaccurate, he filed his delinquent federal returns for tax years 2002 through 2009 with the assistance of a tax attorney, and he received tax refunds. Applicant made no effort to file his delinquent state X income tax returns for those tax years, however, and the state garnished his wages based on the substitute returns filed by the IRS. After asserting in October 2010 that he had misunderstood his tax status because of the foreign earned income exclusion, but also that he was aware of his error in that regard, he made no attempt to file his federal and state X income tax returns for tax years 2010 through 2015 by May 2017.

U.S. tax law provides that citizens and U.S. resident aliens living abroad are taxed on their worldwide income. However, they may qualify under the foreign earned income tax exclusion to exclude from taxation an amount of their foreign earnings adjusted annually for inflation. The maximum foreign earned income credit was \$92,900 for 2011, \$95,100 for 2012, \$97,600 for 2013, \$99,200 for 2014, and \$100,800 for 2015. Applicant likely qualified for the foreign earned income exclusion for all of the tax years at issue. According to IRS Publication 54, *Tax Guide for U.S. Citizens and Resident Aliens Abroad*, to claim the foreign income exclusion, his tax home must be in a foreign country;³ he must have foreign earned income; and as a U.S. citizen, he must be a bona fide resident of a foreign country for an uninterrupted period that includes an entire tax year, or physically present in a foreign country or countries for at least 330 full days during 12 consecutive months. There is no evidence that Applicant had any earned income in, or resided in the United States since April 2001. Even if Applicant could validly claim the foreign earned income tax exclusion, he was still required to file income tax returns if his gross income from worldwide sources as a single taxpayer was at least \$9,350 in 2010, \$9,500 in 2011, \$9,750 in 2012, \$10,000 in 2013, \$10,150 in 2014, and \$10,300 in 2015.⁴ Applicant indicated, with no

³ Tax home is defined as the general area of one's main place of business, employment, or post of duty, regardless of family home. To meet the bona fide residence of physical presence test, the person must live in or be present in a foreign country, which includes any territory under the sovereignty of a government other than that of the United States. It does not include U.S. possessions. See IRS Publication 54.

⁴ The tax filing thresholds are available at www.irs.gov and are set forth in IRS Publication 17 for each of the tax years.

evidence to the contrary, that his income has been under the annual income threshold of the foreign earned income tax exclusion. However, there is no information that his income has been less than the threshold required for filing a return. The IRS would not have filed substitute returns for him if he had not met the income threshold for filing.

According to state X's department of revenue, a state X resident reporting U.S. federal taxable income must continue to file state X returns as a full-year resident, no matter how long he is out of the United States. All foreign income that is exempt for federal purposes is also exempt for state X purposes. Continued state X residency is presumed if the individual has not severed all connections to state X. For example, an individual who still carries a state X driver's license, votes in state X by absentee ballot, or returns to state X is presumed to be a state X resident. Individuals may abandon state X domicile and become permanent residents of a foreign country and in that case no longer be required to file state X income tax returns. However, the burden of proving abandonment of state X residency is on the individual.⁵ There is no evidence that Applicant has severed domicile in state X. Applicant does not dispute the requirement to file federal or state X returns for the tax years at issue. Disqualifying condition 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," is established.

Applicant has the burden of presenting evidence of explanation, extenuation, or mitigation to overcome the security concerns raised by his years of noncompliance with his tax-filing obligations. The security concerns are potentially mitigated under one or more of the following conditions under AG ¶ 20:

- (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.

⁵ See www.colorado.gov/pacific/sites/default/files/Income28.pdf.

Applicant's tax issues are too recent for mitigation under AG ¶ 20(a). Applicant admitted in June 2017 that he had not yet filed his delinquent federal and state tax returns for the tax years alleged in the SOR. AG ¶ 20(b) has not been shown to apply. Applicant may have believed before 2010 that he was not required to file federal or state X income tax returns while living and working abroad for a U.S. employer and earning less than the foreign earned income exclusion. However, he knew in or before April 2010 that he was required to file federal and state X income tax returns irrespective of whether he was owed refunds because of the foreign earned income tax exclusion. He did not act responsibly by not filing timely federal and state income tax returns for tax years 2010 through 2015 due, in part, to "personal laziness and procrastination."

Applicant is credited with retaining the services of a tax professional in June 2017 to assist him in preparing his delinquent income tax returns. However, his belated effort at rectification appears to have been prompted by the SOR and the potential loss of his security clearance eligibility. There is no evidence that any of his delinquent income tax returns had been filed as of October 2017. There are no clear indications that his tax issues are being resolved or are under control or that he is in compliance with his tax obligations. Neither AG ¶ 20(c) nor AG ¶ 20(g) are satisfied.

The Appeal Board has long held that an applicant who fails to file timely tax returns does not demonstrate the high degree of good judgment and reliability required of persons granted access to classified information. See, e.g., ISCR Case No. 14-00221 at 4 (App. Bd. Jun. 29, 2016), citing ISCR Case No. 12-05053 at 4 (App. Bd. Oct. 30, 2014). Applicant's security clearance was renewed in May 2011 after he had reportedly resolved his federal income tax-filing issues for tax years 2002 through 2009. By then, Applicant knew that he had an obligation to file his tax returns on time. His failure to file tax returns for tax years 2010 through 2015 engenders considerable doubts about whether he can be trusted to comply with his tax-filing obligations going forward. The financial considerations security concerns are not mitigated.

Whole-Person Concept

In assessing the whole person, 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). The analysis under Guideline F is incorporated in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under that guideline, but some warrant additional comment.

The security clearance adjudication is not intended to punish an applicant for past mistakes or shortcomings. Rather, it involves an evaluation of an applicant's judgment, reliability, and trustworthiness in light of the security guidelines in the Directive. See ISCR Case No. 09-02160 (App. Bd. Jun. 21, 2010). At the same time, Applicant can be expected to comply with such an important obligation as filing tax returns. Applicant admitted that the reasons given for his noncompliance ("[his] personal laziness and procrastination and the knowledge that filing would cause a refund of taxes that had been withheld") were not valid reasons.

The Appeal Board has repeatedly held that the government need not wait until an applicant mishandles or fails to safeguard classified information before denying or revoking security clearance eligibility. See, e.g., ISCR Case No. 08-09918 (App. Bd. Oct. 29, 2009, citing *Adams v. Laird*, 420 F.2d 230, 238-239 (D.C. Cir. 1969)). It is well 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). Based on the evidence before me, I am unable to conclude that it is clearly consistent with the national interest to grant or continue security clearance eligibility for Applicant at this time.

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, Financial Considerations:	Against Applicant
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Subparagraphs 1.a-1.b:	Against Applicant
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Conclusion

In light of all of the circumstances, it is not clearly consistent with the national interest to grant or continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Elizabeth M. Matchinski
Administrative Judge