



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



In the matter of:

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ISCR Case No. 15-06440

Applicant for Security Clearance

**Appearances**

For Government: Gina Marine, Esq., Department Counsel

For Applicant: James S. Morris, Esq.

08/11/2017

**Decision**

TUIDER, Robert, Administrative Judge:

Applicant has mitigated security concerns pertaining under Guideline F (financial consideration). Clearance is granted.

**Statement of the Case**

On November 6, 2014, Applicant completed and signed a Questionnaire for National Security Positions (SF-86). On February 28, 2016, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued an SOR to Applicant under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry*, February 20, 1960; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), January 2, 1992; and the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information*, which became effective on September 1, 2006 (Sept. 1, 2006 AGs).

The SOR detailed reasons why the DOD CAF did not find under the Directive that it is clearly consistent with the interests of national security to grant or continue a security clearance for him, and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked. Specifically, the SOR set forth security concerns arising under the financial considerations guideline.

On April 8, 2016, Applicant responded to the SOR. On July 1, 2016, Department Counsel was prepared to proceed. On August 4, 2016, the Defense Office of Hearings

and Appeals (DOHA) assigned the case to me. On September 27, 2016, DOHA issued a notice of the hearing, setting the hearing on October 24, 2016. The hearing was held as scheduled.

At the hearing, Department Counsel offered Government Exhibits (GE) 1 and 2, which were received into evidence without objection. Applicant did not call any witnesses, testified, and offered Applicant Exhibits (AE) A through P, which were received without objection. On November 1, 2016, DOHA received the hearing transcript (Tr.). I held the record open until November 30 2016, to permit Applicant to submit additional evidence. Applicant timely submitted AE Q(1) through Q(11), which were received without objection. Applicant also submitted four DOHA case citations, that were marked as Exhibits (Ex) I through IV for administrative notice purposes.

On December 13, 2016, I forwarded an e-mail to Department Counsel and Applicant stating that I intended to issue a summary decision granting Applicant's security clearance. On the same day, Department Counsel replied by e-mail stating without elaboration that the Government objected to issuance of a summary decision in this case.

While this case was pending a decision, the Director of National Intelligence issued Security Executive Agent Directive 4, establishing *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AGs) which he made applicable to all covered individuals who require initial or continued eligibility for access to classified information or eligibility to hold a sensitive position. The new AGs supersede the Sept. 1, 2006 AGs and are effective "for all covered individuals" on or after June 8, 2017. Accordingly, I have evaluated Applicant's security clearance eligibility under the new AGs, as required.<sup>1</sup>

### **Procedural Matters**

Department Counsel moved to amend SOR ¶ 1.a to read, "You failed to file your (Federal) income tax returns for at least tax years 2005 through 2014." Without objection from Applicant's counsel, I granted Department Counsel's motion. (Tr. 59-60)

### **Findings of Fact<sup>2</sup>**

In Applicant's SOR response, he admitted the sole SOR allegation, with explanations. Applicant's admission is accepted as findings of fact. Additional findings of fact follow.

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<sup>1</sup> The new AGs are available at [http://ogc.osd.mil/doha/5220-6\\_R20170608.pdf](http://ogc.osd.mil/doha/5220-6_R20170608.pdf).

<sup>2</sup> Some details were excluded to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

## **Background Information**

Applicant is a 56-year-old junior engineer employed by a defense contractor since October 2011. He seeks a security clearance in conjunction with his current employment. He previously held a secret security clearance for approximately five years with a former employer in the 1990s. (Tr. 12-15, 17-18)

Applicant graduated from high school in June 1978. (Tr. 15) He was awarded an associate of arts degree in January 1982, and attended a four-year university from January 1990 to January 1992, but did not earn a degree. (Tr. 15-16, 54) He has never married and has no dependents. (Tr. 16-17) He did not serve in the U.S. armed forces. (Tr. 17)

## **Financial Considerations**

The SOR, as amended, alleged that Applicant failed to file his federal income tax returns for tax years 2005 through 2014. (SOR ¶ 1.a) This allegation is established through Applicant's admissions; his November 6, 2014 SF-86; his April 9, 2015 Office of Personnel Management Personal Subject Interview (OPM PSI); and his hearing testimony. (GE 1, GE 2)

Applicant stated in his SOR answer, his SF-86, and his OPM PSI, that he did not file his federal income taxes because he always had the maximum withholdings withheld from his pay and did not owe any taxes. (SOR answer, GE1, GE 2) He reiterated that point in his testimony stating that he always had maximum payroll withholdings and had "no financial obligation in terms of liability." Furthermore, he never owed the IRS money and had he filed, he would have received a refund. He stated, "... I know it sounds maybe unusual, but I felt that that was a good cause, if you will. So, I forfeited those returns." (Tr. 19) Alternatively stated, Applicant believed that since he was owed a refund, he was not required to file.

Department Counsel thoroughly questioned Applicant on this point. Applicant never wavered in his belief that he was not required to file a tax return if owed a refund. (Tr. 27-52) Applicant's counsel questioned him further on this point and his testimony remained the same. (Tr. 55-59) Having had a chance to observe Applicant's demeanor and listen to his testimony, I found him to be credible, albeit mistaken.

When Applicant was informed that he was required to file his federal income tax returns, regardless of whether he was due a refund, he took immediate corrective action. (Tr. 19-20) In 2016, he hired an accountant and filed all required tax returns with the IRS, which in his case was for the previous seven years. (Tr. 20-22) Applicant submitted copies of his income tax returns for tax years 2009 to 2015, corroborating what he has been stating from the onset, that the IRS owed him a refund for every year he did not file. Broken down by year, a summary of refunds follows: 2009 - \$520; 2010 - \$641; 2011 - \$1,307; 2012 - \$1,130; 2013 - \$1,054; 2014 - \$1,974; 2015 - \$982 (Tr. 20-21; AE B – AE P, AE Q(3) - AE Q(8)) Tax returns filed more than three years late are not eligible for

refunds. Applicant provided copies of IRS refund checks for tax years 2012 – 2015. (AE A, AE Q(1)) In short, Applicant is now current on all of his Federal income tax obligations.

Applicant lives in a mobile home that he owns outright. Similarly, his automobile is paid for. Applicant's budget reflects that he lives within his means and leads a modest lifestyle. His net monthly remainder is \$2,824 and he has approximately \$80,000 in his savings account. (Tr. 22, 61-62; AE Q(2)) He lives in a farming community and his family has a long-standing farming tradition. For a hobby, he grows vegetables and sells them at a local farmer's market. (Tr. 23-26)

### **Character Evidence**

Applicant's 2016 annual performance review reflects sustained superior performance. It is clear from his performance review that his company views him as a valued employee. (AE Q(9)). Applicant submitted a personal and professional reference letter from an individual who has known him for 34 years. This individual described Applicant as loyal, hardworking, and professional. (AE Q(10)) Additionally, Applicant's employer recognized him with a technical award for submitting a work-related provisional patent application. (AE Q(11))

### **Policies**

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President 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." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicant's 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.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These guidelines 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 overarching 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.

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 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. 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. Thus, nothing in this decision should be construed to suggest that it is based, in whole or in part, on any express or implied determination about applicant’s allegiance, loyalty, or patriotism. It is merely an indication the applicant 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 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein 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 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**

### **Financial Considerations**

AG ¶ 18 articulates the security concern for financial problems:

Failure 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 or sensitive information. Financial distress can also be caused or exacerbated by, and thus can be a possible indicator of, other issues of personnel security concern such as excessive gambling, mental health conditions, substance misuse, or alcohol abuse or dependence. An individual who is financially overextended is at greater risk of having to engage in illegal or otherwise questionable acts to generate funds. . . .

The Appeal Board explained the scope and rationale for the financial considerations security concern in ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012) (citation omitted) as follows:

This concern is broader than the possibility that an applicant might knowingly compromise classified information in order to raise money in satisfaction of his or her debts. Rather, it requires a Judge to examine the totality of an applicant's financial history and circumstances. The Judge must consider pertinent evidence regarding the applicant's self-control, judgment, and other qualities essential to protecting the national secrets as well as the vulnerabilities inherent in the circumstances. The Directive presumes a nexus between proven conduct under any of the Guidelines and an applicant's security eligibility.

AG ¶ 19 includes one disqualifying condition that could raise a security concern and may be disqualifying in this case: "(f) failure to file . . . annual Federal . . . income tax returns . . . as required." The record establishes the disqualifying condition in AG ¶ 19(f), requiring additional inquiry about the possible applicability of mitigating conditions.

Applicant did not timely file his federal income tax returns for tax years 2005 to 2014. A willful failure to timely make (means complete and file with the IRS) a federal income tax return is a misdemeanor-level federal criminal offense.<sup>3</sup> For purposes of this decision, I am not weighing Applicant's failure to timely file his federal income tax returns against him as a federal crime, since his actions were not alleged under the criminal conduct AG.

Two financial considerations mitigating conditions under AG ¶ 20 are applicable: "(a) the behavior . . . 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;" and "(g) the individual has made arrangements with the appropriate tax authority to file or pay the amount owed and is in compliance with those arrangements."

Applicant negligently failed to timely file his federal income tax return for tax years 2005 to 2014. He was due refunds for all of those tax years. The DOHA Appeal Board has commented:

Failure to file tax returns suggests that an applicant has a problem with complying with well-established governmental rules and systems. Voluntary compliance with such rules and systems is essential for protecting classified information. ISCR Case No. 01-05340 at 3 (App. Bd. Dec. 20, 2002). As we

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<sup>3</sup> Title 26 U.S.C, § 7203, willful failure to file return, supply information, or pay tax, reads:

Any person . . . 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 . . . 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 . . . .

A willful failure to make return, keep records, or supply information when required, is a misdemeanor without regard to existence of any tax liability. *Spies v. United States*, 317 U.S. 492 (1943); *United States v. Walker*, 479 F.2d 407 (9<sup>th</sup> Cir. 1973); *United States v. McCabe*, 416 F.2d 957 (7<sup>th</sup> Cir. 1969); *O'Brien v. United States*, 51 F.2d 193 (7<sup>th</sup> Cir. 1931).

have noted in the past, a clearance adjudication is not directed at collecting debts. See, e.g., ISCR Case No. 07-08049 at 5 (App. Bd. Jul. 22, 2008). By the same token, neither is it directed toward *inducing an applicant to file tax returns*. Rather, it is a proceeding aimed at evaluating an applicant's judgment and reliability. *Id.* A person who fails repeatedly to fulfill his or her legal obligations does not demonstrate the high degree of good judgment and reliability required of those granted access to classified information. See, e.g., ISCR Case No. 14-01894 at 5 (App. Bd. Aug. 18, 2015). See *Cafeteria & Restaurant Workers Union Local 473 v. McElroy*, 284 F.2d 173, 183 (D.C. Cir. 1960), *aff'd*, 367 U.S. 886 (1961).

ISCR Case No. 14-04437 at 3 (App. Bd. Apr. 15, 2016) (emphasis in original). See ISCR Case No. 14-05476 at 5 (App. Bd. Mar. 25, 2016) (citing ISCR Case No. 01-05340 at 3 (App. Bd. Dec. 20, 2002)); ISCR Case No. 14-01894 at 4-5 (App. Bd. Aug. 18, 2015). The Appeal Board clarified that even in instances where an “[a]pplicant has purportedly corrected [the applicant’s] federal tax problem, and the fact that [applicant] is now motivated to prevent such problems in the future, does not preclude careful consideration of [a]pplicant’s security worthiness in light of [applicant’s] longstanding prior behavior evidencing irresponsibility” including a failure to timely file federal income tax returns. See ISCR Case No. 15-01031 at 3 and note 3 (App. Bd. Jun. 15, 2016)

In ISCR Case No. 15-01031 at 2 (App. Bd. Jun. 15, 2016), the Appeal Board reversed the grant of a security clearance, and noted the following primary relevant disqualifying facts:

Applicant filed his 2011 Federal income tax return in December 2013 and received a \$2,074 tax refund. He filed his 2012 Federal tax return in September 2014 and his 2013 Federal tax return in October 2015. He received Federal tax refunds of \$3,664 for 2012 and \$1,013 for 2013.

Notwithstanding the lack of any tax debt owed when the tax returns were filed in ISCR Case No. 15-01031 (App. Bd. June 15, 2016), the Appeal Board provided the following principal rationale for reversing the grant of a security clearance, “By failing to file his 2011, 2012, and 2013 Federal income tax returns in a timely manner, Applicant did not demonstrate the high degree of good judgment and reliability required of persons granted access to classified information.” ISCR Case No. 15-01031 at 4 (App. Bd. Jun. 15, 2016) (citations omitted).

On June 8, 2017, the new AGs went into effect. In 2016, Applicant “made arrangements with the appropriate tax authority to file [all required federal income tax returns] . . . and is in compliance with those arrangements.” AG ¶ 20(f). There is sufficient assurance that his financial problems are resolved, are under control, and will not recur in the future. Under all the circumstances, financial considerations security concerns are mitigated.

## 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 the circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d):

(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), "[t]he ultimate determination" of whether to grant a security clearance "must be an overall commonsense judgment based upon careful consideration" of the guidelines and the whole-person concept. My comments under Guideline F are incorporated in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under that guideline but some warrant additional comment.

Applicant is a 56-year-old junior engineer employed by a defense contractor since October 2011. His employer values him as an employee and supports him for a security clearance. Applicant successfully held a security clearance for five years during the 1990s.

Once Applicant became aware that he was required to file federal income tax returns, regardless of whether he was owed a refund, he took prompt corrective action. He is current on the filing of all of his income tax returns. I agree with Applicant's admission of negligence; however, it is important to note that he was entitled to refunds for all of those tax years. Applicant's error in judgment is less serious because it was not motivated by a desire to withhold funds due to the IRS. This process has had a sobering effect on Applicant and I am confident that he will endeavor to timely file and his taxes in the future.

I have carefully applied the law, as set forth in *Egan*, Exec. Or. 10865, and the new AGs, to the facts and circumstances in the context of the whole person. I conclude that financial consideration security concerns are mitigated. It is clearly consistent with the interests of national security to grant Applicant security clearance eligibility.



## **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:

FOR APPLICANT

Subparagraph 1.a:

For Applicant

### **Conclusion**

In light of all of the circumstances in this case, it is clearly consistent with the interests of national security to grant Applicant's eligibility for a security clearance. Eligibility for access to classified information is granted.

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ROBERT TUIDER  
Administrative Judge