



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



In the matter of: )  
 )  
 ) ISCR Case No. 15-01439  
 )  
Applicant for Security Clearance )

**Appearances**

For Government: Pamela Benson, Esq., Department Counsel  
For Applicant: *Pro se*

04/27/2016

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**Decision**

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CERVI, Gregg A., Administrative Judge:

Applicant has not mitigated the financial considerations security concerns. Eligibility for access to classified information is denied.

**Statement of the Case**

Applicant completed a Questionnaire for National Security Positions (SF 86) on August 14, 2014. On September 15, 2015, 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 (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented by the DOD on September 1, 2006.

Applicant responded to the SOR on October 5, 2015,<sup>1</sup> and elected to have the case decided on the written record in lieu of a hearing. The Government's written brief with supporting documents, known as the File of Relevant Material (FORM), was submitted by Department Counsel on January 27, 2016.

A complete copy of the FORM was provided to Applicant, who was afforded an opportunity to file objections and submit material to refute, extenuate, or mitigate the security concerns. Applicant received the FORM on February 4, 2016, and replied with a written response (AE A) and a pay document (AE B). He did not assert any objections to the Government's evidence. The case was assigned to me on March 9, 2016. Government exhibits (Items 1 to 3) and Applicant exhibits (AE A and AE B) are admitted into evidence without objections.

### **Findings of Fact**

The SOR alleges Applicant failed to file and pay federal and state income taxes from 2009 to 2013. The SOR alleges he owes approximately \$60,000 in federal tax delinquencies and \$8,000 in state tax delinquencies. Applicant admitted all the allegations in the SOR, and provided a written response to the SOR<sup>2</sup> and the FORM, along with a copy of his pay stub.<sup>3</sup> The evidence submitted with the FORM substantiates the SOR allegations.<sup>4</sup>

Applicant is 55 years old and employed as a pipe fitter for a defense contractor since September 2014. He was previously self-employed as a consultant to a medical company from 2004 to 2014. He completed college in 1985 and is unmarried.<sup>5</sup>

Applicant failed to file and pay federal and state income taxes from 2009 to 2013. Additionally, he admitted that he also failed to file his 2014 tax returns when due. He stated he intends to file the 2014 and 2015 tax returns by April 2016.<sup>6</sup> Applicant asserts that his failure to file and pay taxes resulted from the added responsibility he assumed when he began to care for his sister and niece after his sister lost her job and attempted suicide. He did not indicate when this occurred or how much financial assistance he provided. Applicant made assertions in his 2014 SF 86 that he was meeting with an accountant to complete his tax returns and make payments under a payment plan.<sup>7</sup> In

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<sup>1</sup> Item 1.

<sup>2</sup> Item 1.

<sup>3</sup> AE A and B.

<sup>4</sup> Items 1-3.

<sup>5</sup> Items 2 and 3.

<sup>6</sup> AE A. Failure to file 2014 federal and state tax returns on time was not alleged in the SOR.

<sup>7</sup> Item 2.

his November 2014 Office of Personnel Management (OPM) interview, he made similar assertions, stating he had taken no action to pay his tax delinquencies but he was in the process of preparing his tax returns and intended to settle his tax debts with use of funds in a 401k retirement plan.<sup>8</sup>

Applicant stated in his Answer to the SOR that “in one week” he will request to have additional funds withheld from his paycheck per week for federal (\$50) and state (\$25) taxes. In addition, he asserted that he intended to send \$9,000 to the Internal Revenue Service (IRS) and \$10,000 to the state tax authorities to apply toward his tax debts. Finally, he stated he intended to withdraw \$32,000 from his retirement fund by January 2016 and apply it toward his tax debts.<sup>9</sup>

In his response to the FORM, Applicant stated that he modified his withholding as stated above beginning in 2015. He provided a pay stub from February 2016 showing the additional \$75 withheld for taxes, but there is no documentary evidence to show the starting date of this action. He also stated that he intends to file his 2014 and 2015 tax returns by April 2016. He then will gather necessary documents to file his 2012 and 2013 returns, and then will begin the process for the remaining returns. He also claimed that he intended to withdraw the 401k funds, but was hoping the value of the account would increase before he made the withdrawal.

No documentary evidence has been submitted to support any actions with regard to filing and paying past-due taxes except for the change to Applicant’s tax withholding from his pay. There is no evidence that he has contacted federal or state tax authorities to determine his tax liabilities, and to negotiate and pay the delinquencies. Additionally, there is no evidence Applicant has obtained credit counseling or budgeting education. I was unable to evaluate his personal credibility, demeanor, or further inquire into his tax and financial status since he elected to have his case decided without a hearing.

### **Policies**

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

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, administrative judges apply the guidelines in conjunction with the factors listed in the adjudicative process. The administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(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

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<sup>8</sup> Item 3.

<sup>9</sup> Item 1.

available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel.” The applicant has the ultimate burden of persuasion to obtain a favorable security clearance decision.<sup>10</sup> The Supreme Court stated that the burden of proof is less than a preponderance of the evidence.<sup>11</sup>

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that “[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security.” It is well-established law that no one has a right to a security clearance. As noted by the Supreme Court in *Egan*, “the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.” Under *Egan*, Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.<sup>12</sup>

The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that adverse decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See also EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

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<sup>10</sup> ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

<sup>11</sup> *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988) (“it should be obvious that no one has a ‘right’ to a security clearance”); *Duane v. DOD*, 275 F.3d 988, 994 (10<sup>th</sup> Cir. 2002) (no right to a security clearance).

<sup>12</sup> *Egan*, 484 U.S. at 531.

## **Analysis**

### **Guideline F, Financial Considerations**

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

The guideline notes several conditions that could raise security concerns under AG ¶ 19. The following are potentially applicable in this case:

- (a) inability or unwillingness to satisfy debts;
- (b) a history of not meeting financial obligations; and
- (g) failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same.

Applicant failed to file federal and state tax returns from 2009 to 2013, and has long-standing delinquent tax debts that he is unable or unwilling to resolve. The evidence is sufficient to raise the above disqualifying conditions.

Conditions that could mitigate the financial considerations security concerns are provided under AG ¶ 20. The following 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;
- (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; and
- (d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

Applicant has been employed full-time since at least 2004, but failed to file and pay federal and state taxes. Although he alleges additional financial burdens to care for his niece and sister in their time of need, insufficient evidence has been submitted to explain the period of time involved and the impact on Applicant's ability to file and pay taxes. Applicant has provided no documentary evidence to show resolution of the debts except to show that he has increased his tax withholding from his pay. The efforts made to date are insufficient to show that the problem is being resolved or his financial issues are under control. He has been complacent about addressing these long-standing tax issues and apparently has not made the first step of filing past-due tax returns and to contact the tax authorities to determine what he owed and establish a plan to repay. Promises of future actions are insufficient to mitigate financial security concerns.

There is insufficient evidence for a determination that Applicant's financial problems are being or will be resolved within a reasonable period. I am unable to find that he acted responsibly under the circumstances or that he made a good-faith effort to file his returns and pay his tax debts. His financial issues are recent and ongoing. They continue to cast doubt on his current reliability, trustworthiness, and good judgment. None of the above mitigating conditions are applicable.

### **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.

Under AG ¶ 2(c), 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 all of the potentially disqualifying and mitigating conditions in light of all the evidence, facts and circumstances surrounding this case. I have incorporated my findings of fact and comments under Guideline F in this whole-person analysis.

Overall, the record leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. I conclude Applicant did not mitigate 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:	Against Applicant
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Subparagraphs 1.a – 1.d:	Against Applicant
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### **Conclusion**

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

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Gregg A. Cervi  
Administrative Judge