



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



In the matter of: )  
)  
) ISCR Case No. 17-02448  
)  
Applicant for Security Clearance )

**Appearances**

For Government: David F. Hayes, Esq., Department Counsel  
For Applicant: Charles B. Singleton, Esq.

11/06/2018  
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**Decision**  
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KILMARTIN, Robert J., Administrative Judge:

Applicant did not mitigate the security concerns under Guideline F, financial considerations. Applicant's eligibility for access to classified information is denied.

**Statement of the Case**

Applicant submitted a security clearance application (SCA) on January 24, 2017. On August 4, 2017, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline F, financial considerations. The DOD CAF acted under Executive Order (EO) 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 (AGs) implemented by DOD on June 8, 2017.

On November 2, 2017, the Government filed an Amendment to the SOR, alleging that Applicant failed to timely file federal and state income tax returns for tax years (TY) 1998, 1999, and 2000. Applicant timely answered the SOR and Amendment to the SOR, admitting all of the SOR allegations. He admitted failing to file federal and state income tax returns for 14 years, and to owing the state approximately \$13,000 for tax

years (TYs) 2009 through 2012. Applicant also requested a hearing before an administrative judge. The case was assigned to me on August 20, 2018. On September 4, 2018, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for September 25, 2018. I convened the hearing as scheduled.

Government Exhibits (GE) 1 through 4 were admitted into evidence without objection. At the hearing, Applicant testified and submitted documents, which were marked as Applicant's Exhibits (AE) A - J, and admitted without objection. I granted Applicant's request to leave the record open until October 2, 2018, so that he could provide substantiating documentation. (Tr. 84) He submitted AE K and L, including copies of state A and federal income tax returns for TY 2009-2016, which were signed on September 25, 2018, and filed at the end of September 2018. I received the transcript (Tr.) on October 3, 2018.

### **Findings of Fact<sup>1</sup>**

Applicant is 54 years old. He obtained a bachelor's degree in 2009, and he obtained a master's degree in project management in 2011. He is twice divorced and has been cohabitating with a partner for nine years. (Tr. 61-62) He served honorably on active duty in the U.S. Army from 1985 to 2006, primarily as a signals soldier and telecommunications chief. (Tr. 38) He served in an extremely high visibility communications agency from 1987 to 1994. Applicant received awards including the Presidential Service Badge, a Meritorious Service Medal, and six Army Achievement Medals. (Tr. 61) Applicant has been employed as a project manager for a federal contractor, supporting the Army Reserve, since November 2012.

The SOR alleges Applicant's failure to file state and federal income tax returns for several years, and that he is indebted to state A for delinquent taxes in the amount of \$13,000 to TY 2009-2012. Applicant admitted all of these allegations in his answer to the SOR. Applicant disclosed these tax issues in section 26 of his SCA. (Tr. 15) At the hearing, Applicant submitted copies of his 2009 - 2016 federal income tax returns (federal returns) that were recently prepared by his certified public accountant (CPA). (AE A) However, many of these were not yet signed and Applicant testified that they were not yet filed with the IRS. (Tr. 26, 42, 55) He also submitted copies of his state A tax returns for 2009 to 2016 (AE B) and testified that he was prepared and intended to file all of these state and federal returns on the day of the hearing. (Tr.43)

Applicant filed a request for an extension to file his TY 2017 federal returns. (Tr. 25, AE C) Applicant also submitted documentary evidence that he paid \$16,797 for taxes owed to state A on the morning of the hearing. (Tr. AE D) His IRS Form W-2 reflects adjusted gross income (AGI) of \$140,245 earned in 2017, plus \$25,494 in retirement income according to his IRS Form 1099. (AE E and F) Applicant also submitted a document showing that his 401k retirement plan has a balance of \$87,212.

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<sup>1</sup> Unless stated otherwise, the source of the information in this section is Applicant's January 24, 2017 Security Clearance Application (SCA) and his sworn statement dated March 25, 2003. (GE 1 and 4)

(AE G) His Employee Stock Option Program account reflected a balance of \$88,075 (AE H), and he provided a certificate of credit counseling completed on the day before the hearing. (Tr. 38, AE J)

In his July 25, 2017 Answers to Interrogatories (GE 3), Applicant stated “I have routinely been late filing taxes from yearly . . . I secured the services of [a] CPA for years 2009 – 2012 for approximately \$1,600. Because some documentation was missing from various years, the taxes were not filed prior to the IRS filing for me using standard deductions.” In the same Answers, Applicant indicated he had failed to file federal and state B income tax returns timely for TYs 2002 – 2004. He also failed to file state A and federal income tax returns timely for TYs 2007 – 2015. He stated that he filed his state B and federal tax returns for TYs 2002 - 2004 in April 2006; his TY 2006 federal return in May 2007; and his TYs 2005 and 2007 federal returns in September 2008. He claimed that his TY 2008 returns were filed in 2012, and his TYs 2009 - 2012 returns had been filed for him by the IRS in December 2016. (GE 3) The 2013 - 2016 returns were pending filing, and he expected refunds for each of those TYs.

Applicant testified that he spoke to his CPA, who prepared the unfiled tax returns for his signature including returns for TYs 2009 and 2010, despite the fact that the IRS had already filed these on his behalf. (Tr. 42) That is because he already paid approximately \$20,000 in taxes for these two years, although the returns were not yet filed, because the IRS had filed simple, non-itemized returns on his behalf. Applicant thought he was only harming himself by not timely filing tax returns, because he had always received refunds in previous years. (Tr. 43-44) His failures to file had nothing to do with financial hardship. (Tr. 45) He recently received a raise in October, and his salary is now approximately \$150,000 plus over \$25,000 in military retirement benefits. (Tr. 46) Post-hearing documents submitted by Applicant, including copies of income tax returns for TY 2009-2016 filed at the end of September 2018, indicate that he had average AGI of \$171,734 during those years. (AE K and L)

Applicant testified that he paid his CPA \$3,110 to prepare federal and state A income tax returns for TYs 2009-2016. (Tr. 50) He has never filed for bankruptcy protection, and he has no judgments against him. (Tr. 48) Applicant completed financial counseling online the day before the hearing. (Tr. 48, AE J) He prepared a personal financial statement attached to his June 2017 answers to interrogatories. (GE 2) It reflects a \$2,200 remainder each month after Applicant pays all of his expenses. He owns a house valued at \$165,000. (Tr. 53) Applicant testified that this has been a humbling experience when he realized the ramifications of not timely filing his tax returns. He stated “I acknowledge fully that I was negligent in making this happen, but I assure you that . . . this will never happen again.” (Tr. 54-55)

Applicant testified that his state A tax returns for TYs 2009 – 2016 were also prepared by his CPA, but were not filed yet. (Tr. 75) He owes over \$30,000 to state A for income taxes for TYs 2012-2016, and he paid \$17,000 to the state department of revenue on the day of the hearing. Post-hearing documents indicate that the state A income tax returns have now been filed. (AE L) Applicant testified that his 1998 to 2004

federal income tax returns were also not timely filed, but he is now up to date on filing all income tax returns, and payment of all back taxes up to 2008. (Tr. 70) Applicant contends that he has been paying taxes all along, that were deducted from his paychecks, but he just didn't file returns timely.

Applicant is extensively involved in community activities including as co-chairman for a national fraternity involved in fundraising for charities and awarding various scholarships. (Tr. 51-52) He is a devoted father, a great role model, and selfless leader in his community according to the testimony of three character witnesses who testified on his behalf. (Tr. 80-92) A subordinate testified that Applicant is his supervisor and he has known him for 12 years. Applicant trains other employees on the requirements for a security clearance, and he is brutally honest, trustworthy and reliable. (Tr. 79-83) A co-worker of Applicant for nine years testified that Applicant is a great leader with impeccable character. (Tr. 84-87) A doctor who has been dating Applicant for nine years said he is highly respected and very active in volunteering for various organizations in their community. (Tr. 92) Applicant's daughter testified that Applicant is fiscally responsible, a great leader and role model.

### **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, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are 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, 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, Appendix A, ¶ 2(a), the adjudicative process is an examination of a sufficient period and a careful weighing 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 administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG, Appendix A, ¶ 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. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an "applicant is

responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining 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 that an applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that 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.”

## **Analysis**

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

The security concern relating to 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. Financial distress can also be caused or exacerbated by, and thus can be a possible indicator of, other issues of personnel security concern such as excessive gambling, mental health conditions, substance abuse, or alcohol abuse or dependence. 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 an individual might knowingly compromise classified information in order to raise money. It encompasses concerns about an individual’s self-control, judgment, and other qualities essential to protecting classified information. An individual who is financially irresponsible may also be irresponsible, unconcerned, or negligent in handling and safeguarding classified information.

AG ¶ 19 provides conditions that could raise security concerns. The following apply here:

- (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 taxes as required.

Applicant's delinquent taxes and failure to file state and federal income tax returns, alleged in the SOR, are confirmed by his SCA, answers to interrogatories, sworn statement, and answer to the SOR. The Government produced substantial evidence to support the disqualifying conditions in AG ¶¶ 19(a), 19(b), 19(c), and 19(f), thereby shifting the burden to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the facts.<sup>2</sup> Applicant has not met that burden. He exercised poor judgment in repeatedly failing to file, or filing federal and state income tax returns late, going back to 1998. He also failed to pay his federal and state income taxes when due, although he has recently paid them at the time of the hearing.

The guideline also includes conditions that could mitigate security concerns arising from financial difficulties. 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 . . . , and the individual acted responsibly under the circumstances;
- (d) the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts; and
- (g) the individual has made arrangements with appropriate tax authority to file or pay the amount owed and is in compliance with those arrangements.

Applicant labored under the misconception that he did not have to file income tax returns if he expected to receive a tax refund. He suffered through a divorce, and transition from military service. To some extent, these conditions were beyond his control. However, he has not produced relevant and responsive documentation

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<sup>2</sup> Directive ¶ E3.1.15. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep 22, 2005) (An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government).

demonstrating that he acted responsibly under the circumstances. He self-disclosed his delinquent income taxes and failure to timely file income tax returns in his SCA in January 2017. He provided elaboration about his tax issues in his answers to interrogatories in June and July 2017. Yet, as of the time of the hearing in late September 2018 he had not resolved these issues. He did provide supplemental post-hearing documentation, showing that he has now filed the TYs 2009 - 2016 state and federal returns. It is unclear why he has collected a military retirement and federal contractor salary for many years, yet he waited so long to comply with the law and file his tax returns. In short, his eleventh hour effort is too little, too late, to overcome 14 years of failure to timely file income tax returns and delinquent taxes.

The allegations of failure to timely file federal and state income tax returns alleged in the SOR have not been resolved. AG ¶¶ 20(d) and 20(g) apply only partially for the back taxes owed and failure to file in several TYs. The back taxes owed to state A have now been paid. Inadequate reasons were offered for the delay in filing these tax returns, and paying the back taxes. Otherwise, the mitigating conditions enumerated above do not apply.

### **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, Appendix A, ¶ 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, Appendix A, ¶ 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. I have incorporated my comments under Guideline F in my whole-person analysis. Some of the factors in AG, Appendix A, ¶ 2(d) were addressed under that guideline. Applicant served honorably in the Army for over 20 years, including some prestigious assignments. He also raised a daughter and made significant contributions to the DOD for several years as a contractor. Several character witnesses attested to his honesty, integrity, and leadership in his community.

Most importantly, Applicant has not addressed the specific allegations in the SOR about timeliness of his filings. He has not met his burden of production.

Applicant's finances remain a security concern. The record evidence leaves me with questions and doubts as to Applicant's suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the security concerns arising under Guideline F, financial considerations.

### **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 through 1.c:	Against Applicant
Subparagraph 1.d:	For Applicant
Subparagraph 1.e:	Against Applicant

### **Conclusion**

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

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Robert J. Kilmartin  
Administrative Judge