



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



In the matter of:	)	
	)	
[Redacted]	)	ISCR Case No. 09-08505
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Julie R. Mendez, Esq., Department Counsel  
For Applicant: Alan V. Edmunds, Esq.

03/28/2012

**Decision**

FOREMAN, LeRoy F., Administrative Judge:

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

**Statement of the Case**

Applicant submitted a security clearance application (SCA) on July 24, 2009. On December 2, 2011, the Defense Office of Hearings and Appeals (DOHA) notified him that it was unable to find that it is clearly consistent with the national interest to grant him access to classified information, and it recommended that his case be submitted to an administrative judge for a determination whether to deny his application. DOHA set forth the basis for its action in a Statement of Reasons (SOR), citing security concerns under Guidelines F and E. DOHA acted under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented by the Department of Defense on September 1, 2006.

Applicant received the SOR on December 17, 2011; answered it on December 20, 2011, denied all the allegations in the SOR; and requested a hearing before an administrative judge. DOHA received the request on January 4, 2012. Department Counsel was ready to proceed on January 17, 2012, and the case was assigned to me on January 23, 2012. DOHA issued a notice of hearing on February 2, 2012, scheduling it for February 23, 2012. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 3 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibits (AX) A through N, which were admitted without objection. I held the record open until February 29, 2012, to enable Applicant to submit additional documentary evidence. He timely submitted AX O through U, which were admitted without objection. Department Counsel's comments regarding AX O through U are attached to the record as Hearing Exhibit I. DOHA received the transcript (Tr.) on March 6, 2012.

### **Findings of Fact**

Applicant is a 35-year-old employee of a federal contractor. He has worked for his current employer since January 2007. He worked for another federal contractor from December 2002 to January 2007, and he received a security clearance in August 2004.

Applicant attended college from August 1995 to May 1999, and received a bachelor's degree in English literature. He attended graduate school from August 1999 to May 2002 and worked as a graduate teaching assistant in the English department, but he did not receive a degree because of his poor grades. (Tr. 24.) He married in October 2009. (Tr. 36.)

Applicant did not file his federal and state income tax returns for 2000, 2001, 2002, 2003, 2005, 2006, 2007, and 2008. He timely filed his 2004 federal return and received a refund of \$1,054. (GX 3 at 7.) He timely filed his federal and state tax returns for 2009 in March 2010. (AX P; AX Q.) He filed his overdue federal returns for 2001 through 2003 and 2005 through 2008 in September 2010, after he received DOHA interrogatories about his overdue tax returns in August 2010. (GX 2; GX 3 at 4-6, 8-12.) He filed his federal and state tax returns for 2010 in May 2011. (AX O; AX R.) He filed his state tax returns for 2000 through 2008 in December 2011, after he received the SOR. (AX J; Tr. 31-33.)

According to the IRS transcripts, Applicant was entitled to federal tax refunds for the years he failed to file as follows: \$746 for 2001; \$905 for 2002; \$671 for 2003; \$737 for 2005; \$820 for 2006; and \$151 for 2008. (GX 3 at 4-12.) He explained his failure to claim his refunds as follows: "Honestly, it was because at the time I valued not having the hassle of sending it in more than I valued the [refund] coming back." (Tr. 28-29.)

When Applicant submitted his SCA in July 2009, he answered "No" to question 26c, which asks, "Have you failed to pay Federal, state, or other taxes, or to file a tax return, when required by law or ordinance?" He did not disclose his failures to file federal and state returns for the years listed above.

On September 1, 2009, about five weeks after submitting his SCA, Applicant told a security investigator that he did not file his tax returns because he believed that he was not required to file returns for years in which he did not owe additional taxes. He had roughly computed his tax liability based on his pay brackets and exemptions and determined that he did not owe taxes for those years. He believed that the only consequence of failing to file returns was the loss of any refunds. He told the investigator that the source of his belief was advice from someone whose identity he could not remember. He told the security investigator that he believed he would be able to file all his overdue tax returns by December 2009.

At the hearing, Applicant gave the same explanation for not filing his tax returns, explaining that he believed he was not “required by law or ordinance” to file returns for years in which he did not owe additional taxes. (Tr. 19-20.) He testified that this advice was “passed around as common information” while he was in college. (Tr. 26.)

The investigator’s summary of the September 2009 interview does indicate whether Applicant volunteered the information about his failure to file or the investigator confronted him with the evidence of failure to file. Applicant’s hearing testimony indicates that he volunteered the information as they reviewed each question on the SCA. (Tr. 34.)

In the September 2009 interview with a security investigator, Applicant also was questioned about derogatory entries in his credit report. He told the investigator that he fell behind in his payments on a credit card while he was in graduate school, because his meager stipend as a graduate teaching assistance made him unable to keep up with the payments. (GX 2 at 11.) At the hearing, he claimed that he was able to keep up with his bills while living on his stipend. (Tr. 29.)

According to Applicant, he first learned that he was required to file returns in August 2009 after reading the Internal Revenue Service (IRS) Web page. (GX 2 at 10.) At the hearing, he testified that he went to the IRS website in preparation for his interview by the security investigator, because he was concerned that he might have been wrong in his understanding of the requirement for filing tax returns. (Tr. 29-30.)

Applicant testified that he never contacted the IRS or state authorities regarding his duty to file return, and he was never contacted by the IRS or state authorities regarding his failure to file returns. He had assumed that the tax authorities would contact him if he should have filed a return. (Tr. 35.)

Applicant also failed to pay personal property taxes on his automobile for 2003 and 2008. In each case, liens were filed on his automobile until the taxes were paid. He told the security investigator that the tax notices were mailed to his parents’ home and

he could not remember whether he failed to pick up his mail or forgot to pay the taxes. (GX 2 at 10-11.) His failure to pay personal property taxes is not alleged in the SOR.<sup>1</sup>

Applicant's program manager submitted a letter describing him as one of the most honest, hardworking, and diligent persons he has known in about 33 years of working in a classified environment. He stated that Applicant has proven his loyalty, dedication, judgment, and honesty in the past and continues to do so. (AX A.) The letter does not state whether the author was aware of the allegations in the SOR, but Applicant testified that he was. (Tr. 20.)

Applicant's immediate supervisor has daily contact with him and is aware of the allegations in the SOR. He submitted a letter stating that Applicant has always performed in a responsible and dedicated manner. He states that Applicant's honesty and work ethic are unquestionable. (AX B; AX T.)

The senior director of the program on which Applicant is working has frequent contact with him and is aware of the allegations in the SOR. He submitted a letter stating that Applicant's insight, depth of knowledge, and personal character have made him an essential member of the team. (AX C; AX S.)

Applicant's contract coordinator, who is aware of the allegations in the SOR, submitted a letter describing him as honest, hardworking, and diligent. He stated that Applicant is one of the brightest, most dedicated, loyal, and trustworthy individuals he has met during his entire career. (AX D; AX U.)

Applicant's performance reviews for 2009 and 2010 rated him as meeting expectations. (AX F; AX G.) His performance review for 2011 rated him as consistently exceeding expectations. (AX H.)

Applicant earns \$112,750 per year, and his spouse earned \$90,500 per year. He estimates his net worth to be about \$258,459. He and his spouse have no difficulty meeting their financial needs and paying their taxes as required. (Tr. 16-17; AX K.)

### **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

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<sup>1</sup> Conduct not alleged in the SOR may be considered to assess an applicant's credibility; to decide whether a particular adjudicative guideline is applicable; to evaluate evidence of extenuation, mitigation, or changed circumstances; to consider whether an applicant has demonstrated successful rehabilitation; or as part of a whole-person analysis. ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006). I have considered Applicant's failure to pay personal property taxes for these limited purposes.

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, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the AG. 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, 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.” See 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. 92-1106 at 3, 1993 WL 545051 at \*3 (App. Bd. Oct. 7, 1993).

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; see AG ¶ 2(b).

## Analysis

### Guideline F, Financial Considerations

The SOR alleges that Applicant failed to file his state income tax returns for tax years 2000, 2001, 2002, 2003, 2005, 2006, 2007, and 2008 (SOR ¶ 1.a) and failed to file his federal income tax returns for tax years 2001, 2002, 2003, 2005, 2006, 2007, and 2008 (SOR ¶ 1.b). The concern under this guideline 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.

The evidence does not establish AG ¶ 19(a) ("inability or unwillingness to satisfy debts"), AG ¶ 19(c) ("a history of not meeting financial obligations"), or AG ¶ 19(d) ("deceptive or illegal financial practices such as . . . income tax evasion . . ."), because Applicant did not owe any taxes for the years in which he failed to file. To the contrary, he forfeited substantial tax refunds by a failure to file. However, the evidence establishes the disqualifying condition in AG ¶ 19(g) ("failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same").

Security concerns under this guideline may be mitigated if "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." AG ¶ 20(a). The first two prongs of this mitigating condition are not established because Applicant's conduct continued until recently and was repeated for many years. Ignorance of the tax laws would be a circumstance making recurrence unlikely now that the ignorance has been cured. If, however, his failure to file was attributable to negligence or lack of concern about complying with the tax laws, then recurrence might well be likely.

The threshold issue is whether Applicant's claimed ignorance about his obligation to file is credible and plausible. It is difficult to imagine that a well-educated adult who has worked for federal contractors since 2002 was so oblivious to the television and newspaper coverage of "tax time" and conversations among coworkers and friends about the burden of filing tax returns that he did not suspect he had an obligation to file annual returns. It is also difficult to understand why he believed that the burden of filing outweighed the financial reward of more than \$4,000 in refunds. It is difficult to understand why he did not consider claiming his refunds during his days as a graduate teaching assistant, especially if he was having difficulty paying his credit card bill. The timing of his first tax research in August 2009, shortly before his interview with a security

investigator, suggests that he suspected that he should have filed returns for the years when he did not owe additional taxes.

On the other hand, Applicant has consistently given the same explanation for non-filing through the clearance process. Five weeks after submitted his SCA, he fully disclosed his tax situation to the security investigator. His educational background is in English literature, not law or business. He has earned a reputation among his supervisors for honesty, a sense of responsibility, and trustworthiness. He presented himself as candid and sincere at the hearing. I conclude that his failures to timely file his returns were the product of ignorance.

Applicant's hearing testimony was that value of avoiding the hassle of filing a return outweighed the value of the tax refund. This attitude, coupled with his failure to pay property taxes on his car for two years, suggests that he regarded tax filing as an inconvenience to be avoided. He did not file his late federal returns for more than a year after discovering his obligation to file, and his filing was prompted by the receipt of DOHA interrogatories. He did not file his state tax returns for more than two years, and he did so only after receiving the SOR. Thus, even if his original failures to file were prompted by ignorance, he has not credibly explained why he procrastinated for so long after discovering his obligation to file returns. He has a long track record of procrastination and avoidance on tax matters. Thus, I cannot conclude that the circumstances around his failures to file make recurrence unlikely. I conclude that AG ¶ 20(a) is not established.

Security concerns under this guideline also can be mitigated by showing 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." AG ¶ 20(c). Applicant has worked with a tax preparer and all his late returns have been filed. He does not owe any taxes. This mitigating condition is established. No other enumerated mitigating conditions under this guideline are relevant.

After considering all the evidence, I conclude that Applicant has not mitigated his failure to file timely federal and state tax returns. Although he eventually filed all his returns, his dilatory response to his August 2009 discovery of his duty to file leaves lingering doubts about his reliability and good judgment.

### **Guideline E, Personal Conduct**

The SOR alleges that Applicant falsified his SCA by intentionally failing to disclose the conduct alleged above under Guideline F (SOR ¶ 2.a). It also cross-alleges the Guideline F allegations under this guideline. (SOR ¶ 2.b).

The concern under this guideline is set out in AG ¶ 15 as follows:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions

about an individual's reliability, trustworthiness and ability to protect classified 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 disqualifying condition relevant to the Applicant's alleged falsification of his SCA is "deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire . . . ." AG ¶ 16(a). When a falsification allegation is controverted, as in this case, the Government has the burden of proving it. An omission, standing alone, does not prove falsification. An administrative judge must consider the record evidence as a whole to determine an applicant's state of mind at the time of the omission. See ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004). For the reasons set out in the above discussion of AG ¶ 20(a) under Guideline F, I conclude that AG ¶ 16(a) is not established.

However, Applicant's failures to timely file federal and state tax returns establish the following disqualifying conditions under this guideline:

AG ¶ 16(c): credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, 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; and

AG ¶ 16(e): 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.

Security concerns raised by personal conduct may be mitigated 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." AG ¶ 17(c). Failure to file a timely return when no taxes are owed is arguably a "minor" offense. However, Applicant's failures to file were numerous and not rectified until recently. For the reasons set out in the above discussion of AG ¶ 20(a) under Guideline F, I am not satisfied that his conduct is unlikely to recur. Thus, I conclude that AG ¶ 17(c) is not established.

Security concerns under this guideline may be mitigated if "the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress." AG ¶ 17(e). This mitigating condition is established because Applicant has filed all his late returns.



## 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(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.

I have incorporated my comments under Guidelines F and E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Applicant is intelligent and well-educated. He enjoys the respect of his supervisors. He was candid and sincere at the hearing. Although he eventually rectified his failures to file his federal and state tax returns, his response to discovering his obligation to file was dilatory. He was not motivated by a sense of obligation, but by his desire to protect his security clearance and his job

After weighing the disqualifying and mitigating conditions under Guidelines F and E, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns based on financial considerations and personal conduct. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the national interest to continue his eligibility for access to classified information.

### 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-1.b: Against Applicant

Paragraph 2, Guideline E (Personal Conduct): AGAINST APPLICANT

Subparagraph 2.a:  
Subparagraph 2.b:

For Applicant  
Against Applicant

### **Conclusion**

I conclude that it is not clearly consistent with the national interest to continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

LeRoy F. Foreman  
Administrative Judge