



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



In the matter of:

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ISCR Case No. 16-01211

Applicant for Security Clearance

**Appearances**

For Government: Ross Hyams, Esq., Department Counsel

For Applicant: Art Sharpe, Personal Representative

03/07/2018

**Decision**

TUIDER, Robert, Administrative Judge:

Applicant mitigated security concerns pertaining to Guideline F (financial consideration). Clearance is granted.

**Statement of the Case**

On January 26, 2015, Applicant completed and signed a Questionnaire for National Security Positions (SF-86). On September 15, 2016, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) to Applicant under 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 for Determining Eligibility for Access to Classified Information*, which became effective on September 1, 2006 (Sept. 1, 2006 AGs).

The SOR detailed reasons why the DOD CAF did not find under the Directive that it is clearly consistent with the interests of national security 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 guideline.

On October 14, 2016, Applicant answered the SOR. On December 20, 2016, Department Counsel was prepared to proceed. On April 25, 2017, the Defense Office of Hearings and Appeals (DOHA) assigned the case to me. On May 18, 2017, DOHA issued a notice of the hearing, setting the hearing on June 13, 2017. The hearing was held as scheduled.

At the hearing, Department Counsel offered Government Exhibits (GE) 1 through 6, which were received into evidence without objection. Applicant testified and offered Applicant Exhibits (AE) A through F, which were received without objection. I held the record open until July 28, 2017, to afford Applicant the opportunity to submit additional evidence. Applicant timely submitted AE G, which was received without objection. On June 21, 2017, DOHA received the hearing transcript (Tr.).

While this case was pending a decision, the Director of National Intelligence issued Security Executive Agent Directive 4, establishing *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AGs) which he made applicable to all covered individuals who require initial or continued eligibility for access to classified information or eligibility to hold a sensitive position. The new AGs supersede the Sept. 1, 2006 AGs and are effective “for all covered individuals” on or after June 8, 2017. Accordingly, I have evaluated Applicant’s security clearance eligibility under the new AGs, as required.<sup>1</sup>

### **Findings of Fact<sup>2</sup>**

Applicant did not specifically admit or deny the sole SOR allegation, but rather provided an explanation with attachments. Accordingly, I am treating his narrative response as an admission. Additional findings of fact follow.

### **Background Information**

Applicant is a 65-year-old senior logistics analyst employed by a defense contractor since December 2013. (Tr. 14-15) He seeks to retain his secret security clearance which is a requirement of his continued employment. Since 1974, Applicant has successfully held a security clearance at various levels to include a top secret security clearance with access to sensitive compartmented information. (Tr. 17-18, 25)

Applicant graduated from high school in 1971. He was awarded a bachelor of science degree in chemistry in 1975, and was awarded a master of science degree in management in 1989. See Applicant’s resume for additional course work and service schools. (Tr. 15-16, 40-43; AE C) Applicant served in the U.S. Army from 1976 to 1997, and retired with an honorable discharge as a lieutenant colonel (pay grade O-5). (Tr. 16, 20-21; AE C) Following his Army career, he was employed primarily in the defense

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<sup>1</sup> The new AGs are available at [http://ogc.osd.mil/doha/SEAD4\\_20170608.pdf](http://ogc.osd.mil/doha/SEAD4_20170608.pdf).

<sup>2</sup> Some details were excluded to protect Applicant’s right to privacy. Specific information is available in the cited exhibits.

industry in the private or public sectors. (Tr. 22-25; AE C) Applicant married in 1978 and divorced in 2000. He remarried in 2005, and has two adult stepdaughters. Applicant's wife had a successful banking career in a management positions, and no longer works outside the home. (Tr. 16-17, 28-29, 38-39, 57-58; AE E)

## **Financial Considerations**

The SOR alleges a sole allegation under this concern, a 2013 \$54,507 Federal tax lien. This tax lien arose from Applicant's failure to file his Federal tax returns from 2002 to 2005. (Tr. 18-20) This allegation was established through Applicant's admission and the evidence presented. (SOR answer; GE 1-5)

During this timeframe, Applicant was in the midst of a very contentious and costly divorce, and he lost his mother, father, grandmother, and brother-in-law. Moreover, while all of this was going on, he was doing his level best to stay focused on a demanding defense-related job that involved a daily three-hour commute. The cumulative effect of these factors caused his health to suffer and led him to a state of depression and anxiety and "things just slipped." (SOR answer; Tr. 26-28, 56-57)

Upon receipt of the IRS tax lien, Applicant hired a tax relief firm (TRF). He sent the TRF all requested documents and a \$3,950 fee. In January 2014, the TRF notified Applicant that the IRS closed out his account as currently not collectible for tax years 2000 to 2005. The TRF explained that the IRS deemed Applicant unable to pay the debt and notified him that they were closing his file. Applicant hired the TRF because he wanted "complete closure with everything resolved and finalized." The TRF company president informed him that he need not be concerned because the statute of limitations would run out before the IRS could take any further action. That information proved to be incorrect and led to a falling out between the TRF and Applicant. (SOR answer; Tr. 28-30, 43-46, 48-50)

As of May 2016, the IRS had recalculated the amount Applicant owed to be \$35,370. After his fallout with the TRF, Applicant worked directly with the IRS. To avoid a levy against all of his income, Applicant paid the IRS \$2,891 reducing the amount owed to \$32,749. He set up a payment plan and is paying the IRS \$1,600 monthly by direct debit. In addition to the monthly payment by direct debit, Applicant paid \$4,600 to the IRS in October 2016. As of October 2016, the amount owed to the IRS had been reduced to \$27,880. (SOR answer; Tr. 30, 46-48, 50-52, 55-56)

Although Applicant set up a payment plan, he challenged the 30% tax rate the IRS assessed him for tax years 2002 to 2005 claiming that he was historically assessed a tax rate at 18-20%. The higher assessment was apparently based on Applicant's filing status being listed as married filed separately when he should have been listed as single. Applicant was unaware that his filing status was incorrect. While continuing to make monthly payments, Applicant plans to appeal the penalties assessed, the applied tax rate, and statute of limitations issue. (SOR answer; Tr. 33- 35; AE F) As of his hearing, Applicant had reduced his debt to the IRS to about \$16,139. (Tr. 31-32, 32-36, 48, 53-54; AE A)

Applicant has not missed filing his tax returns since 2004. He is current on all of his debts and his credit score is 783. Should Applicant be unsuccessful in challenging his tax arrearage, he has the means to continue making his agreed payments. (Tr. 36-37; AE B, AE F) He is happily married, and the marital discord and personal tragedies he experienced in the past are behind him. Applicant leads a lifestyle consistent with his income level. (Tr. 37-39, 52-53, 57; AE D) Post-hearing, Applicant provided documentation that he filed his 2002 to 2005 Federal tax returns. (Tr. 58-59; AE G)

## **Character Evidence**

Applicant submitted a detailed resume that documents over 40 years of service in support of the national defense, initially as a career Army officer and later as a defense contractor and a Government employee. He received the highest ratings possible on his recent performance evaluations. (Tr. 39, 54-55; AE C)

## **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 in this decision should be construed to suggest that it is based, 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 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 for financial problems:

Failure 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 or sensitive information. . . . An individual who is financially overextended is at greater risk of having to engage in illegal or otherwise questionable acts to generate funds. . . .

The Appeal Board explained the scope and rationale for the financial considerations security concern in ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012) (citation omitted) as follows:

This concern is broader than the possibility that an applicant might knowingly compromise classified information in order to raise money in satisfaction of his or her debts. Rather, it requires a Judge to examine the totality of an applicant’s financial history and circumstances. The Judge must consider pertinent evidence regarding the applicant’s self-control, judgment, and other qualities essential to protecting the national secrets as well as the vulnerabilities inherent in the circumstances. The Directive

presumes a nexus between proven conduct under any of the Guidelines and an applicant's security eligibility.

AG ¶ 19 includes three disqualifying conditions that could raise a security concern and may be disqualifying in this case: "(a) inability to satisfy debts;" "(c) a history of not meeting financial obligations;" and "(f) failure to . . . to pay annual Federal . . . income tax as required."

Applicant did not pay his Federal income taxes for tax years 2002 to 2005 that led to a \$54,507 tax lien. Based on this and other information in the SOR, the record established the disqualifying conditions in AG ¶¶ 19(a), 19(c), and 19(f) requiring additional inquiry about the possible applicability of mitigating conditions.

AG ¶ 20 lists seven potential mitigating conditions:

(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, a death, divorce or separation, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances;

(c) the individual has received or is receiving financial counseling for the problem from a legitimate and credible source, such as a non-profit credit counseling service, and there are clear indications that the problem is being resolved or is under control;

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

(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;

(f) the affluence resulted from a legal source of income; and

(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.

AG ¶¶ 20(d), (e) and (g) are fully applicable. When Applicant realized that he had tax issues, he retained the services of a TRF, but unfortunately, they failed to solve his IRS tax problems. Following this failed effort, Applicant chose to deal directly with the IRS

and entered into an agreement to pay them \$1,600 a month. He is making that payment through direct debit and as of his hearing had reduced a debt that started out at \$54,507 to \$16,139. Applicant is committed to resolving this debt, has a plan in place, and has the means to continue monthly payments to the IRS until this debt is paid. Applicant is current on his other debts, lives within his means, and has an excellent credit rating.

Failure to file Federal tax returns and failure to pay annual Federal income tax is a serious security concern. Under these facts, application of AG ¶ 20(a) initially appears limited because there are multiple income tax returns at issue and repayment of taxes is ongoing. Applicant is aware of his obligations to remain current on his Federal income taxes. Apart from this four-year tax filing gap, he has never failed to file his tax returns before or since. Consequently, I find AG ¶ 20(a) applies. Moreover, Applicant is genuinely contrite over his laxity and oversight. He has taken the appropriate corrective action. Evidence of his Federal tax return filings was introduced. Applicant's tax situation is now under control.

Applicant fell behind on filing his Federal tax returns for four years, primarily because of a plethora of personal problems. 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) (emphasis in original). 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. Jun. 15, 2016)

In ISCR Case No. 15-01031 at 2 (App. Bd. Jun. 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 when the tax returns were filed in ISCR Case No. 15-01031 (App. Bd. June 15, 2016), the Appeal Board provided the following principal rationale for reversing the grant of a security clearance, “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. Jun. 15, 2016) (citations omitted).

On June 8, 2017, the new AGs went into effect. In 2016, Applicant “made arrangements with the appropriate tax authority to file [all required federal income tax returns] . . . and is in compliance with those arrangements.” AG ¶ 20(g). Based on consideration of his credibility, contrition, and new understanding of his responsibilities, there is sufficient assurance that his financial problems are being resolved, are under control, and will not recur in the future. Under all the circumstances, financial considerations security 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(d):

(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), “[t]he ultimate determination” of whether to grant a security clearance “must be an overall commonsense judgment based upon careful consideration” of the guidelines and the whole-person concept. My comments under Guideline F are incorporated in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under that guideline but some warrant additional comment.

Applicant is a 65-year-old senior logistics analyst who has been employed by a defense contractor since December 2013. He has worked in support of the national defense over 40 years and has successfully held a security clearance to include top secret with access to sensitive compartmented information during that entire timeframe. His



civilian employer noted his excellent performance and the contribution he is making toward the national defense.

Shortly after the IRS contacted Applicant about his tax issues, he sought professional help with the TRF. When the TRF failed to obtain the desired results, Applicant chose to deal directly with the IRS and set up a payment plan. He is not proud of his delay in filing required tax returns and it is clear that that this failure in an otherwise stellar record of lifetime service, will not happen again. This process has had a sobering effect on Applicant and I am confident that he will endeavor to file timely his tax returns in the future.

I have carefully applied the law, as set forth in *Egan*, Exec. Or. 10865, and the new AGs, to the facts and circumstances in the context of the whole person. I conclude that financial consideration security concerns are 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:	FOR APPLICANT
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Subparagraphs 1.a:	For Applicant
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### **Conclusion**

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

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ROBERT TUIDER  
Administrative Judge