



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



In the matter of:)
)
) ISCR Case No. 17-01294
)
Applicant for Security Clearance)

Appearances

For Government: Gatha Manns, Esq., Department Counsel
For Applicant: Dan Meyer, Esq.

04/05/2019

Decision

RIVERA, Juan J., Administrative Judge:

Applicant’s failure to file income tax returns could be attributed, in part, to circumstances beyond his control. He filed all of his overdue returns, paid all federal taxes owed, and is complying with his state’s tax payment agreement. He has been acting responsibly under the circumstances. His financial problems are being resolved and are under control. The omissions in his 2015 security clearance application (SCA) were not deliberate. Clearance granted.

Statement of the Case

Applicant submitted an SCA on February 25, 2015, seeking to continue the clearance required for his position with a federal contractor. He was interviewed by a government background investigator in June and November 2016, and answered a set of interrogatories in June 2017. (GE 2) After reviewing the information gathered during the background investigation, the Department of Defense (DOD) issued him a Statement of Reasons (SOR) on July 31, 2017, alleging security concerns under Guideline F (financial considerations) and Guideline E (personal conduct). Applicant answered the SOR on September 15, 2017, and requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA).

The case was assigned to another administrative judge on May 18, 2018, who convened a hearing on August 29, 2018. At the hearing, the administrative judge admitted three documents as Hearing Exhibits (HE I-III). (Tr. 12-15) The Government offered six exhibits (GE 1 through 6). (Tr. 15) Applicant testified and submitted five exhibits (AE 1 through 5). (Tr. 6-7, and 16) All exhibits were admitted without objection. DOHA received the hearing transcript (Tr.) on September 7, 2018.

Following the hearing, the administrative judge developed an ongoing medical condition that prevented her from writing a decision. DOHA reassigned the case to me on February 27, 2019, to expedite the clearance process. On March 1, 2019, I notified the parties that the case was reassigned to me. I provided Applicant the opportunity to request a new hearing, or to agree for me to write a decision based on the record, including the August 29, 2018 transcript and all evidence submitted at the hearing. Because of the elapsed period, I allowed the parties the opportunity to supplement the record with additional documentary evidence. (See HE IV – email notice to the parties.)

Department Counsel's response included a recent credit report from March 2019. The credit report were marked as GE 4 and made part of the record. Applicant's emails agreeing to me issuing the decision based on the established record were marked AE 6 and admitted.

Procedural Issues

At hearing, Department Counsel moved to amend the third line in SOR ¶ 2.b by changing the date "May 2016" to read "May 2015." Without objections, the motion was granted as requested. (Tr. 6)

Findings of Fact

The SOR alleged under Guideline F that Applicant failed to timely file federal income tax returns for tax years 2011, 2014, and 2016; and state income tax returns for tax years 2013 and 2014. (SOR ¶¶ 1.a and 1.b, respectively.) Under Guideline E, the SOR alleged that Applicant failed twice to adhere to court-ordered alcohol abstinence in 2015. (SOR ¶¶ 2.a and 2.b) It further alleged that Applicant falsified his 2015 SCA when he answered "No" to questions in Section 26 (Financial Record) and failed to disclose that he did not timely file federal income tax returns for tax years 2011, 2014, and 2016; and state income tax returns for tax years 2013 and 2014. (SOR ¶ 2.c)

In his SOR Answer, Applicant admitted the factual allegations in SOR ¶¶ 1.a, 1.b, and 2.c. He denied SOR ¶ 2.a, but at his hearing, Applicant amended his SOR Answer and admitted the allegation. (Tr. 71) He denied SOR ¶ 2.b. His admissions to the SOR and at his hearing are incorporated herein as findings of fact. After a thorough review of the record evidence, including his testimony and all evidence admitted, I make the following additional findings of fact:

Applicant is a 58-year-old employee of a federal contractor. He received a General Education Development (GED) certificate in 1978. Since then, he has completed numerous job-related technical certifications. He has never been married, and has no children.

Applicant's employment history shows that he has worked for different federal contractors since 1990. He has held a secret clearance continuously since the early 1990s. His current employer and security sponsor hired him in July 2014.

Applicant explained that his failure to file 2011 income tax returns resulted from medical problems in 2011-2012 (diagnosed with cancer). He received treatment during two years, but he is now considered to be in remission. (Tr. 20-22) Additionally, in 2014, he withdrew \$50,000 from his 401k retirement account to buy a home. He was not aware of the tax penalties associated with an early withdrawal of 401k monies, and the additional income placed him in a higher tax bracket. Applicant claimed that he prepared the 2014 federal income tax return, but did not file it because he did not have the money to pay the tax owed. Apparently, he also failed to file his 2016 federal income tax return and his state tax returns for tax years 2013 and 2014 because he did not have the money to pay the taxes owed. He averred that unexpected maintenance costs for his new home were so high that he did not have the money to pay his owed taxes and did not file his income tax returns. (Tr. 22-23)

Applicant also stated during his 2016 interview with a government investigator that he did not file his 2014 and 2016 income tax returns because he moved residences, and he could not find his documents. He was not diligent about filing because he believed it was not a big deal since he believed that he owed no taxes. He promised the investigator that he would promptly file his 2014 and 2015 income tax returns, and he did. (GE 2)

After his 2016 interview, Applicant became scared about the concerns raised by his failure to file his 2014 income tax returns and hired a tax preparer to do so. He filed his 2014 federal income tax return in February 2017, and in June 2017, he paid the IRS \$27,000 for back taxes. (Tr. 100) At his hearing, Applicant testified he had filed all of his overdue returns and he owed no back taxes to the IRS.

Although Applicant requested tax return transcripts for tax years 2008 – 2010, the IRS no longer has those records. The IRS Wage and Income Transcript form for tax year 2011 (prepared in 2017) shows that Applicant filed his 2010 income tax return and received a \$53 refund. The IRS Wage and Income Transcript form for tax year 2011 does not indicate that Applicant filed his 2011 income tax return. (Only the first page was submitted and it appears to be a multipage document.) He provided no documentary evidence to show he filed it, but implied that he did. (Tr. 33) During his 2016 interview, Applicant told the investigator that he did not file his 2011 income tax return, and when confronted by the IRS about it, and threatened with a garnishment of wages, Applicant agreed to the garnishment of wages to satisfy the 2011 tax debt. (GE 2, Tr. 77-81)

Applicant filed his 2012 federal income tax return in October 2013. He filed his 2013 federal income tax return in April 2014. He filed his 2014 federal income tax return in February 2017. Apparently, he filed his 2015 income tax return between 2016 and 2017. He requested a 2015 tax transcript, but the IRS informed him that there was an identity theft issue with that year's return. (GE 2) He filed his 2016 federal income tax return on June 26, 2017. (GE 2)

Concerning his 2013 and 2014 state income tax returns, Applicant testified he filed them late and paid off any taxes due for tax year 2013. He still owes about \$2,000 for tax year 2014, but has been making \$150 monthly payments as agreed. (Tr. 35)

Section 26 (Financial Record - Taxes) of the 2015 SCA, asked Applicant to disclose whether in the last seven years he had failed to file or pay federal, state, or other taxes when required by law. Applicant answered "No," and failed to disclose that he did not timely file a federal income tax return for tax year 2011, and a state income tax return for tax year 2013. I note that Applicant submitted the 2015 SCA in February 2015. Thus, at that time, the only late returns would have been the 2011 federal return and the 2013 state return.

Applicant admitted that he provided an inaccurate response in his 2015 SCA, but averred that he is an honest person who made an inadvertent and honest mistake. Applicant explained he had submitted an SCA before he failed to file his income tax returns in 2011, and before he was charged with DUI in 2014. (The prior SCA is not part of the record.) When his employer's FSO found out about his 2014 DUI charge, Applicant was asked to update the prior SCA with the DUI information. Because he was not asked to update the whole SCA, he only updated the DUI questions, and did not look at or update any other SCA sections, including the questions about his failure to file income tax returns. Applicant highlighted that when he was asked during his 2016 interview about his tax problems, he promptly disclosed that he had failed to file his federal income tax returns for 2011 and 2014; the state returns for 2013 and 2014; and he disclosed that he had identity theft issues with his 2015 tax return. (Ge 2, Tr. 24-25)

Regarding the SOR allegations that Applicant failed twice to adhere to court-ordered alcohol abstinence in 2015 (SOR ¶¶ 2.a and 2.b), I find that the evidence is insufficient to establish SOR ¶ 2.b. Applicant explained that the court ordered him to abstain from alcohol consumption while undergoing alcohol counseling. Applicant admitted that during his counseling period, he took a urinalysis screening for alcohol in his system and failed once. (GE 5) He denied that the Interlock device in his vehicle was ever fully triggered. He repeatedly stated that the device had a false positive on one occasion, but that the Interlock device was not activated. When he retried the Interlock device after five minutes, the car started. After Applicant's compliance with the other terms of his sentence, the charge for violating the terms of his probation was dismissed. (Tr. 75, GE 5)

Applicant considers himself to be honest, reliable, hardworking, and a key player within his company. He believes he will be devastated if he was to lose his clearance

eligibility because he would likely lose his job, and at his age it would be difficult to get a new job. His references consider Applicant to be honest, trustworthy, dedicated, hardworking, and a competent and valuable employee. They endorsed his eligibility for a clearance.

Applicant acknowledged that he made a mistake when he failed to timely file his federal and state income tax returns because he did not have the money to pay the taxes owed. He acknowledged he should have been more diligent about filing the income tax returns. He believes that he has learned a valuable lesson. He understands the seriousness of the security concerns raised by his tax problems. He promised to timely file and pay his taxes in the future. Applicant highlighted his 40 years of employment with federal contractors while holding a clearance since 1990s. He believes that his financial situation is now stable.

Policies

The SOR was issued 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* (Directive) (January 2, 1992), as amended; and the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AG), implemented by the DOD on 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, § 2. 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 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 failed to timely file federal income tax returns for tax years 2011, 2014, and 2016; and state income tax returns for tax years 2013 and 2014. He explained he failed to file his 2011 income tax returns because of health problems. Apparently, when confronted by the IRS about his failure to file and threatened with a garnishment of wages, he agreed to the garnishment and paid the taxes owed.

Applicant provided several reasons for his failure to timely file his federal tax returns for tax years 2014 and 2016; and his state tax returns for tax years 2013 and 2014: medical problems related to his cancer diagnosis and treatment; the purchase of a home in 2014; and moving residences and not being able to find his documents. He stated that in 2014 his taxes were complicated because he withdrew \$50,000 from his 401k retirement account to purchase a home. He was unaware of the penalties associated with the early withdrawal of monies from the retirement account, and he ended up in a higher tax bracket.

Applicant testified that he prepared his own 2014 tax return, but when he realized he did not have the money to pay the taxes owed, he did not file it. After his 2016

interview, Applicant hired a professional tax preparer, and filed his 2014 federal income tax return in February 2017. In June 2017, he paid the IRS \$27,000 for back taxes owed for 2014. He wanted to clear any possible security concerns about him owing taxes as soon as possible. As of his hearing, Applicant had filed all federal (except for 2011) and state tax returns and claimed he owed no back taxes to the IRS. He is in a payment agreement with the state authorities for taxes owed for 2014.

AG ¶ 19 provides disqualifying conditions that could raise a security concern and may be disqualifying in this case: “(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 . . . income tax as required.” The record established the disqualifying conditions, requiring additional inquiry about the possible applicability of mitigating conditions.

The following 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, or 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.

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. Sept. 24, 2013).

Some of the above financial considerations mitigating conditions are raised by the facts in this case and mitigate the security concerns. Applicant’s financial problems are ongoing and recent because he is still paying his state back taxes. However, his financial problems occurred under circumstances unlikely to recur and they do not cast doubt on his current reliability, trustworthiness, or judgment.

Applicant’s financial problems could be attributed to, or were aggravated by, his cancer illness and his lack of knowledge concerning penalties for early withdrawal of 401k monies. He has filed all his income tax returns, paid any federal tax owed, and has a payment arrangement with the state.

Applicant acknowledged he made a mistake by not timely filing his tax returns and believing it was not important to file if all taxes owed had been paid. He now understands that he should have been more diligent filing and paying his taxes. Applicant established that when he became aware of the security concerns raised by his failure to file and pay his taxes, he quickly made arrangements with a tax preparer to help him resolve his tax problems.

Applicant’s efforts to timely file and pay his taxes are not ideal, but he made an effort to resolve his tax problems. He also is paying his tax debt to his state via monthly payments. I note that Applicant has timely filed and paid all his taxes for tax years 2016 and 2017. He owes no taxes for those years. His actions show diligence and responsibility in the handling of his tax obligations.

Considering the evidence as a whole, and including his recent actions, Applicant has been financially responsible under the circumstances. His financial situation is improving and there are clear indications that his financial problems are being resolved and under control.

Guideline E, Personal Conduct

AG ¶ 15 articulates the security concern for personal conduct:

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 information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

AG ¶ 16 provides two conditions that could raise a security concern and may be disqualifying in this case:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire . . . used to conduct investigations, determine employment qualifications, award benefits or status, determine national security clearance eligibility or trustworthiness, or award fiduciary responsibilities;¹ and

(d) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information.

Regarding the allegations that Applicant failed twice to adhere to court-ordered alcohol abstinence in 2015 (SOR ¶¶ 2.a and 2.b), I find that the evidence is insufficient to establish the Interlock device violation (SOR ¶ 2.b). Applicant admitted that during his counseling period, he took a urinalysis screening for alcohol and failed once. (SOR ¶ 2.a) The charge for violating the terms of his probation was dismissed by the court after Applicant's compliance with the other terms of his sentence.

Considering that there are no alcohol consumption concerns alleged, that the court dismissed the 2015 court-order violation after Applicant successfully completed his sentence terms, that Applicant admitted his conduct, and the passage of time since 2015, I find this allegation to be of no security significance, even when considered against all of the evidence as a whole.

Concerning SOR ¶ 2.c, I find that Applicant's failure to disclose that he failed to file his federal income tax return for tax year 2011, and a state income tax return for tax year 2013, was not deliberate or made with the intent to deceive. Applicant's

¹ The Appeal Board has cogently explained the process for analyzing falsification cases, stating:

(a) when a falsification allegation is controverted, Department Counsel has the burden of proving falsification; (b) proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred; and (c) a Judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning the applicant's intent or state of mind at the time the omission occurred. [Moreover], it was legally permissible for the Judge to conclude Department Counsel had established a prima facie case under Guideline E and the burden of persuasion had shifted to the applicant to present evidence to explain the omission.

ISCR Case No. 03-10380 at 5 (App. Bd. Jan. 6, 2006) (citing ISCR Case No. 02-23133 (App. Bd. June 9, 2004)).

explanation, that he was only asked to update the SCA with information regarding his 2014 DUI, is plausible. Of course, Applicant should have realized that every time he completes an SCA he has a legal obligation to ensure that its contents are accurate. Because I find that Applicant's failure to disclose the information requested was not deliberate, none of the disqualifying conditions under AG ¶ 16 are applicable to that conduct.

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. SEAD 4, App. A, ¶¶ 2(a) and 2(d). I have incorporated my comments under Guidelines F and E in my whole-person analysis. Some of these factors were addressed under that guideline, but some warrant additional comment.

Applicant is a 58-year-old employee of a federal contractor. He has worked for federal contractors since the early 1990s while holding a clearance. The record evidence is sufficient to establish that his financial problems are being resolved and are under control. Applicant is fully aware of the security concerns raised by his failure to timely file and pay his taxes. He promised to maintain financial responsibility to ensure that he continues to be eligible for a clearance. I find that Applicant's omission on his 2015 SCA was not deliberate or made with the intent to deceive. The financial considerations and personal conduct security concerns are mitigated.

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:	FOR APPLICANT
Subparagraphs 1.a and 1.b:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraphs 2.a - 2.c:	For Applicant

Conclusion

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest of the United States to grant eligibility for a security clearance to Applicant. Clearance is granted.

JUAN J. RIVERA
Administrative Judge