



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



In the matter of: )  
)  
) ISCR Case No. 11-14439  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Richard Stevens, Esq., Department Counsel  
For Applicant: *Pro se*

09/19/2013

**Decision**

DUFFY, James F., Administrative Judge:

Applicant failed to mitigate security concerns arising under Guideline F, Financial Considerations. Clearance is denied.

**Statement of the Case**

On June 4, 2013, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline F. This action was taken under Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive); and the adjudicative guidelines (AG) implemented on September 1, 2006.

The SOR detailed reasons why DOD could not find under the Directive that it is clearly consistent with the national interest to grant or continue Applicant's security clearance. On July 9, 2013, Applicant answered the SOR and requested a hearing.

The case was assigned to me on August 19, 2013. The Defense Office of Hearings and Appeals issued the Notice of Hearing on August 21, 2013. The hearing was held as scheduled on September 9, 2013. Department Counsel offered exhibits (GE) 1 and 2. Applicant testified and offered exhibits (AE) A and B. All exhibits were admitted into evidence without objection. DOHA received the transcript (Tr.) of the hearing on September 16, 2013.

### **Findings of Fact**

Applicant is a 55-year-old employee of a defense contractor. He has been working at his current job since December 2010. He graduated from college with a bachelor's degree in 1981. Since 1982, he has served in the Army, Army Reserve (active or inactive), or Army National Guard. He currently holds the grade of lieutenant colonel (O-5) and most recently served on active duty from November 2004 to October 2010. He has been married for 34 years and has four children, ages 24, 29, 30, and 33. He has held a security clearance since 1982 without incident.<sup>1</sup>

The SOR listed two allegations. One alleged that Applicant failed to file his federal income tax returns as required from 1996 to present (June 4, 2013) (SOR ¶ 1.a). The other alleged that he failed to file his state income tax returns as required during that same period (SOR ¶ 1.b). In his Answer to the SOR, Applicant admitted both allegations. His admissions are incorporated as findings of fact.<sup>2</sup>

In his Electronic Questionnaire for Investigations Processing (e-QIP) dated July 8, 2011, Applicant disclosed that he had not filed his federal and state income tax returns. In the narrative section discussing that issue, he stated:

Have not filed tax returns since 1996. Have sought advice on retaining a tax attorney to clear this up this year and will have all returns filed and satisfied this summer. Have always been having maximum taxes withheld from my pay since that time and always had a tax refund in previous years. This inaction was not malicious on my part and WILL be taken care of.<sup>3</sup>

During an Office of Personnel Management (OPM) interview on August 30, 2011, he reportedly stated:

[Applicant] has failed to file his federal income tax returns since 1996. Prior to 1996, [his] spouse always filed the income tax returns. In 1996, she was seriously injured in a car accident and was disabled and on

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<sup>1</sup> Tr. at 6-7, 19, 27, 40-44; GE 1.

<sup>2</sup> SOR and Applicant's Answer to the SOR.

<sup>3</sup> Tr. at 44-45, 48; GE 1.

medication which left her “foggy.” [He] was the primary caregiver of their four children, and also worked full-time. He never got around to filing his 1996 tax return. In subsequent years since, he’s been so fearful of the IRS [Internal Revenue Service], he purposely did not file because he didn’t want to send up any “red flags” to alert the IRS that he hadn’t filed previously. Subject has always had the maximum deduction taken out of every, single paycheck and always had a federal tax refund. He never had to pay in prior to 1996. He is not sure if he owes any taxes at all, but he’s been too afraid to contact the IRS to find out for sure. He hasn’t quite been sure where to start with it all. Everything snowballed for him. Last year, while at [Army installation], he asked a woman (name not recalled) in their financial advising office what he should do, and she simply printed off tax returns for him to fill out for the years he missed. [He] is in the process of searching for a tax attorney to assist/advise him on how to resolve this issue. [He] did not intentionally or willfully not file his return for financial gain; in fact, not filing has hurt him financially, as he wasn’t able to apply for FAFSA [Free Application for Federal Student Aid] aid for his children for college, nor was he eligible for any federal stimulus money, or able to take out a home building loan. He’s let the fear of the consequences paralyze him from taking any action. He hopes that now that he’s taking accountability, he can get the assistance he needs to remedy the situation. [His] current financial status is good. He has never had financial counseling. He is capable of meeting his financial obligations. No one would question his willingness or ability to repay his debts. No one would question his ability to live within his means. His spouse, children, supervisor . . . and security officer at [his company] are aware of this issue and he is not susceptible to blackmail or coercion.<sup>4</sup>

In his testimony, Applicant reiterated that, after initially failing to file his income tax returns, he became terrified of the IRS. He described his fear of the IRS as irrational, a phobia. He acknowledged that he was “dead wrong” for failing to file his income tax returns. He also indicated that his wife was still not employed, remains disabled from a back injury arising from her car accident, and is essentially bedridden.<sup>5</sup>

In responding to interrogatories on May 6, 2013, Applicant indicated that he was in the process of gathering documents so that he could file his income tax returns. He provided a letter from a tax firm indicating he was working with them on filing the returns.<sup>6</sup>

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<sup>4</sup> GE 2.

<sup>5</sup> Tr. at 40-46, 49, 60, 62-63.

<sup>6</sup> GE 2.

On September 5, 2013 (*i.e.*, four days before the hearing), Applicant filed his federal income tax returns for tax years 2003 through 2012. Those income tax returns reflected the following:

Tax Year	Adjusted Gross Income	Amount of Tax Owed	Tax Refund Due
2003	\$53,895	0	\$617
2004	\$61,150	0	\$279
2005	\$74,664	0	\$408
2006	\$79,559	\$1,948	0
2007	\$74,137	\$853	0
2008	\$4,990 <sup>7</sup>	0	\$695
2009	\$65,125	\$21	0
2010	\$77,972	\$414	0
2011	\$95,592	0	\$1,840
2012	\$75,615	0	\$1,999
Totals		\$3,236	\$5,838

Applicant testified that he filed his income tax returns for tax years 1996, 1997, and 1998, but provided no proof that he did so. No information was presented to show that he filed his federal income tax returns for tax years 1999 through 2002. The statute of limitations for the IRS to assess and collect any outstanding balances does not start until a tax return has been filed. In other words, there is no statute of limitations for assessing and collecting income taxes if no return has been filed.<sup>8</sup>

Under 26 U.S. Code § 7203, an individual who willfully fails to file a federal income tax return when required to do so by law or regulation commits a criminal offense. At the time of the hearing, the IRS had just received Applicant's federal income tax returns and was processing them. It is unknown whether he owed any back taxes, interest, or penalties. Applicant expects to hear from the IRS in about six weeks as to whether he owes any money.<sup>9</sup>

<sup>7</sup> Applicant was serving on active duty in the Army overseas in 2008. A significant portion of his income was exempt from federal income taxes because he was serving in a combat zone.

<sup>8</sup> Tr. at 45-47, 50-52; GE 2; AE A, B. For information on the statute of limitations for filing returns, see <http://www.irs.gov/taxtopics/tc153.html>.

<sup>9</sup> Tr. at 52-53. Section 7203 of Title 26, U.S. Code 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. In the case of any person with respect to whom there is a failure to pay any estimated tax, this section shall not apply to such person with

At the time of the hearing, Applicant had not yet filed his delinquent state income tax returns. He indicated that his accountant has requested documents from the state so that he could file those returns, but had not yet received the paperwork.<sup>10</sup>

Applicant served on active duty in the Army overseas from about January 2008 to February 2009. During his military career, he has been awarded the Meritorious Service Medal, Army Commendation Medal, five Army Achievement Medals, Army Good Conduct Medal, and Armed Forces Reserve Medal with 20 year device.<sup>11</sup>

## Policies

The President of the United States 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. *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988). The President has authorized the Secretary of Defense to grant 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. The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These AGs are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge’s 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, to reach his decision.

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respect to such failure if there is no addition to tax under section [6654](#) or [6655](#) with respect to such failure. In the case of a willful violation of any provision of section [6050I](#), the first sentence of this section shall be applied by substituting “felony” for “misdemeanor” and “5 years” for “1 year”.

An individual must file a federal income tax return if his or her income is above a certain level; which varies depending on the individual’s filing status, age, and the type of income received. For 2012, the minimum income requirement for a head of a household who is under 65 years of age was \$12,500. See Page 1 of Chapter 4, IRS Publication 17, *Your Federal Income Tax*, at <http://www.irs.gov/pub/irs-pdf/p17.pdf>.

<sup>10</sup> Tr. at 49-50, 56-59.

<sup>11</sup> GE 1, 2

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 of potential, rather than actual, risk of compromise of classified information. Clearance decisions must be “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. See also Executive Order 12968 (Aug. 2, 1995), Section 3. Thus, a clearance decision is merely an indication that the Applicant has or 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 (4<sup>th</sup> Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed and an applicant’s security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

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 ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue [his or her] security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[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 security concern for financial considerations is set out in 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.

The guideline notes several conditions that could raise security concerns under AG ¶ 19. One is potentially applicable in this case:

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

Applicant failed to file his federal and state income taxes as required for about 16 years. This evidence is sufficient to raise the above disqualifying condition.

Three financial considerations mitigating conditions under AG ¶¶ 20 are potentially applicable:

(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;

(b) the conditions that resulted in the financial problem 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; and

(c) 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.

Although Applicant has filed his federal income tax returns for tax years 2003 to 2012, he did so only four days before the hearing. He did not provide proof that he has filed his federal income tax returns for tax years 1996 through 2002. At the hearing, he indicated that he still had not filed his delinquent state income tax returns.

In the past, the Appeal Board has stated:

. . . Applicant's failure to file federal and state income tax returns reflect both an overall pattern of Applicant failing to live up to his lawful obligations as a citizen, and his selective compliance with laws. Such a pattern has negative security implications because the industrial security program relies heavily on the full and voluntary compliance of applicants with security regulations, practices and procedures. Persons who are unwilling or unable to fulfill all their lawful obligations in a conscientious manner do not inspire trust and confidence in their willingness or ability to properly handle and safeguard classified information.<sup>12</sup>

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<sup>12</sup> ISCR Case No. 94-0964 at 4-6 (App. Bd. Jul .3 1996).

In this case, Applicant's failure to file his income tax returns occurred recently, is ongoing, and casts doubt on his reliability, trustworthiness, and good judgment. His wife's disability that arose from a car accident in 1996 may have provided a justification for some delay in filing his income tax returns. Her disability, however, certainly does not justify the delay shown in this case. In the intervening 16 years since her accident, Applicant did not act responsibly in meeting his tax-filing obligations. His fear of the IRS provides no mitigation and raises questions about his reliability, e.g., how would he react if faced with the decision of whether or not to report a negligent security violation that he committed. Insufficient evidence has been presented to conclude that Applicant's failure to file his income tax returns is a resolved problem and will not recur. None of the mitigating conditions apply.

### **Whole-Person Concept**

Under the whole-person concept, the 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. The 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.

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.

I considered the potentially disqualifying and mitigating conditions in light of all relevant facts and circumstances surrounding this case. I have incorporated my comments under Guideline F in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

Applicant has served in the military for 32 years. He recently served in a combat zone in the Middle East. Nonetheless, he failed to file his federal and state income tax returns as required for about 16 years. His recent filing of his federal income tax returns for tax years 2003 through 2012 falls into the category of "too little, too late" to mitigate the security concerns about his reliability and judgment or show that he has reformed himself and will comply with the income tax return filing requirements in the future. His failure to file his income tax returns remains a security concern.



Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. Therefore, I conclude Applicant has not mitigated the security concerns arising under Guideline F.

### **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 – 1.b:	Against Applicant

### **Decision**

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

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James F. Duffy  
Administrative Judge