



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



In the matter of:)	
)	
XXXXXXXXXXXXXXXXXX)	ISCR Case No. 16-02243
)	
Applicant for Security Clearance)	

Appearances

For Government: Alison Marie, Esquire, Department Counsel
For Applicant: *Pro Se*

09/25/2018

Decision

METZ, John Grattan, Jr., Administrative Judge:

Based on the record in this case,¹ I deny Applicant's clearance.

On 29 November 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 26

¹Consisting of the transcript (Tr.), Government exhibits (GE) 1-15, hearing exhibit (HE) I, and Applicant exhibits (AE) A-G. AE G was timely received post hearing. The record closed 29 December 2017, when Department Counsel stated no objection to AE G.

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. However, on 10 December 2016, the Director of National Intelligence (DNI) signed Security Executive Agent Directive 4, implementing new AG, effective with any decision issued on or after 8 June 2017. My decision is the same under both guidelines.

September 2017, and I convened a hearing 13 December 2017. DOHA received the transcript 27 December 2017.

Findings of Fact

Applicant admitted failing to timely file his 2005-2013 Federal income tax returns (SOR 1.b). In fact, he only failed to timely file his 2005-2010 returns.³ He denied the remaining allegations.

Applicant is a 52-year-old computer system administrator employed by a U.S. defense contractor since July 2011. He has been employed in related positions since April 2004. He has previously had favorable background investigations in June 2004 and August 2008. This is a periodic reinvestigation of that clearance (GE 1).

From May 1984 to May 2004, Applicant served honorably in the United States (U.S.) military before retiring in paygrade E-7. Applicant's W2's from his employers (GE 4) and his 2015 tax account transcripts (GE G, Email 9) show that his gross income for tax years 2008 through 2015 was never less than \$170,000 annually, except for tax year 2008, when it was \$114,500. Applicant filed single withholding status 2006-2009, married filing separate 2010-2012, and single 2013-2016. Applicant obtained an extension of time to file his 2016 taxes to October 2017, but did not document that they had been filed. Applicant married in December 1985, separated in May 2004, divorced in early 2006, and remarried the same woman in June 2010. During the course of their marriage, his tax returns were prepared by his wife's friend, an accountant.

Applicant has a history of financial problems with the IRS dating back to at least tax year 2002. In November 2012, the IRS rejected Applicant's proposed installment plan for tax years 2002-2010⁴ because the IRS concluded that Applicant could afford a higher payment than he had offered. In August 2013 (GE 6), the IRS levied \$118,383.10 against Applicant's assets for tax years 2004-2011. On 6 December 2013 (Answer), the IRS approved a plan for Applicant to pay \$2,611 monthly beginning on 28 December 2013 for delinquent taxes from tax years 2004-2012.⁵ On 18 December 2013 (GE 7), the IRS filed a \$102,751 lien against Applicant. A 15 January 2014 pay statement (Answer) shows that no payment was received for December 2013, and \$2,611 was

³Tax account transcripts submitted by the Government (GE 5) and the Applicant (Answer; AE G, Email 9) document that Applicant filed his 2006-2008 tax returns in May 2012; that he filed his 2009-2010 returns in February 2012; and that he filed his 2011-2014 returns by the respective due dates. He filed his 2015 return late, but he incurred no penalties because he was due a refund, which was seized and applied to his 2010 taxes. He owed Federal taxes for 2011-2012. He received refunds for 2013-2014, which were seized by the Internal Revenue Service (IRS) and applied to his 2010 taxes. Unless specifically stated otherwise, any reference to documents, taxes, levies, or letters, refers to documentary evidence generated by the IRS.

⁴I do not know if the nine years listed represent the maximum number of years that the IRS will deal with in any one installment agreement, or if no tax years earlier than 2002 were at issue.

⁵Applicant's 2006-2013 tax transcripts show that these years were placed in installment agreement status on 26 November 2013.

due 28 January 2014. The account balance, including penalties and interest, was \$120,293.58. However, a 19 February 2014 pay statement (GE 8) shows that a \$2,612 payment was received 29 January 2014, reducing the 2004-2012 tax years balance to \$115,556.55. Moreover, Applicant's 2007-2013 tax account transcripts show that those tax years were placed in an installment agreement in November 2013, but that no payments were received between November 2013 and 14 July 2014, when the nine accounts were taken out of the installment agreement, presumably because Applicant had failed to make the required payments consistently.⁶ The record contains no further evidence of payments on the November 2013 installment plan.

On 25 September 2015 (AE C), the IRS levied \$197,456.27 against Applicant's assets for tax years 2005-2011. On 5 October 2015 (Answer), the Defense finance and Accounting Center (DFAS) notified Applicant that the IRS had levied his retirement check \$736.53 monthly, beginning 1 December 2015.⁷ Applicant's 2010 account transcript shows 14 monthly payments credited to his taxes between December 2015 and January 2017. A January 2017 DFAS retired pay statement shows the tax levy was taken out for the final levy (AE G, Email 1).⁸

On 31 January 2017 (AE G, Email 6), the IRS approved an installment plan for Applicant to pay \$2,096 monthly beginning 28 March 2017, for \$223,972.84 in delinquent taxes for tax years 2005-2013. On 2 February 2017 (GE 10), the IRS filed a \$5,308 tax lien against Applicant. A 19 April 2017 pay statement (AE F) shows the payment was made as required on the due date, with the next payment due 28 April 2017. A 28 December 2017 IRS electronic Confirmation of Scheduled Transaction (AE G, Email 5) purports to confirm the scheduled payment of an unspecified amount. However, although the hearing was held in mid-December and the record kept open until the end of December, Applicant did not provide any proof that he made the required payments from April to November 2017.

Applicant has financial problems with his state tax agency that mirror those with the IRS. On 21 May 2012 (GE 11), the state filed a \$6,642 tax lien on Applicant (SOR 1.d). On 17 February 2016 (GE 12), the state filed a \$45,289 tax lien (SOR 1.c). On 1 June 2016 (GE 13), the state filed a \$2,822 lien. Applicant's Answer included the 9

⁶The IRS generally applies payments to the oldest outstanding tax years, so the 2006-2013 account transcripts would not show any payments that were applied to tax year 2005 and earlier. I infer from the tax transcripts that the January 2014 payment was credited to a tax year earlier than 2005, that any subsequent payments were similarly credited, but that Applicant began missing payments and the plan was ended in July 2014. In crafting this chronology, I do not attempt to reconcile the competing numbers reflected in each IRS document, but merely to show the progression of Applicant's efforts to resolve his tax debt.

⁷DFAS also garnished Applicant's February 2012 retired pay for \$838.44 (AE G, Email 6), but there is no other evidence disclosing the garnishee or tax years involved.

⁸The 2010 tax account transcript illustrates the circuitous route the IRS frequently uses to resolve a tax debt. The 19 December 2017 transcript shows a zero account balance as of 7 August 2017. The IRS reached that balance by seizing Applicant's 2004 and 2013-2015 tax refunds, garnishing the 14 monthly levies cited above, and applying a 17 January 2017 payment of \$2,159.08.

February 2016 court record showing a \$45,289.53 lien for tax years 2005-2011. Applicant has been in touch with the state, but as of December 2017 had not been able to execute a payment agreement with the state because the required state official was out of the office five days before Christmas 2017 (AE G, Email 4).

Applicant stated that he failed to timely file his 2005-2010 Federal income tax returns because his wife's friend failed to file them during the period of separation and divorce, and Applicant was unaware of this fact until their reconciliation and remarriage. He says the IRS contacted him in 2010 about delinquent taxes. The problem with this explanation is that he also stated that he only remembers signing 2007 and 2008 tax returns (Tr. 53) during this period, that he had not signed any subsequent tax returns, and that the friend did not have power of attorney for signing any tax returns (Tr. 87). In addition, the 2006-2010 account transcripts show that the IRS sent Applicant inquiries when his returns were not timely filed.

However, the tax transcripts and other IRS records also reflect Applicant's regular efforts to reach an agreement with the IRS to resolve his tax issues. This process was complicated by issues Applicant had sorting out the correct amount of reportable income for some of the years in question. The process was also complicated by the fact that Applicant was providing some financial help for his adult son's own financial problems in 2014. The tax transcripts show that beginning in 2013, Applicant's delinquent taxes were pending installment agreement then taken out of them or actually placed in installment agreements only to be taken out of the agreements some months later with no payments shown for any tax years before 2006. Applicant's documents are not a model of clarity. Many of them are incomplete. They are not organized in any discernible manner. Documents which may have established a history of payments, e.g. his retired pay statements, or his IRS installment payments after January 2017, were not provided.

As a result of providing financial support to his son, Applicant also fell behind on his mortgage. His April 2015 credit report (GE 2) stated that he had an agreement with the creditor to make partial payments, but was 120 days or more past due with a past-due balance of \$18,454 (SOR 1.e). In September 2015, the house was in pre-foreclosure (GE 14). By 24 September 2015, the mortgage was \$29,597.81 in arrears. The creditor offered Applicant a catch-up plan. Beginning 1 November 2015, Applicant would make six monthly payments of \$7,209.39 (an amount which included his regular mortgage payment and arrears) through April 2016 to bring the account current. Applicant claimed to have made the payments, but provided no corroboration. However, on 8 March 2017, a civil suit brought against Applicant by the substitute trustee in foreclosure was dismissed without prejudice on the trustee's motion (AE E).

Applicant claimed to have long paid SOR debt 1.f. When he could not find proof of that fact, he paid it again in December 2017 (AE G, Email 7). He was unable to obtain any information on SOR debts 1.g and 1.h. The three debts total \$320, a sum that lacks security significance in the context of Applicant's tax problems.

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, 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.⁹

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 at least six years. This conduct resulted in Federal tax liens. Similar issues led to state tax liens.¹⁰ His tax issues may be on the cusp of being resolved by repayment plans, but he has not established a track record of payments on the plans. The remainder of his alleged financial problems are mitigated.

⁹See, *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

¹⁰¶19(a) inability to satisfy debts; (b) unwillingness to satisfy debts regardless of the ability to do so; (c) a history of not meeting financial obligations; (f) failure to file or fraudulently filing annual Federal, state, or local income tax returns of failure to pay annual Federal, state, or local income tax as required;

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 other 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 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).

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).

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 his failure to timely file his Federal returns for at least six years put him in a serious financial hole. Despite the timely filing of his 2011-2015 returns, and the seizure of 2013-2015 refunds, the installment agreement he entered into in January 2017 covers nearly \$224,000 for tax years 2005-2013. A repayment plan for his delinquent state taxes is pending. He has no established track record of payments for either his state or Federal taxes.

Applicant only partially meets the mitigating conditions for financial considerations. His failures to timely file his Federal returns are multiple, but not recent, and the circumstances are not likely to recur.¹⁴ However, it is debatable whether his failure to file was due to circumstances beyond his control. He is responsible for ensuring that his income tax returns are timely filed. At some point, he knew that he was not providing the necessary information to his wife's friend so that she could prepare the tax returns. Nevertheless, assuming that he can make a colorable claim that the circumstances were beyond his control, he can make a partial showing that he acted responsibly in dealing with his Federal taxes. He has a lengthy history of contacts with the IRS attempting to enter an installment plan for his taxes. Undercutting those efforts is the fact that he made a decision to help his adult son financially, which meant he could not keep up with the November 2013 installment plan. He was successful in entering a new plan in January 2017, but did not document regular payments on the plan.¹⁵

Applicant has not had any credit or financial counseling, and there are no clear indications that his tax debt is being resolved.¹⁶ His efforts to work with the IRS and the state are certainly being made in good-faith, but his inability to follow through with the earlier installment plans or to establish a track record of payments on the most recent plan means I cannot conclude that his current efforts constitute a good-faith effort.¹⁷ 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.

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

¹⁵¶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;

¹⁶¶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;

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

Formal Findings

Paragraph 1. Guideline F: AGAINST APPLICANT

Subparagraphs a-d: Against Applicant
Subparagraphs e-h: 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