



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



In the matter of:	)	
	)	
REDACTED	)	ISCR Case No. 15-06639
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Tovah A. Minster, Esq., Department Counsel  
For Applicant: Jacob T. Ranish, Esq.

02/01/2017

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**Decision**

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MENDEZ, Francisco, Administrative Judge:

Applicant presented sufficient evidence to mitigate security concerns raised by his past tax issues. He did not timely file his tax returns due to a combination of a genuine misunderstanding as to his filing requirements and matters beyond his control. He addressed his overdue tax returns, receiving refunds from the federal government totaling nearly \$38,000. He has taken positive steps to meet all his financial obligations going forward, including the obligation of all citizens to timely file their tax returns and pay their taxes. Clearance is granted.

**Statement of the Case**

On April 2, 2016, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) sent Applicant a Statement of Reasons (SOR) alleging security concerns under the financial considerations and foreign influence guidelines.<sup>1</sup> Applicant, through

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<sup>1</sup> This action was taken under Executive Order (E.O.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the Adjudicative Guidelines (AG) implemented by the Department of Defense on September 1, 2006.

his counsel, answered the SOR and requested a hearing to establish his continued eligibility for access to classified information.

On December 13, 2016, a date mutually agreed to by the parties, a hearing was held.<sup>2</sup> At the hearing, Department Counsel moved to withdraw the foreign influence allegations and, without objection, the motion to amend the SOR was granted. Department Counsel initially offered Government Exhibits 1 – 4, but withdrew Exhibit 2 upon Applicant's timely objection.<sup>3</sup> The remaining exhibits offered by Department Counsel, Applicant's Exhibits A – E, and the documents attached to the Answer were admitted into the administrative record.<sup>4</sup> Applicant was the only witness who testified at the hearing. The transcript (Tr.) was received on December 20, 2016.

On December 29, 2016, after reviewing the transcript and the record evidence, I advised the parties that the matter appeared appropriate for summary disposition in Applicant's favor. Department Counsel objected to the resolution of the case through summary disposition and requested a full decision.<sup>5</sup>

### **Findings of Fact**

Applicant is a defense contractor and provides information technology support to the U.S. military. He has been with his current employer since January 2014. He served in the U.S. military for 10 years from 1982 to 1992. His military service included several overseas deployments and service during the First Gulf War. After separating from active duty in 1992 and receiving an honorable discharge, Applicant began working as a federal contractor. He has held a security clearance without issue since 1982. Outside of work, Applicant is involved in his community, mentoring underprivileged, at-risk youth.

From approximately 1992 to 2001, Applicant worked overseas as a U.S. Government contractor. His employer provided assistance in completing and filing his tax returns. From 2001 to 2010, Applicant, with the assistance of a tax preparer, completed and filed his own tax returns. These tax returns were filed on time.

Applicant did not timely file his federal and state tax returns for tax years 2010 through 2014. He explained at hearing that he was under the mistaken belief that since he was owed a refund for each of these years (as he always had more taxes withheld

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<sup>2</sup> Prehearing correspondence, the notice of hearing, and case management order were marked and attached to the record as Appellate Exhibits (App. Exh.) I – III.

<sup>3</sup> Exhibit 2 for identification was a summary of Applicant's security clearance interview. Applicant objected to its admission. See Directive, Enclosure 3, E3.1.20. Department Counsel then withdrew the offered exhibit before I could rule upon its admission. Therefore, Exhibit 2 is not included in the administrative record nor did I consider it.

<sup>4</sup> I overruled Applicant's relevancy objection to Exhibit 4. (Tr. 11-12) It, as well as Exhibits 1 and 3, were admitted into the administrative record and considered in assessing the security concerns at issue.

<sup>5</sup> App. Exh. IV.

from his pay than he expected to owe) that he had three years to both file the return and claim the refund. If he failed to file his return within the allotted time, Applicant understood that he would forfeit his refund. He was also under the mistaken impression that he owed no state income tax because in 2009 he moved from State A to State B, which did not have a state income tax. It was only later that Applicant became aware that he had to file a tax return with State A and owed the state income taxes, because he kept his home there.

Applicant submitted documentary evidence showing that he filed his 2010 – 2014 federal tax return within three years of when they were due and received refunds totaling nearly \$38,000. His IRS account transcripts (Exhibit A) reflect the following:

Tax Year	Date return filed	Tax refund (or, tax owed)
2010	10/22/2012	(\$350, paid, \$0 balance)
2011	10/29/2012	\$5,100
2012	8/25/2014	\$12,100
2013	6/13/2016	\$4,725
2014	6/13/2016	\$8,880
2015	6/20/2016	\$6,900

Applicant also submitted documentary evidence to corroborate his testimony that he filed his overdue state tax returns and paid any taxes owed. He has obtained the assistance of a tax professional to assist him in filing his tax returns in future years.

Applicant also explained at hearing that he did not timely file his tax returns because of several matters beyond his control. Specifically, in 2011, Applicant received a short-notice assignment to work on a U.S. Government contract at an overseas base. He helped his wife move back to their home in State A, but left for the assignment before fully unpacking and locating the boxes containing the necessary tax documents. In 2015, he was the victim of a computer virus or malware that impacted his ability to review his tax forms and file his returns by the deadline.

SOR 1.a and 1.b reflect Applicant's failure to timely file his federal and state tax returns for tax years 2010 – 2014. He disclosed this adverse information on the security clearance application (Exhibit 1), which he submitted as part of the clearance reinvestigation. SOR 1.c alleges a charged-off debt. Applicant was unemployed in 2013, and incurred this medical debt. He researched the debt, located the creditor, and paid the debt. The record evidence reflects no other derogatory financial information in the past 10 years.<sup>6</sup> A March 2016 credit report (Exhibit 3) reflects that Applicant pays his accounts "as agreed," including the fixed-rate, 30-year mortgage on his home.

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<sup>6</sup> Applicant received a Chapter 7 bankruptcy discharge in 2003. He filed for bankruptcy after a costly divorce, which was on the heels of being unemployed for a lengthy period time and then having to take a job paying far less than he previously earned. The bankruptcy was not alleged in the SOR and, thus, was not considered for disqualification purposes. However, I have considered it in assessing Applicant's mitigation case and overall suitability for continued access to classified information.

Applicant earns a yearly salary of approximately \$140,000. He owns a home, has nearly \$10,000 in a savings account to pay unanticipated expenses, and about \$25,000 in a retirement account. His personal financial statement reflects that, after paying recurring monthly expenses, he has a positive net monthly remainder. His recent performance appraisal reflects favorably on his job performance, and a long-time coworker submitted a character reference stating, under oath, his favorable opinion of Applicant's character and suitability for a clearance.

## **Policies**

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). Individual applicants are eligible for access to classified information "only upon a finding that it is clearly consistent with the national interest" to authorize such access. E.O. 10865 § 2.

When evaluating an applicant's eligibility for a security clearance, an administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations, the guidelines list potentially disqualifying and mitigating conditions. The guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies the guidelines in a commonsense manner, considering all available and reliable information, in arriving at a fair and impartial decision.

Department Counsel must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.14. Applicants are responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven . . . and has the ultimate burden of persuasion as to obtaining a favorable clearance decision." Directive ¶ E3.1.15.

Administrative judges are responsible for ensuring that an applicant receives fair notice of the security concerns at issue, has a reasonable opportunity to address those concerns, and is not subjected to unfair surprise. ISCR Case No. 12-01266 at 3 (App. Bd. Apr. 4, 2014).

In resolving the ultimate question regarding an applicant's eligibility, an administrative judge must resolve "[a]ny doubt concerning personnel being considered for access to classified information . . . in favor of national security." AG ¶ 2(b). Moreover, recognizing the difficulty at times in making suitability determinations and the paramount importance of protecting national security, the Supreme Court has held that "security clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531.

An individual who is granted access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information.

Security clearance decisions include, by necessity, consideration of the possible risk an applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

## **Analysis**

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

The financial considerations security concern is explained at AG ¶ 18:

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.

Applicant's failure to timely file his 2010 – 2014 tax returns raises this security concern and, specifically, the disqualifying conditions listed at AG ¶¶ 19(c) and 19(g). Once a disqualifying condition is established, the burden shifts to an applicant to present evidence demonstrating extenuation or mitigation sufficient to warrant a favorable security clearance decision. In the present case, Applicant bears a heavy burden in mitigating the heightened security concerns raised by his late tax filings.<sup>7</sup>

The adjudicative guidelines list conditions that can mitigate security concerns raised by an applicant's past conduct and current circumstances. Here, the record evidence raised the following mitigating conditions:

AG ¶ 20(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;

AG ¶ 20(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;

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<sup>7</sup> See *generally* ISCR Case No. 14-03358 at 3 (App. Bd. Oct. 9, 2015) (Board explained the heightened security concerns raised by tax-related financial issues, as follows: "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.").

AG ¶ 20(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

AG ¶ 20(d): the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

Applicant's failure to timely file his tax returns was primarily a result of his genuine, but incorrect belief that he had three years within which to file his returns.<sup>8</sup> He was also unable to timely file some of his returns due to matters largely beyond his control. However, one would expect an individual with Applicant's age and experience to have hired a professional to assist him in preparing and filing his returns. By failing to take this otherwise prudent step, Applicant created the financial problems at issue that raised questions about his continued eligibility for access to classified information.

Applicant, however, did take concrete, responsible action to address and resolve his past tax issues and avoid similar problems in the future. He filed the 2010 tax returns, which were originally due in 2011, a year later in 2012. This is the only tax year for which he owed federal taxes and he paid that debt in 2012. He did not owe federal taxes for the other tax years at issue and, more importantly, after being made aware that he was mistaken as to the tax filing requirement, secured the assistance of a professional and filed his overdue federal tax returns. He also addressed his overdue state tax filings. The record evidence reflects that he currently manages his personal finances in a responsible manner and has taken the necessary steps to meet all his financial obligations going forward, including the obligation to file his tax returns and pay his taxes.<sup>9</sup> After thoroughly reviewing and considering the record evidence, I find that AG ¶¶ 20(a) through 20(d) apply, either in full or in part, and together with the whole-person factors noted herein mitigate the security concerns at issue.

### **Whole-Person Concept**

Under the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of an applicant's conduct and all the relevant circumstances. An administrative judge should consider the

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<sup>8</sup> I found Applicant's testimony on this issue credible. His testimony was wholly consistent with the record evidence. Notably, the IRS account transcripts reflect that for all the years in question, except one, Applicant was owed a sizeable refund and he filed all the returns at issue within three years. Applicant also submitted documentation with his Answer reflecting the type of information he reviewed from official U.S. Government websites, which could lead a reasonable person to be misled as to when a tax return is due when s/he expects a refund. Moreover, I had an opportunity to observe Applicant's demeanor at hearing and found him credible.

<sup>9</sup> *Contrast with* ISCR Case No. 15-03481 (App. Bd. Sep. 27, 2016) (resolution of overdue tax filing alone insufficient to mitigate heightened security concerns, where no evidence of financial reform or extenuating circumstances to explain the late filing); ISCR Case No. 14-00221 (App. Bd. June 29, 2016) (same); ISCR Case No. 15-01031 (App. Bd. June 15, 2016) (same).

non-exclusive factors listed at AG ¶ 2(a). I hereby incorporate my above analysis and highlight some additional whole-person factors.

Applicant's past financial problems were not the result of frivolous or reckless spending. He was not trying to evade paying his taxes or deliberately violating the law. Instead, he incorrectly conflated the time period allowed for claiming a refund before it is forfeited and when a tax return must be filed. He voluntarily disclosed the information regarding his overdue tax returns on his security clearance application and, during the processing of his case, provided extensive tax documents, notably, his IRS account transcripts and his state tax returns. This level of cooperation and candor provides some measure of assurance that the Government can continue to entrust him with the responsibility of properly discharging his security obligations, including the duty to disclose potentially adverse information. Additionally, in assessing Applicant's judgment, reliability, and other pertinent character traits, I extended favorable consideration to his years of service, both in and out uniform, good employment record, favorable character reference, and community involvement.

After weighing the evidence, both favorable and unfavorable, I find that Applicant met his heavy burden of persuasion. He mitigated the security concerns at issue and established his eligibility for continued access to classified information.

### **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):	FOR APPLICANT
Subparagraphs 1.a – 1.c:	For Applicant
Paragraph 2, Guideline B (Foreign Influence):	WITHDRAWN
Subparagraphs 2.a and 2.b:	Withdrawn

### **Conclusion**

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

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Francisco Mendez  
Administrative Judge