



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
) ISCR Case No. 14-02554
)
)
Applicant for Security Clearance)

Appearances

For Government: Philip J. Katauskas, Esq., Department Counsel
For Applicant: Pro se

07/29/2015

Decision

MASON, Paul J., Administrative Judge:

While Applicant had filed neither federal nor state tax returns for several years, his documented action in filing returns and paying taxes sufficiently allays the security concerns arising from the financial considerations guideline. Eligibility for access to classified information is granted.

Statement of the Case

On January 26, 2013, Applicant signed and certified an electronic questionnaires for investigations processing (e-QIP, Item 5). He was interviewed by an investigator from the Office of Personnel Management (OPM) on February 21, 2013. (Item 6) On August 1, 2014, the Department of Defense (DOD) issued the Statement of Reasons (SOR) detailing security concerns under financial considerations (Guideline F). (Item 1) The action was taken under Executive Order 10865, Safeguarding Classified Information within Industry (February 20, 1960), as amended; Department of Defense Directive 5220.6, Defense Industrial Personnel Security Clearance Review Program

(January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented by DOD on September 1, 2006.

Applicant furnished his notarized answer to the SOR on August 23, 2014. He decided to have his case decided on the administrative record. A copy of the Government's File of Relevant Material (FORM), the Government's evidence in support of the allegations of the SOR, was sent to Applicant on February 25, 2015. In an attachment to the FORM, Applicant was advised he could object to the information in the FORM or submit additional information in explanation, mitigation, or extenuation. He received the FORM on March 6, 2015. His response to the FORM was dated April 2, 2015. Attached to his response are 11 exhibits (Exh. 1-9). On April 7, 2015, Department Counsel indicated he had no objection to the documentation in Applicant's response. The case was assigned to me on April 27, 2015.

Findings of Fact

The SOR alleges that Appellant failed to file federal tax returns as required by law for 2006 to 2011. (SOR 1.a) He failed to file state tax returns as required by law for tax years 2005 to 2011. (SOR 1.b) He admitted both allegations and explained that he received filing extensions for the federal taxes in all cases. He paid the estimated federal taxes required with each extension. He filed the federal tax returns and paid most of the taxes or penalties except for 2010 and 2011. He expected to have the missing federal returns filed within two weeks to a month, then deal with any potential penalty or interest that would be assessed.

Regarding the missing state returns, Applicant admitted that he did not file returns for years 2005 to 2011. In 2013, he received a notice of assessment for tax year 2009, and he paid the assessment of \$2,814.¹ He believed he would be receiving additional notices for the other years, but none were sent. He intended to contact the state tax agency to investigate the status of the 2005 through 2008 tax years. He intended to file the 2010 and 2011 state tax returns after he filed federal tax returns for those years. Applicant has paid most of the federal and state taxes and penalties and will pay any taxes or penalties for tax returns that have not been filed. He attached the 2009 state notice of assessment. He noted that he was ready to make a withdrawal from his \$175,000 retirement account to cover any taxes or penalties that could be imposed. He did not attach copies of tax returns he claimed were filed. (Answer to SOR, attachment, 2009 notice of assessment; retirement account statement)

Applicant is 55 years old. He was married in August 1983 and separated in June 2004. He has a 30-year-old son. After receiving a bachelor's degree in May 1981 from a military university, he served in the U.S. Army on active duty for 20 years and retired in

¹ He paid the assessment in March 2013. (Exh. 9)

May 2001.² He has been employed by a defense contractor as a systems engineer since December 2012. Before his current employment, he was a chief systems engineer for another contractor for eight years. He has no alcohol or drug issues. He has held a security clearance since March 2001, and has never had a security violation.

In his e-QIP dated January 26, 2013, Applicant identified all federal and state tax years in which he did not file returns. On February 21, 2013, he confirmed to an OPM investigator that he did not file the federal and state tax returns at issue. He explained that in 2012, he filed his 2006 federal tax return and paid taxes. In 2011, he filed his 2007 and 2008 federal tax returns and paid \$50 in taxes for 2007 and \$300 in taxes for 2008. In 2011, he filed his 2009 federal return and paid \$300 in taxes. (Item 5 at 45-46; Item 6 at 4)

Applicant told the OPM investigator that a missing W-2 form prevented him from filing his federal and state tax returns for 2010. Though procrastination/oversight and not having the proper paperwork appeared to be his primary reasons for not filing the returns, he did not consider that his procrastination/oversight represented poor judgment. (Item 5 at 45-46; Item 6 at 4)

On April 2, 2015, Applicant submitted his 5-page response to the FORM with 11 exhibits. He registered objections to the language used in the government's brief (attached to the FORM) supporting the SOR. He registered objections to the brief equating a failure to file tax returns with poor judgment. Then, he raised objections to several of the cases cited in the government's brief as either being irrelevant or distinguishable for assorted reasons. However, Applicant conceded that ". . . failure to file income tax returns could be the basis for an adverse security clearance [decision] as that is stated in Guideline F." (Response to FORM at 1-2)

Applicant's 11 tax exhibits appended to his response to the FORM show that he filed federal returns and paid taxes and penalties for 2010, 2011, 2012, and 2013. However, he provided no documentation in support of his interview summary claim of filing federal returns or paying taxes for 2006, 2007, 2008, and 2009. (Item 6 at 4; Response to FORM at 3-4; Exh. 1, 2, 10, and 11)

Regarding the missing state returns, Applicant provided documentation of filing state returns and paying taxes, including penalties and interest for 2005 through 2008, and 2010 through 2013.³ The state tax agency indicated on March 30, 2015, that his filed 2014 tax return had not processed. He planned to file his 2009 state return on May 1, 2015, even though a state tax agent told him that he did not have to file a tax return because he paid the assessment. (Response to FORM at 3-4; Exh. 4-9)

² Between March 2001 and May 2001, Applicant was on terminal leave from the Army while working for a computer corporation. Because he could be called back to the service at any time, he entered "retired" rather than "discharged" from the service. (Item 6 at 2)

³, Applicant filed state tax returns for 2012 and 2013 before the end of calendar year 2014. (Response to FORM at 3)

Applicant does not believe he is a security risk because his documentation shows that he has his tax problems resolved or under control. As was discussed in the explanatory information cited above in Statement of the Case, an applicant has the burden of presenting evidence in rebuttal, mitigation, or extenuation. Therefore, it is Applicant's responsibility to submit character evidence about himself.

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the guidelines in the AG. Each guideline lists potentially disqualifying conditions and mitigating conditions that are useful in evaluating an applicant's eligibility for access to classified information.

The administrative judge's ultimate goal is to reach a fair and impartial decision that is based on sound and prudent judgment. The decision should also include a careful, thorough evaluation of a number of variables known as the "whole-person concept" that brings together all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision. 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.I.14., the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.I.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. . . ." Because this case is decided on the administrative record, credibility assessments of Applicant are limited to his statements and interview summaries. The applicant bears the ultimate burden of persuasion in demonstrating that he warrants a favorable security clearance decision.

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 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.

One disqualifying condition under ¶ 19 is potentially applicable:

(g) failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same.

The explanations of procrastination, oversight, and not having the proper paperwork to file the returns do not excuse Applicant's deliberate failure to file federal tax and state tax returns for the years identified in the SOR. His acts of omission over several years represent a pattern of poor judgment within the ambit of AG ¶ 19(g). The burden shifts to Applicant to rebut or mitigate the security concerns related to not filing tax returns.

The potentially pertinent mitigating conditions under AG ¶ 20 are:

(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.

AG ¶ 20(a) applies in part. Applicant indicated he started filing returns for the missing years in 2011, more than two years before the SOR was issued. There is documented proof that he satisfied the 2009 state assessment in March 2013. Though he did not file most of the other missing returns until after he received the SOR, he appears to have a growing understanding of the importance of complying with the federal and state laws requiring him to file annual tax returns in a timely manner.

Neither prong of AG ¶ 20(b) applies. Applicant offered no evidence of any unforeseen event beyond his control that resulted in his repeated failure to meet his obligations to federal and state tax agencies. Though he acted responsibly to file the federal and state returns, the risk of losing his security clearance probably was a motivating factor in his curative action.

Applicant has filed most of his federal and state tax returns. Based on the credible and detailed documentation from the federal and state agencies supporting his claims of filing federal returns for 2010 through 2013, and filing state returns for 2005 through 2014, I believe Applicant filed the 2006 through 2009 federal returns and paid the corresponding taxes in 2011 and 2012. Considering the evidence as a whole, Applicant receives mitigation under the second prong of AG ¶ 20(c) which indicates there are “clear indications the problem is being resolved or is under control.” His filing of most of the returns and payment of taxes establishes limited mitigation under AG ¶ 20(d).

Whole-Person Concept

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

The final security clearance decision must be an overall commonsense judgment based upon careful consideration of the specific guidelines, each of which is to be evaluated in the context of the whole person. (AG ¶ 2(c))

Applicant is 55 years old. He served his country honorably for 20 years. For 11 years, he has been employed as a systems engineer for two defense contractors. He has held a security clearance since 2001 without any security violations. He has no drug or alcohol issues. His failure to file federal and state tax returns demonstrates poor judgment. However, he displayed good judgment by filing several federal returns and paying taxes in 2011 and 2012, before the SOR was issued. He filed almost all federal returns before the Internal Revenue Service (IRS) filed a lien or garnishment against his earnings or his property. Although most of the action to correct his tax issues did not occur until after he received the SOR, he provided sufficient evidence for me to confidently conclude that he will timely file and pay his federal and state taxes in the future. See AG ¶ 2(a)(1) through AG ¶ 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):

FOR APPLICANT

Subparagraphs 1.a-1.b:

For Applicant

Conclusion

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

Paul J. Mason
Administrative Judge