



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



In the matter of:	)	
	)	
	)	ISCR Case No. 18-01230
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Ross Hyams, Esq., Department Counsel  
For Applicant: Tokay T. Hackett, Esq.

06/27/2019

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**Decision**

\_\_\_\_\_

Curry, Marc E., Administrative Judge:

Applicant has filed all of his Federal and state income tax returns, and he has paid most of his tax delinquencies. However, in light of the length of time these delinquencies were outstanding, and the nature and seriousness of his conduct, it is too soon to conclude that he has mitigated the security concern.

**Statement of the Case**

On June 29, 2018, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) to Applicant, detailing the security concerns under Guideline F, financial considerations, explaining why it was unable to find it clearly consistent with the national interest to grant security clearance eligibility. The DOD CAF took the action 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 National Adjudicative Guidelines (AG) effective for any adjudication made on or after June 8, 2017. On August 1, 2018, Applicant answered the SOR, admitting the allegations except 1.i through 1.m. He requested a hearing, whereupon, the case was assigned to me on November 1, 2018. On February 22, 2019,

the Defense Office of Hearings and Appeals issued a notice of hearing, scheduling Applicant's case for March 28, 2019. The hearing was held as scheduled. I received seven Government exhibits (GE 1 – GE 7) and 18 Applicant's exhibits (AE A - AE R), together with the testimony of Applicant and three character witnesses. Also, I received a copy of Department Counsel's discovery letter to Applicant (Hearing Exhibit I). At the close of the hearing, I left the record open at Applicant's request, to allow him the opportunity to submit additional exhibits. Within the time allotted, he submitted six exhibits which I incorporated into the record as AE S through AE X. The transcript (Tr.) was received on April 11, 2019.

### **Preliminary Ruling**

SOR subparagraphs 1.j through 1.m allege that Applicant has four outstanding parking tickets totaling \$625. Applicant admits having been issued these parking tickets, but denied the allegations, contending that he paid them. He provided evidence corroborating proof of payment. (AE S) I resolve these subparagraphs in Applicant's favor.

### **Findings of Fact**

Applicant is a 48-year-old married man with two children, ages seven and two. He has been married since July 2014. (Tr. 43) Two previous marriages ended in divorce. He was married to his first wife from 2002 to 2004. (GE 1 at 17) He was married to his second wife from 2010 to 2014. (GE 1 at 18) They were separated approximately two years before their divorce. (Tr. 50) His oldest child is from his second marriage.

Applicant is a veteran of the U.S. Navy, serving from 1988 to 1991. He received a discharge under other than honorable conditions. (Tr. 51; GE 1 at 13) Applicant has a high school degree and has earned some technical school credits.

Applicant is a system administrator. He has worked for the same employer at various locations since 1996. (Tr. 50) He is highly respected on the job. According to a former supervisor, he was an excellent employee who worked day and night. Moreover, "if something was bro[ken] at 3:00 AM, [Applicant's former supervisor] would call on him . . . and he [would] work on it and get it fixed." (Tr. 31) According to a coworker, whenever their government client needed something fixed as soon as possible, they always requested Applicant first. (Tr. 21) Another coworker characterizes Applicant as a man of honor character, and integrity. (Answer at 12)

In January 2014, a lien was entered against Applicant's property for unpaid Federal income taxes from tax years 2006 to 2008, totaling \$87,950, as alleged in subparagraph 1.d. (GE P at 4) There are no allegations that Applicant did not file his 2006 or 2007 federal tax returns on time. The record evidence indicates that, contrary to the allegation set forth in SOR subparagraph 1.b, Applicant did file his 2008 federal income tax return on time. (GE 2 at 17) Applicant contends that the debt from these years stemmed from an audit conducted a few years later that revealed that he owed more than he paid when he filed the income tax returns. Specifically, as a contractor, Applicant files his federal income tax

returns using a 1099 form. (Tr. 109) Applicant owed additional money after the IRS disallowed the business expenses that he claimed. (Tr. 111)

Applicant satisfied his 2008 Federal income tax delinquency with two payments made in March 2019, totaling \$39,363. (AE B at 3-5) It is unknown from the record whether he has satisfied the tax delinquency from 2006 and 2007. Moreover, the evidence that the federal tax lien for tax years 2006 through 2008 (subparagraph 1.d) has been released is inconclusive.

Applicant filed his 2009 federal and state income tax returns on time, contrary to the allegation set forth in subparagraph 1.b. (AE B, AE T at 3; Tr. 60) He paid a \$5,003 federal income tax debt when he filed the return. (AE T at 3-4) Applicant owed no state income tax delinquency from 2009. (AE N)

For tax years 2010 to 2016 Applicant filed his federal and state income returns late, as alleged in subparagraphs 1.b and 1.g. Specifically, he did not file his income tax returns for 2010 until March 2014, (AE C at 1); he did not file his 2011 and 2012 income tax returns until February 2016, (AE D at 1; AE E at 1); he did not file his 2013 income tax return until June 2015, (AE F at 1); he did not file his 2014 income tax return until May 2016, (AE G); and he did not file his 2015 income tax return until February 2019. (Tr. 87) Applicant's federal income tax delinquency for tax year 2010 resulted in a lien against his property, filed in August 2014, in the amount of \$7,113, as alleged in subparagraph 1.e. (AE O)

Contrary to the allegation set forth in subparagraph 1.b, Applicant filed his federal and state income tax return for 2017 on time. (AE J) He owes no delinquency for this tax year. (AE T at 18)

Applicant satisfied his delinquent income taxes from 2010 to 2016 through the following payments:

Year	Amount	Date Paid	Balance	Source
2010	\$8,577	2/25/19	0	AE C at 3; AE T at 5
2011	\$7,419	6/20/18	-\$12.18	AE D
2012	\$6,205	11/12/18	0	AE E
2013	\$24,823	6/8/18	0	AE F
2014	\$23,823	3/11/19	0	AE B at 4
2015	\$13,625	2/12/19	0	AE H; AE T at 14
2016	\$8,284	8/1/18	0	AE T at 17

Applicant's payment of his 2010 tax delinquency resulted in the release of a lien against his property, as alleged in subparagraph 1.d, in March 2019. (AE O) He made the tax payments with his credit card. At the end of each month that he made the payments, he would typically pay his credit card balance, using money drawn from either his savings

account, or his checking account. (Tr. 72, 75, 98) His credit and retail card debt totals approximately \$140,000. (AE K at 3; AE I at 2) All of his accounts are current.

In March 2019, Applicant requested a transcript of all of the state income tax returns that had outstanding delinquencies. (Tr. 93) Per the transcript, he owed \$4,777 for tax year 2014 and \$2,265 for tax year 2015. (AE N at 1) Applicant paid the balance for tax year 2015 on March 20, 2019. (AE N at 3) He is making monthly \$311 payments on the 2014 balance through an installment plan. (Answer at 20)

In April 2015, a lien was entered against Applicant's property for delinquent 2010 state income taxes totaling \$3,333, as alleged in subparagraph 1.i. This lien was released in June 2018 after Applicant paid the delinquency. (AE P at 1)

Applicant attributes his failure to file or pay his federal and state income taxes timely to the deterioration of his second marriage, followed by his 2014 divorce and the ensuing litigation that began when he filed for full custody of their child in December 2017. (AE Q at 4). Their marriage began deteriorating shortly Applicant's wife had their child in 2012. (Tr. 53) Their separation was particularly bitter because Applicant raised allegations that his second wife was physically abusing their daughter. Fearing for his daughter's safety, Applicant spared no expense during the divorce proceedings, hiring one of the best family law attorneys in the state, who told him that his legal fees would range between \$100,000 and \$150,000. (Tr. 123) Applicant then began saving money to pay the attorney. Some of the money ordinarily would have been set aside to pay income taxes. (Tr. 54-56)

In 2013, Applicant went on a tropical cruise. (Tr. 119; GE 1 at 29) He spent approximately \$5,000. (Tr. 120) In late 2014, approximately nine months after his divorce from his second wife was finalized, Applicant traveled out of the country to visit his current wife's family. His in-laws paid for most of the expenses. He spent approximately \$1,400.

Applicant earns \$113,000 per year. He has approximately \$15,000 deposited in a savings account, and \$15,000 invested in a 401k plan. (Tr. 126) He has \$2,000 of monthly discretionary income.

## **Policies**

The U.S. Supreme Court has recognized the substantial discretion the Executive Branch has 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). When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are required to be considered 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, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overall 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 ¶ 1(d) requires that “[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security.” In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. 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 applicant or proven by Department Counsel. . . .” The applicant has the ultimate burden of persuasion to obtain a favorable security decision.

Under the whole-person concept, the administrative judge must consider the totality of an applicant’s conduct and all relevant circumstances in light of the nine adjudicative process factors in AG ¶ 2(d). They are as follows:

- (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.

## **Analysis**

### **Guideline F: Financial Considerations**

The security concerns about financial considerations are set forth 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 or sensitive information . . . . An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

Applicant failed to file his federal or state income tax returns on time between 2010 and 2016, incurring delinquencies in excess of \$100,000. Moreover, although he filed his 2008 federal income tax return on time, he failed to pay the amount due, totaling approximately \$39,000, on time. Consequently, AG ¶ 19(a), “inability to satisfy debts,” AG ¶

19(c), “a history of not meeting financial obligations,” and AG ¶ 19(f), “failure to file . . . federal, state, or local income tax returns or failure to pay annual federal, state, or local income tax, as required,” apply.

The following migrating conditions are potentially applicable under AG ¶ 20:

(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; 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.

Applicant contends that his failure to timely file his income tax returns or to timely pay the corresponding taxes stem from the emotionally draining litigation related to the divorce from his second wife. Since the culmination of both the divorce and the custody proceedings, Applicant has filed his tax returns and satisfied all of the delinquencies except a \$4,800 state tax delinquency, which he is paying through an installment plan. AG ¶ 20g) and the second prong of AG ¶ 20(c) apply.

Applicant did not make any significant payments towards his income tax delinquencies until after the SOR was issued. By then, the oldest tax debts had been delinquent for approximately eight years. The emotionally compelling circumstances surrounding Applicant’s divorce are undercut by the fact that Applicant’s 2010 income tax returns were not filed, and its corresponding balance was already delinquent by the end of 2011, before Applicant’s child was born and before his marital problems dramatically worsened. Also, despite having significant delinquent income tax debt and income tax returns that had not been filed, Applicant spent \$5,000 to take a tropical cruise, and later spent \$1,400 to travel out of the country to visit his parents in-law. Under these circumstances, AG ¶ 20(b) does not apply.

### **Whole-Person Concept**

Applicant did not merely fail to file timely or pay one or two tax returns late; he failed to timely file tax returns or pay his income tax debts for several consecutive years. As such, he violated Federal law with impunity. Applicant is a well-respected employee with an exceptional work history. He offered emotionally compelling testimony involving the circumstances surround the custody dispute and its relationship to his failure to file his

income tax returns or to pay his tax debt. These factors, however, are insufficient to mitigate the security concern, given the nature and seriousness of Applicant's long-time delay in filing his income tax returns and the length of time that elapsed before he satisfied them. I conclude Applicant failed to carry the burden.

### **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
Subparagraphs 1.b – 1.h:	Against Applicant
Subparagraph 1.i:	For Applicant:
Subparagraphs 1.j -1.m	For Applicant

### **Conclusion**

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

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Marc E. Curry  
Administrative Judge