



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



In the matter of:)
)
XXXXXXXXXXXXXXXXXXXXXXXXXXXX) ISCR Case No. 15-02888
)
Applicant for Security Clearance)

Appearances

For Government: Alison P. O'Connell, Esquire, Department Counsel
For Applicant: Eric A. Eisen, Esquire

12/09/2016

Decision

METZ, John Grattan, Jr., Administrative Judge:

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

On 26 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 19 May 2016. DOHA received the transcript 1 June 2016.

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

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.f, but denied the remaining allegations. He is a 57-year-old deputy program manager employed by a U.S. defense contractor since April 2014. He held a clearance from September 1977, when he entered a U.S. military academy, to February 1989, when he completed his active duty service obligation. He has not previously held an industrial clearance.

The SOR alleges, and the Government's evidence (GE 1-4) documents, that Applicant failed to file his Federal and state tax returns for tax years 2008-2012, and that the tax returns remained unfiled at the time of the SOR. The SOR also alleges, and Government exhibits establish, 12 delinquent debts totaling nearly \$8,800.

Applicant's May 2014 clearance application (GE 3) reported several delinquent debts, including what he described as "various" debts totaling \$8,500. He also noted that he had not yet filed his Federal and state taxes for 2008-2012. He stated that he was in the process of filing the delinquent returns and negotiating a settlement of his outstanding tax liability.

Applicant filed his delinquent Federal income tax returns in December 2015 and his state income tax returns in May 2016 (AE A). In April 2016, he made three payments to the Internal Revenue Service (IRS) for tax years 2008-2010 (AE B). Applicant stated in his Answer that he was not required to file Federal or state income tax returns for 2011 and 2012. That may be true for tax year 2012, as he reported no income, but may not be true for tax year 2011, for which he had reportable income. He claims, without corroboration, to have entered into a repayment plan with the IRS to pay \$700 monthly for the next five or six years, beginning in June 2016 (Tr. 48).

Applicant paid SOR debt 1.q in February 2013. He paid SOR debts 1.r-1.v in June 2014 (AE C). He claims to have paid \$7,000-10,000 between 2013 and 2015 to resolve debts which were not alleged in the SOR (Tr. 54). He paid SOR debt 1.k in November 2015 (Tr. 52), along with SOR debts 1.l and 1.o (AE C). He paid SOR debt 1.p in December 2015 (AE C). He paid SOR debt 1.m in March 2016 and SOR debt 1.n in May 2016 (AE C).

Applicant traces his financial problems to his 2008-2010 divorce proceedings and his five years' unemployment from December 2008 to April 2013. In December 2008, he lost his job of nearly 20 years when his company relocated to another state and he was unable to make the transfer. At the same time, Applicant and his wife separated, and ultimately divorced in January 2010. Applicant received a small severance package from his employer and used his retirement account to pay his living expenses. Applicant did not provide any evidence of the steps he took to obtain new employment. His clearance application listed employment from November 2009 to April 2013 as program manager for a start-up company that never got off the ground. He received no income from this job.

When Applicant was married, his father-in-law prepared Applicant's joint tax return with his wife. For tax year 2008, Applicant anticipated that his father-in-law would file for an extension, and that questions related to tax filings for that year would be addressed in the marital settlement agreement (Tr. 39). In January 2010, Applicant learned that his 2008 and 2009 taxes were not being filed (Tr. 40). He consulted a tax accountant in early 2013, but took no concrete action (Tr. 41). He used commercial tax software to prepare the estimated tax liabilities he reported on his May 2014 clearance application (Tr. 43). He finally hired a tax accountant to file his delinquent taxes in October 2015 (Tr. 44).

Applicant's ex-wife, his current cohabitant (although not identified as such), and a former supervisor and military academy classmate all consider him honest and trustworthy, and recommend him for his clearance (AE E). He provided no budget or evidence of any financial or credit counseling.

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

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

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 and federal income tax returns from 2008 to 2012, a period of five years.⁴ He filed his delinquent federal income tax returns in December 2015, and filed his delinquent state income tax returns in May 2016, both dates after he received the SOR. Further, he had nearly \$8,800 in delinquent debts.⁵ He paid one debt before he completed his clearance application (SOR 1.q) and five others he paid in June 2014, just after he completed his clearance application (SOR 1.r-1.v). These six debts I resolve for Applicant. However, the remaining six debts (SOR 1.k-1.p) were not paid until after Applicant received the SOR.⁶

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.”⁷

This is true whether the failure to file is willful⁸ or attributed to the press of family circumstances.⁹ 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.

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

⁵¶19(a) inability or unwillingness to satisfy debts; ¶19(c) a history of not meeting financial obligations;

⁶Because Applicant did not separately identify the “various” debts totaling \$8,500 that he listed on his clearance application, and the record contains no evidence of a subject interview concerning his debts, I cannot draw a direct correlation between what Applicant disclosed on his clearance application and the SOR debts. However, the SOR debt allegations are based on the May 2014 credit report (GE 4) most recent in time to Applicant’s clearance application, and total only about \$300 more than what Applicant reported on his clearance application.

⁷ISCR 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).

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

⁹See, ISCR Case No. 98-0761 (App. Bd. Dec. 27, 1999)(routine failure to file).

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)¹⁰

Security concerns under Guideline F are not limited to cases in which an Applicant is financially insolvent or is experiencing difficulty in paying debts; although in this case Applicant also became delinquent on his credit accounts. Applicant reported his 2008-2012 tax filing issues on his May 2014 clearance application. There is no evidence he was ever interviewed about them. Nevertheless, he stated that he was in the process of addressing his taxes. Yet, it was another 18 months before his Federal taxes were filed, and two years before his state taxes were filed. Not until October 2015 had he hired a tax accountant to address his delinquent taxes.

None of the mitigating conditions for financial considerations apply. Applicant's financial problems are both recent and not infrequent; to the extent that his financial problems were due to his divorce and his unemployment, the immediate causes of his problems may be unlikely to recur.¹¹ However, while his divorce and his unemployment were certainly beyond his control, he was not responsible in addressing his financial problems. First, there is no evidence of his efforts to obtain employment during the five years he was unemployed. Second, he was aware that his 2008-2009 tax returns had

¹⁰The 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.

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

not been filed by the time of his January 2010 divorce. Yet he took no action to get them filed for nearly six years, and for more than two years after he became re-employed.¹²

Applicant has apparently had no credit or financial counseling, but his taxes have been filed, and the SOR debts paid, albeit half of them only after he received the SOR.¹³ Applicant has stated what he thinks his current tax situation is, but there is no evidence of the IRS's view of his taxes.¹⁴ Applicant's tardy filing of his taxes cannot be considered a good-faith effort to address his taxes;¹⁵ nor can his late November 2015 and beyond payments of SOR debts. Moreover, Applicant has mostly disregarded these tax obligations since April 2013, when he became re-employed. He moved with more alacrity on his delinquent debt but still did not document any debt payments between June 2014, when he had paid half the SOR debts, and October 2015, when he started paying the other half. His documented inaction for over two years 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 cannot overcome my conclusion that Applicant's track record of at least five years of procrastination on his taxes and his extensive delay in addressing his delinquent debts 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-p:

Against Applicant

Subparagraphs q-v:

For Applicant

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;

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 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.

¹⁵ ¶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