



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



In the matter of:)	
)	
REDACTED)	ISCR Case No. 17-01473
)	
Applicant for Security Clearance)	

Appearances

For Government: Daniel F. Crowley, Esq., Department Counsel
For Applicant: *Pro se*

04/26/2018

Decision

MENDEZ, Francisco, Administrative Judge:

Applicant did not present sufficient evidence to mitigate security concerns raised by his tax-related financial problems and deliberate falsification of his security clearance application (SCA). Clearance is denied.

Statement of the Case

On June 2, 2017, the Department of Defense (DoD) sent Applicant a Statement of Reasons (SOR) alleging security concerns under the financial considerations and personal conduct guidelines. Applicant answered the SOR and requested a hearing.

On April 12, 2018, a date mutually agreed to by the parties, a hearing was held. Applicant testified at the hearing. Government Exhibits 1 – 3 and Applicant's Exhibits A – E were admitted into the administrative record without objection. (Applicant's objection to Exhibit 4 for identification was sustained.) The transcript of the hearing was received on April 20, 2018.

Findings of Fact

Applicant is married with three adult children. He served in the U.S. military for 20 years from 1959 to 1979, and has worked as a federal contractor since 2003. His income tax returns for 2015 and 2016 reflect adjusted gross income of over \$225,000. As of

August 2017, Applicant and his wife's monthly net income exceeded \$8,000, and they owned four cars. He has held a security clearance for several years.¹

In 2009, the IRS filed tax liens totaling over \$100,000 for unpaid federal taxes, including for tax years 1996 and 1997. Applicant states that the liens and the underlying tax debts are no longer collectible.²

Applicant did not timely file his federal income tax returns for tax years 2012 through 2015. He was embroiled in a court proceeding with the IRS related to deductions he claimed on his 2009 tax return for his daughter's inpatient drug rehabilitation program. The case was resolved in his favor in approximately May 2016. He was aware that he was required to file his 2012 – 2015 returns while the tax case was ongoing, but made the conscious decision not to file them. He also did not file his 2011 tax return on time. He estimates owing the IRS approximately \$100,000 for tax years 2011 through 2016.³

In August 2017, Applicant filed his overdue tax returns for tax years 2011 – 2015. He also submitted a request for an installment agreement. The following month, the IRS replied that they had received Applicant's request for an installment agreement to resolve his outstanding tax debt for tax years 2011 – 2016, but they could not consider his request because they needed to process the information he had supplied. He testified that he has yet to hear back from the IRS.⁴

In April 2015, Applicant submitted an SCA. In response to questions about his financial record, Applicant reported that his wages were garnished by the IRS for a \$100,000 tax debt for "underpayment of self employment taxes while an independent consultant in the mid 90s." He stated that the matter was closed, and "matter has been completely resolved."⁵ He did not report any other financial problems. He did not disclose his failure to file his federal income tax returns for tax years 2012 and 2013. Applicant did not report this negative financial information (unfiled federal income tax returns and unpaid taxes) on his SCA, because he was worried it would adversely impact his security clearance eligibility. He had gone through a background investigation in connection with another federal contracting position in 2012 or 2013, and was told that his then tax issues could negatively impact his clearance eligibility. Instead of addressing and resolving the tax issues at that time, Applicant changed jobs and obtained a contract position with a different government agency.⁶ Applicant testified as follows regarding his decision not to report his tax issues on his 2015 SCA:

¹ Answer; Exhibit 1; Exhibit B; Exhibit D.

² Answer; Exhibit A; Transcript (Tr.) 31-33.

³ Tr. 26-29, 37-38, 44-46; Answer; Exhibit B. Applicant's untimely filed 2011 tax return and large tax debt for tax years 2011 – 2016 were only considered in assessing mitigation and whole-person.

⁴ Tr. 28-31, 47-48; Exhibit B (On his 2015 and 2016 tax returns, Applicant claimed his 57-year-old daughter as a dependent and claimed her as an exemption).

⁵ Exhibit 1 at 33-34.

⁶ Tr. 33-37.

Applicant: . . . I did not declare [on the SCA] the fact that I owed the taxes because I went through an iteration with the OPM [Office of Personnel Management] back in 2012/2013 sometime, when I was working for the [another federal agency]. And they did the investigation, at that time I had several bills on my credit report, and some tax things that were addressed. And they, at that time, I went ahead and paid off all the bills. I think all but one. And then they insisted that I had to get my resolution done with the IRS. Didn't have to necessarily pay them, but I had to resolve it. . . . And I decided, no. I'm not going to go ahead and pay off what turned out to be about a \$20,000, almost \$20,000 difference. To be able to get this clearance. So, I basically said, no. Left the job with the [federal agency]. Took one with the Secretary of [military department], which was a much more secured effort, they had a much bigger budget up there. And continued to work for my company [as a federal contractor].

Judge: All right, so let me see if I get this right. Back in 2012/2013, you went through an OPM investigation which found that you had several outstanding delinquent debts as well as some tax issues?

Applicant: Yes.

Judge: Okay. You were told you needed to resolve those issues in order to get a security clearance. Is that accurate?

Applicant: Yes.

Judge: You went ahead and paid a bunch of those delinquent debts.

Applicant: Yes.

Judge: They also wanted you to resolve the IRS tax issue, but you decided not to because it was a big tax debt.

Applicant: It would have been a big tax debt.

Judge: So then you left that job, and went to another job with (military department)?

Applicant: Yes.

Judge: So then when you went to fill out your security clearance application in 2015 and they asked you about whether you failed to file or pay federal, state taxes? You entered, no. And is that because you knew this was an issue?

Applicant: Yes.⁷

⁷ Tr. 33-36.

Law, Policies, and Regulations

This case is decided under Executive Order (E.O.) 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 National Security Adjudicative Guidelines (AG), which became effective on June 8, 2017. ISCR Case No. 02-00305 at 3 (App. Bd. Feb. 12, 2003) (security clearance decisions must be based on current DoD policy and standards).

“[N]o one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). Instead, persons are only eligible for access to classified information “upon a finding that it is clearly consistent with the national interest” to authorize such access. E.O. 10865 § 2.

When evaluating an applicant’s eligibility for a security clearance, an administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations, the guidelines list potentially disqualifying and mitigating conditions. The guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies the guidelines in a commonsense manner, considering all available and reliable information, in arriving at a fair and impartial decision. AG ¶ 2.

Department Counsel must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.14. Applicants are responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven . . . and has the ultimate burden of persuasion as to obtaining a favorable clearance decision.” Directive ¶ E3.1.15.

Administrative Judges must remain fair and impartial, and carefully balance the needs for the expedient resolution of a case with the demands of due process. Therefore, an administrative judge will ensure that an applicant: (a) receives fair notice of the issues, (b) has a reasonable opportunity to address those issues, and (c) is not subjected to unfair surprise. Directive, ¶ E3.1.10; ISCR Case No. 12-01266 at 3 (App. Bd. Apr. 4, 2014).

In evaluating the evidence, a judge applies a “substantial evidence” standard, which is something less than a preponderance of the evidence. Specifically, substantial evidence is defined as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record.” Directive, ¶ E3.1.32.1.⁸

Any doubt raised by the evidence must be resolved in favor of the national security. AG ¶ 2(b). See *also* Security Executive Agent Directive 4 (SEAD 4), ¶ E.4. Additionally,

⁸ However, a judge’s mere disbelief of an applicant’s testimony, without actual evidence of disqualifying conduct or admission by an applicant to the disqualifying conduct, is not enough to sustain an unfavorable finding. ISCR Case No. 15-05565 (App. Bd. Aug. 2, 2017); ISCR Case No. 02-24452 (App. Bd. Aug. 4, 2004). Furthermore, an unfavorable decision cannot be based on non-alleged conduct. ISCR Case No. 14-05986 (App. Bd. May 26, 2017). Unless an applicant is provided notice that unalleged conduct raises a security concern, it can only be used for specific limited purposes, such as assessing mitigation and credibility. ISCR Case No. 16-02877 at 3 (App. Bd. Oct. 2, 2017).

the Supreme Court has held that responsible officials making “security clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531.

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. 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 an 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

Applicant’s failure to file his tax returns and 2009 tax liens, as alleged in the SOR, raise the financial considerations security concern, which is set forth at AG ¶ 18:⁹

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.

The security concern here is not limited to a consideration of whether persons with financial issues might be tempted to compromise classified information or engage in other illegality to pay their debts. It also addresses the extent to which the circumstances giving rise to delinquent debt cast doubt upon a person's judgment, self-control, and other qualities essential to protecting classified information. See *generally* ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012).

In assessing Applicant’s case, I considered the applicable disqualifying and mitigating conditions, including:

AG ¶ 19(c): a history of not meeting financial obligations;

AG ¶ 19(f): failure to file . . . annual Federal, state, or local income tax returns . . . as required;

AG ¶ 20(d): the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts; and

AG ¶ 20(g): the individual has made arrangements with the appropriate tax authority to file or pay the amount owed and is in compliance with those arrangements.

⁹ In light of the evidence, the \$475 medical debt allege in SOR 1.b is insignificant from a security risk assessment perspective and is decided in Applicant’s favor.

An applicant who fails to timely file or pay his or her taxes, a basic and fundamental financial obligation of all citizens, bears a heavy burden in mitigating the financial considerations security concern.¹⁰ An administrative judge should closely examine the circumstances giving rise to an applicant's tax-related issues and his or her response to it. Furthermore, an applicant's claim of financial reform must be weighed against the lack of judgment and reliability evidenced by the person's failure to timely file their income tax returns or pay their taxes.¹¹

Applicant failed to meet his burden of proof and persuasion. He made a conscious decision not to file his tax returns for tax years 2012 through 2015, and only took action to resolve the matter after the SOR was issued. Based on the record evidence, I am not convinced that Applicant will follow the law in filing and paying his taxes unless the Government takes some direct action threatening his personal interests (i.e., IRS files a garnishment action or DoD CAF moves to revoke the clearance that he needs to keep his six-figure salary job as a federal contractor). Accordingly, I find that the disqualifying conditions listed at AG ¶¶ 19(c) and 19(f) apply. None of the mitigating conditions apply. The record evidence regarding the manner in which Applicant handles his personal financial obligations leaves me with concerns about his ability and willingness to follow rules and regulations for the proper handling and safeguarding of classified information.

Guideline E, Personal Conduct

The security clearance process relies on the honesty and candor of all applicants. Dishonesty during the security clearance process raises the security concern that is explained at AG ¶ 15:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information.¹²

In assessing Applicant's case, I considered the applicable disqualifying and mitigating conditions, including the following:

AG ¶ 16(a): deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations . . . determine national security eligibility or trustworthiness, or award fiduciary responsibilities;

¹⁰ See *generally*, ISCR Case No. 14-03358 at 3 (App. Bd. Oct. 9, 2015) (Board explained the heightened security concerns raised by tax-related financial issues).

¹¹ ISCR Case No. 14-05794 (App. Bd. July 7, 2016); ISCR Case No. 14-00221 (App. Bd. June 29, 2016); ISCR Case No. 15-01031 (App. Bd. June 15, 2016); ISCR Case No. 12-09545 (App. Bd. Dec. 21, 2015).

¹² See *also* SEAD-4, Appendix A, ¶ 2(i) ("the adjudicative process is predicated upon individuals providing relevant information pertaining to their background and character for use in investigating and adjudicating their national security eligibility. Any incident of intentional material falsification . . . raises questions about an individual's judgment, reliability, and trustworthiness.")

AG ¶ 17(a): the individual made prompt, good-faith efforts to correct the . . . falsification before being confronted with the facts; and

AG ¶ 17(c): the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

Applicant deliberately failed to report on the SCA his failure to file his 2012 and 2013 federal income tax returns.¹³ He attempted to hide his ongoing tax problems by claiming that they were “completely resolved.”¹⁴ (Exhibit 1 at 33) At the time, Applicant's federal tax case was ongoing and he was not filing his income tax returns when they were due. He continued not to file his income tax returns and pay his taxes after submitting the SCA. At hearing, Applicant admitted that he deliberately falsified his SCA, but this belated action is insufficient to mitigate the serious security concerns raised by his dishonesty. In short, through his words and his actions, Applicant showed that he is untrustworthy and not a suitable candidate for a security clearance. AG ¶ 16(a) applies. None of the mitigating conditions apply.

Whole-Person Concept

In addition to the specific adjudicative guidelines at issue, a judge must also take into account factors that are applicable to all cases. These factors are grouped together under the all-encompassing umbrella of the whole-person concept.¹⁵ I hereby incorporate my above analysis and highlight some additional whole-person matters.

Applicant is a dedicated father, who voluntarily spent a substantial amount of his personal financial fortune and time in helping his daughter overcome her drug addiction. He is a U.S. military veteran and has worked as a cleared federal contractor for many years. However, this and the other favorable record evidence are insufficient to mitigate the heightened security concerns raised by Applicant's history of tax-related issues and dishonesty during the security clearance process. Overall, the record evidence leaves me with serious doubts about Applicant's eligibility for continued access to classified information.¹⁶

¹³ The SOR alleges in 2.a that Applicant failed to report his failure to file his 2012 – 2015 tax returns. Although Applicant's 2014 and 2015 returns would not have been due at the time Applicant submitted his SCA on April 8, 2015, I find that he was on sufficient notice that his failure to file his 2012 and 2013 tax returns raised a security concern under Guideline E.

¹⁴ The SOR also alleges that Applicant failed to disclose the 2009 tax liens. Although Applicant's disclosure of his past tax problems was far from complete, he did put the Government on notice that he had tax issues between 1994 and 2010. (Exhibit 1 at 34) Accordingly, SOR 2.b is decided in his favor.

¹⁵ See AG ¶ 2. See also SEAD-4, ¶ E.4; Directive, ¶ 6.3.

¹⁶ I also considered the exceptions listed in SEAD 4, Appendix C, but none are warranted in this case.

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 (Financial Considerations):	AGAINST APPLICANT
Subparagraphs 1.a, 1.b, and 1.d:	Against Applicant
Subparagraph 1.c:	For Applicant
Paragraph 2, Guideline E (Personal Conduct):	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	For Applicant

Conclusion

In light of the record evidence, it is not clearly consistent with the interests of national security to grant Applicant initial or continued eligibility for access to classified information. Applicant's request for a security clearance is denied.

Francisco Mendez
Administrative Judge