



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



In the matter of:

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ISCR Case No. 17-01287

Applicant for Security Clearance

**Appearances**

For Government: Benjamin R. Dorsey, Esq., Department Counsel

For Applicant: *Pro se*

06/04/2018

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**Decision**

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HEINY, Claude, Administrative Judge:

Applicant's statement of reasons (SOR) alleged unpaid federal taxes for tax years 2013 and 2014 and three bankruptcies filed in 1998, 2009, and 2016. She failed to mitigate the security concerns under Guideline F, financial considerations. Applicant's eligibility for access to classified information is denied.

**Statement of the Case**

Acting under the relevant Executive Order and DoD Directive,<sup>1</sup> on May 16, 2017, the DoD issued a Statement of Reasons (SOR) detailing security concerns under Guideline F, financial considerations. On May 27, 2017, Applicant answered the SOR and elected to have the matter decided without a hearing. On June 29, 2017, Defense Office of Hearings and Appeals (DOHA) Department Counsel (DC) submitted the Government's case in a File of Relevant Material (FORM). The FORM contained eight attachments (Items). On July 19, 2017, Applicant responded to the FORM and submitted tax

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<sup>1</sup> Executive Order 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 (Sept. 1, 2006 AG) effective within the DoD on September 1, 2006.

transcripts for tax year 2013 and 2014, which were admitted without objection as Items A, B, and C. On October 1, 2017, I was assigned the case.

While this case was pending a decision, the Director of National Intelligence issued Security Executive Agent Directive 4, establishing the *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.<sup>2</sup>

### **Findings of Fact**

In Applicant’s answer to the SOR, she admitted at the time she applied for her clearance she owed \$12,175 in Federal income tax for tax years 2013 and 2014. She also admitted filing for bankruptcy protection in 1998, 2009, and 2016. After a thorough review of the pleadings and exhibits, I make the following additional findings of fact.

Applicant is a 36-year-old customer service agent, who has worked for her employer since May 2016. (Item 3) In 1995, she married and has three children ages 21, 28, and 29. Applicant has not served in the military.

In April 1998, Applicant and her spouse filed for Chapter 13, Wage Earner’s Plan, bankruptcy protection. She indicated she did so to save her home. In March 1997, her third child was born, and she asserts it was difficult keeping up with her finances while raising two other children. The five-year Wage Earners plan requiring \$160 monthly payments was paid in full in September 2003, discharging the debts. (Item 2, Item 8) The amount of debt discharged is not shown in the record.

In September 2009, Applicant and her spouse filed for Chapter 7 bankruptcy protection. They did so to eliminate some of their unsecured debt. Her husband’s hourly wage rate and the number of work hours had been reduced. She provided no documentation as to the wage or hours reduction. In October 2009, certificates of credit counseling were filed for Applicant and her husband. (Item 7) In February 2010, the plan had been fully administered and the debts were discharged. (Item 2) The amount of claims discharged without payment was \$279,433. (Item 7)

On Applicant’s e-QIP, she indicated she lost a part-time job in 2015, overtime was cut, and she was separated from her husband. She had worked as a records clerk in a county sheriff’s office from September 1998 through March 2016. She provided no evidence as to how much she had previously been paid at her part-time job, how much

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<sup>2</sup> Application of the AGs that were in effect as of the issuance of the SOR would not change my decision in this case. The new AGs are available at [http://ogc.osd.mil/doha/5220-6\\_R20170608.pdf](http://ogc.osd.mil/doha/5220-6_R20170608.pdf).

her overtime had decreased, her salary at the sheriff's office, or how long the separation lasted.

In August 2016, Applicant and her spouse again filed for Chapter 13, Wage Earner's Plan, bankruptcy protection. She indicated she did so to save her home and to resolve debt. In February 2017, the payment plan was confirmed. The plan called for \$32,697 to be paid over a five-year period. (Item 2) Applicant asserted she was making payments in accord with the plan, but there is no documentation showing payments having been made. In January 2017, financial management certificates were filed for Applicant and her husband. (Item 6) There is no information as to what Applicant learned during this financial management course or her previous financial management course.

In Applicant's August 2016 joint bankruptcy filing, she indicated she had been unemployed since April 2016, from her job as a cook at a casino. She indicated she had the job for five years. In her August 2016 filing, she did not mention her job with the sheriff's office which had ended in March 2016. (Item 6) The bankruptcy filing form indicates a combined monthly income of \$2,513, which was the amount of her husband's income. (Item 6) The file does not explain how Applicant and her spouse's wages for 2013 were \$96,000 and for 2014 were \$95,000, but when they filed for bankruptcy protection in 2016 their combined yearly wages would equate to \$30,000. (Item 6, Item A, Item B)

Applicant's 2016 bankruptcy filing listed \$192,104 of assets of which the home accounted for \$132,402. The filing listed \$425,414 in liabilities owed to more than fifty creditors. The liabilities does not include \$126,023 owed for student loans, which are generally not dischargeable in bankruptcy. (Item 4)

Applicant failed to timely file her Federal income tax for 2013 and 2014. She did not request a filing extension, and the returns were filed in 2016. Applicant did not provide a reason for not filing her federal income tax returns in a timely manner. The IRS tax account transcripts indicate the tax return for tax year 2013 was filed in June 2016, and the tax return for tax year 2014 was filed in May 2016. (Item A and Item B)

For tax year 2013, Applicant and her husband's adjusted gross income was \$96,148. As of February 2017, no taxes were due and a \$113 refund was issued in November 2016. (Item A, Item 2) For tax year 2014, Applicant and her husband's adjusted gross income was \$99,451. As of February 2017, no taxes were due and a \$295 refund was issued in November 2016. (Item B, Item 2)

### **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 must be considered 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, these guidelines are applied 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 adjudication process is an examination of a sufficient period and a careful weight of a number of variables of an individual's life to make an affirmative determination that the individual is an acceptable security risk. This is known as the whole-person concept.

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." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record.

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 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 Executive Order 10865 provides that decisions shall be "in terms of the national interest and shall in no sense be a determination of the loyalty of the applicant concerned." See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

## **Analysis**

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

Adjudicative Guideline (AG) ¶ 18 articulates the security concerns relating to 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.

Additionally, an individual who is financially irresponsible may also be irresponsible, unconcerned, negligent, or careless in properly handling and safeguarding classified information. Behaving responsibly or irresponsibly in one aspect of life provides an indication of how a person may behave in other aspects of life.

A person's relationship with her creditors is a private matter until evidence is uncovered demonstrating an inability or unwillingness to repay debts under agreed upon terms. Absent evidence of strong extenuating or mitigating circumstances, an applicant with a history of serious or recurring financial difficulties is in a position of risk that is inconsistent with holding a security clearance. An applicant is not required to be debt free, but is required to manage her finances to meet her financial obligations.

Applicant failed to file her 2013 and 2014 income tax returns in a timely manner and had to resort to bankruptcy protection three times. AG ¶ 19 includes four disqualifying conditions that could raise a security concern any may be disqualifying in this case: "(a) inability to satisfy debts;" "(b) unwillingness to satisfy debts regardless of the ability to do so;" "(c) a history of not meeting financial obligations;" and (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 Government's evidence and Applicant's own admissions raise security concerns under AG ¶¶ 19(a), 19(b), 19(c), and 19(f). The burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the security concerns. (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. September 22, 2005)). Applicant has the burden of presenting evidence of explanation, extenuation, or mitigation to overcome the financial considerations security concerns.

The Appeal Board concisely explained Applicant's responsibility for proving the applicability of mitigating conditions as follows:

Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in security clearance decisions is that articulated in *Egan, supra*. "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." Directive, Enclosure 2 ¶ 2(b).

ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013).

The following mitigating conditions under AG ¶ 20 are potentially applicable:

(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 person has received or is receiving 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; 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.

Applicant failed to timely file her Federal income tax for 2013 and 2014. She did not request filing extensions and did not file the returns until 2016. A willful failure to timely make (means completed and filed with the IRS) a federal income tax return is a misdemeanor-level federal criminal offense.<sup>3</sup> For purposes of this decision, I am not

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<sup>3</sup>Title 26 U.S.C. § 7203, willful failure to file return, supply information, or pay tax, reads:

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 tax 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 (9th Cir. 1973); *United States v. McCabe*, 416 F.2d 957 (7th Cir. 1969); *O'Brien v. United States*, 51 F.2d 193 (7th Cir. 1931).

weighing Applicant's failure to timely file her federal income tax returns against her as a federal crime. The failure to timely file federal tax returns has security implications because:

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).

The Appeal Board ruled that “even in instances where an “[a]pplicant has purportedly corrected [his or her] 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 [his or her] 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. June 15, 2016).

Notwithstanding the lack of any tax debt owed, failing to timely file tax returns indicates an individual fails to demonstrate the degree of good judgment and reliability required of persons granted access to classified information.

In this instance AG ¶ 20(g) applies because Applicant has filed all tax returns and paid all taxes. The tax return for tax year 2013 was filed in June 2016 and the tax return for tax year 2014 was filed in May 2016. The tax returns were not timely filed, but were filed before Applicant completed her July 2016 e-QIP and before either the May 2017 SOR or the June 2017 FORM were issued. Applicant did not provide a reason for her failure to file her federal tax returns in a timely manner. Notwithstanding the application of AG ¶ 20(g), under the circumstances, she failed to establish mitigation of financial security concerns.

Applicant’s delinquent debts are “a continuing course of conduct. She has filed for bankruptcy protection three times most recently in August 2016. Applicant's act of filing for bankruptcy did not preclude consideration of Applicant's overall history of financial problems, including evidence indicating that she had been less than diligent in addressing her longstanding financial problems.

While a discharge in bankruptcy is intended to provide a person with a fresh start financially, it does not immunize an applicant's history of financial problems from being considered for its security significance. See, e.g., DISCR Case No. 87-1800 (February 14, 1989) at p.3 n.2 ("Although bankruptcy may be a legal and legitimate way for an applicant to handle his financial problems, the Examiner must consider the possible security implications of the history of financial debts and problems that led to the filing of bankruptcy. Furthermore, a discharge in bankruptcy does not, in itself, prove that an applicant has changed the financial habits that led to the debts discharged in bankruptcy or that his past financial difficulties are not likely to recur."). Cf. *Marshall v. District of Columbia Government*, 559 F.2d 726, 729-30 (D.C. Cir. 1977) (discharge in bankruptcy does not preclude city from considering whether past financial problems disqualify person for position as police officer).

None of the mitigating conditions sufficiently mitigate the financial considerations security concerns. AG ¶ 20(a) does not apply because the behavior did not happen long ago. The most recent bankruptcy filing was in August 2016. The behavior was not infrequent since large delinquent debts resulted in having to seek bankruptcy protection three times during an 18-year period. The explanation provided is insufficient to show the financial problems are unlikely to recur. She indicated the first bankruptcy filing was due to her son being born. Numerous families have three children and do not have to resort to filing for bankruptcy protection. The statement that her spouse's hours and hourly wages were cut fails to explain \$279,433 of debt being discharged in the September 2009 Chapter 7 bankruptcy. Applicant's loss of employment in 2016 fails to explain \$425,414 in unsecured debt listed in her August 2016 bankruptcy filing. AG ¶ 20(b) does not apply.

After a bankruptcy, a reasonable person would be hyper vigilant about their finances. After a second bankruptcy the concern over one's finances would be even greater. Having to file a third time shows the individual has not acted responsibly.

In February 2010, \$279,433 in unsecured debt was discharged in the Chapter 7 bankruptcy, but six years later Applicant had accumulated \$425,414 in additional unsecured debt. This debt does not include \$126,000 in student loans. In January 2017, certificates of completion for a financial management course were filed for Applicant and her spouse. What was learned from the financial management course is unknown from the record. Previously, in October 2009, a certificate of financial management course and a certificate of credit counseling were filed on behalf of Applicant and her spouse. What was learned from those financial management and credit counseling courses were insufficient to prevent the third filing for bankruptcy protection. AG ¶ 20(c) does not apply.

Bankruptcy is a legitimate and legal means to resolve debt, but it does not establish a good-faith effort to repay overdue creditors. AG ¶¶ 20(d) and 20(e) do not apply since there has been no showing of a good-faith effort to repay overdue creditors and none of the delinquent obligations are being disputed.



## **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(a):

(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 have incorporated my comments under Guideline F in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Applicant failed to timely file her Federal income tax returns for tax years 2013 and 2014 and filed for bankruptcy protection three times. In these three bankruptcies her liabilities exceeded \$700,000. Her explanation as to why she had to file for bankruptcy protection failed to mitigate the financial concerns. There is no showing of monthly payments in accord with the 2016 bankruptcy filing.

In requesting a decision without a hearing, Applicant chose to rely on the written record. In so doing, however, she failed to submit sufficient information or evidence to supplement the record with relevant and material facts regarding her circumstances, articulate her position, and mitigate the financial security concerns. By failing to provide such information, and in relying on only the limited response in her SOR Answer, financial considerations concerns remain.

This decision should not be construed as a determination that Applicant cannot or will not attain the state of true reform and rehabilitation necessary to be eligible for a security clearance. The determination of an individual's eligibility and suitability for a security clearance is not a once in a lifetime occurrence, but is based on applying the factors, both disqualifying and mitigating, to the evidence presented. Under Applicant's current circumstances, a clearance is not warranted. In the future, Applicant may well demonstrate persuasive evidence of her security worthiness.

The issue is not simply whether all the delinquent obligations have been paid—it is whether her financial circumstances raise concerns about her fitness to hold a security clearance. (See AG ¶ 2(c)) 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 Applicant failed to mitigate the financial considerations concerns.

### **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, Financial Considerations: AGAINST APPLICANT

Subparagraphs 1.a – 1.d: 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 a security clearance. Eligibility for access to classified information is denied.

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CLAUDE R. HEINY II  
Administrative Judge