



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



In the matter of: )  
)  
) ISCR Case No. 14-05730  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Richard Stevens, Esq., Department Counsel  
For Applicant: *Pro se*

12/03/2015

**Decision**

DUFFY, James F., Administrative Judge:

Applicant refuted the Guideline E (personal conduct) allegation, but failed to mitigate the security concerns arising under Guideline F (financial considerations). Eligibility for access to classified information is denied.

**Statement of the Case**

On February 15, 2015, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines F and E. DOD CAF took that action under Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive); and the adjudicative guidelines (AG) implemented on September 1, 2006.

The SOR detailed reasons why DOD CAF could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national

interest to continue Applicant's security clearance. On March 30, 2015, Applicant answered the SOR and requested a hearing. On June 15, 2015, the case was assigned to me. On July 8, 2015, the Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing scheduling the hearing for July 22, 2015. The hearing was held as scheduled.

At the hearing, Department Counsel offered Government Exhibits (GE) 1 and 2, but later withdrew GE 2. Applicant testified and offered Applicant Exhibits (AE) A through D. The record of the proceeding was left open to August 12, 2015, to provide Applicant the opportunity to present additional matters. He timely submitted documents that were marked as AE E through L. GE 1 and AE A through L were admitted into evidence without objection. The transcript (Tr.) of the hearing was received on July 29, 2015.

### **Preliminary Matters**

Applicant waived the 15-day hearing notice requirement under ¶ E.3.1.8 of the Directive.<sup>1</sup>

Department Counsel requested that administrative notice be taken of 26 U.S.C § 7203 and two Internal Revenue Service (IRS) documents that address income tax filing deadlines. Applicant had no objection to Department Counsel's request. The request was granted.<sup>2</sup>

### **Findings of Fact**

Applicant is a 55-year-old employee of a defense contractor. He has worked for his current employer since December 1991. He graduated with a bachelor's degree in 1982. He served in the Navy from July 1978 to July 1988 and in the Navy Reserve from January 1989 to September 2004. He attained the grade of captain (O-6) and retired honorably. He married in 1983 and has three children, ages 23, 28, and 29. He has held a security clearance for over 30 years.<sup>3</sup>

Under both Guidelines F and E, the SOR alleged that Applicant failed to timely file his federal income tax returns for 2006, 2008, and 2009 (SOR ¶¶ 1.a and 2.a); that he failed to pay \$12,804 in federal taxes for 2009 (SOR ¶¶ 1.b and 2.a); that he failed to file his federal income tax returns for 2010, 2011, 2012, and 2013 and pay any taxes due for each year (SOR ¶¶ 1.c and 2.a); that he failed to timely file his state income tax returns for 2006, 2007, 2008, and 2009 (SOR ¶¶ 1.d and 2.a); and that he failed to file

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<sup>1</sup> Tr. 13-15.

<sup>2</sup> Tr. 21-22. The IRS documents were Page 9 of Publication 17 (2014) and U.S. Tax Center article, *2015 Deadlines for Filing 2014 Tax Returns*. See Hearing Exhibit 1.

<sup>3</sup> Tr. 6-8, 50-53; GE 1.

his state income tax returns for 2010, 2011, 2012, and 2013, and pay any taxes for each year (SOR ¶¶ 1.e and 2.a). In his Answer to the SOR, Applicant admitted each allegation with comments. His admissions are incorporated as findings as fact.<sup>4</sup>

In his Electronic Questionnaire for Investigations Processing (e-QIP) dated April 7, 2014, Applicant disclosed that he did not timely file his federal income tax returns for 2006, 2008 and 2009. The information he provided about those tax returns is summarized in the following table:

Federal Income Tax Returns			
Tax Year	Month Tax Return Filed	Reason for Late Filing	Refund or Amount Due
2006	May 2009	Lost financial records.	\$3,563 refund.
2008	October 2012	Misplaced financial records.	\$4,965 refund forfeited because of late filing.
2009	January 2013	Misplaced financial records.	\$12,804 in taxes dues. Petitioned U.S. Tax Court and received favorable decision.

In the e-QIP, he also disclosed that he filed his 2009 state income tax return late and owed about \$400 in state income taxes that he paid in April 2014, the month in which he submitted the e-QIP. He further disclosed that he had not filed his federal and state income tax returns for 2010, 2011, and 2012. He indicated that he expected to file his 2010 federal and state income tax returns on April 15, 2014 (approximately a week after submission of the e-QIP), and he was locating and assembling financial records for the other years.<sup>5</sup>

In his Answer to the SOR, Applicant noted that his 2014 e-QIP was the first time that he was asked about the status of his tax filings and tax payments during a periodic reinvestigation of his security clearance. He indicated the previous investigations only asked about tax liens and the questions about tax filings and payments came as a “total surprise” to him. He stated that he started to get organized and locate financial records in early 2014 so that he could respond to the questions being asked about his taxes. He also indicated that he overstated his federal income tax deficiency for 2009. Instead of the \$12,804 deficiency he reported for 2009, he actually owed \$2,093 in taxes and \$1,210 in interest and penalties for that year. He contested his federal tax deficiency for 2009 in U.S. Tax Court. He stated he paid the deficiency in September 2013 upon receipt of the Tax Court’s decision, but provided no documentation confirming the payment of that tax deficiency.<sup>6</sup>

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<sup>4</sup> Applicant's Answer to the SOR.

<sup>5</sup> Tr. 54-56; GE 1.

<sup>6</sup> Tr. 56-60; GE 1; Applicant’s Answer to the SOR.

In his Answer to the SOR, Applicant stated that he did not disclose in his e-QIP the late filing of his 2006 through 2008 state income tax returns because he did not understand the question. He indicated that he expected to file his 2010 through 2013 federal and state income tax returns in the near future. He stated he deeply regretted his tax filing deficiencies and highlighted a number of factors that showed he was reliable. He claimed that, during an IRS audit in 1999, the auditor informed him that he had three years from the filing deadline to actually file the tax return. He later learned that was erroneous information. He explained his tax deficiencies were the result of him having too many personal demands coupled with personal disorganization and misplaced priorities.<sup>7</sup>

At the hearing, Applicant attributed his tax problems to being disorganized and placing his work ahead of other obligations. The tax documents that he had difficulty locating included paperwork for unreimbursed work-related travel expenses. He had unreimbursed travel expenses because he failed to file his travel claims in a timely manner. During his testimony, he also stated that he was audited by the IRS in the 1990s because he had not filed his federal income tax return. He noted that he previously filed five to ten U.S. Tax Court appeals because the IRS had prepared substitute income tax returns for him in which they assessed him taxes. He would challenge such tax assessments by filing his actual Form 1040 for the year in question.<sup>8</sup>

At the hearing, Applicant provided documentation confirming that he filed both his 2010 and 2011 federal income tax returns on July 22, 2015 (the date of the hearing). He was entitled to refunds for both years, but forfeited those refunds because of his late tax filing. He also testified that he was issued a state tax assessment for 2010 before he submitted his state income tax return for that year. He did not contest the assessment and paid the assessed amount. He indicated that he was still in the process of preparing his federal income tax returns for 2012 and 2013 and his state income tax returns for 2011 through 2013. He did not know whether he owed past-due state income taxes for the years in which he had not filed. He stated that he wished he could present additional tax filings, but noted it takes time to find and organize all the required records. He testified that he was committed to rectifying his tax filing deficiencies and anticipated completing the tax filing process within a short period of time. He further testified that he filed his 2014 federal and state income tax returns on time, but provided no documents confirming he filed those tax returns.<sup>9</sup>

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<sup>7</sup> Tr. 64-67; GE 1; Applicant's Answer to the SOR. The factors that Applicant highlighted to show he was reliability and trustworthy include the full disclosure of his tax issues in his e-QIP; his cooperation throughout the security clearance process; his efforts to improve his personal organization and record-keeping; his reprioritizing of his obligations to ensure full compliance with tax filing and payment requirements; his long professional life characterized by unquestioned allegiance to the United States; his military and professional achievements; the lack of any other adverse matters concerning him; the poor advice he received during an IRS audit; and numerous other personal and family demands. See Applicant's Answer to the SOR. He reiterated many of those factors in his post-hearing submission.

<sup>8</sup> Tr. 36-46, 55-56, 60-64, 69-74.

<sup>9</sup> Tr. 36-46, 55-56, 60-64, 69-74; AE A, B, C, I, J.

In his post-hearing submission, Applicant provided documents confirming that he filed his 2012 federal income tax return on August 5, 2015, and his 2013 federal income tax return on August 10, 2015. He expected to receive federal income tax refunds of \$8,771 for 2012 and \$14,940 for 2013. He also submitted documents confirming he paid the past-due amount of \$1,036 for his 2010 state income taxes in February 2015. He indicated that all his federal income tax returns had been filed and he owed no additional money to the U.S. Treasury. He further indicated that his state income tax returns for 2011 through 2013 were being prepared, and he expected to file those returns in the near future. Additionally, he indicated that his state required a copy of the federal income tax return to be filed with the state income tax return for a particular year so completing the state returns was not possible until the federal returns were completed.<sup>10</sup>

Applicant provided a letter from his supervisor that indicated Applicant is an expert in a very specialized scientific field. He has known Applicant for over ten years. He indicated he has not observed anything that would lead him to question Applicant's judgment, reliability, or ability to properly safeguard national security information. He stated that Applicant has demonstrated a high attention to detail with regard to security matters.<sup>11</sup>

### **Policies**

The President of the United States has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information. *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988). The President has authorized the Secretary of Defense to grant eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information Within Industry* § 2 (Feb. 20, 1960), as amended. The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These AGs are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge's adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavourable, to reach his decision.

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<sup>10</sup> AE E, F, G, H, K, L.

<sup>11</sup> Tr. 67-68; AE D.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information. Clearance decisions must be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See Exec. Or. 10865 § 7. See also Executive Order 12968 (Aug. 2, 1995), Section 3. Thus, a clearance decision is merely an indication that the applicant has or has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4<sup>th</sup> Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed and an applicant’s security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue [his or her] security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

## **Analysis**

### **Guideline F, Financial Considerations**

The security concern for this guideline is set out in AG ¶ 18 as follows:

Failure or inability to live within one’s means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual’s reliability, trustworthiness and ability to protect classified information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

Applicant's admissions and the record evidence established the following disqualifying condition under AG ¶ 19:

- (c) a history of not meeting financial obligations; and
- (g) failure to file annual Federal, state, or local income tax returns as required . . . .

Four mitigating conditions under AG ¶ 20 are potentially applicable:

- (a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;
- (b) the conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation), and the individual acted responsibly under the circumstances;
- (c) the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control; and
- (d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

Applicant has a history of not complying with income tax return filing requirements. He failed to file his 2006 and 2008 through 2013 federal income tax returns in a timely manner. He filed his 2010 and 2011 federal income tax returns on the day of the hearing. He filed his 2012 and 2013 federal income tax returns after the hearing was held. Even though he provided no paperwork confirming payment of his 2009 past-due federal taxes, he testified credibly he paid those taxes. In the past, he often relied on the IRS to prepare substitute income tax returns for him. If he disagreed with a tax assessment arising from a substitute return, he would then file his Form 1040 to challenge that assessment.

Applicant failed to file his 2006 through 2013 state income tax returns in a timely manner. His state prepared a 2010 substitute income tax return for him and assessed him additional taxes. He paid that assessment. At the close of the record, he still had not filed his state income tax returns for 2011 through 2013. It is unknown whether he owes past-due state income taxes for those years.

Applicant failed to establish that a condition beyond his control caused his tax problems. The evidence established that Applicant has acted irresponsibly for many years by failing to file his federal and state income tax returns as required. He has been

on notice since submitting his e-QIP in April 2014 that his tax filing deficiencies raised security concerns, yet he still has not fully resolved those deficiencies. It appears this pending security clearance determination was the reason why he filed his 2010 through 2013 federal tax returns recently. Insufficient evidence was presented to conclude that Applicant's tax filing problems are unlikely to recur. His tax problems continue to cast doubt on his current reliability, trustworthiness, and good judgment. None of the mitigating conditions fully apply.

### **Guideline E, Personal Conduct**

The security concern for personal conduct is set out in AG ¶ 15, as follows:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying conditions are potentially applicable:

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information; and

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as engaging in activities which, if known, may affect the person's personal, professional, or community standing . . . .

Applicant's tax problems are adequately addressed under Guideline F. He disclosed his tax problems in his e-QIP. Insufficient evidence was presented to establish that Applicant is subject to exploitation because of his tax problems. Applicant refuted the Guideline E allegation. I find in favor of Applicant on Guideline E.

### **Whole-Person Concept**

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

(1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

The ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. Some of the factors in AG ¶ 2(a) were addressed under Guidelines F, but some warrant additional comment.

Applicant served in the military and honorably retired as a Navy captain. He is a valued employee. He has held a security clearance for many years. Nevertheless, despite being aware of his legal obligation to file his income tax returns in a timely manner, he acted irresponsibly by failing to comply with those requirements. This is a persistent problem that still is not resolved and continues to cast doubt on his eligibility and suitability for a security clearance. For all these reasons, I conclude that Applicant failed to mitigate the financial considerations and personal conduct security concerns.

### **Formal Findings**

Formal findings on the allegations set forth in the SOR are:

Paragraph 1, Guideline F:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	For Applicant
Subparagraphs 1.c-1.e:	Against Applicant
Paragraph 1, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	For Applicant

### **Decision**

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

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James F. Duffy  
Administrative Judge