



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:

)
)
)
)
)

ISCR Case No. 17-03836

Applicant for Security Clearance

Appearances

For Government: Nicole A. Smith, Esq., Department Counsel

For Applicant: *Pro se*

02/26/2019

Decision

MASON, Paul J., Administrative Judge:

Applicant has provided sufficient mitigating evidence to overcome his failure to file his Federal and state tax returns for tax years 2009 through 2012. Eligibility for security clearance access is granted.

Statement of the Case

On December 15, 2015, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) for security clearance eligibility so that he could work for a defense contractor. On July 31, 2017, he provided interrogatory answers and attached information. In the exhibit, Applicant provided explanations for his Federal tax problems, and also provided Federal tax return and account transcripts for several tax years. On December 21, 2017, the Department of Defense (DOD) could not make the necessary affirmative finding to grant Applicant's security clearance and issued a Statement of Reasons (SOR) to him detailing security reasons under the financial considerations guideline (Guideline F). The action was taken 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 adjudicative guidelines (AG) effective in the DOD on June 8, 2017.

Applicant provided his notarized answer to the SOR on January 17, 2018. The case was assigned to me July 20, 2018. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on September 6, 2018, scheduling the hearing on September 13, 2018. The hearing was held as scheduled. The Government's two exhibits (GE) 1 and 3 were admitted in evidence. Applicant offered no exhibits to be admitted into evidence. The record remained open until September 28, 2018, to allow Applicant the opportunity to submit post-hearing exhibits. He was granted two extensions to submit post-hearing exhibits. No exhibits were received by November 7, 2018, the final deadline for submitting additional evidence. The exchange of post-hearing emails between the parties have been marked and entered into evidence as Applicant's exhibit (AE) A. The transcript (Tr.) was received on September 24, 2018. The record in this case closed on November 7, 2018.

Rulings on Procedure

At the beginning of the hearing, I asked Applicant why he did not bring the Government's correspondence to the hearing. Applicant's answer was that he was not certain what documents he was supposed to bring to the hearing. (Tr. 6) To determine whether Applicant had received copies of the proposed Government exhibits in advance of the hearing, Department Counsel asked him whether he recognized the proposed Government exhibits. He recognized GE 1 (December 2015 e-QIP) and GE 3 (July 2017 answers to interrogatories). Because Applicant did not recall receiving GE 2, his February 2016 personal subject interview (PSI), Department Counsel moved to withdraw the exhibit. The motion was granted. (Tr. 18-19)

Findings of Fact

The SOR contains one allegation that Applicant did not file his Federal and state tax returns for tax years 2009 through 2012. Applicant admitted that he failed to file the returns and explained that when employed by a fast food restaurant in 2009, his employer inserted an incorrect social security number (SSN) for Applicant on his W-2 form and their personnel employment system records.

Applicant is 27 years old and single. He has a four-year-old daughter. He and the daughter's mother (former girlfriend) each have 50% custodial rights of the child. He has been working as a helpdesk administrator since April 2017. Before his current job, he was employed for about 18 months as a field technician for a public school system. After graduating from high school, Applicant received three computer certifications between 2011 and 2013. Those certifications were in computer knowledge, networking and security. This security clearance application is Applicant's second. In 2012, he was

sponsored for a security clearance, but his interim clearance was denied for unknown reasons. (GE 1 at 11-30, 46; Tr. 6-13, 33)

Applicant's tax problems started in tax year 2009, when his first employer, a fast food operation, entered an incorrect SSN on his W-2 form, a document that an employer must send to an employee and the Internal Revenue Service (IRS) at the end of the tax year. Two days before Applicant (19 years old at the time) was required to file the 2009 Federal tax return (April 2010), he discovered the W-2 form had the wrong SSN. He filed for an extension, but did not file a return for 2009. He tried unsuccessfully to contact his employer's corporate offices. Then, Applicant informed his general manager who responded that the SSN would be corrected. (GE 1 at 25-30; Tr. 22-24)

Later in 2010, Applicant received another W-2 form with a corrected SSN. He spoke with a family friend who told him that he could not file for the current tax year unless he had filed for the previous tax year. Nonetheless, he filed for an extension for 2010 (April 2011) as he had done for 2009. However, he did not file the 2010, 2011, or 2012 Federal and state tax returns because he was still guided by the notion that he could not file for current tax years unless he had filed for previous tax years. He remembered saving the W-2 forms for 2009 through 2012 tax years and intended to file the Federal tax returns. Even though he had the corrected W-2 forms, he could not furnish a reason for not filing the federal tax returns. He eventually lost the 2009 through 2012 W-2 forms. Applicant claimed that after he was told in 2013 he could file for current tax years even though he had not filed for previous years, he filed his Federal and state tax returns for all subsequent years. Applicant submitted proof that he filed Federal returns for tax years 2013, 2014, 2015, and 2016. There is no evidence that Applicant owes any Federal or state taxes for any tax year. (Answer to SOR; GE 3 at 18-26; Tr. 24-29)

In an effort to recover his W-2 forms for the missing Federal tax years, Applicant tried to contact his previous employers, but received little cooperation from them, and in some instances his phone calls were never returned. He claimed that he contacted the IRS, but had no success. He entered the IRS website and obtained the tax transcripts (GE 3), but only for the years he filed returns. He has been unable to speak with an IRS representative because of his work hours. (Tr.29-31)

Applicant's post-hearing documentation consists of emails explaining his efforts to obtain the necessary Federal and state tax documentation. On September 17, 2018, four days after the hearing (September 13, 2018), Applicant reported that he obtained the state tax returns from 2013 to the present and would be submitting them at a later time. Regarding the missing W-2 forms, a tax preparer service informed him that he would have to fill out an application with the IRS. Then, it would take up to 10 days for the IRS to send him the IRS income tax reports. Applicant did not believe he would be able to retrieve the pertinent documents by the September 28, 2018 deadline for submitting post-hearing documents. (AE A at 1)

On September 18, 2018, Applicant indicated that that he had applied for a personal identification number (PIN) with the IRS. He estimated that it would take up to two weeks from September 18, 2018 (beyond the post-hearing deadline) to receive the PIN and consult with the tax preparer service to process the return. He inquired whether he should copy and submit the complete state tax returns or just the first page of the return showing the stamp of the state tax agency. On September 25, 2018, Department Counsel indicated no objection to an extension of the September 28, 2018 deadline for submission of post-hearing documents. On September 26, 2018, I granted an extension of the deadline to October 17, 2018. (AE A)

On October 16, 2018, Applicant provided an update of the difficulties confronted in obtaining his W-2 forms so that he could file his tax returns. First, he was unable to get the W-2 forms from most of his previous employers. He obtained the income reports from the IRS, but they do not contain earned income numbers (EIN) for previous employers and state tax withholding information. One state tax agency in which he was previously employed advised him that they do not retain state tax withholding information. The agency informed him that he would have to submit an application with the Social Security Administration (SSA) to receive the missing W-2 forms. According to the form, it would take up to six weeks to receive copies of the W-2 forms. Then, he would provide W-2 forms and income reports to his tax preparation service for processing. Applicant requested another extension of deadline. On October 17, 2018, Applicant's request for an extension was granted until November 7, 2018. No documentation was presented. (AE A)

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines and all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision. These guidelines, which are flexible rules of law, are applied together with common sense and the general factors of the whole-person concept. The protection of the national security is the paramount consideration. AG ¶ 2(d) requires that "[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security."

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 in seeking a favorable security decision.

Analysis

Financial Considerations

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.

AG ¶ 19. The disqualifying condition relevant in this case is:

(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.

When he was 19 years old (2009), Applicant was working at a fast food restaurant. Through no fault of his own, his employer entered an incorrect SSN for Applicant on his W-2 form and its personnel employment records system. He did not discover the SSN error until two days before the 2010 deadline for filing his 2009 federal tax return. He received an extension to file his 2009 tax return, but did not file the return. He received a new W-2 form with a corrected SSN before the deadline for filing his 2010 tax return. However, he believed he could not file for the current tax year unless he filed for the previous tax year. Though he received an extension to file his 2010 Federal tax return, he did not file the return. He did not file his federal tax returns for 2011 and 2012, even though he had corrected W-2 forms for 2009 through 2012. Failure to file his Federal and state tax returns suggests that Applicant may not have the judgment necessary for complying with well-established government rules that are essential for safeguarding classified information. AG ¶ 19(f) applies.

AG ¶ 20. Conditions that could mitigate security concerns include:

(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;

(c) the individual has received or is receiving financial counseling for the problem from a legitimate and credible source, such as a nonprofit 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.

I find the foregoing mitigating conditions apply. When Applicant received the corrected W-2 forms in 2011, he exercised poor judgment in not immediately filing his Federal and state tax returns. However, after conversing with a tax filer in 2013 who informed him that he could file returns for the current tax year even though he did not file for previous years, he filed his 2013 Federal tax return, and has continued to file all Federal and state tax returns since. Initiating his legal obligation to file his tax returns in 2014 (2013 tax year) demonstrates that his failure to file the tax returns between 2009 through 2012 is unlikely to recur, and no longer raises doubts about Applicant's judgment and trustworthiness. AG ¶ 20(a) applies.

While there is no evidence that Applicant received counseling on tax issues until September 2018, he received informal advice in 2011 from a family friend and in 2013 from another tax filer. The information he received in 2011 was untrue. On the other hand, he received truthful advice two years later persuading him to exercise good judgment in filing his 2013 tax return, even though he had not filed returns for previous years. In his detailed post-hearing emails, he has received ongoing guidance from the tax preparation service and the Federal and state tax agencies on acquiring his W-2 forms, IRS income reports, and state tax withholding information. Based on the steps Applicant has taken thus far to file the missing Federal and state tax returns, I am confident he will obtain the missing tax information that will enable him to file his Federal and state tax returns in a reasonable period time. AG ¶ 20(b) applies. AG ¶ 20(g) does not apply because Applicant's earnings during the period were probably insufficient to require him to file tax returns.

Whole-Person Concept

I have examined the evidence under the guideline for financial considerations in the context of the nine general factors of the whole-person concept listed at AG ¶ 2(d):

(1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for access to classified information must be an overall common-sense judgment based upon careful consideration of the guidelines and the whole-person concept.

According to his December 2015 e-QIP, Applicant began his employment career in 2009 as a fast food worker. In 2011, 2012, and 2013, he earned three computer certificates in knowledge, networking, and security. In October 2015, he put his computer knowledge to use as a field technician repairing a public school's system computers. In April 2017, he continued to apply his computer knowledge as a help desk administrator for a computer contractor. In his December 2015 e-QIP, his July 2017 answers to interrogatories, his January 2018 answer to the SOR, and at the hearing, Applicant provided a consistently credible explanation of how he encountered tax issues.

In his post-hearing emails in September and October 2018, Applicant provided information in persuasive detail of his ongoing efforts to acquire the missing W-2 forms so that he can file the 2009 through 2012 Federal and state tax returns. Though procrastination was a major reason why he did not file the missing tax returns in the past, he was much younger when he was working in his first job at the fast food restaurant in 2009. In addition to not being sufficiently knowledgeable about tax issues, Applicant was not prepared for his employer entering the wrong SSN on his W-2 form. After receiving correct information in 2013 that he could file returns for the current tax year even though he had not filed returns for previous tax years, Applicant has filed tax returns for all subsequent years. Having considered the entire record from an overall common-sense point of view, Applicant's irresponsibility in not filing his Federal and state tax returns for four years from 2009 through 2012 is mitigated by the corrective action he is taking to file the missing returns. His conduct convinces me that he will consistently file all tax returns in the future.

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

Subparagraph 1.a:

For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the security interests of the United States to grant Applicant eligibility for access to classified information. Eligibility for access to classified information is granted.

Paul J. Mason
Administrative Judge