



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



In the matter of:)	
)	
XXXXXXXXXXXXXXXXXXXXX)	ISCR Case No. 18-01581
)	
Applicant for Security Clearance)	

Appearances

For Government: Dan O'Reilley, Esquire, Department Counsel
 Andrea M. Corrales, Esquire, Department Counsel
 For Applicant: *Pro Se*

05/28/2019

Decision

METZ, John Grattan, Jr., Administrative Judge:

Based on the record in this case,¹ I deny Applicant's clearance.

On 12 October 2018, the Department of Defense (DoD) sent Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline F, Financial Considerations.² Applicant timely answered the SOR, requesting a hearing before the Defense Office of Hearings and Appeals (DOHA). DOHA assigned the case to me 26 February 2019, and I convened a hearing 8 April 2019. DOHA received the transcript 30 April 2019, and the record closed.

¹Consisting of the transcript (Tr.), Government exhibits (GE) 1-2, hearing exhibit (HE) I, and Applicant exhibits (AE) A-F. AE E-H were timely received post hearing. AE E-G comprise Applicant's 2014 Federal income tax return.

²DoD 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. He is a 48-year-old cyber security specialist employed by a U.S. defense contractor since 2016. He has been self-employed in similar positions since October 2010. His clearance status is unclear.

Since 2010, Applicant has started a series of businesses, sometimes with partners, sometimes solo. The tax structures of the various companies complicated his personal taxes, which he found overwhelming. Consequently, he failed to timely file his income tax returns as required. He considered obtaining professional help, and dabbled some with an individual who was prepared to handle matters going forward, but who was not prepared to handle his back taxes. He recently hired an administrator, attorney, and bookkeeper for his company, and his delinquent personal income tax returns were filed in April 2019. He did not consider timely filing of his tax returns to be an urgent matter, as he understood there was no penalty for filing late if a refund was due (Tr. 25-26). He also changed his withholding so that he would almost always overpay, and be entitled to a refund.

The SOR alleges that Applicant failed to timely file his Federal income tax returns for tax years 2010-2017 (2010-2013 for SOR 1.a; 2014-2017 for SOR 1.b), and that the 2014-2017 tax returns remained unfiled at the time of the SOR. Applicant's November 2018 Answer included Applicant's Internal Revenue Service (IRS) tax transcripts for tax years 2008-2017. Tax years 2008-2009 are not at issue. Applicant's 2010-2013 tax transcripts show that he timely filed for an extension of time to file for tax years 2010, 2011, and 2013, and that he timely filed his 2010 and 2013 income tax returns. Although he timely filed for an extension for 2011, he did not file his tax return until nine months after the extended due date. While he did not file for an extension for tax year 2012, he filed the return within three months of the due date. He received substantial tax refunds for each of the years, although he owes about \$800 on tax year 2013 for otherwise unexplained late payment penalties and interest (AE H). Applicant did not file for extensions of time to file for tax years 2014-2017, and they remained unfiled at the time of the SOR. AE A-G show that Applicant filed his 2014-2018 Federal income tax returns in April 2019. He apparently has refunds totaling about \$32,463 for state and Federal taxes for 2014-2017, but owes about \$19,345 for 2018.

Applicant provided no work or character evidence, or evidence of community involvement. He has not received credit or financial counseling. He provided no budget. Specifically, while he submitted evidence that his delinquent taxes had now been filed, he provided no evidence of contacts with the IRS to show his proposed arrangements for reconciling the results of the four tax returns.

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.³

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 2011, and 2014-2017, as required.⁴ 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

³See, *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

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

have demonstrated the high degree of judgment and reliability required for access to classified information.”⁵

This is true whether the failure to file is willful⁶ or attributed to the press of family circumstances.⁷ 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)⁸

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 recently ruled that “failure to file tax returns by itself can be a reason to deny a clearance”.⁹

⁵ISCR 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).

⁶See, ISCR Case No. 98-0801 (App. Bd. Jun. 8, 2000)(tax protester).

⁷See, ISCR Case No. 98-0761 (App. Bd. Dec. 27, 1999)(routine failure to file).

⁸The 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.

⁹See, ISCR Case No. 16-03208 (App. Bd. Feb. 28, 2018).

Finally, the fact that Applicant over-withheld on his taxes, or the fact that he does not appear to owe any taxes for the tax years in question, does not mitigate the judgment concerns raised by his pattern of failing to file in a timely fashion. Nor does the fact that the IRS has not undertaken any enforcement action against.

None of the mitigating conditions for financial considerations apply. His failures to timely file his Federal taxes are both recent and multiple, and may not be demonstrated to be unlikely to recur.¹⁰ 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 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.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 four 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.

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

¹¹ ¶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;

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;

¹³ The 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.

Formal Findings

Paragraph 1. Guideline F: AGAINST APPLICANT

Subparagraphs a-b: Against Applicant

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