



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
XXXXXXXXXXXXXXXXXXXX) ISCR Case No. 18-03010
)
Applicant for Security Clearance)

Appearances

For Government: Daniel F. Crowley, Esquire, Department Counsel
For Applicant: Eric A. Eisen, Esquire

11/02/2020

Decision

METZ, John Grattan, Jr., Administrative Judge:

Based on the record in this case [Transcript (Tr.), Government exhibits (GE) 1-7, hearing exhibit (HE) I, and Applicant exhibits (AE) A-C]. I deny Applicant's clearance.

On 31 January 2019 the Department of Defense (DoD) sent Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline F, Financial Considerations.¹ Applicant timely answered the SOR, requesting a hearing before the Defense Office of Hearings and Appeals (DOHA). DOHA assigned the case to me 10 April 2019, and I convened a hearing 4 June 2019. DOHA received the transcript 13 June 2019, and the record closed.

¹DoD acted 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 Security Executive Agent Directive 4, effective on 8 June 2017.

Findings of Fact

Applicant admitted the SOR financial allegations, except SOR 1.g, 1.i, and 1.j. On my own motion, I amended SOR 1.d to correctly reflect that it was a Federal income tax lien, not a state lien, in accordance with GE 6. Applicant is a 60-year-old operations lead contracted to a U.S. defense contractor since July 2014. He was briefly unemployed May-July 2014, while a bid protest was resolved, having been first contracted to the same employer in April 2014. He was contracted to a different defense contractor from June 2007 to March 2014. He seeks to retain the clearance he was issued in May 2009 (GE 1).

Applicant married in March 1987, and had two children with his wife, an adult son and an adult daughter. However, in the 1990s, he became involved with another woman, and had three children with her: two adult daughters, and a soon-to-be-20 son. He is away at college, but will soon be moving home to attend a closer college. Applicant's oldest son, wife, and grandchild live with Applicant, as do both Applicant's younger daughters (GE 1).

Applicant's earlier employment history is a bit hazy. He describes starting his own company in about 2002, with about 15 employees, and a single, big client, but that ended abruptly in about 2003 (Tr. 29-30). He then got a job with a Government contractor. In about 2005, he started up his company again, as a vehicle for contracting his services, and continued to work for his previous employer. He used a commercially-available tax preparation software to do his taxes (Tr. 31). In late 2011, the Internal Revenue Service (IRS) audited him for tax years 2008-2010, and disallowed a number of business deductions, which left him with a large tax liability. In spring 2012, Applicant experienced a medical condition that required surgery, and a week's hospital stay. Over the next few years, he spent another three weeks in the hospital (Tr. 32-33). In 2012, he was also diagnosed with depression. Nevertheless, he did what he could to address his tax indebtedness.

The SOR alleges that Applicant failed to timely file his 2010, 2011, and 2016 state and Federal income tax returns. Applicant reported this on his December 2017 clearance application (GE 1), asserting that he had made payment arrangements on his approximately \$22,000 combined 2010 debt, and satisfied the debt in August 2016, had made payment arrangements on his approximately \$28,000 combined 2011 debt in August 2015, and was paying \$3,350 monthly, and was making payment arrangements for his approximately \$23,000 combined 2016 tax debt. He also reported a \$1,300 medical debt. All the SOR debts are listed in Applicant's January 2018 credit report (GE 2). They do not appear in Applicant's November 2018 credit report (GE 4) because it reports accounts with one credit bureau, and not the bureau that reported those debts on GE 2.

Applicant later acknowledged that he also failed to timely file his 2012-2014 state and Federal income tax returns (AE B, Tab A. 3). Although these tax issues were not alleged in the SOR [because Applicant did not disclose them on his December 2016

clearance application (GE 1) or during his March 2018 interview with a Government investigator (GE 3)], I cannot consider them on the merits of this case, but I can consider them for evidence of absence of mistake and other purposes.

Applicant discussed his tax filing issues, and delinquent debts, during a March 2018 interview with a Government investigator (GE 3). Applicant stated that he had made payment arrangements with the medical creditors at SOR 1.h-1.j, and was current on his payments. He also stated that he had made payment arrangements with the IRS for tax years 2010, 2011, and 2016, and was making payments. Applicant attributed his tax issues solely to his inability to make the large lump-sum payments required to satisfy his tax liabilities. He repeated this explanation to the Government investigator.

Applicant provided a May 2019 printout listing official payments to the IRS and the state beginning in June 2012 through a single payment in May 2018 (AE B, Tab A.4). The payments were irregular, and it appears that Applicant entered into multiple installment agreements with the IRS, with varying degrees of constancy and success. From September 2014 through May 2015 he made regular required payments; June 2015 he made a partial payment; he made the July 2015 payment with two checks; and the same with August 2015; he made the September payment late; missed the November 2015 payment; made the December 2015 payment on time; then no installment payment until May 2018.

Applicant's tax year 2010 IRS account transcript (AE B, Tab A.1) shows that his tax return was filed only a month late. It largely confirms the official payments records, but also shows a large gap in payments between August 2015 and June 2017. The resumption of payments in June 2017 lasted until May 2018, although several of the 2018 payments were dishonored and had to be made up. Applicant paid over \$69,000 to the IRS, and as of May 2019 owes only accrued interest and penalties. His 2011 account transcript shows a \$61,759.44 balance as of May 2019 (AE B, Tab A.2); his 2012, 2013, and 2014 tax transcripts show balances of \$56,913.57, \$47,900.38, and \$11,223.39, respectively (AE B, Tab A.3). Applicant did not provide a tax transcript for 2016.

As a result of his failure to timely file these returns, in March 2013, the Federal government obtained a \$141,017.68 tax lien for tax years 2009-2011 (SOR 1.d)(GE 6), and in January 2014 obtained a \$39,918.63 tax lien for tax year 2012 (SOR 1.c) GE 5), for \$180,939 total Federal tax liens. In August 2012, the state filed a \$39,369.11 tax lien for tax years 2009-2010, which Applicant paid in March 2018, before the SOR was issued (SOR 1.f)GE 7). In February 2013, the state filed a \$12,596.72 tax lien for tax year 2011 (SOR 1e)(GE 7). GE 7 also reports tax liens for 2005, 2012, and 2013, that were satisfied before the SOR was issued. However, GE 7 also reports a March 2019 state lien of \$87,345.06 for tax years 2009-2014.

Also alleged in the SOR were a delinquent child support account (SOR 1.g) and three delinquent medical accounts (SOR 1.h-1.i). Applicant produced an April 2019 child support record that showed no arrears as of January 2017 (the reported delinquencies were dated 2015)(AE B, Tab G). He produced an April 2019 letter from the SOR 1.h

creditor, showing a pending monthly payment for May 2019 (AE B, Tab H). He produced a February 2019 letter from the SOR 1.i creditor, showing the account paid in full (AE B, Tab I). He produced a May 2019 letter from the SOR 1.j creditor, showing the account paid in full (AE B, Tab J).

In May 2018, Applicant hired a professional tax relief company to help him deal with Federal and state issues, and appointed it as his representative (AE B, Tab A.5). Applicant's tax transcripts reflect the appointment of a representative around that time. In May 2019, the representative provided Applicant's current tax status (AE B, Tab A.6). Applicant has filed all his Federal income tax returns through 2017, owes the IRS \$190,765—of which he has paid \$1,000—and expects to have an installment agreement within the next 30-60 days (or approximately the end of July 2019). The due date for his 2019 return has been extended to October 2019. Applicant is compliant with IRS requirements, which is what makes him eligible for an installment agreement. The representative estimates his required monthly payment between \$2,500-\$3,500. The representative did not provide a current status for Applicant's state tax issues. Applicant claimed to have had a repayment plan with the state until February 2018, when the state tried to withdraw over \$99,000 from his bank account (AE B, Tab B). Applicant documented the attempted withdrawal (AE B, Tab B.1), but no prior payments. AE B, Tab A.4 documents only a handful of payments to the state, none after September 2015. Applicant's final state tax liability is undetermined. He produced the actual lien of judgment for unpaid state tax showing \$87,345.06 due as of February 2019, for tax years 2009 through 2014 (AE B, Tab D.1).

Applicant's work and character references [three recent work references from the Government agency Applicant supports and a long-standing friend (AE A)], all consider Applicant honest and trustworthy, and recommend him for his clearance. Only the friend is aware of the SOR issues and Applicant's health issues, but he also comments favorably on Applicant's community involvement. It does not appear that Applicant has received credit or financial counseling. He provided a budget that shows \$101 positive monthly cash flow, after providing for a \$3,500 payment on lien or judgment (presumably the IRS), and a \$1,300 payment to other (presumably the state lien).

Policies

The adjudicative guidelines (AG) list factors for evaluating a person's suitability for access to classified information. Administrative judges must assess disqualifying and mitigating conditions under each issue fairly raised by the facts and situation presented. Each decision must also reflect a fair, impartial, and commonsense consideration of the factors listed in AG ¶ 2(a). Any one disqualifying or mitigating condition is not, by itself, conclusive. However, specific adjudicative guidelines should be followed where a case can be measured against them, as they represent policy guidance governing access to classified information. Considering the SOR allegations and the evidence as a whole, the relevant adjudicative guideline is Guideline F (Financial Considerations).

Security clearance decisions resolve whether it is clearly consistent with the national interest to grant or continue an applicant's security clearance. The Government must prove, by substantial evidence, controverted facts alleged in the SOR. If it does, the burden shifts to applicant to refute, extenuate, or mitigate the Government's case. Because no one has a right to a security clearance, the applicant bears a heavy burden of persuasion.

Persons with access to classified information enter 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 judgement, reliability, and trustworthiness of those who must protect national interests as their 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.²

Analysis

The Government established a case for disqualification under Guideline F, and Applicant failed to mitigate the security concerns. Applicant failed to timely file his Federal income tax returns for 2010-2011,, and 2016, as required.³ Applicant knew he was required to file his income tax returns, and he knew that his stated reason for failing to file did not excuse his conduct.

The Appeal Board has long held that failure to timely file required tax returns may demonstrate a lack of judgment inconsistent with access to classified information.

A person who fails repeatedly to fulfill his or her legal obligations does not demonstrate the high degree of good judgment and reliability required of persons granted access to classified information. Indeed, the Board has previously noted that a person who has a history of not fulfilling their legal obligation to file income tax returns may be said not to have demonstrated the high degree of judgment and reliability required for access to classified information."⁴

²See, *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

³¶19(f) failure to file or fraudulently filing annual Federal, state, or local income tax returns or failure to pay annual Federal, state, or local income tax as required;

⁴ISCR Case No. 12-05053 at 4 (App. Bd. Oct. 30, 2014), reversing Administrative Judge's favorable decision. See, e.g., ISCR Case No. 98-0608 at 2 (App. Bd. Jun. 27, 2000)(failure to file for five years).

This is true whether the failure to file is willful⁵ or attributed to the press of family circumstances.⁶ As recently as December 2015, the Appeal Board upheld a denial of clearance, in a case notably similar to this, of an applicant who had failed to file Federal or state income tax returns for 10 years.

The filing of tax returns is both a financial and a legal obligation. Applicant's . . . failure to have done so for many years is sufficient to raise a concern that he may be unwilling to follow other rules and regulations, such as those that govern the handling of classified information. See, e.g., ISCR Case No. 14-01894 at 5 (App. Bd. Aug. 18, 2015) (A person who fails repeatedly to fulfill his or her legal obligations does not demonstrate the high degree of good judgment and reliability required of those granted access to classified information). See also *Cafeteria & Restaurant Workers Union Local 473 v. McElroy*, 284 F.2d 173, 183 (D.C. Cir. 1960), *aff'd*, 367 U.S. 886 (1961). Indeed, as the Judge noted, Directive, Enclosure 2 ¶ 19(g) explicitly provides that failure to file tax returns is a circumstance that can raise a security concern. Moreover, the Directive presumes a nexus between admitted or proven conduct under any of the Guidelines and an applicant's eligibility for a clearance. See, e.g., ISCR Case No. 14-04648 at 3 (App. Bd. Sep. 9, 2015). ISCR Case No. 14-02930 at 3 (App. Bd. Dec. 9, 2015)⁷

Security concerns under Guideline F are not limited to cases in which an Applicant is financially insolvent or is experiencing difficulty in paying debts. Indeed, the Appeal Board has ruled that "failure to file tax returns by itself can be a reason to deny a clearance".⁸

The mitigating conditions for financial considerations do not fully apply. His failures to timely file his Federal taxes are both recent and multiple, and may not be demonstrated to be unlikely to recur.⁹ He has cited no circumstances that would demonstrate that his failures to file were due to circumstances beyond his control. Certainly, he chose to start

⁵See, ISCR Case No. 98-0801 (App. Bd. Jun. 8, 2000)(tax protester).

⁶See, ISCR Case No. 98-0761 (App. Bd. Dec. 27, 1999)(routine failure to file).

⁷The cases cited by Applicant's post-hearing brief all involve cases where the failures to timely file occurred over three-four years, and none of them has been identified as an Appeal Board case.

⁸See, ISCR Case No. 16-03208 (App. Bd. Feb, 28, 2018).

⁹¶20(a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur . . .

several new businesses. Moreover, Applicant was not responsible in addressing his taxes. Applicant is an intelligent, well-educated man, with both the skill and experience to know when he should engage professional help. Yet, he did not do so for many years, and apparently only when his clearance was at risk.¹⁰ However, he appears to have successfully resolved his state income tax issues.¹¹

The circumstances of this case do not suggest that Applicant would benefit from credit or financial counseling, but his taxes have been partially resolved to date.¹² Applicant has documented what his tax accountant thinks his tax situation is, but there is no evidence of the IRS's view of his taxes.¹³ Applicant's tardy contacts with the IRS cannot be considered a good-faith effort to address his taxes,¹⁴ to the extent that this mitigating condition could be considered applicable. Moreover, Applicant had mostly disregarded these tax obligations since at least October 2015, when he missed his first extended filing deadline, and again since May 2017, when he discussed his delinquent taxes with a Government investigator. His documented inaction for almost another two years—until April 2019, when he filed the remaining delinquent returns—raises significant security concerns that Applicant has not addressed by the flurry of activity triggered by his receipt of the SOR. And that flurry of activity fails to mitigate Applicant's overall course of conduct, as it cannot overcome my conclusion that Applicant's track record of at least four years procrastination makes it too soon to conclude that his security-significant conduct is behind him. I conclude Guideline F against Applicant.

Formal Findings

Paragraph 1. Guideline F:	AGAINST APPLICANT
Subparagraphs a-d:	Against Applicant
Subparagraphs e-g:	For Applicant
Subparagraphs h-j:	Against Applicant

¹⁰¶20(b) the conditions that resulted in the financial problem were largely beyond the person's control . . . and the individual acted responsibly under the circumstances;

¹¹¶20(g) the individual has made arrangements with the appropriate tax authority to file or pay the amount owed and is in compliance with those arrangements.

¹²¶20(c) the person has received or is receiving counseling for the problem and there are clear indications that the problem is being resolved or is under control;

¹³The fact that the IRS may not yet have taken action on Applicant's lately-filed taxes can only be attributed to Applicant's ongoing delays in filing his taxes.

¹⁴¶20(d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

Conclusion

Under the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance denied.

John Grattan Metz, Jr
Administrative Judge