



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



In the matter of:	)	
	)	
	)	ISCR Case No. 17-01119
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Gatha Manns, Esq., Department Counsel  
For Applicant: William Savarino, Esq.

08/31/2018

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**Decision**

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GARCIA, Candace Le'i, Administrative Judge:

Applicant did not mitigate the financial considerations security concerns involving his failure to timely file his federal and state income tax returns for tax years 2007 and 2009 through 2015. Eligibility for access to classified information is denied.

**Statement of the Case**

On May 9, 2017, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline F (financial considerations). The action was taken 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 DOD on September 1, 2006.<sup>1</sup>

Applicant responded to the SOR on June 7, 2017, and requested a hearing before an administrative judge. The case was assigned to me on March 5, 2018. The

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<sup>1</sup> I also considered this case under the AG implemented on June 8, 2017, and my conclusions are the same using either set of AG.

Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on March 26, 2018, scheduling the hearing for April 18, 2018. I convened the hearing as scheduled.

The Government's exhibit list, the discovery letter, and Applicant's exhibit list were appended to the record as Hearing Exhibits (HE) I, II, and III. Government Exhibits (GE) 1 and 2 were admitted in evidence without objection. Applicant testified, called one witness, and submitted Applicant Exhibits (AE) A through J, which were admitted in evidence without objection. I marked as AE AA through DD documents that were attached to Applicant's response to the SOR, and admitted them in evidence without objection.

At Applicant's request and with no objection from the Government, I left the record open until May 7, 2018, for Applicant to submit additional documentation. He timely provided additional evidence, which I marked as AE K and L, and admitted in evidence without objection. I marked as HE IV the Government's email indicating no objection to AE K and L. DOHA received the hearing transcript (Tr.) on May 1, 2018.

### **Findings of Fact**

Applicant admitted both of the SOR allegations. He is 41 years old. As of the date of the hearing, he was unmarried and he had one minor child.<sup>2</sup>

Applicant graduated from high school. He attended some college but did not earn a degree. He has worked for various defense contractors since 2009. He has worked for his current employer, a defense contractor, since April 2016. He was a senior computer applications developer as of the date of the hearing. He has held a security clearance since 2009, and he requires one for his job.<sup>3</sup>

The SOR alleges Applicant's failure to timely file federal and state income tax returns for tax years 2007 and 2009 through 2015, as required. The allegations are established by Applicant's admissions. Applicant also listed and discussed his failure to timely file his relevant tax returns on his 2009 and 2015 security clearance applications (SCA) and during his 2015 background interview.<sup>4</sup>

Applicant's failure to timely file his relevant tax returns began in tax year 2007. He cited, in part, to problems with the IRS Form W-2 he received from his then employer, a plumbing company. As the April 2007 tax deadline approached, he received for the first time in his work history a paper W-2 with numbers crossed out. When he subsequently received a second W-2 that was also in paper form,

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<sup>2</sup> Response to the SOR; AE DD; Tr. at 27-28, 62-63; GE 1, 2.

<sup>3</sup> Tr. at 27-30, 46, 63-66, 73; GE 1, 2.

<sup>4</sup> Response to the SOR; AE DD; Tr. at 27-78; GE 1, 2.

“[s]omething felt fishy about that. And so, it raised flags or concerns about what they were providing me at the time, so, which I wanted to clarify that.”<sup>5</sup>

Applicant also attributed his failure to timely file his federal and state income tax returns for tax year 2007 to prioritizing work and “[i]mmediate necessities in order to be able to support myself.” At his request, his tax preparer since 1996--a certified public accountant--requested an extension on his behalf. He did not ask the tax preparer to do anything else. As this was the first time he had ever requested such an extension, he was unaware that the extension ended in October 2007. He did not inquire with the tax preparer or research on his own whether there was a deadline to the extension.<sup>6</sup>

Applicant did not recall filing his income tax returns for tax year 2008, but he did so with his tax preparer’s assistance. He received an extension of time to file his federal income tax return in April 2009. He then filed the return and received a \$2,439 federal refund in July 2009. Since 2008, he increased his tax withholdings and decreased his tax exemptions. He initially did so because he knew that tax year 2007 was unresolved. He continued to do so to ensure that he did not owe any federal or state taxes. At his request, his tax preparer requested extensions on his behalf for tax years 2009 through 2015. He remained unaware of any deadlines to his extensions. He testified that he did not receive any notices from the IRS or the state tax authority for any of the tax years in which he did not file. IRS transcripts reflect that notices were issued in 2011, 2013, and 2016 for tax years 2009, 2011, and 2014, respectively.<sup>7</sup>

Again, Applicant attributed his failure to timely file his relevant tax returns to:

It’s my responsibility, and it wasn’t at the top of my priority list. Everything else took precedence. Work took precedence. Family took precedence. Community took precedence. And they all took precedence. And this was at the bottom of my list. And this is why my reports on work are what they are, because I made those my priorities.

He intended to eventually file them. He believed that because he had requested extensions, he had flexibility in filing his tax returns.<sup>8</sup>

Applicant also cited to the following life events as contributing factors in his failure to timely file his relevant tax returns. After his aunt died in 2005, his mother was removed as the co-vice president of his aunt’s group home services company by his aunt’s son. His aunt’s son also removed his mother’s group home clients that resided in her home. His mother had to return to the work force. She filed a lawsuit against the

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<sup>5</sup> Tr. at 30-39, 73-77; GE 1, 2.

<sup>6</sup> Tr. at 30-39, 42-43, 46-47, 55-62, 66-68, 73-78; AE K.

<sup>7</sup> Tr. at 30-39, 42-43, 46-47, 55-62, 66-68, 72-78; AE H, K.

<sup>8</sup> Tr. at 30-39, 42-43, 46-47, 55-62, 66-68, 72-78.

group home services company at a cost of \$100,000, and she lost. He prioritized financially assisting her during this period.<sup>9</sup>

In 2008, Applicant's estranged father was diagnosed with cancer. He traveled out of state a number of times to try to develop a relationship with his father. In July 2013, his mother died while she was on travel in Belize. He was involved in the funeral arrangements, to include bringing her back to the United States, as well as her estate issues. In 2016, his father told him that his cancer diagnosis progressed to terminal stage four.<sup>10</sup>

Applicant disclosed his failure to timely file his relevant tax returns on both the 2009 and 2015 SCAs. He indicated in the 2015 SCA that he requested extensions and was "meeting with accountant to resolve tax burden if any . . . ." Yet, he did not reprioritize filing them. It was not until he received the SOR in May 2017 that "[t]he reality of it stood in my face . . . ." He realized "I have to make restitution. I can't put this off anymore. This is now my priority. I have to take care of this immediately, and expeditiously." He located his tax documents, to include some that were in storage, and took them to his tax preparer. He instructed the preparer to immediately prepare his returns. Applicant then filed them in person in June 2017. He did not owe taxes for any of the relevant tax years. He was due federal and state refunds, but forfeited a total of around \$25,000 because of the passage of the statute of limitations in which to claim the refunds for tax years 2007 and 2009 through 2012.<sup>11</sup>

With his tax preparer's assistance, Applicant timely filed his 2016 and 2017 tax returns. He timely filed all tax returns prior to tax year 2007. He intends to timely file all future tax returns. He set a reminder on his calendar. He asked his tax preparer to help him ensure that all future tax returns are timely filed. He asked his friends to help hold him accountable. He compiled all of his tax records in one location for easy accessibility during tax season. He understood the ramifications of failing to timely file any future tax returns. He understood it was his responsibility to keep track of filing deadlines and be aware of the limits of requesting extensions.<sup>12</sup>

Applicant disclosed on his 2015 SCA that he traveled a number of times for pleasure during the period in which he failed to timely file his relevant tax returns. He took many short trips to Jamaica for tourism and other purposes between June 2006 and August 2013. He again traveled to Jamaica from August to September 2013 for tourism. He traveled to Canada in February 2014 for tourism. He also traveled to the Dominican Republic from July to August 2014 for tourism.<sup>13</sup>

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<sup>9</sup> Tr. at 39-42, 55-62, 66-68; GE 1, 2.

<sup>10</sup> Tr. at 39-42, 55-62, 66-68; GE 1, 2.

<sup>11</sup> Tr. at 43-46, 66-68, 70-77; GE 1; AE AA, BB, CC, G, H, K.

<sup>12</sup> Tr. at 33-34, 50-51, 54, 58-59, 70-78; AE I.

<sup>13</sup> GE 1.

Applicant has not had any security clearance violations since he was granted a clearance in 2009. He had been seeing a therapist on his own since November 2017, after realizing upon receiving the SOR that he needed resolution for several things in his life. He also wanted to take accountability for his actions. He discussed his failure to file his relevant tax returns with his therapist. The therapist wrote that “[i]t started with a seemingly valid concern over an employer’s tax withholding and continued due to perceived lack of urgency.” The therapist helped him understand that in extending himself to others, he may have forgotten himself and he needed to meet all of his obligations in order to be able to help others. He is involved in his community. He sings in his church choir. He serves as a youth mentor. He is a volunteer snowboard instructor for under-served children.<sup>14</sup>

Applicant’s witness has been his supervisor since around early 2017. He held a security clearance as of the hearing date. He described Applicant as an expert in his field, capable of performing independently and reliably. He rated Applicant as “exceeding standards” in three performance evaluations. He testified that Applicant informed him one week prior to the date of the hearing of his failure to timely file his relevant federal and state income tax returns. Applicant told the witness that it was simply not his priority at the time. He also told the witness that he hired an attorney to assist him with filing his outstanding returns. The witness did not question Applicant’s ability to abide by rules and regulations, as Applicant’s failure to timely file his relevant tax returns never interfered with his work. His previous program manager and character references echoed the same sentiments. His character references, to include his tax preparer, also indicated that they did not believe Applicant intentionally shirked his tax responsibilities. They stated that he accepted responsibility and was remorseful for his actions.<sup>15</sup>

## **Policies**

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are to be used in evaluating an applicant’s eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, administrative judges apply the guidelines in conjunction with the factors listed in the adjudicative process. The administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(a), the entire process is a conscientious scrutiny of a number of variables known as the “whole-person concept.” The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

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<sup>14</sup> Tr. at 46-55, 68-77; AE A, B, L.

<sup>15</sup> Tr. at 13-26, 52-53; AE B, C, D, E, F, J, K.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that “[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security.”

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel.” The applicant has the ultimate burden of persuasion to obtain a favorable security decision.

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 and endures throughout off-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 the 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.

Section 7 of Exec. Or. 10865 provides that adverse decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* Exec. Or. 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

## **Analysis**

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

The security concern for financial considerations 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 . . . .

AG ¶ 19 describes conditions that could raise a security concern and may be disqualifying. I considered the following relevant:

(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.

Applicant failed to timely file his federal and state income tax returns for tax years 2007 and 2009 through 2015, as required. AG ¶ 19(f) is established.

I have considered all of the mitigating conditions under AG ¶ 20 and considered the following relevant:

(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; 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.

In June 2017, Applicant filed his delinquent federal and state income tax returns. He received refunds, some of which he forfeited due to his delinquent filing. He timely filed his most recent income tax returns for tax years 2016 and 2017. He intends to file his future income tax returns in a timely manner. AG ¶ 20(g) is established.

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).

The paper W-2s Applicant received from his employer in 2007, to include one in which certain numbers were crossed out, caused him some concern. He wanted to clarify it further before filing his income tax returns for that year, so he requested an extension. He continued to request extensions for tax years 2009 through 2015. He did not inquire with the tax preparer or research on his own whether there was a deadline to the extensions. He acknowledged that he did not prioritize filing these tax returns. He prioritized his work, family, and community involvement. He traveled a number of times for pleasure during this period. Though he disclosed his failure to timely file his relevant tax returns on his 2009 and 2015 SCAs, and stated in his 2015 SCA that he was working with an accountant to resolve his outstanding tax issues, he continued to fail to prioritize them. He did not prioritize them until he received the SOR in May 2017. Conditions that resulted in his failure to timely file his relevant tax returns were not

largely beyond his control, and he did not act responsibly under his circumstances. AG ¶ 20(b) is not established.

Applicant failed to timely file his relevant tax returns for eight years, for the reasons previously discussed. He only did so in June 2017 after he received the SOR. I find that such behavior did not happen so long ago, was not infrequent, and did not occur under such circumstances that are unlikely to recur. It continues to cast doubt on his current reliability, trustworthiness, and judgment. AG ¶ 20(a) is not established.

### **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 relevant 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), 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.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude that Applicant did not mitigate the financial considerations security concerns involving his failure to timely file his federal and state income tax returns for tax years 2007 and 2009 through 2015, as required.

### **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:	AGAINST APPLICANT
Subparagraphs 1.a – 1.b:	Against Applicant

## **Conclusion**

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant continued eligibility for a security clearance. Eligibility for access to classified information is denied.

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Candace Le'i Garcia  
Administrative Judge