



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



In the matter of:	)	
	)	
[NAME REDACTED]	)	ISCR Case No. 19-03353
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Raashid Williams, Esq., Department Counsel  
For Applicant: Dan Meyer, Esq.

11/02/2020

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**Decision**

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MALONE, Matthew E., Administrative Judge:

Applicant did not timely file his federal income tax returns for the 2012 through 2015 tax years. His response to the Government’s security concerns did not resolve the doubts raised by his conduct about his judgment and reliability. Applicant’s request for a security clearance is denied.

**Statement of the Case**

On November 27, 2017, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) to renew his eligibility for a security clearance required for his employment with a federal contractor. On July 20, 2018, Applicant completed a personal subject interview (PSI) by a government investigator as part of the background investigation initiated when Applicant submitted his e-QIP. Based on the results of that background investigation, Department of Defense (DOD) adjudicators could not determine, as required by Security Executive Agent Directive (SEAD) 4, Section E.4, and

by DOD Directive 5220.6, as amended (Directive), Section 4.2, that it is clearly consistent with the interests of national security for Applicant to have a security clearance.

On January 23, 2020, DOD issued a Statement of Reasons (SOR) alleging facts that raise security concerns under the adjudicative guideline for financial considerations (Guideline F). The adjudicative guidelines (AG) cited in the SOR were issued by the Director of National Intelligence on December 10, 2016, to be effective for all adjudications on or after June 8, 2017.

Applicant timely responded to the SOR (Answer) and requested a hearing. I received the case on July 21, 2020, and convened the requested hearing on September 17, 2020. I received a transcript of the hearing (Tr.) on September 30, 2020. At the hearing, Department Counsel proffered Government Exhibits (GX) 1 – 3, which I admitted without objection. Applicant testified and presented Applicant Exhibits (AX) A – E, which I admitted without objection. Also included in the record are Hearing Exhibit (HX) 1 (*Index of Government Exhibits*), HX 2 (*List of Applicant's Exhibits*), and HX 3 (*Brief of Applicant's Counsel*). At the end of the hearing, I held the record open to give Applicant time to submit additional relevant information. The record closed on October 16, 2020, when I received Applicant's post-hearing submission, AX F, and Department Counsel's waiver of objection thereto.

### **Findings of Fact**

Under Guideline F, the Government alleged that Applicant did not file his federal income tax returns as required for the 2012, 2013, 2014, and 2015 tax years (SOR 1.a). In response to the SOR, Applicant admitted the allegation and requested a hearing. In addition to the facts established by Applicant's admission, I make the following findings of fact.

Applicant is 38 years old and has been employed by the defense contractor currently sponsoring his request for clearance since August 2016. After graduating from college in 2005 with a bachelor's degree in engineering, he received an officer's commission in the United States Navy. Between 2005 and 2011, Applicant was stationed aboard ship and in shore assignments at various locations in the United States. Applicant was raised in State A and lived there until he graduated from college and entered the Navy. He maintained State A as his home of record throughout his military career and until he returned from overseas in 2018. While stationed in State B between 2005 and 2008, he bought a house in which to live during that assignment. When he left State B for his next assignment, he kept the house as a rental property. Between October 2011 and his honorable discharge from active duty in September 2014, Applicant was stationed in a foreign country. After leaving active duty, he remained in that country, affiliating with a Navy Reserve unit there while studying for a master's degree in business administration (MBA), which he received in June 2017. Applicant remained overseas for his first job with his current employer until August 2018, when he relocated to his current residence in the

United States. Applicant and his wife were married in November 2016 and have a three-year-old child. (GX 1; Tr. 29 – 34)

Applicant has held a security clearance since he began his military career in 2005. His eligibility for access was last renewed in 2011. In his most recent clearance application in November 2017, he disclosed that he had not timely filed his federal income taxes for the 2012, 2013, 2014, and 2015 tax years. He also stated that in November 2017, he had filed his 2012, 2013, and 2015 returns, but was still waiting for information he needed to complete his 2014 return. Available information shows that his 2012, 2013, and 2014 returns were received by the IRS in March and April 2018. Despite Applicant's claim that he also submitted his 2015 return in 2017, available information shows that the IRS did not receive his 2015 return until January 27, 2020. In his testimony on this issue, Applicant reiterated his claim that he filed his 2015 return in 2017, further asserting that there was some confusion in IRS processing of the 2015 return. In advance of his hearing, he resubmitted that return by registered mail on September 6, 2020. Applicant also testified that he filed all state and federal returns as required through the 2011 tax year and that he has timely filed his returns for the tax years 2016 through 2020. At hearing, Applicant submitted copies of his federal returns for 2012 – 2015; however, those documents are unsigned and undated products of an electronic filing system. After the hearing, Applicant submitted an IRS transcript of Applicant's 2015 tax filing activity that reflects the aforementioned January 2020 filing date. Applicant testified that he has been able to file his returns electronically through the IRS website without assistance. (GX 1 – 3; AX E; AX F; Tr. 22 – 23, 40 – 43)

Applicant claims he did not file the returns in question for three reasons. First, while living and working overseas, he had difficulty receiving tax documents pertaining to his State B rental property and could not complete his 2012 return. Second, Applicant believed that because he knew he would be receiving refunds for excess taxes paid in 2012, 2013, 2014, and 2015, and because he was living outside the United States, he did not have to file returns for those years. Finally, Applicant believed that because his home-of-record State A no longer taxed military income, he did not have to file a federal return. Applicant was mistaken on all three counts. He further has claimed that when he submitted his November 2017 e-QIP, he realized that he was delinquent in his tax reporting obligations and acted to compile and submit his past-due returns. When he submitted his e-QIP, he also notified his company's security manager of his tax filing discrepancies. (GX 1; GX 3; AX C; Tr. 17 – 22)

As to his understanding of State A's tax laws, Applicant testified that State A changed its tax laws regarding military income in 2010. Nonetheless, Applicant filed his federal income tax returns as required for 2010 and 2011. Beginning with his 2012 tax return, the first return he should have filed after transferring overseas from State B, Applicant stated he had difficulty receiving tax documents about his State B rental property and could not complete his return. He did not indicate when or if he has since received that information, but at the time he was able to determine based on previous years' returns that he would receive a refund for the 2012 tax year. Applicant's only known

reason for not filing the other returns at issue here was a combination of his beliefs that if he did not owe any taxes (or was due a tax refund), and if State B did not tax military income, and if he was living outside the United States, he did not have to file returns. He did not base those beliefs on any professional tax advice and he has not sought any such advice or assistance in filing his past-due returns despite the fact such assistance was readily available to him, at least while he was on active duty. Applicant also did not explain why or how the act of submitting his most recent e-QIP caused him to realize his failure to file his returns was incorrect. (AX C; Tr. 26 – 27, 34 – 40)

Applicant owes no unpaid taxes and his personal finances are sound. He recently engaged the services of a financial counselor who assisted him in establishing a monthly budget. There is no indication from the available information that Applicant owes unpaid taxes to the IRS or any other tax authority. (AX E; Tr. 27)

Applicant provided four letters of support for his request for a clearance. Each of his references stated they were familiar with the SOR allegation, but none had any direct knowledge of Applicant's conduct regarding his taxes. Despite the government's concerns about his failure to file his tax returns, each reference endorsed and supported Applicant's request for clearance. They each cited their experience with Applicant's reliability, professionalism, integrity, and hard work as the reasons they had no concerns recommending Applicant for access to classified information. (AX D)

### **Policies**

Each security clearance decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information, and consideration of the pertinent criteria and adjudication policy in the adjudicative guidelines (AG). (See Directive, 6.3) Decisions must also reflect consideration of the factors listed in ¶ 2(d) of the guidelines. Commonly referred to as the "whole-person" concept, those factors are:

- (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.

The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an applicant. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information. A security clearance decision is intended only to resolve whether it is clearly

consistent with the national interest for an applicant to either receive or continue to have access to classified information. (Department of the Navy v. Egan, 484 U.S. 518 (1988))

The Government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for an applicant. Additionally, the Government must be able to prove controverted facts alleged in the SOR. If the Government meets its burden, it then falls to the applicant to refute, extenuate or mitigate the Government's case. Because no one has a "right" to a security clearance, an applicant bears a heavy burden of persuasion. (See Egan, 484 U.S. at 528, 531) A person who has access to classified information enters 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 one who will protect the national interests as his or her 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. (See Egan; AG ¶ 2(b))

## **Analysis**

### **Financial Considerations**

The Government presented sufficient reliable information to support the SOR allegation that Applicant did not timely file his federal tax returns for the 2012, 2013, 2014, and 2015 tax years. This information reasonably raises a security concern about Applicant's finances that is expressed, in relevant part, at 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.

More specifically, available information requires application of the disqualifying condition at AG ¶ 19(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*). I also have considered the potential application of the following pertinent AG ¶ 20 mitigating conditions:

(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; 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.

AG ¶ 20(g) applies because all of Applicant's past-due tax returns at issue have been filed. AG ¶ 20(c) applies because Applicant sought financial counseling to improve management of his personal finances; however, there is no issue of debt or poor financial health raised by the Government's information.

Application of AG ¶¶ 20(a) and 20(b) is more problematic. Applicant did not fulfill a fundamental obligation of most U.S. citizens in similar circumstances. Accordingly, the focus of this case is squarely on Applicant's judgment and reliability. In response to the Government's information, his position appears, in part, to be that his failure to file his returns was due to circumstances beyond his control; namely, his belief that that he was not required to file if he expected to receive a refund, and his belief that because State A did not tax military income and because he was living and working overseas, he did not have to file.

A person may not avoid his or her income tax reporting responsibility simply because he expects to receive a tax refund. Additionally, Applicant's confusion about his tax reporting obligations was not a circumstance beyond his control. He could easily have resolved those concerns at any time by consulting tax preparation resources readily available both in the United States and abroad. His explanation regarding the impact of State A tax law changes is also inconsistent with his actions. According to Applicant, those laws changed in 2010, yet he filed his 2010 and 2011 federal returns as required. Applicant did not provide a credible explanation about why he then became confused about his filing obligations. Finally, his conduct is not remote in time because he did not act to resolve his filing discrepancies until late 2017 or early 2018, between three and five years after they were due. It also may be that his 2015 return was not filed until September

2015 or January 2020. I conclude from all of the foregoing that the record does not support application of AG ¶¶ 20(a) or 20(b).

The security concerns about raised under AG ¶ 18 have not been mitigated. I also evaluated this record in the context of the whole-person factors listed in AG ¶ 2(d). Information about Applicant's character and military service is significant. Nonetheless, the value of the recommendations in this case is limited. While each of his references had reviewed the SOR, they were not fully informed of Applicant's conduct so as to render incomplete their opinions of Applicant's suitability for a position of trust. Having considered all of the information presented, I conclude that doubts about Appellant's judgment and reliability remain. Because protection of the interest of national security is the principal focus of these adjudications, those doubts must be resolved against continuation of his access.

### **Formal Findings**

Formal findings 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:	Against Applicant

### **Conclusion**

It is not clearly consistent with the interests of national security for Applicant to have access to classified information. Applicant's request for a security clearance is denied.

MATTHEW E. MALONE  
Administrative Judge