



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



In the matter of:)
)
XXXXXXXXXXXXXXXXXXXXXXXXXXXX.) ISCR Case No. 12-10319
)
Applicant for Security Clearance)

Appearances

For Government: Candace L'ei Garcia, Esquire, Department Counsel
For Applicant: *Pro Se*

03/29/2017

Decision

METZ, John Grattan, Jr., Administrative Judge:

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

On 23 July 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 11 April 2016 and I convened a hearing 10 May 2016. DOHA received the transcript 23 May 2016, and the record closed.

¹Consisting of the transcript (Tr.) and Government exhibits (GE) 1-6.

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 admitted SOR financial allegations 1.a-1.c, and 1.f; he denied SOR 1.d-1.e. He is a 56-year-old construction superintendent employed by a U.S. defense contractor since July 2010. He has been employed in related positions since May 2000. He has not previously held a clearance, although he received Common Access Card (CAC) access in February 2012 (GE 1).

The SOR alleges, and Applicant admits, that he failed to timely file his Federal income tax returns for tax years 2004-2010 and 2012-2013 (SOR 1.a), and failed to timely file his state tax returns for at least tax years 2005-2011 (SOR 1.b). The SOR further alleges, and Applicant admits, that he owes the Internal Revenue Service (IRS) \$2,620 for tax years 2012-2013 (SOR 1.c), and owes \$477 to a medical provider (SOR 1.f). Finally, the SOR alleges, and Government exhibits (GE) 2-6 establish, that he owes his state \$8,963 for a tax lien filed in April 2014 (SOR 1.d), and had an August 2005 judgment against him for \$3,123 (SOR 1.e).³

Applicant's January 2012 Declaration for Federal Employment (GE 2) reported that he was in a fast-track IRS repayment agreement for delinquent back taxes. His April 2012 clearance application (GE 1) reported that he had failed to timely file his 2005-2009 Federal income tax returns, but he had a repayment plan on which he was current.⁴

Applicant's June 2015 IRS account transcripts reveal that Applicant timely filed his 2003 and 2010-2014 income tax returns.⁵ However, he failed to timely file his 2004-2009 income tax returns. Applicant's May 2015 credit report (GE 6) reflects a \$14,064 Federal tax lien filed March 2011 and released in December 2012, and a \$4,200 Federal tax lien filed June 2011 and released February 2014. An \$8,963 state tax lien was filed in April 2014. Applicant's August 2015 Answer documented that he had

³The judgment was by Applicant's divorce lawyer. According to Applicant, he signed a retainer agreement with the lawyer and paid her \$1,500. Even though he says he knows how a retainer agreement works, he mistakenly thought he had contracted for a \$1,500 divorce fee. When the retainer ran out, the lawyer sent Applicant additional small bills, which he paid. When the final bill came, he refused to pay it, and the lawyer obtained the judgment in August 2005.

⁴His 2006 tax account transcript reflects that a lien was filed in March 2011, an installment agreement was established in July 2011, the account was removed from the installment agreement in September 2011, and the lien released in November 2012. Applicant's 2007-2010 account transcripts follow a similar pattern, with Applicant making regular monthly payments from October 2011 through May 2014, which when combined with other credits applied to his tax accounts, resolved his tax liability. Applicant's 2011 taxes required no further payment.

⁵Although his 2010 taxes had a balance due that was partially resolved by four installment payments in spring 2014. His 2012 tax transcript shows a balance owed, but no resolution or activity after June 2015. His 2013 account transcript shows a balance owed, a June 2014 installment agreement, and one installment payment in November 2014, the last noted activity as of June 2015.

reduced his state tax balance to \$3,383, and had resolved the August 2005 judgment in February 2013.

Applicant filed his 2004 and 2005 Federal income tax returns on 16 February 2011;⁶ he filed his 2006 Federal income tax return in May 2009 and his 2007 Federal income tax return in September 2009; he filed his 2008 and 2009 Federal income tax returns on 16 February 2011. His tax account transcripts show no remaining liability for 2003-2011. However, Applicant owes about \$3,220 for tax years 2012-2013.

Applicant married his first wife in October 1984, and they divorced in June 2010. They had a daughter, born in January 1985, and a son, born in February 1987. During the time they were married, Applicant's wife ran her own business, as a sole proprietorship. She handled the household finances. Every year she would get Applicant to sign tax forms. Applicant assumed they were being filed.

Applicant discovered this was not the case in 2006, when his ex-wife dumped a number of unfiled tax forms and IRS correspondence on him (Tr. 37, GE 2). Apparently, she had not only failed to file the tax returns, but she had failed to make her required quarterly payments for her business. She told Applicant that she had not filed the tax returns because they could not then afford to pay the balances owed. Applicant ultimately resolved the marital tax issues because none of the tax years from before his divorce are alleged in the SOR. However, he had already failed to timely file his 2004 Federal income tax returns, and he just continued to not file his state and Federal tax returns. He received communications from the IRS that he ignored. The record does not reveal what motivated Applicant to file his 2006 and 2007 tax returns in 2009, but it is clear that he took no further action on these tax years until January 2011, when an IRS agent was appointed to his case.⁷

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,

⁶Applicant attracted no administrative action from the IRS for 2004 because his withholding covered all of his tax liability. Similarly, his 2005 withholding and credits resulted in credits to his tax liabilities for 2006 and 2007.

⁷During Applicant's May 2012 interview with a Government investigator, Applicant refers to a personal contact from an IRS agent in fall 2011, relating to tax years 2005-2010 and income from his wife's business. Applicant has not explained how these dates can be correct since his divorce was final in June 2003, and his 2003 account transcript shows him filing individually as head of household in 2004.

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 judgment, 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 fully mitigate the security concerns. Applicant failed to timely file his state and Federal income tax returns for many years. This conduct resulted in both state and Federal tax liens. He also had a judgment against him from his divorce lawyer, as well as an unpaid medical bill.⁹ Applicant documented that he has substantially reduced his tax debt between October 2011 and November 2014, fully resolving his 2004-2011 tax debts. Similarly, he reduced his state tax lien from \$8,963 to \$3,383 between April 2014 and August 2015. He satisfied the judgment in February 2013. Finally, he claimed but did not corroborate that the medical bill at SOR 1.f was due to an error between the hospital and his insurance, and has been resolved. Nevertheless, I find the security concerns raised by the financial aspect of this case mitigated. However, the judgment issues raised by Applicant's failure to timely file his state and Federal income tax returns over a period covering tax year 2004 to tax year 2011, plus waiting almost eight years to pay the 2005 judgment, raise security concerns that remain unmitigated.

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

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

⁹¶19(a) inability or unwillingness to satisfy debts; (c) a history of not meeting financial obligations; (g) failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same;

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.”¹⁰

This is true whether the failure to file is willful¹¹ or attributed to the press of other circumstances.¹² 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).

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 there were delinquent debts to be resolved, and Applicant satisfactorily resolved them. But, delinquent debts are not required to hold Applicant accountable for his failures to timely file his tax returns. Here, the failure to file was deliberate. Applicant was annoyed

¹⁰ISCR 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).

¹¹See, ISCR Case No. 98-0801 (App. Bd. Jun. 8, 2000)(tax protester).

¹²See, ISCR Case No. 98-0761 (App. Bd. Dec. 27, 1999)(routine failure to file).

by his ex-wife's failure to execute the financial responsibilities she undertook during their marriage.

Applicant only partially meets the mitigating conditions for financial considerations. His failures to timely file his Federal and state taxes are multiple, but not recent, and the circumstances are not likely to recur.¹³ However, the circumstances were not beyond his control. He deliberately failed to file taxes after 2004, and when he filed two tax years in 2009, he engaged in no follow up for at least another two years, when the IRS began to take serious enforcement action against him.¹⁴

The circumstances of this case do not suggest that Applicant would benefit from credit or financial counseling, but the financial aspect his taxes have been largely resolved to date.¹⁵ Applicant has documented what his tax account status for tax years 2003 to 2014, and all tax years have been resolved except 2012-2013. Applicant's efforts with the IRS and the judgment constitute a good-faith effort to address his debts.¹⁶ However, Applicant mostly disregarded these tax obligations over several years. He was over five years late filing the oldest of his tax returns. 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-b:

Against Applicant

Subparagraphs c-f:

For Applicant

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

¹⁴ ¶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;

¹⁵ ¶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;

¹⁶ ¶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