



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 14-04594

Appearances

For Government: Eric Borgstrom, Esq., Department Counsel
For Applicant: *Pro se*

11/20/2015

Decision

WESLEY, Roger C., Administrative Judge:

Based upon a review of the pleadings and exhibits, I conclude that Applicant mitigated security concerns regarding his finances and personal conduct. Eligibility for access to classified information is granted.

History of the Case

On December 2, 2014, the Department of Defense (DOD) Consolidated Adjudication Facility (CAF) issued a Statement of Reasons (SOR) detailing reasons why DOD adjudicators could not make the preliminary affirmative determination of eligibility for granting a security clearance and recommended referral to an administrative judge to determine whether a security clearance should be granted, continued, denied, or revoked. The action was taken under 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 (AGs) implemented by the DOD on September 1, 2006.

Applicant responded to the SOR on December 29, 2014, and elected to have his case decided on the basis of the written record. Applicant received the Government's File of Relevant Material (FORM) on August 24, 2015, and timely responded to the FORM with copies of his filed federal tax returns for tax years 2012, 2013, and 2014 and endorsements from friends and a former colleague who know him. The Government's submissions are admitted as Items 1-4, and Applicant's submissions are admitted as Items 5-10. The case was assigned to me on September 8, 2015. Applicant has since documented his filing of his 2009 state tax return as well. This submission is accepted as Applicant's Item 11.

Summary of Pleadings

Under Guideline F, Applicant allegedly (a) failed to file his federal income tax returns for at least tax year 2009 and (b) failed to file his state income tax returns for at least tax year 2009.

Under Guideline E, Applicant allegedly falsified his security clearance application of January 2014 by answering "no" to Section 26, which inquired whether he had failed to file any federal or state tax return within the last seven years. By answering "no" to Section 26, the Government alleges that Applicant deliberately failed to disclose his federal and state tax returns to at least tax year 2009.

In his response to the SOR, Applicant admitted his non-filing of his federal and state tax returns for the tax year of 2009. He claimed his filing lapses were isolated incidents based on a faulty understanding of the tax laws (i.e., if he was entitled to a refund, he had no obligation to file tax returns with either federal or state taxing authorities) and his lack of understanding of available professional help. He claimed he has since consulted a professional accountant and will be providing federal and state tax return filings for the tax year of 2009.

Addressing the alleged January 2014 omissions of his failure to file his 2009 federal and state tax returns, Applicant admitted his omissions. He denied any intent to falsify and could not accurately explain why he omitted his failure to file tax returns for 2009. He claimed he voluntarily disclosed his filing lapses when facing questions by an agent from the Office of Personnel Management (OPM) in March 2014.

Findings of Fact

Applicant is a 34-year-old senior farm operations coordinator for a defense contractor who seeks a security clearance. The allegations covered in the SOR and admitted by Applicant are adopted as relevant and material findings. Additional findings follow.

Background

Applicant married in April 2005 and has one child from this marriage. (item 2) He earned an associate's degree from a local community college in computer science in

2002 and is pursuing a bachelors' degree in engineering in an on-line program administered by a respected state university in his state. (Items 1-4) He claimed no military service.

Finances

Applicant failed to file his federal and state income tax returns for tax year 2009. He could not explain with any degree of accuracy why he did not file them. He stated in his answer that he believed he did not have to file tax returns if he was entitled to a refund, and he lost track of time. (Items 1 and 4) He claimed he would contact a tax professional and file his federal and state tax returns by June 14, 2014. (Item 4)

Applicant received the SOR in December 2014, and has since been furnished his prepared federal and state tax returns for tax year 2009 by his tax preparers. (Item 5) With the help of his accountants, he assured that he filed both his federal and state tax returns for tax year 2009. (Item 5) He documented his filing of his 2009 federal return with an IRS transcript covering the 2009 tax period. (Item 7) He also provided a copy of his 2009 state tax return. (Item 11) He did not file his 2009 federal and state tax returns, however, until December 2014, following his receipt of the SOR. (Items 5-11) Both his federal and state returns credit Applicant with refunds: \$2,209 for his federal refund and \$398 for his state refund. (Items 5-11)

In his post-FORM submission, Applicant assured that he filed his federal tax returns for tax years 2012-2014 in a timely way, using a certified public accountant. (Items 5 and 7-10) He documented his tax filings for these years with unsigned tax returns covering the respective years to back his claims that his failure to file his 2009 federal and state returns was an isolated judgment lapse.

Omissions of federal and state tax filing lapses

Applicant failed to file his federal and state income tax returns for tax year 2009. He cannot fully explain his failure to list his tax-filing omissions in the Electronic Questionnaires for Investigation Processing (e-QIP) he completed on January 7, 2014. (Item 2) He believed that if he was entitled to refunds in each of the taxing jurisdictions, he need not file returns. (Items 1 and 4) He now realizes he was mistaken and has since filed his missing federal and state returns for tax year 2009. (Items 5 and 7-11) He received refunds as claimed which help to reinforce his assurances that his omissions were based on mistake and not on any intent to falsify.

Applicant's explanations reflect some imprudence on his part. For federal filing exemptions for tax filers are very limited and are not available to tax filers with reported gross income over minimum threshold levels. Still, Applicant was quick to correct his filing lapses when questioned about his taxes in an ensuing OPM interview in January 2014. In his interview with the OPM agent he was credited with a voluntary disclosure of his failure to file his federal and state income tax returns. (Item 4)

Considering all of the facts and circumstances, findings are warranted that Applicant's omissions of his filing lapses for tax year 2009 were imprudent and lacked due diligence, but were not knowing and wilful omissions. These findings are reinforced by Applicant's answers in an interview with an OPM agent two months later (in March 2014). Without any prompting from the agent, Applicant voluntarily disclosed his 2009 filing lapses when questioned by the agent. Applicant's omissions reflect prompt, good faith corrections of filing lapses in his completed e-QIP.

Endorsements

Applicant is well-regarded by friends and a former colleague who have known Applicant for many years. They credit him with the highest standards of personal integrity and discretion. (Item 6) His father-in-law characterizes him as diligent and studious with his college studies in his chosen field of electronics. (Item 6)

Policies

The AGs list guidelines to be used by administrative judges in the decision-making process covering DOHA cases. These guidelines take into account factors that could create a potential conflict of interest for the individual applicant, as well as considerations that could affect the individual's reliability, trustworthiness, and ability to protect classified information. These guidelines include "[c]onditions that could raise a security concern and may be disqualifying" (disqualifying conditions), if any, and many of the "[c]onditions that could mitigate security concerns." These guidelines must be considered before deciding whether or not a security clearance should be granted, continued, or denied. The guidelines do not require administrative judges to place exclusive reliance on the enumerated disqualifying and mitigating conditions in the guidelines in arriving at a decision. Each of the guidelines is to be evaluated in the context of the whole person in accordance with AG ¶ 2(c).

In addition to the relevant AGs, administrative judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in AG ¶ 2(a) of the revised AGs, which are intended to assist the judges in reaching a fair and impartial commonsense decision based upon a careful consideration of the pertinent guidelines within the context of the whole person. The adjudicative process is designed to examine a sufficient period of an applicant's life to enable predictive judgments to be made about whether the applicant is an acceptable security risk.

When evaluating an applicant's conduct, the relevant guidelines are to be considered together with the following AG ¶ 2(a) factors: (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.

Viewing the issues raised and evidence as a whole, the following individual guideline is pertinent in this case:

Financial Considerations

The Concern: 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. AG ¶ 18.

Burden of Proof

By virtue of the principles and policies framed by the AGs, a decision to grant or continue an applicant's security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires administrative judges to make a commonsense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a security clearance depends, in large part, on the relevance and materiality of that evidence. See *United States, v. Gaudin*, 515 U.S. 506, 509-511 (1995). As with all adversarial proceedings, the judge may draw only those inferences which have a reasonable and logical basis from the evidence of record. Conversely, the judge cannot draw factual inferences that are grounded on speculation or conjecture.

The Government's initial burden is twofold: (1) it must prove by substantial evidence any controverted facts alleged in the SOR, and (2) it must demonstrate that the facts proven have a material bearing to the applicant's eligibility to obtain or maintain a security clearance. The required materiality showing, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a security clearance. Rather, the judge must consider and weigh the cognizable risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the evidentiary burden shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation, or mitigation. Based on the requirement of Exec. Or. 10865 that all security clearances be clearly consistent with the national interest, the applicant has the ultimate burden of demonstrating his or her clearance eligibility. "[S]ecurity-clearance

determinations should err, if they must, on the side of denials.” See *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

Analysis

Applicant is a fully-employed senior farm operations coordinator who failed to file his 2009 federal and state tax returns in a timely way. He has since filed his 2009 federal and state returns and provided unsigned copies of the federal returns he timely filed covering tax years 2012-2014.

Security concerns are raised over Applicant’s failing to file his federal and state tax returns for tax year 2009. Applicant’s tax-filing lapses warrant the application of one of the disqualifying conditions (DC) of the AGs: DC ¶ 19(g), “failure to file Federal, state, or local income tax returns as required or the fraudulent filing of the same.” His post-FORM submissions document his filing of his 2009 federal and state tax returns as well as his timely filing of his federal and state returns for tax years 2012-2014.

Holding a security clearance involves the exercise of important fiducial responsibilities, among which is the expectancy of consistent trust and candor. Financial stability in a person cleared to access classified information is required precisely to inspire trust and confidence in the holder of the clearance. While the principal concern of a clearance holder’s demonstrated financial difficulties is vulnerability to coercion and influence, judgment and trust concerns are also explicit in financial cases.

Applicant’s tax filing problems merit only partial application of MC ¶ 20(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.” Judgment lapses related to an applicant’s failure to file his tax returns in a timely way reflect a lack of due diligence in making the effort to verify his tax-filing requirements for federal and state tax returns. To his credit, Applicant has since documented his filing of his federal and state tax returns for tax year 2009, which entitle him to refunds.

Addressing and resolving the only two financial concerns raised in the SOR, Applicant satisfied the level of financial progress required to meet the criteria established by the Appeal Board for assessing an applicant’s efforts to rectify his poor financial condition with responsible efforts considering his circumstances. See ISCR Case No. 08-06567 at 2-3 (App. Bd. Oct. 29, 2009). Applicant’s sufficient tax filing actions of his own enable him to meet the Appeal Board’s requirements for demonstrating financial stability. ISCR Case No. 07-06482 (App. Bd. May 21 2008); see ISCR Case No. 05-11366 at 4 n.9 (App. Bd. Jan. 12, 2007)(citing ISCR Case No. 99-0462 at 4 (App. Bd. May 25, 2000)); ISCR Case No. 99-0012 at 4 (App. Bd. Dec. 1, 1999).

From a whole-person standpoint, Applicant's demonstrated efforts to date are encouraging with his documented filing of his 2009 federal and state tax returns. Backed by his filing of his 2009 federal and state tax returns and a renewed understanding of his filing obligations, Applicant's recent efforts are enough to overcome security concerns associated with his history of financial instability. Whole-person assessment is aided by the character references he has received from his friends and a colleague who know him and have worked with him.

Considering all of the circumstances surrounding Applicant's isolated tax filing lapses in 2009, his actions to date are sufficient to meet mitigation requirements imposed by the guideline governing his finances. Favorable conclusions are warranted with respect to the allegations covered by subparagraphs 1.a and 1.b of Guideline F.

Personal conduct concerns

Additional security concerns are raised over Applicant's failure to disclose his failure to file his federal and state tax returns for tax year 2009. While Applicant admitted his e-QIP omissions of his failure to file his federal and state tax returns for tax year 2009, he denied any deliberate attempt to falsify the e-QIP he completed in January 2014. He assured that his omission was based on a misunderstanding over whether he was required to file tax returns. His omissions reflect judgment lapses, but not deliberate omissions.

In his defense, Applicant did receive refunds on his tax returns for tax year 2009, which reconciles with his claims that his omissions were the result of mistaken understandings about his need to file tax returns for the year at issue (2009). Moreover, when afforded an opportunity by the interviewing OPM investigator to discuss his taxes in a March 2014 interview, Applicant fully disclosed his tax filing omission without any prompting from the investigator.

To the extent Applicant's omissions reflect any reckless action on Applicant's part, they are mitigated by his good-faith disclosure two months after completing his e-QIP in January 2014. MC ¶ 17(a), "the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts," fully applies to Applicant's situation

Formal Findings

In reviewing the allegations of the SOR and ensuing conclusions reached in the context of the findings of fact, conclusions, conditions, and the factors listed above, I make the following formal findings:

GUIDELINE F (FINANCIAL CONSIDERATIONS): FOR APPLICANT

Subparas. 1.a-1.b:	For Applicant
Subpara. 2.a:	For Applicant

Conclusions

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue Applicant's security clearance. Clearance is granted.

Roger C. Wesley
Administrative Judge

