



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



In the matter of:	)	
	)	
REDACTED	)	ISCR Case No. 16-02145
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Nicole A. Smith, Esq., Department Counsel  
For Applicant: *Pro se*

08/03/2017

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**Decision**

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MENDEZ, Francisco, Administrative Judge:

Applicant did not present sufficient evidence to mitigate security concerns raised by his tax-related financial problems. Clearance is denied.

**Statement of the Case**

On September 6, 2016, the Department of Defense (DoD) Consolidated Adjudications Facility (CAF) sent Applicant a Statement of Reasons (SOR) alleging security concerns under the financial considerations guideline. Specifically, the SOR alleged that Applicant failed to file his federal income tax returns for tax years 2012, 2013, and 2015.

On September 30, 2016, Applicant answered the SOR (Answer), admitting that he had failed to file the tax returns for the years in question. He also provided documentation showing that, a few days after receiving the SOR, he filed the late returns. He requested a determination on the administrative (written) record.

On October 19, 2016, Department Counsel sent Applicant the Government's written case, known as a file of relevant material (FORM). On November 28, 2016, the Defense Office of Hearings and Appeals received Applicant's FORM Response.

On July 1, 2017, I was assigned Applicant's case. After receiving confirmation of Applicant's continued sponsorship for a security clearance, I reopened the record to provide the parties an opportunity to provide updated information.<sup>1</sup> Neither side submitted additional matters, and the record closed on July 28, 2017.

### **Evidentiary Ruling**

Department Counsel offers Items 1 – 5 for admission into the administrative record. These exhibits were forwarded to Applicant with the FORM. Item 4 is a summary of Applicant's security clearance interview. Applicant contests the thoroughness of the background investigation and claims the security clearance investigator who prepared the summary of interview was unprofessional. (Response at 2-3.) I interpret Applicant's comments as an objection to Item 4. Specifically, Applicant raises a question as to the accuracy and reliability of the exhibit, and calls attention to the Government's failure to lay a proper foundation (authentication) for the exhibit's admission. Applicant's objection to Item 4 is sustained.<sup>2</sup> Applicant did not raise any other objections and, therefore, the remaining exhibits (Items 1-3, and 5) are admitted.<sup>3</sup>

### **Findings of Fact**

Applicant, 63, earned a bachelor's degree in 1981. He attended college from 2003 to 2007, but did not earn an additional degree. He was first granted a security clearance in 1987, and has been employed as a federal contractor since at least 2004. He began working for his current employer in approximately February 2013.

Applicant, in response to relevant questions, reported on his June 2015 security clearance application that he had not paid his 2011 federal income taxes totaling over \$4,000. He also reported failing to file his federal income tax returns for 2012 and 2013. He noted that missing receipts and the complicated nature of the returns were the root causes for the delay, but claimed to be working on the issue to resolve it. The following year, Applicant did not file his 2015 tax return by the April 15<sup>th</sup> deadline.<sup>4</sup>

On or about September 28, 2016, Applicant filed his 2012, 2013, and 2015 federal and state tax returns. He admits that he filed these tax returns late. His tax

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<sup>1</sup> Confirmation of Applicant's continuing sponsorship for a security clearance and the email sent to the parties reopening the record were marked as Appellate Exhibits I and II, respectively.

<sup>2</sup> E.O. 10865, § 5 (investigative reports (ROIs) are inadmissible in due process proceedings without an authenticating witness); Directive, ¶ E3.1.20 (similar). See also ISCR Case No. 15-01807 (App. Bd. Apr. 19, 2017) (the portion of an ROI summarizing a security clearance interview is admissible unless an objection is raised or there is some evidence indicating the summary contains inaccurate information).

<sup>3</sup> Applicant's Answer, to include the exhibits he forwarded with the Answer, were included with the FORM and marked as Item 2.

<sup>4</sup> Item 3 at 41-42. Since Applicant admits in his Answer and Response that he filed his 2015 federal return late, he apparently did not apply for an automatic four-month extension to file the return. Also, non-alleged matters, such as Applicant's failure to timely pay his 2011 federal income taxes, were only considered for the limited purpose of assessing mitigation and conducting a whole-person analysis.

returns indicate that his adjusted gross income for the three years in question was between \$144,000 and \$148,000. He claims that several personal and professional issues, notably, health concerns, as well as the complicated nature of the returns, negatively impacted his ability to timely file his tax returns. He, however, acknowledges that his failure to properly manage his finances and monitor his tax filing obligations were also to blame for his failure to timely file his returns.<sup>5</sup>

Applicant was able to prepare and his 2012, 2013, and 2015 tax returns using a commercially available tax software program. His returns indicate that he was supposedly owed refunds in 2012 and 2015.<sup>6</sup> The returns also indicate that he owed approximately \$1,600 for tax year 2013. He presented no evidence that the returns were accepted by the IRS, or that he satisfied the taxes owed for 2013.

### **Law, Policies, and Regulations**

This case is decided under Executive Order (E.O.) 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) implemented on June 8, 2017, through Security Executive Agent Directive 4 (SEAD-4).

“[N]o one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). Instead, persons are only eligible for access to classified information “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. 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. AG ¶ 2.

Department Counsel must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.14. See e.g. ISCR Case No. 15-05565 (Aug. 2, 2017) (Board reversed favorable decision where Department Counsel failed to present evidence to substantiate allegations, which applicant had denied). 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.

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<sup>5</sup> Answer (“I agree and do not deny that these 2012, 2013, and 2015 personal tax returns have been delinquent. Just this week, I was able to calculate and compose all three returns for submission directly to the IRS. . . . Admittedly, I do need to discipline my own record-keeping, financial management, and tax filing obligations.”)

<sup>6</sup> Applicant’s 2012 tax return and anticipated refund appears to be based, in part, on the IRS accepting his claim of charitable deductions (cash contributions) totaling nearly \$10,000. (Item 2 at 63.)

Administrative Judges must remain fair and impartial, and conduct all hearings in a timely and orderly manner. Judges must carefully balance the needs for the expedient resolution of a case with the demands of due process. Therefore, an administrative judge will ensure that an applicant: (a) receives fair notice of the issues, (b) has a reasonable opportunity to address those issues, and (c) is not subjected to unfair surprise. Directive, ¶ E3.1.10; ISCR Case No. 12-01266 at 3 (App. Bd. Apr. 4, 2014).

In evaluating the evidence, a judge applies a “substantial evidence” standard, which is something less than a preponderance of the evidence. Specifically, substantial evidence is defined as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record.” Directive, ¶ E3.1.32.1.

Any doubt raised by the evidence must be resolved in favor of the national security. AG ¶ 2(b). See *also* SEAD-4, ¶ E.4. Additionally, the Supreme Court has held that responsible officials making “security clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531.

A person who seeks 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. 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**

Applicant’s failure to timely file his federal income tax returns raises the financial considerations security concern, which is explained at AG ¶ 18:

Failure to . . . 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 or sensitive information. . . .

In assessing Applicant’s case, I considered all pertinent disqualifying and mitigating conditions, including the following:

AG ¶ 19(c): a history of not meeting financial obligations;

AG ¶ 19(f): failure to file . . . annual Federal, state, or local income tax returns . . . as required;

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 . . . and the individual acted responsibly under the circumstances;

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;

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

AG ¶ 20(g): the individual has made arrangements with the appropriate tax authority to file or pay the amount owed and is in compliance with those arrangements.

An applicant who fails to timely file or pay his or her taxes, a basic and fundamental financial obligation of all citizens, bears a heavy burden in mitigating the financial considerations security concern.<sup>7</sup> An administrative judge should closely examine the circumstances giving rise to an applicant's tax-related issues and his or her response to it. Furthermore, an applicant's claim of financial reform must be weighed against the overriding concerns about the individual's lack of judgment and history of not abiding by rules and regulations in failing to timely file or pay their taxes.<sup>8</sup>

Here, Applicant presented documentary proof the he filed his late tax returns. However, he did so only after receiving the SOR, which decreases the mitigating value that can be attached to such remedial action. Moreover, Applicant did not submit evidence from which I can find that his late tax filings were an aberrational event or that it is unlikely to reoccur. To the contrary, Applicant's failure to timely file his 2015 federal income tax return after submitting a security clearance application, wherein he claimed to be working on resolving past tax issues, evidences a disregard for his legal tax filing obligation. In short, Applicant's past failure to timely file his federal income tax returns continues to raise questions about his present judgment, reliability, and trustworthiness.

Furthermore, although Applicant's tax returns may have been complicated, such does not excuse his repeated failure to timely file his tax returns. He clearly earned a sufficient income to hire a tax professional to assist with their preparation and filing. He elected not to do so. Instead, he only took corrective action after it became evident that

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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).

<sup>8</sup> ISCR Case No. 14-05794 (App. Bd. July 7, 2016); ISCR Case No. 14-00221 (App. Bd. June 29, 2016); ISCR Case No. 15-01031 (App. Bd. June 15, 2016); ISCR Case No. 12-09545 (App. Bd. Dec. 21, 2015).

the six-figure salary he was commanding as a contractor for the federal government – a job dependent on maintaining a security clearance – was placed in jeopardy due to his failure to file his tax returns. He then, a few days after receiving the SOR, prepared and filed the returns by himself using readily available commercial software. Applicant's ability to so quickly remedy the issue undercuts his claims that the reason for the delay was the tax returns purported complicated nature and points to a potentially far more significant underlying issue(s) for the late filing of the returns.<sup>9</sup>

Under the circumstances presented by this case, I find that Applicant failed to establish any of the above-listed mitigating conditions. I also find that he failed to meet his heavy burden of proof and persuasion to continue his eligibility for a security clearance. The security concerns raised by his past failure to timely file his federal income tax returns remain. ISCR Case No. 14-02930 at 3 (App. Bd. Dec. 9, 2015) ("The filing of tax returns is both a financial and a legal obligation. Applicant's admitted failure to have done so for many years is sufficient to raise a concern that he may be unwilling to follow other rules and regulations, such as those that govern the handling of classified information.")<sup>10</sup> Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility for continued access to classified information.<sup>11</sup>

### **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**

Subparagraph 1.a:      **Against Applicant**

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<sup>9</sup> ISCR Case No. 10-05909 (App. Bd. Sep. 27, 2012) (judge properly considered the manner in which and the timing of when applicant took action to resolve financial issues in concluding that the impending security clearance process was the major motivating factor).

<sup>10</sup> See *a/so* ISCR Case No. 15-03481 (App. Bd. Sep. 27, 2016) (applicant's resolution of alleged financial issue (filed overdue tax returns) was insufficient to mitigate security concerns, because no extenuating circumstances to explain late tax filing and lack of evidence of financial reform).

<sup>11</sup> In reaching this conclusion, I considered the whole-person factors in AG ¶ 2(d), including that Applicant has held a security clearance for over 30 years and self-reported the information at issue, as well as other potentially adverse information. (Item 3 at 12, 15, 41-43.) Also, in light of Applicant's request for a probationary clearance, I considered the exceptions listed in SEAD-4, Appendix C. However, I do not find that any of the exceptions are warranted in this case. See *generally* SEAD-4, ¶ E.3 and AG ¶ 2(h); *contrast with* ISCR Case No. 10-03646 at 2 (App. Bd. Dec. 28, 2011) (under previous version of the guidelines, judges had "no authority to grant an interim, conditional or probationary clearance.")

## **Conclusion**

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

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Francisco Mendez  
Administrative Judge