



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



In the matter of:)	
)	
XXXXXXXXXXXXXXXXXXXXX)	ISCR Case No. 15-02745
)	
Applicant for Security Clearance)	

Appearances

For Government: Carroll J. Connelley, Esquire, Department Counsel
For Applicant: Sheldon I. Cohen, Esquire

03/31/2017

Decision

METZ, John Grattan, Jr., Administrative Judge:

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

On 15 October 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 3 June 2016. DOHA received the transcript 13 June 2016, and the record closed.

¹Consisting of the transcript (Tr.), Government exhibits (GE) 1, 3, and Applicant exhibits (AE A-X).

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 the SOR financial allegations. He is a 52-year-old engineer employed by a U.S. defense contractor since May 1987. He has an adult daughter and an adult son with his first wife. He remarried in July 2014 (Tr. 19, 43). He seeks to retain the clearance he has held since at least November 2000 (GE 1).

The SOR alleges, and Applicant admits, that he failed to timely file his Federal income tax return for tax year 2003 (SOR 1.a) and failed to file his Federal income tax returns for tax years 2006-2010. Applicant generally disclosed his tax-filing issues on his June 2011 clearance application (GE 1), and stated that he was in the process of collecting the necessary records to file his delinquent taxes and had an accountant to help him file. He discussed his tax issues with a Government investigator in November 2004 (GE 3) and in 2011 (Tr. 90-91).

Applicant's tax account transcripts (AE A-J, V) reflect his filing history with the Internal Revenue Service (IRS) since 2001. Applicant timely filed his 2001 and 2002 taxes in April 2002 and 2003. Applicant filed his 2003 taxes eight months late in December 2004, after being interviewed by a Government investigator in November 2004 (GE 3), as part of an earlier background investigation (Tr. 84-86). He timely filed his 2004 taxes with an extension, but was late filing his 2005 taxes even with an extension (AE V).³ However, he received a refund for both years.

Applicant's 2006 taxes were filed in February 2016 because he overlooked those records when he gave his delinquent tax records to his fiancée in 2012 (AE A, Tr. 77-79). He would have received a refund except that the statute of limitations for collection had expired. His 2007 taxes were filed in January 2011, when the IRS filed a substitute tax return for him (AE B, Tr. 91-92). Applicant later re-filed and received a refund (Tr. 92). Applicant filed his 2008-2011 taxes in October 2012. Credits for 2008 were transferred to another tax year (AE C). He received refunds for 2009-2011, even though his 2011 return was also late (AE D-F).⁴ He timely filed his 2012-2014 taxes, and received refunds (AE G-I). He timely filed his 2015 taxes, but owed a small amount (AE J).

Applicant met his second wife in February 2009 (Tr. 22), and proposed to her in December 2009 (Tr. 42). However, she had noticed mail from the IRS during her visits to his home, and she told him that she would not marry him until he filed his taxes (Tr.30-31). However, his delinquent taxes were not filed until after he moved in with her in 2012, and she filed them (Tr. 30-36, 67). She continued to file his taxes for 2012-2014. She also prepared their joint return for 2015.

³This late filing was not alleged in the SOR, and I have not considered this late filing on the merits. However, I have considered it on the general issue of pattern or plan, or absence of mistake.

⁴This late filing was also not alleged in the SOR, and I have not considered this late filing on the merits. However, I have considered it on the general issue of pattern or plan, or absence of mistake.

Applicant attributed his failure to timely file his taxes to a variety of factors. He blamed his tax issues on his son and his busy travel schedule (Tr. 69-70), although he acknowledged having the means to hire an accountant, he did not want to pay to have something done that he could do himself (Tr. 88). It was also not his main priority at the time (Tr. 91).

Principally, his son moved in with him in 2003, followed soon by the son's girlfriend. They both were, or soon would be, addicted to drugs. Applicant thought he could get them off drugs (Tr. 50). The couple had two children together, a granddaughter born in 2007 and a grandson born in 2009. Applicant traveled a great deal during this time, and the couple did not take very good care of the house. In addition, they stole things from Applicant, pawned them, and used the money to buy drugs. His son also wrote bad checks on Applicant's checking accounts, and used the money to buy drugs.⁵

In September 2009, Applicant's son and his girlfriend were arrested on drug charges (Tr. 59) and subsequently sentenced to a year in jail. Applicant got custody of his granddaughter for that year; his ex-wife got custody of the grandson (Tr. 60-62). Fortunately, that year was a year when Applicant had very little travel. Nevertheless, Applicant let his son move back in after his time in jail (Tr. 63-64). He kept hoping he could get his son off drugs, with no success. He had better luck with his son's girlfriend, who got off drugs, regained custody of her children and moved into her own apartment (AE T). Applicant eventually moved in with his fiancée in 2012.

Applicant's work references—three coworkers, a supervisor, and a subordinate—consider him honest and trustworthy, and recommend him for his clearance (AE M-P, S). However, none of them were aware of Applicant's tax issues because Applicant did not tell them (Tr. 96-97). He has excellent work evaluations (AE Q-R). Applicant documented no credit or financial counseling, and did not submit a budget.

Applicant's daughter (AE W) and his son's girlfriend (AE T) praise Applicant's character in the highest terms.

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

⁵Applicant made good on the bad checks, because he otherwise would have had to press charges against his son (Tr. 64-66).

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.⁶

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 Federal income tax returns for 2003 and 2006-2010.⁷ Between 2003 and 2011, eight out of nine years were filed late. Prodded by a Government investigator in November 2004, Applicant filed his 2003 taxes in December 2004, eight months late. Despite assurances to a Government investigator in June 2011 that he would address his delinquent taxes quickly, he took no action on his delinquent taxes until he moved in with his fiancée in 2012, and then the only action he took was to give her his tax records so she could prepare his tax returns, which she has done since, including their 2015 joint return.

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."⁸

⁶See, *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

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

⁸ISCR 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 willful⁹ or attributed to the press of other circumstances.¹⁰ 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 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. 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, even if motivated by Applicant's compassion for his son (and his girlfriend) and grandchildren.

Applicant only partially meets the mitigating conditions for financial considerations. His failures to timely file his Federal taxes are multiple, but not recent, and the circumstances are not likely to recur, if only because his wife now does the taxes.¹¹ However, the circumstances were not beyond his control. No doubt the years after his son moved in 2003 were troublesome, but Applicant managed to keep up with his other financial obligations during this time. He had the means to hire professional help, but did not want to spend the money.¹²

⁹See, ISCR Case No. 98-0801 (App. Bd. Jun. 8, 2000)(tax protester).

¹⁰See, ISCR Case No. 98-0761 (App. Bd. Dec. 27, 1999)(routine failure to file).

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

¹²¶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;

The circumstances of this case do not suggest that Applicant would benefit from credit or financial counseling, but the financial aspect of his taxes have been largely resolved to date.¹³ Applicant has documented his tax account status for tax years 2006 to 2015, and all tax years have been resolved. Applicant's efforts, or more precisely his fiancée's efforts, with the IRS constitute a good-faith effort to address his debts,¹⁴ but Applicant can claim little mitigating credit for this. Applicant himself mostly disregarded these tax obligations over several years. He was over five years late filing the oldest of his tax returns. Moreover, while he generally submitted impressive references, their value is somewhat undercut by their lack of knowledge about the basis for the SOR. I find them inadequate to 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

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

¹³ ¶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;

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