



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



In the matter of:

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ISCR Case No. 18-02159

Applicant for Security Clearance

**Appearances**

For Government: Erin Thompson, Esq., Department Counsel

For Applicant: *Pro se*

08/19/2019

**Decision**

HARVEY, Mark, Administrative Judge:

Applicant owed about \$60,000 to state tax authorities for several years. He claimed that he received minimal income (below \$8,000 annually from 2012 to 2017). He was a professional commercial tractor-trailer driver with opportunities to earn substantially more income. He did not establish that he was unable to increase his income which would have enabled him to better address his delinquent taxes. He did not provide proof of any payments to address his delinquent state tax debts. Financial considerations security concerns are not mitigated. Access to classified information is denied.

**Statement of the Case**

On October 16, 2017, Applicant completed and signed a Questionnaire for National Security Positions (SF 86) or security clearance application (SCA). (Government Exhibit (GE) 1) On October 15, 2018, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a statement of reasons (SOR) to Applicant under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry*, February 20, 1960; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), January 2, 1992; and Security Executive Agent Directive 4, establishing in Appendix A the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AGs), effective June 8, 2017. (Hearing Exhibit (HE) 2)

The SOR detailed reasons why the DOD CAF did not find under the Directive that it is clearly consistent with the interests of national security to grant or continue a security clearance for Applicant and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked. Specifically, the SOR set forth security concerns arising under Guideline F (financial considerations). The Defense Office of Hearings and Appeals issued an undated amended SOR. (HE 3)

On October 28, 2018, December 14, 2018, and March 1, 2019, Applicant responded to the SOR and amended SOR. (HE 4) On December 14, 2018, he requested a hearing. (HE 5) On June 28, 2019, Department Counsel was ready to proceed. On July 19, 2019, the case was assigned to me. On July 19, 2019, DOHA issued a notice of hearing, setting the hearing for July 29, 2019, using video teleconference. (HE 1) Applicant waived his right to 15 days of notice of the date, time, and location of the hearing. (Tr. 12-14; HE 5)

During the hearing, Department Counsel offered 11 exhibits; Applicant offered 2 exhibits; there were no objections; and all proffered exhibits were admitted into evidence. (Transcript (Tr.) 16-18; Government Exhibit (GE) 1-11; Applicant Exhibit (AE) A-AE B). On August 5, 2019, DOHA received a transcript of the hearing.

Some details were excluded to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

### **Findings of Fact**

In Applicant's SOR responses, he denied all of the SOR allegations. (HE 4) He also provided extenuating and mitigating information. (HE 4) Applicant's SOR responses and attached documentation are admitted into evidence. (Tr. 11-12)

Applicant is a 58-year-old commercial truck driver. (Tr. 8) He has worked for a government contractor for almost two years under a lease contract. (Tr. 8) He needs a security clearance to enable him to deliver hazardous materials. (Tr. 8) In the late 1970s, he receive a General Education Diploma (GED). (Tr. 6) He has not attended college. (Tr. 6) Applicant served in the Army from 1983 to 1988; he left the Army as a private (E-2); and he received an honorable discharge. (Tr. 7, 19; GE 2) He was a truck driver in the Army, and he denied that he received nonjudicial punishment while he was in the Army. (Tr. 7)

Applicant was married twice, and his most recent divorce was in 1998. (Tr. 19) He has four adult children, and they do not live with him. (Tr. 20) He has cohabitated with his co-driver for the past 14 years. (Tr. 20) Applicant has been a truck driver since about 2006. (Tr. 21-22) Applicant has lived for more than three years in state M1. (Tr. 22; GE 1) His cohabitant owns his residence, and Applicant pays part of the mortgage. (Tr. 22)

Applicant left state S "many years ago" possibly in 1998. (Tr. 27) He was unclear about when he moved from state S. (Tr. 28-29) In 2013, Applicant moved to state M1

from state T. (Tr. 23; GE 1) In state T, he used a post-office address because he was often on the road or staying with family and friends. (Tr. 23-24) He lives in state M1 with his cohabitant when he is not traveling as a truck driver. (Tr. 26) His cohabitant owns the 18-wheel truck that he drives. (Tr. 45-46) Applicant said he paid his recent state tax debts. (Tr. 42) Applicant does not have taxes withheld from his paycheck, and he pays his taxes when he files his tax returns. (Tr. 56) His cohabitant pays him as a private contractor. (Tr. 56)

### Financial Considerations

SOR ¶¶ 1.a through 1.d allege the federal government filed tax liens as follows: in 2014, for \$161,857; in 2013, for \$161,133; in 2003, for \$154,534; and in 2005, for \$51,092. Applicant's October 28, 2017 combined credit report from three credit reporting companies showed the two federal tax liens for \$161,857 and \$161,833. (GE 4 at 2-3) The two federal tax liens for \$154,534 and \$51,092 were shown in LexisNexis but not in the October 28, 2017 combined credit report. (GE 5; GE 6)

SOR ¶¶ 1.e through 1.h allege that state government S filed tax liens as follows: in 2002, for \$10,987; in 2003, for \$10,693; in 2003, for \$17,357; and in 2003, for \$11,424. The four tax liens were shown in LexisNexis. (GE 7-GE 10) SOR ¶ 1.i alleges that state government M1 filed a state tax lien in 2007 for \$13,191. The tax lien was shown in LexisNexis. (GE 11)

The federal and state tax lien documentation in the file do not include information about which tax years resulted in the delinquent taxes in the liens.

On September 25, 2017, Applicant said in response to DOHA interrogatories that he filed and owed the amounts depicted in the following table for federal income taxes. (GE 2 at 2) The table also shows adjusted gross income from the Internal Revenue Service (IRS) tax transcripts he provided. (GE 2 at 5-10; AE B) The IRS tax transcripts for tax years 1999, 2002, and 2012 through 2017 show an account balance of zero. (GE 2 at 5-10; AE B)

| Tax Year | Date Filed    | Adjusted Gross Income | Amount Owed | Date Paid     |
|----------|---------------|-----------------------|-------------|---------------|
| 1999     | Feb. 5, 2001  | \$102,738             | \$57,127    | Uncollectable |
| 2002     | Dec. 1, 2003  | \$100,867             | \$56,302    | Uncollectable |
| 2012     | Apr. 15, 2013 | \$3,898               | \$763       | Apr. 10, 2013 |
| 2013     | Apr. 15, 2014 | \$6,688               | \$530       | Mar. 21, 2014 |
| 2014     | Apr. 15, 2015 | \$7,713               | \$677       | Apr. 10, 2015 |
| 2015     | Mar. 29, 2016 | \$0                   | \$240       | Unknown       |
| 2016     | Apr. 18, 2017 | \$5,567               | \$420       | Mar. 28, 2017 |
| 2017     | Apr. 17, 2018 | \$1,109               | \$83        | Apr. 11, 2018 |

In response to DOHA inquiries about his state taxes, Applicant wrote that there were no state taxes in state T. (GE 2) He did not say anything about state taxes owed in state S or M1. (GE 2)

The IRS tax transcript for tax year 2011 indicated "RETURN NOT PRESENT FOR THIS ACCOUNT." (GE 2 at 4) The SOR did not allege that he failed to file his 2011 federal income tax return, and this discrepancy is not being considered as a disqualifying fact in Applicant's case. Applicant's claimed income, which is not part of the record, might have been too low to necessitate filing a federal income tax return.

Applicant's IRS tax transcript dated March 6, 2019, indicates for tax year 1999, he did not pay any taxes until December 6, 2004, when he paid \$5,058. In 2013, the IRS determined the tax for tax year 1999 was uncollectable, and in 2013, the lien was removed. (AE B) On June 9, 2014, the IRS wrote off the \$57,127 balance due, and his tax transcript indicates the current balance owed is zero. (AE B)

Applicant's tax transcript dated March 6, 2019, indicates for tax year 2002, the IRS filed a substitute return on December 1, 2003, and the only payment made was a transfer from tax year 2012 of \$517. (AE B) The IRS filed liens in 2013 and 2014 seeking collection for tax year 2002. (AE B) In 2014, the IRS wrote off the \$56,302 balance owed and removed the liens. (AE B) Applicant agreed with Department Counsel's statement that he previously owed more than \$300,000 in federal taxes, and he paid nothing to address his delinquent tax debt. (Tr. 35) Applicant did not submit tax transcripts for several tax years, and tax transcripts would have been helpful for a more complete understanding of how most of his federal income tax debt was generated.

Applicant attributed his initial tax problems to unemployment, inability to pay, and letting things "get out of hand." (Tr. 33-34) Applicant said his annual income was about \$23,000, and in 2018, it was about \$30,000. (Tr. 29) He did not specify the year in which his annual income was \$23,000. He was employed during the previous 10 years. (Tr. 29) He estimated he drove about eight or nine months of the year, and about two to five days a week. (Tr. 44) He is paid based on the miles he drives. (Tr. 44) The IRS did not audit his income taxes. (Tr. 32) At his hearing, Applicant insisted that he honestly reported and did not underreport his income to the IRS. (Tr. 36, 52)

Applicant pays his cohabitant \$250 a month for rent. (Tr. 30) He has less than \$400 in his checking and savings accounts. (Tr. 30) He does not have a 401(k) retirement account. (Tr. 30-31) He did not receive financial counseling. (Tr. 38)

Applicant provided a March 26, 2019 letter from a debt resolution firm stating Applicant's past due liabilities from the IRS, state M1, and state S were resolved. (SOR response) Applicant's October 2018, Equifax, TransUnion, and Experian credit reports did not indicate any tax liens. (SOR response)

Applicant admitted that he had several tax liens from state S and one from state M1. (Tr. 38-39) Applicant said some of them could be duplications because they were filed the same year. (Tr. 39) Applicant said he called state S and state M1 tax authorities about two months before his hearing, and he learned state S wanted a total of about \$57,000 and state M1 wanted about \$8,000. (Tr. 39, 41) The four state S tax liens in ¶¶ 1.e through 1.h total \$50,461. He did not provide proof that any of the State S tax liens were duplications. He conceded the March 26, 2019 letter from a debt resolution firm was

incorrect about resolution of the state tax liens. (Tr. 40, 47) He learned that generally his debt resolution firm does not resolve or address state tax problems. (Tr. 48) He said he had been making payments of unspecified amounts to states M1 and S every year for the last 10 or 15 years; however, he did not provide proof of such payments. (Tr. 46)

## **Policies**

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information.” *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicant’s eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. 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 about potential, rather than actual, risk of compromise of classified information. Clearance decisions must be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See Exec. Or. 10865 § 7. Thus, nothing in this decision should be construed to suggest that it is based, in whole or in part, on any express or implied determination about applicant’s allegiance, loyalty, or patriotism. It is merely an indication the applicant has not met the strict guidelines the President, Secretary of Defense, and DNI have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

## Analysis

### Financial Considerations

AG ¶ 18 articulates the security concern for 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. . . .

The Appeal Board explained the scope and rationale for the financial considerations security concern in ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012) (citation omitted) as follows:

This concern is broader than the possibility that an applicant might knowingly compromise classified information in order to raise money in satisfaction of his or her debts. Rather, it requires a Judge to examine the totality of an applicant’s financial history and circumstances. The Judge must consider pertinent evidence regarding the applicant’s self-control, judgment, and other qualities essential to protecting the national secrets as well as the vulnerabilities inherent in the circumstances. The Directive presumes a nexus between proven conduct under any of the Guidelines and an applicant’s security eligibility.

AG ¶ 19 includes disqualifying conditions that could raise a security concern and 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.” Applicant’s history of tax debt from 1999 to present establishes AG ¶¶ 19(a), 19(b), 19(c), and 19(f).

Seven financial considerations mitigating conditions under AG ¶ 20 are potentially applicable in this case:

(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;

(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;

(f) the affluence resulted from a legal source of income; 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.

The DOHA 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).

Applicant had a period of unemployment around 2003, and he reported exceptionally low income received from his cohabitant from 2012 to 2017. These are circumstances beyond his control that adversely affected his finances. However, these circumstances are insufficiently detailed to prove he acted responsibly under the circumstances. Applicant was a professional commercial tractor-trailer driver with opportunities to earn substantially more income. He did not establish that he was unable to increase his income which would have enabled him to better address his delinquent taxes. He did not provide proof that he diligently sought or was unable to seek higher-paying employment.

Applicant has taken an important step towards showing his financial responsibility. He employed a debt resolution company, which was able to convince the IRS that he had very low income and that he qualified for uncollectable status. On June 9, 2014, the IRS wrote off about \$300,000 in delinquent federal income tax debt. I have credited Applicant with mitigating his federal income tax debts in SOR ¶¶ 1.a through 1.d.

There is insufficient evidence about why Applicant was unable to address his delinquent state tax debts owed to states S and M1 as reflected in SOR ¶¶ 1.e through 1.i. He could have obtained more income because of his profession as a professional commercial truck driver. He owes an estimated \$65,000 in state income tax debt. He failed to establish mitigation of financial considerations security concerns.

### **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(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), "[t]he ultimate determination" of whether to grant a security clearance "must be an overall commonsense judgment based upon careful consideration of the guidelines" and the whole-person concept. My comments under Guideline F are incorporated in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under that guideline but some warrant additional comment.

Applicant is a 58-year-old commercial truck driver. He has worked for a government contractor for almost two years under a lease contract. He needs a security



clearance to enable him to deliver hazardous materials. Applicant served in the Army from 1983 to 1988; he left the Army as a private (E-2); and he received an honorable discharge.

From 1999 to 2002, Applicant received substantial income, and he did not pay his federal and state income taxes in full when due. By 2014, he owed about \$300,000 in delinquent federal income taxes, and the tax transcripts he provided showed minimal payments to the IRS, except for a \$5,058 payment on December 6, 2004. On June 9, 2014, the IRS declared his federal tax debts to be uncollectable and wrote them off. For more than four years, he has had no delinquent federal income taxes, according to his IRS tax transcripts. I have mitigated the federal tax debts listed in the SOR.

Applicant admitted that state S wants a total of about \$57,000 and state M1 wants about \$8,000 from Applicant. The primary problem here is that Applicant has known that he needed to pay his state income taxes for several years, and he failed to provide evidence that he attempted to secure better paying employment. He kept working for his cohabitant who was paying him very little. For example, in 2017, he told the IRS that his adjusted gross income from driving an 18-wheel truck was only \$1,109, and the federal poverty level for a single person in 2017 was \$12,060. See Federal Health and Human Services website (<https://aspe.hhs.gov/2017-poverty-guidelines>). If he worked 52 weeks a year, 40 hours a week, and earned \$7.50 an hour (the national minimum wage), his annual income would be \$15,600. Working for annual income substantially below the minimum wage, when such substantial state tax debts were owed, shows a lack of financial good judgment.

It is well settled that once a concern arises regarding an applicant's security clearance eligibility, there is a strong presumption against granting a security clearance. See *Dorfmont*, 913 F. 2d at 1401. Unmitigated financial considerations security concerns lead me to conclude that grant of a security clearance to Applicant is not warranted at this time.

I have carefully applied the law, as set forth in *Egan*, Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. Financial considerations security concerns are not mitigated.

### **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.d: | For Applicant     |
| Subparagraphs 1.e through 1.i: | 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 or continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

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Mark Harvey  
Administrative Judge