



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



In the matter of: )  
)  
) ISCR Case No. 16-01298  
)  
Applicant for Security Clearance )

**Appearances**

For Government: David Hayes, Esq., Department Counsel  
For Applicant: *Pro se*

02/09/2018

**Decision**

TUIDER, Robert, Administrative Judge:

Applicant mitigated security concerns regarding Guideline F (financial considerations). Clearance is granted.

**Statement of the Case**

On May 7, 2015, Applicant submitted a Questionnaire for National Security Positions (SF-86). On September 30, 2016, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued an SOR to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended; and the adjudicative guidelines (AG) promulgated by the President on December 29, 2005.

The SOR alleged security concerns under Guideline F (financial considerations). The SOR detailed reasons why the DOD CAF was unable to find that it is clearly consistent with the national interest to grant a security clearance for

Applicant, and it recommended that his case be submitted to an administrative judge for a determination whether his clearance should be granted.

On January 9, 2017, Applicant responded to the SOR. On February 1, 2017, Department Counsel was ready to proceed. On February 6, 2017, the Defense Office of Hearings and Appeals Office (DOHA) assigned Applicant's case to me. On March 2, 2017, DOHA issued a hearing notice, setting the hearing for March 16, 2017. Applicant's hearing was held as scheduled. At the hearing, Department Counsel offered Government Exhibits (GE) 1 through 5, which were received into evidence without objection. Applicant testified, but did not call witnesses, and did not offer any exhibits.

I held the record open until April 14, 2017, to afford Applicant the opportunity to submit evidence. Applicant timely submitted Applicant Exhibits (AE) A through H, which were received into evidence without objection. On March 24, 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 September 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**

In his SOR answer, Applicant admitted all of the allegations and attached mitigating documentation. Applicant's answers are incorporated as findings of fact. After a thorough review of the evidence, I make the following additional findings of fact.

### **Background Information**

Applicant is a 40-year-old electrical planner employed by a defense contractor since June 2007. He seeks a secret security clearance to enhance his position within the company. (GE 1, Tr. 10-12)

Applicant graduated from high school in 1994. He served in the U.S. Navy from January 1995 to April 1998, and received a general discharge under honorable conditions. (GE 1, Tr. 12-16) Applicant was married from 1994 to 2000, and that marriage ended by divorce. He has six minor children with five different mothers and

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<sup>1</sup> The new AGs are available at [http://ogc.osd.mil/doha/5220-6\\_R20170608.pdf](http://ogc.osd.mil/doha/5220-6_R20170608.pdf).

pays child support for his three oldest children. As of his hearing, Applicant stated that he had a fiancé who lived with him. She is employed full-time as an electrician at a shipyard. However, when Applicant submitted his post-hearing documents, he included his "spouse's" income in his monthly budget. (GE 1, GE 2; AE B; Tr. 16-23, 47-49)

Applicant's annual salary is \$69,020 and he earns \$700 to \$1,500 a year as a part-time instructor. (Tr. 21-22) Applicant is paying \$304 a month in child support for his oldest child, \$359 a month for his second oldest child, and \$546 a month for his third oldest child, for a total of \$1,209 in monthly child support payments. His take-home pay is \$638 a week, four times a month. Applicant has informal support arrangements with the mothers of his three youngest children. (Tr. 23-25) Applicant's monthly rent is \$1,200. (Tr. 26) Applicant's post-hearing budget is discussed *infra*.

### **Financial Considerations**

Applicant's SOR lists nine allegations under this concern: 1.a. – child support collection account for \$5,019; 1.b – a medical collection account for \$328; and 1.c. – a September 2014 Federal tax lien for \$30,456; and 1.d through 1.i – that he failed to file and pay his Federal taxes for 2005 to 2009 and 2012. These allegations are established through the Government's exhibits (GE 1 – 5)

Since November 2012, Applicant has been paying his child support arrearage through wage garnishment. As of his hearing, Applicant estimated that he still owed approximately \$3,000. (SOR answer; Tr. 32-35, 49, 54; SOR ¶ 1.a) **DEBT BEING RESOLVED.**

As of his hearing, Applicant had not determined the identity of the medical collection account creditor. However, post-hearing, he had identified this creditor and submitted a receipt for \$328 documenting payment in full for this account. (GE 3; AE C; Tr. 35-37, 59-61; SOR ¶ 1.b) **DEBT RESOLVED.**

Applicant took out a loan in September 2016 to pay off his \$30,456 Federal tax lien. He submitted IRS Form 668, Certificate of Release of Federal Tax Lien, dated January 3, 2017, that documents that his tax lien was satisfied. The Release reflected tax arrears for the years 2006, 2008, 2009, 2010, and 2011 were satisfied. (SOR answer; Tr. 27-29; SOR ¶ 1.c) **DEBT RESOLVED.**

Applicant has never denied that he failed to file and pay his Federal income taxes. (SOR answer; Tr. 40-41) He testified that he "got some bad advice" from a coworker. He was trying to find someone "good" to file his taxes and unfortunately, his coworker advised him that he did not need to file his taxes "right away." That advice proved to be wrong and costly for Applicant. Applicant did not realize the extent of his problems until the IRS contacted him. In 2009, he hired a tax preparer who was an "old school friend" to file all of his tax returns for 2005 to 2009. Applicant did not have the money to pay all of his back taxes and the IRS filed a tax lien in 2014 for

arrearages. To prevent future tax withholding problems, Applicant files as single with zero dependents. (Tr. 37-40, 45-46, 51-52, 56-59) Applicant asked the Government to forgive him for his mistake and noted that he did everything he could to correct his tax situation once he became aware of the problem. Having gone through this experience, Applicant has a thorough understanding of his tax filing requirements and is committed to never falling behind on future tax filing obligations. (Tr. 61)

The SOR alleged that Applicant did not file and pay his 2012 Federal tax return. He self-reported 2012 by “mistake” when completing his SF-86. Applicant testified that his tax preparer lost his return “when his computer went down.” After “drop[ping] the ball,” the tax preparer resubmitted Applicant’s 2012 return and his tax arrearage was paid in 2016 along with the other tax arrearages. (Tr. 42-44, 49-51, 54)

Applicant’s Federal taxes are current. Post-hearing, he submitted his IRS tax transcript dated April 13, 2017, documenting that his 2016 taxes were filed, and that he received a \$4,710 refund. No other arrearages for previous tax years were noted on the transcript. (AE A; Tr. 44-45) **FEDERAL TAXES ARE RESOLVED.**

Department Counsel thoroughly questioned Applicant on the tax issues. Applicant never wavered in his responses nor did he give me any indication that he was being untruthful. Having had a chance to observe Applicant’s demeanor and listen to his testimony, I found him to be credible, albeit mistaken, on the requirement to file federal income taxes.

Post-hearing, Applicant submitted a monthly budget that he has a net monthly remainder of \$1,114. His budget also factors into account his spouse’s income. His budget further reflects that Applicant is living a modest lifestyle and lives within his means. (AE B)

## **Character Evidence**

Applicant submitted two work-related reference letters and recent performance evaluations. His superiors view him as a valued employee. One of his references described him as “always willing to go the extra mile” and that he is “honest and reliable.” Both references recommend Applicant for a security clearance. The other reference described Applicant’s community involvement as a volunteer basketball coach adding that he is not only a coach, but also a mentor to the players. His evaluations reflect consistent top-notch performance. (AE D - H)

## **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. See also Executive Order 12968 (Aug. 2, 1995), § 3.1. Thus, nothing in this Decision 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 (4<sup>th</sup> 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 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 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 file . . . annual Federal . . . income tax returns or failure to pay annual Federal . . . income tax as required.” The record establishes these disqualifying conditions, requiring additional inquiry about the possible applicability of mitigating conditions.

Applicant did not timely file his Federal income tax returns for tax years 2005 to 2009 and 2012. A willful failure to timely prepare (means complete and file with the IRS) a federal income tax return is a misdemeanor-level federal criminal offense.<sup>2</sup> For

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<sup>2</sup> Title 26 U.S.C. § 7203, willful failure to file return, supply information, or pay tax, reads:

purposes of this decision, I am not weighing Applicant's failure to file timely his Federal income tax returns against him as a federal crime, since his actions were not alleged under the criminal conduct AG. 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

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Any person . . . required by this title or by regulations made under authority thereof to make a return, keep any records, or supply any information, who willfully fails to . . . make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor . . . .

A willful failure to make return, keep records, or supply information when required, is a misdemeanor without regard to existence of any tax liability. *Spies v. United States*, 317 U.S. 492 (1943); *United States v. Walker*, 479 F.2d 407 (9<sup>th</sup> Cir. 1973); *United States v. McCabe*, 416 F.2d 957 (7<sup>th</sup> Cir. 1969); *O'Brien v. United States*, 51 F.2d 193 (7<sup>th</sup> Cir. 1931).

(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.

Applicant has resolved or is resolving his SOR debts. AG ¶ 20(d) is applicable to all of the SOR allegations. The remainder of this analysis will primarily focus on Applicant's failure to timely file his Federal income tax returns from 2005 to 2009 and 2012, the most significant security concern alleged. Under these facts, application of AG ¶ 20(a) initially appears limited because the multiple income tax returns at issue were for recent years and his other debts have been ongoing until recently. Now apprised of the importance of filing tax returns, even when a refund is expected, Applicant is aware of his obligations in that regard. He promised to seek professional guidance in the future and to file his Federal tax returns on time, as required. 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 and payment of tax arrearages was introduced. The situation is now under control and AG ¶ 20(g) applies.

Applicant believed he was not required to file his Federal tax returns for all of those tax years. 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 2009, shortly after learning of the requirement to file tax returns, regardless of whether he was owed a refund, 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 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 40-year-old electrical planner employed by a defense contractor since June 2007. He has worked the majority of his adult working life in the defense industry, and having a clearance will enhance his ability to contribute further. His employer values him as an employee and supports him for a security clearance.

Once Applicant became aware that he was required to file Federal income tax returns, regardless of whether he was owed a refund, he took prompt corrective action by taking out a loan to pay his tax arrearages. He is current on the filing of all of his income tax returns. I agree with Applicant’s admission of negligence. Applicant’s error in judgment is less serious because it was not motivated by a desire to withhold funds due to the IRS or having a *laissez faire* attitude. This process had a sobering effect on Applicant and I am confident that he will endeavor to timely file and his taxes 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. It is clearly consistent with the interests of national security to grant Applicant security clearance eligibility.

### **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 – 1.i:	For Applicant
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### **Conclusion**

In light of all of the record as a whole, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Clearance is granted.

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ROBERT TUIDER  
Administrative Judge