



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



In the matter of:)	
)	
REDACTED)	ISCR Case No. 17-01775
)	
Applicant for Security Clearance)	Corrected Copy ¹

Appearances

For Government: Alison O'Connell, Esq., Department Counsel
For Applicant: Eric A. Eisen, Esq.

08/21/2018

Revised Decision

MENDEZ, Francisco, Administrative Judge:

Applicant did not file his tax returns when due, because he was overwhelmed with the constant strain and demands of caring for a special needs child, an elderly parent with dementia, and his wife's serious medical condition. His situation was also negatively impacted by unemployment for over a year, which resulted in Applicant having to take a job out of state. He resolved his overdue tax filings, paid all outstanding taxes, and hired an accountant to help him and his wife prepare their complicated tax returns. This favorable evidence and the imposition of easily verifiable conditions fully mitigates the heightened security concerns at issue and safeguards national security. A conditional clearance is granted.

Statement of the Case

On July 14, 2017, the Department of Defense (DoD) issued a Statement of Reasons (SOR) alleging security concerns under the financial considerations guideline. Applicant answered the SOR and requested a hearing.

On April 26, 2018, a date mutually agreed to by the parties, the hearing was held. Applicant and his wife testified at the hearing. The exhibits offered by the parties were

¹ This decision revises the conditions set forth in the original decision issued on August 13, 2018.

admitted into the administrative record without objection.² The hearing transcript (Tr.) was received on May 4, 2018, and the record closed on May 18, 2018.

Findings of Fact

Applicant, 60, was first granted a security clearance in 2005. His father served in the U.S. Air Force, and Applicant was born near a U.S. military base. Applicant and his wife met in college. He graduated with a bachelor's degree in engineering, while his wife holds undergraduate and master's degrees in engineering. They married over 30 years ago, purchased their home in either 1993 or 1994, and had three children. Their oldest son died from cancer and their youngest son recently completed his freshman year at a top-tier college.³

Applicant's middle child is autistic. Applicant's wife left her full-time job when their son was diagnosed in elementary school and started her own business, which provided her the necessary flexibility to care for their children. Applicant and his wife also hired au pairs to help them with raising a special needs child.

Nonetheless, Applicant's autistic son's developmental and behavioral issues placed great strains and demands on the family. It reached a near breaking point in 2007, when their son's school attempted to place him in a highly-restricted environment. This began a highly contentious and long fight with the school to keep their son in a least restrictive, mainstream classroom. Applicant and his wife let some of their other responsibilities slip, notably, the filing of their income tax returns. They had until then prepared and filed their tax returns on their own, but their tax situation had become complicated due to Applicant wife's self-employment and other issues.

In about 2012, Applicant took action to resolve his tax filing delinquency. He hired an accountant who prepared and filed their overdue 2007 through 2010 tax returns.⁴ However, after resolving these past tax issues, Applicant's family experienced several upheavals. Applicant's mother-in-law, who suffered from dementia and had, up to that point, resided in an assisted living facility, moved in with Applicant and his family. A year later, Applicant lost his job. He was unemployed from June 2013 to August 2014, and was only able to obtain employment out of state. For the next two years, Applicant worked and lived out of state.

In 2016, Applicant's wife suffered a heart attack and Applicant redoubled his efforts to find a job closer to his family. He applied for a position with his current employer, a defense contractor, and was hired. He submitted a security clearance application (SCA) in connection with the job in March 2016. Applicant self-reported on the SCA his failure

² Government Exhibits 1 – 4; Applicant's Exhibits A – C. Department Counsel's discovery letter and other correspondence were marked and are attached to the record as Appellate Exhibits I and II, respectively. On August 6, 2018, I reopened the record to ascertain Applicant's continued sponsorship at the time of the hearing. Appellant remains sponsored for a security clearance. See Appellate Exhibit III.

³ Transcript (Tr.) 10-14, 27-31.

⁴ Tr. 10-34; Answer; Exhibit 1; Exhibit 2; Exhibit A; Exhibit B.

to file his 2012 – 2015 income tax returns, and fully discussed his past tax issues during the security clearance process. He hired a certified public accountant (CPA), filed his overdue tax returns, and paid all outstanding taxes.

Applicant has retained the CPA to help him prepare and file his tax returns going forward. The CPA prepared and filed Applicant's 2016 and 2017 income tax returns. Applicant's IRS account transcripts for 2016 and his 2017 tax returns reflect that Applicant over withheld income taxes from his pay. His federal and state tax refunds for 2016 and 2017 total nearly \$10,000.⁵

Applicant submitted IRS account transcripts and other documents showing that all overdue returns were filed, taxes were paid, and that he recently received a refund from the IRS of nearly \$19,000. Applicant provided additional documentation showing he placed this sizeable tax refund in a separate bank account, because he and his wife are uncertain whether they are entitled to the refund for a past tax year.⁶

In January 2018, Applicant was fired from his full-time position with the defense contractor. However, his employer continues to sponsor him for a security clearance. Aside from his past tax problems, Applicant has been able to remain relatively financially stable. He took out a home equity loan in 2017, which he used to pay his taxes and other debts. Credit reports from the three major credit reporting agencies reflect credit scores of between 752 and 783.⁷

Applicant's coworkers, neighbors, friends, and family submitted letters on his behalf. These letters reflect that Applicant is a hard-working, trustworthy, and reliable person who freely gives his time to help others. He is active in his children's lives, including volunteering as an umpire when his children played youth sports.⁸

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.

"[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.

⁵ Tr. 10-34; Answer; Exhibit 1; Exhibit 2; Exhibits A – C.

⁶ Tr. 34-36; Exhibits A – C.

⁷ Tr. 37; Exhibit 2; Exhibit B; Appellate Exhibit III.

⁸ Exhibit A.

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.

The Directive sets forth an administrative judge’s authority, responsibilities, and obligations. A judge 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. See *also* ISCR Case No. 16-03712 at 3 (App. Bd. May 17, 2018).⁹

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, 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

⁹ However, a judge’s mere disbelief of an applicant’s testimony or statements, 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 or issue. ISCR Case No. 17-02952 (App. Bd. Aug. 3, 2018); ISCR Case No. 14-05986 (App. Bd. May 26, 2017). Unless an applicant is provided notice that unalleged conduct or issue 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).

degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.¹⁰

Analysis

Guideline F, Financial Considerations

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 information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.¹¹

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 . . . or failure to pay annual Federal, state, or local income tax as required;

AG ¶ 20(a): the behavior . . . 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;

AG ¶ 20(b): the conditions that resulted in the financial problem were largely beyond the person's control . . . and the individual acted responsibly under the circumstances;

AG ¶ 20(c): . . . there are clear indications that the problem is being resolved or is under control;

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.

¹⁰ See generally ISCR Case No. 11-13626 (App. Bd. November 7, 2013) (discussing predictive nature of security clearance adjudications). See also *Palmieri v. United States*, 2018 U.S. App. LEXIS 20477, * 8 (D.C. Cir. July 24, 2018) ("*Egan* holds that 'the grant of security clearance to a particular employee, a sensitive and inherently discretionary judgment call, is committed by law to the appropriate agency of the Executive Branch.' . . . The idea is that 'an outside non-expert body,' including a court, is institutionally ill suited to second-guess the agency's '[p]redictive judgment' about the security risk posed by a specific person.") (citing to and quoting from *Egan*, 484 U.S. 527, 529).

¹¹ AG ¶ 18.

In a Guideline F case, an administrative judge examines the way a person handles his or her personal financial obligations to attempt to discern how they may handle their security obligations. Here, Applicant's security clearance eligibility was called into question because he did not timely file his tax returns for a number of years and incurred a sizeable tax debt. An applicant's failure to timely file his or her income tax returns and/or pay taxes raises heightened security concerns about the person's judgment and ability to abide by rules and regulations. This, in turn, requires a judge to closely scrutinize the circumstances giving rise to tax-related financial issues and the person's response to it.¹²

Applicant's tax-related financial issues were primarily attributable to matters largely beyond his control. He was not trying to evade filing his tax returns or paying his taxes. He and his wife, who had been primarily responsible for handling the couple's finances, became overwhelmed due to a succession of substantial matters largely beyond their control, starting with their middle child's developmental issues. Over the past two years, Applicant has taken decisive and concrete action to address his tax situation. He hired a CPA, filed overdue tax returns, and paid all outstanding taxes. He has retained the CPA to help him stay on top of his taxes going forward, and presented documentation showing that the CPA prepared and filed his 2016 and 2017 income tax returns. The above-listed mitigating conditions apply.

Whole-Person Concept

In addition to the specific adjudicative guidelines, a judge must also take into account factors that are applicable in all cases. These factors are grouped together under the all-encompassing umbrella of the whole-person concept.¹³ I hereby incorporate my above analysis and highlight some additional whole-person matters.

Applicant has held a clearance without a security incident or violation since 2005. He demonstrated that he can be trusted to self-report potentially adverse information, as evidenced by the disclosures he made on his security clearance application. His honesty and candor continued throughout the security clearance process and at hearing. Of note, Applicant voluntarily provided his IRS account transcripts for tax years 2012 through 2015. He also voluntarily provided his IRS account transcript for 2016 and his federal and state 2017 tax returns – even though these later two tax years were not alleged as a security concern in the SOR. Applicant's candor and cooperation with the security clearance process, coupled with the mitigating conditions noted above and the other favorable record evidence, reflect positively on his security clearance suitability.

On the other hand, however, Applicant's failure to timely file his tax returns continued for a number of years and he did not file his 2017 tax return until after the hearing. In light of the heightened security concerns at issue, I find that the provision of

¹² 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: "A security clearance represents an obligation to the Federal Government for the protection of national secrets. Accordingly failure to honor other obligations to the Government has a direct bearing on an applicant's . . . ability to protect classified information.").

¹³ See AG ¶ 2. See also SEAD-4, ¶ E.4; Directive, ¶ 6.3.

additional, easily verifiable security measures is a prudent means through which the interests of national security can be fully safeguarded in this case. Accordingly, after carefully considering and weighing the financial considerations security concern, as well as the facts and circumstances giving rise to said concern and the evidence in this case, I find that granting Applicant a conditional security clearance is consistent with the national security interests of the United States.¹⁴ Specifically, Applicant's continued eligibility is conditioned on the following:

- (1) Applicant will submit to his facility security officer (FSO) his federal and state income tax returns for the next five years;
- (2) Applicant will provide his FSO every six months for the next two years a copy of his credit report, providing a written explanation for any negative entries appearing on the credit report;
- (3) Applicant will immediately report to his FSO any financial issues that could raise a security concern, to include any failure to timely file or pay taxes or debts; and
- (4) Applicant will provide his FSO a copy of this decision, so his FSO can be aware of these conditions and, if necessary, report to the Government any failure to comply.¹⁵

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): FOR APPLICANT

Subparagraphs 1.a – 1.d: For Applicant

¹⁴ See SEAD 4, Appendix C (granting DOHA administrative judges the discretionary authority to grant initial or continued eligibility for a security clearance, *despite the presence of an issue(s) that can be partially but not completely mitigated*, with the provision of additional security measures). See also Memorandum, Director for Defense Intelligence (Intelligence and Security), dated January 12, 2018 ("Appendix C identifies authorized exceptions that are to be utilized when making adjudicative decisions to grant initial or continued eligibility for access to classified information or to hold a sensitive position . . . Effective immediately, authority to grant clearance eligibility with one of the exceptions enumerated in Appendix C is granted to any adjudicative, hearing, or appeal official or entity now authorized to grant clearance eligibility when they have jurisdiction to render the eligibility determination.")

¹⁵ The above conditions are easily verifiable and place the reporting requirement on the appropriate party, namely, Applicant. Although, currently, DOHA administrative judges do not have the authority to compel a third party, such as an employer, to monitor a person's compliance with conditions, such as those set forth herein, an FSO has an independent obligation to report to the Government any information raising a security concern, including a cleared employee's failure to timely file or pay their taxes.

Conclusion

In light of the record evidence, it is clearly consistent with the interests of national security to grant Applicant initial or continued eligibility for access to classified information subject to the additional conditions and safeguards set forth herein.

Francisco Mendez
Administrative Judge