



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



In the matter of:	)	
	)	
	)	ISCR Case No. 19-00659
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Ross Hyams, Esq., Department Counsel  
For Applicant: *Pro se*

01/24/2020

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**Decision**

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HEINY, Claude R., Administrative Judge:

Applicant owes more than \$66,500 in delinquent taxes for tax years 2012 through 2016. He was more than \$33,000 delinquent on his mortgage and is delinquent on two automobile loan accounts. He filed for bankruptcy protection in October 2011. He has made little progress toward resolving his past-due balances. Clearance is denied.

**Statement of the Case**

On March 29, 2019, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) to Applicant, detailing security concerns under Guideline F, financial considerations. The SOR explained why the DOD CAF was unable to find it clearly consistent with the national interest to grant or continue security clearance eligibility for him. The DOD CAF took the action 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 *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AG) effective within the DOD on June 8, 2017.

On June 14, 2019, Applicant responded to the SOR allegations and requested a decision based on the written record in lieu of a hearing. On August 29, 2019, the Government submitted a File of Relevant Material (FORM), consisting of ten exhibits (Items 1-10). The Defense Office of Hearings and Appeals (DOHA) forwarded a copy of the FORM to Applicant and instructed him that any response was due within 30 days of receipt. Applicant received the FORM on September 9, 2019. No response was received by the October 10, 2019 deadline. On November 21, 2019, the case was assigned to me to determine whether it is clearly consistent with the interests of national security to grant or continue a security clearance for Applicant.

### **Evidentiary Ruling**

Department Counsel submitted, as Item 5, a summary report of a personal subject interview (PSI) of Applicant conducted on October 18, 2017. The summary report was part of the DOD Report of Investigation (ROI) in Applicant's case. Under ¶ E3.1.20 of the Directive, a DOD personnel background report of investigation may be received in evidence and considered with an authenticating witness, provided it is otherwise admissible under the Federal Rules of Evidence. The summary report did not bear the authentication required for admissibility under ¶ E3.1.20.

In ISCR Case No. 16-03126 decided on January 24, 2018, the Appeal Board held that it was not error for an administrative judge to admit and consider a summary of personal subject interview where the applicant was placed on notice of his or her opportunity to object to consideration of the summary; the applicant filed no objection to it; and there is no indication that the summary contained inaccurate information. In this case, Applicant was provided a copy of the FORM and advised of his opportunity to submit objections or material that he wanted the administrative judge to consider. In the FORM, Applicant was advised as follows:

Department of defense Directive 5220.6, Paragraph E3.1.7, provides that you be provided with a copy of all relevant and material information (FORM) that could be adduced at hearing and that you shall have 30 days from the receipt of this information in which to submit a documentary response setting forth objections, rebuttal, extenuation, mitigation, or explanation, as appropriate. If you do not file any objections or submit any additional information within 30 days of receipt of this letter, your case will be assigned to an Administrative Judge for a determination based solely on this File of Relevant Material. Additional information concerning your rights and responsibilities is provided in Directive and the cover letter accompanying this document.

Applicant did not respond to the FORM. Concerning whether Applicant understood the meaning of authentication or the legal consequences of waiver, Applicant's *pro se* status does not confer any due process rights or protections beyond those afforded him if he was represented by legal counsel. He was advised in ¶ E3.1.4 of the Directive that he

may request a hearing. In ¶ E3.1.15, he was advised that he is responsible for presenting evidence to rebut, explain, or mitigate facts admitted by him or proven by Department Counsel and that he has the ultimate burden of persuasion as to obtaining a favorable clearance decision. While the Directive does not specifically provide for a waiver of the authentication requirement, Applicant was placed on sufficient notice of his opportunity to object to the admissibility of the interview summary report, to comment on the interview summary, and to make any corrections, deletions, or updates to the information in the report. In the absence of any objections, I accepted Item 5 in evidence, subject to issues of relevance and materiality in light of the entire record.

### **Findings of Fact**

The SOR alleges under Guideline F that, as of the March 29, 2019 SOR, Applicant owed \$62,279 in delinquent federal taxes for tax years 2012 through 2016 (SOR ¶ 1.b). In 2018, his home state entered a \$4,267 tax lien (SOR ¶ 1.c) against him. (Item 8) He was \$32,100 past due on his mortgage (SOR ¶ 1.d) with a balance of \$621,081; \$1,341 past due on an automobile loan account (SOR ¶ 1.e) with a balance of \$25,613; and \$171 past due on an automobile loan account (SOR ¶ 1.f) with a balance of \$14,491. The SOR alleged he filed for Chapter 13 bankruptcy protection in September 2011 (SOR ¶ 1.a). That bankruptcy was discharged in October 2016. Applicant had also filed for Chapter 13 bankruptcy protection in April 2009, which was not alleged in the SOR. That bankruptcy action had been dismissed.

When Applicant answered the SOR allegations, he admitted that the debts are legitimate and attributed them to having made overpayments on his bankruptcy. (Item 3) He was unaware that he could readjust the amount of his payments. In July 2018, he submitted an IRS FORM 433-D, Installment Agreement. The IRS indicated the payment plan was being processed and no payments had been made. Applicant asserted he was working with a local tax attorney in an attempt to correct the debt. (Item 3) Applicant provided no documentation related to his association with the local tax attorney or actions taken concerning his tax debt. In his SOR response, Applicant stated he owed the state tax lien and was considering working with a local tax attorney concerning the tax lien. (Item 3)

Applicant admitted being past due on his mortgage, and had attempted to work with the mortgage company, but was unable to get a loan modification. (Item 3) Being \$32,100 past due would represent nonpayment on his mortgage for 14 months. He stated he would be leaving the home following a sheriff's sale on August 5, 2019. He provided no documentation related to the sheriff's sale or any funds owed following the sale. He stated he and his wife had separated, and he would be renting a room and his wife would move in with family. (Item 3)

Applicant admitted being past due on his wife's vehicle (SOR ¶ 1.e) and his vehicle (SOR ¶ 1.f). He indicated that after the foreclosure was completed and they moved out of the home, he would contact the lenders of the automobile loan accounts to work with them to become caught up on past-due payments. (Item 3) He provided no documentation

showing what if anything has been done concerning the past-due automobile loan accounts.

After considering the FORM, which includes Applicant's Answer to the SOR (Item 3), I make the following findings of fact:

Applicant is a 48-year-old technology consultant who has worked for a defense contractor since December 1999. In November 1992, he was granted sensitive compartmented information (SCI) access. He and his spouse married in March 2005, and they have an 11-year-old son. (Item 3.)

On August 21, 2017, Applicant completed and certified to the accuracy of an Electronic Questionnaires for Investigations Processing (e-QIP). (Item 4) He indicated he had filed for Chapter 13, Wage Earner's Plan, bankruptcy relief in September 2009. The plan listed assets of \$640,073 and liabilities of \$990,350. (Item 10) His case was dismissed in July 2011 due to the inability of their attorney to get the case confirmed. Applicant and his wife refiled for Chapter 13 bankruptcy relief in September 2011. They filed bankruptcy because his retail business, a book company, had failed. (Item 4) Other than stating the company failed due to low sales and insolvency, he provided no details or specifics about the business or provided any documentation related to the business.

Applicant listed on his e-QIP he owed \$6,867 for tax year 2012; \$7,049 for tax year 2013; \$12,638 for tax year 2014; \$15,962 for tax year 2015; and \$14,030 for tax year 2016. The total amount of delinquent taxes listed was \$56,546. (Item 4) He listed \$45,216 being more than 120 days delinquent on rental property and \$101,752 being more than 120 days delinquent on the mortgage of his primary residence. (Item 3) A \$101,752 delinquent mortgage would represent 34 months of delinquency.

A check of Applicant's credit on October 18, 2018, revealed \$32,100 past due on his mortgage, \$1,341 past due on one car loan, and \$171 past due on the other car loan. (Item 6)

On October 18, 2017, Applicant was interviewed by an authorized investigator for the Office of Personnel Management (OPM) and an enhanced subject interview was conducted. (Item 5) As of the date of the interview, Applicant indicated his mortgage loan had been modified reducing his monthly payments to \$2,279 for the original amount of \$2,938. (Items 5 and 7) He indicated he was four months delinquent on his payments. He indicated he owed \$66,546 in state and Federal delinquent income taxes.

Applicant explained his book business failed. He had moved his book business to a new location in hope of better sales. This was not to be and his landlord filed a lien against him. Other creditors demanded payment as well. (Item 5) In October 2011 due to his book business failure, Applicant filed for Chapter 13 bankruptcy relief. The plan required bi-monthly payments of \$1,269, which by April 2016, would pay off \$137,101 in debt. (Item 5) The plan listed assets of \$623,430 and liabilities of \$1,167,931. (Item 9) Secured debt was \$839,272. (Item 9) Applicant's monthly gross wages was listed as \$10,416 and his

spouse's monthly gross income was \$1,594. (Item 9) The plan listed \$71,475 in taxes due. (Item 9) Making the monthly payments under the bankruptcy plan made it difficult to pay the basis living expenses. (Ex. 5)

In October 2011, in order to generate additional income, Applicant started working an extra job as a deejay. His deejay job generated \$15,000 to \$22,000 in profit per year from 2011 to 2016. (Item 5) He failed to set aside taxes to cover this additional amount of income. (Item 5) He realizes he should have consulted a tax attorney when he started his deejay business. (Item 5) Applicant's income was affected by a loss of the use of a company car and then loss of \$400 weekly reimbursement for the use of his private automobile, which resulted in a loss of income of \$19,300.

In October 2016, Applicant started working a seasonal/part-time job at a big hardware appliance store. In May 2017, he resigned his job when the store wanted him to work full time. He was unable to work two full-time jobs. (Item 5) He is very concerned about the impact his finances could have on his ability to retain his security clearance. (Item 5) As of the enhanced subject interview in October 2017, his primary concern was paying off his tax debt and making timely payments on his mortgage, rent, car payments, and utilities. (Item 5)

In the August 29, 2019 FORM, Applicant was placed on notice of the Government's concern about his failure to provide any documentary evidence to show that he acted responsibly toward his creditors or that he has any repayment plans in place for his debts. In rebuttal to the FORM, Applicant had an opportunity to provide information of his current income, actions he has taken to address his financial problems, and of contacts with creditors taken to address the repayment of his debts. There is no indication that he responded by the October 10, 2019 deadline.

## **Policies**

The U.S. Supreme Court has recognized the substantial discretion the Executive Branch has in regulating access to information pertaining to national security, emphasizing that "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). 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 required to 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 overall 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.

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 that 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. 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.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

## **Analysis**

### **Guideline F: Financial Considerations**

The security concerns about financial considerations are articulated 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. . . .

An applicant is not required to be debt free, but is required to manage his finances in a way as to exhibit sound judgment and responsibility. 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.

Applicant and his wife refiled for Chapter 13 bankruptcy relief in September 2011 when his retail book business failed. His monthly wage earner's payment under the plan was so large that it made it difficult for him to meet his daily living expenses. He started working as a deejay which generated \$15,000 to \$19,000 income annually. However, his failure to pay his taxes on this income resulted in more than \$62,000 in delinquent Federal income taxes for tax years 2012 through 2016 and a state tax lien of more than \$4,000. He was more than \$32,000 past due on his home mortgage before the home went to foreclosure in August 2019. He fell behind on two vehicle loans as well. There is no indication that he has paid his delinquent taxes or made current his past-due accounts. Disqualifying conditions AG ¶¶ 19(a), "inability to satisfy debts," 19(c), "a history of not meeting financial obligations," and 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," apply.

The burden is on Applicant to mitigate the negative implications for his financial judgment raised by his delinquent debts. Application of the aforesaid disqualifying conditions triggers consideration of the potentially mitigating conditions under AG ¶ 20. One or more of the following conditions may apply in whole or in part:

(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 explained that he had to file for bankruptcy protection when his book business failed. Under AG ¶ 20(a), Applicant benefitted from the consumer credit extended to him by way of his home mortgage and automobile purchases, and he has yet to document making any payments toward the consumer-credit delinquencies alleged in the SOR. Additionally, he owes more than \$62,000 in delinquent Federal tax and owes more than \$4,000 on a state tax lien. The debts are considered recent because “an applicant’s ongoing, unpaid debts evidence a continuing course of conduct and, therefore, can be viewed as recent for purposes of the Guideline F mitigating conditions.” ISCR Case No. 15-06532 at 3 (App. Bd. Feb. 16, 2017) (citing ISCR Case No. 15-01690 at 2 (App. Bd. Sept. 13, 2016)). AG ¶ 20(a) does not apply.

A business failure is a situation that implicates AG ¶ 20(b). Even assuming that the business failure, which occurred prior to October 2011, more than eight years ago, was incurred because of circumstances outside of his control, several of Applicant’s unpaid delinquencies are owed to retailers and a mortgage company. Moreover, I have to consider whether Applicant acted in a reasonable manner when dealing with his financial difficulties. See ISCR Case No. 05-11366 at 4, n.9 (App. Bd. Jan. 12, 2007) (citing ISCR Case No. 99-0462 at 4 (App. Bd. May 25, 2000); ISCR Case No. 99-0012 at 4 (App. Bd. Dec. 1, 1999); ISCR Case No. 03-13096 at 4 (App. Bd. Nov. 29, 2005)). Applicant has provided no documentation concerning his business failure, or showing he has reached a settlement agreement with IRS and made payments in accord with that agreement; that he has been involvement with a local tax attorney; or that his delinquent mortgage loan has been resolved through the foreclosure on his home.

When Applicant’s tax problems started, he attempted to generate additional income starting in October 2011, when he obtained an extra job as a deejay. From 2011 to 2016, his deejay job generated \$15,000 to \$22,000 in profit per year. In October 2016, he started working a seasonal/part-time job at a big hardware appliance store. However, he had to resign in May 2017, when the store wanted him to work full time.

During his enhanced subject interview, Applicant stated he was very concerned about the impact his finances could have on his ability to retain his security clearance, and his primary concern was paying off his tax debt and making timely payments on his mortgage, rent, car payments, and utilities. However, this did not occur. He indicated in response to the SOR that he tried to negotiate repayment plan with the IRS, but he provided no details and lacks corroboration of any such efforts. It is difficult to find that



Applicant acted responsibly when there is scant detail in the record about his income and expenses. AG ¶ 20(b) was not fully established.

Applicant has had ample opportunity to provide evidence of actions taken, if any, to make payments on his delinquent consumer-credit debts, and he submitted no evidence of any payments. There is no evidence that he has had financial counseling. Neither AG ¶ 20(c) nor AG ¶ 20(b) can reasonably apply in mitigation. The Appeal Board has consistently held that a promise to pay a debt in the future is not a substitute for a track record of paying debts in a timely manner. See e.g., ISCR Case No, 09-05390 at 2 (App. Bd. Oct. 22, 2010). AG ¶ 20(e) does not apply because Applicant admitted all of the debts.

### **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 his conduct and all relevant circumstances in light of the nine adjudicative process factors in 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.

There is no documentary evidence Applicant has contacted his creditors or has paid any of his delinquent obligations. An applicant is not required to be debt-free or to develop a plan for paying off all debts immediately or simultaneously, but he is required to act responsibly given his circumstances and develop a reasonable plan for repayment, accompanied by "concomitant conduct," that is, actions which evidence a serious intent to effectuate the plan. See ISCR Case No. 07-06482 at 3 (App. Bd. May 21, 2008). What constitutes responsible behavior depends on the facts of a given case. He must document he has established a plan to resolve financial problems and taken significant action to implement the plan, which is not shown in the record. To his credit, he sought part-time employment to generate additional income, and he made his payments to his Chapter 13 bankruptcy plan.

Applicant requested a decision on the written record, so it was incumbent on him to provide the evidence that might extenuate or mitigate the poor judgment raised by his history of outstanding delinquent debt. By requesting an administrative determination, and then did not responding to the government's file of relevant material (FORM), he failed to submit sufficient information or evidence to supplement the record with relevant and material facts regarding his circumstances, articulate his position, and mitigate the financial security concerns. He failed to offer evidence of financial counseling or provide documentation regarding his past efforts to address his delinquent debt. By failing to

provide such information, and in relying solely on his explanation in his SOR Response, financial considerations security 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 his security worthiness.

The issue is not simply whether all the delinquent obligations have been paid—it is whether his financial circumstances raise concerns about his fitness to hold a security clearance. (See AG ¶ 2(c)). Applicant has not demonstrated the sound financial judgment expected of a person with eligibility for classified access. It is well settled that once a concern arises regarding an applicant's security clearance eligibility, there is a strong presumption against the grant or renewal of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990) Overall, the record evidence, due to a lack of documentation, 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, and I conclude that it is not clearly consistent with the national interest to grant or continue security clearance eligibility for Applicant.

### **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-1.f:	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 or continue eligibility for a security clearance for Applicant. Eligibility for access to classified information is denied.

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Claude R. Heiny  
Administrative Judge