



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



In the matter of:

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ISCR Case No. 15-03687

Applicant for Security Clearance

**Appearances**

For Government: Ray T. Blank, Esq., Department Counsel  
For Applicant: *Pro se*

03/20/2017

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**Decision**

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HEINY, Claude, Administrative Judge:

Applicant's federal income tax returns were not timely filed for three years and his state income tax returns for two years. He owed taxes for those years. The financial considerations security concerns have been mitigated. Access to classified information is granted.

**History of the Case**

On February 1, 2016, the Department of Defense (DoD) Consolidated Adjudication Facility (CAF) issued a Statement of Reasons (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 Statement of Reasons (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 Applicant, and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked. Specifically, the SOR set forth security concerns arising under the financial considerations guidelines.

On February 24, 2016, Applicant responded to the SOR and requested a hearing. On May 17, 2016, the Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing, setting the hearing for June 6, 2016. The hearing was held as scheduled.

Department Counsel offered five exhibits (Ex.) 1-5, and Applicant offered nine exhibits, Ex. A-I. There were no objections to the proffered exhibits and all were admitted. On June 14, 2016, DOHA received a copy of the transcript (Tr.) of the hearing.

### **Findings of Fact**

In Applicant's SOR response, he admitted owing federal income tax for tax years 2010, 2011, and 2012. He denied owing state income tax and asserted he had paid the state tax debts. Applicant's admissions are incorporated as facts. After a thorough review of the pleadings, exhibits, and submissions, I make the following additional findings of fact.

Applicant owed \$4,933 federal tax for tax year 2010; \$27,087 for tax year 2011; and \$22,406 for tax year 2012. As of February 2015, he owed the IRS \$57,370. (Tr. 33) He owed \$7,903 state tax for 2011 and \$7,196 for tax year 2012. The totaled owed the state franchise tax board was \$15,125 as of February 2015. (Tr. 33)

Applicant is 45 years old, has been employed by a defense contractor as a software engineer since September 2009, and seeks to retain a secret security clearance. (Ex. 1, Tr. 25) His annual salary is approximately \$152,000. (Tr. 25, 46) As of February 2015, his monthly net reminder (monthly income less monthly expenses and monthly debt payment) is approximately \$1,000. (SOR Answer) He has approximately \$107,000 in his 401(k) retirement plan.

Applicant was divorced in October 2002. In June 2003, he remarried and has a daughter age 11 and two step-sons ages 22 and 24. His spouse does not work outside of the home. (Tr. 26)

Applicant's section manager stated Applicant is highly ethical and moral, a dedicated and diligent worker, and has demonstrated his trustworthiness, integrity, and honesty. (Ex. H) His pastor states Applicant is truthful, reliable, upright, honest, and a man of integrity. (Ex. I)

In January 2008, Applicant filed for Chapter 7 bankruptcy protection and listed \$116,700 in unsecured nonpriority claims. (Ex. 2) In April 2008, his debts were discharged. (SOR Answer) He asserted the bankruptcy resulted from lack of employment when he was a contractor. (Tr. 51) In 2001, he moved from one Midwest state to another Midwest state, changing jobs when his prior employer lost a contract to his next employer. (Ex. 5) The change of employers resulted in a 30 percent pay cut. (Ex. 5) The move to a new state was also due in part, to his desire for a fresh start. (Tr. 43)

In September 2009, Applicant accepted his current job, which required his relocation from the Midwest to the West coast. (SOR Answer, Tr. 26) The West coast cost of living increase was huge adjustment. When he received a \$4,800 federal tax refund for tax year 2009<sup>1</sup>, he decided to adjust the amount of his withholdings on his pay to allow for a smaller refund. (Tr. 54, 56) He miscalculated the proper amount of deductions, which resulted in him owing approximately \$5,000 for tax year 2010. (Tr. 56) In the fall of 2010, he accepted a position with his company in Afghanistan. (Ex. B, Tr. 27) He was overseas from February 2011 through April 2012. (Ex. 5, Tr. 54) He was told a portion of his income would be exempt<sup>2</sup> from federal or state income tax. He moved his family to a new location in the United States before going overseas.

In February 2011, when Applicant went overseas, he chose to not have taxes taken from his wages. (SOR Answer) He intended this change to be temporary and intended to have taxes again taken out of his pay. It was not until Christmas time 2012 that he realized no taxes were being withheld. His mail and pay statements were sent to his U.S. address while he was overseas. He was seriously under withheld. In May 2012, he returned to the United States, he filed his state and federal income tax returns for tax years 2010-2012. In late June or early July 2012, he started discussions with the Internal Revenue Service (IRS) concerning the repayment of his taxes. (Tr. 32) In November 2012, an installment agreement with the IRS was established. (Ex. C, Answer SOR, Tr. 32, 62) In December 2012, he started making \$350 monthly payments to the IRS and is current on his monthly payments. (Ex. C) Between December 2012 and March 2016, he paid the IRS more than \$12,000. (Ex. C, D)

In February 2014, Applicant entered into an installment agreement with the state franchise tax board. (Ex. E) In March 2014, a \$750 monthly automatic withdrawal began. (Ex. 5, Tr. 34, 38) Between January 2014 and December 2015, he paid the state approximately \$24,000 to address his 2011 and 2012 delinquent state taxes. (Ex. F) In December 2015, he made his last payment, which paid all delinquent state taxes owed. (Tr. 42)

In December 2013, due to the high cost of West coast living, Applicant relocated to the Midwest. (Ex. 5) For tax year 2015, Applicant's adjusted gross income was \$178,000 and his federal tax was approximately \$30,000. He overpaid his taxes by approximately \$2,000, which the IRS intercepted and applied to his tax liability. (Ex. G, Tr.77)

Applicant is current on his two credit cards, which have a total of \$1,200 maximum credit. (Tr. 47) He is current on his \$430 monthly payments on his 2012

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<sup>1</sup> Applicant's adjusted gross income was approximately \$135,000. His tax was approximately \$14,000, which resulted in a refund of \$4,800. (Ex. A)

<sup>2</sup> The federal foreign earned income exclusion for 2011 was \$92,900 and for 2012 it was \$95,100. (IRS Publication 54, Chapter 4). Additionally, all pay Applicant received for hostile fire pay or imminent danger pay was exempt from taxation. (IRS Pub 3) Applicant's annual income while overseas was \$130,000 plus overtime plus an additional 30 to 40 percent for being in a war zone, which brought his total annual income to approximately \$300,000. (Tr. 30)

pickup truck and on his wife's \$550 monthly lease payments on her vehicle. (Tr. 47) His student loans are in deferment status. (Tr. 69) He is not receiving any calls or letters from creditors demanding payment. (Tr. 69)

## **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 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<sup>3</sup> . . . .” Applicant failed to have tax withholding on his wages, resulting in owing approximately \$57,000 to the IRS and \$15,000 to the state franchise tax board. He owed federal taxes for tax years 2010, 2011, and 2012 and owed state taxes for tax years 2011 and 2012. AG ¶¶ 19(a), (b), and (c) apply

In ISCR Case No. 08-12184 at 7 (App. Bd. Jan. 7, 2010), the Appeal Board explained:

It is well-settled that adverse information from a credit report can normally meet the substantial evidence standard and the government’s obligations under [Directive] ¶ E3.1.14 for pertinent allegations. At that point, the burden shifts to applicant to establish either that he [or she] is not responsible for the debt or that matters in mitigation apply.

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<sup>3</sup> It is noted that the SOR does not allege a failure to file, but only alleges the tax indebtedness.

(internal citation omitted). 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.

Three 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;

(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; and

(d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.<sup>4</sup>

The Appeal Board concisely explained an 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).

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<sup>4</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)).

From February 2011 through April 2012, Applicant worked overseas. While overseas he failed to have sufficient funds withheld from his salary to pay his federal and state income tax. Upon arriving back in the United States, he filed his 2011 and 2012 tax returns. Two months later he contacted the IRS and the state franchise tax board to arrange repayment plans. In December 2012, he started making \$350 monthly payments to the IRS and is current on his monthly payments. Between December 2012 and March 2016, he paid the IRS more than \$12,000. In March 2014, a \$750 monthly automatic withdrawal began to the state franchise board. He paid the state approximately \$24,000 to address his 2011 and 2012 delinquent state taxes. In December 2015, he made his last payment, which paid all delinquent state taxes owed.

The DOHA Appeal Board has commented about tax filing issues:

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's tax liability resulted from the two years he was employed overseas in 2011 and 2012. This behavior did not happen so long ago, but was infrequent in the

sense it was limited to the time he was overseas. The behavior is unlikely to recur. AG ¶ 20 (a) applies.

Applicant has initiated a good-faith effort to repay his delinquent taxes. His state taxes were paid in full in December 2015 and he is current on his monthly payments to the IRS. AG ¶ 20 (d) applies to his taxes. Since entering into the repayment arrangements he has paid the IRS and state approximately \$36,000 on his delinquent taxes. There are clear indications that the problem is being resolved or is under control. His taxes were the only debts listed under the financial considerations security concerns and they have been addressed. AG ¶ 20 (c) applies. His financial considerations concerns are 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 tax problems resulted from the two years he was employed in a war zone overseas. He has repaid his state taxes and is current on his monthly payments to the IRS. He repaid the state \$24,000 and between December 2012 and March 2016, he paid the IRS more than \$12,000. I believe that someone who enters into a repayment agreement, honors that agreement, and pays his delinquent state taxes is likely to honor his repayment agreement with the IRS.

The federal tax debt is large and will take some time to satisfy, but the monthly amount is automatically deducted from Applicant's account. He has already paid \$36,000 on his state and federal taxes, which makes it likely he will continue his agreement with the IRS until it is paid. He is not living beyond his means. Payment on his two credit cards is current, and he is receiving no demand from creditors for payment. His taxes were the only financial problems raised by the SOR.



The issue is not simply whether all Applicant's debts have been paid—it is whether his financial circumstances raise concerns about his fitness to hold a security clearance. (See AG ¶ 2(a)(1).) Overall, the record evidence leaves me without questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the security concerns arising from his financial considerations.

### **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: FOR APPLICANT

Subparagraphs 1.a through 1.e: For Applicant

### **Conclusion**

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is granted.

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Claude R. Heiny  
Administrative Judge