



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



In the matter of:	)	
	)	
	)	ISCR Case No. 10-04136
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Raashid S. Williams, Esquire, Department Counsel  
For Applicant: Sheldon I. Cohen, Esquire

January 30, 2012

**Decision**

METZ, John Grattan, Jr., Administrative Judge:

Based on the record in this case,<sup>1</sup> Applicant's clearance is denied.

On 8 April 2011 the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines F, Financial Considerations and E, Personal Conduct.<sup>2</sup> Applicant timely answered the SOR, requesting a hearing. DOHA assigned the case to me 31 August 2011, and I convened a hearing 28 September 2011. DOHA received the transcript (Tr.) 6 October 2011.

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<sup>1</sup>Consisting of the transcript (Tr.), Government exhibits (GE) 1-10, and Applicant exhibits (AE) A-TT.

<sup>2</sup>DOHA acted 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 1 September 2006.

## Findings of Fact

Applicant denied the SOR allegations. He is a 54-year-old technical subject matter expert employed by a defense contractor since July 2007. He seeks to retain the clearance he has held without incident since at least April 1989. He has been the subject of favorable clearance adjudications in April 1989, April 1991, January 1995, August 1996, September 2001, and November 2003 (GE 1, 2).

Applicant deliberately failed to file his state and federal income tax returns as required for tax years 2002-2009. Some years he filed for extensions, some years he did not, but his failures to file went beyond the final extension dates (Tr. 149-152). He knew he was required to file these returns but did not, mostly because he was paralyzed into inaction by his mistaken belief that he had to have his earlier tax returns completely correct before he could complete and submit later years (Tr. 182).<sup>3</sup> He was galvanized into action when the state filed a \$9,500 tax lien against him in December 2008, and garnished his wages to obtain payment (Tr. 189). The collection action caused him financial hardship. He hired a tax attorney in January 2009, and between April 2009 and November 2010 filed the missing tax returns (AE E-CC, NN, RR). Although he lost refunds of about \$42,000 for some of the earlier years because his claim for refunds was time barred for refunds, he always had enough tax withholding to satisfy his tax liability. He timely filed his 2010 state and federal tax returns using a commercially-available tax preparation program (AE DD, EE). He completed a personal finance course in September 2011 (AE B, C). However, discussions of taxes constituted a small portion of the course, and appear to have been limited to tax planning issues (AE C). He has started using computer software that will remind him when his taxes are due.

In April 2010, Applicant refused to sign the Internal Revenue Service (IRS) release required to allow Government investigators access to his tax records as part of his background investigation (GE 10, AE D; Tr 31-34, 190-194). Applicant refused to sign the release because it authorized access to tax returns that he knew he had not yet filed and he was concerned that he would be accused of fraud if he signed a release for tax years for which there was no return filed. Applicant offered to sign the release if he could annotate it with his concerns, but the IRS will not accept the release if it is not completed as required by IRS instructions, instructions that prohibit any annotations (Tr. 40-41). The investigator who came to Applicant advised him of the potential adverse consequences of his failure to sign the release. She also told him she would record his

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<sup>3</sup>Although not alleged in the SOR, Applicant also failed to file his state and federal income tax returns for tax years 1997-2001. He failed to file then for essentially the same reasons he failed to file now. Again, he did not address his delinquent tax returns until a local government filed a \$900 tax lien against him in October 2000 for non-payment of business taxes (GE 2) and the state garnished his wages for \$5,114 for unpaid income taxes. He filed his 1997 tax return in April 2000 (AE M) and his 1998-2001 tax returns in January and February 2003 (GE 7, AE M ). This issue was adjudicated as part of his July 2002 background investigation. Because his earlier tax problems were not alleged in the SOR, I have not considered them on the merits of this case. However, I have considered them on the issue of Applicant's credibility as well as to establish his prior knowledge of the Government's concern about his failure to file his income tax returns.

reservation in her report when he signed the release (and she recorded it when she recorded his reason for not signing the release).

Applicant executed his most recent clearance application in mid-January 2009 and he reported his tax lien as well as the fact that he had hired a tax attorney in early-January 2009 to address his delinquent tax returns. He asserts that his hiring the attorney was not related to his clearance application (Tr. 208-209). He similarly asserts that hiring a certified public accountant around 2001 was not related to his pending periodic reinvestigation (Tr. 217-218).

Applicant's character witnesses (Tr. 55-112; AE MM, OO, PP) consider him honest and trustworthy. All are aware of his failure to file his income taxes, some more fully than others. He has an excellent work record (AE FF-II) and has been singled out for the quality of his work (AE JJ).

### **Policies**

The adjudicative guidelines (AG) list factors to evaluate a person's suitability for access to classified information. Administrative judges must assess disqualifying and mitigating conditions under each issue fairly raised by the facts and situation presented. Each decision must also show a fair, impartial, and commonsense consideration of the factors listed in AG ¶ 2(a). The applicability of a disqualifying or mitigating condition is not, by itself, conclusive. However, specific guidelines should be followed when a case can be measured against them, as they are policy guidance governing the grant or denial of a clearance. Considering the SOR allegations and the evidence as a whole, the relevant adjudicative guidelines are Guideline F (Financial Considerations) and Guideline E (Personal Conduct).

Security clearance decisions resolve whether it is clearly consistent with the national interest to grant or continue an applicant's security clearance. The Government must prove, by substantial evidence, disputed facts alleged in the SOR. If it does, the burden shifts to applicant to refute, extenuate, or mitigate the Government's case. Because no one has a right to a security clearance, the applicant bears a heavy burden of persuasion.

Persons with access to classified information enter into a fiduciary relationship with the Government based on trust and confidence. Therefore, the Government has a compelling interest in ensuring each applicant possesses the required judgement, reliability, and trustworthiness of those who must protect national interests as their own. The "clearly consistent with the national interest" standard compels deciding any reasonable doubt about an Applicant's suitability for access in favor of the Government.<sup>4</sup>

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<sup>4</sup>See, *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

## Analysis

The Government established a case for disqualification under Guideline F, and Applicant did not mitigate the security concerns. Applicant deliberately failed to file his state and federal income tax returns as required for eight years. He was aware of his requirement to do so, and he knew that his failure to do so had earlier been a subject of discussion during his background investigation. Although he has since filed all the delinquent tax returns, he did so only after the state filed a tax lien against him and sought to collect the lien through garnishment.<sup>5</sup> While he always had enough tax withheld to cover his tax liability, his dereliction caused him to forfeit tax refunds that were time barred. The fact that Applicant usually had enough tax withheld to meet his tax liability does not mitigate the security concerns raised by his not filing the tax returns when required. The legal requirement to file income tax returns is no less important than the legal requirement to have taxes withheld from earnings or to otherwise pay quarterly estimates.

Applicant meets none of the mitigating factors for financial considerations. Strictly speaking, there is no mitigating condition for failing to timely file required tax returns. However, while his failures to file may have occurred under circumstances unlikely to recur, they are both recent and multiple.<sup>6</sup> The failures to file were not due to circumstances beyond his control, and he did not act responsibly to address his tax returns.<sup>7</sup> He sought no guidance or counseling that might have corrected his erroneous assumptions, and only belatedly brought the problem under control after tax liens were filed.<sup>8</sup> Consequently, his late filing of his returns does not constitute a timely, good-faith effort.<sup>9</sup> The steps he has taken to ensure that he will be reminded of filing deadlines seems to me to not address the fundamental causes of his failures to file: assuming facts that are wrong coupled with an intransigence that is inconsistent with the judgment necessary for access to classified information. I conclude Guideline F against Applicant.

The Government established a case for disqualification under Guideline E, and the Applicant did not mitigate the security concerns. Alleging Applicant's failures to file as separate issues under Guideline E (SOR 2.b) raises no independent security concerns, because those failures are fully addressed under Guideline F. However,

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<sup>5</sup>¶19 (a) inability or unwillingness to satisfy debts;(c) a history of not meeting financial obligations; (g) failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same . . .

<sup>6</sup>¶20 (a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur . . .

<sup>7</sup>¶20 (b) the conditions that resulted in the financial problem were largely beyond the person's control . . . and the individual acted responsibly under the circumstances;

<sup>8</sup>¶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;

<sup>9</sup>¶20 (d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

Applicant's refusal to sign required releases (SOR 2.a) constitutes a failure to cooperate with the security clearance process that normally results in an unfavorable clearance action.<sup>10</sup> Of course, Applicant has an absolute right to refuse to sign the release for any reason or for no reason. However, unless he has a good reason, his failure to sign the release comes with adverse consequences. Applicant's tortured reasoning for not signing the tax releases—that he might be considered to have executed a fraudulent release by signing a release for tax records that he knew did not exist beggars credibility. No language in the release supports such a conclusion, and Applicant persisted in his refusal even after the investigator advised him that the IRS allowed no annotations to the release, but she would record his reservation in her report (which she did when she recorded his reason for not signing the release). Applicant's refusal to sign the release was not reasonable, was not caused or significantly contributed to by improper or inadequate advice (he sought no advice), and continued after he was advised of the requirement to sign the release and the potential consequences of not signing.<sup>11</sup> Finally, his conduct illustrates the key reason that he is unsuitable for access to classified information. He reaches a conclusion based not on fact, common sense, or knowledge, seeks no outside advice or opinions on the conclusion he has reached, and persists in the conclusion even when confronted by contrary evidence from people whose job it is to know the requirements. I resolve Guideline E against Applicant.

In assessing Applicant's whole person, I have given substantial consideration to his work evaluations, the testimony of his character witnesses, and the affidavits of other character witnesses. However, some of his character references have noted—positively—character traits that are negative when taken to extremes, as Applicant has done regarding the filing of his income taxes and his failure to sign the IRS release. Applicant demonstrates that he is willing to substitute his judgment about what is required in any given situation and rigidly cling to that assessment without consulting anyone whose job it is to know about the situation, or to actively ignore what he his told by those whose job it is to know about the situation. Further, I found Applicant evasive in answering questions about his taxes and his failure to sign the IRS release. He quibbled about many of his answers. Consequently, I found him not to be a credible witness. He rejected commonsense interpretations of his conduct. I do not know if he was providing deliberately misleading answers or was merely incredibly obtuse about the answers, but either way, he has not demonstrated the judgment or reliability required of those with access to classified information.

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<sup>10</sup>¶15 (a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to . . . completing security forms or releases . . .

<sup>11</sup>¶17 (b) the refusal or failure to cooperate . . . 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 process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully.

### **Formal Findings**

Paragraph 1. Guideline F:	AGAINST APPLICANT
Subparagraphs a-p:	Against Applicant
Paragraph 2. Guideline E:	AGAINST APPLICANT
Subparagraph a:	Against Applicant
Subparagraph b:	For Applicant

### **Conclusion**

Under the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance denied.

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JOHN GRATTAN METZ, JR  
Administrative Judge