



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



In the matter of:)
)
) ISCR Case No. 14-00632
)
Applicant for Security Clearance)

Appearances

For Government: Braden Murphy, Esq., Department Counsel
For Applicant: *Pro se*

09/09/2014

Decision

O'BRIEN, Rita C., Administrative Judge:

Based on a review of the pleadings, exhibits, and testimony, I conclude that Applicant has mitigated the security concerns raised under the guideline for financial considerations. His request for a security clearance is granted.

Statement of the Case

On April 8, 2014, the Department of Defense (DOD) issued to Applicant a Statement of Reasons (SOR) citing security concerns under Guideline F (financial considerations) of the Adjudicative Guidelines (AG).¹ In his Answer to the SOR, Applicant admitted the four allegations. He requested a hearing before an administrative judge of the Defense Office of Hearings and Appeals (DOHA). At the August 14, 2014 hearing, I admitted four exhibits offered by the Government (GE 1-4), and marked

¹ Adjudication of the case is controlled by Executive Order 10865, as amended; DOD Directive 5220.6 (Directive), as amended; and the Adjudicative Guidelines, which supersede the guidelines listed in Enclosure 2 to the Directive. They apply to all adjudications or trustworthiness determinations in which an SOR was issued on or after September 1, 2006.

Department Counsel's exhibit list as Hearing Exhibit (HE) I. I took administrative notice of an Internal Revenue Service (IRS) document offered by Department Counsel and marked it HE II. Applicant offered 12 documents, admitted as AE A-L, and an exhibit list marked as HE III. I granted Applicant's request to submit additional documents after the hearing. I timely received three documents, which I admitted as AE M through O.² DOHA received the transcript on August 25, 2014. The record closed on August 27, 2014.

Findings of Fact

Applicant's admissions to the SOR allegations are incorporated as findings of fact. After a thorough review of the pleadings and the record evidence, I make the following additional findings of fact.

Applicant, 51 years old, is a high school graduate, and completed a certificate of electronic technology from a technical school in 1984. He has held a top secret security clearance without incident since 1996. He has worked for the same small defense contracting company since 1985 and held several positions including field service engineer and service manager. Currently, he is the director of technical services. (GE 1; AE A, B)

Applicant and his wife have been married for 27 years. In 2005, they adopted a foreign-born child, who was born in 2004. In 2009, they adopted a second foreign-born child, who was born in 2005. The second child, who is now nine years old, was malnourished at the time of adoption, and had medical problems. The medical and neurological issues continue, and Applicant expects his son to require special education at school. (GE 1; AE A; Tr. 38-41, 48, 786-77)

Before 2009, Applicant timely filed his federal and state tax returns for approximately 25 years. He did not request extensions. However, in 2010, he had difficulty with his returns. As an adoptive parent of a foreign-born child, he was entitled to a tax credit for the 2009 tax year. To receive the credit, he was required to submit certain adoption paperwork. During 2009 and 2010, the two adoption agencies involved in his son's adoption could not agree about the wording of one of the documents, and did not produce it. Applicant timely requested an extension to file his 2009 federal tax return. The extension allowed him six months, until October 2010, to file his complete return. (AE A; HE II; Tr. 40-45, 54)

In August 2010, Applicant's wife was diagnosed with cancer. Over the next few years, she underwent surgery, chemotherapy, radiation, and later, reconstructive surgery. Applicant cared for her and the children, and managed the household. He

² Applicant offered the first page of his tax returns for tax years 2011, 2012, and 2013 (AE E, G, I). Department Counsel objected that they were incomplete without the signatures at page 2. Applicant submitted the second page of each return after the hearing (AE M-O).

admits that he misplaced papers and documents: “[p]apers all around the house have been moved by myself, in trying to keep the house clean and orderly. And it became a great challenge to find the papers and the documents that I felt I needed to continue with this.” He testified that he was “[o]verwhelmed, and chose to ignore, if you will, or put on the super back burner this issue.” (AE A; Tr. 45-50, 59)

Applicant knew he would receive a refund on his 2009 tax returns, because he qualified for the adoption credit of approximately \$10,000. In October 2010, he contacted the IRS and explained his difficulties stemming from his wife’s illness and obtaining the required adoption documents for his 2009 return. He testified the IRS representative told him that he should file his returns, but as he did not owe taxes, the IRS would not take action if he filed within three years of the original due date of April 2010; if he filed later than that, he would lose the refund. Applicant testified,

And that's the way I understood the ruling of the IRS representative, who advised me that you need to take care of this. But since you're getting a refund you have technically up to three years, otherwise, we will keep that refund. (Tr. 46)

He also testified, “I was saying to myself that this is my new deadline, 2013.” Applicant requested extensions for 2010 through 2012. He knew, from the “rough drafts” he filed with the extension requests, that he had overpaid his taxes, did not owe additional tax to the federal or state governments, and would be owed a refund each year. He also met with representatives of his state’s comptroller’s office, and was informed that the state would follow the federal agency’s policy. (Answer; AE A; Tr. 45-49, 53-59, 83-85)

Applicant prepared his tax return himself, using tax preparation software. As the three-year deadline approached, he again worked with the IRS in 2013 to prepare and submit his 2009 federal tax return. He spoke with IRS representatives by telephone, and also met with them in person. He filed the 2009 return in July 2013, and received a \$13,668 refund. He mistakenly thought he should not file the subsequent completed returns until he had received the previous year’s refund, because each refund would affect the following year’s computation. He waited to file the completed 2010 return until 2014. He received a refund of \$3,823. He subsequently learned from the IRS representatives that he did not have to wait, and could submit each return as soon as it was completed. He filed the 2011, 2012, and 2013³ returns together in 2014. He received refunds for each year. Applicant testified he did not seek professional tax-preparation help. He testified, “And had I engaged the assistance of professionals it probably would have worked out a different way.” (Tr. 67) He also testified that he has learned from the experience, and that he should:

³ Applicant’s 2013 return is not at issue because he filed it within the six-month extension period. (AE I)

[s]eek out counsel or oversight from others who have more experience on matters than myself. Don't just make my own judgments, but seek information from people to help make a better decision. In doing this by myself, I realize that's where my error was. (Tr. 125)

(Answer; GE 3, 4; AE A, C, E, G, I, M-O; Tr. 49, 58-59, 61, 64, 66-67, 71, 125)

Applicant was also due to receive refunds on his state taxes in each year from 2009 to 2013. He filed the 2009 state return in April 2013, and received a refund of \$2,292. He filed the 2010 return in April 2014, and his refund was \$2,147. All 2011 through 2013 returns were filed in August 2014, and he received refunds of approximately \$1,800 each year. (GE 3, 4; AE D, F, H, J)

Applicant earns approximately \$99,000 gross annual salary. His wife is now recovered and works part-time as a physician's assistant. Applicant's finances are stable. His October 2013 credit report shows that, other than two small medical debts, all of his accounts are current. The SOR alleges the medical debts, which total \$221. He testified that he thought the debts had been paid years ago, and was unaware that they were delinquent. He provided documentation showing he has paid both debts. (GE 2, 3; AE K, L; Tr. 74-78)

Two witnesses testified for Applicant. Both hold top secret security clearances. The vice president for finance and administration testified that she has known Applicant for almost 30 years, and knows his wife and children. She noted in her letter, "His character as both an individual and an employee is one of the most dependable, moral, and honest individuals I have ever known or worked with." He is sincere and works for the best interest of the company and the federal government clients. The president of Applicant's company has known him for 29 years. He knew Applicant's father, and knows his wife and two sons. He is aware of Applicant's failure to timely file his tax returns. However, he testified, "I think that if, had [Applicant] owed the Government money this wouldn't have happened. . . I think if [Applicant] owed somebody money it would have been taken care of very promptly. That's just the way he is." He opined that, "[I] don't think the Government could ask for a better person, a more trustworthy person, a more patriotic person." (AE B; Tr. 93-110)

Policies

Each security clearance decision must be a fair, commonsense determination based on all available relevant and material information, and consideration of the pertinent criteria and adjudication policy in the AG.⁴ Decisions must also reflect consideration of the "whole-person" factors listed in ¶ 2(a) of the guidelines. The

⁴ Directive. 6.3.

presence or absence of a disqualifying or mitigating condition does not determine a conclusion for or against an applicant. However, specific applicable guidelines are followed when a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information. In this case, the pleadings and the information presented by the parties require consideration of the adjudicative factors addressed under Guideline F.

A security clearance decision is intended only to resolve the questions of whether it is clearly consistent with the national interest⁵ for an applicant to either receive or continue to have access to classified information. The Government bears the initial burden of producing admissible information on which it based the decision to deny or revoke a security clearance for an applicant. Additionally, the Government must prove controverted facts alleged in the SOR. If the Government meets its burden, it then falls to the applicant to refute, extenuate, or mitigate the Government's case. Because no one has a "right" to a security clearance, an applicant bears a heavy burden of persuasion.⁶ A person who has access to classified information enters into a fiduciary relationship with the Government based on trust and confidence. Therefore, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability, and trustworthiness to protect the national interest as her or his 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.⁷

Analysis

Guideline F (Financial Considerations)

AG ¶ 18 expresses the security concern pertaining to 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 over-extended is at risk of having to engage in illegal acts to generate funds. . .

Applicant's two small delinquent medical debts, which are now paid, are not security-significant. However, he failed to timely file his 2009 through 2012 federal and

⁵ See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

⁶ See *Egan*, 484 U.S. at 528, 531.

⁷ See *Egan*; Adjudicative Guidelines, ¶ 2(b).

state income tax returns. The record supports application of the following disqualifying condition under AG ¶ 19:

(g) failure to file annual Federal, state, or local income tax returns as required . . . ;

The financial considerations guideline also contains factors that can mitigate security concerns. I have considered the mitigating factors under AG ¶ 20, especially the following:

(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), and the individual acted responsibly under the circumstances; and

(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.

Applicant's failure to file his returns is not in the distant past. However, it occurred during a particularly stressful time in his family's life. The adoption issues are now resolved, and his wife has recovered and is working. It is unlikely that such a combination of events will recur. Applicant has followed the IRS's instructions, filed all of his returns, and his current trustworthiness and reliability are not at issue. AG ¶ 20(a) applies.

Applicant's problems occurred during the years 2010 through 2012, when his family life was chaotic and he was dealing with family difficulties. These circumstances include the problems with his son's adoption documentation, his son's ongoing medical issues, and primarily, his wife's cancer diagnosis, surgeries, and treatment. These circumstances were beyond his control. Applicant acted responsibly by filing extension requests, and by keeping in touch with the IRS and the state tax office to determine how he should proceed. However, based on the information from the IRS, he mistakenly believed he could file within three years because he did not owe taxes. He also relied on a faulty understanding of the filing process, and delayed filing the late returns because he thought he could not file each year's return until the previous year's refund was received. Once he realized that he was misinformed, he filed the last three returns at the same time. Applicant should have acted more quickly as his family crises began to resolve, and receives only partial mitigation under AG ¶ 20(b).

Although Applicant paid his legitimate taxes, and had no delinquent taxes at any point, he did fail to timely file his tax forms. However, over the past 14 months, he has filed each of the returns at issue. He has received all the refunds due for each year. He has no outstanding returns, and has brought his tax-filing situation under control. AG ¶ 20(c) applies.

Whole Person Analysis

Under the whole-person concept, an administrative judge must evaluate the Applicant's security eligibility by considering the totality of the Applicant's conduct and all the circumstances. An administrative judge should consider the nine adjudicative process factors listed at 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) 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.

AG ¶ 2(c) requires that the ultimate determination of whether to grant a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. Under the cited guideline, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case.

Applicant's family life was disrupted by a series of circumstances, including the difficulty related to the foreign adoption, ongoing medical and educational problems with his younger son, and his wife's protracted treatment for a life-threatening illness. Applicant demonstrated maturity and character during that time as the family's sole financial support, managing the home, while maintaining his job. For several years during his wife's illness, his life was chaotic, and he filed requests for extensions on his federal and state tax returns. He knew from the "rough drafts" he filed with the extension requests, that he had overpaid his taxes, and did not owe additional taxes to the federal or state governments.

Applicant has a 25-year history of timeliness in filing his federal and state returns. More recently, an aberration occurred when, for a period of three years, circumstances interfered with his ability to gather required documentation. Applicant should have been more diligent and filed the last several returns timely to receive his refunds. However, the evidence indicates no intent to defraud the government, or to withhold legitimate tax payments: he did not owe delinquent taxes, and had paid more taxes than he owed.

Applicant has demonstrated behavioral change and rehabilitation by filing all due returns over the past 14 months. He realizes the errors he made in failing to seek professional financial guidance, and has expressed his sincere regret for his failure to timely file. He was open and candid during his investigation, and in his testimony. His witnesses, who know Applicant and his family for almost 30 years, both attested to his honesty and trustworthiness.

Applicant's stable home life, his employment history supporting a federal contractor over the past three decades, his history of timely payment of taxes and filing of returns before 2009, and his 15 years of holding a security clearance without incident, support a finding of trustworthiness and reliability that outweighs the failure to timely file during a difficult three-year period in his life. His tax filings are now current and he credibly intends to maintain timely filings in the future. I conclude he will not repeat his conduct in the future.

Overall, the evidence satisfies the doubts raised about Applicant's suitability for a security clearance. For all these reasons, I conclude Applicant has mitigated the security concerns raised by the financial considerations guideline.

Formal Findings

Paragraph 1, Guideline F	FOR APPLICANT
Subparagraphs 1.a – 1.d	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the interests of national security to allow Applicant access to classified information. Applicant's request for a security clearance is granted.

RITA C. O'BRIEN
Administrative Judge