



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



In the matter of:

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ISCR Case No. 15-03902

Applicant for Security Clearance

**Appearances**

For Government: Alison O'Connell, Esq., Department Counsel

For Applicant: *Pro se*

12/08/2016

RIVERA, Juan J., Administrative Judge:

Applicant failed to show he has filed his delinquent 2013 income tax return. His evidence is insufficient to establish that he has a track record of financial responsibility. He failed to mitigate the Guideline F (financial considerations) security concerns. Clearance is denied.

**History of the Case**

Applicant submitted a security clearance application (SCA) on November 12, 2014. On December 13, 2015, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) alleging security concerns under Guideline F (financial considerations).<sup>1</sup> Applicant answered the SOR on January 12, 2016, and requested a decision based on the written record.

A copy of the Government's file of relevant material (FORM), dated February 26, 2016, was provided to Applicant by transmittal letter dated February 29, 2016. Applicant received the FORM on March 11, 2016. He was allowed 30 days to submit any objections to the FORM and to provide material to refute, extenuate, and mitigate the concerns. Applicant did not respond to the FORM or submit any additional evidence. The case was assigned to me on December 6, 2016.

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<sup>1</sup> DOD acted under Executive Order 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive) (January 2, 1992), as amended; and the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), implemented by the DOD on September 1, 2006.

## **Procedural Issue**

In the FORM, Department Counsel advised Applicant that the FORM included his unauthenticated summary of interview with a government investigator from February 13, 2015. Applicant was informed he could object to the summary of his interview and it would not be admitted, or that he could make corrections, additions, deletions, and update the document to make it accurate. Applicant was informed that his failure to respond to the FORM or to raise any objections could be construed as a waiver, and the evidence would be considered by me. Applicant failed to respond to the FORM, and he raised no objections. I considered the FORM proposed evidence, including the summary of interview.

## **Findings of Fact**

In Applicant's SOR response, he admitted that he failed to timely file his 2013 income tax return. Applicant's SOR admission is incorporated herein as a finding of fact. After a thorough review of the record evidence, I make the following additional findings of fact:

Applicant is a 51-year-old employee of a defense contractor. After graduating from high school, he enlisted in the U.S. Army where he honorably served on active duty from 1983 to 1988. After his discharge, Applicant enlisted in the Army National Guard Active Reserve where he honorably served until 1991. Applicant has never been married, but has been living with a cohabitant since 2002. He has a child born out of wedlock (age unknown) with whom he has no contact.

Applicant worked for private companies between 1988 and 2012. He was fired from his job for being late to work and not calling his supervisor in 2012. He was unemployed between May and August 2013; temporarily employed during September and October 2013; and unemployed from November 2013 to November 2014. Applicant has worked for his current employer, a federal contractor, since November 2014. This is his first SCA.

In response to Section 26 (Financial Record) of Applicant's 2014 SCA, he disclosed that he failed to file his federal 2013 income tax return. He stated that he collected unemployment benefits during most of 2013, and did not file his 2013 income tax return. He estimated that he owed the IRS \$2,000. As of his 2014 SCA, Applicant had not filed his 2013 income tax return. He stated that he would resolve his tax problem when "I have steady income starting in December 2014."

During follow-up interviews with a government investigator in February 15-16, 2015, Applicant confirmed his failure to file his 2013 income tax return. He further stated that he believed he did not owe any taxes, but he did not contact the IRS to determine his tax liability, if any.

A review of Applicant's credit reports disclosed no delinquent or in collection accounts. I note that, if Applicant made less than \$10,300 gross income in 2013, as a

single filer he would be exempt from filing an income tax return. If his filing status was “married filing jointly,” he would not have to file a tax return if his gross income was less than \$20,600. ([www.irs.gov/publications/p17/ch01.html](http://www.irs.gov/publications/p17/ch01.html) - IRS Publication 17)

Applicant’s 2014 SCA disclosure, his February 2015 summary of interviews, and his admission to the SOR allegation, establish the SOR allegation. He presented no documentary evidence to show that he has filed his 2013 income tax return or that he has been in contact with the IRS to resolve his failure to file and his possible tax debt. He provided no information about his current financial position. He did not provide any information about his current income, monthly expenses, and whether his income is sufficient to pay his living expenses and debts. There is no information to indicate whether he has participated in financial counseling or whether he follows a budget.

### **Policies**

Eligibility for access to classified information may be granted “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. The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

The AG list disqualifying and mitigating conditions for evaluating a person’s suitability for access to classified information. Any one disqualifying or mitigating condition is not, by itself, conclusive. However, the AG should be followed where a case can be measured against them, as they represent policy guidance governing access to classified information. Each decision must reflect a fair, impartial, and commonsense consideration of the whole person and the factors listed in AG ¶ 2(a). All available, reliable information about the person, past and present, favorable and unfavorable, must be considered.

Security clearance decisions resolve whether it is clearly consistent with the national interest to grant or continue an applicant’s security clearance. The Government must prove, by substantial evidence, controverted facts alleged in the SOR. If it does, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. The applicant bears the heavy burden of demonstrating that it is clearly consistent with the national interest to grant or continue his or her security clearance.

Persons with access to classified information enter into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability, and trustworthiness of those who must protect national interest as their own. The “clearly consistent with the national interest” standard compels resolution of any reasonable doubt about an applicant’s suitability for access in favor of the Government. “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; AG ¶ 2(b). Clearance decisions are not a determination of the loyalty of the

applicant concerned. They are merely an indication that the applicant has or has not met the strict guidelines the Government has established for issuing a clearance.

## **Analysis**

### **Financial Considerations**

Under Guideline F, the security concern is that 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 ¶ 18)

This concern is broader than the possibility that an individual might knowingly compromise classified information in order to raise money. It encompasses concerns about an individual's self-control, judgment, and other qualities essential to protecting classified information. An individual who is financially irresponsible may also be irresponsible, unconcerned, or negligent in handling and safeguarding classified information.

Applicant failed to file his 2013 income tax return. AG ¶ 19 provides 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." The Government established the above disqualifying conditions 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; 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).

None of the financial considerations mitigating conditions apply. Applicant's financial problem is recent and ongoing. He presented no evidence to show that he filed his 2013 income tax return or that he was not required to file one. It is not clear whether he owes money to the IRS. Applicant failed to establish that his financial problem is under control, and that his failure to file occurred under circumstances unlikely to recur. Applicant presented no evidence of efforts taken to contact the IRS, or of efforts taken to resolve his tax problem.

Applicant presented some positive financial information. He was unemployed during two periods totaling about a year and one-half. If he was unemployed due to circumstances beyond his control (not due to his own misconduct) that information may help him mitigate the concerns. His evidence is insufficient to make this determination. Also, his credit reports reflect no delinquent or in collection accounts.

The negative financial considerations concerns are more substantial. Applicant failed to timely file his 2013 income tax return for tax year 2013. 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).

In ISCR Case No. 15-01031 at 2 (App. Bd. June 15, 2016), the Appeal Board reversed the grant of a security clearance, and noted the following primary relevant disqualifying facts:

Applicant filed his 2011 Federal income tax return in December 2013 and received a \$2,074 tax refund. He filed his 2012 Federal tax return in September 2014 and his 2013 Federal tax return in October 2015. He received Federal tax refunds of \$3,664 for 2012 and \$1,013 for 2013.

Notwithstanding the lack of any tax debt owed in ISCR Case No. 15-01031 (App. Bd. June 15, 2016), the Appeal Board provided the following principal rationale for reversal:

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 2011, 2012, and 2013 Federal income 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.

ISCR Case No. 15-01031 at 4 (App. Bd. June 15, 2016) (citations omitted).

The negative financial and judgment information in Applicant’s case is more significant. He failed to timely file his federal income tax return for 2013, or to show he did not have to file. He did not explain what efforts he has taken to file or resolve any possible

tax debt. His evidence is insufficient to fully mitigate financial considerations security concerns.

Applicant was made aware of the Government's financial considerations security concerns caused by his failure to file his income tax return when he answered questions about filing his income taxes when he completed his 2014 SCA, and when he was questioned by a government investigator during his 2015 interview. He was allowed a period of 30 days after receipt of the FORM to produce evidence in extenuation and mitigation. He failed to provide any documentary evidence to show that he filed his 2013 income tax return or that he has been in contact with the IRS and attempted to resolve his tax problem.

Applicant's periods of unemployment cannot excuse his failure to file his income tax return because the filing of tax returns is required by law. It also cannot be considered as a circumstance beyond his control that contributed to or aggravated his financial problems because, at least during one period, he became unemployed because he was fired for being late to work. For mitigating condition AG ¶ 20(b) to apply, Applicant must establish that he was responsible under the circumstances. Applicant did not submit sufficient evidence to show his financial responsibility.

### **Whole-Person Concept**

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, and under the whole-person concept. AG ¶ 2(c). 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 submitted no evidence to show he has filed his 2013 income tax return. He also submitted no evidence of any efforts to resolve his tax problem. There is insufficient evidence of progress addressing his financial problem. The available information is insufficient to establish clear indications that he does not have a current financial problem, or that his financial problem is being resolved. In sum, Applicant failed to establish that he has a track record of financial responsibility.

Moreover, when a tax issue is involved, an administrative judge is 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>2</sup> The primary problem here is that Applicant presented no evidence he has filed his 2013 income tax returns.

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<sup>2</sup> The recent emphasis of the Appeal Board on security concerns arising from tax cases is instructive. 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

Once a concern arises regarding an Applicant's eligibility for a security clearance, there is a strong presumption against the grant or renewal of a security clearance. Unmitigated financial considerations concerns lead me to conclude that grant of a security clearance to Applicant is not warranted at this time. This decision should not be construed as a determination that Applicant cannot or will not attain the state of reform necessary for award of a security clearance in the future. With a track record of behavior consistent with his obligations, he may well be able to demonstrate persuasive evidence of his security clearance worthiness. The financial considerations security 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
Subparagraph 1.a:	Against Applicant

### **Conclusion**

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

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JUAN J. RIVERA  
Administrative Judge

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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). See *also* 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.").