



DEPARTMENT OF DEFENSE  
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of: )  
)  
) ISCR Case No. 19-00076  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Moira Modzelewski, Esq., Department Counsel  
For Applicant: *Pro se*

03/03/2020

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**Decision**

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MURPHY, Braden M., Administrative Judge:

When he was deployed overseas in 2014, Applicant falsely claimed that his income was tax exempt, leading to several thousand dollars of past-due federal income taxes. He then failed to file annual federal income tax returns on time, as required, for tax years 2014-2016. While the tax returns at issue have now been filed and the past-due taxes have now been paid, this is insufficient to mitigate the financial security concerns resulting from his conduct. Applicant’s eligibility for access to classified information is denied.

**Statement of the Case**

Applicant submitted a security clearance application (SCA) on June 14, 2016. On June 13, 2019, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline F, financial considerations. The DOD CAF acted 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 Security

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

Applicant answered the SOR on June 28, 2019, and requested a hearing. The case was assigned to me on August 7, 2019. On August 9, 2019, the Defense Office of Hearings and Appeals (DOHA) issued a notice scheduling the hearing for September 13, 2019.

The hearing convened as scheduled. Department Counsel submitted Government's Exhibits (GE) 1 through 3, which were admitted without objection during its case in chief, as well as GE 4 through 6, which were offered during rebuttal and admitted without objection. Applicant testified and submitted Applicant's Exhibit (AE) A, which was admitted without objection. I held the record open until September 27, 2019, to allow him the opportunity to submit additional documentation. He timely submitted two additional documents, which I marked as AE B and C, and admitted without objection. DOHA received the hearing transcript on September 23, 2019.

### **Findings of Fact**

Applicant admitted all three SOR allegations, ¶¶ 1.a, 1.b, and 1.c. His admissions are incorporated into the findings of fact. After a thorough and careful review of the pleadings and evidence submitted, I make the following additional findings of fact.

Applicant is 38 years old. He was married from 2008 to 2013. He has no children. He currently lives with his girlfriend and her teenage son. Applicant has some junior college credits and professional training. He has held jobs as an aircraft mechanic since 2004 for multiple defense contractors. Since October 2008, he has worked on rotational deployments in Afghanistan, for 60 or 90 days at a time, with 45 to 60 days off in between. Applicant had worked for his current employer for about a year and a half at the time of the hearing. He has had a clearance since about 2007. (Tr. 10-11; 33-35; GE 1)

Applicant failed to timely file his federal income tax returns, as required, for tax years 2014, 2015, and 2016. At one point he had past-due federal income tax debt for those years of over \$100,000. (SOR ¶¶ 1.a, 1.b, 1.c)

Applicant said it was common practice among his deployed co-workers to change their federal tax withholding status to "exempt" late in the year. The purpose was to increase their paychecks temporarily, so as to have more money for Christmas. (Tr. 44, 52, 81-82) During one of his deployments in 2014, Applicant changed his tax withholding status to exempt. Though he initially intended it to be temporary, he failed to change his exemption status back until 2017. (Tr. 56, 61)

Applicant said that he initially changed his withholding status by submitting a revised W-4 form to a company administrator. When he went back later to change it, he said he had to do it on a company computer. He said he was unable to effect the

change because the computer connection from Afghanistan was poor, so after a while he gave up trying. (Tr. 65-66, 80) He acknowledged, however, that he could have made the re-adjustment to his W-4 while he was home on rotational leave, but did not do so. (Tr. 84)

Applicant asserted that, once he exempted all his income, whether he would actually qualify for an overseas exemption (of \$90,000, he said) would depend on who his tax preparer was, and what they told him about whether or not he qualified. However, he also acknowledged being told that he did not qualify for an overseas exemption, which explained his high tax bills. (Tr. 44-46)

GE 4 is a blank copy of an IRS form W-4 from 2014, like the one Applicant prepared. Box 7 contains the following language (emphasis in original), followed by the signature block:

I claim exemption from withholding for 2014, and I certify that I meet **both** of the following conditions for exemption:

- Last year I had a refund of **all** federal income tax withheld because I had **no** tax liability, **and**
- This year I expect a refund of **all** federal income tax withheld because I had **no** tax liability. If you meet both conditions, write "Exempt" here.

Under penalties of perjury, I declare that I have examined this certificate and, to the best of my knowledge and belief, it is true, correct, and complete.

Applicant acknowledged that, for tax year 2013 and 2014, he owed and paid taxes, so he did not have a right to a refund due to having no tax liability. He acknowledged that in signing the W-4 in 2014, he had asserted that his answers were true, when, in fact, he knew they were false. (Tr. 53-56, 60-61; GE 4, GE 5)

By treating all of his income as tax exempt, Applicant had no income taxes withheld for part of 2014, all of 2015, and all of 2016. He then did not timely file his 2014 tax return. He acknowledged that had he done so, it would have become clear to him that he was not exempt since he earned far too much income. (Tr. 62-63; GE 5 (an excerpt from an IRS publication noting that any single filer earning more than \$10,300 could not be exempt from taxes)).

Applicant earned \$158,000 in 2014, \$195,000 in tax year 2015, and \$140,000 in 2016. He had no taxes withheld for either year. The exemption remained in place until he changed it in 2017. (Tr. 59, 62)

Beginning in April 2015, Applicant failed to timely file his federal tax returns for three straight years. He testified at hearing that when he was deployed during tax time, it was difficult to address his taxes in a timely manner. He knew that the federal tax filing

deadline is April 15 each year, and he said he filed an extension in 2015. But he did not file his 2015 tax return because he was busy and forgot. (Tr. 37-38; GE 1) He also received correspondence from the IRS each year about his unfiled tax returns and past-due taxes, yet took no action. (GE 2 at 5; Tr. 64, 66-68)

At the time of the April 15, 2016 tax deadline, Applicant “freaked out” with anxiety about dealing with it, so he put it off. (Tr. 40, 66) He disclosed his tax issues on his SCA, which he filled out in June 2016. He disclosed that he had failed to file his 2014 and 2015 federal income tax returns, and estimated owing about \$10,000 in past-due taxes for each year. He said he was working on resolving the problem. (GE 1 at 33-34; Tr. 36-37) He acknowledged that his SCA was what spurred him to act. (Tr. 40-42; GE 1 at 33-34)

However, Applicant also failed to timely file his 2016 tax return by the April 2017 deadline. In 2017, he hired a tax preparer to address his unfiled taxes. Applicant claimed that his tax preparer told him that his 2016 tax return, filed in December 2017, was not late, because the IRS had granted a filing extension to State 1 residents (such as Applicant) since State 1 was impacted by Hurricane Irma. (GE 2 at 5; Tr. 41-42, 88) However, while the IRS did grant such an extension – until January 31, 2018 -- it did not do so until September 15, 2017. (GE 6) By that time, Applicant’s 2016 federal income tax return, due on April 15, 2017, was already late, unless he had filed a request for an extension (which he didn’t). (GE 3; Tr. 89-96)

With the assistance of his tax preparer, Applicant filed his 2014, 2015, and 2016 federal income tax returns in late December 2017. (GE 3, Tr. 43, 69) He was then notified by the IRS that he owed about \$130,000 in past-due taxes for the tax years at issue. While he initially considered a monthly repayment plan, he took money out of his 401(k) fund and paid the taxes back in bulk. (Tr. 71-72; GE 6 at 6) The status of Applicant’s late-filed returns and past-due taxes, as alleged in the SOR, is as follows:

SOR ¶ 1.a (2014: Amount alleged: \$26,636): The IRS assessed penalties and interest relating to the late filing. In mid-February 2019, Applicant made a lump-sum payment of \$26,149. After additional adjustments to penalties and interest, he was issued a refund of about \$1,945 in mid-March 2019. (GE 3 at 1-2)

SOR ¶ 1.b (2015: Amount alleged: \$65,190): The IRS assessed penalties and interest relating to the late filing. He received a large credit from his 2017 tax payment. In mid-February 2019, Applicant made a lump-sum payment of about \$56,660. In March 2019, he was assessed about \$6,000 in additional penalties and interest. (GE 3 at 3-4) His IRS account transcript for tax year 2017 reflects a \$13,551 credit transferred out to his 2015 taxes in April 2018. (GE 3 at 7) As of March 2019, he had a zero balance for the 2015 tax year. (GE 3 at 3) (Tr. 48)

SOR ¶ 1.c (2016: Amount alleged: \$40,128): The IRS assessed penalties and interest relating to the late filing. In mid-February 2019, Applicant made a lump-sum payment of about \$44,520. In March 2019, he was assessed about \$5,100 in additional

penalties and interest. As of April 2019, he had a zero balance for the 2015 tax year. (GE 3 at 5-6)

Applicant filed his 2017 federal income tax returns on or about April 15, 2018 (on time). As of May 2018, he had a zero balance for the 2017 tax year. (GE 3 at 7)

Applicant acknowledged that he did not save the money he was not paying in taxes. He figured his tactic would catch up to him eventually, and he would address his tax debt through a payment plan. (Tr. 78-79) He testified that by resolving his federal tax debts by taking early withdrawals from his 401(k) funds, this in turn, caused additional tax consequences, for the 2019 tax year. He said he has an extra \$500 withheld from his pay to account for that. (Tr. 47-48-51, 72, 86, 107; AE B, AE C) It is unclear, however, what the tax consequences might be for the early withdrawals from his 401(k).

Applicant acknowledged his actions, said it was a mistake, and said he “didn’t handle it well.” He also noted that his tax returns had been filed and his debts paid. (Tr. 49)

Applicant currently earns between \$140,000 and \$150,000 a year. (Tr. 72-73) He owns several used cars. He purchased his most recent car in 2016, for about \$28,000 or \$30,000. He has a monthly payment. He also bought a \$25,000 boat, in 2015, for which he also has a monthly payment. (Tr. 73-75)

Applicant’s supervisor since 2010 provided a reference letter attesting to his outstanding performance, dependability, and professional demeanor. Other professional and personal references provided letters attesting to Applicant’s character, professionalism, dependability, and trustworthiness. (AE A)

## **Policies**

It is well established that no one has a right to a security clearance. As the Supreme Court has held “the clearly consistent standard indicates that security determinations should err, if they must, on the side of denials.” *Department of Navy v. Egan*, 484 U.S. 518, 531 (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 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

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 security concern for financial considerations 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. . . . An individual who is financially overextended is at greater risk of having to engage in illegal or otherwise questionable acts to generate funds. . . .

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

- (a) inability to satisfy debts;

(b) unwillingness to satisfy debts regardless of the ability to do so;

(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.

When he was deployed overseas in 2014, Applicant falsely claimed that his income was tax exempt, leading to several thousand dollars of past-due federal income taxes. Rather than stockpile the money he should have paid in taxes, he spent it. He also failed to file annual federal income tax returns on time, as required, for tax years 2014-2016. AG ¶¶ 19 (a), (b), (c) and (f) all apply.

In ISCR Case No. 14-04437 at 3 (App. Bd. Apr. 15, 2016) (emphasis added), the DOHA appeal board detailed the security concern about applicants who fail to file their tax returns as follows:

Failure to file tax returns suggests that an applicant has a problem with complying with well-established governmental rules and systems. Voluntary compliance with such rules and systems is essential for protecting classified information. ISCR Case No. 01-05340 at 3 (App. Bd. Dec. 20, 2002). As we have noted in the past, a clearance adjudication is not directed at collecting debts. See, e.g., ISCR Case No. 07-08049 at 5 (App. Bd. Jul. 22, 2008). By the same token, *neither is it directed towards inducing an applicant to file tax returns. Rather, it is a proceeding aimed at evaluating an applicant's judgment and reliability. Id.* A person who fails repeatedly to fulfill his or her legal obligations does not demonstrate the high degree of good judgment and reliability required of those granted access to classified information. See, e.g., ISCR Case No. 14-01894 at 5 (App. Bd. Aug. 18, 2015); See *Cafeteria & Restaurant Workers Union Local 473 v. McElroy*, 284 F.2d 173, 183 (D.C. Cir. 1960), *aff'd*, 367 U.S. 886 (1961).

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's tax problems began in 2014, when he chose to exempt all of his income while working overseas as a defense contractor. Even temporarily, he had no right to do so, yet he did it anyway. His problems compounded when he failed to re-adjust his exemptions, and then when he failed to file his federal income tax returns, first in April 2015, then in April 2016, and again in April 2017. He took no action despite receiving correspondence from the IRS about his overdue taxes and unfiled returns, and despite disclosing his tax issues on his June 2016 SCA. Only in 2017 did Applicant begin to address the problem by hiring a tax preparer. Further, despite exempting all of his income from federal taxes for three years, he failed to stockpile the money he owed for the day his actions caught up to him. As a result, he had to pay the past-due taxes by cashing out his 401(k) pension. While that action cured the taxes he owed for tax years 2014, 2015, and 2016, the tax consequences of that action have not yet been determined.

Applicant hired a tax preparer to address his past-due returns and to pay his past-due taxes. The returns were filed in December 2017 and the past-due taxes paid in 2019. AG ¶¶ 20(c) and 20(g) both apply.

However, this does not end the analysis. After several years of having his income wrongly exempted from federal income taxes and taking no action to limit the scope of the problem, Applicant was finally energized to address his overdue tax returns and tax debt only during 2017, during the processing of his June 2016 SCA. As he acknowledged, filling out his SCA was what spurred him to act. The fact that Applicant acted only when his clearance was imperiled raises questions about his willingness to follow the sometimes complex rules governing classified information when his personal interests are not at stake. See, e.g., ISCR Case No. 15-01070 at 4 (App. Bd. Mar. 9, 2016). Further, even though Applicant has documented that he filed all his past-due returns and paid all his past-due tax debt, I cannot simply adopt a position of "no harm, no foul" or "all's well that ends well." ISCR Case No. 14-01894 at 4-5 (App. Bd. Aug. 18, 2015). AG ¶ 20(d) does not apply.

Even though Applicant has no outstanding tax debt or unfiled tax returns, he has not established a track record of good-faith compliance with his tax requirements to show that his prior tax issues are unlikely to recur or no longer cast doubt on his reliability, trustworthiness and judgment. AG ¶ 20(a) does not fully apply.



## 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.

Applicant's tax issues were entirely self-created, as they were initiated by his misguided attempt to game the system by attempting to exempt all of his income from federal income taxes. Even temporarily, this was wrong. Applicant's problems worsened when he allowed the situation to perpetuate for several years, and when he failed to file his federal income tax returns, as required, also for several years. Only during the security clearance process did he begin to act. Applicant's demonstrated pattern of unwillingness to comply with his legal obligations until his eligibility for a security clearance was at stake raises serious security concerns. Even though Applicant has filed all of the tax returns at issue and paid all of the tax debt, he still engaged in a continuous course of conduct that calls his judgment, trustworthiness, and reliability into question, along with his respect for rules and regulations. These characteristics are the underpinnings of the security clearance process. Even though Applicant acknowledges his errors and has addressed all of the allegations in the SOR, he has not provided sufficient evidence to mitigate the security concerns that arose from his conduct. Overall, the record evidence leaves me with questions and doubts as to Applicant's continued eligibility for access to classified information. Applicant did not mitigate financial 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

Subparagraphs 1.a-1.c:                      Against Applicant

## **Conclusion**

In light of all of the circumstances presented, it is not clearly consistent with the interests of national security to grant Applicant eligibility for continued access to classified information. Eligibility for access to classified information is denied.

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Braden M. Murphy  
Administrative Judge