



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



In the matter of: )  
)  
) ISCR Case No. 12-03589  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Caroline E. Heintzelman, Esq., Department Counsel  
For Applicant: Curtis L. Thomas, Esq.

05/20/2014

**Decision**

NOEL, Nichole L., Administrative Judge:

Applicant contests the Defense Department's intent to deny his eligibility for a security clearance to work in the defense industry. Applicant failed to mitigate the security concern raised by his repeated failure to file federal and state income tax returns as required. Clearance is denied.

**Statement of the Case**

On October 24, 2013, the Department of Defense (DOD) issued a Statement of Reasons (SOR) detailing security concerns under the financial considerations guideline.<sup>1</sup> DOD adjudicators were unable to find that it is clearly consistent with the national interest to grant Applicant's security clearance.

<sup>1</sup> This case is adjudicated under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry*, signed by President Eisenhower on February 20, 1960, as amended; as well as DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive). In addition, the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), effective within the Defense Department on September 1, 2006, apply to this case. The AG were published in the Federal Register and codified in 32 C.F.R. § 154, Appendix H (2006). The AG replace the guidelines in Enclosure 2 to the Directive.

Applicant timely answered the SOR and requested a hearing.<sup>2</sup> At the hearing convened on March 27, 2014, I admitted Government's Exhibits (GE) 1 and 2, as well as Applicant's Exhibits (AE) A through D, without objection. After the hearing, Applicant submitted AE E, a copy of his IRS Forms 1040 from 2005 to 2011, which I also admitted without objection. I received the transcript (Tr.) on April 7, 2014.

### **Findings of Fact**

Applicant, a 52-year-old software architect, has worked for a federal contractor since 2010. This is his first application for a security clearance. Married since 2010, Applicant has one infant child.<sup>3</sup>

Applicant completed his security clearance application in December 2011. In response to questions regarding his financial record, Applicant disclosed that he failed to file federal and state income tax returns from 2004 to 2010. Although Applicant did not file his income tax returns, each year he did a calculation to determine his federal or state tax liability, if any. In 2004, Applicant calculated that he owed a federal tax liability of approximately \$2,500. He paid the estimated tax liability and filed for an extension to file his income tax return. Applicant failed to file his federal 2004 tax return by the August 2005 extension deadline.<sup>4</sup>

Between 2007 and 2009, Applicant was underemployed, earning less than \$5,000 in gross income each of those years. In 2010, Applicant timely filed an extension request with the IRS; however, Applicant failed to file by the deadline. In January 2012, Applicant was interviewed by a background investigator and discussed his failure to file his federal and state income tax returns. He informed the investigator that he planned to file his outstanding income tax returns by the end of 2012 and that he intended to comply with federal and state income tax filing requirements in the future. However, Applicant filed his 2011 and 2012 federal income tax returns late and he did not have all of his outstanding federal and state income tax returns until June 2013. Applicant did not have any outstanding federal or state tax liabilities and was owed federal tax refunds for 2005 through 2010. Applicant filed his 2013 federal and state income tax returns before the filing deadlines.<sup>5</sup>

At first, Applicant did not file his income tax returns because he was busy. Expecting federal and state tax refunds, Applicant did not make filing his income tax returns a priority. As the years passed, he became disorganized and the task of filing so many returns became overwhelming. At the hearing, Applicant again vowed to comply with the federal and state income tax filing requirements in the future. Applicant testified

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<sup>2</sup> To assist in his preparation for the hearing, Applicant received correspondence from Department Counsel and the Chief Administrative Judge. These letters are appended to the record as Appellate Exhibits (AP) I through III.

<sup>3</sup> Tr. 17-18, 23-24; GE 1.

<sup>4</sup> Tr. 24, 22; GE 1-2; Answer.

<sup>5</sup> Tr. 20-21, 29-30; GE 1-2; AE A-E; Answer.

that he does not want to engage in any behavior that could negatively impact his ability to obtain or hold a security clearance. Although Applicant has not held a security clearance before, his job does require him to work with sensitive information protected by a federal statute. As a result, he is required to undergo annual training on the proper handling and protection of that information. Applicant has handled the security responsibilities related to this sensitive information without incident.<sup>6</sup>

## **Policies**

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are to be used in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, administrative judges apply the guidelines in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, 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.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel." The applicant has the ultimate burden of persuasion to obtain a favorable security decision.

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 individuals 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 of potential, rather than actual, risk of compromise of classified information.

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<sup>6</sup> Tr. 19-20, 27, 38-39, 44; GE 1-2.

Section 7 of EO 10865 provides that adverse 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).

## Analysis

### Financial Considerations

Failure to . . . 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.”<sup>7</sup> Similarly, an individual who is financially irresponsible may also be irresponsible, unconcerned, or negligent in handling and safeguarding classified information. The security concern under the financial considerations guideline is not limited to an applicant’s failure to pay monetary debt. As is alleged here, an applicant’s failure to file annual federal or state income tax returns, as required, also raises a concern and is potentially disqualifying.<sup>8</sup>

Neither party presented evidence to establish whether or not Applicant was required to file federal and state income tax returns for the years alleged in the SOR. The SOR allegations and Applicant’s admissions to them are based on the supposition that all individuals who earn income are required to file federal and state income tax returns. This is not the case. Each year, the IRS and Applicant’s state of residency issue guidelines to the public outlining filing requirements.<sup>9</sup> Applying the IRS and state guidance, Applicant was not required to file federal or state income tax returns for the 2007 through 2009 tax years because his gross income fell below the minimum filing requirement.<sup>10</sup> However, Applicant’s gross income exceeded the federal minimum gross income requirements for the 2004 through 2006 and 2010 through 2011 tax years.<sup>11</sup> As such, he was required to file federal income tax returns for those years.<sup>12</sup> Under the

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<sup>7</sup> AG ¶ 18.

<sup>8</sup> AG ¶ 19(g).

<sup>9</sup> The federal and state income tax filing guidelines, which are appended to the record as AP IV and V, are applied to this case over Department Counsel’s objection. The Government argues that it is beyond the scope of authority for a DOHA administrative judge to interpret IRS rules and regulations and apply them to a specific set of facts as necessary to determine whether or not Applicant had an obligation to file federal and state income taxes as alleged. Instead, the Government argues, that an administrative judge is limited to the facts established by the record evidence and cannot speculate as to how another agency would apply its regulation to those facts. However, the language of the disqualifying condition and the allegation necessitates a finding on whether or not Applicant was required to file federal and state income tax returns for the years alleged in the SOR. The parties’ positions on these issues are appended to the record as AP VI.

<sup>10</sup> AE E; See AP IV.

<sup>11</sup> AE E.

<sup>12</sup> See AP IV.

state rules, Applicant was required to file a state income tax return for each year he was required to file a federal return.<sup>13</sup> The record contains evidence of Applicant's multiple failures to perform duties required by law over an eight-year period.

Applicant's failure to file his federal and state income tax returns was not motivated by a desire to avoid any potential financial obligations to the Government. Applicant is not a tax protestor. However, this does not mitigate Applicant's repeated failure to file his federal and state income tax returns on time. Nor is Applicant's conduct mitigated by the fact the he was entitled to refunds for each of the years alleged in the SOR. While Applicant receives partial mitigation for filing his outstanding tax returns prior to the issuance of the SOR,<sup>14</sup> he has not presented sufficient evidence to show that his failure to file will not recur in the future. Applicant's failure to file his state and federal income tax returns was not caused by events beyond his control. He allowed his tax reporting obligations to fall victim to the banalities of life. He was busy, disorganized, and eventually overwhelmed by the seeming enormity of the task of filing state and federal income tax returns for multiple years. His assurances that he will comply with filing requirements in the future carry little weight because Applicant has timely filed his federal and state income tax returns only once in the last 10 years. Applicant's failure to comply with state and federal income tax filing requirements continue to raise concerns about his judgment, reliability, and willingness to abide by rules and regulations.

### **Whole-Person Concept**

After reviewing the record, I have doubts about Applicant's current suitability for access to classified information. In reaching this conclusion, I have also considered the whole-person factors at AG ¶ 2(a). Applicant has failed to mitigate the security concern raised by his history of failing to file his federal and state income tax returns as required. Because Applicant has not demonstrated a clear track record of rehabilitation or reform, it is not appropriate to grant him access to classified information at this time. However, the award of a security clearance is not a once in a lifetime occurrence, but is based on applying the factors, both disqualifying and mitigating, to the evidence presented. Applicant, who has appropriately handled sensitive information relevant to his job requirements since 2010, may well establish a record of his ability to comply with rules and regulations and honor his basic obligations to the Government. At this time, however, Applicant's request for access to classified information is denied.

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<sup>13</sup> See AP V.

<sup>14</sup> AG ¶ 19(c).

## 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, Financial Considerations:	Against Applicant
Subparagraphs 1.a:	For Applicant
Subparagraph 1.b – 1.c:	Against Applicant <sup>15</sup>

## Conclusion

In light of all of the circumstances presented, it is not clearly consistent with the national interest to grant Applicant a security clearance. Eligibility for access to classified information is denied.

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Nichole L. Noel  
Administrative Judge

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<sup>15</sup> With exception of tax years 2007 through 2009, for which Applicant was not required to file federal or state income tax returns.