



DEPARTMENT OF DEFENSE  
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of: )  
 )  
 [Redacted] ) ISCR Case No. 19-01431  
 )  
 Applicant for Security Clearance )

**Appearances**

For Government: Kelly Folks, Esq., Department Counsel  
For Applicant: *Pro se*

01/16/2020

---

**Decision**

---

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guideline F (Financial Considerations). Eligibility for access to classified information is denied.

**Statement of the Case**

Applicant submitted a security clearance application on August 31, 2016. On July 19, 2019, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guideline F. 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 adjudicative guidelines (AG) promulgated in Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (December 10, 2016).

Applicant answered the SOR on August 9, 2019, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on September 19, 2019, and the case was assigned to me on October 15, 2019. On October 25, 2019, the

Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for November 13, 2019. I convened the hearing as scheduled. Government Exhibits (GX) 1 and 2 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibits (AX) A through E, which were admitted without objection. DOHA received the transcript (Tr.) on December 18, 2019.

### Findings of Fact

In Applicant's answer to the SOR, he admitted the allegations in SOR ¶¶ 1.a and 1.b and denied the allegations in SOR ¶¶ 1.c and 1.d. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 60-year-old engineer employed by a defense contractor. He began his employment immediately after receiving his bachelor's degree in June 1982. He married in July 1982 and has three adult daughters, two of whom no longer live with him. He has held a security clearance since September 1982.

The SOR alleges that Applicant failed to timely file his federal and state income tax returns and pay the taxes due for tax years 2010 through 2017. The table below reflects Applicant's record of late tax filings for the years alleged in the SOR, plus 2018, when he ended his track record of late filings. The information in the table is set out in GX 2 at 2-14.

<b>Tax Year</b>	<b>Date Federal Return Filed</b>	<b>Date State Return Filed</b>	<b>Federal Tax Due or Refund</b>	<b>State Tax Due Or Refund</b>
2010	8/29/2013	8/29/2013	Refund \$1,623	Refund \$91
2011	6/29/2014	6/24/2014	Refund \$982	Due \$65
2012	4/18/2016	4/18/2016	Refund \$711	Refund \$33
2013	4/15/2017	5/1/2017	Refund \$30	Due \$253
2014	4/12/2018	4/12/2018	Refund \$741	Due \$293
2015	3/20/2019	3/20/2019	Refund \$4	Due \$317
2016	3/29/2019	3/29/2019	Due \$821	Refund \$159
2017	4/8/2019	4/8/2019	Due \$1,292	Due \$414
2018	4/14/2019	4/14/2019	Due \$4,112	Due \$439

Applicant prepared his own tax returns, using commercial tax-preparation software. (Tr. 47.) In April 2009, he was not prepared to file his federal income tax return for 2008, and he obtained an extension until October 15, 2009. On October 15, 2009, he had continued to procrastinate. He called the IRS, told the IRS representative that he believed he was entitled to a refund for 2008, and asked about the repercussions of not filing by October 15, 2009. Applicant testified that the representative told him that there would be no penalty if he was entitled to a refund, but that his refund would be forfeited if he did not file his return within three years of the original due date. Up to this time, Applicant had always received refunds. The federal

refunds ranged for \$1,723 to \$4,038, and the state refunds ranged from \$99 to \$348. (Tr. 21-22.)

After filing his 2008 return, Applicant adopted a three-year deadline for filing late federal and state returns. (Tr. 23.) Each tax year, he requested a six-month extension for his federal return and then filed in accordance with his self-imposed three-year deadline. (Tr. 46.) He never requested an additional extension beyond the automatic six-month extension. (Tr. 63.) He could not recall when he started requesting extensions from the state. (Tr. 64.) He did not consider the impact of late filings on his security clearance until he was interviewed by a security investigator in July 2018. (Tr. 44.) He admitted at the hearing that his attitude toward his obligations to timely file tax returns was “lackadaisical.” (Tr. 16.)

Applicant knew that his tax liability increased as his children became adults and he could no longer take deductions for them. In an effort to ensure that he would not owe federal taxes, he prepaid \$1,000 with each extension to file for 2014, 2015, and 2016, and he prepaid \$3,500 with his 2017 request for an extension of time to file. However, his prepayments were insufficient to avoid a federal tax liability for 2016 and 2017. (GX 2 at 8-12, 25.) When he filed his state income tax return for 2013 in May 2017, he sent a payment of \$500 to offset any state taxes due for 2016, which resulted in a refund for 2016. (Tr. 26.) As of June 27, 2019, Applicant had filed his federal and state tax returns and paid all federal and state income taxes due. (Answer to SOR at 25-28.)

Except for Applicant’s failures to timely file federal and state income tax returns and timely pay the taxes due, he has no other history of financial irresponsibility. His credit record reflects no derogatory information. (AX B.) He earns about \$121,000 per year. His wife is a retired educator, receives a pension, and works occasionally as a substitute teacher. (Tr. 31.)

Applicant’s current supervisor, who has worked with him for 14 years, submitted a letter attesting to Applicant’s honesty and trustworthiness and opining that he should be allowed to retain his security clearance. (AX E.) Applicant’s department security representative, who has worked with him for 31 years, attested to his unquestionable ethics, integrity, and attention to detail. He believes that Applicant’s neglect of his obligation to timely file his tax returns was an anomaly and should not preclude him from holding a security clearance. (AX C.) A former peer who became Applicant’s department manager considers Applicant trustworthy, reliable, and worthy of retaining his security clearance. (AX D.)

### **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.

Eligibility for a security clearance 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 all available and reliable information about the person, past and present, favorable and unfavorable.

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. 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 (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 ISCR Case No. 15-01253 at 3 (App. Bd. Apr. 20, 2016).

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 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.

## 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. . . .

This concern is broader than the possibility that a person might knowingly compromise classified information to raise money. It encompasses concerns about a person's self-control, judgment, and other qualities essential to protecting classified information. A person who is financially irresponsible may also be irresponsible, unconcerned, or negligent in handling and safeguarding classified information. See ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012).

Applicant's admissions and the documentary evidence in the record establish the following disqualifying conditions under this guideline:

AG ¶ 19(c): a history of not meeting financial obligations; and

AG ¶ 19(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.

The following mitigating conditions are potentially applicable:

AG ¶ 20(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; and

AG ¶ 20(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.

AG ¶ 20(a) is not established. Applicant's neglect of his federal and state tax obligations was recent, frequent, and did not occur under circumstances making recurrence unlikely.

AG ¶ 20(g) is established. Applicant has filed all his past-due tax returns and paid the taxes due. However, Applicant's eventual compliance with his tax obligations does not end the inquiry. A security clearance adjudication is not a tax-enforcement

procedure. It is an evaluation of an individual's judgment, reliability, and trustworthiness. The fact that Applicant has filed his past-due returns "does not preclude careful consideration of Applicant's security worthiness based on longstanding prior behavior evidencing irresponsibility." ISCR Case No. 12-05053 (App. Bd. Oct. 30, 2014). He did not abandon his three-year rule until he was interviewed by a security investigator in July 2018 and realized that his security clearance was in jeopardy. His belated action in an effort to protect his security clearance "does not reflect the voluntary compliance of rules and regulations expected of someone entrusted with the nation's secrets." ISCR Case No. 14-05794 at 7 (App. Bd. July 7, 2016)

### **Whole-Person Concept**

Under AG ¶ 2(c), 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. In applying the whole-person concept, an 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. An administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d):

- (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.

I have incorporated my comments under Guideline F in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under that guideline, but some warrant additional comment. Applicant has worked for a defense contractor and held a security clearance for many years. He was candid and remorseful at the hearing. On the other hand, he admitted that his failure to timely file his returns was due to procrastination and a lackadaisical attitude about his tax obligations. He may be a conscientious employee and a careful manager of his personal finances, but he has offered no excuse other than procrastination for failing to carry out his basic duty as a citizen to timely file his tax returns. He is an intelligent, well-educated adult, but his explanation for his failures to timely file his returns conflates the rule for forfeiture of refunds with the legal requirement to file timely returns.

Although Applicant has established the mitigating condition in AG ¶ 20(g), the establishment of some mitigating evidence does not compel a favorable security-clearance decision. ISCR Case No. 11-14784 (App. Bd. Jan. 17, 2014). "Once a concern arises regarding an applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance." ISCR Case No.

09-01652 at 3 (App. Bd. Aug. 8, 2011), *citing Dorfmont v. Brown*, 913 F.2d 1399, 1401 (9<sup>th</sup> Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). Applicant has not overcome this presumption. After weighing the disqualifying and mitigating conditions under Guideline F, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns raised by his intentional and repeated failures to timely file his federal and state income tax returns and pay the taxes due.

### **Formal Findings**

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline F (Financial Considerations): AGAINST APPLICANT

Subparagraphs 1.a and 1.b: Against Applicant

Subparagraphs 1.c and 1.d: For Applicant

### **Conclusion**

I conclude that it is not clearly consistent with the national security interests of the United States to continue Applicant's eligibility for access to classified information. Clearance is denied.

LeRoy F. Foreman  
Administrative Judge