



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



In the matter of:

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ISCR Case No. 15-00888

Applicant for Security Clearance

**Appearances**

For Government: David F. Hayes, Esq., Department Counsel  
For Applicant: *Pro se*

08/17/2016

**Decision**

HARVEY, Mark, Administrative Judge:

Applicant's state and federal tax returns were not timely filed for several years, and he has owed the state and federal tax authorities thousands of dollars since 2010. In the last three years, he has made some progress; however, he is unsure whether all of his state tax returns have been filed, and he does not know how much he owes the state and federal government for delinquent taxes. Financial considerations security concerns are not mitigated. Access to classified information is denied.

**History of the Case**

On April 12, 2012, Applicant completed and signed a Questionnaire for National Security Positions (SF 86) (SCA). (Government Exhibit (GE) 1) On November 27, 2015, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued an SOR to Applicant pursuant to Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry*, February 20, 1960; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), January 2, 1992; and the adjudicative guidelines (AG), which became effective on September 1, 2006.

The SOR detailed reasons why the DOD CAF did not find under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for him, and recommended referral to an administrative judge to determine whether a

clearance should be granted, continued, denied, or revoked. (HE 2) Specifically, the SOR set forth security concerns arising under the financial considerations guideline.

On February 1, 2016, Applicant responded to the SOR. On April 6, 2016, Applicant requested a hearing. (Transcript (Tr.) 16) On April 6, 2016, Department Counsel was ready to proceed. On May 24, 2016, the case was assigned to me. On June 6, 2016, the Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing, setting the hearing for June 22, 2016. (HE 1) Applicant waived his right to 15 days of notice of the date, time, and location of the hearing. (Tr. 19-20) The hearing was held as scheduled on June 22, 2016.

Department Counsel offered four exhibits, and Applicant offered three exhibits, which were admitted into evidence without objection. (Tr. 27-31; Government Exhibit (GE) 1-4; Applicant Exhibit (AE) 1-3) On June 29, 2016, DOHA received a copy of the transcript of the hearing. On August 2, 2016, Applicant provided one post-hearing exhibit consisting of 18 pages including forwarding emails, which were admitted without objection. (AE D pg. 1-18)

### **Findings of Fact**

In Applicant's SOR response, he admitted all of the SOR allegations. He also provided extenuating and mitigating information. Applicant's admissions are accepted as findings of fact.

Applicant is 55 years old, and he has been employed by a defense contractor as an analyst and technical writer for six years. (Tr. 5; GE 1; AE A) In 1978, he graduated from high school. (Tr. 6) He served in the Air Force from 1979 to 2000. (Tr. 6-11) He honorably retired from the Air Force as a master sergeant (E-7). (Tr. 10) He served in Southwest Asia, and he received numerous awards including the Meritorious Service Medal, Air Force Commendation Medals, and Good Conduct Medals. (Tr. 10) His last few years were in the Air Force Reserve, and he will not be able to receive retirement pay until age 60. (Tr. 12) In 2000, he received an associate's degree in flight engineering. (Tr. 6)

In 1995, he married, and in 1997, he divorced. (Tr. 12; GE 1) In 1999, he married, and he has been separated from his current spouse for three years. (Tr. 13) His stepchildren are adults, and his 16-year-old daughter lives with his spouse. (Tr. 13)

Applicant has been unemployed since May 1, 2016. (Tr. 32, 34) He is receiving \$359 weekly unemployment compensation, and this amount is too low for him to address his SOR debts. (Tr. 33, 36) His child support responsibility for his 16-year-old daughter is \$1,140 monthly; however, this payment is not court ordered. (Tr. 36-37) Applicant has been borrowing from family to make ends meet until his employment resumes. (Tr. 42-43)

## Financial Considerations

SOR ¶ 1.a alleges a bank debt for \$4,590, and SOR ¶ 1.b alleges a bank debt for \$626. Applicant did not make any payments to address these two debts. (Tr. 32) The debt in SOR ¶ 1.a resulted from the voluntary repossession of his vehicle, and the debt in SOR ¶ 1.b is from a credit card. (Tr. 33, 40)

SOR ¶¶ 1.c, 1.d, and 1.e allege three state tax liens that were entered against Applicant in the following years and amounts: 2010 for \$46,470; 2013 for \$12,582; and 2013 for \$6,163.

SOR ¶ 1.f alleges Applicant failed to file his state tax returns for tax years 2003 through 2010, and SOR ¶ 1.g alleges he failed to file his federal income tax returns for tax years 2007 through 2010. Applicant was unclear on when his federal and state tax returns were filed. (Tr. 45-46) At the time of his September 12, 2012 Office of Personnel Management (OPM) personal subject interview (PSI), Applicant had not filed his federal and state income tax returns for 2007 through 2010. (Tr. 47-48; AE C at 5) He estimated that he filed his federal tax returns in 2012 or 2013. (Tr. 46, 51, 58) The SOR does not allege Applicant owes federal income taxes; however, Applicant said the Internal Revenue Service (IRS) garnished \$540 monthly from his pay for several years. (Tr. 49, 57) Applicant believes the IRS is satisfied with the current payment plan. (Tr. 49) He estimated the IRS has garnished about \$16,000 over the last three years to address his tax debt. (Tr. 56-57)

In April 2016, Applicant hired a tax service to file his state tax returns; however, as of the date of his hearing his state tax returns were not filed. (Tr. 52; AE B) He agreed to pay the tax service \$500 monthly from April 2016 to March 2017 or a total of \$6,500 to help with his tax issues. (AE B) He was unsure about which years he failed to file his state tax returns. (Tr. 52, 61) He estimated he owes about \$70,000 in delinquent taxes. (Tr. 53; AE B) He was unaware of whether the tax service had taken any action on Applicant's behalf. (Tr. 56) He may have to stop payments to the tax service until he becomes employed. (Tr. 55-56)

SOR ¶ 1.h alleges Applicant filed for bankruptcy under Chapter 13 of the Bankruptcy Code in September 2000, and in April 11, 2003, his bankruptcy was dismissed. Applicant explained his bankruptcy was dismissed because he was able to pay his bills, and there was no need to continue the bankruptcy. (Tr. 44)

Applicant's federal income tax transcript for tax year 2014 shows: his tax return was received on May 3, 2016; his income was \$85,760; his income tax was \$14,863; and his refund was \$2,004. (AE D at 11-13) Applicant's federal income tax transcript for tax year 2015 shows: his tax return was received on May 3, 2016; his income was \$86,566; his income tax was \$14,763; and his refund was \$1,944. (AE D at 11-13)

Applicant attributed his financial problems to delay in filing his tax returns and substantial variations in his income. (Tr. 24, 66) He emphasized he had a payment plan with the IRS for his federal taxes, and he has taken steps to bring his state taxes to

current status. (Tr. 23) He has reduced his expenses. (Tr. 25) He has contributed to his country for 38 years. (Tr. 25, 67) He promised to endeavor to pay his remaining tax debt. (Tr. 66) He understands the requirement to maintain his financial responsibility. (Tr. 66) He is a loyal employee who is professional and competent. (Tr. 24-26) Applicant's program manager has known Applicant for six years, and he lauded Applicant's loyalty, diligence, and competence. (AE A)

## **Policies**

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). 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. The President has authorized the Secretary of Defense or his designee to grant applicant's eligibility for access to classified information "only 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 revised 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 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. Thus, nothing should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination about applicant's allegiance, loyalty, or patriotism. It is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

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 (4th 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**

### **Financial Considerations**

AG ¶ 18 articulates the security concern relating to financial problems:

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.

AG ¶ 19 provides three disqualifying conditions that could raise a security concern and may be disqualifying in this case: "(a) inability or unwillingness to satisfy debts;" "(c) a history of not meeting financial obligations;" and "(g) failure to file annual Federal, state, or local income tax returns as required . . . ." Applicant admitted that he failed to timely file his federal and state tax returns, and he owes state and federal income taxes. He has two additional delinquent debts totaling about \$5,000. The Government established the disqualifying conditions in AG ¶¶ 19(a), 19(c), and 19(g) requiring additional inquiry about the possible applicability of mitigating conditions.

Five mitigating conditions under AG ¶ 20 are potentially applicable:

(a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;

(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;<sup>1</sup> 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.

The Appeal Board concisely explained Applicant's responsibility for proving the applicability of mitigating conditions as follows:

Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in security clearance decisions is that articulated in *Egan, supra*. "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." Directive, Enclosure 2 ¶ 2(b).

ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013).

No mitigating conditions apply; however, Applicant presented some mitigating information. He had variations in his income, and he became unemployed around May 1, 2016. These unusual circumstances were beyond Applicant's control and caused or contributed to Applicant's financial problems. Applicant's Chapter 13 bankruptcy was dismissed in 2003, and Applicant was able to pay his debts. Applicant is credited with mitigating the financial allegation in SOR ¶ 1.h.

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<sup>1</sup>The Appeal Board has previously explained what constitutes a "good faith" effort to repay overdue creditors or otherwise resolve debts:

In order to qualify for application of [the "good faith" mitigating condition], an applicant must present evidence showing either a good-faith effort to repay overdue creditors or some other good-faith action aimed at resolving the applicant's debts. The Directive does not define the term "good-faith." However, the Board has indicated that the concept of good-faith "requires a showing that a person acts in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation." Accordingly, an applicant must do more than merely show that he or she relied on a legally available option (such as bankruptcy) in order to claim the benefit of [the "good faith" mitigating condition].

(internal citation and footnote omitted) ISCR Case No. 02-30304 at 3 (App. Bd. Apr. 20, 2004) (quoting ISCR Case No. 99-9020 at 5-6 (App. Bd. June 4, 2001)).

Applicant failed to withhold sufficient funds from his salary to pay his share of his federal and state income taxes. He failed to timely file his state and federal tax returns. The DOHA Appeal Board has commented:

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

ISCR Case No. 14-04437 at 3 (App. Bd. Apr. 15, 2016). See ISCR Case No. 14-05476 at 5 (App. Bd. Mar. 25, 2016) (citing ISCR Case No. 01-05340 at 3 (App. Bd. Dec. 20, 2002)). ISCR Case No. 14-01894 at 4-5 (App. Bd. Aug. 18, 2015). The Appeal Board clarified that even in instances where an “[a]pplicant has purportedly corrected [the applicant’s] federal tax problem, and the fact that [applicant] is now motivated to prevent such problems in the future, does not preclude careful consideration of [a]pplicant’s security worthiness in light of [applicant’s] longstanding prior behavior evidencing irresponsibility” including a failure to timely file federal income tax returns. See ISCR Case No. 15-01031 at 3 and note 3 (App. Bd. June 15, 2016) (characterizing “no harm, no foul” approach to an Applicant’s course of conduct and employed an “all’s well that ends well” analysis as inadequate to support approval of access to classified information with focus on timing of filing of tax returns after receipt of the SOR).

Applicant paid about \$16,000 through garnishment of his pay to address his federal income tax debt. He hired a tax service to help with his taxes and to find out whether he needs to file some state tax returns. Notwithstanding these positive developments, there are too many unanswered questions about Applicant’s tax situation. It is unclear how much he owes the state and federal government, and it is unclear whether he has filed all of his state tax returns. Financial considerations concerns are not mitigated.

### **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 the 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.

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 have incorporated my comments under Guideline F in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under Guideline F, but some warrant additional comment.

Applicant is 55 years old, and he has been employed by a defense contractor as an analyst and technical writer for six years. He served in the Air Force from 1979 to 2000. He honorably retired from the Air Force as a master sergeant. He served in Southwest Asia, and he received numerous awards including the Meritorious Service Medal, Air Force Commendation Medals, and Good Conduct Medals. In 2000, he received an associate's degree in flight engineering.

Three state tax liens were entered against Applicant in 2010 for \$46,470, in 2013 for \$12,582, and in 2013 for \$6,163. He failed to timely file his state tax returns for tax years 2003 through 2010, and he failed to timely file his federal income tax returns for tax years 2007 through 2010. About \$16,000 has been garnished from his pay over the previous three years to address his federal income tax arrearage.<sup>2</sup> His history of failing to fully pay his federal and state income taxes when due raises unresolved financial considerations security concerns. He owes an unspecified amount of state and federal income taxes.<sup>3</sup> When an issue of delinquent taxes is involved, an administrative judge is

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<sup>2</sup>Of course, Applicant loses some mitigating credit because some debt payments were made through garnishment of his salary even though his opportunity to establish a payment plan was limited because of lack of income and other financial commitments. Payment of a debt "though garnishment rather than a voluntary effort diminishes its mitigating force." *Compare* ISCR Case No. 08-06058 at 4 (App. Bd. Aug. 26, 2010) *with* ISCR Case No. 04-07360 at 2-3 (App. Bd. Sept. 26, 2006) (payment of two of four debts through garnishment did not bar mitigation of financial considerations concerns). See also ISCR Case No. 09-05700 at 4 (App. Bd. Feb. 24, 2011) (garnished payments towards delinquent tax debts is not mitigating information in light of other factors); ISCR Case No. 08-06058 at 6 (App. Bd. Sep. 21, 2009) (remanding the case to the administrative judge and stating when addressing an Internal Revenue Service garnishment, "On its face, satisfaction of a debt through the involuntary establishment of a creditor's garnishment is not the same as, or similar to, a good-faith initiation of repayment by the debtor.").

<sup>3</sup>See ISCR Case No. 14-03358 at 3, 5 (App. Bd. Oct. 9, 2015) (reversing grant of a security clearance, noting \$150,000 owed to the federal government, and stating "A security clearance represents an obligation to the Federal Government for the protection of national secrets. Accordingly failure to honor other obligations to the Government has a direct bearing on an applicant's reliability, trustworthiness, and ability to protect classified information.").



required to consider how long an applicant waits to file their tax returns, whether the IRS generates the tax returns, and how long the applicant waits after a tax debt arises to begin and complete making payments.<sup>4</sup> The primary problem here is that Applicant has owed thousands of dollars to the IRS and state since 2010. He did not prove his inability to make greater progress resolving his tax debts.

I have carefully applied the law, as set forth in *Egan*, Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. Financial considerations concerns are not mitigated.

### **Formal Findings**

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

Paragraph 1, Guideline F:	AGAINST APPLICANT
Subparagraphs 1.a through 1.g:	Against Applicant
Subparagraph 1.h:	For Applicant

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<sup>4</sup>See ISCR Case No. 14-05794 at 7 (App. Bd. July 7, 2016) (reversing grant of security clearance and stating, “His delay in taking action to resolve his tax deficiency for years and then taking action only after his security clearance was in jeopardy undercuts a determination that Applicant has rehabilitated himself and does not reflect the voluntary compliance of rules and regulations expected of someone entrusted with the nation’s secrets.”); ISCR Case No. 14-01894 at 2-6 (App. Bd. Aug. 18, 2015) (reversing grant of a security clearance, discussing lack of detailed corroboration of circumstances beyond applicant’s control adversely affecting finances, noting two tax liens totaling \$175,000 and garnishment of Applicant’s wages, and emphasizing the applicant’s failure to timely file and pay taxes); ISCR Case No. 12-05053 at 4 (App. Bd. Oct. 30, 2014) (reversing grant of a security clearance, noting not all tax returns filed, and insufficient discussion of Applicant’s efforts to resolve tax liens). More recently, in ISCR Case No. 14-05476 (App. Bd. Mar. 25, 2016) the Appeal Board reversed a grant of a security clearance for a retired E-9 and cited applicant’s failure to timely file state tax returns for tax years 2010 through 2013 and federal returns for tax years 2010 through 2012. Before his hearing, he filed his tax returns and paid his tax debts except for \$13,000, which was in an established payment plan. The Appeal Board highlighted his annual income of over \$200,000 and discounted his non-tax expenses, contributions to DOD, and spouse’s medical problems. The Appeal Board emphasized “the allegations regarding his failure to file tax returns in the first place stating, it is well settled that failure to file tax returns suggest that an applicant has a problem with complying with well-established government rules and systems. Voluntary compliance with such rules and systems is essential for protecting classified information.” *Id.* at 5 (citing ISCR Case No. 01-05340 at 3 (App. Bd. Dec. 20, 2002) (internal quotation marks and brackets omitted).

### **Conclusion**

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

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MARK HARVEY  
Administrative Judge