



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 17-03363

Appearances

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

09/25/2018

Decision

RIVERA, Juan J., Administrative Judge:

Applicant failed to file his federal income tax returns for tax years 2000 through 2006. He presented no evidence of efforts to pay his delinquent state and federal taxes. He has a history of financial problems and his evidence is insufficient to establish a track record of financial responsibility. He failed to demonstrate good judgment, reliability, and ability to comply with the law. He has a problem complying with well-established government rules. The financial considerations security concerns are not mitigated. Clearance is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on June 9, 2016, seeking the continuation of his clearance eligibility required for his position with a federal contractor. After reviewing the information gathered during the background investigation, the Department of Defense (DOD) issued a Statement of Reasons (SOR) on October 26, 2017, alleging security concerns under Guideline F (financial considerations). Applicant answered the SOR on November 6, 2017, and requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA).

DOHA assigned the case to me on April 13, 2018, and issued a notice of hearing on June 1, 2018, setting the hearing for June 20, 2018. The hearing was held as scheduled. At the hearing, the Government offered six exhibits (GE 1 through 6). Applicant testified and submitted eight exhibits (AE 1 through 8). AE 8 was received post-hearing. All exhibits were admitted without objection. DOHA received the hearing transcript (Tr.) on June 28, 2018.

Findings of Fact

Applicant admitted all of the SOR allegations (§§ 1.a through 1.h), and submitted documents in mitigation. His SOR admissions, and those at the hearing, are incorporated herein as findings of fact. After a thorough review of the record evidence, I make the following additional findings of fact:

Applicant is a 55-year-old transportation specialist working for a federal contractor. He graduated from high school in 1981. He married in 1992 and divorced in 2005. He has two children, ages 36 and 17. Applicant started working for federal contractors in the early 1990s. He received eligibility for a secret clearance in 1996, which has been continued to present. He has been employed by the same federal contractor since 2003, initially as a mail clerk, and since 2012 as a transportation specialist.

In his response to Section 26 (Financial Record) of his 2016 SCA, Applicant disclosed financial problems, which included: his failure to timely file his federal and state tax returns for tax years 2000 through 2006, delinquent federal taxes, wage garnishments, and liens filed against his property by the IRS.

The background investigation addressed his financial problems and revealed the two Chapter 7 bankruptcy filings and discharged debts in both 1997 and 2006. (SOR §§ 1.a and 1.b) It also established that: Applicant failed to timely file his federal and state income tax returns for tax years 2000 through 2006 (SOR § 1.c); his state entered liens against him in 2010 for \$7,994 and 2008 for \$1,496 (SOR §§ 1.d and 1.e); the IRS entered liens against him in 2007 for \$14,774 and 2006 for \$8,613 (SOR §§ 1.f and 1.g); and he owed a medical debt for \$312 (SOR § 1.h).

Concerning his 1997 Chapter 7 bankruptcy, Applicant stated that his wife lost her job and they could not afford the mortgage payments. He was behind on his mortgage payments and other debts and filed for bankruptcy. Concerning his 2006 Chapter 7 bankruptcy, Applicant testified that he got swindled by his lawyer. He had not filed his income tax returns for a number of years and acquired a large tax debt to the IRS. He claimed his lawyer advised him to file for bankruptcy to release his tax obligation. However, tax debts are not dischargeable through bankruptcy.

Applicant claimed he filed his delinquent income tax returns for tax years 2000 through 2006 sometime after 2007. Applicant claimed that he retained an accountant to help him file his 2000 - 2006 delinquent federal income tax returns. He had to file his

delinquent federal income tax returns before the IRS would start any negotiations with him. He failed to provide documentary evidence to show he filed his 2000 – 2006 tax returns.

Applicant's take home pay is about \$1,200 every two weeks. He is paid \$28.30 an hour. He has about \$2,000 in a savings account and \$50,000 in a retirement account. He has worked a part-time job as a security guard from 2010 to present, and makes about \$365 every two weeks. (Tr. 27) Applicant paid the debt alleged in SOR ¶ 1.h in November 2017. (AE 5)

Applicant pays \$425 in child support to his daughter. He testified that he provides another \$300 extra a month to help his daughter. She is suffering from cancer (in remission) and required four different operations between 2012 and 2015. His ex-wife has custody of the daughter. Applicant's or his ex-wife's medical insurance paid for most of his daughter's operations and other medical treatment.

Applicant explained he failed to timely file his 2000 through 2006 income tax returns because he was having marital issues. He and his wife separated around 2000 and divorced in 2005. During this period, he was "in a real messed up state of mind at that point and filing his taxes was the last thing on his mind."

Applicant submitted certificates of release of federal tax liens for tax years 2000 (\$8,613); 2001 (\$3,090); 2002 (\$1,478); 2003 (\$1,978); 2004 (\$4,810); 2005 (\$3,415); and 2006 (\$3,305). Applicant testified that the statute of limitations to collect the taxes has run. He never tried to establish a payment arrangement with the IRS or his state. (Tr. 44) He presented no evidence of any payments made. Applicant claimed that the release of the liens should be sufficient evidence to show that he filed the income tax returns for tax years 2000 - 2006. I disagree. The IRS could have filed substitute tax returns for Applicant for those tax years when he failed to do so.

I note that Applicant testified that he could not find his W-2 forms for tax years 2005 and 2007 to file or refile his state income tax returns. He averred he was in the process of requesting his W-2 forms from the Social Security Administration to dispute his state tax assessments. Apparently, because he did not file his income tax returns, the state assessed him at the highest tax bracket and he wants to dispute the assessments before establishing negotiations with his state tax authorities to pay his back taxes. (Tr. 19, 38-40) Applicant testified that he has timely filed his federal and state income tax returns for tax years 2007 through 2017. He also averred that he has paid any taxes due for those tax years.

Applicant presented no evidence of any payment agreements or payments made to the IRS or his state to pay his delinquent taxes. The state garnished Applicant's pay and his income tax refunds to collect past-due taxes. (AE 6 and 7) Around 2014, Applicant requested the assistance of the Tax Defense Network to help him resolve his tax problems. With their assistance, the IRS placed him in a non-collectible status. When asked why he never made any payments on his delinquent taxes, Applicant

testified that he did not have an answer. (Tr. 49) He knew he had to take care this issue, and he just did not. (Tr. 51)

Policies

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

Eligibility for access to classified information may be granted “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended. The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

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

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

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

merely an indication that the applicant has or has not met the strict guidelines the Government has established for issuing a clearance.

Analysis

Financial Considerations

AG ¶ 18 articulates the security concern for financial problems:

Failure or inability to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information. Financial distress can also be caused or exacerbated by, and thus can be a possible indicator of, other issues of personnel security concern such as excessive gambling, mental health conditions, substance misuse, or alcohol abuse or dependence. An individual who is financially overextended is at greater risk of having to engage in illegal or otherwise questionable acts to generate funds

Applicant's history of financial problems is documented in the record. He filed for Chapter 7 bankruptcy protection and his dischargeable debts were discharged in both 1997 and 2006. He failed to timely file his federal income tax returns for tax years 2000 through 2006. There is no documentary evidence to show he ever filed those income tax returns. Apparently, the IRS filed substitute tax returns for him. Applicant's state tax authorities entered tax liens against him in 2010 (\$7,994) and 2008 (\$1,496). They are garnishing his pay and his tax refunds to collect the delinquent taxes. The IRS entered tax liens against Applicant in 2006 (\$8,613) and 2007 (\$18,079). The IRS released the federal tax liens after the expiration of the statute of limitations in November 2017. Applicant's evidence failed to establish that he ever filed his delinquent income tax returns or that he made any good faith efforts to pay his delinquent state and federal taxes.

AG ¶ 19 provides disqualifying conditions that raise a security concern and may be disqualifying in this case: "(a) inability to satisfy debts"; "(c) a history of not meeting financial obligations"; and "(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." The record established the disqualifying condition, requiring additional inquiry about the possible applicability of mitigating conditions.

Six mitigating conditions under AG ¶ 20 are potentially applicable:

(a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;

(b) the conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, a death, divorce or separation, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances;

(c) the individual has received or is receiving financial counseling for the problem from a legitimate and credible source, such as a non-profit credit counseling service, and there are clear indications that the problem is being resolved or is under control;

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

(e) the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue;

(f) the affluence resulted from a legal source of income; and

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

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

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

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

Considering the evidence as a whole, I find that none of the mitigating conditions are sufficiently raised by the evidence and are not applicable in this case. AG ¶ 20(a) does not apply because Applicant failed to file his taxes for seven consecutive years. Thus, his behavior was frequent.

Applicant failed to file income tax returns for seven years because he was going through a difficult marital period that culminated in his divorce. Giving due consideration to Applicant's difficult and challenging life events, I find that he failed to demonstrate financial responsibility under the circumstances. He failed to provide convincing evidence of efforts to file his federal and state income tax returns. Moreover, he made no effort to pay his delinquent state and federal taxes since he accrued them. Although the federal liens have been released, the evidence shows he owed \$26,692 in past-due taxes and he presented no evidence of any efforts to pay his delinquent taxes. Applicant presented no reasonable explanation for his failure to make any efforts to pay his past-due taxes.

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

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

Whole-Person Concept

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

Applicant, 55, has been employed with federal contractors since the mid-1990s, and has held a clearance since 1996. Because of his over 20 years holding a clearance and work for federal contractors, Applicant was aware he was required to maintain his financial responsibility to be eligible for a clearance. He failed to demonstrate good judgment and reliability. His failure to timely file his tax returns shows that he has a problem complying with well-established government rules. His evidence is insufficient to establish a track record of financial responsibility.

Formal Findings

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline F:	AGAINST APPLICANT
Subparagraphs 1.a, 1.b, and 1.h:	For Applicant
Subparagraphs 1.c - 1.g:	Against Applicant

Conclusion

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

JUAN J. RIVERA
Administrative Judge