



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



In the matter of:)
)
) ISCR Case No. 15-01859
)
)
Applicant for Security Clearance)

Appearances

For Government: Benjamin Dorsey, Esq., Department Counsel
For Applicant: Sheldon I. Cohen, Esq.

08/11/2016

Decision

MASON Paul J., Administrative Judge:

Applicant exercised poor judgement by failing to file his federal and state tax return for tax year 2009. He compounded his poor judgment by repeating his acts of omission in 2010 and 2011. However, in 2012, Applicant demonstrated good judgment when he sought professional counseling from two medical health professionals. In 2013, he filed his federal and state tax returns for 2009, 2010, and 2011. He has filed all state and federal returns since then as required. He has completed financial counseling courses to better manage his finances and his time. Eligibility for access to classified information is granted.

Statement of the Case

Applicant completed and signed an Electronic Questionnaire for Investigations Processing (e-QIP) on August 12, 2012. On September 30, 2015, the Department of

Defense (DOD) issued a Statement of Reasons (SOR) detailing security concerns under the financial considerations guideline (Guideline F) and the foreign influence guideline (Guideline B). The action was taken pursuant to 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 the Department of Defense on September 1, 2006.

Applicant's notarized answer was submitted on November 5, 2015. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on March 28, 2016, for a hearing on April 27, 2016. The hearing was held as scheduled. Two Government exhibits (GE 1-2) were admitted in evidence without objection. Applicant testified and presented 25 exhibits (AE A-Y), appearing in a black three-ring binder. On the first page inside the binder is Applicant's exhibit list. The exhibits were admitted in evidence without objection. The transcript (Tr.) was received by DOHA on May 10, 2016, and the record closed the same day.

Evidentiary Rulings

Before making his opening statement, Department Counsel moved to withdraw SOR ¶¶ 2.a and 2.b. (foreign influence guideline) based on credible evidence that Applicant's mother has moved to the United States, and his father was deceased. The motion was granted under E3.1.17 of DOD Directive 5220.6. (Tr. 5)

Findings of Fact

SOR ¶ 1.a alleges that Applicant failed to pay federal and state taxes for tax years 2009 through 2011. Applicant denied the federal tax portion of the allegation because the federal returns were filed and refunds were provided without penalties or fees. SOR ¶ 1.b alleges a delinquent medical account. Applicant denied he owed the account since he paid the bill in January 2015. (Answer to SOR)

Applicant is 48 years old. He has been married since April 1998. He has one son, 15 years old. He began working as a program manager for his current employer in September 2005. In December 2015, Applicant was promoted to director of digital investigations and insider threats. Before his employment with his present employer, he worked as an information systems engineer for 17 years. Applicant has held a security clearance since June 1992. (Tr.43)

Applicant has four mental health issues that are successfully being treated. They are depression, anxiety, attention deficit/hyperactivity disorder (ADHD), and sleep apnea. Since October 2012, he has been under a psychiatrist's care for three of those issues, consulting

her weekly through 2015, and currently once a month. Because of the consultations with the psychiatrist and the medication she prescribed, Applicant believes his mental conditions are under control while the related motivational issues are improving. The doctor does not believe Applicant has a disorder that would impair his judgment. A second doctor has placed Applicant on breathing machines to treat his sleep apnea and other cardiovascular issues. (AE X; Tr. 44-48)

Applicant's wife has been under a doctor's care for depression that caused her to leave her job in April 2012. At three years old, Applicant's son was diagnosed with a condition causing difficulty in social interaction, motor skill development, and communication. He also has ADHD. He is under medical care and is receiving education that accommodates his conditions. The mental conditions of his wife and son, as well as his own psychological issues, hampered Applicant's ability to file his tax returns for those tax years identified in the SOR. Moreover, he could no longer rely on his wife to manage certain responsibilities related to the household and their son. (Tr. 50-53)

In previous years, Applicant utilized a computer software program to prepare his taxes. However, in tax year 2009, because of his unfamiliarity with tax issues like a stock bonus, investment sales, home improvements, and trust distributions to his siblings, he did not think that he addressed these issues appropriately. His feeling of unease was complicated by his ADHD that prevented him from filing the 2009 federal tax return. He did not complete and file the tax return for 2010 because it required information from the 2009 return. The same problem occurred for the federal tax return for tax year 2011. Because the state tax returns required the federal returns to be filed, he did not file state returns for tax years 2009, 2010, and 2011. (SOR ¶ 1.a) (Tr. 48-49)

After realizing his mental issues were deteriorating to a level where he could not handle his tax returns, Applicant sought psychiatric help in October 2012. One of the areas addressed by his treating doctor was to direct his attention to problems requiring assistance. One of those problems was the filling of his federal and state tax returns. Based on the doctor's recommendation, before the end of 2012, Applicant hired an accountant who filed the returns in 2013, and has been preparing his tax returns since. (Tr. 50)

AE E represents the tax transcripts showing that the federal tax return for 2009 was filed on March 15, 2013, and a refund was issued on May 27, 2013; the federal tax return for 2010 was filed on October 9, 2013, and a refund was issued on February 10, 2014; and, the federal tax return for 2011 was filed on October 9, 2013, and a refund was issued on March 17, 2014. On April 15, 2013, Applicant filed for an extension for tax year 2012, and filed the federal tax return on October 28, 2013; a refund was issued on March 7, 2014. For tax year 2014, Applicant filed for an extension of time to file on April 10, 2015; he filed the federal tax return on November 30, 2015, and was issued a refund on the same day. On

March 20, 2016, he filed his return for tax year 2015, and is due a refund. (AE C, E, F, G, W; Tr. 56-59)

All of Applicant's state tax returns have been filed. The 2009 state tax return was filed on March 8, 2013. The 2010 state tax return was filed on April 18, 2016. Applicant's accountant misplaced the state tax return for 2011. However, records from the state tax agency show that Applicant filed his 2011 tax return (no date cited) and was issued a refund on November 5, 2013. Applicant received a refund from the state for tax years 2009 through 2015. To avoid tax issues in the future, Applicant intends keep the accountant on retainer for all tax issues. He has hired an organizer to assist him to prepare the documentation for filing the taxes. Finally, he has designated a specific time to complete his tax returns. (AE U, V; Tr. 60-66, 82)

SOR ¶ 1.b alleges that Applicant is indebted to a creditor for a delinquent medical account totaling \$81. Applicant explained the debt was for an emergency room visit. Applicant paid the bill in January 2013. He received a collection notice on April 29, 2014. Since he was certain he paid the bill, Applicant sent a letter to the collection agency searching for an explanation, but received no response. In a telephone call to the collection agency, they advised him that the \$81 dollar figure was the physician's bill that apparently had not been mailed to Applicant with the original invoice. In January 2015, he paid the balance due on the \$81 balance. (Tr. 53-56; AE B)

Applicant's monthly budget is dated April 16, 2016. The figures in the budget are primarily the same every month. Since he purchased his home in 2003, Applicant has been paying an extra amount (pre-paying) over his regular monthly mortgage payments. He has been pre-paying an extra amount above his regular monthly home equity payments. As the budget reflects, Applicant sets money aside monthly for savings and the state educational program for his son. Applicant has an excellent credit agency score. (AE K, Q; Tr. 66-68)

Applicant's performance evaluations for 2008 through 2014 demonstrate that he met or exceeded his performance objectives. In his 2014 year-end review, Applicant's manager praised the leadership Applicant demonstrated in fulfilling cybersecurity objectives of the company. He received nine awards for his quality job performance between 2008 and 2014. (AE H, I; Tr. 69-71)

In April 2016, Applicant enrolled in financial counseling and credit education classes that focused on budgeting and setting financial goals. He also took an online course that explained how to eliminate debt. He received certificates of completion of all financial courses. Applicant found the budgeting course was even more helpful than the others because the course demonstrated that managing finances is as important as managing time when contemplating and implementing financial decisions. (AE R, S, T; Tr. 75-78)

Character Evidence

Mr. A has worked for Applicant's employer for the last 16 years. He is currently Vice President of Cybersecurity. Before his current employment, Mr. A retired as a colonel in the United States (U.S.) Air Force after completing 22 years of service. He has possessed a security clearance since 1980. For the last three years, Mr. A, has been Applicant's supervisor with daily contact. The four job responsibilities of Applicant's position as director of investigations and forensics (insider threats), is to: (1) launch an initial investigation when oddities appear in the information technology (IT) network; (2) monitor lawsuits and other legal action; (3) conduct IT security training; and, (4) detect and terminate insider threats as they appear. In Mr. A's view, Applicant's job performance earned him a promotion in December 2015, to his current position. Mr. A is aware of Applicant's tax issues, but has seen no negative impact on his performance. Mr. A recommends Applicant be granted a security clearance. (Tr. 12-27)

Mr. B has been employed by Applicant's company for 36 years and has held a security clearance for the same amount of time. He is currently Vice President of Security. He is responsible for the company's national security program and Mr. A is responsible for the IT network. Mr. B has known Applicant professionally for two years, interacting with him about once a week. Applicant communicates peculiarities in the network that are then investigated by Mr. B. Applicant is responsible for initially assessing and reducing potential incidents before they become actionable, balancing the company's security interests with an employee's privacy rights. Based on his dependability and judgment in keeping their discussions confidential, Mr. B recommends Applicant for a security clearance. (Tr. 27-38)

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 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:

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

The medical debt identified at SOR ¶ 1. b has no security significance due to the small amount, and the fact that it is the only delinquent debt in Applicant's credit report. Initially, he demonstrated good judgment by responsibly investigating why he received a second bill for a medical service he believed in good-faith he had already paid. After receiving a credible explanation for the second bill, he immediately paid the bill about ten months before the SOR was issued. SOR ¶ 1.b is resolved in Applicant's favor.

Conversely, Applicant exhibited poor judgment by not filing his federal and state tax returns for 2009, 2010, and 2011 (SOR ¶ 1.a) Failing to file federal and state tax returns suggests that an applicant has a problem with following federal and state laws and rules. AG ¶ 19(g) applies to SOR ¶ 1.a.

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.

While Applicant's failure to file his federal and state tax returns occurred over five years ago, he did not file the missing returns until 2013. Hence, his acts of omission, though infrequent, occurred recently. But, his failure to file occurred under unusual and stressful circumstances. His comprehensive approach in simultaneously filing his returns and addressing his mental and medical health issues, while continuing to address those mental health issues of his family, justifies complete confidence Applicant will not commit this kind of behavior in the future. Applicant's corrective action in filing the missing returns and all subsequent returns successfully rehabilitates his temporary demonstration of poor judgment in 2009, 2010, and 2011. AG ¶ 20(a) applies.

Though there is no direct evidence of the beginning of Applicant's mental and health issues, it is fair to assume that he probably had these conditions for some time before 2009. Diagnosed with a psychological condition in 2004, his son has been receiving continuing treatment and special schooling. Applicant's mental and medical conditions, coupled with the increasing family responsibilities he had to manage, were circumstances outside of his control. Though almost three years passed before Applicant sought professional help in October 2012, he has been consulting the doctor regularly for more than three and one-half years. He filed his federal and state tax returns in 2013, about two years before the SOR was issued. Because of the delay in filing the missing returns, AG ¶ 20(b) has only partial application.

While Applicant did not complete financial counseling courses until April 2016, a careful review of his credit report shows that he has his finances under control. The courses have been beneficial for Applicant because he realizes that managing his time is just as important as managing his budget. AG ¶ 20(c) applies. AG ¶ 20(d) applies to Applicant's good-faith effort in resolving his delinquent tax issues about two years before the SOR was issued.

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.

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. (AG ¶ 2(c))

Applicant is 48 years old and married with a 15-year-old son. In 2004, his son was diagnosed with a psychological condition that has required continuing treatment and special education. Applicant's mental and medical issues were probably festering during next five years, preventing him from filing his federal and state tax returns for tax year 2009, 2010, and 2011.

Notwithstanding the loss of his wife's income in April 2012, Applicant "righted the ship" when he began receiving professional treatment in October 2012. He is under the care of a pulmonologist for his sleep issues. His wife and son are under treatment. The record shows that he retained an accountant to marshal the documentation and file returns for the missing years. He decided to keep the accountant on retainer to file subsequent returns as they become due. Applicant hired an organizer who should improve Applicant's time-management. Finally, he designates a specific time (additional evidence of time management) to work through his taxes.

Applicant has been working for his employer since 2005. His performance evaluations paint an impressive picture of his work product. Mr. A and Mr. B enthusiastically described Applicant's outstanding job performance and the reason why he was promoted in December 2015. The steps Applicant has taken to cure his federal and state tax issues while managing his mental and medical health issues and those of his family, combined with the credible evidence of financial counseling, only strengthens my overall finding for Applicant under the financial considerations guideline.

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-b:	For Applicant
Paragraph 2 (Guideline B):	WITHDRAWN

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