



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
XXXXXXXXXXXXXXXXXXXXX) ISCR Case No. 18-02862
)
Applicant for Security Clearance)

Appearances

For Government: Nicole A. Smith, Esquire, Department Counsel
For Applicant: *Pro Se*

08/25/2020

Decision

METZ, John Grattan, Jr., Administrative Judge:

Based on the record in this case [the transcript (Tr.), Government exhibits (GE) 1-2, hearing exhibit (HE) I, and Applicant exhibits (AE) A-C], I deny Applicant's clearance.

On 26 June 2019, the Department of Defense (DoD) sent Applicant a Statement of Reasons (SOR) raising 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 26 September 2019, and I convened a hearing 23 October 2019. DOHA received the transcript 31 October 2019. The record closed 8 November 2019, when Department Counsel stated no objection to AE C.

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 8 June 2017.

Findings of Fact

Applicant admitted failing to timely file his 2008-2012 and 2014 Federal income tax returns, accumulating over \$51,000 delinquent Federal tax debt for tax years 2010-2011, and accumulating over \$92,000 delinquent state tax debt (SOR 1.a-1.e). At hearing, Department Counsel withdrew SOR allegations 1.d-1.e (Tr. 11).

Applicant is a 60-year-old self-employed consultant seeking access to classified information. He has twice married and divorced, and has an adult son. He has held a variety of clearances/public trust positions between April 1998 and February 2017 (GE 1).

Applicant disclosed failing to file his Federal income tax returns, and resulting indebtedness, on his December 2017 clearance application (GE 1). He discussed these issues during his March 2018 interview with a Government investigator (GE 2). He attributed his failure to timely file his Federal income tax returns for the years at issue to his April 2009 injury while on foreign travel. He claimed to be compliant with his payment arrangements; however, it does not appear that he had any agreement with the Internal Revenue Service (IRS) at the time of the interview.

Applicant's tax problems began in May 2009, when he was injured while traveling overseas. He underwent significant surgery and rehabilitation. His final clinical review was in July 2009 (AE B). Applicant claimed that his injury and recovery left him unable to work, and he remained unemployed until November 2011, when he became a self-employed consultant. Between November 2011 and October 2017, he held a series of consulting and other positions, only one of which (October 2014-2015) lasted as long as a year.

Because Applicant was unemployed, he took premature withdrawals from his retirement account in 2009 to pay his living expenses, not fully aware of the tax consequences of this action. He filed for an extension of time to file his tax year 2006-2007 returns, but had only used a portion of each extension before filing his returns. He received a \$21,000 tax refund for tax year 2007. He had filed for an extension of time to file his 2008 Federal income tax return, which gave him October 2009 to file. However, he not only missed this deadline, he missed the three-year deadline for filing for the nearly \$21,000 tax refund to which he was otherwise entitled. He also missed the filing deadlines for tax years 2009-2012.

Applicant's 2009 premature retirement withdrawals resulted in significant unanticipated tax liability. It is not clear when Applicant first became aware of that liability, but the IRS filed a substitute tax return in late December 2011. Applicant's 2009 tax transcript shows that he later filed his tax return in July 2012, made some token payments in late 2013-early 2014, had his taxes considered uncollectible in April 2014, made two additional small payments with a mid-October 2014 offer in compromise, and had that offer denied in October 2015. Most of his 2009 tax liability was paid by seizing his 2013-2016 tax refunds; the final balance appears to have been paid in March 2017.

In late December 2013, Applicant retained the services of a tax resolution service (AE 3). By that time, Applicant had filed his then-delinquent tax returns. The service appears to have successfully filed his 2013 and 2015-2016 income tax returns in a timely fashion, but he was late filing his 2014 tax return, a default he has not really explained. The tax service was unable to reach a successful offer in compromise with the IRS.

In late December 2017, Applicant retained the services of a tax attorney (GE 2). He was also not able to settle Applicant's taxes with an offer in compromise. However, in May 2019, Applicant increased his 2019 Federal income tax withholding to increase his potential 2019 refund, with an eye to having it seized and applied to his remaining 2010 balance (AE C). In October 2019, Applicant made a lump-sum payment to resolve his remaining 2011 tax liability (SOR 1.c). In November 2019, Applicant entered into a repayment agreement with the IRS to begin repaying \$450 monthly beginning in December 2019, changing to \$1,315 monthly beginning in December 2020. According to the tax attorney, Applicant's plan is to obtain a home equity line of credit on his home and make the \$50,000 lump sum payment necessary to pay the 2010 balance in full (AE C). There is no indication to date that he has fallen through with this plan.

Applicant documented no credit or financial counseling, and did not submit a budget. He provided no work or character references, or evidence of community involvement.

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 2008-2012, and 2014 Federal income tax returns, resulting in delinquent indebtedness of over \$51,000. While his injury, subsequent surgery and rehabilitation, and unemployment offer some explanation for his failure to file his 2008 and 2009 income tax returns, they do not, by themselves, explain his subsequent failures to file, or his inability to get his 2008 tax return filed—an inability that cost him a substantial refund.³

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

This is true whether the failure to file is willful⁵ or attributed to the press of other circumstances.⁶ In 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

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

³19(a) inability to satisfy debts; (b) unwillingness to satisfy debts regardless of the ability to do so;(c) a history of not meeting financial obligations; (f) failure to file or fraudulently filing annual Federal, state, or local income tax returns of 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).

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).

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).

Security concerns under Guideline F are not limited to cases in which an Applicant is financially insolvent or is experiencing difficulty in paying debts. In this case his failure to timely file his Federal returns for several years leaves potentially unresolved tax debt. In nearly a decade of dealings with the IRS over his initial failures to file, Applicant has only just established a repayment plan with the IRS, a repayment plan which has not yet started, and for which Applicant can demonstrate no track record of payment.

Applicant meets none of the mitigating conditions for financial considerations. His indebtedness and his failures to timely file his Federal returns are multiple, recent, and ongoing.⁷ Moreover, he has not demonstrated that his indebtedness and failures to timely file over several years were all due to circumstances beyond his control. Even if I could conclude that the stated reasons justified the delay, it is clear that he has not been fully responsible in addressing his debts or his taxes.⁸ Reducing ones outstanding tax balance by having ones subsequent tax refunds seized is not a repayment plan. Although he hired professional help, that help was not entirely effective. Moreover, free, or low cost, tax return help is readily available every tax year.

Applicant has not had any credit or financial counseling, and his recent repayment agreement with the IRS means only that his tax issues may be resolved at some point in the future.⁹ However, without a documented record of repayment, Applicant cannot

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

⁸¶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;

⁹¶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;

demonstrate that he has made a good-faith effort to resolve his debts.¹⁰ The missing details of his current tax status requires the same conclusion regarding his taxes.¹¹ Moreover, he submitted no work or character evidence which might support a whole-person assessment to overcome the security concerns raised by his conduct. I conclude Guideline F against Applicant.

Formal Findings

Paragraph 1. Guideline F:	AGAINST APPLICANT
Subparagraphs a-c:	Against Applicant
Subparagraphs d-e:	Withdrawn by Government

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

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

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.