



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



In the matter of:)
)
) ISCR Case No. 14-02930
)
)
Applicant for Security Clearance)

Appearances

For Government: Candace Garcia, Esq., Department Counsel
For Applicant: Edward C. Fanning, Jr., Esq.

09/14/2015

Decision

MASON Paul J., Administrative Judge:

Applicant admitted that he did not file his federal and state tax returns for tax years 2004 through 2013. Given his knowledge of the legal requirement to file annual federal and state tax returns, combined with having held a security clearance since 1973, he knew or should have known that even if he was due refunds, he was still required to file annual tax returns. His repeated acts of omission have not been mitigated by his explanations for not filing, or by his filing a few of the returns shortly before the hearing and the remainder immediately after the hearing. Overall, Applicant’s ten-year history of not filing tax returns in a timely manner demonstrates poor judgment and continues to pose security concerns that have not been mitigated based on the financial considerations guideline. Eligibility for access to classified information is denied.

Statement of the Case

Applicant completed and signed an Electronic Questionnaire for Investigations Processing (e-QIP) on January 7, 2014. On January 23, 2014, he was interviewed by an investigator from the Office of Personnel Management (OPM). On November 7, 2014, the Department of Defense (DOD) issued a Statement of Reasons (SOR) detailing security concerns under the financial considerations guideline (Guideline F). The action was taken pursuant to Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented by the DOD in September 1, 2006.

On December 5, 2014, Applicant provided a notarized answer to the SOR. On May 11, 2015, this case was assigned to me. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on May 15, 2015, for a hearing on June 5, 2015.¹ The hearing was held as scheduled. The Government's two exhibits (GE) 1-2 and Applicant's one exhibit (AE) A were admitted into evidence without objection. AE A is a ring-binder containing Applicant's tax returns for tax years 2004 through 2014. His two post-hearing exhibits are now in the record as AE B and AE C.² AE B will be discussed in Evidentiary Rulings below. The exhibits were admitted in evidence without objection. The record in this case closed when the hearing transcript (Tr.) was received on June 12, 2015.

Evidentiary Rulings

In his answer, which was written on his copy of the two-page SOR, Applicant admitted the two allegations in the SOR. In his own handwriting, he drew a line through the year "2012" in both allegations and inserted the year "2013" directly underneath. To the right of his handwritten "2013," he wrote his initials. To the right of the word "required" in both allegations, he wrote "I Agree," and entered his initials. He entered his full signature at the bottom of his the SOR. He testified that he had not filed his 2013 federal and state taxes. (Tr. 17) Pursuant to E3.1.17 of the Directive, both SOR allegations were amended to include the tax year 2013.

On June 4, 2015, I received (by facsimile) 153 pages of Applicant's tax returns and supporting documents from 2004 through 2014. The faxed material, which is marked as

¹ On June 4, 2015, I received (by facsimile) 153 pages of tax documentation for tax years 2004 to 2014. The pre-hearing submission will be discussed in "Evidentiary Rulings below.

² AE B contains a 1099-R form describing \$197.66 in distributions from a life insurance company for tax year 2004. AE C contains U.S. Mail receipts proof of mailing federal and state tax returns for tax years 2004 through 2012, and email receipts for e-filing federal and state returns for 2013 and 2014.

Hearing Exhibit (HE) 1 and admitted into evidence, contains the same information as AE A, but is not in a ring-binder. During a review of HE 1, I noticed that page 148 was illegible. At the hearing, I advised Applicant's attorney that the page was unreadable. He replaced the page with a legible copy, which is a post-hearing exhibit already admitted into evidence as AE B. After a full review of AE A and HE 1, I am changing my original decision and will rely on AE A, referring to HE 1 if necessary. (Tr. 32, 38-41)

Findings of Fact

The SOR alleges under SOR 1.a that Applicant did not file federal tax returns for tax years 2004 through 2013. Applicant admitted this allegation. SOR 1.b alleges that Applicant did not file state returns for tax years 2004 through 2013. He admitted this allegation. At the bottom of the SOR, Applicant handwrote, "I am actively working on submitting Federal and State Income tax returns from the 2004-2013 by April 15, 2015." He provided his signature. Applicant knew that he was legally required to file tax returns. (Answer to SOR; Tr. 26)

Applicant's answer to the SOR has three parts. The first part is his handwritten response on a copy of the SOR that he received in November 2014. The second part is a one-page position statement explaining his remorse for not filing the tax returns. The third part is a six-page application for disability insurance for Applicant's son. The purpose of the information is to obtain or continue disability insurance for his son. Applicant indicated that if he loses his security clearance he will lose his job and not be able to obtain or continue disability insurance for his son. On November 6, 2014, his son's treating physician prepared a handicapped/disabled dependent insurance form indicating that the son has had a permanent physical and mental condition since 2001. A functional limitation was that the son could not sit or stand for long periods of time. Applicant's son prepared a similar form on November 12, 2014, describing his mobility issues and his inability to interact socially in a desired manner. The son has not been employed since the onset of his disability. (Answer to SOR; position statement; attachment)

Applicant is 66 years old. He divorced his second wife in 2006, after their separation in approximately 2003. He has a 28-year-old son and a 25-year-old daughter from this marriage. He also has a stepson. From October 1967 until his honorable discharge in June 1973, he served in the U.S. Navy, spending his last two years of service in the Inactive Reserve. In June 1972, he received an associate's degree. He received the following computer technology certificates: November 2009, a computer information training certificate; November 2010, an information assurance certificate; and May 2012, an additional information training certificate. Since April 2008, Applicant has been working for a defense contractor as an information technologist IV. Before his three-month unemployment between January and April 2008, he was a network administrator for six years. He purchased his home in December 1990. He seeks continuation of his security

clearance that he has held since 1973. He has no drug or alcohol problems. He has no criminal record. (GE 1 at 7-34; Tr. 12)

When Applicant submitted his e-QIP in January 2014, he voluntarily admitted under Section 26 that he had not filed his federal or state tax returns for 2006 through 2012. Regarding the federal returns, he indicated that he “postponed (filing the returns) knowing I always recieved [sic] a refund. One would say if you were getting money back why wouldn’t you file. Money has never been the driving factor in my life. Working on filing all unfiled returns by April 2014 tax due date or before.” He conceded that he had not filed the state returns and indicated, “no debt. Working on filing all back tax paperwork by April 15, 2014.” He repeated the two foregoing statements seven times for each year (2006-2012) that he did not file federal or state tax returns. According to his e-QIP, Applicant has no other financial issues. He has always paid for his cars in cash and he has been regularly paying his mortgage since 1990. (GE 1 at 35-39; Tr. 34-37)

In his OPM interview summary dated January 23, 2014, Applicant admitted that procrastination was the primary reason for not filing federal or state tax returns from 2006 through 2012. He also admitted not filing his 2004 and 2005 federal and state tax returns, but did not disclose the additional missing years on his e-QIP because the information was more than seven years before he signed the e-QIP. He did not include back tax amounts on the form because he never owed any taxes. During his OPM interview later in the same month, he reiterated his intention to handle all federal and state tax issues by April 2014, expecting at the time that he would prepare and file the returns himself. (GE 1 at 35-38; GE 2 at 3-4; Tr. 14-15, 22-24, 26-27)

Applicant stopped filing returns after his second wife, who had filed his tax returns for him, suddenly left him in 2003. Her departure upset him emotionally and caused him to omit filing his returns the following year and in successive years. Also, problems in obtaining information from his second wife frustrated his attempt to file the returns. Applicant did not file in recent years because he was devoting most of his attention to his critically ill fiancé who passed away in February 2015. Applicant had not mentioned his fiancé’s illness earlier in the security investigation because her illness had not reached a critical level where she needed urgent care. (GE 1 at 35-38; GE 2 at 3-4; Tr. 14-15, 22-24)

Applicant testified that after receiving the hearing notice in May 2015, he retained counsel. He hired an accountant on June 1, 2015. The contract for accounting services appears at the beginning of Applicant’s prepared federal and state tax returns for tax years 2004 through 2014. The returns for tax years 2013 and 2014 were electronically filed on June 5, 2015. Applicant anticipated that he would be mailing the remaining returns shortly. He owes no back taxes. He will be getting \$22,000 in refunds for tax years 2012 through

2014.³ He lost refunds for tax years 2004 to 2010 because of negligence. He did not foresee a future tax problem because he has hired a tax firm who will prepare his taxes in the future. (AE A Tr. 16-19, 26-30)

Character Evidence

In his January 2014 e-QIP, Applicant identified six people that he knew well. Four individuals are friends and two are his former mother and father-in-law. Applicant submitted no independent character or performance evidence from his employment to support his unblemished record at his workplace. (GE 1 at 15-18; Answer to SOR)

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the potentially disqualifying and mitigating conditions of the AG. These conditions should be evaluated in the context of nine general factors known as the whole-person concept to bring together all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision regarding security clearance eligibility. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to the potential, rather than actual, risk of compromise of classified information.

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. . . ." An applicant has the ultimate burden of persuasion of establishing that it is clearly consistent with the national interest to grant him a security clearance.

Analysis

Financial Considerations

The security concern for financial considerations is set forth in AG ¶ 18:

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

³ The federal and state refunds total \$21,367. (AE A, tax returns for tax years 2014, 2013, and 2012; HE 1 at 2)

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. Compulsive gambling is a concern as it may lead to financial crimes including espionage. Affluence that cannot be explained by known sources of income is also a security concern. It may indicate proceeds from financially profitable criminal acts.

The applicable disqualifying conditions under AG ¶ 19 are:

- (a) inability or unwillingness to satisfy debts;
- (c) a history of not meeting financial obligations; and
- (g) failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same.

The SOR alleges and Applicant admits that he did not file federal and state tax returns for the tax years 2004 through 2013. Since there are no allegations of delinquent debt or back taxes for any of the years identified in the SOR, there is no evidence to support AG ¶¶ 19(a) and 19(c). Applicant's admissions in his e-QIP, his interview, and at the hearing, support the Government's case under AG ¶ 19(g). The burden shifts to Applicant to rebut or mitigate his failure to file his federal and state tax returns.

Four mitigating conditions under AG ¶ 20 are potentially pertinent:

- (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 reliability, trustworthiness, and good judgment;
- (b) the conditions that resulted in the financial problem were largely beyond the person's control and the individual acted responsibly under the circumstances;
- (c) the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control; and
- (d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

By not filing his Federal and state tax returns for ten consecutive years, Applicant demonstrated a history of disregarding rules and regulations. Even though he finally filed the missing returns, the filing did not occur until June 2015, about 17 months after he declared on two occasions in January 2014 that he wanted to have the returns filed by April 2014, and about six months after he submitted his answer to the SOR when he stated he was trying to have the returns filed by April 15, 2015. Clearly, Applicant has shown the financial management skills necessary (regularly paying his mortgage since 1990, and keeping his other bills in a paid-as-agreed status) to timely comply with rules when it is in his interest to do so. His ten-year habitual course of conduct continues to cast doubt on his reliability and trustworthiness. AG ¶ 20(a) does not apply.

Applicant's second wife left him suddenly in 2003. She took some important tax documents that frustrated his supposed plan to file tax returns during the period. In 2012, his fiancé became very ill and passed away in February 2015. The sudden departure of his second wife in 2003 is attenuated by the passage of ten years. The death of his fiancé in February 2015 is probative of why he may not have been in a suitable frame of mind to file returns during the period, but it provides no extenuation for his failure of filing returns beginning in 2004. While he receives mitigation for the unanticipated departure of his second wife, and fiancé's serious illness and passing in February 2015, he receives no mitigation for his procrastination, a condition totally within his control. Applicant garners no mitigation under the second prong of the condition because he acted irresponsibly in not filing the returns until June 2015. AG ¶ 20(b) has only limited application.

On June 1, 2015, Applicant retained a tax accounting firm to prepare his taxes. By June 8, 2015, all missing returns were filed with the IRS and state tax agency. AG ¶ 20(c) applies in part because Applicant finally sought accounting assistance even through the filing of his federal and state returns did not occur until after he received the hearing notice in May 2015. AG ¶ 20(d) does not apply because there are no delinquent debts alleged.

Whole-Person Concept

I have examined the evidence under the disqualifying and mitigating conditions of the financial guideline. I have also weighed the circumstances within the context of nine variables known as the whole-person concept. In evaluating the relevance of an individual's conduct, the administrative judge should consider the following factors:

AG ¶ 2(a) (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 the participation was 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 a security clearance must be a commonsense judgment based on careful consideration of the guidelines and the whole-person concept.

Applicant is 66 years old and divorced. He was honorably discharged from the U.S. Navy in 1973, after six years of service. He has been an information technologist since 2008, and he was a network administrator for six years before his current employment. He has three children. He has held a security clearance since 1973.

The foregoing evidence that supports Applicant's security clearance falls short of overcoming the disqualifying evidence under the whole-person concept. Given his age, Applicant knew or should have known that even if he was due refunds, he was still required to file federal and state tax returns. He had several opportunities to file the missing returns, but took no documented action until June 1, 2015, when he finally determined that he could lose his security clearance. Procrastinating until June 2015, before filing the missing federal and state tax returns raises ongoing doubt about Applicant's judgment, reliability, and willingness to comply with rules and regulations. Based on his track record of inaction for 10 years, it is too early to confidently conclude that he will dutifully file his federal and state tax returns in the future. After a making a commonsense evaluation of the evidence under the specific conditions and the general factors of the whole-person concept, I conclude that Applicant has not mitigated the security concerns stemming from the financial considerations guideline. See AG ¶ 2(a)(1) through 2(a)(9).

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:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Paul J. Mason
Administrative Judge