



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



In the matter of:	)	
	)	
[NAME REDACTED]	)	ISCR Case No. 11-06622
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Alison O’Connell, Esquire, Department Counsel  
For Applicant: *Pro se*

04/12/2012

**Decision**

MALONE, Matthew E., Administrative Judge:

Applicant failed to mitigate the security concerns raised by his deliberate failure to file federal or state income taxes for tax years 2005 through 2010. Based upon a review of the pleadings and exhibits, Applicant’s request for a security clearance is denied.

On February 22, 2011, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) to obtain a security clearance required for his job with a defense contractor. After reviewing the completed background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) sent interrogatories<sup>1</sup> to Applicant seeking to clarify or augment information contained therein. Based on his responses to the interrogatories and the results of the background

<sup>1</sup> Authorized by DoD Directive 5220.6 (Directive), Section E3.1.2.2.

investigation, DOHA adjudicators were unable to find that it is clearly consistent with the national interest to continue Applicant's access to classified information.<sup>2</sup>

On October 6, 2011, DOHA issued to Applicant a Statement of Reasons (SOR) alleging facts which raise security concerns addressed at Guideline F (Financial Considerations) and Guideline E (Personal Conduct) of the adjudicative guidelines (AG).<sup>3</sup> Applicant timely responded to the SOR and requested a decision without a hearing. On November 23, 2011, Department Counsel issued a File of Relevant Material (FORM)<sup>4</sup> in support of the preliminary decision to deny Applicant's request for a clearance. Applicant received the FORM on January 25, 2011, and was given 30 days to file a response to the FORM. Applicant did not respond to the FORM and the case was assigned to me on March 30, 2012.

### **Findings of Fact**

Under Guideline F, it was alleged that Applicant did not file his federal tax returns (SOR 1.a) or his state tax returns (SOR 1.b) for tax years 2005 through 2010. Under Guideline E, his failure to file his tax returns was cross-alleged as disqualifying personal conduct (SOR 2.a); and it was alleged that he was fired from a defense contractor in 2004 "for improperly charging as work the time he spent accessing non-work related internet sites" (SOR 2.b).

Applicant denied the general security concern under both guidelines, and he denied that SOR 2.a reflects unacceptable personal conduct. He admitted, with explanations, the allegations in SOR 1.a, 1.b, and 2.b. In addition to the facts established through his admissions, I have made the following findings of fact.

Applicant is 49 years old. He graduated from one of the U.S. military service academies in 1984 and served as an officer on active duty until he was honorably discharged in 1988. Applicant has bachelor's and master's degrees in computer science. Since September 1998, he has held at least ten different jobs as a software engineer. He was hired for his current position with a large defense contractor in August 2010. Applicant held a security clearance while he was in the military, and has held one as a civilian for most of the past 20 years. A security clearance is required as part of his current employment. (FORM, Item 5)

When Applicant submitted his eQIP, he disclosed that he had not filed his federal or state income tax returns for tax years 2005 through 2010. His stated reason for not filing is that, although he overpaid his income taxes each year and expected a refund, he simply did not like doing paperwork and, so, decided not to file. He reiterated his disdain for paperwork when he was interviewed by a government investigator, and

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<sup>2</sup> Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.

<sup>3</sup> See Directive, Enclosure 2. See also 32 C.F.R. § 154, Appendix H (2006).

<sup>4</sup> See Directive, Enclosure 3, Section E3.1.7. The FORM included seven documents (Items 1 - 7) proffered in support of the Government's case.

when he responded to the SOR. (FORM, Items 4 - 6) On August 30, 2011, in response to DOHA interrogatories, Applicant stated that he had not yet filed his back tax returns because he could not locate all of the paperwork needed to do so. He also claimed he would contact an accountant and do his best to file his returns by the end of September 2011. (FORM, Item 6) He has not submitted any information showing he has filed any or all of his returns.

Applicant is required to file a federal tax return each year. Intentional failure to do is a misdemeanor criminal offense under 26 U.S.C. § 7203, and is punishable by fines of up to \$25,000, incarceration for up to one year, or both. The state where Applicant maintains his legal residence also requires annual filing of individual income tax returns. (FORM, Items 4, 6 and 7)

Applicant worked as a senior software engineer for a large defense contractor from September 1998 until December 2004. Applicant was terminated from that job for improperly charging his time to a government contract when he was actually using the Internet for purposes not related to his work. Applicant claimed he was not using the Internet any more than his fellow employees. He further claimed that his boss just wanted an excuse let him go, because his boss did not like that Applicant, who claims he suffers from narcolepsy, was excessively tardy because of that sleep disorder. (FORM, Items 4 and 6) The record contains no other instances of work-related problems.

## **Policies**

Each security clearance decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information,<sup>5</sup> and consideration of the pertinent criteria and adjudication policy in the adjudicative guidelines. Decisions must also reflect consideration of the factors listed in ¶ 2(a) of the new guidelines. Commonly referred to as the “whole-person” concept, those factors are:

- (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.

The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an applicant. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information.

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<sup>5</sup> Directive. 6.3.

A security clearance decision is intended only to resolve whether it is clearly consistent with the national interest<sup>6</sup> for an applicant to either receive or continue to have access to classified information. Department Counsel must produce sufficient reliable information on which DOHA based its preliminary decision to deny or revoke a security clearance for an applicant. Additionally, Department Counsel must prove controverted facts alleged in the SOR.<sup>7</sup> If the Department Counsel meets its burden, it then falls to the applicant to refute, extenuate, or mitigate the case for disqualification.<sup>8</sup>

Because no one is entitled to a security clearance, an applicant bears a heavy burden of persuasion to establish that it is clearly consistent with the national interest for the applicant to have access to protected information.<sup>9</sup> A person who has access to such information enters into a fiduciary relationship with the government based on trust and confidence. Thus, there is a compelling need to ensure each applicant possesses the requisite judgment, reliability and trustworthiness of one who will protect the nation's interests as his or her own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access to classified information in favor of the government.<sup>10</sup>

## Analysis

### Financial Considerations

Applicant did not file his state and federal tax returns for 2005 through 2010 because he does not like paperwork. Complying with income tax reporting is a basic financial obligation of most income-earning U.S. citizens. Failure to do so raises a security concern addressed, in relevant part, at AG ¶ 18 as follows:

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.

More specifically, Applicant's conduct requires application of the disqualifying condition at AG ¶ 19(g) (*failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same*). Applicant claimed, during his subject

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<sup>6</sup> See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

<sup>7</sup> Directive, E3.1.14.

<sup>8</sup> Directive, E3.1.15.

<sup>9</sup> See *Egan*, 484 U.S. at 528, 531.

<sup>10</sup> See *Egan*; Adjudicative Guidelines, ¶ 2(b).

interview and in his responses to interrogatories and the SOR, that he would file his past-due tax returns. However, he has not filed any returns, and he has not produced information that supports any of the mitigating conditions listed at AG ¶ 20. Applicant did not mitigate the security concerns under this guideline.

## **Personal Conduct**

The fact that Applicant was terminated from one of the jobs he has held in the past 15 years does not raise a security concern. He self-reported this information and there is no independent information about his dismissal to counter his version of events. I resolve SOR 2.b for the Applicant. Nonetheless, Applicant wilfully disregarded the law by not filing income tax returns for five consecutive years. Such conduct raises significant concerns about his judgment and reliability, which are expressed at 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.

More specifically, available information requires application of the disqualifying condition at 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. (emphasis added)

Although not specifically alleged as such, Applicant's failure to file his tax returns also raises security concerns under the adjudicative guideline for criminal conduct. By contrast, Applicant has not established that his decision making is no longer a concern. His disdain for paperwork, a view likely shared by much of the tax-paying public, is not a sufficient excuse for not filing his taxes. His conduct must be considered recent and continuing because he has not yet corrected his filing status, and he may yet be subject to misdemeanor prosecution for his conduct. Applicant has not mitigated the security concerns about his personal conduct.

## **Whole-Person Concept**

I have evaluated the facts presented and have applied the appropriate adjudicative factors under Guidelines E and F. I have also reviewed the record before me in the context of the whole-person factors listed in AG ¶ 2(a). Applicant is a 49-year-old military service academy graduate who honorably served his country as a

commissioned officer. He is presumed to be a mature, responsible adult. Applicant has been steadily employed through several software engineering positions and, aside from his 2004 dismissal from a defense contractor position, there is no other indication of misconduct. However, no matter how much Applicant may dislike doing what is required to meet his legal obligations under federal and state tax laws, he must still comply. His intentional failure to do so indicates that, if he does not like doing what is required to comply with procedures for safeguarding classified information, he may decide not to follow those requirements as well. His poor judgment and willful disregard of the law continues to raise doubts about his suitability for access to classified information. Because protection of the national interest is paramount in these determinations, those doubts must be resolved for the government.

### **Formal Findings**

Formal findings 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 and 1.b:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	For Applicant

### **Conclusion**

In light of all available information, it is not clearly consistent with the national interest for Applicant to have access to classified information. Applicant's request for a security clearance is denied.

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MATTHEW E. MALONE  
Administrative Judge