



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 16-02580

Appearances

For Government: Aubrey M. De Angelis, Esquire, Department Counsel

For Applicant: *Pro se*

02/09/2018

Decision

GALES, Robert Robinson, Administrative Judge:

Applicant mitigated the security concerns regarding financial considerations and personal conduct. Eligibility for a security clearance and access to classified information is granted.

Statement of the Case

On March 27, 2015, Applicant applied for a security clearance and submitted an Electronic Questionnaire for Investigations Processing (e-QIP) version of a Security Clearance Application. On October 18, 2016, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) to him, under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended and modified; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended and modified (Directive); and the *Adjudicative Guidelines for Determining Eligibility For Access to Classified Information* (December 29, 2005) applicable to all adjudications and other determinations made under the Directive, effective September 1, 2006.¹ The SOR

¹ Effective June 8, 2017, by Directive 4 of the Security Executive Agent (SEAD 4), dated December 10, 2016, *National Security Adjudicative Guidelines* (AG) for all covered individuals who require initial or continued eligibility for

alleged security concerns under Guideline F (Financial Considerations) and Guideline E (Personal Conduct), and detailed reasons why the DOD adjudicators were unable to find that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The SOR recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

It is unclear when Applicant received the SOR as there is no receipt in the case file. On November 10, 2016, he responded to the SOR and elected to have his case decided on the written record in lieu of a hearing. A complete copy of the Government's file of relevant material (FORM) was mailed to Applicant by the Defense Office of Hearings and Appeals (DOHA) on July 10, 2017, and he was afforded an opportunity, within a period of 30 days after receipt of the FORM, to file objections and submit material in refutation, extenuation, or mitigation. In addition to the FORM, Applicant was furnished a copy of the Directive. Applicant received the FORM on July 20, 2017. An exchange of correspondence between Department Counsel and Applicant took place on several occasions, and Applicant timely submitted his initial Response to the FORM on August 21, 2017 (Initial Response), a second Response to the FORM on August 31, 2017 (2nd Response), and a third Response to the FORM on September 20, 2017 (3rd Response). Applicant's final response was due on September 27, 2017. The case was assigned to me on January 19, 2018.

Rulings on Procedure

Department Counsel requested that I take administrative notice of certain enumerated facts associated with the filing requirements of Federal income tax returns. Specifically, those filing requirements are:

- Generally, the same rules for filing Federal income tax returns apply to U.S. citizens or resident aliens, whether they are in the United States or abroad (citing Internal Revenue Service (IRS) Pub. 54, *Tax Guide for U.S. Citizens and Resident Aliens Abroad 2016* (December 8, 2016), at 3. U.S. citizens living abroad are taxed on their worldwide income (citing IRS Pub. 54, at 12);
- For tax year 2013, an individual who was married filing separately was required to file an income tax return with the IRS if his gross income was at least \$3,900. An Individual Income Tax Return (Form 1040) was to be filed by April 15, 2014 for tax year 2013 (citing IRS *1040 Instructions 2013* (December 24, 2013), at 6-7);
- For tax year 2014, an individual who was married filing separately was required to file an income tax return with the IRS if his gross income was

access to classified information or eligibility to hold a sensitive position, were established to supersede all previously issued national security adjudicative criteria or guidelines. Accordingly, those guidelines previously implemented on September 1, 2006, under which this security clearance review case was initiated, no longer apply. In comparing the two versions, there is no substantial difference that might have a negative effect on Applicant in this case.

at least \$3,950. A Form 1040 was to be filed by April 15, 2015 for tax year 2014 (citing IRS *1040 Instructions 2014* (January 26, 2015), at 6-7);

- For tax year 2015, an individual who was single and under the age of 65 was required to file an income tax return with the IRS if his gross income was at least \$10,300. A Form 1040 was to be filed by April 18, 2016 for tax year 2015 (citing IRS *1040 Instructions 2015* (January 5, 2016), at 7-8);
- Individuals meeting certain requirements may qualify for the foreign earned income and foreign housing exclusions and foreign housing deduction (citing IRS Pub. 54, at 12). The foreign earned income exclusion is voluntary, and can be chosen by filing Form 2555, *Foreign Earned Income*, or Form 2555-EZ, *Foreign Earned Income Exclusion* (citing IRS Pub. 54, at 20). One of these forms must be filed each year the individual claims the foreign earned income exclusion (citing IRS Pub. 54, at 23);
- For individuals filing on a calendar year basis, the due date for filing income tax returns is April 15 of the following year (citing IRS Pub. 54, at 3). Individuals are allowed an automatic two-month extension to file their return and pay federal income taxes if they are a U.S. citizen or resident alien, and on the regular due date of the return, they: (1) are living outside the United States and Puerto Rico and their main place of business or post of duty is outside the United States and Puerto Rico, or (2) are in the military or naval service on duty outside the United States and Puerto Rico (citing IRS Pub. 54, at 4). If they are not able to file the return by the automatic two-month extension period, they can generally get an additional four months to file a return, for a total of six months, but the request for the additional four months must be made by the due date allowed by the two-month extension (citing IRS Pub. 54, at 4). In addition to the six-month extension, taxpayers who are out of the country can request a discretionary two-month additional extension of time to file their returns (to December 15 for calendar year taxpayers), but calendar year taxpayers must send a letter to the IRS explaining the reason why they need the additional time by October 15th (citing IRS Pub. 54, at 4); and
- An electronically filed return is not considered filed until the IRS acknowledges acceptance of the electronic portion of the tax return for processing (citing IRS Pub. 1345, *Handbook for Authorized IRS e-file Providers of Individual Income* (undated)).

After weighing the reliability of the source documentation and assessing the relevancy and materiality of the facts proposed by the Government, pursuant to Rule 201, *Federal Rules of Evidence*, I take administrative notice of certain facts,² as set forth above.

Findings of Fact

In his Answer to the SOR, Applicant denied, with comments, both of the factual allegations pertaining to financial considerations (§§ 1.a. and 1.b.), as well as the sole allegation pertaining to personal conduct (§ 2.a.), in the SOR. However, in his Initial Response to the FORM, he changed his position related to both allegations pertaining to financial considerations, and he now admits them. There has been no change in his position related to personal conduct allegation. Applicant's admissions and comments are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact:

Applicant is a 56-year-old employee of a defense contractor. He has been a live fire training technician with the company, serving overseas since August 2001. He is a 1979 high school graduate. He enlisted in the U.S. Army in June 1981, and he served on active duty until he was honorably retired in July 2001. He was granted a secret security clearance in 1981, and maintained that clearance through subsequent reinvestigations. Applicant was married in 1990, and divorced in 1992. He remarried in 1993, and was divorced in 2015. He has been cohabiting with a foreign national since 2012. Applicant has two daughters, born in 1994 and 2010.

Financial Considerations

Applicant has been working and residing overseas since August 2001. During an interview with an investigator from the U.S. Office of Personnel Management (OPM) on March 31, 2016, Applicant acknowledged that for the past several years, with emphasis on the tax years 2013, 2014, and 2015, he failed to timely file his federal income tax returns. He explained that his failures were unintentional because he "he does not view filing U.S. tax returns as a priority because he never owes any taxes. He noted that the IRS gives him up to two years to file a Form 2555 to prove that his tax home is overseas,

² Administrative or official notice is the appropriate type of notice used for administrative proceedings. See *McLeod v. Immigration and Naturalization Service*, 802 F.2d 89, 93 n.4 (3d Cir. 1986); ISCR Case No. 05-11292 at 4 n.1 (App. Bd. Apr. 12, 2007); ISCR Case No. 02-24875 at 2 (App. Bd. Oct. 12, 2006) (citing ISCR Case No. 02-18668 at 3 (App. Bd. Feb. 10, 2004)); ISCR Case No. 11-01994 at 2 (App. Bd. Apr. 25, 2012). The most common basis for administrative notice at ISCR proceedings, is to notice facts that are either well known or from government reports. See Stein, *ADMINISTRATIVE LAW*, Section 25.01 (Bender & Co. 2006) (listing fifteen types of facts for administrative notice). Requests for administrative notice may utilize authoritative information or sources from the internet. See, e.g. *Hamdan v. Rumsfeld*, 126 S.Ct. 2749 (2006) (citing internet sources for numerous documents). See ISCR Case No. 99-0452 at 8 n. 7 (App. Bd. Mar. 21, 2000) ("In light of the Electronic Freedom of Information Act Amendments of 1996, Pub. L. 104-231, 110 Stat. 3048 (amending 5 U.S.C. 552) and the wide-spread availability of Internet access to the public, The Board concludes that official or administrative notice may be taken, in appropriate cases, of official documents posted by federal departments or agencies on their Web sites.") In this instance, although Department Counsel has selected only certain pages of facts appearing in the identified publications, I have not limited myself to only those facts, but have considered the publications in their entirety.

which qualifies him for the Foreign Earned Income Exclusion. He planned to file his federal income tax returns for 2013, 2014, and 2015 in April or May 2016. He vowed to change his practices and will no longer allow his filings to lapse in the future.³

In his Answer to the SOR, Applicant added:⁴

I have and do file my taxes for every year. Since I know I don't owe I maybe sometimes file late but I always follow the tax laws and do file my taxes. . . I have never failed to file or pay any taxes I owe. If I would have owed over the past three years in question I would have paid. I hadn't filed at the time of my interview or the time I was doing the questionnaire. During my interview with the agent I did inform him I had already dropped my taxes off to get them done and just needed to go sign them so they could be sent off.

In July 2017, Applicant stated:⁵

I was under the impression that if I didn't owe the IRS, I had more time to file than I had. I accept full responsibility for my lack of knowledge in these matters. This was clearly a misunderstanding/oversight on my part and it will not occur again. I do acknowledge that calendar years 2013, 2014 and 2015 were filed late in 2016. Also my lack of knowledge in this subject was the basis for failing to file for an extension. I honestly was not aware that it was time sensitive if I didn't owe money. . . . In the future, I will ensure that my taxes are filed prior to the deadline.

The SOR alleged that Applicant had failed to file his federal income tax returns for the tax years 2013, 2014, and 2015, as required. Their current status, according to the evidence submitted by the Government and Applicant, and Applicant's comments regarding same, are described below:

(SOR ¶ 1.a.): the federal income tax return for the tax year 2013 was not filed as required. Applicant submitted a copy of his 2013 Form 1040, 2013 Form 2555-EZ, and a 2013 IRS *e-file* Signature Authorization (Form 8879), that reflected that an identified tax preparer completed the Form 1040 on May 2, 2016, and that the Forms 1040 and 2555-EZ were electronically filed on June 6, 2016. The Form 1040 was erroneously dated by Applicant as June 6, 2015.⁶ The IRS confirmed that the income tax return was received on June 6, 2016 – over four months before the SOR was issued.⁷ According to

³ Item 5 (Personal Subject Interview, dated March 31, 2016), at 11.

⁴ Item 3 (Applicant's Answer to the SOR, dated November 10, 2016), at 3.

⁵ Memorandum, dated July 26, 2017, attached to Applicant's Initial Response to the FORM.

⁶ 2013 Form 1040 and 2013 Form 8879, attached to Applicant's Answer to the SOR. There is also an invoice from the income tax return preparer, dated June 6, 2016, that indicates Applicant was charged \$320 for the preparation of the necessary documentation.

⁷ IRS Account Transcript, dated July 31, 2017, attached to Applicant's Initial Response to the FORM.

Applicant's filing, his entire wage of \$74,312 was considered as foreign income exclusion, and he had zero taxable income. Department Counsel argued persuasively that there is no evidence to support a conclusion that Applicant had followed the process of applying for the appropriate extensions available under IRS Pub. 54, described above, or that the 2013 federal income tax return had been timely filed. Nevertheless, the return has been filed before the SOR was issued.

(SOR ¶ 1.a.): the federal income tax return for the tax year 2014 was not filed as required. Applicant submitted a copy of his 2014 Form 1040, 2014 Form 2555-EZ, and a 2014 Form 8879, that reflected that an identified tax preparer completed the Form 1040 on June 6, 2016, and that the Forms 1040 and 2555-EZ were electronically filed on June 6, 2016. The Form 1040 was dated by Applicant as June 6, 2016.⁸ The IRS confirmed that the income tax return was received on June 6, 2016 – over four months before the SOR was issued.⁹ According to Applicant's filing, his entire wage of \$78,477 was considered as foreign income exclusion, and he had zero taxable income. Once again, Department Counsel argued persuasively that there is no evidence to support a conclusion that Applicant had followed the process of applying for the appropriate extensions available under IRS Pub. 54, described above, or that the 2014 federal income tax return had been timely filed. Nevertheless, the return has been filed before the SOR was issued.

(SOR ¶ 1.b.): the federal income tax return for the tax year 2015 was not filed as required. Applicant submitted a copy of his 2015 Form 1040, 2015 Form 2555-EZ, and a 2015 Form 8879, that reflected that an identified tax preparer completed the Form 1040 on June 6, 2016, and that the Forms 1040 and 2555-EZ were electronically filed on June 6, 2016. The Form 1040 was dated by Applicant as June 6, 2016.¹⁰ The IRS confirmed that the income tax return was received on June 6, 2016 – over four months before the SOR was issued.¹¹ According to Applicant's filing, his entire wage of \$56,536 was considered as foreign income exclusion, and he had zero taxable income. Applicant qualified for an automatic two-month extension to file his return and pay federal income taxes because he is a U.S. citizen, and on the regular due date of the return, he is living outside the United States and his main place of business is outside the United States. Accordingly, Applicant's federal income tax return for the tax year 2015 was timely filed.

⁸ 2014 Form 1040 and 2014 Form 8879, attached to Applicant's Answer to the SOR. There is also an invoice from the income tax return preparer, dated June 6, 2016, that indicates Applicant was charged \$330 for the preparation of the necessary documentation.

⁹ IRS Account Transcript, dated July 31, 2017, attached to Applicant's Initial Response to the FORM.

¹⁰ 2014 Form 1040 and 2014 Form 8879, attached to Applicant's Answer to the SOR. There is also an invoice from the income tax return preparer, dated June 6, 2016, that indicates Applicant was charged \$290 for the preparation of the necessary documentation.

¹¹ IRS Account Transcript, dated July 31, 2017, attached to Applicant's Initial Response to the FORM.

Personal Conduct

On March 27, 2015, when Applicant completed his e-QIP, he responded to a question pertaining to his taxes. The question in Section 26 – Financial Record asked if, in the past seven years, he had failed to file or pay Federal, state, or other taxes when required by law or ordinance. Applicant answered “no” to the question. He certified that the response was “true, complete, and correct” to the best of his knowledge and belief, but the response to that question was, in fact, technically false. Applicant subsequently denied intending to falsify his response. He attributed his actions to a misunderstanding of various aspects of filing requirements, the time-sensitivity of filing, and the necessity of requesting extensions.

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.”¹² 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. The President has authorized the Secretary of Defense or his designee to grant an applicant eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.”¹³

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the guidelines in SEAD 4. In addition to brief introductory explanations for each guideline, the guidelines list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant’s eligibility for access to classified information.

An administrative judge need not view the guidelines as inflexible, ironclad rules of law. Instead, acknowledging 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. 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 meaningful decision.

In the decision-making process, facts must be established by “substantial evidence.”¹⁴ The Government initially has the burden of producing evidence to establish

¹² *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

¹³ Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

¹⁴ “Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all contrary evidence in the record.” ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). “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).

a potentially disqualifying condition under the Directive, and has the burden of establishing controverted facts alleged in the SOR. Once the Government has produced substantial evidence of a disqualifying condition, under Directive ¶ E3.1.15, the applicant has the burden of persuasion to present evidence in refutation, explanation, extenuation or mitigation, sufficient to overcome the doubts raised by the Government's case. The burden of disproving a mitigating condition never shifts to the Government.¹⁵

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 as well. It is because of this special relationship that the Government must be able to repose a high degree of trust and confidence in those 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 as to potential, rather than actual, risk of compromise of classified information. Furthermore, "security clearance determinations should err, if they must, on the side of denials."¹⁶

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."¹⁷ Thus, nothing in this decision should be construed to suggest that I have based this decision on any express or implied determination as to Applicant's allegiance, loyalty, or patriotism. It is merely an indication the Applicant has or has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance. In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Analysis

Guideline F, Financial Considerations

The security concern relating to the guideline for Financial Considerations is set out in AG ¶ 18:

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

¹⁵ See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

¹⁶ *Egan*, 484 U.S. at 531.

¹⁷ See Exec. Or. 10865 § 7.

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. Affluence that cannot be explained by known sources of income is also a security concern insofar as it may result from criminal activity, including espionage.

The guideline notes one condition that could raise security concerns under AG ¶ 19: (f) failure to file or fraudulently filing annual Federal, state, or local income tax returns or failure to pay annual Federal, state, or local income tax as required. Applicant failed to file his federal income tax returns for 2013 and 2014 until June 2016, without filing the necessary extension requests. He filed his federal income tax return for 2015 in June 2016, within the automatic extension period. As to the federal income tax returns for the tax years 2013 and 2014, AG ¶ 19(f) has been established. As to the federal income tax return for the tax year 2015, the Government has failed to prove the SOR allegation.

The guideline also includes an example of a condition that could mitigate security concerns arising from financial difficulties under AG ¶ 20: (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.

AG ¶ 20(g) applies. Shortly before he was interviewed by an OPM investigator, Applicant furnished his income tax return preparer the financial paperwork necessary to prepare and file his federal income tax returns for three years. Over four months before the SOR was issued, Applicant filed his federal income tax returns for the tax years 2013, 2014, and 2015. The IRS confirmed that the income tax returns were received on June 6, 2016. Applicant did not owe the IRS any unpaid taxes for those three years. While the return for 2015 was considered timely filed, the federal income tax returns for the tax years 2013 and 2014 were not timely filed as no extensions had been requested as set forth in IRS Pub. 54. Applicant attributed his failure to make the timely filings to his misunderstanding of the filing rules. He was under the impression that if he didn't owe the IRS, he had more time to file than he actually had. He acknowledged that it was clearly a misunderstanding or oversight on his part and that it will not occur again. His lack of knowledge was the basis for his failing to file for the appropriate extensions, it was not the delayed avoidance of paying owed taxes. He was not aware that it was time sensitive if he didn't owe money. Applicant vowed that in the future, he will file his income tax returns prior to the deadline.

Federal income tax rules and regulations are confusing, even those set forth in IRS Pub. 54. The Commerce Clearing House (CCH) publishes the *Standard Federal Tax Reporter* consisting of 70,000 pages, with notations after each statute containing relevant cases and other information. CCH considers this volume to be representative of "the tax

code,” since an expert needs to know all 70,000 pages to understand the tax code in full.¹⁸ Applicant is not considered an expert.

Clearance decisions are aimed at evaluating an applicant’s judgment, reliability, and trustworthiness. When the security concerns involve tax issues, when an individual has made arrangements with the appropriate tax authority to file or pay the amount owed and is in compliance with those arrangements, the concern may be mitigated. In this instance, there was no amounts owed and unpaid. The sole issue was Applicant’s failure to timely file his federal income tax returns for 2013 and 2014. The guidelines do not require an applicant to establish resolution of each and every issue alleged in the SOR. An applicant needs only to establish a plan to resolve financial problems and take significant actions to implement the plan. A reasonable plan and concomitant conduct may provide for the resolution of his financial issues one at a time. In this instance, Applicant’s overall plan was to file his delinquent federal income tax returns, and he did so, significantly before the SOR was issued.

Under the circumstances, Applicant has acted responsibly by addressing his delinquent federal income tax returns and seeing to it that they were filed, albeit too late to meet the deadlines with approved extensions. Applicant’s actions, under the circumstances, no longer cast doubt on his current reliability, trustworthiness, and good judgment.¹⁹

Guideline E, Personal Conduct

The security concern relating to the guideline for Personal Conduct is set out in AG ¶ 18:

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 or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes. The following will normally result in an unfavorable national security eligibility determination, security clearance action, or cancellation of further processing for national security eligibility:

(a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, cooperation with medical or psychological evaluation, or polygraph examination, if authorized and required; and

¹⁸ <https://taxfoundation.org/how-many-words-are-tax-code/>

¹⁹ See ISCR Case No. 09-08533 at 3-4 (App. Bd. Oct. 6, 2010).

(b) refusal to provide full, frank, and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

The guideline notes a condition that could raise security concerns under AG ¶ 16:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine national security eligibility or trustworthiness, or award fiduciary responsibilities.

As noted above, on March 27, 2015, when Applicant completed his e-QIP, he responded to a question pertaining to his financial record. The question in Section 26 – Financial Record asked if, in the past seven years, he had failed to file or pay Federal, state, or other taxes when required by law or ordinance. Applicant answered “no” to the question. He certified that the response was “true, complete, and correct” to the best of his knowledge and belief, but the response to that question was, in fact, technically false. Applicant subsequently denied intending to falsify his response. He attributed his actions to a misunderstanding of various aspects of filing requirements, the time-sensitivity of filing, and the necessity of requesting extensions.

Applicant’s comments provide sufficient evidence to examine if his submission was a deliberate falsification, as alleged in the SOR, or merely an omission that was the result of oversight or misunderstanding of the true facts on his part. Proof of an omission, standing alone, does not establish or prove an applicant’s intent or state of mind when the falsification or omission occurred. As an administrative judge, I must consider the record evidence as a whole to determine whether there is a direct or circumstantial evidence concerning Applicant’s intent or state of mind at the time the alleged falsification or omission occurred. I have considered the entire record, including Applicant’s initial and subsequent comments.²⁰

²⁰ The Appeal Board has cogently explained the process for analyzing falsification cases, stating:

(a) when a falsification allegation is controverted, Department Counsel has the burden of proving falsification; (b) proof of an omission, standing alone, does not establish or prove an applicant’s intent or state of mind when the omission occurred; and (c) a Judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning the applicant’s intent or state of mind at the time the omission occurred. [Moreover], it was legally permissible for the Judge to conclude Department Counsel had established a prima facie case under Guideline E and the burden of persuasion had shifted to the applicant to present evidence to explain the omission.

ISCR Case No. 03-10380 at 5 (App. Bd. Jan. 6, 2006) (citing ISCR Case No. 02-23133 (App. Bd. June 9, 2004)). See also ISCR Case No. 08-05637 at 3 (App. Bd. Sept. 9, 2010) (noting an applicant’s level of education and other experiences are part of entirety-of-the-record evaluation as to whether a failure to disclose past-due debts on a security clearance application was deliberate).

Applicant's explanations for his submission, in my view, were that he essentially misunderstood the question in its entirety. Applicant attributed his failure to make the timely filings to his misunderstanding of the filing rules. He was under the impression that if he didn't owe the IRS, he had more time to file than he actually had. He acknowledged that it was clearly a misunderstanding or oversight on his part. His lack of knowledge was the basis for his failing to file for the appropriate extensions, it was not the delayed avoidance of paying owed taxes. He was not aware that it was time sensitive if he didn't owe money. The question to which Applicant is alleged to have deliberately lied is not that clear. In asking if he had failed to file or pay his taxes when required by law, without further explanation as to what the phrase means, leaves room for uncertainty. Applicant did not fail to pay any taxes, as he did not owe any taxes. Applicant did not fail to file his income tax returns, for he did so. Applicant acknowledged that he was required to file his income tax returns as required by law. What he failed to appreciate was the significance of the term "when." While the financially sophisticated might be aware of the correct meaning, it is unclear if the word referred to a specific date, or if it referred to the simple act of filing. In light of Applicant's explanations, and in the absence of more persuasive evidence to the contrary, I conclude that AG ¶ 16(a) has not been established. Applicant's actions under the circumstances do not cast doubt on his current reliability, trustworthiness, and good judgment.

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 SEAD 4, App. A, ¶ 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 SEAD 4, App. A, ¶ 2(c), the 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. Moreover, I have evaluated the various aspects of this case in light of the totality of the record evidence and have not merely performed a piecemeal analysis.²¹

²¹ See *U.S. v. Bottone*, 365 F.2d 389, 392 (2d Cir. 1966); See also ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006).

There is some evidence against mitigating Applicant's conduct. He failed to timely file federal income tax returns for the tax years 2013 and 2014, and he failed to acknowledge his failures in his e-QIP.

The mitigating evidence under the whole-person concept is simply more substantial. Applicant is a 56-year-old employee of a defense contractor. He has been serving overseas since August 2001. He served on active duty until he was honorably retired in July 2001. He was granted a secret security clearance in 1981, and maintained that clearance through subsequent reinvestigations. Over four months before the SOR was issued, Applicant filed his federal income tax returns for the tax years 2013, 2014, and 2015. The IRS confirmed that the income tax returns were received on June 6, 2016. Applicant did not owe the IRS any unpaid taxes for those three years. While the return for 2015 was considered timely filed, the federal income tax returns for the tax years 2013 and 2014 were not timely filed as no extensions had been requested as set forth in IRS Pub. 54. Applicant misunderstood the filing rules. He was under the impression that if he didn't owe the IRS, he had more time to file than he actually had. He acknowledged that it was clearly a misunderstanding or oversight on his part and that it will not occur again. His lack of knowledge was the basis for his failing to file for the appropriate extensions, it was not the delayed avoidance of paying owed taxes. He was not aware that it was time sensitive if he didn't owe money. Applicant vowed that in the future, he will file his income tax returns prior to the deadline.

Overall, the evidence leaves me without questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all of these reasons, I conclude Applicant has mitigated the security concerns arising from his financial considerations and personal conduct. See SEAD 4, App. A, ¶ 2(d)(1) through AG ¶ 2(d)(9).

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
Subparagraphs 1.a. and 1.b.:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a.:	For Applicant

Conclusion

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

ROBERT ROBINSON GALES
Administrative Judge