



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



In the matter of:	)	
	)	
REDACTED	)	ISCR Case No. 16-01804
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Daniel F. Crowley, Esq., Department Counsel  
For Applicant: Aileen Xenakis, Esq.

01/22/2018

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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 problems. He filed and paid his taxes on time until 2012, when his then three-year-old daughter was forcibly sodomized and raped by a daycare employee. Over the next two years, Applicant and his wife focused on caring for their daughter. They disregarded some of their financial obligations, including preparing and filing their tax returns. Applicant addressed his overdue tax filings and tax debt by securing the services of an accounting firm in 2014. He filed his overdue tax returns and paid his taxes. He self-reported the information on his security clearance application and fully cooperated with the ensuing security clearance investigation, including voluntarily providing his tax returns and IRS account transcripts. His financial situation is under control and it is unlikely that similar financial issues will recur. Clearance is granted.

**Statement of the Case**

On February 10, 2017, the Department of Defense (DoD) issued a Statement of Reasons (SOR) alleging security concerns under the financial considerations guideline. Applicant answered the SOR and requested a hearing.

On December 19, 2017, a date mutually agreed to by the parties, a hearing was held. Applicant testified and the exhibits offered by the parties were admitted into the

administrative record without objection. (Government Exhibits 1 – 3; Applicant's Exhibits A – F.) The transcript was received on December 27, 2017.<sup>1</sup>

After the hearing, I informed both sides my intent to resolve the case through summary decision unless an objection was raised. See *generally* ISCR Case No. 15-03176, n.2 (App. Bd. May 26, 2017) (providing a benchmark for when summary disposition is warranted). Department Counsel objected to a summary decision.<sup>2</sup>

### **Findings of Fact**

Applicant, 46, earned his bachelor's degree in information systems operations management in 2009. He is currently employed in that field. He leads a team of professionals providing cybersecurity services to federal agencies. He received his initial security clearance in 2008. He has not had any security violations or infractions.<sup>3</sup>

Applicant has been with his current employer for nearly seven years. His recent performance review reflects that he is a positive leader who mentors other employees. Coworkers and social references submitted letters noting Applicant's patriotism, integrity, trustworthiness, and overall good character.<sup>4</sup> One of Applicant's coworkers describes Applicant as a person who holds and exhibits actions deeply rooted values.<sup>5</sup>

Applicant and his wife have been married for nearly 20 years. They have three children, twin 8 year olds and a 13-year-old. Applicant's children are the focus of his life. He volunteers his time to help coach his sons' sports teams and does not miss a game unless there is a conflict with his daughter's gymnastics. Applicant is also active in his church. He has been a member of the same church for about 15 years and is part of the men's choir. He is a self-taught bass player.<sup>6</sup>

In 2012, Applicant's then three-year-old daughter was sexually assaulted at a home-based daycare.<sup>7</sup> Applicant explained that "everything just stopped there in that moment for our family." Applicant's main focus for the next several years was on caring for his daughter and getting her back on the "right track."<sup>8</sup> In addition to the emotional and

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<sup>1</sup> Correspondence, the notice of hearing, the case management order, and other administrative documents, if any, were marked and are attached to the record as Appellate Exhibit I.

<sup>2</sup> Appellate Exhibit II. Department Counsel did not provide a basis or explanation for their position.

<sup>3</sup> Transcript (Tr.) at 13-15, 28; Exhibit A.

<sup>4</sup> Tr. at 13-15; Exhibits B – C.

<sup>5</sup> Exhibit C.

<sup>6</sup> Tr. at 16-17.

<sup>7</sup> Answer; Tr. at 18-20; Exhibit D (newspaper article describing heinous criminal acts, including forcible sodomy and aggravated sexual battery).

<sup>8</sup> Tr. at 18. The transcript does not adequately capture Applicant's raw emotion and demeanor as he testified how "[t]he toughest thing was just sitting there with my daughter and she's telling me that this hurts and there's absolutely nothing as a father you can do."

psychological toil this situation exacted from Applicant, he also faced increased financial costs associated with his daughter's care and, after he returned to work on a full-time basis, daycare expenses for his daughter and her twin brother at a corporate daycare facility (\$150 a week for two children increased to about \$2,000 a month).<sup>9</sup>

After the incident, Applicant did everything he could to keep his daughter safe and he acknowledges that everything else for the most part fell by the wayside. He was able to pay their recurring bills and "keep a roof" over his family's head, but other financial obligations, such as preparing and filing his tax returns, were disregarded.<sup>10</sup>

Further complicating Applicant's financial situation was his wife's decision a few months before the incident to start her own business. She had taken a 401(k) loan before she left her former job and the remaining loan amount became taxable income. Shortly before their tax returns were due, their accountant told them that, due to the complicated nature of their return, she was unable to help them. They started looking for a new accountant, but then their daughter was assaulted and her care became the main and, at times, sole priority in their lives for several years.<sup>11</sup>

Time went by and before Applicant realized it, he had not filed his tax returns for several years. In 2014, he hired a new accountant and began the process of preparing and filing his overdue tax returns and paying his taxes. With the accountant's help, Applicant negotiated a payment plan with the IRS. He routinely sent extra money each month to pay off his federal tax debt sooner. He finally started to see light at the end of the tunnel, when his mother was diagnosed with breast cancer in late 2016. His mother moved into their home, and Applicant and his wife helped care for her after her surgeries. Notwithstanding the increased workload at home and stringent demands of his job, Applicant has filed all overdue federal and state income tax returns. He has paid all federal taxes that were owed, and is paying his past-due state tax debt. He provided copies of his federal and state tax returns. His IRS account transcripts from 2011 through 2016 reflect that Applicant routinely deducted an excess amount in taxes from his wages to pay off his tax debt. The account transcripts also reflect a \$0 balance for each year.<sup>12</sup>

Before the 2012 incident, Applicant had timely filed and paid his taxes. He retains the accounting firm that he hired in 2014 to help him keep on top of his tax issues moving forward. He and his wife have centralized all their documents, so that they can quickly turn them over to their accountant as soon as they receive their W-2 tax statements and other tax documents. His wife is no longer self-employed and has been working for her current employer, a private firm, for the past three years. Applicant and his wife's adjusted gross income for 2016 was \$220,000. They pay their regular, recurring bills and debts on time.<sup>13</sup> Applicant explained their view about paying their financial obligations:

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<sup>9</sup> Tr. at 18-21, 33.

<sup>10</sup> Tr. at 20.

<sup>11</sup> Tr. at 20-21, 29-31, 35-39.

<sup>12</sup> Tr. at 21-28, 34; Exhibit 3; Exhibit E; Exhibit F.

<sup>13</sup> Tr. at 21-33; Exhibit F.

Both my wife and I feel the same way about this. We don't like to owe. We like to pay what we owe. And we don't believe that there's a free ride. . . . this is just who we are. I don't like being indebted to anyone and I don't like missing deadlines. I just don't. My wife doesn't. We want to make sure that we're hitting these things because that's who we are. We believe that if it's owed from us, then it's owed from us and we want to make sure that's taken care of. That's just how we were raised and that's how we are.<sup>14</sup>

Applicant's testimony was credible and fully supported by corroborating documentation. He self-reported his tax issues on a security clearance application that he submitted in July 2014, and discussed them fully during the course of his recent security clearance investigation. He also voluntarily provided his tax returns and IRS account transcripts during the course of the security clearance process.<sup>15</sup>

### **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 National Security Adjudicative Guidelines (AG), which became effective on June 8, 2017. ISCR Case No. 02-00305 at 3 (App. Bd. Feb. 12, 2003) (security clearance decisions must be based on current DoD policy and standards).

"[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. 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 must remain fair and impartial, and 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,

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<sup>14</sup> Tr. at 24-28.

<sup>15</sup> Exhibits 1, 2.

(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.<sup>16</sup>

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

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 ¶ 18

In assessing Applicant’s case, I considered all the disqualifying and mitigating conditions listed under Guideline F, including the following:

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

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

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<sup>16</sup> However, a judge’s mere disbelief of an applicant’s testimony, without actual evidence of disqualifying conduct or admission by an applicant to the disqualifying conduct, is not enough to sustain an unfavorable finding. ISCR Case No. 15-05565 (App. Bd. Aug. 2, 2017); ISCR Case No. 02-24452 (App. Bd. Aug. 4, 2004). Furthermore, an unfavorable decision cannot be based on solely non-alleged conduct. ISCR Case No. 14-05986 (App. Bd. May 26, 2017). Unless an applicant is provided notice that unalleged conduct raises a security concern, it can only be used for specific limited purposes, such as assessing mitigation and credibility. ISCR Case No. 16-02877 at 3 (App. Bd. Oct. 2, 2017).

AG ¶ 20(a): the behavior happened so long ago . . . 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 individual has received or is receiving financial counseling for the problem from a legitimate and credible source . . . and there are clear indications that the problem is being resolved or is under control;

AG ¶ 20(d): the individual initiated and is adhering to 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.

In a Guideline F case, an administrative judge examines the way an applicant handles his or her personal financial obligations to attempt to discern how they may handle their security obligations. Here, Applicant's security clearance eligibility was called into question because he did not timely file his income tax returns for successive years (tax years 2011 – 2016) and incurred past-due tax debt. An applicant's failure to timely file his or her income tax returns and/or pay taxes raises heightened security concerns about the person's judgment and ability to abide by rules and regulations. This, in turn, requires a judge to closely scrutinize the circumstances giving rise to tax-related financial issues and the person's response to it.<sup>17</sup>

The record evidence clearly reflects that Applicant was not trying to evade paying his taxes, nor was his tax situation due to procrastination. In light of the circumstances giving rise to Applicant's past tax-related financial problems and a review of the entire record evidence, I find that his tax issues do not cast doubt on his reliability, judgment, trustworthiness, and ability and willingness to follow the law, rules, and regulations.

Applicant became overwhelmed coping and dealing with the consequences flowing from the 2012 assault. Before then, he had filed and paid his taxes on time. It took Applicant a couple of years to come to grips with his circumstances. He started to address and resolve his tax situation in 2014 – three years before the SOR was issued. He hired an accountant, filed his overdue returns, and paid all outstanding taxes. He has retained the accountant and instituted other measures to stay on top of his tax situation going forward. Additionally, other circumstances that impacted his ability to timely file and pay his taxes in the past, notably, his wife's self-employment, are no longer an issue.

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<sup>17</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, "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 . . . ability to protect classified information.").

Beyond responsibly addressing and resolving his past tax issues, Applicant has a track record of responsibly handling his personal financial and security obligations. He has held a security clearance without issue for a decade. He was upfront and candid about his tax issues throughout the security clearance process. He voluntarily provided his tax returns and IRS account transcripts.

Applicant demonstrated that his current financial situation is under control and, going forward, he can once again be trusted to responsibly handle his financial obligations in the manner expected of all clearance holders.<sup>18</sup> AG 20(a) – 20(d), and 20(g) apply, in full or in part. Additionally, a number of favorable whole-person factors weigh in favor of mitigation.<sup>19</sup> In short, the circumstances giving rise to Applicant's tax-related financial problems and the manner in which he responsibly addressed them mitigate the security concerns at issue. Applicant met his burden of proof and persuasion.<sup>20</sup> Overall, the record evidence leaves me with no questions or doubts about Applicant's continued eligibility for a security clearance.

### Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by Directive, ¶ E3.1.25, are:

Paragraph 1, Guideline F (Financial Considerations): FOR APPLICANT

Subparagraphs 1.a and 1.b: For Applicant

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<sup>18</sup> *Contrast with* ISCR Case No. 15-03481 (App. Bd. Sep. 27, 2016) (filing of overdue tax returns alone insufficient to mitigate heightened security concerns, because no evidence of financial reform or extenuating circumstances to explain the late filing).

<sup>19</sup> AG ¶ 2; SEAD 4, ¶ E.4.

<sup>20</sup> In reaching this favorable conclusion, I took particular note and considered the Appeal Board's recent decision in ISCR Case No. 15-06440 (App. Bd. Dec. 26, 2017). In the cited case, the Board reversed a favorable decision involving an applicant who had failed to file his tax returns for 10 successive years (2005-2014). The following significant factors that the Board relied on in its decision were considered.

(1) *Reason for not filing returns*: The applicant in the cited Appeal Board case claimed to misunderstand his tax filing obligation based on a casual conversation with an acquaintance (a friend of a friend). Here, on the other hand, the extenuating circumstances giving rise to the tax issues are quite unique and clearly a matter beyond Applicant's control that directly impacted his ability to prepare and file his tax returns.

(2) *Timing of remedial action*: In the cited case, the applicant had only filed one of his overdue tax returns before receiving the SOR. He waited until 2016 to start repaying his tax debt. In contrast, in this case, Applicant started taking action to resolve his tax situation three years before the SOR was issued. He had been paying on an installment agreement for some time when the SOR was issued.

(3) *Candor*: In the cited case, the applicant minimized the extent of his tax problems on his security clearance application. Here, however, Applicant fully disclosed the issue on his application and remained candid about it throughout the security clearance process. Additionally, unlike the applicant in the cited case who only provided his tax returns, in this case, Applicant provided his IRS account transcripts, which allowed the Government to independently verify the information he provided.

## **Conclusion**

In light of the record evidence, it is clearly consistent with the interests of national security to grant Applicant continued eligibility for access to classified information. Applicant's request for a security clearance is granted.

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Francisco Mendez  
Administrative Judge