



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



In the matter of: )  
)  
) ISCR Case No. 20-01654  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Aubrey De Angelis, Esq., Department Counsel  
For Applicant: Carl Marrone, Esq.

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**Decision**

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WESLEY, ROGER C. Administrative Judge

Based upon a review of the case file, pleadings, exhibits, and testimony, Applicant did not mitigate financial consideration concerns. Eligibility for access to classified information or to hold a sensitive position is denied.

**Statement of the Case**

On August 26, 2021, the Defense Counterintelligence and security Agency (DCSA) Consolidated Central Adjudications Facility (CAF) issued a statement of reasons (SOR) to Applicant detailing reasons why under the financial considerations guidelines the DCSA could not make the preliminary affirmative determination of eligibility for granting a security clearance, and recommended referral to an administrative judge to determine whether a security clearance should be granted, continued, denied, or revoked. The action was taken under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960); DoD Directive 5220.6 *Defense Industrial Personnel Security Clearance Review Program*, (January 2, 1992) (Directive); and Security Executive Agent Directive 4, establishing in Appendix A the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AGs), effective June 8, 2017.

Applicant responded to the SOR on August 10, 2022, and requested a hearing. This case was assigned to me on August 23, 2022. A hearing was scheduled for January 25, 2023, and was heard on the scheduled date. At the hearing, the Government's case consisted of two exhibits. (GEs 1-2) Applicant relied on five exhibits. (AEs A-O) and one witness (himself). The transcript (Tr.) was received on February 3, 2022.

### **Procedural Issues**

Prior to the convening of the hearing, the Government amended the SOR to add the following allegations under Guideline F: Applicant is indebted (c) to his state of residence (State 3) for \$184 for tax year 2013; (d) to his former state of residence (State 2) for \$4,542 for tax year 2015; (e) to the Federal Government for \$458 for tax year 2016;; (f) to State 3 for \$38.00 for tax year 2016; (g) to State 1 for \$13,031 for tax year 2016; (h) to State 2 for \$885 for tax year 2016; (i) to the Federal Government for \$8,204 for tax year 2017; and (j) to State 1 for \$9,137 for tax year 2017.

In his response to the amended SOR allegations, Applicant denied each of the allegations with explanations and clarifications. He claimed mitigation based on circumstances that trace to 2013 and do not currently reflect his currently exhibited maturity, responsibility, and unwavering desire to resolve his situation. He claimed he has since filed all necessary Federal and state taxes for the years in question with the help of numerous professionals and credible sources. And, he claimed the benefit of overall professional achievement and recognition as a reliable and trustworthy network engineer who warrants considerable credit under a whole-person analysis. Applicant attached copies of his federal and state tax returns for tax years 2013-2017.

Before the close of the hearing, Applicant requested the record be kept open to permit him the opportunity to supplement the record with documentation of his updated state payment status. For good cause shown, Applicant was granted 21 calendar days to supplement the record. Department Counsel was afforded three days to respond. Within the time permitted, Applicant submitted updates of his payment progress with his state taxing agencies. Applicant's submissions were admitted without objections as AEs P-R.

### **Summary of Pleadings**

Under Guideline F, Applicant allegedly failed to file his federal and state income tax returns, as required, for tax years 2013 through 2017. Allegedly, these tax returns remain unfiled.

In Applicant's response to the SOR, he admitted all of the allegations with explanations. He claimed he has since filed his federal and state tax returns for the years in issue and has mitigated the Government's security concerns. He also claimed that he is extremely talented and a professional who is a true asset to the country. He further claimed that he moved multiple times and experienced job layoffs and the loss of tax documents needed for filing his tax returns.

In his response, Applicant claimed, too, that he was continuously frustrated in his use of Turbo tax planning and encountered repeated difficulties in his attempts to navigate the program. He claimed that he has since filed his federal and state 2013-2017 tax returns in January 2022, and has resolved the Government's concerns with the aid of tax professionals he has enlisted to help him. And, he claimed that he was told by the Internal Revenue Service (IRS) that he overpaid \$8,000 for tax year 2013 and ultimately overpaid his taxes despite not having timely filed to claim a tax refund. Applicant attached copies of his filed tax returns, along with endorsements from colleagues and friends.

### **Findings of Fact**

Applicant is a 53-year-old employee of a defense contractor who seeks a security clearance. Allegations covered in the SOR and admitted by Applicant are incorporated and adopted as relevant and material findings. Additional findings follow.

### **Background**

Applicant married in March 2003 and divorced in March 2007. (GE 1; Tr. 32, 58) He has no children from this marriage. He remarried in in October 2011, and has one stepchild from this marriage. (GE 1; Tr. 33-34) Applicant earned a bachelor's degree in June 2006. (GE 1 and AE I) He reported no military service.

Since May 2016, Applicant has been employed by his current employer as a network engineer. (GE 1; Tr.26, 80) Between October 2013 and May 2016, he worked as a network engineer for another defense contractor in State 2 (his prior state of residence). (GE 1) In this job, he typically worked at two main sites: one in State 1 (his current employment state) and the other in State 3 (his current state of residence). (GE 1)

Applicant reported brief unemployment (between January 2013 and April 2013) and work for another defense contractor (located in State 2) between September 2006 and January 2013 as a senior network administrator, who was detailed primarily overseas. (GE 1; Tr. 33-35, 59) Applicant has held a security clearance since February 2008. (GE 1; Tr. 26)

### **Applicant's finances**

Records document that Applicant did not timely file his federal and state income tax returns, as required, for tax years 2013 through 2017. (GEs 1-2; Tr. 30) He attributed his tax filing lapses to (a) anxiety attacks when facing stressful situations like filing tax returns and (b) losing or misplacing material tax information during his multiple relocations. (Tr. 26-32)

During first his marriage (2003-2007), Applicant's wife (a tax accountant by training) handled the preparation and filing of their federal and state tax returns. (Tr. 32-

33, 38-41) Tax preparers he retained to file his returns for the years in issue failed to keep Applicant informed of their respective failures to file his federal and state tax returns for the 2013-2017 tax years in issue. (AEs D-E; Tr. 59-60) In 2017, Applicant retained a tax accounting firm to help him with filing his federal and state income tax returns without material documents he had lost. (Tr. 47)

By April 2021, Applicant learned from his retained tax preparers that they had not filed his back tax returns as expected. (Tr. 48) Despite having paid this tax accounting firm their demanded fees in April 2021, the firm never followed up with filing his 2013-2017 tax returns. (Tr. 48) Moreover, this tax preparer never responded with progress updates. (Tr. 49-56) IRS tax transcripts for tax years 2016-2017 report additional taxes assessed, as well as penalties and interest imposed for late payments and non-filing of tax returns for the years in issue, but no notations of any installment agreements between Applicant and the IRS for these years. (AE J) IRS transcripts for tax years 2013-2015 reveal no notations either of installment agreements between Applicant and the IRS for these tax years.

Pressed by the IRS and state taxing authorities with demands for payments on taxes owed for the 2013-2017 tax years, Applicant made the demanded payments without filing tax returns for these tax years (AEs K-N) and was credited with his payments. (AEs K-N; Tr. 49-52) Some of Applicant's payments to these taxing authorities (notably a \$31,400 payment to the IRS) were not made until after the issuance of the SOR. (AEs J-N)

In January 2021, Applicant retained his current tax preparer to help him in the preparation and filing of his tax returns and respond to a letter from the IRS demanding \$32,000. (AE K; Tr. 49) However, this tax preparer never responded with progress updates. (Tr. 49-56) Beginning in 2018, Applicant adjusted his tax payment practice and tendered \$30,000 to the IRS to cover late taxes, interest, and penalties imposed by the IRS for tax year 2016. (AE J; Tr. 49)

Applicant documented his self-filing of his federal and state income tax returns for tax years 2013-2019 between January 2022 and October 2022, well past the issuance of the SOR in August 2021, and without any documented extensions. (AEs F and J; Tr. 51-52, 60-62) Currently, Applicant uses a bookkeeper and accountant to help him prepare and file his taxes. (Tr. 52-53) With his updated filing practice, he has been able to timely file his federal and state tax returns for tax years 2018 through 2021. (Tr. 53-56)

Taxes owed to State 1 (his employment state) for tax years 2016 (\$13,031) and 2017 (\$9,137) have since been repaid in 2022 and credited to Applicant, along with his late filing of State 1 income tax returns for these tax years. For only two of the tax years in issue (2016-2017) did Applicant apparently owe taxes to State 1, and this was due to his commuting to the state from his current residence in State 3. (AE F and M)

Likewise, taxes owed to State 2 for tax year 2015 (\$4,542) and tax year 2016 (\$885) have reportedly been paid (dates unclear). (AE N) Only the small amounts

reportedly owed to his current state of residence (State 3) for tax years 2013 (\$184) and 2016 (\$380) lack any payment documentation. In the non-resident tax return he filed with State 3 covering tax year 2016, he claimed source income from State 1 (of \$211,633 in adjusted gross income and \$199,287 after adjustments in State 1 source income). (AE F)

For 2017, Applicant filed a partial resident tax return with State 3 and reported only \$10 in source income from that state, with the balance in source income reported to State 1 for that tax year. (AE F) Whether Applicant owes any more in allocated source income to State 3 (a low tax state) after allowing for payment credits to State 1 (a high tax state) for tax years 2016 and 2017 is unclear. Applicant's efforts to obtain an updated status report of any taxes owed to State 3 have been unsuccessful. (AE P) Payment credits for each of these states post-date the issuance of the SOR in August 2021. Applicant's efforts to reach state 3 tax enforcement authorities to verify his tax status were unsuccessful despite his repeated efforts to verify his current tax status with the state.

Because State 1 had reciprocity with State 3 (Applicant's state of residence during the relevant tax years in question, tax years 2015-2018), Applicant reported all of his earned income from his work in State 1 on his State 1 tax returns for tax years 2016 and 2017, with slight adjustments in 2016 to account for small State 3 source income. (AEs F and M; Tr. 80) And, because he has continued to commute to State 1 from State 3, (allocating most of his source income to State 1 where his employer is located), he has continued to treat State 1 as his principal taxing state jurisdiction. (Tr. 81-84)

Federal taxes owed for tax years 2016 (\$458) and 2017 (\$8,204) total \$45,599 (inclusive of assessed filing late penalties and accrued interest) according to IRS tax transcripts. (AE J) After credits assigned to payments transferred in from prior tax years (totaling \$35,702) for tax year 2017, the IRS reduced Applicant's owed taxes to \$8,024 on reported income of \$177,415. (AEs F and J) Without more tax information from Applicant on his credited payments, his reported IRS balance owing for tax year 2017 cannot be favorably reconciled.

Except for his still unresolved tax liabilities, Applicant's finances appear to be in stable operating condition. His credit report assigned an excellent credit score of 805 on his reported debts of \$469,819. (AE O; Tr. 56) Although he could have likely benefitted from both mental health and financial counseling, he has opted for neither to help him with his past tax filing difficulties, electing instead to address his tax returns by himself with the aid of a bookkeeper and accountant.

## **Endorsements**

Applicant is highly regarded by his company president, supervisors (past and present), and his coworkers. (AEs G-H) His chief executive officer (CEO) expressed his appreciation for Applicant's "hard work, patience and support" and rewarded him with a bonus for the 2021 calendar year. (AE G)

Friends and coworkers credited Applicant with intelligence and concern for others. (AE H) A current company administrator credited Applicant with paying his fair share of taxes. (AE H) Applicant has received numerous certifications of achievement in the information technology field. (AE I)

## **Policies**

By virtue of the jurisprudential principles recognized by the U.S. Supreme Court in *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988), “no one has a ‘right’ to a security clearance.” As Commander in Chief, “the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information.” *Id.* at 527. Eligibility for access to classified information may only be granted “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.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The AGs list guidelines to be considered by judges in the decision-making process covering DOHA cases. These guidelines take into account factors that could create a potential conflict of interest for the individual applicant, as well as considerations that could affect the individual’s reliability, trustworthiness, and ability to protect classified information. These guidelines include conditions that could raise a security concern and may be disqualifying (disqualifying conditions), if any, and all of the conditions that could mitigate security concerns, if any.

These guidelines must be considered before deciding whether or not a security clearance should be granted, continued, or denied. Although, the guidelines do not require judges to place exclusive reliance on the enumerated disqualifying and mitigating conditions in the guidelines in arriving at a decision.

In addition to the relevant AGs, judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in ¶ 2(a) of the AGs, which are intended to assist the judges in reaching a fair and impartial, commonsense decision based on a careful consideration of the pertinent guidelines within the context of the whole person. The adjudicative process is designed to examine a sufficient period of an applicant’s life to enable predictive judgments to be made about whether the applicant is an acceptable security risk.

When evaluating an applicant’s conduct, the relevant guidelines are to be considered together with the following ¶ 2(d) factors: (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 of the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Viewing the issues raised and evidence as a whole, the following individual guidelines are pertinent herein:

### **Financial Considerations**

*The Concern:* 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 or 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 acts or otherwise questionable acts to generate funds. . . . AG ¶ 18.

### **Burdens of Proof**

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours.

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 about potential, rather than actual, risk of compromise of classified information. Clearance decisions must be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See Exec. Or. 10865 § 7. See also Exec. Or. 12968 (Aug. 2, 1995), § 3.1.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. "Substantial evidence" is "more than a scintilla but less than a preponderance." See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4<sup>th</sup> Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the

criteria listed therein and an applicant's security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his [or her] security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

### **Analysis**

Security concerns are raised over Applicant's failure to timely file his federal and state income tax returns for tax years 2013-2017. While he subsequently filed his federal and state tax returns in 2022, his multiple filing lapses raise trust, reliability, and judgment concerns about his current and future ability to manage his finances safely and responsibly. Additional security concerns are raised over Applicant's accumulation of delinquent federal and state tax debts over the same tax years. While state taxes owed for tax years 2013-2017 have since been satisfied, Applicant's payments were not credited until after the issuance of the SOR.

### **Financial concerns**

Applicant's multiple tax-filing lapses and accumulation of delinquent federal and state taxes warrant the application of one of the disqualifying conditions (DC) of the financial consideration guidelines. DC ¶ 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," applies to Applicant's situation.

Financial stability in a person cleared to protect classified information is required precisely to inspire trust and confidence in the holder of a security clearance that entitles the person to access classified information. While the principal concern of a security clearance holder's demonstrated difficulties is vulnerability to coercion and influence, judgment and trust concerns are implicit in cases involving delinquent debts.

Historically, the timing of addressing and resolving tax-filing and payment failures are critical to an assessment of an applicant's trustworthiness, reliability, and good judgment in following rules and guidelines necessary for those seeking access to classified information or to holding a sensitive position. See ISCR Case No. 14-06808 at 3 (App. Bd. Nov. 23, 2016); ISCR Case No. 14-01894 at 5 (App. Bd. Aug. 18, 2015); ISCR Case No. 14-00221 at 2-5 (App. Bd. June 29, 2016).

To his credit, Applicant has resolved (albeit belatedly in most instances) his state tax liabilities for the years in question. Whether State 1 ever credited Applicant with withheld state taxes more appropriately apportioned to income claimed by Applicant's



current state of residence is unclear. If not, Applicant conceivably could have recourse against State 1 for state taxes not properly apportioned to State 3 in 2016 and 2017, and conceivably even for other years. For Federal law proscribes states from taxing the same revenue produced in a calendar year in one income source state that is also taxed by the taxpayer's state of residence without a reciprocity agreement. See *Comptroller of the Treasury of MD. v. Wynne et aux*, 575 U.S. 542, 564-565 (2015) (relying in principle on the dormant commerce clause while acknowledging the due process power of resident states to tax all of the revenue earned by the resident taxpayer, both in-state and out-of-state, without apportioning).

Without any evidence of IRS and state approved extensions of times for Applicant's filing his tax returns and paying his taxes owed for the respective tax years (2013-2017), none of the potentially available mitigating conditions are available to Applicant. Applicant's specific reliance on MC ¶ 20(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," cannot be applied to Applicant's case without evidence of installment agreements in place for the 2013-2017 years in issue.

In the past, the Appeal Board has consistently imposed evidentiary burdens on applicants to provide documentation corroborating actions taken to resolve financial problems, whether the issues relate to back taxes, consumer, medical, or other debts and accounts. See ISCR Case No. 19-02593 at 4-5 (App. Bd. Oct. 18, 2021); ISCR Case No. 19-01599 at 3 (App. Bd. Jan. 20, 2020) Federal and state tax returns filed by applicants after the issuance of an SOR have generally been held to fall short of the high standards of timeliness imposed on applicants seeking security clearance eligibility. See ISCR Case No. 14-06808, *supra*; ISCR Case No. 14-00221, *supra*; and ISCR Case No. 14-01894, *supra*.

### **Whole-person assessment**

Whole-person assessment of Applicant's clearance eligibility requires consideration of whether his history of multiple tax-filing lapses and accumulating delinquent tax debts is fully compatible with minimum standards for holding a security clearance. While Applicant is entitled to credit for his work in the defense industry, his efforts are not enough at this time to overcome his repeated failures or inability to address his tax-filing and tax-paying responsibilities in a timely way over the course of many years.

Overall trustworthiness, reliability, and good judgment have not been established. Based on consideration of all the facts and circumstances considered in this case, it is too soon to make safe predictions that Applicant will be able to undertake reasoned, good-faith efforts to mitigate the Government's financial concerns within the foreseeable future. More time is needed for him to establish the requisite levels of stability with his finances to establish his overall eligibility for holding a security clearance.

I have carefully applied the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), Exec. Or. 10865, the Directive, and the AGs, to the facts and

circumstances in the context of the whole person. I conclude financial considerations security concerns are not mitigated. Eligibility for access to classified information is denied.

### **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:

Guideline F (FINANCIAL CONSIDERATIONS): AGAINST APPLICANT

Subparagraphs 1.a- 1.i:

Against Applicant

### **Conclusion**

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

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Roger C. Wesley  
Administrative Judge