



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 14-06816

Appearances

For Government: Chris Morin, Esquire, Department Counsel

For Applicant: *Pro se*

09/16/2015

Decision

GALES, Robert Robinson, Administrative Judge:

Applicant failed to mitigate the security concerns regarding financial considerations and personal conduct. Eligibility for a security clearance and access to classified information is denied.

Statement of the Case

On June 3, 2014, Applicant applied for a security clearance and submitted an Electronic Questionnaire for Investigations Processing (e-QIP) version of a Security Clearance Application.¹ On April 18, 2015, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) to him, pursuant to Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended and modified; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended and modified (Directive); and *Adjudicative Guidelines for Determining Eligibility For Access to Classified Information* (effective within the DOD on September

¹ GE 1 ((e-QIP), dated June 3, 2014).

1, 2006) (AG) for all adjudications and other determinations made under the Directive. The SOR alleged security concerns under Guidelines F (Financial Considerations) and E (Personal Conduct), and detailed reasons why the DOD adjudicators could not make an affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The SOR recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

Applicant acknowledged receipt of the SOR on April 29, 2014. In a sworn statement, dated May 19, 2015, Applicant responded to the SOR allegations and requested a hearing before an administrative judge. On June 16, 2015, Department Counsel indicated the Government was prepared to proceed. The case was assigned to me on July 9, 2015. A Notice of Hearing was issued on July 31, 2015. I convened the hearing, as scheduled, on August 25, 2015.

During the hearing, two Government exhibits (GE 1 and GE 3), four Applicant exhibits (AE A through AE D), and one administrative exhibit were admitted into evidence without objection. Applicant testified. The transcript of the hearing (Tr.) was received on September 2, 2015. The record closed on September 2, 2015.

Findings of Fact

In his Answer to the SOR, Applicant admitted the factual allegations in the SOR under financial considerations (§ 1.a.) and personal conduct (§ 2.a.). Applicant's admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact.

Applicant is a 57-year-old employee of a defense contractor. He has been serving as a naval architect since November 2007.² He previously served in similar positions with other companies beginning in April 2003.³ A May 1976 high school graduate,⁴ Applicant received a bachelor's degree in naval architecture and marine engineering in May 1981 and took a semester of additional credits in early 2004, but did not earn another degree.⁵ Applicant has never served with the United States military.⁶ He was granted a confidential security clearance in 1986 and a secret security

² GE 1, *supra* note 1, at 11-12; Tr. at 27.

³ GE 1, *supra* note 1, at 13-16.

⁴ GE 1, *supra* note 1, at 10.

⁵ GE 1, *supra* note 1, at 10-11; Tr. at 25-26, 51-52.

⁶ GE 1, *supra* note 1, at 16; Tr. at 26.

clearance in 2003.⁷ He was married the first time in May 1985 and divorced in October 1991. He married again in February 2007.⁸ He has a son, born in 1987.⁹

Financial Considerations

There was nothing unusual about Applicant's finances except that he did not file his federal or state income tax returns for the tax years 2011, 2012, and 2013, as required by law.¹⁰ With one exception when he was overseas and had a professional prepare his tax returns, Applicant generally prepared and filed his own federal and state income tax returns using a computer program or by hand.¹¹ He attributed his failures to file his returns for those tax years to evolving reasons: in his June 2014 e-QIP, he said he needed to get his tax returns from the previous year;¹² during his June 2014 interview with an investigator from the U.S. Office of Personnel Management (OPM), he said it was solely procrastination, and that there were no events beyond his control that prohibited him from filing the tax returns as required;¹³ in his Answer to SOR in May 2015, it was because he was concerned that he was missing some necessary, but unspecified, information that should be included in his returns, and that he suffered a computer failure that extended his delays in filing the returns;¹⁴ and during his August 2015 hearing, Applicant said there was a combination of procrastination in failing to find some of his wife's certificates of deposit (CDs) or an individual retirement account (IRA), a printer breakdown, juggling work requirements, his wife's health issues, and general

⁷ GE 1, *supra* note 1, at 40.

⁸ GE 1, *supra* note 1, at 19-21; Tr. at 26.

⁹ GE 1, *supra* note 1, at 22-23; Tr. at 26.

¹⁰ The legal requirement to file a federal income tax return is based upon certain conditions, including an individual's gross income and other enumerated conditions. Once it is determined that there is an obligation to so file, the following applies:

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return, keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than \$25,000 (\$100,000 in the case of a corporation), or imprisoned not more than 1 year, or both, together with the costs of prosecution. In the case of any person with respect to whom there is a failure to pay any estimated tax, this section shall not apply to such person with respect to such failure if there is no addition to tax under section 6654 or 6655 with respect to such failure. In the case of a willful violation of any provision of section 60501, the first sentence of this section shall be applied by substituting "felony" for "misdemeanor" and "5 years" for "1 year".

26 U.S.C. § 7203, *Willful failure to file return, supply information, or pay tax*

¹¹ Tr. at 34.

¹² GE 1, *supra* note 1, at 41-42.

¹³ GE 2 (Personal Subject Interview, dated June 25, 2014), at 5.

¹⁴ Applicant's Answer to SOR, dated May 19, 2015, at 1.

life complications.¹⁵ Applicant also repeatedly referred to the fact that since he expected to receive refunds each year, he was not concerned about filing late. He failed to see the urgency and was not motivated to do so, because by failing to file his income taxes on time, the government was benefiting from interest-free loans.¹⁶

During his OPM interview, Applicant stated an intention to file his delinquent income tax returns, beginning with the oldest first, and have all of the returns completed by the 2014 tax filing date, essentially April 15, 2015.¹⁷ They were not. Applicant filed his federal and state income tax returns for 2014 on April 15, 2015,¹⁸ and he prepared his delinquent federal income tax returns, but as of the date of the hearing, those returns – all Forms 1040A¹⁹ – had not been sent to the Internal Revenue Service (IRS).²⁰ Applicant acknowledged that while he had filed his state income tax return for 2011, he had still not filed his state income tax returns for the tax years 2012 and 2013.²¹ There is no evidence that Applicant has received counseling related to the filing of his income tax returns.

Applicant's adjusted gross income in 2011 was \$83,446.03;²² in 2012, it was \$84,352.59;²³ in 2013, it was \$89,129.13;²⁴ and in 2014, it was \$91,664.67.²⁵ Based on the anticipated filings, it appears that Applicant should receive refunds for each such year, minus interest and penalties for delinquent filings, of between \$6,500 and \$6,900.²⁶

¹⁵ Tr. at 36-37, 40-41. Applicant noted that his wife is a homemaker, without a salary, but that she had some CDs and an IRA. He characterized them as "relatively minor stuff," that related to annual interest fluctuations. Tr. at 53-54.

¹⁶ Tr. at 36-38.

¹⁷ GE 2, *supra* note 13, at 5.

¹⁸ AE D (Form 1040A (U.S. Individual Income Tax Return 2014), dated April 15, 2015); Tr. at 49.

¹⁹ AE A (Form 1040A (U.S. Individual Income Tax Return 2011), dated August 18, 2015); AE B (Form 1040A (U.S. Individual Income Tax Return 2012), dated August 19, 2015); AE C (Form 1040A (U.S. Individual Income Tax Return 2013), undated and unsigned).

²⁰ Tr. at 40.

²¹ Tr. at 48-49.

²² AE A, *supra* note 19, at 1.

²³ AE B, *supra* note 19, at 1.

²⁴ AE C, *supra* note 19, at 1.

²⁵ AE D, *supra* note 19, at 1.

²⁶ AE A, *supra* note 19, at 2; AE B, *supra* note 19, at 2; AE C, *supra* note 19, at 2.

Personal Conduct

(SOR ¶ 2.a.): As noted above, Applicant failed to timely file his federal and state income tax returns for 2011, 2012, and 2013.

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, “no one has a ‘right’ to a security clearance.”²⁷ 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. The President has authorized the Secretary of Defense or his designee to grant an applicant eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.”²⁸

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the AG. In addition to brief introductory explanations for each guideline, the AG list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant’s eligibility for access to classified information.

An administrative judge need not view the guidelines as inflexible, ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. The entire process is a conscientious scrutiny of a number of variables known as the “whole-person concept.” The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a meaningful decision.

In the decision-making process, facts must be established by “substantial evidence.”²⁹ The Government initially has the burden of producing evidence to establish a potentially disqualifying condition under the Directive, and has the burden of establishing controverted facts alleged in the SOR. Once the Government has produced substantial evidence of a disqualifying condition, under Directive ¶ E3.1.15, the applicant has the burden of persuasion to present evidence in refutation, explanation,

²⁷ *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

²⁸ Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

²⁹ “Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all contrary evidence in the record.” ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). “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).

extenuation or mitigation, sufficient to overcome the doubts raised by the Government's case. The burden of disproving a mitigating condition never shifts to the Government.³⁰

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours as well. It is because of this special relationship that the Government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information. Furthermore, "security clearance determinations should err, if they must, on the side of denials."³¹

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."³² Thus, nothing in this decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant's allegiance, loyalty, or patriotism. It is merely an indication the Applicant has or has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance. In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Analysis

Guideline F, Financial Considerations

The security concern relating to the guideline for Financial Considerations is set out in AG ¶ 18:

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. . . .

³⁰ See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

³¹ *Egan*, 484 U.S. at 531.

³² See Exec. Or. 10865 § 7.

The guideline notes a specific condition that could raise security concerns. Under AG ¶ 19(g), a “failure to file annual Federal, state, or local income tax returns as required. . .” may raise security concerns. Applicant failed to timely file his federal and state income tax returns for 2011, 2012, and 2013. As of the date of the hearing, only his state income tax return for 2011 had been filed, but the remaining returns still had not been filed. AG ¶ 19(g) has been established.

The guideline also includes examples of conditions that could mitigate security concerns arising from financial considerations. Under AG ¶ 20(a), the disqualifying condition may be mitigated where “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.” Also, under AG ¶ 20(b), financial security concerns may be mitigated where “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.” Evidence that “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” is potentially mitigating under AG ¶ 20(c).

AG ¶¶ 20(a), 20(b), and 20(c) do not apply. Applicant’s failures to timely file his state and federal income tax returns were neither infrequent nor under unusual circumstances; they constituted a routine practice that continued to occur over a multiyear period. As noted above, Applicant generally prepared and filed his own federal and state income tax returns using a computer program or by hand. He attributed his failures to file his returns for those tax years to evolving reasons: he needed to get his tax returns from the previous year; it was solely procrastination, and that there were no events beyond his control that prohibited him from filing the tax returns as required; it was because he was concerned that he was missing some necessary, but unspecified, information that should be included in his returns, and that he suffered a computer failure that extended his delays in filing the returns; there was a combination of procrastination in failing to find some of his wife’s CDs or an IRA, a printer breakdown, juggling work requirements, his wife’s health issues, general life complications; and since he expected to receive refunds each year, he was not concerned about filing late, he failed to see the urgency, and he was not motivated, for by failing to file his income taxes on time, the government was benefiting from interest-free loans. None of those enumerated reasons appears to qualify as something largely beyond Applicant’s control. It is his failure to see the urgency or to be motivated to do so, that sets Applicant’s actions apart. The law is to be complied with, and it is not up to the individual to determine the urgency, or generate the motivation, to comply with the law in a timely manner. In the absence of clear demonstrations that his behavior has been modified, there is nothing to indicate that it is unlikely to recur. Applicant’s actions under the circumstances presented continue to cast doubt on his current reliability, trustworthiness, or good judgment.³³

³³ See ISCR Case No. 09-08533 at 3-4 (App. Bd. Oct. 6, 2010).

Guideline E, Personal Conduct

The security concern relating to the guideline for Personal Conduct is set out in AG ¶ 15:

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.

The guideline notes several conditions that could raise security concerns. Under AG ¶ 16(d), it is potentially disqualifying if there is

credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information 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. This includes but is not limited to consideration of: . . . (3) a pattern of dishonesty or rule violations. . . .

Under AG ¶ 16(e), it is also potentially disqualifying if there is

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 failed to timely file his federal and state income tax returns for 2011, 2012, and 2013. AG ¶¶ 16(d) and 16(e) have been established.

The guideline also includes examples of conditions that could mitigate security concerns arising from personal conduct. AG ¶ 17(c) may apply if "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." Also, AG ¶ 17(e) may apply if "the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress."

AG ¶¶ 17(c) and 17(e) do not apply. As noted above, Applicant's failures to timely file his state and federal income tax returns were neither infrequent nor under unusual circumstances; they constituted a routine practice that continued to occur over a multiyear period. Applicant simply failed to determine the urgency, or generate the motivation, to comply with the law in a timely manner. His actions reflect a somewhat

cavalier attitude towards his legal responsibilities for timely filing income tax returns, as well as his questionable judgment, unreliability, and unwillingness to comply with established rules and regulations.

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.

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.

There is some evidence in favor of mitigating Applicant's behavior. He has been serving as a naval architect with his current employer since November 2007, and he has previously served in similar positions with other companies since April 2003. There is no evidence of substance abuse, security violations, or indebtedness caused by frivolous or irresponsible spending. There is also no evidence of a history of not meeting financial obligations. Applicant has no delinquent debts. While he failed to timely file his federal and state income tax returns for certain years, for those years, it was anticipated that he would receive refunds for over-withheld income tax.

The disqualifying evidence under the whole-person concept is more substantial than the mitigating evidence. Applicant routinely failed to timely file his federal and state income tax returns over a multi-year period. Although Applicant was aware of his failures, and the government's interest in them, he failed to make timely efforts to address his taxes after being interviewed by OPM. He promised to have his income tax returns filed by April 15, 2015, but they were not. He received the SOR on April 29, 2015, and the hearing was scheduled for August 25, 2015. Yet, despite the repeated warnings of the significance of his issue, Applicant failed to determine the urgency, or generate the motivation, to comply with the law. The state of the evidence is that Applicant finally prepared his federal income tax returns, but as of the hearing, he still had not filed them. He claimed he had filed one of his state income tax returns, but failed to submit documentation to confirm his claim. The other state income tax returns had not yet been prepared.

Applicant has demonstrated a very poor track record of timely filing federal and state income tax returns. His explanations for those failures are simply not credible. Overall, the record evidence leaves me with substantial questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has failed to mitigate the security concerns arising from his financial considerations and personal conduct. See AG ¶ 2(a)(1) through AG ¶ 2(a)(9).

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:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, 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.

ROBERT ROBINSON GALES
Administrative Judge