



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



In the matter of: )  
)  
) ISCR Case No. 18-01488  
)  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Gatha Manns, Esq., Department Counsel  
For Applicant: *Pro se*

03/12/2019

**Decision**

MURPHY, Braden M., Administrative Judge:

Applicant mitigated financial security concerns about unfiled state and federal income tax returns and related tax debt. Applicant’s tax filing issues are in the past and he is making regular payments on his remaining tax debt. Applicant’s eligibility for access to classified information is granted.

**Statement of the Case**

Applicant submitted a security clearance application (SCA) on September 29, 2015. On August 28, 2018, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline F, financial considerations. DOD CAF took this action 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* (January 2, 1992), as amended (Directive); and

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Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (AG), effective June 8, 2017.

Applicant answered the SOR on October 4, 2018, and requested a hearing. The case was assigned to me on November 13, 2018. On November 21, 2018, the Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing scheduling the hearing for December 11, 2018.

The hearing convened as scheduled. At the hearing, Government's Exhibits (GE) 1 through 4 were offered and admitted without objection. Applicant testified and submitted Applicant's Exhibit (AE) A, which was admitted without objection. I held the record open until January 31, 2019, to provide Applicant the opportunity to submit additional information. He did not submit any additional materials.<sup>1</sup> DOHA received the hearing transcript on January 2, 2019. The record closed on January 31, 2019.

### **Amendments to the Statement of Reasons**

Department Counsel withdrew SOR ¶ 1.b, concerning a past-due federal income tax debt, and added SOR ¶ 1.d, concerning Applicant's failure to file state income tax returns.<sup>2</sup> SOR ¶ 1.d reads as follows:

- 1.d: You failed to file your [state] income tax returns, as required, for tax years 2007-2014.

### **Findings of Fact**

Applicant admitted SOR ¶¶ 1.a, 1.c, and the newly added SOR ¶ 1.d.<sup>3</sup> He denied SOR ¶ 1.b, which was withdrawn. His admissions and explanations are incorporated into the findings of fact. After a thorough and careful review of the pleadings and exhibits submitted, I make the following additional findings of fact.

Applicant is 52 years old. He has never married, but he has a fiancée, who is also his cohabitant. He has a daughter, age 19, who is in college, and an adult son, age 25. Applicant has a high school diploma. He has worked for his employer, a defense contractor, since 1990. He has held a security clearance for many years. (Tr. 12, 18-24,

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<sup>1</sup> Department Counsel called Applicant to confirm whether he had submitted post-hearing documents, but never heard back from him. He does not have e-mail. (Hearing Exhibit III)

<sup>2</sup> Tr. 18-25. Applicant did not object to the amendments. He admitted SOR ¶ 1.d. (Tr. 21) Because SOR ¶ 1.d was added at the start of the hearing, I gave Applicant about seven weeks after the hearing to submit responsive documents. (Tr. 118) He did not do so. (HE III)

<sup>3</sup> In his Answer, Applicant admitted SOR ¶ 1.a only in part. At the start of the hearing, he admitted it in full. (Tr. 16)

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29, 46, 109, 110, 115; GE 1) Applicant works in State 1. He has lived for many years in State 2, a neighboring state. (Tr. 112-113)

As to federal tax issues, Applicant disclosed on his September 2015 SCA that he “failed to file and pay federal income taxes during the years 2007, 2008, and 2009. I made payments and loss [sic] income returns.” He estimated that he had failed to pay about \$5,000 in federal income taxes. He also stated that the debt had been satisfied in about May 2012. (GE 1 at 29)

As to state tax issues, Applicant stated on his SCA, “I do not know why I failed to file/pay for the years listed 2007, 2008, 2009, 2010, 2011, 2012, 2013, and 2014.” He estimated that he had failed to pay about \$15,000 in state income taxes, and said he was “still making payments for the unpaid taxes.” (GE 1 at 30)

Applicant had background interviews on January 23 and 26, 2018. He authenticated the interviewing agent’s summaries of those interviews in an Interrogatory Response to DOHA in July 2018. (GE 2) Those interview summaries do not address the issue of Applicant’s failure to timely file state and federal income tax returns. Applicant also had an earlier interview, in July 2017, but the summary of that earlier interview is not in evidence. (GE 2 at 6)

Applicant stated in his January 23, 2018 interview summary that \$300 of his monthly pay had been garnished to resolve his federal income tax debt. The start date is not noted, but the garnishment ended in May 2012, when the IRS notified him that his federal income tax debt was satisfied. (GE 2 at 6) This evidence provided the basis for the Government’s withdrawal of SOR ¶ 1.b (which Applicant also denied in his Answer).

Applicant’s State 2 tax debt was initially being paid through a wage garnishment, which began in 2015. (GE 3; Tr. 91, 98-100) In November 2017, the garnishment was removed when Applicant contacted State 2 tax authorities and arranged to pay \$382 a month through his bank account to resolve his past-due state income tax debt, estimated at about \$15,000, for tax years 2007-2014.<sup>4</sup> (Tr. 100, 114-115; GE 2 at 6, 7; GE 3; AE A) He began those voluntary payments in January 2018. (Tr. 49)

A “Statement of Account” from State 2’s Department of Revenue shows that as of July 2018, Applicant owed \$8,465 in State 2 taxes, penalties, and interest, for tax years 2013 and 2014. (SOR ¶ 1.c) He had paid \$2,934 towards his tax debt during 2018. The July 2018 “Statement of Account” does not reference any earlier tax years. (GE 4)

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<sup>4</sup> This \$15,000 figure was erroneously alleged in SOR ¶ 1.b as what Applicant owed in past-due federal tax debt. He disclosed on his SCA that he owed \$5,000 in federal taxes, not \$15,000, and in any event, SOR ¶ 1.b was withdrawn, since that debt was paid in 2012.

Applicant provided a November 2018 bank statement showing that he continues to have \$382 withdrawn each month towards his State 2 tax debt. (AE A) He did not provide documentation from State 2 of an updated balance, but said he had paid an additional \$1,000 or \$1,200 since July 2018, and had about \$7,000 left to pay. (Tr. 50, 62, 70, 98)

As amended, the SOR alleges that for tax years 2007 to 2014, Applicant failed to timely file his federal income tax returns (SOR ¶ 1.a) and state income tax returns (SOR ¶ 1.d), as required.

Applicant testified that he filed his state and federal tax returns for tax years 2007, 2008, and 2009, "all three at the same time," in 2010. (Tr. 52, 55-57, 64, 82, 86) When asked why he filed his returns late, Applicant said he was told by an informal tax advisor that "if I didn't owe taxes I could file three years together." He also said he heard the person who told him this was later indicted. (Tr. 56) (Tr. 82-83) If Applicant filed all three of these returns in April 2010, as he said, this would make his 2009 returns timely, but his 2007 and 2008 returns late. (Tr. 59, 84)

While the record is rather unclear on this point, Applicant also testified that, either for those years (2007-2009), or perhaps for some years after that (2010-2013), his fiancée attempted to file their tax returns on their home computer, through a nationally recognized tax preparation software program. (Tr. 51, 52, 55, 68) This "didn't work out altogether correct either. So that just put me deeper in the hole," he testified. (Tr. 52) It is unclear if this refers to calculation of taxes owed, or to tax filings as well.

Applicant also asserted that, since he worked in State 1, his employer had not been withholding state taxes for State 2, where he lives. (Tr. 52) He asserted that he was supposed to file state income tax returns both for State 2, where he lives, and a "non-resident" tax return for State 1, where he works. (Tr. 52-54, 88, 113)<sup>5</sup> He also attempted to claim his commuting expenses, because he has an interstate commute to and from work every day. This was not successful, and he had to pay a penalty when he filed his three years of returns, in 2010. (Tr. 56-57)

For tax years 2014 through 2016, Applicant hired a tax preparation firm from California (not Applicant's home state) who he heard about on the radio. He paid them \$5,000. He said they assisted in preparing and filing his federal returns for those years, but not his State 2 returns. By the time of his background interviews (2017 and 2018), he decided to contact State 2 himself to resolve his state tax issues (as discussed above). (Tr. 59-62, 69, 71, 84-94)

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<sup>5</sup> There is no allegation in the SOR about overdue State 1 taxes or tax returns, nor is there any such indication in the record. He also has never lived there.

In his Answer to SOR ¶ 1.a, Applicant admitted that he “failed to timely file as required federal income tax returns for the tax years 2007, 2008, and 2009.” (Answer) This comports with what he disclosed on his SCA. (GE 1 at 29) He did not address tax years 2010 to 2014 in his Answer. At the start of the hearing, when this was brought to his attention, Applicant admitted SOR ¶ 1.a in full, as to all federal tax years alleged. (2007-2014) (Tr. 16, 51)

Later in the hearing, however, when asked about the status of his filings for tax years 2010-2014, Applicant testified, “[w]ell, I didn’t file on time for [State 2]. As far as my federal taxes, I thought that I filed every one [of those years] on time, I honestly did.” (Tr. 63; see *also* Tr. 64) Applicant also said he thought he filed all of those federal returns on time “except for maybe one” year, tax year 2014. (Tr. 65)

Applicant acknowledged at hearing, both in answering SOR ¶ 1.d, and later, that he filed his State 2 tax returns late, for tax years 2007 through 2014. (Tr. 21, 63, 66, 88, 91) This admission also comports with what he disclosed on his SCA. (GE 1 at 30) He did not file an extension to the annual filing deadline. (Tr. 88)

Applicant testified that as of the date of the hearing, he had no federal or State 2 tax returns that remained unfiled, including tax years not alleged (2015, 2016, and 2017). He stated that since 2014, his federal and State 2 tax returns had been filed on time. (Tr. 66-67) He also testified that he owed no past-due federal taxes, and no past-due State 2 income taxes beyond the \$7,000 he still owes for tax years 2013 and 2014. (Tr. 69)

With his July 2018 Interrogatory Response to DOHA, Applicant provided copies of account transcripts from the Internal Revenue Service (IRS) for tax years 2015-2017, but not for any earlier tax year. He said he was only able to request those three years by phone, and would have had to make a written request to the IRS for earlier account transcripts. He did not do that. (Tr. 116)

Applicant filed his 2015 federal tax return in November 2016 (though it was several months late). He filed his 2016 and 2017 federal tax returns on time. (GE 2)<sup>6</sup> GE 2, then, largely supports Applicant’s testimony as to his more recent federal tax filings. He was not asked to provide State 2 tax transcripts with the Interrogatory Response.

Applicant recently began working with a nationally recognized tax preparation service. With their assistance, he filed his 2017 state and federal tax returns on time. (Tr. 67-68, 86; GE 2) His plan is to use them for his 2018 taxes, and in the future. (Tr. 108)

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<sup>6</sup> Applicant submitted federal tax transcripts for tax years 2015, 2016, and 2017 when he responded to DOHA’s Interrogatory. Those returns were not initially submitted as part of GE 2, but were offered by Department Counsel during the hearing when they came up during Applicant’s cross-examination. They were then included as part of GE 2, and admitted without objection. (Tr. 71-81)

In 2015, Applicant earned about \$69,000 in adjusted gross income; in 2016, he earned just under \$71,000 in adjusted gross income; and in 2017, he earned over \$116,000 in adjusted gross income. (GE 2) He attributed this significant increase to an extended work assignment in another state when he worked a lot of overtime. His current income level is between \$60,000 and \$64,000 annually, before overtime, and about \$80,000 including overtime. During summer 2018, Applicant was sidelined for several months with an injury, so he earned significantly less income than usual. (Tr. 101-104)

Applicant and his fiancée live in a home that she owns. He makes the \$520 monthly house payment. He has a \$407 monthly car payment. His daughter is in college, and he helps her financially when he can. With his other monthly expenses, he has limited funds left over at the end of the month and essentially lives paycheck-to-paycheck. He has about \$70,000 in his 401k plan, and borrowed about \$3,000 against it for his recent medical expenses. His fiancée is on disability, and does not work. They try to keep to a budget but he has not had formal credit counseling. (Tr. 94, 103-108, 111, 117)

Applicant loves his country, his job, his children, and his family. He spoke with appreciation of the mentoring he received from older employees when his career began 28 years ago, and seeks to be a mentor now for younger employees himself. He takes great pride in the work he does for his country. He understands the need to “dot every ‘i’ and cross every ‘t’” both at work and otherwise, and he recognizes that he did not do that with his taxes. He is sorry for his actions and recognizes that it was “something I brought on myself. But I’m trying to work through it.” (Tr. 27-29, 70, 127-128)

## **Policies**

It is well established that no one has a right to a security clearance. As the Supreme Court held in *Department of the Navy v. Egan*, “the clearly consistent standard indicates that security determinations should err, if they must, on the side of denials.”<sup>7</sup>

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 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, these guidelines are applied 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

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<sup>7</sup> *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988).

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.” In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have not drawn inferences grounded on mere speculation or conjecture.

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 to obtain 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 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.

## **Analysis**

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

The financial considerations security concern 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. . . .

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The guideline sets forth several conditions that could raise security concerns under AG ¶ 19. The following conditions are potentially applicable:

- (a) inability to satisfy debts;
- (c) a history of not meeting financial obligations; and
- (f) failure to file . . . annual Federal, state, or local income tax returns or failure to pay annual Federal, state, or local income tax as required.

Applicant disclosed on his September 2015 SCA that he had failed to file several years of federal income tax returns (2007-2009) and State 2 income tax returns (2007-2014) on time, as required. He disclosed about \$5,000 in past-due federal income taxes and about \$15,000 in past-due state income taxes.

SOR ¶ 1.c, concerning past-due State 2 income tax debt, is established by the record evidence, and the above disqualifying conditions all apply. SOR ¶ 1.b, concerning federal tax debt, was withdrawn.

The record as to the status of Applicant's late-filed federal and State 2 income tax returns is less clear. This is, in part, because Applicant's testimony was at times confusing as to who he relied on for tax advice for certain tax years, and because his testimony was uncorroborated by clarifying documentation.

Applicant's tax problems began, at least in part, because he initially relied on incorrect advice from an informal tax advisor who told him he could file his tax returns three years late if he was due a refund. Applicant also sought deductions to which he was not entitled (his interstate commuting expenses) and had to pay a penalty when he filed those returns.

Regardless of the reason, Applicant testified consistently that he filed his 2007, 2008, and 2009 state and federal income tax returns in April 2010. That testimony also comports with what he disclosed on his SCA and, as to his federal returns, what he admitted in his Answer. I therefore conclude that Applicant filed his 2007 and 2008 state and federal tax returns late, but find that his 2009 tax returns were timely. AG ¶ 19(f) is established as to Applicant's 2007 and 2008 federal returns. (SOR ¶ 1.a, in part)

Applicant also disclosed on his SCA, with specific, year-by-year details, that he failed to file his State 2 income tax returns for 2007-2014. His testimony also comported with that evidence (but for 2009, as noted above). The Government added SOR ¶ 1.d at the start of the hearing on the basis of the SCA. Applicant did not object to the amendment, though he unquestionably had a right to do so, given its lateness. He was given seven weeks after the hearing to provide relevant documentation, but did not do so. Nonetheless, AG ¶ 19(f) is established as to SOR ¶ 1.d, given his admission and his testimony.

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This leaves Applicant's federal returns for tax years 2010-2014, as alleged in SOR ¶ 1.a. As noted, Applicant did not disclose those federal returns as having been filed late on his SCA. He did not address those returns in answering SOR ¶ 1.a in his SOR response, confining his answer to tax years 2007-2009.

At the start of the hearing, Applicant admitted SOR ¶ 1.a in full. However, his testimony did not support that admission, as he then said several times that he thought he had filed his federal returns on time, but for 2014. However, it was not until 2014 that he retained the tax advisor from California who began to address his federal returns, and it was through their assistance that Applicant later began to file his returns in a timely manner. Applicant's testimony is also not supported by documentation that might have clarified the matter. I also cannot ignore his unqualified admission to SOR ¶ 1.a in full, at the start of the hearing. AG ¶ 19(f) therefore applies to SOR ¶ 1.a (but for his 2009 returns, which I conclude were timely filed, as noted above).

Conditions that could mitigate 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;
- (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; 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 failed to timely file his state and federal income tax returns from 2007 to 2014. He disclosed late-filed income tax returns and related tax debt on his 2015 SCA. He testified that he pursued tax assistance, from a variety of sources, with varying success, for several years. His first tax advisor gave him bad advice, which was that he could file his returns three years late if he was due a refund. He cured that in 2010 by filing earlier returns. That led to the federal tax debt, which took until 2012 to resolve. He and his fiancée then used a nationally recognized computer program to prepare and file their returns themselves, but evidently made errors, either as to calculation of taxes owed, or as to filing, which put him "deeper in the hole," as he testified. Applicant then hired the tax firm from California in 2014, and they resolved his federal tax returns but

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not his state returns. He pursued resolution of those himself and has been making regular payments on that debt. Applicant is now using a nationally recognized, reputable tax preparer and will continue to do so in the future. His issues with late filing tax returns are now in the past.

The document from Applicant's state tax authority (GE 4) lists debt from tax years 2013 and 2014. I therefore conclude that those returns have been filed and that the past-due taxes Applicant owed were then duly calculated by authorities. GE 4 does not reference any outstanding tax owed, or any unfiled return, from any earlier year. I therefore infer from GE 4 that no earlier (or later) state returns are outstanding. Applicant's past-due state tax debt is nonetheless ongoing, so AG ¶ 20(a) does not fully apply. AG ¶¶ 20(c), 20(d), and 20(g) apply to mitigate SOR ¶¶ 1.a, 1.c, and 1.d.

### **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(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(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 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. I also credit Applicant's long employment record in the defense industry. He has mitigated the financial security concerns. In reaching this conclusion, I considered not only Applicant's credibility, but the record evidence as a whole. Overall, the record evidence leaves me without questions or doubts as to Applicant's eligibility for access to classified information.

### **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:

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Paragraph 1, Guideline F: FOR APPLICANT

Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	Withdrawn
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	For Applicant

### **Conclusion**

In light of all of the circumstances presented by the record, 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.

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Braden M. Murphy  
Administrative Judge

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