



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



In the matter of:	)	
	)	
[Redacted]	)	ISCR Case No. 17-00199
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Brittany Muetzel, Esq., Department Counsel  
For Applicant: Greg D. McCormack, Esq.

08/31/2018

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**Decision**

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FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guideline F (Financial Considerations) by Applicant's failure to pay his federal and state income taxes. Eligibility for access to classified information is granted.

**Statement of the Case**

Applicant submitted a security clearance application on January 2, 2014, seeking to continue a security clearance he has held since November 2001. On March 8, 2017, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guideline F. The DOD CAF acted under Executive Order (Exec. Or.) 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 by the DOD on September 1, 2006.<sup>1</sup>

Applicant answered the SOR on March 31, 2017, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on May 31, 2017, and the case was assigned to an administrative judge on June 21, 2017. It was reassigned to me on August 3, 2017. On August 16, 2017, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for September 14, 2017.

Applicant and his attorney appeared at the designated time and place on September 14, 2017. Before the hearing commenced, his attorney informed me that Applicant, a diabetic, was very ill and unable to meaningfully participate in the hearing. I observed Applicant and agreed with his attorney. The hearing was tentatively rescheduled for a date to be determined in November 2017, but was postponed again due to Applicant's medical problems. It was rescheduled for May 23, 2018.

On May 16, 2018, Applicant's attorney requested another postponement on the ground that Applicant was scheduled for diabetes-related eye surgery on May 18, 2018, and would be virtually blind until he recovered. The seriousness of Applicant's vision problem made rescheduling of the surgery medically inadvisable.

The hearing was rescheduled for June 11, 2018, and I convened the hearing as scheduled. Applicant was still visually impaired, but he was able to meaningfully participate. Government Exhibits (GX) 1 and 2 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibits (AX) A through H, which were admitted without objection. I kept the record open until July 27, 2018, to enable him to submit additional documentary evidence. He timely submitted AX I through L, which were admitted without objection. DOHA received the transcript (Tr.) on June 19, 2018.

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

In Applicant's answer to the SOR, he admitted all the allegations, with explanations. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 55-year-old director of security for a defense contractor. He enlisted in the U.S. Navy after graduating from high school, served on active duty from August 1982 to October 1988, and received an honorable discharge. (AX C; Tr. 21.) He

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<sup>1</sup> Security Executive Agent Directive 4 (SEAD 4) was issued on December 10, 2016, revising the 2006 adjudicative guidelines for all adjudicative decisions issued on or after June 8, 2017. The changes resulting from issuance of SEAD 4 did not affect my decision in this case.

<sup>2</sup> Applicant's personal information is extracted from his security clearance application (GX 1) unless otherwise indicated by a parenthetical citation to the record.

was employed by other federal agencies from January 2000 to September 2005, self-employed from September 2005 to December 2006, and employed by defense contractors from August 2011 to the present. (AX A.) He traveled overseas frequently and was involved in classified covert operations. (Tr. 26-28.) He received numerous awards and commendations for his service as a federal employee and a contractor employee (AX B.)

Applicant married in July 1992. He and his wife have no children. His wife has serious but temporary medical issues, making her unable to care for Applicant while he recovers from his eye surgery. (Tr. 12-13.) She has a high-school education and has been employed as a customer service agent in the private sector for more than five years. (Tr. 20.)

When Applicant decided to form his own company in 2005, he hired an accountant, who had been highly recommended by several colleagues, to set up a limited liability corporation (LLC). Applicant paid the accountant \$18,000 to organize the LLC. Because Applicant was traveling overseas frequently, he and his wife hired the accountant to file their personal federal and state income tax returns, and paid him about \$3,500 per year for his services. (Tr. 44.)

Applicant's wife normally manages the family finances. (Tr. 30.) During 2009 through 2011, Applicant was deployed overseas most of the time, frequently in covert operations. He and his wife relied on the accountant to take care of the federal and state income tax returns. Their federal and state tax returns had been timely filed through 2008 without any significant issues. When they received delinquency notices from the federal and state tax authorities regarding the later tax years, they gave them to the accountant, who said he would take care of them, but he did not.

In 2011, after Applicant's wife called the accountant several times and sent him several emails but received no responses, she went to the accountant's office and found that it was closed. She learned from the building manager that the accountant was in a rehabilitation facility. The record does not reflect the nature of the accountant's ailments or the type of rehabilitation he was receiving. Applicant's wife tracked down the accountant at the rehabilitation facility and obtained his approval for the building manager to give Applicant's wife access to the accountant's office. She was able to retrieve their tax files for 2010 and 2011 but not for 2009. The files were in disarray and many important documents were missing. (GX 2 at 11; Tr. 31-34.) The returns for 2009 through 2011 were never filed, and Applicant and his wife owed about \$88,000 in delinquent federal taxes and more than \$19,000 in state taxes. (Tr. 35.)

Applicant and his wife then hired a certified public accountant (CPA) to reconstruct the files for 2009 through 2011. In 2015, they hired a tax attorney to deal with the IRS and the state tax authority. (Tr. 35-36.) With the assistance of the CPA, Applicant and his wife filed their federal income tax return for 2010 in June 2015 and the returns for 2009 and 2011 in October 2015. (AX E at 4-9.) When Applicant responded to financial interrogatories from the DOD CAF in December 2016, he had already filed the

past-due tax returns and was taking steps to resolve the federal and state tax debts. In December 2016, they made a payment agreement with the state. (GX 2 at 16.) In October 2017, the state tax debt was settled for \$11,918 and paid in full, using funds from savings. (AX E at 43-44; Tr. 29, 52.)

Applicant and his wife submitted an offer in compromise to the IRS in December 2017 and proposed a payment schedule. (AX E at 42.) The IRS refused to make a payment agreement and insisted on payment in full. (Tr. 36.)

In an effort to generate funds to pay the federal tax debt, Applicant applied for a refinancing of the mortgage loan on the family home, so that they could use their equity in the home to pay the federal tax debt. (AX E at 44; Tr. 36.) He also listed the family home for sale for \$499,000 in the event he could not generate sufficient funds by refinancing. (AX G; Tr. 36.) At the time of the hearing, he was confident that the refinancing would be approved. (Tr. 59.)

When Applicant filed his federal tax return for 2015, he was entitled to a refund, and \$1,504 was credited to his tax debt for earlier years. When he filed his federal tax return for 2016, he was entitled to a refund, and \$2,801 was credited to his tax debt for earlier years. (AX E at 26-27.) His wife's pay was garnished by the IRS for about \$400 per month, beginning in 2016. (Tr. 53.)

In July 2018, Applicant and his wife paid the IRS \$29,607 for tax year 2009; \$50,664 for tax year 2010; and \$19,727 for tax year 2011. (AX J; AX K; AX L.) The federal tax debt has been paid in full. (AX I.)

Applicant's gross annual pay is about \$140,000, and his wife's is about \$20,000. Their net monthly remainder after paying all financial obligations and living expenses is about \$3,824. (AX E at 1-3.)

The chief executive officer (CEO) of the company by whom Applicant is currently employed submitted a letter lauding his integrity and honesty. The CEO states that he knows no one who maintains higher operational security than Applicant. (AX D at 1.) A former employer respects Applicant for his attention to detail and devotion to duty. (AX D at 2.) A former member of the intelligence community with whom Applicant worked regards him as hard working and extremely honest. (AX D at 3.) A close friend and professional associate considers him a respected, trustworthy, and capable professional. (AX D at 4.) A colleague who worked with Applicant in a sensitive covert program trusted him "to operate successfully under stressful conditions demanding strength of character and a solid moral fabric." (AX D at 5.) The CEO of a former employer considers Applicant a "person of very good moral character" who operates with integrity in all matters. (AX D at 6.)

## Policies

“[N]o 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 applicants 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 § 2.

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, an administrative judge applies these guidelines 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 and 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 that 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 made “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance 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. 15-01253 at 3 (App. Bd. Apr.20, 2016).

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 burden of proving a mitigating condition,

and the burden of disproving it never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

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). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531.

## **Analysis**

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

The SOR alleges that Applicant is indebted to the federal government for \$36,543 for tax year 2009; \$45,307 for tax year 2010; and \$28,173 for tax year 2011 (SOR ¶¶ 1.a-1.c). It also alleges that he is indebted to the state tax authority for \$19,048 (SOR ¶ 1.d).

The security concern under this guideline is set out in AG ¶ 18:

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. . . .

This concern is broader than the possibility that a person might knowingly compromise classified information to raise money. It encompasses concerns about a person's self-control, judgment, and other qualities essential to protecting classified information. A person who is financially irresponsible may also be irresponsible, unconcerned, or negligent in handling and safeguarding classified information. See ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012).

Applicant's admissions and the documentary evidence in the record establish the following potentially disqualifying conditions:

AG ¶ 19(a): inability to satisfy debts;

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

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.

The following mitigating conditions are potentially relevant:

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, a death, divorce or separation, clear victimization by predatory lending practices, or identity theft), 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, such as a non-profit credit counseling service, 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.

AG ¶ 20(a) is established. Applicant's delinquent tax debts were numerous and recent. However, they were incurred under circumstances making them unlikely to recur. Applicant's involvement in frequent overseas and covert operations is not likely to recur, nor is it likely that he and his wife will engage the services of an accountant who becomes incapacitated without their knowledge.

AG ¶ 20(b) is established. The incapacitation of the accountant was a condition beyond Applicant's control. His frequent deployments made it difficult for him to closely monitor his accountant. While he and his wife arguably could have reacted more quickly when they started receiving deficiency notices from the state tax authority and the IRS, they reacted promptly and responsibly upon discovering that the accountant was incapacitated and had not filed the tax returns for 2009, 2010, and 2011.

AG ¶ 20(c) is established. Applicant obtained the services of a CPA and a tax attorney, and the tax problems are resolved.

AG ¶ 20(d) is established. The federal and state tax debts have been resolved through Applicant's good-faith efforts.

AG ¶ 20(g) is established. All past-due returns have been filed and the tax debts have been paid. It is well established that failure to comply with tax laws suggests that an applicant has difficulty with abiding by government rules and regulations. See, e.g., ISCR Case No. 14-04437 at 3 (App. Bd. Apr. 15, 2016). It is also well established that

the mere filing of past-due returns or resolution of delinquent tax debts does not compel a favorable security-clearance adjudication. ISCR Case No. 17-01907 (App. Bd. Mar. 7, 2018). The timing of corrective action is an important factor in determining whether security concerns raised by tax delinquencies are mitigated. Applicants who wait until their clearances are in jeopardy before resolving debts may be lacking in the judgment expected of those with access to classified information. ISCR Case No. 16-01211 (App. Bd. May 30, 2018). In this case, Applicant had already hired a CPA and a tax attorney, filed the past-due federal and state income tax returns, and made a payment agreement with the state by the time he responded to financial interrogatories in December 2016, well before the SOR was issued in March 2017.

### **Whole-Person Concept**

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. In applying the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all relevant circumstances and applying the adjudicative factors in AG ¶ 2(d).<sup>3</sup>

I have incorporated my comments under Guideline F in my whole-person analysis and applied the adjudicative factors in AG ¶ 2(d). I have incorporated my comments under Guideline F in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under that guideline, but some warrant additional comment. Applicant has a long and distinguished record of federal service. He has held a security clearance for at least 17 years. He was candid, sincere, and credible at the hearing. After weighing the disqualifying and mitigating conditions under Guideline F, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns raised by his failures to timely file his federal and state income tax returns and pay the taxes due.

### **Formal Findings**

I make the following formal findings on the allegations in the SOR:

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

Subparagraphs 1.a-1.d:

For Applicant

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<sup>3</sup> The factors are: (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.



### **Conclusion**

I conclude that it is clearly consistent with the national security interests of the United States to continue Applicant's eligibility for access to classified information. Clearance is granted.

LeRoy F. Foreman  
Administrative Judge