



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



In the matter of:	)	
	)	
-----	)	ISCR Case No. 11-13242
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Julie R. Mendez, Esquire, Department Counsel  
For Applicant: Nicole A. Smith, Esq.

06/14/2013

**Decision**

MARSHALL, Arthur E., Administrative Judge:

On February 27, 2013, the Department of Defense (DOD) issued to the above-referenced Applicant a Statement of Reasons (SOR). The SOR enumerated security concerns arising under Guideline F (Financial Considerations), Guideline E (Personal Conduct), and Guideline J (Criminal Conduct). DOD took action under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented by the DOD on September 1, 2006.

In a response dated March 26, 2013, Applicant admitted the allegations raised under Guideline F and Guideline E, denied the allegation set forth under Guideline J, and requested a hearing before a Defense Office of Hearings and Appeals (DOHA) administrative judge. DOHA assigned the case to me on April 22, 2013. Applicant agreed to a hearing date of May 23, 2013, and a notice setting the hearing for that date was issued on May 2, 2013.

The hearing was convened as scheduled. Applicant testified and introduced 26 documents, which were accepted without objection as exhibits (Exs.) A-Z. The Government offered three documents, which were accepted into the record as Exs. 1-3 without objection. The transcript of the proceeding (Tr.) was received on June 6, 2013,

and the record was closed. Based on a review of the testimony, submissions, and exhibits, I find Applicant failed to meet her burden of mitigating security concerns related to financial considerations. Clearance is denied.

### **Findings of Fact**

Applicant is a 58-year-old administrative assistant who has worked for her current employer since 2003. She has worked for the U.S. government for 38 years. During most of that time, she held a security clearance, which was granted and maintained as the result of having completed a security clearance application (SCA) three or four times since first starting her federal service. Applicant's duties are mostly clerical in nature. She has always worked two jobs, either a full-time job and a part-time job, or two full-time positions. In addition to the current position under scrutiny here, she presently works a part-time security position. Applicant is a high school graduate who attended college, but had not completed a degree program. She is married.

In 2005, all of Applicant's tax information and her husband's business information were lost when a family computer crashed and the hard drive was corrupted. They took it to multiple individuals to salvage the computer and its contents, but nobody could retrieve anything from the unit. With the computerized information unavailable, it "would have made it fairly cumbersome and difficult" to otherwise cull the information from, for example, boxed files.<sup>1</sup> The boxes that would contain such information were among many boxes which had been moved a number of times and spread out through their home.<sup>2</sup> In turn, Applicant's tax information would have been boxed together with her husband's business documents, making the task of culling through the boxes more difficult. Consequently, Applicant did not file her state or Federal income tax return for tax year 2005, in violation of Title 26, United States Code, Section 7203.

Applicant continued not to file her state or Federal income tax returns through tax year 2011 because she was under the false impression she could not file for subsequent years until the initial missed year had been filed.<sup>3</sup> Each time tax season would arrive she would say, "well how can I file? I can't file it because . . . I had to file each one in succession."<sup>4</sup> She did not believe this was a problem in situations such as hers, where refunds were owed and no additional payments to the IRS were owed. She

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<sup>1</sup> Tr. 21-22.

<sup>2</sup> Tr. 22.

<sup>3</sup> Tr. 23, 27. The SOR alleges and Applicant admitted that Applicant willfully failed to file her state and Federal income tax returns for tax years 2007 to 2011. At the hearing, Applicant further admitted that her failure to file first occurred in 2005, not 2007. See Tr. 20, 23. The SOR is thus amended to reflect that correction.

<sup>4</sup> Tr. 39.

was not aware her actions might have repercussions in terms of her maintaining a security clearance.<sup>5</sup> Meanwhile, her husband's health and his business declined.<sup>6</sup>

In June 2011, a state tax lien for about \$4,000 was instituted against Applicant through her part-time job. Applicant neither disputed nor investigated the basis of the lien. That lien was ultimately satisfied through payroll deduction.

Applicant completed a SCA in July 2011. On the SCA, at Section 26 (Financial Record), Applicant acknowledged a state tax lien under subsection one. Under subsection two, she noted that she had either failed to pay federal, state, or other taxes, or to file a tax return.<sup>7</sup> She met with investigators in August 2011, during which time tax filings were discussed, but her failure to file for multiple tax years was not explored. She also told the investigator that she had jointly filed taxes with her husband in 2009, but had been unable to pay the balance owed. She later reported that she had always paid her taxes, including her 2010 taxes. Applicant attributes these two incorrect answers to nerves, embarrassment, and feeling the need to provide some answer despite her failure to fully understand the lien situation. She was ashamed and scared.<sup>8</sup> She does not remember telling the investigator that she owed taxes because, as recently confirmed with her belated tax filings, none were owed. With regard to the status of her taxes overall, Applicant is generally confused, unclear, or imprecise with regard to the nuances related to tax reporting; her stated reliance on a tax professional was credibly underscored by her testimony and demeanor.

When she reconnected with her former tax preparer in January 2013, Applicant discovered that she did not need to first file her 2005 tax forms before she could file for subsequent tax years. Applicant then felt confused and ashamed for not having better understood the rules, for not having sought advice from her family, and for not having made contact with her tax preparer earlier. Until she learned this fact, she had thought about contacting an accountant, but had not done so.<sup>9</sup> When asked whether her intent had been "to just not file [taxes] in the future," she responded, "No, I was, I mean, the

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<sup>5</sup> Tr. 33-34. Applicant does not remember the SCA asking if she had timely filed her federal taxes. She admits that she never listed on the SCA any references to her failure to file state or Federal income tax filings.

<sup>6</sup> Applicant's husband has been out of work for several years and his business has not generated any reportable income for the past couple of years, although the business technically remains an active business. Tr. 40-41.

<sup>7</sup> Ex. 2 (SCA) at 29 of 32.

<sup>8</sup> At one point, Applicant responded by stating "yes" to the suggestion she provided "false information during [her] interview" because she was ashamed and scared. Tr. 53. When commenting on her own without prompting, Applicant never went so far as to suggest her answers were intentionally false. See, e.g., Tr. 54. The evidence indicates Applicant has little memory of the interview or her answers. See, e.g., Tr. 55-56

<sup>9</sup> Tr. 42.

IRS knows where I am. And I've talked to an individual before. But since I had always gotten a refund, I didn't think I was hurting anyone other than myself without filing."<sup>10</sup>

In January 2013, Applicant engaged her former tax preparer "to do the very laborious preparing" of the couples' joint tax return filings for tax years 2005 through 2012.<sup>11</sup> The SOR was issued in February 2013. The tax preparer took longer than expected to prepare the filings due to a death in the family and difficulty in locating certain tax and mortgage forms. Applicant filed her state returns for 2005 through 2011, as well as her return for 2012, between mid-April 2013 and mid-May 2013. She hand-carried the 2005 through 2012 filings to her local IRS branch on May 22, 2013, where they were stamped as received and began processing.<sup>12</sup> No money was owed for any of the state or Federal tax years at issue. All filings were in refund status, although the lateness of the filings obviated payment of the available refunds for at least most of the tax years at issue.<sup>13</sup>

I take judicial notice that 26 U.S.C. § 7203 (Willful failure to file return, supply information, or pay tax) states:

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.

### **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

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<sup>10</sup> Tr. 41-42.

<sup>11</sup> Tr. 25.

<sup>12</sup> Tr. 25.

<sup>13</sup> Tr. 29-31.

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>14</sup> The burden of proof is something less than a preponderance of evidence. The ultimate burden of persuasion is on the applicant.<sup>15</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 those 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 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>16</sup> Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such information.<sup>17</sup>

## 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

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<sup>14</sup> See *also* ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug. 10, 1995).

<sup>15</sup> ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

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>18</sup> Applicant knowingly failed to file state and Federal income tax returns for tax years 2005 to 2011, as required. Such facts are sufficient to raise Financial Considerations Disqualifying Conditions AG ¶ 19(g):

— *failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same.*

With a disqualifying condition raised, it is left to Applicant to overcome the case against her and mitigate security concerns.

Applicant first failed to file her state and Federal tax returns for the 2005 tax year. She did so because important information regarding her taxes and her husband's business' taxes were lost when a family computer crashed and the hard drive was corrupted. This situation was obviously out of her control.

Backup files or alternative sources were available in storage, but the prospect of culling through those boxes was daunting and would have demanded significant time. Applicant chose not to go through the family records to find the information necessary for completing their 2005 joint filing. At the time, she was under the incorrect assumption that if one did not file taxes for one year, then one was precluded from filing for subsequent tax years until the missed year was filed.

Applicant did nothing significant to verify with a tax or financial counselor that this information was correct, nor did she make any notable strides to work on the 2005 tax year filing until 2013. There is no evidence that Applicant ever initiated an effort to complete tax year 2005 filings in the interim, despite the fact she was informed in 2011 that her tax issues were under scrutiny as part of the security clearance renewal process. But for her recent January 2013 reunion with her former tax preparation professional and her even more recent Spring 2013 tax filings, it appears likely that her taxes would have remained unfiled to date. Applicant's attempt at corrective action that could demonstrate a renewed commitment to pro-active reliability and sound judgment occurred less than a year ago. More than a few months is necessary to make such a demonstration. Neither Financial Considerations Mitigating Condition (FC MC) 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 –*

nor AG ¶ 20(b):

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<sup>18</sup> AG ¶ 18.

*— 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 —*

applies.

Applicant used the services of a tax preparation professional, but there is no evidence that she has received actual financial counseling. However, although it did not occur until shortly before the May 2013 hearings, Applicant filed her state and Federal taxes for tax years 2005 to 2011. Therefore, AG ¶ 20(c) applies in part:

*— 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.*

None of the other mitigating conditions apply.

### **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>19</sup> Here, Applicant gave incorrect information to an investigator in August 2011 indicating that she had filed state and Federal income taxes for tax year 2009. If her statement was intentionally false, Personal Conduct Disqualifying Conditions AG ¶ 16(b):

*— deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative —*

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 (1) engaging in activities which, if known, may affect the person’s personal, professional, or community standing. . . . —*

apply. Consequently, the burden is on Applicant to mitigate security concerns.

In discussing both the interview and her overall situation regarding her tax filings, Applicant credibly conceded that she was confused about her entire tax situation. Her

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<sup>19</sup> AG ¶ 15.

confusion is apparent from the facts. She noted that she had tax and tax filing issues in her July 2011 SCA, which was submitted before her investigative interview. She credibly laments not contemporaneously discussing her financial situation with family or a tax professional. At the hearing, her explanations for making these and other incorrect answers range from embarrassment, confusion, and willingness to provide some form of answer so as not to seem ignorant of her situation. While her answer to the investigator regarding the 2009 tax year was admittedly incorrect, it does not seem to have been made to purposefully obfuscate or falsify, especially given the more comprehensive answer given on the July 2011 SCA. However, had intentional falsity been indicated, Personal Conduct Mitigating Condition AG ¶ 17(e):

*— the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress —*

would apply.

### **Guideline J – Criminal Conduct**

The concern under this guideline is that criminal activity creates doubt about a person’s judgment, reliability, and trustworthiness. By its very nature, it calls into question a person’s ability or willingness to comply with laws, rules, and regulations.<sup>20</sup> In this case, Applicant admitted that she knowingly and purposefully chose not to file her state and Federal income tax returns for tax years 2005 to 2011. Such failure is in violation of Title 26, United States Code, § 7203. This is sufficient to raise both Criminal Conduct Disqualifying Condition AG ¶ 31(a):

*— a single serious crime or multiple lesser offenses —*

and AG ¶ 31(c):

*— allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.*

Consequently, it is Applicant’s burden to mitigate the security concerns raised.

When her tax information was lost in a computer mishap, Applicant forewent filing her 2005 state and Federal income taxes. She did not search hard documents she and her husband had boxed, archived, and stored because it would take too much time and effort to cull through the boxes for the needed documents. She did not consult a tax preparation professional for guidance. Instead, she did not file income tax returns for tax years 2006 to 2011. She failed to file for those years not because she intended to circumvent the law or avoid Internal Revenue Service scrutiny, but because she was under the mistaken belief that she could not file for subsequent years until the 2005 filing was completed.

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<sup>20</sup> AG ¶ 30.



As the years passed and more tax years went unfiled, Applicant took no corrective action regarding her tax filing obligations. But for this process, Applicant's inaction might have continued. It is clear that Applicant now knows she has a duty to file annually. It is doubtful that she will again decline to file her taxes. However, failing to file, failing to go through her stored documents for backup hard copies, and failing to approach a tax preparation professional within one or two years of missing an annual filing demonstrates poor judgment and reliability. Therefore, Criminal Conduct Mitigating Condition AG ¶ 32(a):

*— so much time has elapsed since the criminal behavior happened, 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 —*

does not apply.

Within the past year, Applicant reunited with her tax professional. She now understands that tax filings are required by law. With the help of her tax preparer, Applicant has filed all the state and Federal tax documents that needed to be filed. All state and Federal tax filings have been completed. When she discovered her error, she was extremely embarrassed and sorry. She is credibly contrite about her lapse in judgment. She stresses that she owed no taxes for the years belatedly filed. In light of these considerations, I find that AG ¶ 32(d):

*— there is evidence of successful rehabilitation, including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement —*

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 FC MC ¶ 20(b), depends on the specific facts in a given case.

I considered the specific facts and circumstances in this case. Applicant is a mature woman who has maintained a security clearance for many years without incident. Industrious by nature, she has worked two jobs throughout her professional career. She is supporting her husband, who is in ill health and whose business is not generating income.

In failing to file her state and Federal income tax forms for multiple years, Applicant did not intend to violate or skirt the law. To the contrary, she earnestly believed that she could not submit subsequent tax year filings until her 2005 joint filing was made. This may well explain why there were no filings for 2006 and, perhaps, 2007. Sound and reliable judgment, however, would have led a responsible person to either submit a belated 2005 filing or contact either the Internal Revenue Service or a tax preparation professional within a year or two, if not a reasonable amount of time, to resolve the situation. It was not reasonable to simply continue neglecting the situation, even after her taxes were raised as potential security issues during her 2011 interview with an investigator. Although she lacked the requisite intent to necessarily raise her actions to the level of criminal violations, and while it is clear that some of her comments regarding her tax situation were knee jerk responses to questions for which she had no valid answers, her failure to finally address her tax filing issues until shortly before the hearing sustains related security concerns. At least one tax year is needed to provide Applicant with the time necessary to demonstrate that she has the requisite knowledge of how to responsibly handle her state and Federal tax obligations. 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-1.b:	Against Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Paragraph 3, Guideline J:	FOR APPLICANT
Subparagraph 1.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 is denied.

ARTHUR E. MARSHALL  
Administrative Judge