



# Applicant for Security Clearance

## Appearances

For Government: Stephanie C. Hess, Esq., Department Counsel  
For Applicant: Sean M. Bigley, Esq.

08/31/2016

## Decision

WHITE, David M., Administrative Judge:

Applicant failed to file his Federal and state income tax returns for tax years 2007 through 2012 in a timely manner. He also had seven delinquent medical or consumer debts, five of which he later repaid. Resulting security concerns were not mitigated. Based on a review of the pleadings and exhibits, eligibility for access to classified information is denied.

## Statement of the Case

Applicant submitted a security clearance application (SF-86) on May 2, 2013.<sup>1</sup> On November 14, 2014, the Department of Defense Consolidated Adjudications Facility (DoD CAF) issued a Statement of Reasons (SOR) to Applicant, detailing security

<sup>1</sup>Item 4.

concerns under Guideline F (Financial Considerations).<sup>2</sup> The action was taken under Executive Order 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines that came into effect in the Department of Defense on September 1, 2006.

Applicant submitted a written answer to the SOR (Answer) on December 30, 2014, and requested that his case be decided by an administrative judge on the written record without a hearing.<sup>3</sup> Department Counsel submitted the Government's written case on January 4, 2016. A complete copy of the File of Relevant Material (FORM)<sup>4</sup> was received by Applicant on January 11, 2016, and he was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation within 30 days of his receipt of the FORM. Applicant submitted additional material in response to the FORM on February 4, and February 8, 2016 (Response), to which Department Counsel did not object. The exhibits included in Applicant's Response are admitted into evidence.<sup>5</sup> I received the case assignment on March 14, 2016.

### **Findings of Fact**

Applicant is 54 years old. He is married with three adult children, who all lived in their family home when he submitted his May 2013 SF-86. He worked for his current employer as an IT subcontractor from March 2009 to May 2010, then accepted his full-time position as that defense contractor's IT Operations Manager. He has also worked part-time as a self-employed IT consultant for various private sector clients since July 2009. He has never held a security clearance, served in the military, or been employed by the Federal Government. He earned a high school diploma in 1980.<sup>6</sup>

In his December 2014 Answer, Applicant denied all of the allegations in the SOR. He stated that all of his Federal and state income tax returns had since been filed, that six of his alleged delinquent debts had been satisfied, and that the seventh alleged delinquent debt had been paid in full. He said that his Federal returns were all filed "within the allotted time allowed for returns in which a refund is due the taxpayer."<sup>7</sup>

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<sup>2</sup>Item 1.

<sup>3</sup>Item 3.

<sup>4</sup>Department Counsel submitted seven Items in support of the SOR allegations, to which Applicant did not object. Those Items are admitted into evidence.

<sup>5</sup>The Response contains comments and argument by Applicant's counsel, which have been considered as such but do not constitute evidence, and documentary evidence identified as Exhibits (AE) A through I.

<sup>6</sup>Item 4.

<sup>7</sup>Item 3.

SOR ¶ 1.a alleges that Applicant failed to file his Federal income tax returns for tax years 2007 through 2012 as required. Applicant disclosed on his May 2, 2013 SF-86 that he failed to file his 2009, 2010, and 2011 Federal returns when required by law, stating that he filed his 2009 return on April 15, 2013, but had not filed the 2010 or 2011 returns. He said that he was due a refund for each of those years, and explained:

I did not file in order to keep this money separated as a type of savings account to be used for future college expenses for my youngest daughter and anticipated wedding expenses for my older daughter. Where there are no penalties for not filing a return if a refund is due I did not see an issue with doing this.<sup>8</sup>

Applicant submitted copies of his IRS account transcripts for tax years 2007 through 2012 with his Answer. They show that he timely requested a filing extension until October 15, 2008, for 2007 but did not file that return until April 15, 2011, and received a refund of about \$3,900. He also timely requested and received a six-month extension for 2008, but was issued numerous inquiries and notices of adverse actions concerning his failure to file that return between June 2010 and September 2011. He filed his 2008 Federal return on April 20, 2012, and received a refund of about \$1,800. He also received inquiries and notices from the IRS from December 2010 to April 2012 concerning his failure to file his 2009 tax return, which the IRS received on April 17, 2013, resulting in a refund of about \$12,800 (including credits for his 2007 and 2008 refunds). This pattern of IRS late filing inquiries and notices to Applicant continued as he filed his 2010 and 2011 returns in April 2014 and his 2012 return in November 2014, resulting in refunds ranging from about \$3,300 to about \$4,900.<sup>9</sup>

In his Response, Applicant's attorney claimed that Applicant, who has no background in finance, taxation, or law, observed language on the IRS website in 2008 that led him to believe that taxpayers who were entitled to refunds had three years to file their returns. He submitted a copy of the current page of the IRS website titled, "Filing Past Due Tax Returns," and highlighted the second sentence in a paragraph titled, "Claim a refund." The sentence reads, "If you are due a refund for withholding or estimated taxes, you must file your return to claim it within 3 years of the return due date." This sentence clearly does not change the "due date," since it sets the deadline for forfeiture of a potential return at three years thereafter. Moreover, the first sentences on this web page say, "File all tax returns that are due, regardless of whether you can pay in full. File your past due return the same way and to the same location you would file an on-time return."<sup>10</sup> None of this language indicates that the due date for a timely return changes based on refund eligibility.

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<sup>8</sup>Item 4 at 34-36.

<sup>9</sup>Item 3.

<sup>10</sup>Response; AE D.

Applicant's counsel's assertions in the Response, to the effect that Applicant honestly believed that he was relieved of the obligation to file his return on time because he was due a refund, are not competent evidence; and the record is devoid of evidence supporting that proposition. To the contrary, Applicant filed for extensions, that he later missed, for tax years 2007 and 2008, on April 15, 2008, and 2009, respectively. He received numerous IRS inquiries and notices concerning his late filing of multiple returns from at least June 2010 to June 2012, and admitted on his May 2013 SF-86 that he had failed to file his 2009, 2010, and 2011 Federal returns as required by law. I find Applicant's SF-86 explanations, that he chose not to file what he knew to be required tax returns because he perceived that there would be no penalty for doing so, to most accurately reflect his state of mind at the time.<sup>11</sup>

SOR ¶ 1.b alleges that Applicant failed to file his state income tax returns for tax years 2007 through 2012 as required. Applicant reported on his May 2, 2013 SF-86 that he failed to file his 2007 and 2008 state tax returns through inadvertence, and said that he planned to file those returns, "in order to close out the paperwork for this year."<sup>12</sup> He disclosed that he filed his 2009 state return late, on April 15, 2013, and included a check for the unpaid taxes, penalties, and interest due for that year. He also reported that he had not filed his state income tax returns for 2010 or 2011 as required, but that he planned to file them in anticipation of small refunds.<sup>13</sup> In the Response, Applicant's counsel said:

Because [Applicant] was required to file his federal income tax returns prior to his state income tax returns, his state income tax returns were also late-filed from 2007-2012 at the same times he filed his respective federal returns. Yet [Applicant] reasonably believed that [his] state law mirrored his interpretation of federal law. As he thought he was due a refund each year on his state tax return, he believed he was entitled to file up to three (3) years after the normal deadlines.<sup>14</sup>

Applicant's state tax transcripts from 2007 through 2012 were submitted as AE E, together with a February 3, 2016 Certificate of Good Standing and/or Tax Compliance from his state Department of Revenue that said he has now paid his state income taxes. The annual tax transcripts indicate that he did not follow through on his stated intentions to file his delinquent state tax returns in 2013, and they contradict the assertion in the Response that he filed overdue state returns at the same times he filed Federal returns for those years. They show that his 2007 and 2008 state returns were filed in mid-March 2015, his 2009 state return was filed in April 2013 (as he reported), his 2010 state return was filed in April 2014, the 2011 return was filed in January 2015, and the 2012 return

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<sup>11</sup>Response; Item 3; Item 4.

<sup>12</sup>Item 4 at 33-34.

<sup>13</sup>Item 4 at 34-36.

<sup>14</sup>Response at 3.

was filed in October 2014. For the years in question, Applicant's state tax return was filed within the six months after he filed his Federal return only for tax years 2009, 2010, and 2012; all of his state returns were filed late; and no state law purporting to give a three-year refund-eligible grace period was cited.<sup>15</sup>

SOR ¶¶ 1.c through 1.i allege seven delinquent debts based on Applicant's credit reports dated May 9, 2013; June 2, 2014; and September 14, 2015.<sup>16</sup> Although Applicant denied all the allegations in his December 2014 Answer, he provided no documented basis for disputing the legitimacy of any of these alleged delinquencies, which totaled a little more than \$3,300. The evidence shows that Applicant repaid five of the alleged debts as follows: SOR ¶ 1.d (\$277 medical debt) in December 2014;<sup>17</sup> SOR ¶ 1.f (\$1,156 credit card debt later reduced to judgment) in April 2014;<sup>18</sup> SOR ¶ 1.g (\$1,117 timeshare debt) in July 2013;<sup>19</sup> SOR ¶ 1.h (\$255 insurance premium debt) in February 2016;<sup>20</sup> and SOR ¶ 1.i (\$32 library overdue-book fine) in December 2014.<sup>21</sup>

SOR ¶¶ 1.c (\$464) and 1.e (\$20) allege medical debts that became delinquent in June and April 2008, respectively, according to record credit reports. Applicant was unable to identify either creditor or make any progress toward resolution of either of these debts.<sup>22</sup>

Applicant received a company "Bronze" award for teamwork in 2013, and provided a copy of the 2014 interim performance review in which his manager commented on his performance and achievements. No major deficiencies were noted, and the manager indicated that Applicant demonstrated accountability, commitment, cooperation, excellence, innovation, and integrity. He commented that, to improve, Applicant "should look to be more proactive in delivering his objectives and assigned deliverables within a set timeframe." The supervisor who hired Applicant and two coworkers, all of whom have known him for five to seven years, signed affidavits describing their high opinions of his exemplary character, good judgment, trustworthiness, honesty, and reliability.<sup>23</sup>

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<sup>15</sup>Item 3; AE E; Response.

<sup>16</sup>Items 5 through 7.

<sup>17</sup>Item 5.

<sup>18</sup>Item 3; Item 5.

<sup>19</sup>Item 3.

<sup>20</sup>AE F.

<sup>21</sup>AE I.

<sup>22</sup>Item 3; Item 6; Item 7; Response.

<sup>23</sup>AE A; AE B; AE C.

Applicant successfully completed three computer-based FDIC *Money Smart* courses of instruction titled, *Money Matters*, *Pay Yourself First*, and *Financial Recovery* on February 5, 2016. These courses postdated any other evidence concerning Applicant's financial considerations, so their efficacy and impact on his future compliance with financial obligations cannot yet be judged.<sup>24</sup>

Applicant also submitted a Personal Financial Statement indicating that his annual gross income is about \$123,000 and his wife earns about \$2,400 per month (presumably still in the education position she held when her lack of income during the summer months was cited as the reason for his delinquent debts on his May 2013 SF-86). Including his wife's income in the monthly approximations, and including less than 7% of their resulting gross income for Federal income tax withholding and no state or local tax withholding, the statement showed a monthly remainder of \$2,069. No corroborating documentation was provided to show actual payroll activities, balances in bank or investment accounts, or claimed asset valuation.<sup>25</sup>

### **Policies**

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions (DCs) and mitigating conditions (MCs), 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, these guidelines are applied in conjunction with the factors listed in AG ¶ 2 describing the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶¶ 2(a) and 2(c), the entire process is a conscientious scrutiny of applicable guidelines in the context 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 access to classified information 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 avoided drawing 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, "[t]he applicant is

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<sup>24</sup>AE G.

<sup>25</sup>AE H.

responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision.” Section 7 of Executive Order 10865 provides: “[a]ny determination under this order adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.”

A person applying for access to classified information seeks to enter 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 protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

## **Analysis**

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

The security concerns under the guideline for financial considerations are set out in AG ¶ 18, which reads in pertinent part:

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 and regulations, all of which can raise questions about an individual’s reliability, trustworthiness and ability to protect classified information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

Department Counsel asserted, and the record evidence established, security concerns under three Guideline F DCs, as set forth in AG ¶ 19:

- (a) inability or unwillingness to satisfy debts;
- (b) a history of not meeting financial obligations; and
- (g) failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same.

Applicant admittedly failed to timely file his Federal and state income tax returns for tax years 2007 through 2012. As he reported when he filed his SF-86, and confirmed by record credit reports, he was then unable to satisfy some of his debts dating back to at least 2008. These facts raise prima facie security concerns under DCs 19(a), (c), and (g), and shift the burden to Applicant to rebut, extenuate, or mitigate those concerns.

The guideline includes five conditions in AG ¶ 20 that could mitigate security concerns arising from the facts 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, or a death, divorce or separation), and the individual acted responsibly under the circumstances;
- (c) the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control;
- (d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts; and
- (e) the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue.

This mitigation analysis must consider two distinct aspects of the SOR allegations. The first concerns Applicant's failure to timely file his Federal and state income tax returns as required by law for six consecutive years. The second concerns the seven delinquent medical and consumer debts alleged in SOR ¶¶ 1.c through 1.i.

As found above, the evidence does not support a finding that Applicant honestly believed that he had no legal obligation to timely file his income tax returns, without regard to whether such a belief could be considered reasonable. His requests for filing extensions in 2007 and 2008, and receipt of numerous IRS inquiries and notices concerning his failures to timely file returns for the years in question, demonstrate that he knew the filing deadline remained unchanged. His SF-86 explanation, that he did not see an issue with failing to file because he was due refunds and would not be penalized for doing so, amounts to "the position of 'no harm, no foul,' which the [DOHA] Appeal Board has discounted in the past."<sup>26</sup> According to that board:

Failure to comply with Federal and/or state tax laws suggests that an applicant has a problem with abiding by well-established Government rules and regulations. Voluntary compliance with rules and regulations is essential for protecting classified information. . . . By failing to file his . . .

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<sup>26</sup>See ISCR Case No. 15-01031 at 3 (App. Bd. June 15, 2016) and cases cited therein.



tax returns in a timely manner, Applicant did not demonstrate the high degree of good judgment and reliability required of persons granted access to classified information.”<sup>27</sup>

Applicant’s voluntary failures to file six years of Federal and state tax returns when required were recent and frequent. Although the returns involved have now been filed, no proof that he filed his tax returns for subsequent tax years in a timely fashion was provided to indicate that the problem is resolved or under control. Accordingly mitigation of the security concerns arising from the conduct described in SOR ¶¶ 1.a and 1.b was not established under AG ¶¶ 20(a), (b), or (c). The remaining MCs have no applicability to AG ¶ 19(g) concerns.

Applicant documented the resolution of his formerly delinquent debts described in SOR ¶¶ 1.d, 1.f, 1.g, 1.h, and 1.i between July 2013 and February 2016. These debts no longer support concerns relating to manipulation or duress, or provide any motive to engage in illegal acts to generate funds. To that extent, those allegations are individually mitigated under AG ¶¶ 20(a), (c), and (d). The two small unresolved medical debts alleged in SOR ¶¶ 1.c and 1.e are so old and of such vague origin that the same can be said for them. However, these voluntarily incurred debts that were delinquent for a substantial period are relevant to Applicant’s history of not meeting financial obligations under AG ¶ 19(c), particularly in conjunction with his not meeting legal obligations to file income tax returns.

Although Applicant formally denied all of the past-due debts alleged in the SOR, he tacitly admitted five by repaying them, and offered no proof to substantiate a basis to dispute the two that remain unresolved. Accordingly, no mitigation under AG ¶ 20(e) was established.

## **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(a):

(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.

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<sup>27</sup>*Id.* at 4. Citations omitted.

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 pertinent facts and circumstances surrounding this case. Applicant is an accountable and experienced adult, who is responsible for the voluntary choices and conduct that gave rise to the security concerns expressed in the SOR. His recent late filings of Federal and state tax returns for six consecutive years reflected a series of conscious decisions not to comply with his legal obligations to those governments. The potential for pressure, coercion, and duress from his financial situation is diminished by his submission of all returns in question and repayment of all but two minor and old medical debts.

Applicant's supervisor and coworkers expressed high opinions of his integrity, trustworthiness, and good character. However, he failed to establish convincing evidence that recurrence of financial irresponsibility is unlikely. He took some computer-based financial courses, but has not had time since doing so to demonstrate rehabilitation or behavioral changes.

Overall, the record evidence leaves me with doubt as to Applicant's present eligibility and suitability for a security clearance. He did not meet his burden to mitigate the security concerns arising from the alleged financial considerations.

### **Formal Findings**

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

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|--------------------------------|-------------------|
| Paragraph 1, Guideline F:      | FOR APPLICANT     |
| Subparagraphs 1.a and 1.b:     | Against Applicant |
| Subparagraphs 1.c through 1.i: | For 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.

DAVID M. WHITE  
Administrative Judge