



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



In the matter of:)	
)	
XXXXXXXXXXXXXXXXXXXX.)	ISCR Case No. 15-04483
)	
Applicant for Security Clearance)	

Appearances

For Government: Tovah A. Minster, Esquire, Department Counsel
For Applicant: Megan C. Connor, Esquire

03/23/2017

Decision

METZ, John Grattan, Jr., Administrative Judge:

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

On 25 March 2016, 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 19 October 2016, and I convened a hearing 28 November 2016. DOHA received the transcript 6 December 2016, and the record closed.

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

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 allegation 1.a, but denied allegations 1.b-1.f. He is a 55-year-old company owner employed by a U.S. defense agency since 2007. He has worked to support this agency since December 2003, when he was employed by a defense contractor. This is a periodic reinvestigation of clearances he has held since at least September 1983 (GE 1).

The SOR alleges, and Government exhibits (GE 1, 3) document, that Applicant failed to timely file his 2008-2010 Federal income tax returns (SOR 1.a-1.b, 1.d), and failed to timely file his state income tax returns for tax years 2009-2010 (SOR 1.c-1.e), and that as a result, Applicant owed the Internal Revenue Service (IRS) \$20,000 for 2009-2010. Applicant admitted failing to timely file his 2008 Federal tax return. Applicant reported these tax issues on his June 2012 clearance application, and stated that he was working with a tax preparer to bring his taxes current. He discussed his tax issues during his November 2012 interview with a Government investigator (GE 3), and stated that he was still working with his tax preparer to get the taxes filed.

Applicant's 19 April 2016 Answer showed that he had yet to file his 2008 Federal taxes. He filed them on 4 August 2016 (over seven years late)(AE A). He filed his 2009 Federal taxes on 1 February 2013 (almost three years late), and filed his 2010 Federal taxes on 7 December 2012 (over 18 months late). He filed his 2009 state taxes on 14 February 2013, and filed his 2010 state taxes on 11 September 2013. He paid penalties and interest for all years, but otherwise owes no money to the IRS. Applicant's April 2015 (GE 2) and November 2016 (AE B) credit reports reflect that Applicant has no reported financial problems and has excellent credit scores.

Applicant traces his tax problems to his caring for his ill mother. She began showing signs of dementia in 2008, and Applicant and his brother put her into assisted living in 2008 or 2009. Applicant tried to have dinner with her every night. However, she continued to experience medical issues, including an emergency surgery that left her unable to communicate. Applicant and his brother moved her into a nursing home in November or December 2010 (Tr. 53-54). She died in February 2012 (Tr. 58).

Applicant's caring for his mother did not prevent him from completing his work responsibilities, or traveling when his job required it. He kept his financial accounts current while his mother was ill (Tr. 45). He also traveled out of the country for vacations in August 2010 and February 2011.

Applicant has received recognition for his work performance from the Government agency he supports.³ His 2015 and 2016 performance evaluations are excellent. He now uses a tax preparer for all of his tax filings (Tr. 55-56). He has not received any financial or credit counseling, and presented no budget.

³Two of the letters of appreciation are dated summer 2009; two are undated.

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.⁴

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 tax returns between 2008 and 2010.⁵ While he attributed these failures to caring for his mother during her last illnesses, the record clearly shows that her illnesses did not otherwise interfere with any other aspect of his personal, professional, or financial lives.

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

⁴See, *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

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

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.”⁶

This is true whether the failure to file is willful⁷ or attributed to the press of family circumstances.⁸ 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)⁹

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 demonstrate his financial management skills, and show that he is able to comply with rules and regulations when he perceives it to be in his interest to do so. The justification for his failure to timely file his Federal and state income taxes, although a sad time in his life, did not prevent him from filing his taxes in a timely fashion, or at least a more timely fashion than he managed. The active care being provided to his mother was provided by the assisted living facility and the nursing home.

⁶ISCR 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).

⁷See, ISCR Case No. 98-0801 (App. Bd. Jun. 8, 2000)(tax protester).

⁸See, ISCR Case No. 98-0761 (App. Bd. Dec. 27, 1999)(routine failure to file).

⁹The 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.

Applicant reported his 2008-2010 tax-filing issues on his June 2012 clearance application and was interviewed about them during his November 2012 subject interview. Despite his clear understanding that these tax issues were of concern to the Government, none of his taxes had been filed by the time of his interview.¹⁰ His 2009 state and Federal taxes were filed in February 2013, but his 2010 state taxes were not filed until 10 months after he filed his 2010 Federal taxes. His 2008 Federal taxes were not filed until after he received the SOR.

Finally, the fact that Applicant otherwise resolved his tax liability expeditiously when each return was filed does not mitigate the judgment concerns raised by his pattern of failing to file in a timely fashion. He paid penalties and interest for each delinquent return.

None of the mitigating conditions for financial considerations apply. His failures to timely file his Federal and state taxes are both recent and multiple, although those circumstances are unlikely to recur.¹¹ However, while his mother's final illnesses were circumstances beyond his control, those circumstances did not prevent him from filing his taxes, and the time it took to begin resolving his taxes after his mother died in February 2012 was not fully responsible.¹² Certainly, his failure to file his 2008 Federal taxes until after he received the SOR was not responsible.

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 resolved.¹³ Applicant's resolution of his 2009 and 2010 state and Federal taxes can be considered a good-faith effort to address his taxes,¹⁴ to the extent that this mitigating condition applies to SOR 1.f. Moreover, Applicant's disregard of his taxes during his mother's illnesses, and his comparatively slow response after her death, raise significant security concerns that Applicant has not addressed. I conclude Guideline F against Applicant.

Formal Findings

Paragraph 1. Guideline F:

AGAINST APPLICANT

Subparagraphs a-e:

Against Applicant

¹⁰Although his 2010 Federal taxes were filed in December 2012.

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;

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.

Subparagraph f:

For 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