



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



In the matter of:

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ISCR Case No. 17-04069

Applicant for Security Clearance

**Appearances**

For Government: Brittany Muetzel, Esq., Department Counsel

For Applicant: *Pro se*

11/16/2018

**Decision**

MURPHY, Braden M., Administrative Judge:

Applicant did not file annual Federal and state income tax returns on time, as required, for tax years 2012-2014. This was due largely because he and his first wife were separated and in divorce proceedings. Under the circumstances, he undertook responsible efforts to remediate his tax issues by attempting to gather appropriate tax documentation, which proved difficult during the divorce process. Applicant hired a tax advisor, and filed his past-due tax returns. He did so before the SOR was issued. His tax filing issues are unlikely to recur, and no longer cast doubt on his current judgment, trustworthiness and reliability. He provided sufficient evidence to mitigate financial security concerns. Applicant's eligibility for access to classified information is granted.

**Statement of the Case**

Applicant submitted a security clearance application (SCA) on December 21, 2015. On December 21, 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 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 Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (AG), effective June 8, 2017.

Applicant answered the SOR on February 8, 2018, and requested a hearing. He provided a narrative response and four documents. The case was initially assigned to another administrative judge on April 12, 2018, and was assigned to me on July 23, 2018. On July 26, 2018, a Notice of Hearing was issued scheduling the hearing for August 21, 2018.

The hearing convened as scheduled. At the hearing, Government's Exhibits (GE) 1 through GE 3 were admitted without objection. Applicant testified and submitted Applicant's Exhibits (AE) A through AE O, which were admitted without objection.<sup>1</sup> After the hearing, I held the record open until September 11, 2018, to provide Applicant the opportunity to submit additional information. He timely submitted additional materials, which were marked as AE P through AE U, and admitted without objection.<sup>2</sup> DOHA received the hearing transcript on August 29, 2018. The record closed on September 11, 2018.

### **Findings of Fact**

Applicant denied SOR ¶¶ 1.a and 1.b, and admitted SOR ¶ 1.c, with explanations and documents. His admission and explanations are incorporated into the findings of fact. After a thorough and careful review of the pleadings and exhibits submitted, I make the following additional findings of fact.

Applicant is 59 years old. He has a bachelor's degree and a master's degree. After serving in his state's national guard from 1977 to 1981, he was commissioned as a U.S. Air Force officer, in 1983. He served on active duty until 1992, and in the Reserves from 1993 to 2003. He then returned to active duty, and retired from the Air Force as a lieutenant colonel in October 2010. (Tr. 50-51, 106-107; GE 1; AE P; AE Q; AE R)

Applicant has worked in the defense industry ever since, with some periods of unemployment (Nov. 2011 to Sept. 2012, and early 2015). He has had a security clearance almost continuously since 1983. (Tr. 14) Since filling out his most recent SCA, he has changed employers, though he performs the same job. He earns a \$95,000 annual salary. (Tr. 50, 99-101; GE 1)

Applicant married his first wife in 2005. They separated in 2012 and divorced in August 2015. (AE N; GE 1; Tr. 47) They lived in State 1 from 2006 to Nov 2010, when

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<sup>1</sup> AE A through AE D are the four documents Applicant included with his Answer.

<sup>2</sup> AE P through AE U are documents relating to Applicant's military career, and various character reference letters.

they moved to State 2. In 2013, after they separated, Applicant returned to State 1 for work, though he maintained a residence in State 2. Applicant has lived in State 1 full time since 2016. He remarried in May 2017. (Tr. 48; GE 1)

SOR ¶¶ 1.a and 1.b concern Applicant's Federal and state income tax returns for tax years 2012, 2013, and 2014. He disclosed on his December 2015 SCA that he had failed to file those returns as required. (GE 1 at 46-48) In his February 2017 background interview, he noted that the returns remained unfiled, because he wanted to file jointly, and his (by now former) spouse wanted to file separately. (GE 3) In answering the SOR, Applicant explained that he had trouble gathering the required documentation from his wife after they separated. His answer included related correspondence and tax returns. (AE A – AE D)

Applicant explained, "It was the time period where I was separated from my wife, [and] the tax documents all went to that – her location. I couldn't get access to them." (Tr. 85) This included documentation regarding his mortgage and military retirement. (Tr. 88-89) Applicant contacted his former wife and attempted to get the necessary documentation. This was not successful. This was due, in part, to the fact that divorce proceedings were pending, and Applicant was advised by his divorce counsel not to contact his wife directly, lest he be accused of harassment. (Tr. 89-91)

Applicant understands the significance of the annual April 15 Federal income tax filing deadline. He testified that he attempted since 2013 to resolve his tax issues. He tried to get the required information, and recognizes the importance of filing his tax returns on time. He apologized that he did not do so. (Tr. 61-66, 82, 112-113)

Applicant requested and received six-month filing extensions for each tax year at issue, and paid estimated taxes. He did not file his 2012 Federal income tax return by the October 2013 extension deadline because he was in negotiations with his former wife, and in need of certain paperwork she had, which was at her home in State 2. The situation repeated in October 2014 and October 2015, by which time Applicant and his wife had formally divorced. (Tr. 61-66; AE O)

Applicant and his first wife had not filed their 2012, 2013 and 2014 tax returns by the time they divorced. An August 2015 Memorandum of Understanding (MOU) they signed while finalizing their divorce states, "Parties shall file joint tax returns for 2012, 2013 and 2014. The taxes must be filed within 90 days. Husband shall be solely responsible for any liability, but shall also receive any refunds." Tax returns for 2015 were to be filed separately. (AE N) Applicant attested at hearing that, contrary to the MOU, his wife filed taxes separately. (Tr. 69)

Applicant travelled to State 2 in summer 2016 to try to gather documentation to file the required taxes. He was not entirely successful, since many of the documents were not easy to gather and organize. (Tr. 68-69) Applicant retained a tax advisor in July 2017 to resolve his unfiled tax returns. (Tr. 68) Following several e-mails between Applicant, his former wife, and their respective tax advisors concerning the status of the

returns, and each party's filing responsibilities,<sup>3</sup> Applicant filed his 2012, 2013, and 2014 Federal and required state tax returns in September 2017.

For tax year 2012, IRS documentation lists Applicant and his wife jointly. (GE 2) The IRS prepared a substitute 2012 return in April 2017. Applicant provided a copy of his 2012 Federal and State 2 returns (filed jointly) with his Answer, and at hearing. Through his tax advisor, he filed an amended return on September 29, 2017. Though additional taxes were assessed, it was less than what was withheld. (AE B; AE F)

For tax year 2013, IRS documentation lists Applicant alone. The IRS prepared a substitute return, in April 2017, as they had no record of a return filed by March 2018. (GE 2) At hearing, Applicant provided IRS documentation showing that his first wife filed a 2013 Federal return (separately) on October 17, 2016. (AE G) On September 18, 2017, through his tax advisor, Applicant filed an amended 2013 Federal return (naming both Applicant and his first wife), an amended 2013 State 2 tax return, (naming both) and a 2013 State 1 tax return (naming Applicant alone). (Tr. 71-79; AE C; AE G; AE J)

Applicant owes \$4,192 in past-due State 2 taxes for tax year 2013. (AE J). He believes he will not owe any state taxes once 2013 Federal taxes are accounted for, based on his amended filing, and his 2013 State 2 taxes are recalculated. (Tr. 91-94) He considered paying but "I don't have an extra \$4,000 sitting around in order to take and pay [State 2] a bill I don't believe I owe." (Tr. 95) An August 2018 letter from his tax advocate indicates that his amended Federal returns for 2013 and 2014 remained in process. (AE L)

For tax year 2014, IRS documentation lists Applicant and his first wife together. A return was filed on October 17, 2016, probably by his first wife.<sup>4</sup> (GE 2; AE A; AE H) On September 17, 2017, through his tax advisor, Applicant filed an amended 2014 Federal return, an amended 2014 State 2 tax return, and a 2014 State 1 tax return. (Tr. 71-79; AE D; AE H; AE I; AE J; AE K) Applicant received a 2014 Federal refund of about \$5,079. (Tr. 95; AE H) (Tr. 78-79, 82; AE L)

Applicant provided correspondence with his former wife from April 2016 about the status of their 2015 tax filings. (AE M) Applicant testified that his 2015 and 2016 state and Federal returns (not alleged) were filed during the extension period. He requested an extension for the 2017 tax year as well. (Tr. 83) Tax returns for tax years after 2014 are not alleged, and there is no indication in the record that they were filed late.

SOR ¶ 1.c, which Applicant admitted, concerns a wage garnishment in 2012 for \$500 in past-due property taxes. When Applicant lived in State 1 between 2006 and 2010, his car was subject to State 1's personal property tax. When he moved to State 2

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<sup>3</sup> AE A; AE O.

<sup>4</sup> Applicant's first wife filed her 2013 Federal return the same day. (AE G)

in 2010, he took the car with him. Rather than register the car in State 2, he put it in storage. He did not report to State 1 that the car was now located out of state. When Applicant later returned to State 1 for work, he learned of an outstanding State 1 personal property tax bill for the car. He told State 1 that the car was now in State 2, but was told that since it was not registered there, he was still required to pay State 1 personal property taxes on it. Before he could do so, State 1 garnished his wages one time, for about \$500, to resolve the debt. (SOR ¶ 1.c)(Tr. 53-60) Appellant continues to live in State 1, and his personal property taxes are current. (Tr. 97)

Applicant was awarded numerous medals during his years of military service. They include the Meritorious Service Medal, multiple Air Medals, the Aerial Achievement Medal, the Joint Service Commendation Medal; multiple Air Force Commendation Medals, and multiple Air Force Achievement Medals, as well as numerous service medals. He flew combat missions during Operations Desert Shield and Desert Storm (1991) and Operation Enduring Freedom (2001-2002) and was later deployed to Afghanistan (2007). (GE 1; AE P – AE R)

Applicant was highly regarded by superior officers during his military career. More current references also attest to his judgment, trustworthiness, and reliability, both personally and professionally. (AE R – AE U)

### **Policies**

It is well established that no one has a right to a security clearance. As the Supreme Court noted in *Department of the Navy v. Egan*, “the clearly consistent standard indicates that security determinations should err, if they must, on the side of denials.”<sup>5</sup>

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 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 ¶ 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>5</sup> *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988).

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. Likewise, I have not drawn 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 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.

## **Analysis**

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

The financial considerations security concern 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 misuse, 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. . . .

The guideline sets forth several conditions that could raise security concerns under AG ¶ 19. Applicant failed to timely file his Federal and state income tax returns for tax years 2012, 2013, and 2014. The following is applicable:

(f) failure to file . . . annual Federal, state, or local income tax returns or failure to pay annual Federal, state, or local income tax as required.

Applicant had a duty to file his annual state and Federal income tax returns in a timely manner, and the fact that he did not do so for tax years 2012, 2013, and 2014 several years is a security concern. As the Appeal Board has long held:

Failure to file tax returns suggests that an applicant has a problem 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 towards 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).<sup>6</sup>

SOR ¶ 1.c concerns past-due personal property taxes, rather than income taxes, so AG ¶ 19(f) does not technically apply. However, AG ¶ 19(c) (a history of not meeting financial obligations) does apply to that debt, since Applicant did not pay it until it was resolved by garnishment.

Conditions that could mitigate financial considerations security concerns are provided under AG ¶ 20. The following 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 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;

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<sup>6</sup> ISCR Case No. 14-04437 at 3 (App. Bd. Apr. 15, 2016) (emphasis added). See ISCR Case No. 14-05476 at 5 (App. Bd. Mar. 25, 2016); ISCR Case No. 14-01894 at 4-5 (App. Bd. Aug. 18, 2015).

(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 the appropriate tax authority to file or pay the amount owed and is in compliance with those arrangements.

Applicant and his first wife separated in 2012. They divorced in September 2015. During their separation, Applicant lived apart from his wife, making it difficult to gather appropriate paperwork so they could file their Federal and state income tax returns in a timely manner. Applicant filed appropriate extensions, but did not file his tax returns on time, during the separation period. He testified credibly that he undertook efforts to resolve the problem, without success.

When Applicant and his first wife divorced, their Federal and state tax returns for 2012, 2013, and 2014 remained unfiled. Under their August 2015 MOU, they were to file joint tax returns for these years, and then file separately for 2015 forward. This did not occur, as she filed taxes separately for some of those years, in October 2016.

In weighing Applicant's responsibility under the circumstances (the second prong of AG ¶ 20(b)) and his good-faith efforts (AG ¶ 20(d)), I must consider the timing of Applicant's actions. The Appeal Board has consistently held that timing of an applicant's resolution of his tax filing problems is relevant in evaluating mitigation. An applicant who resolves financial or tax problems only when his clearance might be imperiled raises questions about his willingness to follow the sometimes complex rules governing classified information when his personal interests are not at stake.<sup>7</sup>

In that regard, Applicant fully disclosed his unfiled income tax returns on his December 2015 SCA, shortly after his divorce. He travelled to State 2 in 2016 in an unsuccessful attempt to gather the required tax paperwork. He hired a tax advisor in summer 2017, and negotiated a resolution to the issues with his first wife and her representative in fall 2017. With his tax advisor's assistance, Applicant filed his 2012, 2013, and 2014 Federal and state income tax returns (for both State 1 and State 2, as appropriate) in fall 2017. While this was several years late, it was nonetheless before the SOR was issued, in December 2017. The Appeal Board has held that an applicant cannot simply adopt a position of "no harm, no foul" or "all's well that ends well."<sup>8</sup> However, I nonetheless conclude that Applicant acted responsibly under the circumstances.

Applicant's tax filing issues are both related to, and limited to, the years he and his wife were separated and in divorce proceedings. Their divorce complicated his subsequent efforts to resolve the tax filings. With help from a tax advisor, Applicant

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<sup>7</sup> ISCR Case No. 15-06440 at 4 (App. Bd. Dec. 26, 2017).

<sup>8</sup> ISCR Case No. 14-01894 at 4-5 (App. Bd. Aug. 18, 2015)



undertook responsible efforts under the circumstances to prepare, file, and resolve his past-due tax filings, though it took several years to do so. AG ¶¶ 20(b), 20(c), and 20(d) apply.

Applicant's past-due tax filings are now resolved. AG ¶ 20(g) applies. As his tax issues were largely attributable to his separation and divorce, they occurred under circumstances that are unlikely to recur, and no longer cast doubt on his current reliability, trustworthiness, or good judgment. AG ¶ 20(a) also applies. AG ¶ 20(a) also applies to the past-due personal property taxes, given their unusual origins.

### **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. I have incorporated my comments under Guideline F in my whole-person analysis.

I had ample opportunity to evaluate Applicant's demeanor at the hearing and to form an opinion of his credibility. He was intelligent, well-spoken, and respectful, and he treated the process seriously. He presented a well-documented, well-organized case. I found him to be a credible witness. I also credit his long and honorable service to this country, both in and out of uniform. Applicant is unlikely to find himself in this position again. He has mitigated the financial security concerns. In reaching this conclusion, I considered not only Applicant's credibility, but the record evidence as a whole. Overall, the record evidence leaves me without questions or doubts as to Applicant's eligibility for access to classified information.

### **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: FOR APPLICANT

Subparagraphs 1.a-1.c: For Applicant

### **Conclusion**

In light of all of the circumstances presented by the record, it is clearly consistent with the interests of national security to grant Applicant eligibility for access to classified information. Eligibility for access to classified information is granted.

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Braden M. Murphy  
Administrative Judge