



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



In the matter of:)	
)	
XXXXXXXX, Xxxxxx Xxxxx)	ISCR Case No. 12-11375
)	
Applicant for Security Clearance)	

Appearances

For Government: Tovah A. Minster, Esquire, Department Counsel
 For Applicant: F. Whitten Peters, Esquire
 John J. Murray, Esquire

02/29/2016

Decision

METZ, John Grattan, Jr., Administrative Judge:

Based on the record in this case,¹ Applicant’s clearance is denied.

On 12 June 2015, 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 17 September 2015 and I convened a hearing 4 November 2015. DOHA received the transcript 17 November 2015.

¹Consisting of the transcript (Tr.), Government exhibits (GE) 1-4, and Applicant exhibits (AE) A-S.

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 the adjudicative guidelines (AG) effective within the DoD on 1 September 2006.

Findings of Fact

Applicant denied SOR financial allegation 1.a, but admitted allegation 1.b. He is a 55-year-old legislative affairs director employed by a U.S. defense contractor since April 2004. This is a periodic reinvestigation of clearances he has held since at least May 1982, when he graduated from a U.S. military academy. He has no history of security violations. Applicant served on active duty in the U.S. military until April 2004, when he retired in paygrade O-5. His exemplary military service included several combat tours in support of U.S. military operations in the Middle East in the 1990s.³ His last military tour was in his branch's headquarters in the Pentagon, where he worked as a Congressional budget and appropriations liaison (GE 1). He excelled at this position (AE H), and at his retirement, received recognition in the Congressional Record (AE I). While serving on active duty, Applicant also earned a post-graduate degree in business administration in December 1996. When Applicant retired from the military, he immediately began his job with the defense contractor, doing essentially the same work he had done for the military (Tr. 58).

Applicant married his first wife in October 1989, and they divorced in October 2001. They had two sons together, born in December 1992 and November 1995. Applicant remarried in August 2003. He and his second wife have four children together: a son born in March 2005, twins (a boy and a girl) born in December 2006, and a daughter born in January 2011. His current wife is mostly not employed outside the home (Tr. 78).

The SOR alleges that Applicant failed to file his Federal and state tax returns for tax years 2008-2010, and that the tax returns remained unfiled at the time of the SOR. Applicant's September 2011 clearance application (GE 1) and his October 2011 subject interview with a Government investigator (GE 2) document that Applicant failed to timely file his Federal and state tax returns for the years alleged. Applicant's July 2012 Answer denied that his Federal taxes were unfiled, asserting, but not documenting, that he had filed his 2008 tax return in 2012, and had filed his 2009 and 2010 tax returns in 2013. Applicant admitted that his state taxes were unfiled at the time of the SOR, again asserting, but not documenting, that he had filed the state returns in July 2011.

Applicant's September 2011 clearance application (GE 3) reported no financial problems, but noted that he had not yet filed his Federal and state taxes for 2008-2010. Applicant's October 2011 subject interview (GE 2) covered Applicant's taxes for the years he disclosed on his clearance application. Applicant's September 2011 (GE 4), November 2014 (GE 3), July 2015 (Answer) and October 2015 (AE P) credit reports reflect that Applicant has no reported financial problems and has excellent credit scores.

³During his deployments, he experienced no problems with filing his taxes. Deployed military receive automatic extensions when deployed. Applicant was apparently able to meet the extension deadlines when he returned from deployment (Tr. 73). He thinks he might have been late with his tax filings after the September 2001 attack on the Pentagon, but that would be the only time his taxes were late while he was in the military.

Applicant failed to timely file his Federal and state income taxes between 2007 and 2014 (Tr. 31, 66; AE A) and 2014 (AE G). He may also have been late filing his taxes for 2004-2006 (Tr. 30, 66). Applicant always over-withholds for his Federal and state taxes, always applies for available extensions (although he misses the extended deadlines as well), and always maintains contact with the Internal Revenue Service (IRS) about his taxes.⁴ He also always files his Federal taxes by the deadline after which he would forfeit any Federal tax refund due. The IRS has taken neither civil nor criminal enforcement action against Applicant. The state involved does not impose any penalty for failure to file if there is a refund due.

Applicant filed his 2008 Federal taxes on 15 April 2012 (AE A); his 2009 Federal taxes were filed on 15 April 2013 (AE B); and his 2010 Federal taxes on 23 September 2013 (AE C). His 2011 Federal taxes were filed on 15 April 2015. After Applicant received the SOR in June 2015, he engaged the services of a tax firm to prepare the remaining tax returns. His 2012 Federal taxes were filed on 23 October 2015 (AE E); his 2013 Federal taxes on 27 October 2015 (AE F); and his 2014 Federal taxes on 29 October 2015 (AE G). His 2014 Federal tax return was due on 15 October 2015. Applicant's 2008-2011 state taxes were filed on 11 July 2015 (AE A-D). His 2012-2014 state taxes were filed the same October 2015 dates as his Federal returns (AE E-G).

Applicant traces his problems to a series of family circumstances beginning in 2004. In 2004, Applicant bought a new house. In March 2003, his son was born prematurely, and spent some time in the hospital, but with no apparent long-term medical issues. His ongoing visitation arrangement with his two oldest sons from his first marriage required him to drive several hours each way, every other weekend. In 2005-2006, he began having custody and child support issues with his ex-wife because his oldest son had become old enough to choose with which parent he wanted to live, and he wanted to live with Applicant. He moved in with Applicant some time in 2006. Applicant went through a similar situation with his second son around 2009.

In December 2006, Applicant's twins were born, without apparent medical issues, but he now had three children under two in the house, along with his teenage son. Applicant described it as a crazy but happy house (Tr. 32-33). In 2008, Applicant began what would become a two-year expansion of their four-bedroom house, which they were rapidly outgrowing. He also was having a second child support dispute with his ex-wife. Applicant addressed his taxes by filing extensions and making additional payments with the extension if he thought he might owe the IRS (Tr. 36-37). He took care to file by the three-year deadline for obtaining refunds (Tr. 38), because forfeiting the refunds would have cost him a lot of money (Tr. 67).

Applicant's job as legislative affairs director often requires him to work long days, which become longer during budget and appropriations season (Tr. 39, 60). He reported his filing problems with his 2011 clearance application (Tr. 42; GE 1), and kept his

⁴However, Applicant did not provide independent corroboration of the claimed extensions or communications.

facility security officer (FSO) informed about the tax situation (Tr. 43, 47; AE L-M⁵), as well as other family issues.

Applicant's second son attempted suicide in early October 2012 (Tr. 44; AE M) after he took all the pain medication he had been given for dental surgery at once (Tr. 49). He spent some time in and out of the hospital. A week later, Applicant's wife had surgery related to a possible cancer diagnosis (Tr. 89; AE M). Fortunately, she is cancer free. In April 2013, Applicant's second son attempted suicide a second time (Tr. 45; AE N) after he took all the attention deficit disorder medications he had been given (Tr. 51).⁶ This time, he was hospitalized for a longer time. In August 2013, Applicant's second son attempted suicide a third time, when he climbed out on a very high ledge at a resort hotel where the family was staying (Tr. 46). Applicant described this incident as really more a suicidal ideation than an actual attempt. His son was upset because his mother had recently moved overseas to live with her new husband, and the son wanted his parents to share custody. This was Applicant's third custody battle with his ex-wife. Applicant's second son was coaxed off the ledge, and announced that he did not want to hurt himself anymore. The son has continued to receive counseling and has had no further problems.

In January 2014, Applicant's mother had a serious heart attack while vacationing in another state. Applicant had to spend significant time with her during her recovery, although he also had his sister and brother to help with her care (Tr. 89-91). Applicant's mother was recuperating out of state for about four months, but it is not clear that Applicant was with her all that time.

Applicant's FSO—who has been his FSO since Applicant came to work for the company in April 2004—considers him honest and trustworthy, and recommends him for his clearance (Tr. 97-106). He also confirms that Applicant informed him of his tax issues in October 2011, shortly after his interview with the Government investigator. He also confirmed that Applicant provided periodic updates on his situation, which the FSO forwarded to corporate security. He does not know what action, if any, corporate security took on those reports. Similarly, Applicant's co-worker since 2004 considers him honest and trustworthy, and recommends him for his clearance, notwithstanding Applicant's family circumstances (of which he is aware)(Tr. 108-126; AE J, Q). However, he is only generally aware that the SOR involves issues of late taxes. Applicant's current supervisor since June 2015 stated that Applicant told him about the tax issues as soon as Applicant became his subordinate in June 2015. He has no security concerns about Applicant's late filing of taxes (Tr. 125-137). Applicant's mother

⁵Although it appears that the emails are in response to update requests from Applicant's security office regarding the status of his clearance application.

⁶Applicant's oldest son, who at this time was attending the same military academy Applicant graduated from, took a leave of absence from college to come home and help with his brother's recovery. However, the oldest son was himself having some academic problems at school, and after returning to college was unable to catch up. He was eventually dismissed from school in May 2014 for failing to maintain his grade average (AE R).

(AE S) and father (AE R) love their son and would not want anything bad to happen to him.⁷

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.⁸

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 state income tax returns from 2007 to 2014, a period of eight years, if not all the way back to 2004, a period of 11 years.⁹ While the SOR only alleged tax years 2008-2010, those

⁷Seriously, Applicant's father recounts, in more linear form, Applicant's difficult family circumstances. Applicant's mother echoes those sentiments, albeit in a more folksy fashion. The essence of their input is that Applicant has always been focused on family, has had complicated family circumstances since he divorced his first wife in October 2001, and has had stressful jobs since 2000, first at the Pentagon and now at his defense contractor. By inference, they believe these things excuse his failure to timely file his tax returns.

⁸See, *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

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

were the only years Applicant reported to the Government.¹⁰ And while the Government did not move to amend the SOR to allege tax years 2004-2007 and 2011-2014, I have considered Applicant's entire course of conduct as evidence of a plan or pattern.

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."¹¹

This is true whether the failure to file is willful¹² or attributed to the press of family circumstances.¹³ 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

¹⁰Of course, Applicant could not be required to report his failures to file for tax years 2011-2014, as the Government apparently made no further inquiry about his taxes after his October 2011 subject interview. However, he failed to report that he was late filing his taxes for 2007 on his September 2011 clearance application. Section 26: Financial Record, c asks Applicant "Have you failed to pay Federal state, or other taxes, **or to file a return, when required by law or ordinance?** (emphasis added) Applicant answered "no," although he reported his failure to file his 2008-2010 taxes in the remarks section. Nevertheless, his 2007 Federal taxes had been filed three years late, just in time for Applicant to be entitled to his refund. The Government did not allege falsification of Applicant's clearance application, and I am not considering this omission as a falsification. But, I have considered the general issue of Applicant's credibility, and I have considered the failure to file the 2007 taxes on the general issue of pattern or plan, or lack of mistake.

¹¹ISCR 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).

¹²See, ISCR Case No. 98-0801 (App. Bd. Jun. 8, 2000)(tax protester).

¹³See, ISCR Case No. 98-0761 (App. Bd. Dec. 27, 1999)(routine failure to file).

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)¹⁴

Security concerns under Guideline F are not limited to cases in which an Applicant is financially insolvent or is experiencing difficulty in paying debts. Applicant's regular mortgage payments and his timeliness in paying other bills demonstrates his financial management skills, and shows that he is able to comply with rules and regulations when he perceives it to be in his interest to do so. Most of what Applicant cites as justification for his failure to timely file his Federal and state income taxes is simply described as the ebb and flow of life. Beginning in 2004, he retired from one job and started another, bought a house, had a child, sorted through child visitation and child custody issues, had more children, lived through an expansion and renovation of his home, and had another child. The 18 months between October 2012 and April 2014 were especially difficult for Applicant, with events that can reasonably be considered circumstances beyond his control: three suicide attempts by his second son, a cancer scare for his wife, and his mother's heart attack. But Applicant was already substantially behind filing his taxes when these events began. Moreover, Applicant's busy work schedule was at least as great a contributing factor to his untimely filings as his family circumstances, and that work schedule was a constant in his life.

Applicant reported his 2008-2010 tax filing issues on his September 2011 clearance application and was interviewed about them during his October 2011 subject interview. Despite his clear understanding that these tax issues were of concern to the Government, his 2008 Federal taxes were not filed for another six months (April 2012), his 2009 Federal taxes were not filed for another year after that (April 2013), and his 2010 Federal taxes were not filed for nearly another six months after that (September 2013). In each instance, filing his Federal taxes before he lost his refund seemed more of a motivating factor than any concern over his financial and legal obligation to do so. Filing his 2011 Federal taxes in April 2015 continued the pattern. Not until he received the SOR in late June 2015, and knew that his clearance was at issue did he hire a tax accountant and take sweeping action to address his remaining delinquent Federal taxes, each of which was nevertheless filed after the extension deadline, but before he would lose any refund due.

¹⁴The 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.

Finally, the fact that Applicant over-withheld on his taxes, or otherwise made extra payments with his extension requests to ensure that he would not owe taxes once they were filed, 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 Applicant. Further, his exemplary careers and his absence of security violations are undercut by at least eight years of security-significant conduct regarding his taxes coincident with that performance.

None of the mitigating conditions for financial considerations apply. His failures to timely file his Federal and state taxes are both recent and multiple; to the extent that his difficult family circumstances from October 2012 to April 2014 contributed to his failures to timely file, the immediate causes of his problems may be unlikely to recur.¹⁵ However, to the extent that his failures to file were due merely to the vicissitudes of life, those circumstances are constant. Similarly, while the medical issues Applicant confronted between October 2012 and April 2014 were certainly beyond his control, the other circumstances were not, and some were also essentially a condition of his employment situation. 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 only when his clearance was at risk.¹⁶

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.¹⁷ 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.¹⁸ Applicant's tardy contacts with the IRS cannot be considered a good-faith effort to address his taxes,¹⁹ to the extent that this mitigating condition could be considered Applicable. Moreover, Applicant has mostly disregarded these tax obligations since April 2014, when his mother's medical issues were largely resolved. His documented inaction for another year—until April 2015, when he filed his then-oldest Federal tax return—raises significant security concerns that Applicant had 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

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

¹⁶¶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;

¹⁷¶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;

¹⁸The 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.

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

cannot overcome my conclusion that Applicant's track record of at least eight 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-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