



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



In the matter of:

)  
)  
)  
)  
)

ISCR Case No. 15-04561

Applicant for Security Clearance

**Appearances**

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

03/31/2017

---

**Decision**

---

HEINY, Claude, Administrative Judge:

Applicant did not timely file his federal and state tax returns for tax years 2011 and 2012. He belatedly filed his federal tax returns; however, he has yet to pay the federal tax he owes. He has yet to file his state tax returns, and the amount of state tax he owes is uncertain for those years. He has failed to rebut or mitigate the security concerns under Guideline F, financial considerations. Clearance is denied.

**History of the Case**

On January 16, 2016, acting under the relevant Executive Order and DoD Directive,<sup>1</sup> the DoD issued a Statement of Reasons (SOR) detailing financial considerations security concerns. DoD adjudicators could not find that it was clearly consistent with the national interest to grant or continue Applicant's security clearance. February 15, 2016, Applicant answered the SOR and requested a hearing. On May 17, 2016, the Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing for a hearing to be convened on June 8, 2016. The hearing was held as scheduled.

---

<sup>1</sup> Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the DoD on September 1, 2006.

Department Counsel offered two exhibits (Ex.) 1 and 2, which were admitted without objection. Applicant offered no exhibits. The record was kept open to allow Applicant to submit documents. On June 22, 2016, Applicant submitted five documents (Ex. A – E), which were admitted. On March 23, 2017, an additional document was submitted and admitted as Ex. F. On June 21, 2016, DOHA received a copy of the transcript (Tr.) of the hearing.

### **Findings of Fact**

Applicant failed to file his 2011 and 2012 federal and state income tax returns and pay the tax associated with those returns. In his SOR response, he admitted the SOR allegations. His admissions are incorporated as facts. After a thorough review of the pleadings, exhibits, submissions, and transcript, I make the following additional findings of fact.

Applicant is 50-year-old senior technical support engineer and manager who has been employed by a defense contractor since January 2011, and seeks to retain a secret security clearance. (Ex. 1, Tr. 13, 25) From July 1984 through July 2009, he served in the U.S. Army honorably retiring as a sergeant first class (E-7). (Ex. A) He served in Germany, Panama, Honduras, Korea, and Iraq during his military service. From March 2003 through July 2003 and November 2005 through November 2006, he served in Iraq, an area designated as an imminent danger pay area. (Ex. A)

Applicant's salary before taxes and other withholding was approximately \$2,800,<sup>2</sup> which on an annual basis would be approximately \$72,800. (Ex. C) However, he stated his annual salary, without overtime, is \$65,000. (Tr. 25) The U.S. Department of Veterans Affairs rates Appellant's disability at 40 per cent for his military service. (Tr. 17) His disability pay is approximately \$600 monthly. (Tr. 17) He receives \$300 per month from his military retirement pay with the remaining \$1,500 going to his ex-wife each month. (Tr. 25) He receives approximately \$11,000 from his VA disability pay and military salary combined and when added to his \$65,000 annual salary brings his annual income to approximately \$76,000.

On Applicant's May 2013 Electronic Questionnaires for Investigations Processing (e-QIP) he indicated his wages had been garnished by the Internal Revenue Service (IRS). (Ex. 1) In July 2013, Applicant completed a personal subject interview (PSI) during which he was questioned about his finances and failure to pay income tax. (Ex. 2) During that interview, he stated he had provided his W-2 for tax year 2011 to a friend in order for that friend to prepare Applicant's federal and state tax returns. (Tr. 19) Applicant repeatedly asked his friend to return his W-2s, but his friend incorrectly stated he had already returned them. In 2013, the friend returned the W-2s without having prepared the returns.

---

<sup>2</sup> Applicant submitted his pay statements for the two weeks of June 4, 2016, to June 17, 2016. His pay statement indicates his pay for two weeks, before deductions and taxes, was approximately \$2,800. (Ex. C)

Applicant failed to file his 2012 federal and state income tax returns because he was overseas from February 2013 through mid-April 2013.<sup>3</sup> (Ex. 2) In December 2012, Applicant's wages were garnished for \$480 by the IRS for taxes owed for tax years 2005 and 2006. (Tr. 21) The debt for those two tax years was satisfied by the single month of garnishment.

During Applicant's PSI, he stated he planned on filing his tax returns within a month of the July 2013 interview. At the hearing, he said the returns were not filed as planned during the month following the interview due to oversight on his part. (Ex. 2, Tr. 14, 30) At the hearing, he again asserted he would be contacting the IRS in a week and would be arranging a repayment plan to address his delinquent taxes.

When no return was received for 2011, the IRS filed a return for him. That return indicated he owed \$17,072 in federal income tax for tax year 2011. (Ex. F) After filing his return, his taxes were adjusted and, as of February 2017, Applicant owed \$4,658 in federal income tax for tax year 2011. If he paid the amount by March 13, 2017, he would not incur additional interest or penalty charges. (Ex. F) He has provided no documents showing payment of the debt.

When Applicant failed to file his 2012 federal tax return, the IRS computed his tax owed, penalties, interest, and determined he owed \$11,448 as of July 22, 2016. (Ex. D) The IRS payoff calculator states "Caution self-identified combat zone." (Ex. D) He has filed his 2012 income tax return, but had not received an adjustment letter from the IRS. From February 2013 through April 2013, when his 2012 federal return was due, he was working overseas. (Tr. 14)

Applicant filed, but not timely filed, his federal income tax returns for tax years 2013 and 2014. (Tr. 24) As of June 2016, he had not filed his federal return for 2015. He has not paid any federal taxes due for tax years 2013 through 2015. He has no idea how much federal tax he owes for years 2012 through 2015. (Tr. 33)

Applicant has not filed his state tax returns for tax years 2011 through 2015 and does not know how much he owes for state tax. (Tr. 23) It was suggested<sup>4</sup> that his W-2s for the tax years in question would show how much federal and state tax was withheld from his pay. (Tr. 28, 35) No W-2s were received from Applicant. His wage statement during two weeks in June 2016 indicated \$515 had been withheld for federal taxes and \$121 had been withheld for state taxes. (Ex. C)

---

<sup>3</sup> Taxpayers are allowed an automatic 2-month extension of time to file a federal return and pay any federal income tax that is due, if they are outside the United States on the filing due date. Even with an extension, interest will be assessed on any tax not paid by the regular due date. For taxpayers acting under the directions of U.S. Armed Forces in a combat zone, the filing is extended 180 days. Applicant did not file his 2012 federal taxes by the due dates of the exceptions.

<sup>4</sup> It was also suggested to Applicant that it was in his interest to provide copies of his tax returns, any repayment agreements he had with the IRS and state taxing authority, and any payments in accord with said agreements. No such documents were received.

Applicant contacted the IRS and was told to file his tax returns, and then he would be contacted as to how much was owed. At that time, repayment arrangements could be made. (Tr. 31) He has yet to make a payment to the IRS or to the state for tax years 2011 and 2012. (Tr. 32)

Applicant is current on his utilities, truck payment, and other month-to-month obligations. (Ex. 2) Prior to his father's death, Applicant helped his father financially. (Tr. 26)

## **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 . . . .” Applicant failed to file his federal and state tax returns for tax years 2011 and 2012 and owes federal and state tax for those years. Applicant is unaware of how much tax is owed, but it is at least \$4,658. AG ¶¶ 19(a), (c), and (g) apply. Once the Government established disqualifying conditions, an additional inquiry about the possible applicability of mitigating conditions is required.

AG ¶ 20 list four Financial Considerations Mitigating Conditions that might apply:

(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; and

(d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts;

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).

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 failing to timely file his federal and state tax returns for 2011 and 2012. He has not filed his 2015 federal tax return or state tax returns for tax years 2011 through 2015. The SOR alleges only tax years 2011 and 2012, but all years of failing to timely file and pay taxes are considered<sup>5</sup>. In July 2013, Applicant was questioned about his finances and his failure to file returns for 2011 and 2012. He has been on notice of the Government concern about his finances and non-filing of his taxes for more than three years.

Applicant’s tax returns were due by April 2012 and April 2013, unless he received an extension. His failure to file did not happen so long ago and the tax owed for those years has not been paid. Additionally, there were four returns that were not timely filed, which is not infrequent. AG ¶ 20(a) does not apply. There is no showing the failure to file was largely beyond his control. His friend was supposed to file his 2011 returns but misplaced Applicant’s W-2s. Applicant could have requested new W-2s for those that were misplaced. There was no medical emergency, business downturn, or other event beyond his control preventing his filing of his tax returns in a timely manner. Additionally, the state returns have not been filed, and whatever state and federal delinquent taxes have not been paid. Failing to pay one’s tax does not show Applicant has acted responsibly under the circumstances. AG ¶ 20(b) does not apply.

There is no showing Applicant has received financial counseling or that the problem is resolved. AG ¶ 20(c) does not apply. Applicant has not initiated a good-faith effort to repay his delinquent taxes and still owes his federal tax and may owe state taxes for the years in question. AG ¶ 20(d) does not apply.

---

<sup>5</sup> The DOHA Appeal Board has long held that the administrative judge may consider non-SOR-alleged conduct to assess an applicant’s credibility; to evaluate an applicant’s evidence of extenuation, mitigation, or changed circumstances; to consider whether an applicant has demonstrated successful rehabilitation; to decide whether a particular provision of the Adjudicative Guidelines is applicable; or to provide evidence for a whole-person analysis under Section 6.3 of the Directive. See, e.g., ISCR Case No. 03-20327 (App. Bd. Oct. 26, 2006); ISCR Case No. 09-07219 (App. Bd. Sep. 27, 2012).

## **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 served honorably in the U.S. Army being twice stationed in an area designated as an imminent danger area. He is not living beyond his means. Payments on his utilities, truck payment, and month-to-month obligations are current. He is not receiving calls or mail from creditors demanding payment on delinquent accounts. His taxes were the only financial problems raised by the SOR. Additionally, to his credit, he listed the IRS garnishment on his e-QIP.

Applicant's annual household income is approximately \$76,000. He has made no payment on his delinquent taxes for 2011 and 2012. He has been aware of the Government's concern about his delinquent debts since his July 2013 interview when he was specifically confronted about his finances and unfiled tax returns. Additionally, the January 2016 SOR put him on notice of the Government's concern about his unfiled tax returns and unpaid tax. The tax is still owed and he has failed to document that a repayment agreements have been made with the IRS or the state taxing authority.

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 with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the security concerns arising from his financial considerations.

This decision should not be construed as a determination that Applicant cannot or will not attain the state of true reform and rehabilitation necessary to justify the award of a security clearance. The awarding of a security clearance is not a once-in-a-lifetime



occurrence, but is based on applying the factors, both disqualifying and mitigating, to the evidence presented. Under Applicant's current circumstances a clearance is not recommended, but should Applicant be afforded an opportunity to reapply for a security clearance in the future, having filed his state tax returns and paid his federal and state's past-due taxes, established compliance with a repayment plan, or otherwise addressed the obligations, he may well demonstrate persuasive evidence of his security worthiness. However, a clearance at this time is not warranted.

### **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, Financial Considerations: AGAINST APPLICANT

Subparagraphs 1.a through 1.d: 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 grant or continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

---

Claude R. Heiny  
Administrative Judge