



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



|                                  |   |                        |
|----------------------------------|---|------------------------|
| In the matter of:                | ) |                        |
|                                  | ) |                        |
| REDACTED                         | ) | ISCR Case No. 15-06517 |
|                                  | ) |                        |
| Applicant for Security Clearance | ) |                        |

**Appearances**

For Government: Alison O’Connell, Esq., Department Counsel  
For Applicant: John V. Berry, Esq.

09/29/2017

**Decision**

MENDEZ, Francisco, Administrative Judge:

Applicant presented sufficient evidence to mitigate security concerns raised by his overdue tax returns. A number of outside issues negatively impacted his ability to timely prepare and file his tax returns, including his wife’s diagnosis and treatment for cancer and unanticipated tax consequences from the state’s decision to use eminent domain to take his wife’s former property. Applicant addressed his overdue tax filings by retaining a certified public accountant in 2015. His financial situation is under control and it is unlikely that similar financial issues will recur. Clearance is granted.

**Statement of the Case**

On April 7, 2016, the Department of Defense (DoD) issued a Statement of Reasons (SOR) alleging security concerns under the financial considerations guideline. Applicant answered the SOR and requested a hearing.

By agreement of the parties, Applicant’s hearing was originally scheduled for May 18, 2017. Upon Applicant’s request and without opposition by Department Counsel, the hearing was moved to July 13, 2017. Applicant testified and called several longtime references as witnesses. The exhibits offered by the parties were admitted into the

administrative record without objection.<sup>1</sup> The hearing transcript (Tr.) was received on July 21, 2017, and the record closed on September 7, 2017.

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

Applicant, 64, was a DoD employee for over thirty years. He retired in 2013 and has since worked as a federal contractor. He is considered a subject-matter expert in his field. He has received top awards and recognition from the DoD for his dedication and work, including fixing some serious structural issues with U.S. Navy ships that could have negatively impacted the nation's overall defense posture.

Applicant was first granted a security clearance in 1981. He is highly respected by coworkers, supervisors, and clients for his work ethic, expertise, and for maintaining the highest ethical standards. Numerous work and social references provided their favorable opinions regarding Applicant's honesty, trustworthiness, and reliability.

Applicant did not file his federal and state income tax returns for tax years 2009 through 2013 when they were due. His failure to timely file these tax returns was partly due to procrastination, but principally due to the following matters:

- 1) Poor record keeping. Applicant was unable to properly capture and account for the income his wife generated through her small business. Although the business did not generate a large amount of income, poor record keeping routinely left Applicant unable to prepare and file their joint returns on time. Applicant's wife closed the business and retired in 2016.
- 2) Complexity of the tax returns. Applicant's frustrations in preparing his and his wife's joint tax returns became even more daunting in 2012, when the state took action under a claim of eminent domain to take property that his wife jointly held with her former husband. The ensuing legal action against the state contesting the action dragged on for years, concluding in 2016. Applicant found it difficult in determining how to calculate capital gains and other tax issues involving the property.
- 3) Caring for sick family members. Shortly after Applicant hired an accountant and started addressing his overdue tax returns, his wife and his mother-in-law became seriously ill. He became their primary caretaker. Applicant's wife was diagnosed with cancer in 2015. She underwent aggressive medical treatment for the next two years, recently receiving a favorable prognosis. In 2016, in the middle of Applicant's wife going through her cancer treatment, her mother (Applicant's mother-in-law) was diagnosed with a condition that ultimately claimed her life.

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<sup>1</sup> Government Exhibits 1 – 4; Applicant's Exhibits A – BB. Correspondence, the notice of hearing, the case management order, and Applicant's granted request to continue the hearing and extend the deadline for the submission of post-hearing matters are appended to the record as Appellate Exhibits (App. Exh.) I – IV, respectively. Applicant's counsel's cover letter listing the exhibits and witnesses he planned to call at hearing is App. Exh. V, while his cover letter listing Applicant's post-hearing exhibits is App. Exh. VI.

<sup>2</sup> Unless otherwise indicated, the facts set forth herein are generally drawn from the admitted exhibits and the testimony presented at hearing (Tr. 12-92).

Applicant self-reported his failure to timely file his income tax returns on his 2014 security clearance application. He testified that, despite not filing his tax returns on time, he submitted payments for the amount in taxes that he estimated owing when he filed for extensions. He routinely overestimated the amount he owed. IRS account transcripts corroborate his testimony.

In July 2015, Applicant hired a certified public accountant (CPA) to prepare and file the overdue tax returns. Between July 2015 and April 2016, Applicant filed his 2009 – 2013 federal income tax returns. IRS account transcripts reflect that, though the returns were not timely filed, Applicant paid the federal income taxes he owed by the deadline, except for the 2012 tax year.

In 2012, State A, by claiming eminent domain, initiated legal action to take the property that Applicant's wife jointly held with her former husband. Applicant's wife received approximately \$500,000 from State A as compensation. Applicant paid over \$100,000 in income taxes by the deadline his 2012 federal returns were due. He then paid an additional \$17,000 upon filing the overdue return in April 2015.

Applicant's IRS account transcripts and state tax records for tax years 2009 – 2013 reflect a \$0 balance for each of these years. Applicant lost a significant amount in refunds that he would have received but for his failure to file the returns within three years of when they were due. Nonetheless, he received refunds from the IRS for tax years 2009 – 2013 totaling over \$20,000. Applicant also provided documents showing that he satisfied his 2014 property taxes for the home that he and his wife jointly own.

Applicant continues to retain the same CPA that helped him complete and file his 2009 – 2013 tax returns. As of the close of the record, the CPA had filed or was in the process of finalizing Applicant's 2014 – 2016 tax returns. Applicant's CPA writes that the complex nature of Applicant's returns has created significant issues in finalizing some of the returns. The CPA has stayed in contact with the IRS and state tax authorities to resolve any outstanding tax issues, and filed all necessary extensions.

Between 2014 and 2016, Applicant's wife received an additional \$700,000 from State A as compensation for her former property. Applicant and his wife purchased several rental properties with these funds, which generate additional income. They hired a property management firm to take care of the paperwork and tax documents. Applicant earns at least \$200,000 annually through his employment as a federal contractor. His credit report reflects an excellent credit rating, with no negative entries.

### **Law, Policies, and Regulations**

This case is decided under Executive Order (E.O.) 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 on June 8, 2017, through Security Executive Agent Directive 4 (SEAD-4). See ISCR Case No. 02-00305

at 3 (App. Bd. Feb. 12, 2003) (security clearance decisions must be based on current DoD policy and standards).

“[N]o one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). Instead, persons are only eligible for access to classified information “upon a finding that it is clearly consistent with the national interest” to authorize such access. E.O. 10865 § 2.

When evaluating an applicant's eligibility for a security clearance, an administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations, the guidelines list potentially disqualifying and mitigating conditions. The guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies the guidelines in a commonsense manner, considering all available and reliable information, in arriving at a fair and impartial decision. AG ¶ 2.

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

Administrative Judges must remain fair and impartial, and conduct all hearings in a timely and orderly manner. Judges must carefully balance the needs for the expedient resolution of a case with the demands of due process. Therefore, an administrative judge will ensure that an applicant: (a) receives fair notice of the issues, (b) has a reasonable opportunity to address those issues, and (c) is not subjected to unfair surprise. Directive, ¶ E3.1.10; ISCR Case No. 12-01266 at 3 (App. Bd. Apr. 4, 2014).

In evaluating the evidence, a judge applies a “substantial evidence” standard, which is something less than a preponderance of the evidence. Specifically, substantial evidence is defined as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record.” Directive, ¶ E3.1.32.1.<sup>3</sup>

Any doubt raised by the evidence must be resolved in favor of the national security. AG ¶ 2(b). See also SEAD-4, ¶ E.4. Additionally, the Supreme Court has held that responsible officials making “security clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531.

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<sup>3</sup> However, a judge's mere disbelief of an applicant's testimony, without actual evidence of disqualifying conduct or admission by an applicant to the disqualifying conduct, is not enough to sustain an unfavorable finding. ISCR Case No. 15-05565 (App. Bd. Aug. 2, 2017); ISCR Case No. 02-24452 (App. Bd. Aug. 4, 2004). Furthermore, an unfavorable decision cannot be based on solely non-alleged conduct. ISCR Case No. 14-05986 (App. Bd. May 26, 2017). Likewise, a judge can only use non-alleged conduct for specific limited purposes, such as, assessing mitigation and credibility, unless an applicant is placed on notice that such conduct also raises a security concern. ISCR Case No. 12-11375 (App. Bd. June 17, 2016).

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. 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 an 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**

Failure or inability 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 information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.<sup>4</sup>

In assessing Applicant's case, I considered all the disqualifying and mitigating conditions listed under Guideline F, including the following:

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

AG ¶ 19(f): failure to file or fraudulently filing annual Federal, state, or local income tax returns or failure to pay annual Federal, state, or local income tax as required;

AG ¶ 20(a): the behavior happened so long ago . . . or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;

AG ¶ 20(b): the conditions that resulted in the financial problem were largely beyond the person's control . . . and the individual acted responsibly under the circumstances;

AG ¶ 20(c): the individual has received or is receiving financial counseling for the problem from a legitimate and credible source . . . and there are clear indications that the problem is being resolved or is under control;

AG ¶ 20(d): the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts; and

AG ¶ 20(g): the individual has made arrangements with the appropriate tax authority to file or pay the amount owed and is in compliance with those arrangements.

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<sup>4</sup> AG ¶ 18.

In a Guideline F case, an administrative judge examines the way an applicant handles his or her personal financial obligations to attempt to discern how they may handle their security obligations. Here, Applicant's security clearance eligibility was called into question because he did not timely file his income tax returns for five successive years and had not paid his 2014 property taxes when due. An applicant's failure to timely file his or her income tax returns and/or pay taxes raises heightened security concerns about the person's judgment and ability to abide by rules and regulations. This, in turn, requires a judge to closely scrutinize the circumstances giving rise to tax-related financial issues and the person's response to it.<sup>5</sup>

Applicant's tax-related financial issues were primarily attributable to matters largely beyond his control. He was not trying to evade paying his taxes. He became overwhelmed trying to prepare his and his wife's joint tax returns because of the complicated nature of their tax situation, which coupled with his own procrastination and his family's serious medical issues, led to the delay in filing the returns. With the benefit of hindsight, Applicant recognizes now that he should have hired a tax professional far sooner. However, in 2015, Applicant did start taking action to resolve his tax situation. He hired a CPA, filed his overdue returns, and paid all outstanding taxes. He has retained the CPA to stay on top of his tax situation going forward. He has also taken other proactive steps, such as, hiring a property management firm, to avoid issues that contributed to his past tax problems.

Beyond resolving the tax issues alleged in the SOR, the record also reflects that Applicant handles his personal financial obligations in a responsible manner. He credibly testified that he will not allow similar financial issues to recur. He was upfront and candid about his tax issues from the beginning of the security clearance process and, during the course of it, voluntarily provided his tax returns and IRS account transcripts. His current financial situation is under control.<sup>6</sup> The above listed mitigating conditions apply, in full or in part, and together with the favorable whole-person factors raised by the evidence,<sup>7</sup> mitigate the security concerns at issue. Overall, the record evidence leaves me with no questions or doubts about Applicant's eligibility for a security clearance.

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<sup>5</sup> See *generally*, ISCR Case No. 14-03358 at 3 (App. Bd. Oct. 9, 2015) (Board explained the heightened security concerns raised by tax-related financial issues, "A security clearance represents an obligation to the Federal Government for the protection of national secrets. Accordingly failure to honor other obligations to the Government has a direct bearing on an applicant's . . . ability to protect classified information.").

<sup>6</sup> *Contrast with* ISCR Case No. 15-03481 (App. Bd. Sep. 27, 2016) (filing of overdue tax returns alone insufficient to mitigate heightened security concerns, because no evidence of financial reform or extenuating circumstances to explain the late filing).

<sup>7</sup> AG ¶ 2; SEAD-4, ¶ E.4.

## Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by Directive, ¶ E3.1.25, are:

|  |               |
|--|---------------|
| Paragraph 1, Guideline F (Financial Considerations): | FOR APPLICANT |
| Subparagraphs 1.a and 1.b:                           | For Applicant |

## Conclusion

In light of the record evidence, it is clearly consistent with the interests of national security to grant Applicant continued eligibility for access to classified information. Applicant's request for a security clearance is granted.

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Francisco Mendez  
Administrative Judge