



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



In the matter of:	)	
	)	
-----	)	ISCR Case No. 09-08301
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Julie R. Mendez, Esquire, Department Counsel  
For Applicant: William Savarino

April 6, 2011

**Decision**

MARSHALL, Jr., Arthur E., Administrative Judge:

On June 14, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) enumerating security concerns arising under Guideline F (Financial Considerations). DOHA took action under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense (DOD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the DOD on September 1, 2006.

In a response received on July 21, 2010, Applicant admitted in part the sole allegation raised under Guideline F and requested a hearing before a DOHA administrative judge. On October 13, 2010, the SOR was amended to reiterate the same allegation under Guideline E (Personal Conduct). There is no evidence that the Applicant responded to the amendment. DOHA assigned the case to me on November 10, 2010. The parties proposed a hearing date of February 2, 2011, and a notice to that effect was issued on January 7, 2011. I convened the hearing as scheduled.

Applicant gave testimony, introduced one witness, and offered nine documents, which were accepted into the record without objection as exhibits (Ex.) A-I. The Government introduced four documents, which were accepted into the record without

objection as Exs. 1-4. The transcript (Tr.) of the proceeding was received on February 9, 2011. The record was then closed. Based on my review of the testimony, submissions, and exhibits, I find Applicant failed to meet his burden of mitigating security concerns related to financial considerations. Clearance is denied.

### Findings of Fact

Applicant is a 47-year-old aircraft maintenance specialist who has worked for the same government contractor since 2004. He served in the United States Marine Corps Reserves in the 1980s. He is married and has four children. Applicant earned a high school diploma and has completed some post-secondary studies.

In June 2004, Applicant was sent abroad for work. For three months, he settled in to his new assignment and prepared for his wife and children's arrival in September 2004. Prior to his relocation, his company did not give him any "advice or instructions on what to expect as an ex-pat]" living and working abroad.<sup>1</sup> Arrangements were made so that Applicant's salary would be directly deposited to a United States bank account when he was abroad. No withholdings were to be deducted for federal taxes from his salary deposits.<sup>2</sup> Applicant was accustomed to filing federal income taxes annually with the help of an accountant.<sup>3</sup> He did not ask his accountant what his tax responsibilities would be while living overseas.<sup>4</sup> He was unsure of his obligations with regard to filing or paying federal income tax while abroad, although he had heard a "rumor of not having to pay income taxes as an expatriate living overseas."<sup>5</sup>

Where Applicant was working overseas, the U.S. military-sponsored tax assistance office did not provide assistance to civilian employees. Applicant knew he had to file taxes, but when he consulted the office in early 2005, he was told that it did not "know how to deal with [his] case. . . [his] issues, and they wouldn't make an appointment" for him.<sup>6</sup> Applicant's wife then contacted accountants in the United States "that didn't know how to do expat taxes."<sup>7</sup> Applicant became "muddled, trying to figure it out [himself]."<sup>8</sup> He found the Internal Revenue Service (IRS) website confusing. Information about tax preparation he got from work peers was "very vague."<sup>9</sup> As time

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<sup>1</sup> Tr. 30.

<sup>2</sup> Tr. 31.

<sup>3</sup> Tr. 31-32, 65.

<sup>4</sup> Tr. 76.

<sup>5</sup> Tr. 30. Applicant further states, "I did not know how that worked. I'd never been in - - I had no idea."

<sup>6</sup> Tr. 33, 76-77.

<sup>7</sup> *Id.* Applicant does not recall whether his accountant in the United States was ever consulted. Tr. 65.

<sup>8</sup> *Id.*

<sup>9</sup> Tr. 66.

passed, the issue of addressing his federal taxes became “kind of ‘outta sight, outta mind.’”<sup>10</sup> He eventually found the correct IRS form, but did not know how to use it.<sup>11</sup> At the time, Applicant thought he did not actually owe any federal income taxes and he expected a refund. He concedes he did not do everything he could to address his federal tax filing obligation.<sup>12</sup> Consequently, he failed to file federal taxes for 2004 in 2005.

In April 2006, Applicant failed to file his federal income tax paperwork for “essentially the same” reasons.<sup>13</sup> He did not think he owed any federal taxes.<sup>14</sup> Applicant concedes that he “probably could have found an accountant” by this point to help him “sort” out his tax situation.<sup>15</sup> He also did not consult his employer for assistance.<sup>16</sup> He similarly failed to file in 2007 and 2008 for tax years 2006 and 2007.

In early 2009, the military tax support office began assisting civilians working for the U.S. Government.<sup>17</sup> The office helped Applicant prepare his 2008 federal tax return. It was timely filed by April 2009 and a tax refund was deemed warranted.<sup>18</sup> Using that return as a template, Applicant began preparing tax returns for the preceding years for which he had not filed.<sup>19</sup>

In October 2009, Applicant discussed his failure to file federal tax returns since 2004 with investigators.<sup>20</sup> During the interview, Applicant noted that he was not required to file state tax returns. He attributed his failure to timely file federal income taxes to his inability to find help in completing the federal tax forms and because he had

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<sup>10</sup> Tr. 33.

<sup>11</sup> Tr. 67.

<sup>12</sup> Tr. 34. When he was asked whether he had done everything he could to address his federal tax situation, Applicant stated, “I probably didn’t. It’s my fault. I probably didn’t. But the resources I had, I couldn’t figure it out.”

<sup>13</sup> *Id.*

<sup>14</sup> Tr. 35.

<sup>15</sup> *Id.*

<sup>16</sup> Tr. 35-36.

<sup>17</sup> Tr. 39.

<sup>18</sup> Tr. 47.

<sup>19</sup> Tr. 40.

<sup>20</sup> Ex. 4 (Interrogatories, dated Mar. 8, 2010) at 3 (Interview of Oct. 15, 2009). The interviewer noted that Applicant had failed to file federal tax filings for tax years 2004-2008. In actuality, at the time of the October 2009 interview, Applicant had filed for tax year 2008. See Tr. 54-56, 61; Ex. H (Tax year 2008 tax return, noted as received on Apr. 15, 2009).

procrastinated and had “kept putting off filling out the forms.”<sup>21</sup> At the time, Applicant noted that he might owe back-taxes of up to \$14,000.<sup>22</sup> He stated that he planned to have his missing federal tax returns filed by January 2010.

By December 2009 or January 2010, Applicant had back-filed for tax years 2004-2007.<sup>23</sup> Those filings were done by hand and mailed to the United States. One return was lost in transit in December 2009 and Applicant re-filed for that year in 2010.<sup>24</sup>

Applicant owed no taxes on his late tax returns.<sup>25</sup> For each of those years, either no taxes were owed or a refund was due. A tax year 2004 refund was denied because his filing was over three years late.<sup>26</sup>

In retrospect, Applicant concedes that if he had “seriously wanted to make [his] tax returns a priority, to get them filed on time, [he] could have,” and takes responsibility for his inaction.<sup>27</sup> He did not attempt to send his documents to his former accountant in the United States and file as if he were not abroad because if he had, he “would owe a tremendous amount of money in taxes. . . without any withholding, and [he] knew that wouldn’t be correct.”<sup>28</sup>

Applicant has no other significant financial issues. He has no debts. At the time of the hearing, he was expecting to make an appointment with the tax support office to address his 2010 taxes when he returned overseas.<sup>29</sup> Applicant has no other examples in his past of failure to abide by rules and regulations.<sup>30</sup> He is a valued employee.<sup>31</sup> He is considered to be an honest man, a loving husband, and a hard worker.<sup>32</sup>

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<sup>17</sup> Ex. 4, *supra*, note 16.

<sup>22</sup> *Id.*

<sup>23</sup> Tr. 62. Applicant states that he mailed the returns by the end of December 2009. He noted that there was a delay in mail service to the United States. It can be assumed the filings were received or expected to have been received by January 2010.

<sup>24</sup> Tr. 41-42.

<sup>25</sup> Tr. 42.

<sup>26</sup> Tr. 44-45.

<sup>27</sup> Tr. 73.

<sup>28</sup> Tr. 77.

<sup>29</sup> Tr. 48-49.

<sup>30</sup> Tr. 49.

<sup>31</sup> Tr. 50.

<sup>32</sup> Tr. 21-27.

## Policies

When evaluating an applicant's suitability for a security clearance, an administrative judge must consider the AG. In addition to brief introductory explanations for each guideline, the AG list potentially disqualifying conditions and mitigating conditions. These guidelines are not inflexible rules of law. Instead, recognizing 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. Under AG ¶ 2(c), this process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record.

The Government must present evidence to establish controverted facts alleged in the SOR. An applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." <sup>33</sup> The burden of proof is something less than a preponderance of evidence. The ultimate burden of persuasion is on the applicant. <sup>34</sup>

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. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include 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 about potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 10865 provides that decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information). "The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." <sup>35</sup> Any reasonable doubt about whether an applicant should be allowed access

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<sup>33</sup> See *also* ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug. 10, 1995).

<sup>34</sup> ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

<sup>35</sup> *Id.*

to sensitive information must be resolved in favor of protecting such sensitive information.<sup>36</sup>

Based upon consideration of the evidence, Guideline F (Financial Considerations) is the most pertinent to this case. Conditions pertaining to this AG that could raise a security concern and may be disqualifying, as well as those which would mitigate such concerns, are set forth and discussed below.

## Analysis

### Guideline F - Financial Considerations

Under Guideline F, “failure or an 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.”<sup>37</sup> It also states that “an individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.”<sup>38</sup> Here, Applicant failed to timely file his required federal taxes for tax years 2004 through 2007 until December 2009 or early 2010. As of October 2009, he thought he could owe up to \$14,000 in back-taxes. Although it was ultimately shown that he owed no taxes, Financial Considerations Disqualifying Condition AG ¶ 19(c) (a history of not meeting financial obligations) and AG ¶ 19(g) (failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same) apply. With such conditions raised, it is left to Applicant to overcome the case against him and mitigate security concerns.

Although, in late 2009 or early 2010, Applicant eventually took ameliorative action in addressing his obligation to file his income tax returns for tax years 2004, 2005, 2006, and 2007, he knowingly and unreliably procrastinated fulfilling his IRS obligation. Consequently, those tax returns were significantly late. At the time, Applicant was unsure whether he might owe money to the IRS. Under these facts, Financial Considerations Mitigating Condition 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) does not apply.

While Applicant was living abroad and did not initially have access to assistance from a military tax support office, he was not living in isolation. He had use of the postal service, telephone, and the internet to find a resource that could prepare his taxes, provide guidance as to how he could meet the basic threshold for making an IRS filing, or walk him through his tax forms on-line. He lived among fellow civilians, at least some of whom were surely submitting timely tax filings. He failed to fully explore and utilize

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<sup>36</sup> *Id.*

<sup>37</sup> AG ¶ 18.

<sup>38</sup> *Id.*

the IRS website, hotline, or information/publication services. Other potential resources, such as commercial tax preparation software, were apparently also under-utilized. The conclusion that Applicant failed to exercise appropriate diligence is highlighted by his concession that he could have done more to make sure his filings were timely, or that his late filings could have been executed earlier. Such facts are insufficient to raise FC MC AG ¶ 20(b) (the conditions that resulted in the behavior 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).

After living abroad for almost five years, Applicant ultimately received guidance from a local, U.S. military tax support office. By helping him complete his 2008 tax year filing by April 2009, he was given a template on which he could file for tax years 2004, 2005, 2006, and 2007. Although it would take nearly eight months to complete and mail those late filings, they were eventually filed. He is prepared to seek that office's assistance to file for tax year 2010. In light of these facts, AG ¶ 20(c) (the person has received or is receiving counseling for the problem and there are clear indications that the problem is being resolved or is under control) applies.

Applicant tarried for over four years before he started filing for past tax years with the IRS. Eventually those filings were completed in December 2009 or early 2010, and no taxes were deemed to be owed. As of mid-2009, when he met with investigators, however, he thought he might potentially owe up to \$14,000 in back-taxes. Given his knowing procrastination in filing his tax returns and his thought that he could owe significant back-taxes, AG ¶ 20(d), (the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts) only applies in part. None of the other mitigating conditions apply.

The burden for mitigation in these proceedings is placed squarely on Applicant. Here, Applicant conceded that he could have done more to make sure his federal tax filings were timely made. This concession is strongly confirmed by the facts. While it was ultimately determined that Applicant owed no tax liability for past tax years, the evidence indicates that he was not thoroughly sure that this would be the case until after the filings were belatedly completed. While there is no suggestion Applicant intentionally plotted to cheat the IRS, the facts in this case demonstrate a pattern of behavior that indicates Applicant exercised poor judgment and failed to abide by rules and regulations. Although ameliorative action was eventually taken, this pattern is sufficient to sustain financial considerations security concerns.

## **Guideline E – Personal Conduct**

Security concerns arise from matters of personal conduct because “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.”<sup>39</sup> In addition, “any failure to

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<sup>39</sup> AG ¶ 15.

provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process” is of special interest.<sup>40</sup>

The allegation raised under this guideline is the same allegation raised under Guideline F. Specifically, it is alleged that Applicant failed to file annual tax returns, as required, for tax years 2004 through 2008. He admitted the same allegation under Guideline F, although he provided evidence that he timely filed with the IRS for tax year 2008. Given this specific allegation, only AG ¶ 16 (d) (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) potentially applies.

AG ¶ 16 (d) specifically contemplates “adverse information that is not explicitly covered under any other guideline.” The facts and circumstances underlying the allegation were thoroughly considered and discussed under Guideline F with regard to an identical allegation, making AG ¶ 16 (d) inapplicable. In light of these considerations, and in light of the ultimate disposition of the case, no personal conduct disqualifying condition applies.

### **Whole-Person Concept**

Under the whole-person concept, an administrative judge must evaluate an applicant’s eligibility for a security clearance by considering the totality of an applicant’s conduct and all the circumstances. An administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2 (a). Under AG ¶ 2(c), the ultimate determination of whether to grant a security clearance must be an overall commonsense judgment based on careful consideration of the guidelines and the whole-person concept. In addition, what constitutes reasonable behavior in such cases, as contemplated by AG ¶ 20(b), depends on the specific facts in a given case.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, as well as the “whole-person” factors. Applicant is a highly credible and mature man who served in the United States Marine Corps Reserves. He is valued for his skills as an aircraft mechanic. He is an honest man and a loving husband and father. His failure to timely file federal income taxes for multiple years was not the result of a plan to defraud the Government.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. When such an individual accepts a position overseas, it is expected that the individual will make all necessary preparations to sustain that fiduciary relationship abroad. Applicant was aware of his legal obligation to file annual tax returns with the IRS before he moved

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<sup>40</sup> *Id.*



overseas. Once he was settled abroad, he tarried in researching how his tax returns could be completed. He failed to utilize available resources that could help him timely file his annual tax returns with the IRS. He also failed to work with the IRS or pursue other options. Applicant concedes that he failed to make his IRS tax obligations a priority. As a result, his tax year 2004, 2005, 2006, and 2007 returns were filed significantly late.

This case is not a typical Guideline F case in which debts were neglected or unpaid. Rather, this case centers on issues regarding Applicant's judgment and his ability to comply with rules and regulations with regard to his financial obligations. As noted in AG ¶ 18, such issues can raise questions about an individuals' reliability, trustworthiness, and ability to protect classified information. Upon a showing of reasonable behavior, one year of delayed IRS filings might mitigate simple oversight or a circumstance beyond one's control. Here, however, Applicant failed to file tax returns for 2004, 2005, 2006, and 2007. In addition, even after completing his 2008 tax filing by April 2009 and meeting with investigators in October 2009, it took the remainder of 2009 to use the 2008 as a template to file returns for 2004, 2005, 2006, and 2007. These delays, under the circumstances, were inordinately protracted. Moreover, Applicant has not yet had time to demonstrate a pattern of reliability in timely filing his federal taxes. Applicant's failure to meet his IRS obligations sustains financial considerations security concerns. Clearance is denied.

### **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
Subparagraphs 1.a:	Against Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraphs 2.a:	For Applicant

### **Conclusion**

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national interest to grant Applicant a security clearance. Clearance denied.

ARTHUR E. MARSHALL, JR.  
Administrative Judge