



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



In the matter of:	)	
	)	
	)	ISCR Case No. 17-03047
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Mary M. Foreman, Esq., Department Counsel  
For Applicant: *Pro se*

03/11/2019

**Decision**

Gregg A. Cervi, Administrative Judge

This case involves security concerns raised under Guideline F (Financial Considerations) and Guideline E (Personal Conduct). Eligibility for access to classified information is granted.

**Statement of the Case**

Applicant submitted a security clearance application (SCA)<sup>1</sup> on May 18, 2015. On October 24, 2017, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent him a statement of reasons (SOR) alleging security concerns under Guidelines F and E.<sup>2</sup> Applicant answered the SOR and requested a hearing.

<sup>1</sup> Also known as a Questionnaire for National Security Positions (SF86).

<sup>2</sup> The DOD CAF acted under Executive Order (Exec. Or.) 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 revised adjudicative guidelines (AG) effective on June 8, 2017.

The case was assigned to me on June 18, 2018. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on July 31, 2018, scheduling the hearing for August 28, 2018. The hearing was convened as scheduled. Government Exhibits (GE) 1 and 2 and Applicant Exhibit (AE) A were admitted in evidence without objection. The Government submitted a request I take administrative notice of certain relevant Internal Revenue Service (IRS) statutes and regulations. The request was marked as Hearing Exhibit (HE) I and admitted into the record. Applicant testified. The record was held open to permit Applicant to submit additional documentary evidence in mitigation. E-mails and documents marked as AE B and C were submitted and admitted without objection. DOHA received the hearing transcript (Tr.) on September 6, 2018.

### **Findings of Fact**

Applicant is a 55-year-old senior systems engineer, employed by a defense contractor since 2013. He worked for previous defense contractors since about 2003. He graduated from high school in 1981. He married in 1984 and divorced in 1986. He married again in 2010, and has one adult child. Applicant has held a security clearance since 2003.

The SOR alleges under Guideline F, that Applicant failed to file Federal income tax returns for tax years 2005-2009 and 2011. The SOR also alleges under Guideline E, that Applicant failed to disclose that his 2008 and 2009 tax returns were not filed when he completed his 2015 SCA. Applicant admitted the Guideline F allegation with explanations, and denied the Guideline E allegation, stating that he did not deliberately fail to disclose the information. The Guideline F SOR allegation is supported by substantial evidence, but the Guideline E allegation is unfounded.

Applicant reported in his SCA, that he worked as a civilian contractor in Iraq from 2005 to 2010 in support of U.S. Armed Forces. He left Iraq in March 2010, and remained unemployed until he began working in Afghanistan in November 2010 to March 2011.<sup>3</sup> He worked in Macedonia from March 2011 to February 2012, when he returned to the United States. Applicant was required to file Federal income tax returns,<sup>4</sup> however while in a combat zone or contingency operation area under IRS rules,<sup>5</sup> he received automatic extensions to file Federal tax returns until the expiration of 180 days after leaving the combat zone or contingency operation area.<sup>6</sup>

After leaving the combat zone area in 2011, Applicant did not file his Federal income tax returns for the tax years while deployed, because of distractions caused by searching for a new job, arranging the immigration needs for his foreign-born spouse, and

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<sup>3</sup> Applicant testified that he worked in Iraq and Afghanistan continuously from 2003 to 2011.

<sup>4</sup> See, Title 26, Internal Revenue Code, section 6012 at HE I.

<sup>5</sup> IRS Pub. 3, Armed Forces Tax Guide, at 28 (2017). Filing extensions apply to civilian personnel in support of the Armed Forces serving in a combat zone or a contingency operation.

<sup>6</sup> IRS Pub. 3, p. 29 at AE B.

moving his family to two different states within six months. After he filed his 2012 Federal tax return on time in April 2013, he stated that the IRS notified him about his unfiled tax returns. He maintained continuous contact with the IRS thereafter and filed the returns he was instructed to file. He stated that he was instructed over the phone on several occasions, to file his 2010 tax return, which he signed on January 6, 2013, and received by the IRS on June 18, 2013, but was instructed not to file the remaining unfiled returns (2005 to 2009 and 2011). He indicated that the IRS was applying a three-year look-back period for any refunds owed to the taxpayer, and a six-year look-back period for any taxes owed to the IRS.

Internal Revenue Service tax transcripts in evidence show the following:

Tax year 2005 – IRS suspended collection of taxes due to military deferment in October 2005; inquiry for non-filing of the tax return issued in July 2007; removed suspension of tax collection in April 2011; issued a notice in May 2011; no tax return was filed. The transcript shows a zero account balance and no information on income, tax paid, or tax owed.

Tax year 2006 – inquiry for non-filing tax return issued in November 2007; notice issued in May 2011; no tax return was filed. The transcript shows a zero account balance and no information on income, tax paid, or tax owed.

Tax year 2007 – inquiry for non-filing of tax return issued in November 2008; notice issued in May 2011; no tax return was filed. The transcript shows a zero account balance and no information on income, tax paid, or tax owed.

Tax year 2008 – inquiry for non-filing of tax return issued in December 2009; notice issued in May 2011; no tax return was filed. The transcript shows a zero account balance and no information on income, tax paid, or tax owed.

Tax year 2009 – inquiry for non-filing of tax return issued in November 2010; notice issued in May 2011; no tax return was filed. The transcript shows a zero account balance and no information on income, tax paid, or tax owed.

Tax year 2010 – inquiry for non-filing of tax return issued in December 2011; notice issued in December 2012; tax return received on June 18, 2013; substitute tax return prepared by IRS in July 8, 2013; additional account action pending noted in July 2013; final notice before tax is determined by IRS issued in September 2013; resolved tax determination in January 2014; W-2 withholding was \$14,325; additional tax assessed of \$17,094 in February 2014; penalty for filing tax return after the due date, interest and penalties charged February 2014; examination of tax return in April 2014; credit transferred from tax years 2013 and 2014 tax refunds applied in 2014 and 2015.

In August 2014, Applicant received an IRS notice of a balance of \$8,555 was due for tax year 2010. He filed a petition in 2015 in the United States Tax Court challenging the deficiency amount. In May 2015, Applicant and the IRS settled the case with a ruling that no deficiency or additional tax was due for tax year 2010. Applicant agreed to pay the \$3,376 balance owed, which he paid in July 2017. The tax year 2010 transcript shows a zero balance.

Tax returns for tax years 2012 to 2017 were filed on time and no tax is owed. Applicant re-contacted the IRS by phone after the hearing, and confirmed that he was in full compliance with IRS instructions, and that they did not require him to file any of the unfiled tax returns. The IRS representatives contacted would not provide a written confirmation.

When Applicant completed his 2015 SCA, he was asked in section 26, to list whether “in the past seven years, have you failed to file or pay Federal, state, or other taxes when required by law or ordinance?” He responded “yes,” and stated that he failed to file his 2009 return:

“due to working overseas in a war zone, I was not required to file until permanent return to the states from working in said war zone. I had not filed in a timely manner for several of those years, but have been working with the IRS to get all returns filed. 2009 is the only one outstanding at this time, though we are still working through 2010 at present.”

In his Answer to the SOR, Applicant stated that 2008 tax return was not listed because he did correctly count back seven years, rather he thought 2009 was the first year to report. Also, since the IRS told him he did not have to file the 2011 return, he did not think to list it as a failure to file a tax return. He acknowledged these errors, but noted that he listed 2009, which was pending at the time, and did not intentionally or willfully fail to list his 2008 and 2011 tax returns.

Applicant is financially stable. He and his spouse earn over \$112,000 per year and reported a monthly net remainder of over \$2,000 after paying expenses. He has no delinquent debt, a paid mortgage, and about \$76,000 in other assets.

### **Law and Policies**

“[N]o one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President 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.” *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants 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 § 2.

National security eligibility is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines in conjunction with an evaluation of the whole person. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider a person's stability, trustworthiness, reliability, discretion, character, honesty, and judgment. AG ¶ 1(b).

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 about potential, rather than actual, risk of compromise of classified information.

Clearance decisions must be made "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is merely an indication the applicant 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. *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 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability. See, e.g., ISCR Case No. 12-01295 at 3 (App. Bd. Jan. 20, 2015).

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 burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. See, e.g., ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; see, AG ¶ 1(d).

## Analysis

### Guideline F: Financial Considerations

The security concern under this guideline is set out in AG ¶ 18:

Failure 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 or sensitive information. . . .

The relevant disqualifying conditions under AG ¶ 19 include:

(f) failure to file or fraudulently filing annual Federal, state, or local income tax returns or failure to pay annual Federal, state, or local income tax as required.

Applicant's admissions and the documentary evidence are sufficient to establish the disqualifying condition above.

The following mitigating conditions under AG ¶ 20 are potentially relevant:

(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;

(e) the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue; and

(g) the individual has made arrangements with the appropriate tax authority to file or pay the amount owed and is in compliance with those arrangements.

Applicant failed to file tax several years of tax returns when his extensions expired after leaving the combat or contingency zone. He did not meet his obligation to file tax returns when due. After he filed his 2012 return in 2013, he began a multi-year "discussion" with the IRS over which unfiled tax returns were required to be filed. It was determined that he owed an additional tax for tax year 2010, and that he should not bother to file returns for 2005 to 2009, and 2011.

The Appeal Board has long held:

Security requirements include consideration of a person's judgment, reliability, and a sense of his or her legal obligations. *Cafeteria & Restaurant Workers Union, Local 473 v. McElroy*, 284 F.2d 173, 183 (D.C. Cir. 1960), *aff'd*, 367 U.S. 886 (1961). Failure to comply with Federal tax laws suggests that an applicant has a problem with abiding by well-established government rules and regulations. Voluntary compliance with rules and regulations is essential for protecting classified information. See, e.g., ISCR Case No. 14-04437 at 3 (App. Bd. Apr. 15, 2016).

Applicant's complicated tax odyssey arose because of multiple years of work in a combat zone that triggered automatic extensions to file Federal tax returns, and his failure to follow-up on required returns before his extensions expired. He resumed filing his 2012 tax return when due, and filed all subsequent returns on time, while diligently communicating with the IRS about filing his past-due returns. The matter was settled to the satisfaction of the IRS, he filed his 2012 to 2017 returns on time, and he has no unpaid Federal tax obligations.

Overall, I find that Applicant has adequately addressed his delinquent tax return obligations, and has established a six-year track record of on-time filings. I find sufficient evidence that his financial status and tax obligations are under control, and that similar problems are unlikely to recur. I find mitigating conditions AG ¶ 20 (a) and (g) 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 or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes.

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

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine national security eligibility or trustworthiness, or award fiduciary responsibilities.

When falsification allegations are controverted, as here, the Government has the burden of proving the allegations. An omission, standing alone, does not prove

falsification. An administrative judge must consider the record evidence as a whole to determine an applicant's state of mind at the time of the omission.<sup>7</sup> An applicant's level of education and business experience are relevant to determining whether a failure to disclose relevant information on a security clearance application was deliberate.<sup>8</sup>

Applicant failed to report unfiled tax returns for tax years 2008 and 2011 in his 2015 SCA, but listed his unfiled 2009 return and discussed the work he was doing to file his 2010 return. The evidence is insufficient to show that Applicant deliberately or intentionally failed to report these unfiled tax returns. He adequately refuted the allegation and convincingly showed that his failure to report the 2009 return was an error in calculation; rather he listed 2009. Additionally, he stated that his failure to report his 2011 unfiled return resulted from his understanding that it was not considered past-due by the IRS. These are plausible explanations for his omissions on his SCA, and intentional falsification is not supported by the evidence. AG ¶ 16(a) is not applicable. Personal conduct security concerns are concluded for Appellant.

### **Whole-Person Concept**

Under AG ¶¶ 2(a), 2(c), and 2(d), the ultimate determination of whether to grant national security eligibility must be an overall commonsense judgment based upon careful consideration of the guidelines and the 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(d).<sup>9</sup> Although adverse information concerning a single criterion may not be sufficient for an unfavorable eligibility determination, the individual may be found ineligible if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility, or unstable behavior. AG ¶ 2(e).

I considered all of the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my findings of fact and comments under Guidelines F and E in my whole-person analysis. Applicant's efforts to resolve his tax-filing obligations satisfactorily complied with IRS directions. He has shown a six-year tax filing record, and has no further IRS obligations. Applicant carried his burden of proof to establish substantial mitigation. The personal conduct allegation is unfounded.

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<sup>7</sup> See ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004).

<sup>8</sup> ISCR Case No. 08-05637 (App. Bd. Sep. 9, 2010).

<sup>9</sup> (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.

Accordingly, I conclude that it is clearly consistent with the national security interests of the United States to grant or continue eligibility for access to classified information.

### **Formal Findings**

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline F:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	For Applicant

### **Conclusion**

I conclude that it is clearly consistent with the national security interests of the United States to grant or continue Applicant's eligibility for access to classified information. Clearance is granted.

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Gregg A. Cervi  
Administrative Judge