



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



In the matter of: )  
)  
) ISCR Case No. 14-03149  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Gina Marine, Esq., Department Counsel  
For Applicant: *Pro se*

04/16/2015

**Decision**

DUFFY, James F., Administrative Judge:

Applicant mitigated the security concerns arising under Guideline F, financial considerations. Eligibility for access to classified information is granted.

**Statement of the Case**

On August 6, 2014, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline F. DOD CAF took that action under Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive); and the adjudicative guidelines (AG) implemented on September 1, 2006.

The SOR detailed reasons why DOD CAF could not find under the Directive that it is clearly consistent with the national interest to grant Applicant a security clearance.

On August 28, 2014, Applicant answered the SOR and did not request a hearing. Department Counsel requested the hearing on September 23, 2014. This case was assigned to me on January 22, 2015. On February 10, 2015, the Defense Office of Hearings and Appeals (DOHA) issued a Notice of Video Teleconference Hearing. The hearing was held as scheduled on February 19, 2015. Applicant waived the 15-day advance notice requirement for the hearing in ¶ E3.1.8 of the Directive.<sup>1</sup>

At the hearing, Department Counsel offered Government's Exhibits (GE) 1 and 2, while Applicant testified and offered Applicant's Exhibits (AE) A through F. Department Counsel's list of exhibits was marked as Hearing Exhibit (HE) 1 and Applicant's list of exhibits was marked as HE 2. The record of the proceeding was left open until February 26, 2015, to provide Applicant an opportunity to present additional matters. Applicant timely submitted additional documents that were marked as AE G through L. All proffered exhibits were admitted into evidence without objection. The transcript (Tr.) of the hearing was received on March 2, 2015.

### **Findings of Fact**

Applicant is a 59-year-old employee of a defense contractor. She has worked for her current employer since September 2011. She served on active duty in the U.S. Navy from September 1973 to September 1980 and in the active Navy Reserve from September 1990 to September 1996. She received honorable discharges for her military service. She earned an associate's degree in 1983 and a bachelor's degree in 1993. She married in 1977 and divorced in 1997. She has one adult child. She first held a security clearance in about 1974 and has held one for various periods over the years.<sup>2</sup>

The SOR alleged that Applicant failed to file her federal income tax returns for 2005, 2009, 2011, and 2012 (SOR ¶ 1.a) and failed to file her state income tax returns for 2009 and 2011 (SOR ¶ 1.b). In her Answer to the SOR, Applicant admitted both allegations with explanations. Her admissions are incorporated as findings of fact.<sup>3</sup>

Applicant attributed her income tax return filing delinquencies to being a victim of a hurricane and to her multiple residential moves. In 2005, she was living in an area that was hit by a hurricane. Her apartment was flooded, and she suffered a significant casualty loss that was physically disruptive. Between 2009 and 2011, she moved six times, including two interstate moves. She indicated the multiple moves resulted in tax documents being packed up and relocated.<sup>4</sup>

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<sup>1</sup> Tr.13-15.

<sup>2</sup> Tr. 6-8, 33; GE 1, 2; AE D.

<sup>3</sup> Tr. 31; Applicant's Answer to the SOR.

<sup>4</sup> Tr. 32-33, 44-54; Applicant's Answer to the SOR.

In her Electronic Questionnaire for Investigations Processing (e-QIP), Applicant disclosed that she had not filed her 2005, 2009, and 2011 income tax returns as required. Her reason for not filing them was:

I paid my taxes, but did not properly file. You are not required to file for Federal taxes as long as you don't owe anything. I will eventually file just to clear the books and get the refund owed to me. I've had 3 employers and 5 addresses in the last 2 years. I'll get everything caught up once I'm settled.<sup>5</sup>

In an Office of Personnel Management (OPM) interview in May 2013, Applicant admitted that she procrastinated in filing her income tax returns and reportedly stated that she had no excuse for failing to file them. She also stated that she had received letters from the Internal Revenue Service (IRS) about her failure to file the income tax returns, but still had not filed the tax returns.<sup>6</sup>

In June 2014, Applicant hired a certified public accountant (CPA) to provide financial planning advice and later hired the CPA to assist her in completing the delinquent income tax returns. She provided proof that she filed each of the past-due income tax returns. The following table provides information on her federal income tax returns.

<u>Tax Year</u>	<u>2005</u>	<u>2009</u>	<u>2011</u>	<u>2012</u>
Date IRS Received Tax Return	8/29/14	8/29/14	8/26/14	8/24/14
Adjusted Gross Income	\$54,940	\$95,517	\$69,797	\$67,185
Tax Liability	\$8,346	\$17,840	\$11,115	\$10,371
Tax Withholdings	\$9,415	\$17,841	\$13,003	\$13,090
Additional Payments	\$1,000	0	\$1,000	0
Tax Overpayment	\$2,069	\$1	\$2,888	\$2,719

She also provided documentation showing that the IRS received her 2008 federal income tax return on September 18, 2014. Her failure to file her 2008 federal income tax return as required was not alleged in the SOR. Due to her delays in filing the 2005 and

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<sup>5</sup> Tr. 31; GE 1.

<sup>6</sup> GE 2.

2008 federal income tax returns, she was ineligible to receive tax refunds for those years.<sup>7</sup>

In 2009 and 2011, Applicant was a part-time resident of a state that imposed an income tax. She provided a document from that state showing her state income tax returns for those years were completed. The state processed those tax returns in February 2015. She overpaid her state income tax by \$168 in 2009 and \$46 in 2011. Whether she was entitled to refunds for those years due to the delays in filing the tax returns is unknown.<sup>8</sup>

At the hearing, Applicant testified that she overpaid her income taxes each year. She also noted that, when she submitted tax filing extensions some years, she submitted additional payments to make sure her tax obligation was paid. She initially believed she did not need to file her income tax returns if she did not owe any further taxes. In 2014, she sought financial planning advice from a CPA on an issue concerning her parents. During that meeting, she learned that she had a legal obligation to file her income tax returns even though she did not owe any additional money. She hired the CPA to prepare her past-due income tax returns. She testified that all of her income tax returns have since been filed, including her 2013 and 2014 income tax returns. She stated that, although she received letters from the IRS about her failure to file income tax returns, she interpreted those as friendly reminders. She thought that filing the income tax returns was something that could wait and did not believe she was doing anything wrong. With her multiple moves, she also noted that she may not have received all of the IRS's letters. She now realizes that she has a legal obligation and a civic duty to file her income tax returns in a timely manner and that failure to file federal income tax returns could constitute a criminal offense. She plans to hire the CPA to assist her in filing her income tax returns in the future. She noted that she already created a filing system for storing her 2015 tax records as they are received.<sup>9</sup>

Applicant is financially stable. She submitted a credit report dated August 12, 2014, showing she had no delinquent accounts.<sup>10</sup>

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<sup>7</sup> Tr. 31-33, 44-54; AE B, C. Conduct not alleged in the SOR will not be considering in applying the disqualifying conditions, but "may be considered (a) to assess an applicant's credibility; (b) to evaluate an applicant's evidence of extenuation, mitigation, or changed circumstances; (c) to consider whether an applicant has demonstrated successful rehabilitation; (d) to decide whether a particular adjudicative guideline is applicable; or (e) to provide evidence for whole-person analysis under Directive Section 6.3 . . . ISCR Case No. 00-0633 at 3 (App. Bd. Oct 24, 2003)." ISCR Case No. 03-20327 at 4 (App. Bd. Oct 26, 2006).

<sup>8</sup> Tr. 48-49, AE C.

<sup>9</sup> Tr. 31-33, 44-54; AE B, C.

<sup>10</sup> Tr. 43; AE E.

Applicant presented character reference letters from coworkers that described her as a hardworking, conscientious, and trustworthy individual. Her employer considers her a valued employee. She has received letters of appreciation from flag officers and work performance awards. Her work performance appraisals indicated that she consistently exceeded expectations and requirements.<sup>11</sup>

In the Navy, Applicant was awarded the Good Conduct Medal and National Defense Service Medal. For the past ten years, she served as a volunteer in the U.S. Coast Guard Auxiliary and received a letter of commendation from the Commandant of the Coast Guard for her contributions.<sup>12</sup>

## **Policies**

The President of the United States has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information. *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988). The President has authorized the Secretary of Defense to grant eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended. The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These AGs are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge’s adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, to reach his decision.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information. Clearance decisions must be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See Exec.

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<sup>11</sup> Tr. 34-44; AE E, H-L.

<sup>12</sup> Tr. 40-43; AE E.

Or. 10865 § 7. See also Executive Order 12968 (Aug. 2, 1995), Section 3. Thus, a clearance decision is merely an indication that the applicant has or has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4<sup>th</sup> Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed and an applicant’s security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue [his or her] security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

## Analysis

### Guideline F, Financial Considerations

The security concern for financial considerations is set out in AG ¶ 18 as follows:

Failure or inability to live within one’s means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual’s reliability, trustworthiness and ability to protect classified information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

“Failure to discharge legal obligations, such as filing tax returns, can impugn an applicant’s judgment and reliability.”<sup>13</sup> Record evidence established the following disqualifying condition under AG ¶ 19:

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<sup>13</sup> ISCR Case No. 12-00608 at 3 (App. Bd. Apr. 11, 2014) (citing ISCR Case No. 98-0810 at 4 (App. Bd. Jun.8. 2000)).

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

Three mitigating conditions under AG ¶ 20 are potentially applicable:

(a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;

(b) the conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation), and the individual acted responsibly under the circumstances; and

(c) the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control.

Applicant's tax return filing delinquencies were recent and repetitive. These delinquencies occurred because she did not understand the filing requirements. Because she is now aware of the filing requirements, such delinquencies are unlikely to recur. AG ¶ 20(a) partially applies.

Applicant was the victim of a hurricane in 2005. She made multiple residential moves between 2009 and 2011. However, she acknowledged that she procrastinated in filing her tax returns. AG ¶ 20(b) minimally applies.

Applicant paid her income taxes. When she applied for filing extensions, she would occasionally make additional payments to ensure she had no tax deficiency. Nevertheless, the legal obligation to file income tax returns in a timely manner is independent of whether an applicant owes additional taxes or is entitled to a refund. I am cognizant that the Appeal Board has recognized that an administrative judge may place too much weight on an applicant's claim that he or she was entitled to tax refunds when analyzing cases of this nature. The primary issue here is a failure to comply with legal requirements.<sup>14</sup>

Credible evidence was presented to show that Applicant lacked an understanding of the tax filing requirements. During her meeting with a CPA for another matter in 2014, she was informed of her legal obligation to file income tax returns even though she owed no additional taxes. Upon learning of that requirement, she hired the CPA to prepare those tax returns. The past-due tax returns have been filed. Now that

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<sup>14</sup> ISCR Case No. 94-0964 at 6 (App. Bd. Jul. 3, 1996).

she is aware of the legal requirement, she intends to file her income tax returns in a timely manner in the future. Her financial problem has been resolved. AG ¶ 20(c) applies.

### **Whole-Person Concept**

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

(1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

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. AG ¶ 2(c).

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

Applicant served honorably in the Navy for eight years and in the Navy Reserve for six years. She is a valued employee of a defense contractor. She had held a security clearance for many years without any apparent problems. She is an active volunteer in the Coast Guard Auxiliary. She failed to file her tax returns in a timely manner due to a lack of understanding of the requirements. She corrected that error by filing the past-due tax returns. Now that she is aware of the requirement, it is unlikely she will fail to meet the filing requirements in the future.

Overall, the record evidence leaves me with no questions or doubts about Applicant's eligibility and suitability for a security clearance. For all the above reasons, I conclude that Applicant mitigated the financial consideration security concerns.

### **Formal Findings**

Formal findings on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline F: For Applicant

Subparagraphs 1.a-1.b: For Applicant

**Decision**

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

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James F. Duffy  
Administrative Judge