DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
----------	)	ISCR Case No. 06-23822
SSN: ----------	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Gregg A. Cervi, Esq., Department Counsel
For Applicant: *Pro se*

July 16, 2010

Decision

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department's intent to deny or revoke his eligibility for a security clearance to work in the defense industry. The record evidence shows Applicant was denied program access in 2005, in part, because he claimed his adult brother as a dependent on his 1995, 2002, and 2003 federal income tax returns. The other governmental agency (OGA) that took this action based its denial, in part, on admissions Applicant made in 2003 that he fraudulently claimed his brother as a dependent for 1995 and 2002. Although the evidence as a whole is insufficient to satisfy the willfulness requirement that applies to federal criminal-tax offenses, it does raise unmitigated personal conduct security concerns. Accordingly, as explained in further detail below, this case is decided against Applicant.

Statement of the Case

Acting under the relevant Executive Order and DoD Directive,[1] on November 4, 2009, the Defense Office of Hearings and Appeals (the Agency) issued a statement of reasons (SOR) explaining it was unable to find it is clearly consistent with the national interest to grant Applicant access to classified information. The SOR is similar to a complaint, and it detailed the factual basis for the action under the security guidelines known as Guideline E for personal conduct and Guideline J for criminal conduct. The gravamen of the SOR, under both guidelines, is that Applicant fraudulently claimed his brother as a dependent on his federal income returns for tax years 1995, 2002, and 2003. The SOR also recommended that the case be submitted to an administrative judge to decide whether to deny or revoke Applicant's security clearance.

Applicant answered the SOR in a timely fashion. Neither Applicant nor Department Counsel requested a hearing, and so, the case will be decided on the written record.[2]

On or about February 24, 2010, the Agency submitted its written case consisting of all relevant and material information that could be adduced at a hearing.[3] This so-called file of relevant material (FORM) was mailed to Applicant and received by him on March 31, 2010. He then had 30 days to submit a response setting forth objections, rebuttal, extenuation, mitigation, or explanation. He responded in a timely fashion with two written submissions. The case was assigned to me April 30, 2010.

Findings of Fact

Based on the record evidence as a whole, the following facts are established by substantial evidence.

Applicant is a 39-year-old employee of a federal contractor. He married for the third time in 2005; his previous marriages ended in divorce. He lives with his wife and two children. He is software engineer for a large publicly-traded company engaged in defense contracting. His employment history includes honorable service in the U.S. Armed Forces. He served in the Navy during 1989–1995; he served in the Air Force Reserve (active status) during 1995–1997; and he served in the Air Force Reserve

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[1] This case is adjudicated under Executive Order 10865, *Safeguarding Classified Information within Industry*, signed by President Eisenhower on February 20, 1960, as amended, as well as DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive). In addition, the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), effective within the Defense Department on September 1, 2006, apply to this case. The AG were published in the Federal Register and codified in 32 C.F.R. § 154, Appendix H (2006). The AG replace the guidelines in Enclosure 2 to the Directive.

[2] Directive, Enclosure 3, ¶ E3.1.7.

[3] The file of relevant material consists of Department Counsel's written brief and supporting documents, some of which are identified as exhibits in this decision.

(inactive status) during 1997–2000. He served as an enlisted servicemember attaining the pay grade of E-5.

Applicant enrolled in college at a major state university upon his discharge from active military duty in 1995. He earned a bachelor's degree in computer science in about June 1998. He then began his first job as a software engineer for a large publicly-traded company. He worked there until May 2001, when he accepted a software engineer position for a privately-held company. That company was subsequently acquired by his current employer, a large publicly-traded company engaged in defense contracting.

The genesis of this case may be traced to about March 2005, when the OGA denied Applicant program access, which is also known as access to sensitive compartmented information (SCI). The OGA's denial letter provided the specific reasons, in relevant part, as follows:

> A review of your file indicates you were first submitted for program access in May 2003. Although that request was canceled in January 2004, you were resubmitted for program access in February 2004. During security processing, you consented to a polygraph [examination] regarding criminal activity. During the polygraph [examination] in August 2003, you admitted fraudulently claiming your brother as a dependent on your 1995 and 2002 federal income tax returns. You stated your brother had been in and out of prison all of his adult life. Although you had no contact with your brother in 1995, you knew he was not in prison and made the decision to claim him as a dependent on your tax return. In January 2003 your brother showed up at your home after his release from prison, and you allowed him to stay with you for several weeks and provided him with financial assistance. You explained you claimed your brother as a dependent for the 2002 tax year because you used part of your 2002 income to support him and estimated saving approximately $1,000 on your taxes because of this deduction. You admitted these deductions were wrong and could not be justified if challenged by the Internal Revenue Service (IRS).
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> When contacted by a government representative in December 2004, you stated you also claimed your brother as a tax deduction for 2003 because you provided him with shelter and financial assistance for two weeks in 2003. You believed claiming your brother as a dependent fell into a gray area and indicated you would be willing to pay any taxes owed if required to do so.[4]

[4] Exhibit 6 (OGA letter, dated March 30, 2005).

The OGA's file is not included in the FORM. As a result of the OGA's denial, Applicant's access to a Department of Defense special access program was terminated in April 2005.[5]

Applicant sought a review or appeal of the OGA's denial. His overall contention was that he filed his federal income tax returns as he understood the applicable IRS rules and regulations at the time.[6] In October 2005, Applicant withdrew his appeal of the decision to deny him program access.[7] He did so, although he still disagreed with the adverse decision, due to ongoing medical or health issues.

In November 2005, Applicant submitted a security clearance application that is the basis for this case.[8] In doing so, he acknowledged having a clearance or access authorization denied, and he provided a detailed explanation in the remarks section of the application. He was apparently granted a security clearance by the Defense Department, because in March 2006 the Defense Security Service (DSS) advised Applicant that the security clearance granted to him in connection with his current employment was suspended.[9] The DSS letter explained that the suspension, which is an interim action, was based on the OGA's decision to deny him access to SCI.

More than two years later in September 2008, Applicant was interviewed by a governmental representative as part of the background investigation. The result of that interview was a signed affidavit regarding his federal income tax returns for 1995, 2002, and 2003.[10] In the affidavit, Applicant explained he believed he was entitled to claim his brother as a dependent since he was the main source of support for his brother during those years. He acknowledged that he may have been wrong for 1995, but he was unable to obtain any information from the IRS about his 1995 return.

In response to the FORM, Applicant, expressed frustration with the security clearance process and maintained that he is hiding nothing and has not engaged in any intentional criminal or fraudulent activity. He explained his position, in part, as follows:

> As stated in my Answer, I have repeatedly advised every investigator who has asked me that I realize now (as of 2005 when these questions were being asked) that I was wrong about claiming my brother as a dependent on my 1995 tax return, but that I did not intentionally or fraudulently

[5] Exhibit 6 (DoD letter, dated April 5, 2005).

[6] Exhibit 6 (Applicant's letters, dated April 15, 2005, and April 27, 2005).

[7] Exhibit 6 (OGA letter, dated October 20, 2005).

[8] Exhibit 5.

[9] Exhibit 6 (DSS letter, dated March 3, 2006).

[10] Exhibit 6 (Applicant's affidavit, as transcribed in typewritten form).

> undertake that action. As stated in all of the evidence, I attempted to correct this but was unable to obtain a copy of my return and was advised that ultimately amending the return would raise more questions than it answered. That year [1995] I only had about $10K in total income. As I also stated in my Answer, I have repeatedly stated that my ability to claim my brother as a dependent in 2002 was in a gray area and that I believe I had the ability to claim my brother as a dependent in 2003 based upon the fact that I was his sole source of income prior to his incarceration.[11]
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> * * * *
>
> When asked about the 1995 return, I explained all the facts to the best of my ability and did attempt to correct the situation as stated in my prior documents. When I was asked about the 2002 return, I openly stated, based upon what the investigator was telling me, that it was possible that claiming my brother as a dependent was incorrect because although I used 2002 funds to support him in 2003, I did not actually give him the money in 2002. But I did not know that when I filed my returns for 2002, so I was not admitting to defrauding the government, as has been asserted. When questioned by the investigator in 2004, I also *voluntarily disclosed* to the investigator that I had claimed my brother for 2003. I wanted to be sure he knew that information if he believed what I had done in 2002 was incorrect. I asked the investigator at the time if I should amend my 2002 return and he stated that it was not necessary based upon their investigation and it would not likely have an effect one way or the other on my security clearance. In addition, with regard to my 2003 return, as I have stated, I asked the advice of my roommate/attorney on claiming my brother. I had no reason to believe that what I did was inappropriate.[12]

A dependency exemption, the terminology used by the IRS, is an exemption allowed for each person claimed as a dependent.[13] An exemption reduces a taxpayer's taxable income by the amount allowed for that tax year. For 1995, a taxpayer was allowed to deduct $2,500 for each exemption claimed; for 2002 it was $3,000; and for 2003 it was $3,050. A dependency exemption is allowed if the taxpayer can show that all five of the dependency tests are met. The five tests include a support test, which requires the taxpayer to provide more than half of a person's total support during the calendar year.

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[11] Applicant's response to FORM at 1.

[12] Applicant's response to FORM at 3–4 (emphasis in original).

[13] *See* Exhibits 7–9 for all information in this paragraph (IRS Publication 501 on Exemptions, Standard Deduction, and Filing Information, for tax years 1995, 2002, and 2003).

To sum up, and in light of the evidence as a whole, I make specific findings of fact as follows:

- Applicant admits filing federal income tax returns for tax years 1995, 2002, and 2003, wherein he claimed his brother as a dependency exemption. To date, none of those returns were amended, modified, or otherwise changed.

- For the three years in question, the Government has not produced any evidence showing the IRS has conducted an audit of Applicant's returns; there is no indication the IRS has assessed additional tax or interest against Applicant; there is no indication the IRS has imposed a penalty, based on civil fraud or civil negligence, against Applicant; and there is no indication the IRS has referred this matter to its criminal investigation division, which investigates reports of violations of federal criminal-tax statutes.

Policies

This section sets forth the general principles of law and policies that apply to an industrial security clearance case. The only purpose of a clearance decision is to decide if an applicant is suitable for access to classified information. The Department of Defense takes the handling and safeguarding of classified information seriously because it affects our national security, the lives of our servicemembers, and our operations abroad.

It is well-established law that no one has a right to a security clearance.[14] As noted by the Supreme Court in *Department of Navy v. Egan*, "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."[15] Under *Egan,* Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

A favorable clearance decision establishes eligibility of an applicant to be granted a security clearance for access to confidential, secret, or top-secret information.[16] An unfavorable decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.[17]

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[14] *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988) ("it should be obvious that no one has a 'right' to a security clearance"); *Duane v. Department of Defense*, 275 F.3d 988, 994 (10th Cir. 2002) (no right to a security clearance).

[15] 484 U.S. at 531.

[16] Directive, ¶ 3.2.

[17] Directive, ¶ 3.2.

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.[18] The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.[19] An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.[20] In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.[21] In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.[22] The DOHA Appeal Board has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.[23]

The AG set forth the relevant standards to consider when evaluating a person's security clearance eligibility, including disqualifying conditions (DC) and mitigating conditions (MC) for each guideline. In addition, each clearance decision must be a commonsense decision based upon consideration of the relevant and material information, the pertinent criteria and adjudication factors, and the whole-person concept.

The Government must be able to have a high degree of trust and confidence in those persons to whom it grants access to classified information. The decision to deny a person a security clearance is not a determination of an applicant's loyalty.[24] Instead, it is a determination that an applicant has not met the strict guidelines the President has established for granting eligibility for access.

Analysis

Under Guideline J for criminal conduct,[25] the suitability of an applicant may be questioned or put into doubt when that applicant has a criminal history record regardless of whether the criminal conduct at issue has been subject to prosecution and adjudication in a court of law. The overall concern under Guideline J is that:

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[18] ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

[19] Directive, Enclosure 3, ¶ E3.1.14.

[20] Directive, Enclosure 3, ¶ E3.1.15.

[21] Directive, Enclosure 3, ¶ E3.1.15.

[22] *Egan*, 484 U.S. at 531.

[23] ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

[24] Executive Order 10865, § 7.

[25] AG ¶¶ 30, 31, and 32 (setting forth the security concern and the disqualifying and mitigating conditions).

> Criminal activity creates doubts about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules, and regulations.[26]

As set forth in SOR ¶ 2, the issue here is whether Applicant engaged in criminal conduct by fraudulently claiming his brother as a dependency exemption on his federal income tax returns in 1995, 2002, and 2003. Nowhere in the SOR does it cite to or mention any particular law or statute that was violated by Applicant. For cases involving unadjudicated criminal conduct, like this case, the best practice is likely for the SOR to allege the criminal conduct by referring to the particular state or federal law or statute the Government contends was violated by an applicant. This may also be the best practice when alleging unadjudicated complex or white-collar crimes like criminal-tax offenses. Three of the more common offenses are tax evasion under 26 U.S.C. § 7201, willfully failing to file tax returns under 26 U.S.C. § 7203, and willfully filing false tax returns under 26 U.S.C. § 7206. Although the deficiency in the SOR might not satisfy the well-settled law that an SOR will be as detailed and comprehensive as permitted by national security, I am satisfied Applicant had sufficient notice of the allegations against him and an opportunity to respond. In addition, Applicant suffered no unfair prejudice because the criminal conduct allegation is decided for him as discussed below.

Given the criminal conduct allegations, it is necessary to briefly review general principles of criminal-tax law. In *United States v. Cheek*, the Supreme Court reviewed a series of tax cases and concluded that "the standard for the statutory willfulness requirement [for federal criminal-tax offenses] is the 'voluntary, intentional violation of a known legal duty.'"[27] The *Cheek* court also explained the Government's requirement to prove willfulness for criminal-tax offenses:

> Wilfulness, as construed by our prior decisions in criminal tax cases, requires the Government to prove that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty.[28]

Here, the evidence shows Applicant's use of the dependency exemption for tax years 1995, 2002, and 2003, was without factual support. Simply put, Applicant has not produced sufficient documentary evidence to prove that he was entitled to claim the dependency exemption. But when applying the willfulness requirement as articulated in *Cheek*, the evidence is insufficient to establish a voluntary and intentional violation of a known legal duty amounting to a federal criminal-tax offense. I am not persuaded the evidence rises to the level of criminal fraud (i.e., willful conduct). Accordingly, Guideline J is decided for Applicant.

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[26] AG ¶ 30.

[27] 498 U.S. 192, at 201 (1991).

[28] 498 U.S. at 201-02.

Turning to personal conduct under Guideline E,[29] it includes issues of false statements and credible adverse information that may not be enough to support action under any other guideline. The overall concern under Guideline E is that:

> Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations [that may] 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.[30]

As set forth in SOR ¶ 1, the issue here is that in 2005 the OGA denied Applicant program access for security concerns raised under criminal conduct and financial considerations. Applicant admits the OGA's denial, but disputes the basis for it. The basis, as alleged in the SOR, was Applicant's use of the dependency exemption for his federal income tax returns in 1995, 2002, and 2003, which are discussed below.

For tax year 1995, Applicant's use of the dependency exemption is without factual support, and he admits as much. But I have no concerns about Applicant's 1995 return because it appears he claimed the dependency exemption due to ignorance or a misunderstanding of the applicable rules or both. In 1995, Applicant was still a relatively young man of 24, fresh off of active duty in the Navy, and it is likely that he did not appreciate the nature and consequences of his actions.

The 2002 and 2003 returns are a different matter. By then, Applicant had attended college, earned a bachelor's degree, and was working as a software engineer. He was several years older and more experienced in the ways of the world by then. For tax year 2002, Applicant's use of the dependency exemption is without factual support because he did provide sufficient information to meet the support test for a dependency exemption. He provided the financial support to his brother in tax year 2003, but says he used 2002 funds to do so. Standing alone, his explanation or justification is highly questionable if not deceptive.

For tax year 2003, Applicant's use of the dependency exemption is also without factual support. Although he claims he provided financial support to his brother for a period in early 2003, before his brother's incarceration, Applicant has not provided sufficient documentary evidence to meet the support test for a dependency exemption. Moreover, his use of the dependency exemption for the 2003 return came after he had been put on notice that it was an issue or concern for security officials. That action is difficult to reconcile with simple common sense and it is indicative of intentional conduct.

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[29] AG ¶¶ 15, 16, and 17 (setting forth the security concerns and the disqualifying and mitigating conditions).

[30] AG ¶ 15.

Taken together, using the dependency exemption for both tax years 2002 and 2003 amounts to a deceptive or fraudulent financial practice. In other words, the evidence shows he engaged in intentional—but not willful—conduct in order to illegally reduce his federal tax liability.[31] This is sufficient to establish credible adverse information supporting an assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, or unwillingness to abide by rules and regulations under Guideline E.[32]

There are several conditions that may mitigate security concerns under Guideline E.[33] The seven conditions are as follows:

> (a) The individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;
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> (b) The refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;
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> (c) The offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;
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> (d) The individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;
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> (e) The individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress;
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> (f) The information was unsubstantiated or from a source of questionable reliability; and

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[31] *See Black's Law Dictionary* 731 (Bryan A. Garner ed., 9th ed., West 2009) ("The distinction between an intentional (i.e., *civil*) and willful (i.e., *criminal*) fraud is not always clear, but *civil fraud* carries only a monetary, noncriminal penalty.").

[32] AG ¶ 16(d).

[33] AG ¶ 17.

(g) Association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

Of those mitigating conditions, the most pertinent here is subparagraph (c). Certainly, the relevant circumstances surrounding the conduct took place several years ago during 2003–2004, when Applicant filed his returns for tax years 2002 and 2003. It did not involve a large sum of money. There is no indication that Applicant has engaged in similar tax-related conduct. Indeed, he has not provided financial support to his brother since early 2003. Applicant receives credit in mitigation for these matters.

What is missing here is substantial evidence of reform and rehabilitation. First, one obvious remedy is filing amended returns for tax years 2002 and 2003. But Applicant has not filed amended returns, and he is unlikely to do so because that action may trigger an audit by the IRS. Second, he could have presented persuasive evidence to support his belief that the dependency exemption was valid for his 2002 and 2003 returns. Considering this matter has been ongoing since about 2005, Applicant should have had ample time and resources to obtain an opinion letter, from a certified public accountant, an enrolled agent, a tax attorney, or another tax expert, validating his use of the dependency exemption. Had Applicant taken either of these actions, neither of which is greatly burdensome, I may have decided this case for him. Although there is some evidence in mitigation, the credit in mitigation is insufficient to overcome the security concerns. Accordingly, Guideline E is decided against Applicant.

To conclude, the facts and circumstances surrounding Applicant's use of the dependency exemption for his 2002 and 2003 federal income tax returns justifies current doubts about his judgment, reliability, and trustworthiness. Following *Egan* and the clearly-consistent standard, I resolve these doubts in favor of protecting national security. In reaching this conclusion, I gave due consideration to the whole-person concept[34] and Applicant's favorable evidence. Nevertheless, Applicant did not meet his ultimate burden of persuasion to obtain a favorable clearance decision. This case is decided against Applicant.

Formal Findings

The formal findings on the SOR allegations are as follows:

Paragraph 1, Guideline E:	Against Applicant
Subparagraph 1.a:	Against Applicant
Subparagraph 1.a(1):	Against Applicant
Subparagraph 1.a(2):	Against Applicant
Subparagraph 1.a(3):	For Applicant

[34] AG ¶ 2(a)(1) – (9).

Paragraph 2, Guideline J:	For Applicant
Subparagraph 2.a:	For Applicant

Conclusion

In light of the record as a whole, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Michael H. Leonard
Administrative Judge