



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



In the matter of:	)	
	)	
SWANN, Aubrey E., JR.	)	ISCR Case No. 21-02098
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Erin P. Thompson, Esq., Department Counsel  
For Applicant: *Pro se*

03/07/2024

**Decision**

HEINTZELMAN, Caroline E., Administrative Judge:

Applicant failed to mitigate security concerns raised by his state and federal tax issues and his failure to disclose these issues on his security clearance application (SCA). National security eligibility for access to classified information is denied.

**History of the Case**

Applicant submitted an SCA on December 10, 2020. On May 20, 2022, the Defense of Defense (DOD) issued a Statement of Reasons (SOR) alleging security concerns under Guideline F (financial considerations) and Guideline E (personal conduct). Applicant responded to the SOR twice, on June 17, 2022, and September 16, 2022, and requested a hearing before a Defense Office of Hearings and Appeals (DOHA) administrative judge. (Answer) The case was assigned to me on December 7, 2022. I convened two hearings in this matter. On January 22, 2023, DOHA notified Applicant that Hearing 1 was scheduled for February 27, 2023. I convened Hearing 1 as scheduled via videoconference. During Hearing 1, Applicant notified me that he was unable to appear due to his technical issues, which established a good-cause basis for a second hearing at a later date. On March 1, 2023, DOHA notified Applicant that Hearing 2 was scheduled for March 6, 2023, which is the date he selected from the multiple options I provided to the parties. Applicant elected to waive the 15-day notice requirement, and I convened the hearing as rescheduled.

At Hearing 2, Applicant testified, but he did not proffer any documentary evidence. I admitted Government Exhibits (GE) 1 and 2 without objection. I appended the following administrative documents to the record as Hearing Exhibits (HE): the case management order I sent to both parties on January 10, 2023 (HE I); the Government's exhibit list (HE II); the Government's September 28, 2022 discovery letter (HE III), and copies of emails I exchanged with the parties regarding the scheduling of Hearing 2, including Applicant's 15-day notice waiver (HE IV). DOHA received the transcript of Hearing 1 on March 8, 2023. The record closed on March 14, 2023, when DOHA received the transcript of Hearing 2 (Tr.).

### **Findings of Fact**

Applicant, age 52, has three adult children with his first wife, and two minor children with his second wife. He married his first wife in 1992 (ex-wife). They divorced in 2013. He has been married to his second wife since 2015 (wife). His two minor children reside with him and his wife. He is not obligated by a court or otherwise to provide financial support to his adult children. He graduated from high school in 1989. He earned a professional certificate in 2005. He worked full time as a professional singer from approximately 2000 to March 2020, when the COVID-19 pandemic shut down the industry. Since approximately August 2011, he has also been employed full time by an independent government agency (IGA). He submitted the SCA in connection with an offer of employment by the defense contractor who sponsored his SCA, pending the successful adjudication of his clearance. (GE 1-2; Tr. 10, 15-19, 32)

Under Guideline F, the SOR alleged Applicant failed to timely file his federal and state income tax returns and pay his federal and his state taxes for tax years (TY) 2017 through 2020. Under Guideline E, the SOR alleged he falsified the SCA by deliberately failing to disclose the federal and state tax issues alleged under Guideline F. He admitted all allegations in his response to the SOR. (Answer)

At the hearing, Applicant admitted he had neither completed nor filed his federal and state income tax returns for TY 2017 through 2018 and TY 2020 through 2021. He claimed, without proffering corroborating documentation, that he filed a "low-earner" income tax return with the Internal Revenue Service (IRS) for TY 2019. He also admitted that he has not made any direct payments to either the IRS or his state for TY 2017 through 2021 income taxes. He anticipated he owes the IRS and his state for TY 2017 through 2021 income taxes, in amounts to be determined. He testified that he intended to file his TY 2022 income taxes in a timely manner. I will consider the unalleged TY 2021 federal and state tax issues for the purpose of evaluating mitigation and the whole-person concept. (Tr. 21, 24, 37, 42)

Applicant also failed to timely file his federal and state income tax returns in previous tax years. In 2016, he filed his federal and income tax returns for four unspecified TY he could not recall, which resulted in him owing federal taxes totaling approximately \$8,000, and state taxes totaling approximately \$2,000. He initially established a payment plan with the IRS to resolve the \$8,000 debt. The record does not indicate whether he made any payments pursuant to the plan. However, the debt was eventually resolved in

the summer of 2022, through a wage garnishment issued to IGA, which was paid via bi-weekly payments of \$300 to \$400. He paid the \$2,000 debt to his state, on a date he could not recall, to reinstate his driver's license, which had apparently been suspended for reasons not indicated in the record. (Tr. 21-24, 38, 40-41)

At the hearing, Applicant acknowledged he failed to prioritize resolving his tax issues, despite being contacted by the IRS in the past regarding his unfiled income tax returns. He did not specify the dates when he was contacted by the IRS, but he denied the IRS has contacted him recently. He denied being contacted at any time by his state regarding his unfiled state income tax returns. (GE 1 at 52-53; GE 2 at 8; Tr. 39-41)

Applicant and his wife file separate income tax returns. She has timely filed her tax returns annually with the assistance of a professional accountant. Applicant earns an annual income of approximately \$45,000 from his IGA employment. His wife earns an annual income of approximately \$90,000 from her employer of over fifteen years. Without proffering any specific amounts, he estimated that the sporadic annual income he earned during his singing career never exceeded more than about \$55,000 or \$60,000. His annual income was reduced for unspecified periods in 2011 and 2016 to 2017, during which he was incapacitated by various medical conditions and surgeries. From March 2020 through July 2021, he received COVID-related unemployment financial assistance, in an amount not specified in the record. (GE 1-2; GE 8; Tr.19-20, 26-31, 46)

Applicant and his wife manage their finances separately. They are each responsible for paying an unspecified portion of their household expenses and bills. He does not manage his finances with a written budget, nor has he sought financial counseling. He reported scant details and provided no documents about his assets and monthly expenses. He reported only one asset: an IGA retirement savings with an unknown balance. He asserted that he has no money in savings and very little remaining at the end of each month. He disclosed that he has been making unspecified monthly payments towards resolving three unalleged delinquent credit-card debts, involving three credit cards that he used to keep himself "afloat" during the COVID-19 pandemic. He claimed he resolved one of the three unalleged debts, is making payments towards resolving the second, and intends to pay the third. I will consider these three unalleged debts for the sole purpose of evaluating mitigation and the whole-person concept. (GE 2; Tr. 33-35, 37, 41, 45, 48-50)

At the hearing, Applicant disclosed that he was in the process of filing for Chapter 13 bankruptcy protection, as he is not eligible for Chapter 7 bankruptcy. He did not indicate the amount or nature of the debts he intends to include in the bankruptcy. He also revealed that, for an unspecified period, he has been playing shows as a musician to help pay his debts. He did not address the amount of income he has earned in this endeavor. He professed that he is seeking a security clearance to obtain a position with a higher salary. (GE 2; Tr. 33-35, 37, 41, 45, 48-50)

On Applicant's December 2020 SCA, he did not disclose his federal and state tax issues or any delinquent debts. However, during his February 2021 background investigation interview, he volunteered, prior to confrontation, his federal and state tax

issues. He claimed that an unrecalled relative, who either held or previously held a security clearance, advised him not to disclose his federal and state tax issues on his SCA, because he could explain those issues during his interview. (GE 2)

## **Policies**

This case is adjudicated under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG), which became effective on June 8, 2017.

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 to be 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, administrative judges apply the guidelines 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(c), 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."

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel." The applicant 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.

Section 7 of EO 10865 provides that adverse decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

## **Analysis**

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

The concern under Guideline F (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. 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 . . . .

Applicant's admissions and the documentary evidence establish the following disqualifying conditions under AG ¶ 19:

- (a) inability to satisfy debts;
  
- (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.

Applicant admitted in his Answer he did not file his federal and state income tax returns for at least TY 2017 through 2021, as required. In his response to interrogatories and at the hearing, he indicated he filed a “low-earner” income tax return with the IRS and his state for TY 2019. Although he did not produce corroborating documentation, I find that this status is consistent with other evidence in the record. Therefore, I find in Applicant's favor for TY 2019 in SOR ¶¶ 1.a - 1.d.

AG ¶ 20 describes conditions that could mitigate security concerns. The following are potentially applicable in this case:

- (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;

(d) the individual initiated 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 financial and tax issues are current, ongoing, and substantial. He admitted in his Answer he did not file his federal and state income tax returns for at least TY 2017 through 2021, as required. At the hearing, Applicant acknowledged he expects to owe money for his TY 2017 through 2021 federal and state income taxes, he has not yet determined the amounts. While circumstances beyond his control may have contributed to his financial and tax issues, he failed to provide evidence that he has acted responsibly to resolve them. There is no evidence that he has initiated any action, including contacting a tax professional, the IRS, or his state, to resolve his tax issues.

Overall, Applicant has not demonstrated any good-faith efforts to address and resolve his tax issues in a timely manner. He is credited with resolving one of the three unalleged credit-card debts and making payments toward the second. Even without specific details, his intent to file bankruptcy and two unresolved credit-card debts suggest ongoing indebtedness concerns. The record indicates that he plans to resolve any existing or future indebtedness by making payments either directly or through a Chapter 13 bankruptcy plan. Considering the record as a whole, including his prior history of failing to timely file his returns and recent wage garnishment, I am unable to conclude that his tax issues and indebtedness are unlikely to recur or no longer cast doubts about his reliability, trustworthiness, and judgment. Mitigation under AG ¶¶ 20(a), 20(b), 20(d), and 20(g) was not established.

#### **Guideline E: Personal Conduct**

AG ¶ 15 expresses the security concern pertaining to personal conduct:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes. The following will normally result in an unfavorable national security eligibility determination, security clearance action, or cancellation of further processing for national security eligibility:

(a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, cooperation with medical or psychological evaluation, or polygraph examination, if authorized and required; and

(b) refusal to provide full, frank, and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

AG ¶ 16 describes the following condition that could raise a security concern and be disqualifying in this case:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine national security eligibility trustworthiness, or award fiduciary responsibilities.

AG ¶ 16 (a) is established. Applicant admitted in his Answer he deliberately failed to disclose his federal and state income tax returns for TY 2017 through 2018 on his SCA. For the reasons stated above, I find that Applicant did not deliberately falsify his SCA regarding his TY 2019 income tax returns. Additionally, his TY 2020 income tax returns were not due, nor did he owe the IRS money when he completed his SCA. I find SOR ¶ 2.a in Applicant's favor for TY 2019 and 2020.

AG ¶ 17 provides conditions that could mitigate security concerns raised under this guideline. Four of those conditions are potentially applicable:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur; and

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

Applicant deliberately omitted his extensive history of untimely filed tax returns on his SCA. The mitigation accorded to his voluntary subsequent disclosure (17(a) during his February 2021 interview is undermined by his failure to proffer a reasonable excuse for his SCA omission. He failed to corroborate the alleged advice of a relative he claimed to have relied upon regarding his SCA omission. He also raised concerns about his credibility by claiming not to recall the alleged relative. Moreover, the record suggests that his SCA omission may also been motivated, at least in part, by his desire to obtain a position with a higher salary, which requires a security clearance. I have ongoing concerns regarding his reliability, trustworthiness, and good judgment. Mitigation was not established under AG ¶ 17.

### **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 Guidelines F and E in my whole-person analysis. Applicant failed to timely file his federal and state income tax returns for TY 2017, 2018, 2020, and 2021, and he deliberately failed to disclose TY 2017 and 2018 on his SCA. He also failed to file for one or more tax years prior to 2016 and for TY 2020 and 2021. Overall, he has not demonstrated the actions of a responsible, reliable, and trustworthy person. I conclude he did not meet his burden of proof and persuasion. He failed to mitigate the security concerns.



## Formal Findings

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline F:	AGAINST APPLICANT
Subparagraphs 1.a - 1.d:	Against Applicant (For Applicant for tax year 2020)
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant (For Applicant for tax year 2020)

## Conclusion

I conclude that it is not clearly consistent with the national interest of the United States to grant or continue Applicant's eligibility for access to classified information. Eligibility for access to classified information is denied.

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CAROLINE E. HEINTZELMAN  
Administrative Judge