



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



In the matter of: )  
)  
) ISCR Case No. 12-05668  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Douglas Velvel, Esq., Department Counsel  
Chris Morin, Esq., Department Counsel<sup>1</sup>  
For Applicant: *Pro se*

01/04/2018  
\_\_\_\_\_

**Decision**  
\_\_\_\_\_

MURPHY, Braden M., Administrative Judge:

Applicant mitigated the security concerns under Guideline F, financial considerations, because the sole allegation has been explained, and it is also dated and unlikely to recur. Applicant's eligibility for access to classified information is granted.

**Statement of the Case**

On August 8, 2016, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline F, financial considerations. The action was taken under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*

---

<sup>1</sup> The Government's case was prepared by Mr. Velvel. He had left the office by the time the case was assigned to me for a decision, so Mr. Morin replaced him.

(January 2, 1992), as amended (Directive); and the Adjudicative Guidelines effective within the DOD for SORs issued after September 1, 2006.

Applicant answered the SOR on September 2, 2016, and elected to have his case decided on the written record in lieu of a hearing. He submitted three exhibits, which were marked as Applicant's Exhibits (AE) A through AE C, and admitted into evidence without objection.<sup>2</sup> On September 26, 2016, Department Counsel submitted the Government's file of relevant material (FORM), including documents identified as Items 1 through 4. Applicant received the FORM on October 12, 2016. He was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation.

Applicant responded to the FORM on November 5, 2016. He did not object to the Government's evidence. His response was marked as AE D. He also submitted 50 pages of tax documents, which were marked collectively as AE E.<sup>3</sup> AE D and AE E were admitted into evidence without objection. The SOR and the answer (combined as Item 1) are the pleadings in the case. Items 2, 3, and 4 are admitted into evidence without objection. The case was assigned to me on July 1, 2017.

### **Procedural Issues**

On December 10, 2016, the Director of National Intelligence issued new National Security Adjudicative Guidelines (AG). The new AGs became effective June 8, 2017, for all decisions after that date, including this one, and they supersede the AGs that Applicant received with the SOR. I provided Applicant a copy of the new AGs by e-mail on November 30, 2017. (HE I)

Additionally, upon reviewing the record evidence, I noted that the Government did not include Applicant's most recent security clearance application (SCA) as part of its case. The SCA likely contains information about Applicant's personal, educational, and professional background. Such information is potentially relevant to this case under the whole person concept, and is helpful to the trier of fact for that reason. Accordingly, I also requested that Department Counsel submit Applicant's most recent security clearance application (SCA) into the record, with copy to the Applicant.<sup>4</sup>

On November 30, 2017, Department Counsel submitted Applicant's November 2011 SCA (Item 5). Applicant received it on December 6, 2017. Applicant timely submitted materials on December 22, 2017 and January 3, 2018. They included a narrative

---

<sup>2</sup> AE A concerns a patent issued to Applicant in 2014. AE B contains reference letters from three of Applicant's former students. AE C is Applicant's professional biography.

<sup>3</sup> AE E contains various tax returns and other documents, relating either to Applicant's prior business, or to Applicant personally.

<sup>4</sup> HE I. I issued my order under ¶ E.3.1.10 of the Directive.

statement (marked as AE F) and several additional documents (marked as AE G through AE O). All of Applicant's documents were admitted without objection. Applicant did not object to Item 5, and it was also admitted. The record closed on January 3, 2018.

### **Findings of Fact**

Applicant denied the sole allegation in the SOR (§ 1.a) with a lengthy explanation. I have incorporated his explanation and subsequent statements into the findings of fact. After a thorough and careful review of the pleadings and exhibits, I make the following findings of fact.

Applicant is 57 years old. He holds a bachelor's degree, a master's degree, and a doctoral degree. He currently works in academia. He previously worked as a government consultant (2010-2014) He submitted his most recent SCA in November 2011. He and his wife have been married for 30 years. They have two grown children. (Item 5; AE F, AE G, AE J, AE K)

Between approximately 1991 and about 2008, Applicant was the sole owner and 100% shareholder of a "Subchapter S-Corporation" involved in construction and electrical services.<sup>5</sup> The business ceased operations in 2008, after Applicant began to experience a debilitating physical condition. Applicant was deemed permanently disabled by Social Security in 2010, the same year the business was closed out with the IRS. (Item 3 at 2; AE F, AE G – AE I)

After he shut down the business, Applicant pursued a graduate education. As a result of his academic and consulting work, Applicant was sponsored for a security clearance, which was granted in 2011. (Items 1, 5) Around the same time, Applicant applied for a higher level clearance for work with another government agency (AGA). (Item 2, 3)

Following a background investigation and an interview, the AGA denied Applicant access to classified information in March 2012. Their determination was based on the "Intelligence Community Policy Guidance 704.2, Adjudicative Guidelines for Criminal Conduct and Personal Conduct." (Item 2) The factual basis for the AGA's determination was set forth as follows:

During your security testing sessions in February 2012, you reported that from 1994 to 2008 you falsely claimed between \$2,000 and \$50,000 worth of business expenses on your income taxes. You later advised that the amount you falsely claimed for those years was approximately \$200,000. You stated that from 2008 to 2009 you received \$2,500 a month for rental reimbursement through an insurance policy, though you were not actually

---

<sup>5</sup> AE D, AE E.

paying any rent. You advised that you have received social security benefits since 2008. You said your company receives \$5,000 a month for your consulting work, but you do not report this income to social security.<sup>6</sup>

Applicant appealed the AGA's decision. The AGA affirmed the denial of Applicant's access to classified information in February 2014.<sup>7</sup>

Applicant's SOR was issued in August 2016. The sole allegation (§1.a) is set forth not under Criminal Conduct or Personal Conduct (as the AGA had done), but rather under Guideline F for Financial Considerations. It is as follows:

From 1994 to about 2004, and as sole owner of a small company, you fraudulently claimed personal expenses approximating not more than \$200,000, as business expenses, on your company's Federal income tax returns.<sup>8</sup>

Applicant denied the allegation with a lengthy explanation, in which he said the following, in part:

. . . I deny claiming personal expenses as business expenses on my companies [sic] Federal income tax returns. While it was a common practice at the time to pay personal bills through my company, these payments were coded within my accounting system as 'shareholder drawings/dividends', making them taxable personal income. Further, at the end of every year, I met with my accountant and we went through the general ledger of accounts for the company to insure that any expenses that could be questionable were recoded as 'shareholder drawings/dividends'.

As a Subchapter-S Corporation, all profits/dividends of the company were reflected as personal taxable income and the K-1 filing on the business return passed those profits/dividends to me as personal taxable income, and is reflected on Form 8903 in the personal tax returns. I recognize now that this practice was ambiguous and problematic when considering my financial behavior for a security clearance. I understand the reason for the concern and have sought, since this was brought to my attention, to provide

---

<sup>6</sup> Item 2.

<sup>7</sup> Items 3, 4. Among Applicant's most recent submissions are documents concerning the medical condition he was suffering from at the time of his examination by the AGA in 2012. While Applicant acknowledges that this information "does not change the nature of the concern," he submitted the medical documents to provide context. (AE F; AE H) I have considered these documents accordingly.

<sup>8</sup> Item 1.

clarification and insure my professional and personal finances are beyond reproach.<sup>9</sup>

Since the Applicant denied the SOR allegation, the Government has the burden to prove it.<sup>10</sup> Beyond the SOR and the answer (Item 1), the Government's case-in-chief initially consisted of only three documents: the AGA's denial letter of March 2012; Applicant's letter in response, dated May 2012; and his March 2014 letter to the AGA, after his appeal was denied. (Items 2-4)

The Government's evidence does not include the AGA's report of investigation. Nor does it include any of the company's federal income tax returns on which Applicant is alleged to have "fraudulently" claimed personal expenses.<sup>11</sup> Further, the Government does not allege (or provide evidence of) whether Applicant's conduct was civil tax fraud or criminal tax evasion under federal law. It cites to no federal statute as a basis to determine whether Applicant's actions were indeed fraudulent.

Thus, the only substantive exhibit in the Government's case-in-chief which directly supports the SOR allegation is Item 2, the AGA's denial letter. In the absence of more documentary evidence in support of the Government's case, one must therefore examine the record evidence of Applicant's other statements.

In his May 2012 letter to the AGA appealing the denial of his clearance, Applicant "speculated" that the amount of personal expenses paid by his company "could have varied" from \$2,000 to \$50,000 per year. When he was asked by the AGA's interviewer for an estimated total over the timeframe 1994 to 2008, Applicant says he "went high" with an estimate of \$200,000. After the interview session, Applicant recalled that these personal expenses were always "recoded" at the end of the year, and included in his personal taxable income. (Item 3)

Applicant also stated that, following his interview session with the AGA, he spoke to his company's former treasurer, who confirmed to him that those personal expenses were "re-posted out of business expense[s] and into shareholder drawings/profits . . . [and] identified as K-1 earnings for my personal tax return." (Item 3) Applicant stated that he held 100% of the stock of the company, and as an S-Corporation, all profits were considered taxable income, and "I did indeed pay tax on this income." (Item 3) Applicant also detailed a conversation with his accountant in May 2012 in which the accountant

---

<sup>9</sup> Item 1. IRS Schedule K-1 (Form 1120 S) is the Shareholder's Share of Income, Credits, and Deductions. (See, e.g., AE E at page 4 of company tax documents for 2003). IRS Form 8903 concerns the "Domestic Production Activities Deduction." See <https://www.irs.gov/pub/irs-pdf/f8903.pdf>.

<sup>10</sup> Directive, ¶ E3.1.14.

<sup>11</sup> With his FORM response, Applicant provided copies of his federal tax returns from tax years 2001-2004 (AE E), but the Government included no tax returns or any other documentary evidence (beyond Item 2) as part of its case-in-chief.

“confirmed that this was how we handled these charges at the end of each year.” “Therefore, I can now confidently say that I did not claim personal expenses as business expenses as was previously discussed.” (Item 3)

In the FORM, Department Counsel argues that Applicant’s use of the term “offense” to describe his actions constitutes an “admission” to tax fraud: (“While I understand that my offense (*in the government’s eyes*) was not minor . . .” (Item 4) (emphasis added). Given this qualification, I conclude that Applicant is merely describing the *Government’s characterization* of his conduct, without “admitting” that he has committed an “offense.” (AE D) Department Counsel’s argument that Applicant’s thereby “admitted” tax fraud simply overstates the case.

In response to the FORM, Applicant submitted a lengthy narrative explanation (AE D), and numerous company and personal tax documents, from tax years 2001 to 2004. He explained that these tax documents were the only ones he could locate at this late date. (AE E) For those tax years, however, Applicant laid out in some detail how the stockholder distributions detailed on the company’s tax documents were accounted for as income from the S-Corporation on his own personal tax returns.<sup>12</sup>

For 2001, the company’s tax documents detail \$151,051 in stockholder distributions, and Applicant reported \$169,979 in income from the S-Corporation on his personal tax return.<sup>13</sup> For 2002, the company’s tax documents detail \$164,477 in stockholder distributions, and Applicant reported \$183,761 in income from the S-Corporation on his personal tax return.<sup>14</sup> For 2003, the company’s tax documents detail \$309,323 in stockholder distributions, and Applicant reported \$296,010 in income from the S-Corporation on his personal tax return.<sup>15</sup> For 2004, the company’s tax documents detail \$268,672 in stockholder distributions, and Applicant reported \$290,009 in income from the S-Corporation on his personal tax return.<sup>16</sup> The record does not contain tax documentation from Applicant’s company for subsequent tax years.

---

<sup>12</sup> AE D at pp. 3-4.

<sup>13</sup> AE E (page 7 of company tax documents and page 4 of Applicant’s tax documents, for 2001).

<sup>14</sup> AE E (page 9 of company tax documents and page 4 of Applicant’s tax documents, for 2002).

<sup>15</sup> AE E (page 9 of company tax documents and page 4 of Applicant’s tax documents, for 2003). This is the only year of the four years documented where the amount on Applicant’s tax documents is less than that reported in shareholder distributions by the company.

<sup>16</sup> AE E (page 5 of company documents and page 4 of Applicant’s tax documents, for 2004).

Applicant has been in academia since before closing out his company in 2008.<sup>17</sup> He does not intend to reenter the construction business, as he notes that to do so is prohibited due to his permanent disability. In 2017, he completed required training through his university employer regarding record-keeping and expense accounting. He states that he reports his university income to his private disability carrier so it can be deducted appropriately from his social security benefits, though he says his income (from teaching part-time) falls well below reporting requirements. (Items 3, 4; AE F)

## Policies

As the Supreme Court noted in *Department of the Navy v. Egan*, it is well established that no one has a right to a security clearance.<sup>18</sup> In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.<sup>19</sup> The *Egan* court also held that “the clearly consistent standard indicates that security determinations should err, if they must, on the side of denials.”<sup>20</sup>

The adjudicative 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(a), 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 national security eligibility will be resolved in favor of the national security.”

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an “applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining 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

---

<sup>17</sup> Applicant submitted recommendation letters from several of his students, all of whom were grateful for and appreciative of his efforts as their professor. He also submitted a recent teaching evaluation reflecting an “outstanding” rating. (AE B, AE L, AE N, AE O)

<sup>18</sup> 484 U.S. 518, 528 (1988).

<sup>19</sup> 484 U.S. at 531.

<sup>20</sup> 484 U.S. at 531.

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 that an 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.

## **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 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.

This concern is broader than the possibility that an individual might knowingly compromise classified information in order to raise money. It encompasses concerns about an individual's self-control, judgment, and other qualities essential to protecting classified information. An individual who is financially irresponsible may also be irresponsible, unconcerned, or negligent in handling and safeguarding classified information.<sup>21</sup>

The sole SOR allegation is that Applicant's fraudulently reported about \$200,000 in business expenses on his company's tax returns from 1994-2004. Applicant denied the allegation. The Government therefore has the burden of proving it in all respects.

Beyond Applicant's own statements, the sole Government exhibit supporting its case is Item 2, the AGA's denial letter. Item 2 is admissible, not for reliance on the outcome, but as a government record providing a factual discussion of the underlying

---

<sup>21</sup> See ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012).



disqualifying conduct.<sup>22</sup> The AGA found that Applicant “falsely claimed” between \$2,000 and \$50,000 in business expenses on his income taxes, and later revised the amount up to about \$200,000. The Government’s evidence does not include the underlying interview. Nor does it include any of the tax returns in question.

The Government also has the burden of establishing that Applicant’s conduct (if proven) constitutes disqualifying conduct under Guideline F. (Unlike the AGA in Item 2, the Government here does not argue potential security concerns under either personal conduct or criminal conduct.)

The following disqualifying conditions, under ¶ 19, are potentially applicable:

(d) deceptive or illegal financial practices such as embezzlement, employee theft,, check fraud, expense account fraud, mortgage fraud, filing deceptive loan statements and other intentional financial breaches of trust; and

(f) failure to file or fraudulently filing annual Federal, state, or local income tax returns . . .

There is no allegation that Applicant ever failed to live within his means, to satisfy debts, to meet financial obligations, ever experienced “financial distress” or was ever “financially overextended,” all of which are potential financial security concerns, under the “general concern” set forth in Guideline F, ¶ 18. There is also no evidence that Applicant ever incurred delinquent debt, so there is also no showing that AG ¶¶ 19(a), 19(b) or 19(c) apply.<sup>23</sup>

The Government did not allege that Applicant committed “fraud” (either civil or criminal) with any specificity. Nor did the Government cite to a civil or criminal fraud statute that might apply to Applicant. Nor did the Government submit any evidence that Applicant committed any such “fraud” when he submitted his company tax returns (and indeed, the Government did not submit any of Applicant’s tax returns at all).

The Government’s burden in security clearance cases is less than a preponderance of the evidence.<sup>24</sup> While there is arguably some evidence that Applicant’s actions constituted general poor judgment, it is difficult to assign a Guideline F disqualifying condition here, without more specific, and documented, evidence from the Government.

---

<sup>22</sup> See ISCR Case No. No. 11-03452 at 4 (App. Bd. Jun. 6, 2012); ISCR Case No. 07-18324 at 5 (App. Bd. Mar. 11, 2011).

<sup>23</sup> Directive, ¶¶ 19(a) inability to satisfy debts; 19 (b) unwillingness to satisfy debts regardless of the inability to do so; and 19(c) a history of not meeting financial obligations.

<sup>24</sup> 484 U.S. at 531.

Applicant explained that, after his AGA interview, he spoke with the company's former treasurer and his accountant, both of whom confirmed that personal expenses were re-posted out of business expenses and into shareholder drawings/profits, and identified as K-1 earnings for Applicant's tax returns. All profits were considered taxable income and accounted for on Applicant's personal tax returns. Given that Applicant stated that the company tax returns and his personal tax returns were prepared on the basis of professional advice, his actions did not constitute an "intentional breach of financial trust" under AG ¶ 19(d).

The AGA finds that Applicant falsely claimed about \$200,000 between tax years "1994 to 2008." In SOR ¶ 1.a, however, the Government ties the same \$200,000 figure to a lesser (and older) timeframe -- "from 1994 to about 2004." There are no tax returns in the record for 1994-2000 at all, and the only tax returns in the record (from 2001 to 2004) were the ones submitted by Applicant with his FORM response. Further, only in 2003 is the reported S-Corporate income on Applicant's personal tax return less than that reported in Shareholder distributions by his company. With this paucity of documentary evidence, I cannot conclude that AG ¶ 19(f) applies.

Having concluded that no Guideline F disqualifying conditions apply, it is nonetheless appropriate to note several additional mitigating circumstances. There is no allegation (or evidence) of any ongoing misconduct on the part of the Applicant. His company closed down several years ago. He is permanently disabled, and he has no interest in running his own company again. He is now in academia. For all of these reasons, I conclude that to whatever extent any security concerns might be shown by the circumstances of this case, they are mitigated under Guideline F mitigating condition AG ¶ 20 (a) ("the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment").

### **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(a), 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 the facts and circumstances surrounding this case. I have incorporated my comments under Guideline F in my whole-person analysis. Overall, the record evidence leaves me with no questions or doubts as to Applicant's eligibility and suitability for a security clearance. I conclude Applicant mitigated the financial considerations security concerns.

### **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 presented by the record in this case, it is clearly consistent with the interests of national security to grant Applicant eligibility for access to classified information. Eligibility for access to classified information is granted.

---

Braden M. Murphy  
Administrative Judge