



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



In the matter of:)	
)	
)	ISCR Case No. 14-04975
)	
Applicant for Security Clearance)	

Appearances

For Government: Andrea Corrales, Esq., Department Counsel
For Applicant: *Pro se*

09/14/2016

Decision

HEINY, Claude R., Administrative Judge:

Applicant contests the Department of Defense’s (DoD) intent to deny his eligibility for a security clearance to work in the defense industry. Applicant failed to file his federal income tax returns for tax years 2008 through 2013. The returns were filed 18 months before his hearing. He has mitigated the financial considerations security concerns. Clearance is granted.

History of the Case

On May 19, 2015, acting under the relevant Executive Order and DoD Directive,¹ the DoD issued a Statement of Reasons (SOR) detailing financial considerations security concerns. DoD adjudicators could not find that it is clearly consistent with the national interest to grant or continue Applicant’s security clearance. On June 12, 2015,

¹ Executive Order 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 within the DoD on September 1, 2006.

Applicant answered the SOR and requested a hearing. On September 30, 2015, I was assigned the case. On October 29, 2015, the Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing for a hearing to be convened on November 16, 2015.

At the hearing, Government's Exhibits (Ex.) 1 and 2 were admitted without objection. The record was left open to allow Applicant to submit documents, which he did and which were admitted as Ex. A – M. Applicant testified at the hearing. On November 15, 2015, DOHA received the hearing transcript (Tr.).

Findings of Fact

In Applicant's Answer to the SOR, he stated that after tax year 2007 he filed federal income tax extension requests² as to the filings his federal income tax returns. He stated he had sufficient income tax withheld for each tax year in question. His admissions are incorporated as facts. After a thorough review of the pleadings, exhibits, and testimony, I make the following additional findings of fact:

Applicant is a 51-year-old assistant software engineer who has worked for a defense contractor since July 2002, and he seeks to obtain a security clearance. His gross annual salary is approximately \$136,000 and his wife's annual income is \$20,000 to \$25,000. He has two retirement accounts that total \$443,528 and \$278,393. (Ex. H, I, K)

In March 2014, Applicant completed an Electronic Questionnaires for Investigations Processing (e-QIP) on which he indicated he had not filed his federal income tax returns as required. His state of residence does not have a state income tax. He indicated he was working with a certified public accountant (CPA) to file his returns. (Ex. 1) A month later, in April 2014, during a personal subject interview (PSI), he admitted failing to file his 2008 through 2013 income tax returns. (Ex. 3) The following month, in May 2014, he filed his federal income tax returns for tax years 2008 through 2013. (Ex. A – F)

Until 2008, Applicant timely filed his federal income tax returns. In 2008, his father died and he became executor of his father's estate. The administration of his father's estate was complicated because of a trust and because his father's residence had been miles away in a different state. Applicant incorrectly assumed the filing of his personal income tax returns was somehow related to the filing of his father's estate return. He incorrectly assumed that he could not file his personal returns until the estate returns were filed.

² The IRs Form 4868, for Automatic Extension of Time to File U.S. Individual Income Tax Returns, allows a six month extension to file returns. There is no extension for the payment of income tax due. The time cannot be extended for more than six months.

In 2014, Applicant's accountant informed him that his father's estate and tax returns were completely independent of his personal income tax returns. In May 2014, after being so informed, he immediately filed his personal returns for tax years 2008 through 2013. He had tax withheld each year sufficient to cover the amount of federal income tax owed. A summary of his income, tax withheld, and overpayment of taxes follows.

Tax Year	Taxable Income	Income Tax Owed	Income Tax Withheld	Amount of Overpayment	Amount to be refunded ³
2008 (Ex. A)	\$88,451	\$10,656	\$17,221	\$6,565	No refund allowed.
2009 (Ex. B)	\$81,773	\$8,419	\$12,899	\$4,480	No refund allowed
2010 (Ex. C)	\$75,862	\$6,631	\$11,438	\$4,805	
2011 (Ex. D)	\$87,306	\$9,931	\$14,218	\$4,287	
2012 (Ex. E)	\$75,326	\$6,141	\$10,728	\$4,587	
2013 (Ex. F)	\$70,206	\$4,691	\$9,482	\$4,791	

Claims for income tax refunds must be made within three years of the due date of the return. For tax returns filed in May 2014, only tax years of 2010 or more recent would be allowed a refund. The filing deadline for filing a return for tax year 2010 was April 2011. The filing deadline for filing a tax refund claim for tax year 2010 was April 15, 2014. However, Applicant filed an extension, which would allow for an additional period to claim a refund.

Although Applicant was over withheld for tax years 2008 and 2009 (according to the table he over withheld for 2008, but not 2009), he will not receive a refund for those years because he failed to claim the refund in a timely manner. The amount over withheld for those years was approximately \$11,000. The IRS informed Applicant by letter dated May 22, 2015, that he would not receive an income tax refund for tax year 2009. (Ex. H, J) Applicant received a \$19,029 federal income tax refund. (Ex. H, L)

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which must be considered in evaluating an applicant's eligibility for access to classified information.

³ The amounts of refunds for tax year 2011, 2012, and 2013 may be less than shown on the chart because those returns might be subject to a penalty for not filing in a timely manner.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record.

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 to obtain a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 10865 provides that decisions shall be "in terms of the national interest and shall in no sense be a determination of the loyalty of the applicant concerned." See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline F, Financial Considerations

Adjudicative Guideline (AG) ¶ 18 articulates the security concerns relating to 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. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

Additionally, an individual who is financially irresponsible may also be irresponsible, unconcerned, negligent, or careless in properly handling and safeguarding classified information. Behaving responsibly or irresponsibly in one aspect of life provides an indication of how a person may behave in other aspects of life.

A person's relationship with his creditors is a private matter until evidence is uncovered demonstrating an inability or unwillingness to repay debts under agreed upon terms. Absent evidence of strong extenuating or mitigating circumstances, an applicant with a history of serious or recurring financial difficulties is in a position of risk that is inconsistent with holding a security clearance. An applicant is not required to be debt free, but is required to manage his finances to meet his financial obligations.

Applicant failed to file his federal income tax returns for tax years 2008 through 2013 in a timely manner. Although he over withheld for those tax years, he still failed to file in a timely manner. AG ¶ 19(g), "failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same" apply.

Five Financial Considerations 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), 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;
- (d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts; and
- (e) the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue.

Until tax year 2008, Applicant filed his federal income tax returns in a timely manner. He became the executor of his father's estate when his father died in 2008. The administration of his father's estate was complicated because of a trust and the distance Applicant lived from his father's location. Applicant incorrectly assumed the filing of his personal income tax returns was somehow related to his father's estate. He incorrectly assumed that he could not file his personal returns until the estate returns were filed.

In 2014, Applicant learned his father's estate and tax returns were completely independent of his personal income tax returns. When so informed in May 2014, he immediately filed his personal returns for tax years 2008 through 2013. He had tax withheld each year sufficient to cover the amount of federal income tax owed. Because his claim for income tax refunds for tax years 2008 and 2009 were beyond the period to claim a refund. Had he timely requested a refund, he would have received approximately \$11,000 due to the overpayment of his taxes.

In 2014, Applicant filed his e-QIP on which he indicated he had not timely filed his tax returns. A month later, he stated the same during a PSI, and a month after the interview. He filed his tax returns, and received refunds totaling more than \$19,000.

Under AG ¶20(a), the behavior was not infrequent for his failure to file involved six tax years, but Applicant's failure to file was due to a misconception that he could not file his personal income tax returns until he filed his father's estate returns. As such this failure to file was the result of circumstances that are unlikely to recur. Because he over withheld and was due a refund, his actions do not cast doubt on his current reliability, trustworthiness, or good judgment. AG ¶ 20(a) applies.

Under AG ¶ 20(c), Applicant has not received counseling for the problem, but did receive proper income tax advice from his CPA. He followed that advice, filed his returns, and there is a clear indication that the problem is resolved. AG ¶ 20(c) applies. Since he has now filed his returns and received refunds of his overpaid taxes. AG ¶ 20(d) applies.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all relevant circumstances. The 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) 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 a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant should have filed his income tax returns in a more timely manner. He was over withheld on his taxes and his failure to file resulted in the loss of more than \$11,000 in refunds for tax years 2008 and 2009. In 2014, when he filed his e-QIP, he was completely honest and indicated he had not timely filed his tax returns. A month later he stated the same in his PSI. Shortly after the interview, he filed his income tax returns and received refunds totaling more than \$19,000. All of his tax returns were filed more than 18 months before the hearing. Additionally, he has retirement accounts that total more than \$700,000.

The issue is not simply whether all his tax returns have been filed — which they have — it is whether his financial circumstances raise concerns about his fitness to hold a security clearance. See AG ¶ 2(a)(1). Overall, the record evidence leaves me without questions or doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has mitigated the security concerns arising from his delinquent financial obligations.

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, Financial Considerations: 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 national interest to grant Applicant a security clearance. Eligibility for access to classified information is granted.

CLAUDE R. HEINY II
Administrative Judge