



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



In the matter of: )  
)  
) ISCR Case No. 17-03760  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Ross Hyams, Esq., Department Counsel  
For Applicant: *Pro se*

08/09/2019

**Decision**

RIVERA, Juan J., Administrative Judge:

Applicant failed to timely file his federal income tax returns for tax years 2010 through 2018. He also failed to pay his taxes as required. His recent efforts are insufficient to establish a track record of financial responsibility. He failed to demonstrate good judgment, reliability, and willingness to comply with the law. The financial considerations security concerns are not mitigated. Clearance is denied.

**Statement of the Case**

Applicant submitted a security clearance application (SCA) on March 11, 2016, seeking the continuation of his clearance eligibility required for his position with a federal contractor. After reviewing the information gathered during the background investigation, the Department of Defense (DOD) issued a Statement of Reasons (SOR) on November 22, 2017, alleging security concerns under Guideline F (financial considerations). Applicant answered the SOR on January 11, 2018, and requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA).

DOHA assigned the case to me on January 30, 2019, and issued a notice of hearing on April 9, 2019, setting the hearing for April 30, 2019. At the hearing, the

Government offered three exhibits (GE 1 through 3). Applicant testified and submitted three exhibits (AE 1 through 3). AE 1 was offered at hearing, but received post-hearing. All exhibits were admitted without objection. DOHA received the hearing transcript (Tr.) on May 13, 2019.

### **Procedural Issue**

At hearing, Department Counsel moved to amend the SOR to conform it to the evidence received. Applicant did not object, and I granted the motion to amend. SOR paragraph 1.b was amended to read as follows: "You failed to file your Federal income taxes as required for tax years 2012 through 2018". (Tr. 29-31)

### **Findings of Fact**

Applicant failed to timely file his federal income tax returns for tax years 2010 through 2018. He paid his 2010 and 2011 income taxes after the IRS filed collection and levy notices against him. He has yet to file income tax returns for tax years 2012 through 2018. (SOR ¶¶ 1.a, 1.b) His SOR admissions, and those at the hearing, are incorporated herein as findings of fact. After a thorough review of the record evidence, I make the following additional findings of fact:

Applicant is a 59-year-old employee of a federal contractor. He graduated from high school in 1979. He enlisted in the U.S. Navy in 1981 and honorably served until 2002, when he retired as an E-6, and was then transferred to the Reserve. He possessed a secret clearance during most of his service. Applicant married in 1991 and divorced in 2004. He has one son, age 24.

Applicant submitted an SCA in March 2016, requesting eligibility for a clearance, recently required for him to continue his job with the U.S. Merchant Marine (USMM). He started working for federal contractors with the USMM in 2006. He was employed between 2006 and 2014; unemployed between April 2014 and September 2015 (due to medical issues); and employed from September 2015 to present with different companies and federal contractors.

In his response to Section 26 (Financial Record) of his 2016 SCA, Applicant disclosed that he did not timely file his federal income tax return for tax year 2010. He explained he failed to file his 2010 income tax return because he was deployed, but he requested an extension to file his tax return.

The record evidence shows that Applicant failed to timely file his federal income tax returns for tax years 2010 through 2018. Specifically, he filed his 2010 income tax return in August 2012; established an installment agreement in September 2012; and paid off his 2010 tax debt in May 2019. He filed his 2011 income tax return and established an installment agreement in May 2012; and paid off his 2011 tax debt in September 2015. (AE 1, IRS account transcripts for 2010-2011) Applicant claimed that he did not timely file his 2010 and 2011 income tax returns because his accountant had

mental health problems and failed to file the taxes. The IRS sent him collection and intent to levy notices before Applicant established payment agreements to pay taxes owed for 2010 and 2011.

As of his hearing, Applicant had not filed his federal income tax returns for tax years 2012 through 2018. The total taxes he owes for those years is unknown. Applicant testified that he retained the services of another accountant to help him file his late tax returns after he received the SOR. He claimed he was in the process of providing the accountant with information so that he can complete and file his delinquent tax returns.

Applicant expressed remorse for not filing his income tax returns on time. He claimed that he has learned a hard lesson and promised to timely file his income tax returns and to pay his taxes in the future. He averred that he failed to file his 2012 – 2018 tax returns because of his multiple deployments and his prior accountant’s mental health problems.

Applicant highlighted his over 35 years of combined service in the Navy and working for the USMM. He is concerned about not getting his clearance and losing his job. In the past, his job did not require him to have a clearance, but recently they changed the rules. Applicant’s boat captain (master) submitted a highly favorable endorsement. In his opinion, Applicant has served with distinction as the ship’s storekeeper during the last three years. He considers Applicant to be honest and trustworthy; the single best storekeeper in the fleet; highly respected by his peers; a true seaman; a model citizen; and a patriot in the truest sense of the word. (AE 2)

Applicant’s crewmember evaluation reports for years 2018 and 2019 show that he has been rated excellent (the highest rating) in most categories, or above average (the second highest rating) in the remaining categories. (AE 3)

## **Policies**

The SOR was issued under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), as amended; and DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive) (January 2, 1992), as amended. The case will be adjudicated under the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AGs), applicable to all adjudicative decisions issued on or after June 8, 2017.

Eligibility for access to classified information may be granted “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).

The AG list disqualifying and mitigating conditions for evaluating a person’s suitability for access to classified information. Any one disqualifying or mitigating condition is not, by itself, conclusive. However, the AG should be followed where a case can be measured against them, as they represent policy guidance governing access to classified information. Each decision must reflect a fair, impartial, and commonsense consideration of the whole person and the factors listed in SEAD 4, App. A ¶¶ 2(d) and 2(f). All available, reliable information about the person, past and present, favorable and unfavorable, must be considered.

Security clearance decisions resolve whether it is clearly consistent with the national interest to grant or continue an applicant’s security clearance. The Government must prove, by substantial evidence, controverted facts alleged in the SOR. If it does, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. The applicant bears the heavy burden of demonstrating that it is clearly consistent with the national interest to grant or continue his or her security clearance.

Persons with access to classified information enter into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability, and trustworthiness of those who must protect national interest as their own. The “clearly consistent with the national interest” standard compels resolution of any reasonable doubt about an applicant’s suitability for access in favor of the Government. “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; SEAD 4, ¶ E(4); SEAD 4, App. A, ¶¶ 1(d) and 2(b). Clearance decisions are not a determination of the loyalty of the applicant concerned. They are merely an indication that the applicant has or has not met the strict guidelines the Government has established for issuing a clearance.

## **Analysis**

### **Financial Considerations**

AG ¶ 18 articulates the security concern for financial problems:

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 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 . . . .

Applicant's history of financial problems is documented in the record. He failed to timely file his federal income tax returns for tax years 2010 and 2011, and he has not filed income tax returns for tax years 2012 through 2018. AG ¶ 19 provides disqualifying conditions that raise a security concern and may be disqualifying in this case: "(a) inability to satisfy debts"; "(c) a history of not meeting financial obligations"; and "(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." The record established the disqualifying conditions, requiring additional inquiry about the possible applicability of mitigating conditions.

Six 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, a death, divorce or separation, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances;

(c) the individual has received or is receiving financial counseling for the problem from a legitimate and credible source, such as a non-profit credit counseling service, and there are clear indications that the problem is being resolved or is under control;

(d) the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts;

(e) the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue; and

(g) the individual has made arrangements with the appropriate tax authority to file or pay the amount owed and is in compliance with those arrangements.

The Appeal Board concisely explained Applicant's responsibility for proving the applicability of mitigating conditions as follows:

Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in security clearance decisions is that articulated in *Egan, supra*. "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." Directive, Enclosure 2, ¶ 2(b).

ISCR Case No. 10-04641 at 4 (App. Bd. Sep. 24, 2013).

Considering the evidence as a whole, I find that none of the mitigating conditions are sufficiently raised by the evidence and are not applicable. AG ¶ 20(a) does not apply because Applicant failed to timely file his 2010 and 2011 income tax returns and has not filed income tax returns for tax years 2012 through 2018. I find his behavior ongoing, frequent, and recent.

Applicant claimed he failed to timely file his income tax returns because of his deployments and his first tax preparer's mental health problems. Giving due consideration to Applicant's frequent deployments on behalf of the United States, and even taking his claims at face value, he failed to establish that he was financially responsible under the circumstances. He presented no evidence of reasonable efforts to resolve his delinquent tax filings for tax years 2012-2018 even after the IRS sent him collection and levy notices concerning tax years 2010 and 2011, and he established payment agreements with the IRS. I note that it was not until after Applicant received the November 2017 SOR that he started his efforts to retain a new accountant to file his yet-to-be-filed delinquent tax returns.

I give Applicant credit for his payment arrangements with the IRS concerning tax years 2010 and 2011, and for his recent efforts to retain an accountant to file his late income tax returns.

Applicant's failure to timely file his federal income tax returns resulted primarily from his lack of diligence. He neglected his legal obligation to timely file his income tax returns over an extended period. "Failure to comply with federal and state tax laws suggests that an applicant has a problem with abiding to well-established Government rules and regulations. Voluntary compliance with rules and regulations is essential for protecting classified information." ISCR Case No. 14-04437 at 3 (App. Bd. Apr. 15, 2016). This is true even if the returns have been filed. See, ISCR Case No. 15-03481 at 5 (App. Bd. Sep. 27, 2016).

Applicant's repeated failure to file his federal income tax returns in a timely manner does not demonstrate the high degree of good judgment and reliability required of persons granted access to classified information. See, ISCR Case No. 14-01894 at 5

(App. Bd. Sept. 27, 2016). In sum, Applicant failed to demonstrate financial responsibility. The financial considerations security concerns are not mitigated.

### **Whole-Person Concept**

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, and under the whole-person concept. Security Executive Agent Directive (SEAD) 4, App. A, ¶¶ 2(a) and 2(d). I have incorporated my comments under Guideline F in my whole-person analysis. Some of these factors were addressed under that guideline, but some warrant additional comment.

Applicant, 59, has over 35 years of active service in the Navy and working for federal contractors in the USMM. He held a clearance while in the service. Because of his many years holding a clearance and working for federal contractors, Applicant was aware he was required to maintain his financial responsibility to be eligible for a clearance. He failed to demonstrate good judgment and reliability. His failure to timely file his tax returns for eight consecutive years shows that he has a problem complying with well-established government rules. At this time, his evidence is insufficient to establish a track record of financial responsibility.

### **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
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	Against Applicant

### **Conclusion**

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national security interests of the United States to continue Applicant's eligibility for a security clearance. Clearance is denied.

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JUAN J. RIVERA  
Administrative Judge