

KEYWORD: Financial; Personal Conduct; Criminal Conduct

DIGEST: Applicant has a history of financial problems due to an unexpected layoff in 2002. He failed to timely file federal and state income tax returns for tax years 2002, 2003, and 2004. Applicant was also disciplined by his employer in 2004 for viewing inappropriate material on his work computer. He is repaying child support arrearage, but security concerns persist because of his failure to pay his mortgage on time, his concealment from his spouse of the details concerning his misuse of the work computer, and his failure to rectify his tax situation. Clearance is denied.

CASENO: 06-11989.h1

DATE: 08/06/2007

DATE: August 6, 2007

In re:)	
)	
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SSN: -----)	ISCR Case No. 06-11989
)	
Applicant for Security Clearance)	

**DECISION OF ADMINISTRATIVE JUDGE
ELIZABETH M. MATCHINSKI**

APPEARANCES

FOR GOVERNMENT

James F. Duffy, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant has a history of financial problems due to an unexpected layoff in 2002. He failed to timely file federal and state income tax returns for tax years 2002, 2003, and 2004. Applicant was also disciplined by his employer in 2004 for viewing inappropriate material on his work computer. He is repaying child support arrearage, but security concerns persist because of his failure to pay his mortgage on time, his concealment from his spouse of the details concerning his misuse of the work computer, and his failure to rectify his tax situation. Clearance is denied.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. As required by Department of Defense Directive 5220.6 ¶ E3.1.2 (Jan. 2, 1992), as amended, DOHA issued a Statement of Reasons (SOR) on March 8, 2007, detailing the basis for its decision—security concerns raised under Guideline F (Financial Considerations), Guideline E (Personal Conduct), and Guideline H (Criminal Conduct) of the revised Adjudicative Guidelines (AG) issued on December 29, 2005, and implemented by the Department of Defense effective September 1, 2006. The revised guidelines were provided to Applicant when the SOR was issued. Applicant answered the SOR on March 28, 2007, and elected to have a decision on the written record without a hearing.

The government submitted a File of Relevant Material (FORM) on April 10, 2007, consisting of 12 exhibits (Items 1-12). DOHA forwarded a copy of the FORM to Applicant and instructed him to respond within 30 days of receipt. No response was received by the May 17, 2007 due date, and on June 14, 2007, the case was assigned to me to determine whether it was clearly consistent with the national interest to grant or continue a security clearance for Applicant.

FINDINGS OF FACT

DOHA alleged under guidelines F (¶ 1.a) and J (¶¶ 3.a and 3.b) that Applicant failed to timely file and pay his federal and state income tax returns for tax years 2002, 2003, and 2004. It was also alleged under Guideline F that Applicant owed a \$1,247 debt as of January 2007 (¶ 1.b) and child support arrearage of \$9,000 as of March 2005 (¶ 1.c), and was late in his monthly mortgage payment six times in 2005 and seven times in 2006 (¶ 1.d). Under Guideline E, Applicant was alleged to have been disciplined by his employer in 2004 for viewing inappropriate (non pornographic) material on his work computer and to have concealed the facts that led to his suspension from his spouse knowing it could subject him to blackmail (¶ 2.a).

Applicant admitted he had difficulties satisfying some of his financial obligations because of a job layoff in 2002, and decreased income when he found work. As for the specific debts, he expressed his belief that the debt in ¶ 1.b had been paid, and he was repaying his child support arrearage at \$225 per month (¶ 1.c). He acknowledged he got behind in his mortgage due to unexpected expenses (vehicles breaking down, home repairs, the care of his elderly father-in-law). He did not anticipate continued problems paying his mortgage on time (¶ 1.d), because he had paid off his vehicle, freeing up \$450 per month, and his father-in-law had returned to his own home.

Applicant admitted he had used poor judgment in not following his employer's policy regarding computer usage, but while he had withheld certain information from his spouse about the disciplinary action, he denied he was subject to blackmail (§ 2.a). Applicant indicated that he and his spouse "desperately want to rectify this situation, file our tax returns, and if any outstanding taxes are owed, work out a plan to meet our obligations" (§§ 3.a and 3.b).

After a thorough review and consideration of the FORM, including Applicant's response to the SOR, I make the following findings of fact:

Applicant is a 40-year-old customer training specialist who has worked for his current employer since June 1997 except for a brief layoff from early 2002 to approximately summer 2003.

Applicant served on active duty in the United States Marines from 1985 to 1997 and was discharged at the rank of staff sergeant (rate E-6). In July 1998, Applicant and his first wife divorced after 11 years of marriage. Applicant and his spouse "each had custody of one of the boys." Applicant was ordered to pay child support, which was \$450 monthly as of March 2007.

Applicant subsequently remarried, although the date of his marriage to his second wife is not in the record available for review. In early 2002, Applicant was laid off from his job with his employer. He chose not to relocate because of the advanced age and ill health of his in-laws, and did not file for unemployment compensation. He found a job where he was paid "much less," but the record is silent as to the extent of the income loss. Applicant notified his former spouse that he could not pay his child support at the same rate and he would ask the court to modify his support obligation. According to Applicant and not rebutted by the government, his ex-wife told him that they would work it out, and Applicant paid little, if any, child support to his ex-wife.

In 2002 Applicant's spouse worked part-time for a company that went out of business at the end of the year. When she did not receive a W-2 form for tax year 2002 by the deadline for filing their federal and state income tax returns, Applicant and his spouse filed for an extension of time to submit their returns. As of March 2007, they had not filed their federal or state income tax returns for tax years 2002, 2003, or 2004. The record is silent as to whether they had filed for tax year 2005.

In or before summer 2003, Applicant returned to work for the defense contractor. Over the next year, he viewed various Internet sites "on a near daily basis" from his work computer, usually during his lunch time but occasionally during working hours. On one website, he viewed non pornographic images of women in swimsuits. On October 12, 2004, Applicant was placed on disciplinary leave for five days, and issued a corrective action memo for viewing inappropriate (non pornographic) material on his work computer in violation of company policy. He told his spouse that his suspension was for viewing the Internet too frequently at work as he did not want her to know that he had been viewing images of other women.

After he started back to work with the defense contractor, Applicant's ex-wife petitioned the court to collect what Applicant owed in child support. He was ordered to pay an arrearage of about \$9,000 at \$225 monthly in addition to his monthly child support payment. Applicant arranged to make the payments through payroll deduction.

In or about October 2003, Applicant's loan account with a finance company was charged off with a past due balance of \$247 (¶ 1.b). As of January 2005, Applicant was more than 120 days delinquent in his \$1,143 monthly mortgage obligation.

On March 9, 2005, Applicant was interviewed by a Defense Security Service (DSS) special agent about his one-week suspension from work and his financial problems. Applicant acknowledged he had accessed sports information and images of women clad in swimsuits on the Internet using his work computer, sometimes during work hours, and that he had been suspended for five days. Applicant indicated he had told his spouse that his suspension was for viewing the Internet too much and he had not told her about the content accessed. He wanted to keep from her that he had viewed images of other women on the Internet because of the stress in their relationship ("I am going to keep this a secret from her and accept that fact that this secret could be used against me for blackmail purposes." Item 6). Concerning his finances, Applicant admitted that he was being threatened with foreclosure for failing to make his mortgage payments for the past three months (¶ 1.d) because of other financial demands (vehicle repair and other bills). He added that he had \$8,700 available to avoid foreclosure. He also admitted that he had a personal loan on which he had made no payments for the past year (¶ 1.b). Applicant averred he would pay the \$800 balance in a few months. Applicant also acknowledged he and his spouse had not filed their 2002 or 2003 federal or state tax returns ("its been difficult to find all the receipts and paperwork that goes along with my wife's occupation, and we seem to keep putting it off"), although he believed he did not owe any taxes. He expressed his belief their delinquent returns would be filed within the next few months.

Under threat of foreclosure, Applicant brought his mortgage current as of April 2005. He had a spotty record of timely payment thereafter, falling behind more than 30 days several times and twice more than 60 days. Applicant attributes his late payments, in part, to expenses incurring in caring for his elderly father-in-law, who had heart valve surgery and a leg amputation. He presented no evidence of the amounts spent caring for his father-in-law.

As of November 2006, Applicant was more than 60 days late in his mortgage. A check of Applicant's credit on January 16, 2007, disclosed Applicant still owed a charged-off balance of \$247 on the debt in ¶ 1.b.¹ He had been late more than 30 days six times in the past two years on his automobile loan, but had brought it current as of November 2006. The loan, opened in November 2001 for \$23,303 with monthly payments of \$461, had a remaining balance of \$1,467 as of December 2006. There is no evidence that Applicant owes any delinquent federal or state income taxes for those tax years for which he has yet to file his returns (2002, 2003, and 2004).

POLICIES

"[N]o 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 occupy a position . . . that will give that person access to such information." *Id.* at 527. The President authorized the Secretary of Defense or his designee to grant applicants eligibility for

¹The evidence substantiates an outstanding balance of \$247 rather than the \$1,247 alleged. The high credit of the loan was \$1,247 according to Applicant's credit report (Item 7).

access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960). 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 revised Adjudicative Guidelines set forth potentially disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

CONCLUSIONS

Guideline F—Financial Considerations

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. (AG ¶ 18). As of March 2007, Applicant had not filed his federal or state income tax returns for tax years 2002, 2003, and 2004. Failure to file annual federal, state, or local income tax returns as required can have financial implications (¶ 19(g) *failure to file annual Federal, state, or local income tax returns as required, or the fraudulent filing of the same*). However, there is no evidence that Applicant owes any delinquent federal or state income taxes, or that his non filing was due to financial difficulties. Applicant told a DSS agent in March 2005 that he believed he owed no taxes, and there is no evidence to the contrary. However, Guideline F concerns are established because of his failure to make timely payments on a personal loan (¶ 1.b), on his child support obligation (¶ 1.c), and on his real estate mortgage (¶ 1.d). Disqualifying conditions (DC) ¶ 19(a) *inability or unwillingness to satisfy debts*, and ¶ 19(c) *a history of not meeting financial obligations*, apply.

Applicant stopped paying his child support and personal loan after he was laid off from his job with the defense contractor in early 2002. The Directive provides for mitigation where debts are incurred due to unforeseen circumstances (*See* mitigating condition (MC) ¶ 20(b), *the condition that resulted in the financial problem were largely beyond the person’s control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation)*), and the individual acted responsibly under the circumstances), but Applicant must have acted reasonably. Concerning the child support arrearage (¶ 1.c), Applicant arranged for an automatic deduction of \$225 per month from his pay toward the arrearage. While repayment pursuant to a court order does not merit the same weight in reform as had he initiated a good faith effort on his own after he returned to work for the defense contractor, that debt is being addressed (¶ 20(c) *the person has received counseling and/or there are clear indications that the problem is being resolved or is under control*).

However, as for the personal loan debt, Applicant knew as of March 2005 that he had not paid on the account for over a year. His January 2007 credit report shows a relatively low balance of \$247 (instead of the \$1,247 alleged). He has yet to produce documentation showing that the debt has been satisfied. As for his home mortgage, he has been late several times in the past two years. He was more than 120 days late in payment of his mortgage in March 2005, notwithstanding his return to work for the defense contractor sometime in 2003. While he came up with about \$8,700 to bring the mortgage current, he had a spotty record of repayment thereafter. Absent documentation confirming expenditures for car repair or for the care of his father-in-law, I am unable to apply MC ¶ 20(b) to his mortgage delinquency.

Applicant submits that he is in a better financial situation now, since he had paid off his car loan and his father-in-law had returned to his own home. A review of his recent credit report shows a balance on his car loan of \$1,467 as of December 2006. He was close to paying the debt off, and there is no evidence of any recent misuse of consumer credit cards. Yet, it is too soon to conclude that his financial problems are safely behind him, given his recent mortgage delinquency, and the absence of any evidence showing his income is adequate to cover his expenses.

Guideline E—Personal Conduct

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process. (AG ¶ 15). Applicant exhibited extremely poor judgment from summer 2003 to about September 2004 when he accessed inappropriate material on the Internet at work, including during work hours on occasion. Applicant's repeated violation of his employer's policy concerning Internet use on his work computer is potentially disqualifying under DC ¶ 16(d) *credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of: (3) a pattern of dishonesty or rule violations; (4) evidence of significant misuse of Government or other employer's time or resources.* Furthermore, since Applicant intentionally concealed from his spouse that he was suspended for viewing images of women in swimsuits on his work computer, DC ¶ 16(e) *personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing, applies.*

Applicant has acknowledged the inappropriate nature of his conduct and his poor judgment ("I have absolutely learned from my experience and ensure that I make intelligent decisions based on proper ethics, policies, procedures, and rules and regulations). Although there is no indication that Applicant has undergone any counseling (*see* ¶ 17(d) *the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur*), there is no evidence of recurrence, and Applicant

is not likely to jeopardize his job by misusing his company computer. However, Applicant has not mitigated the risk of vulnerability to exploitation, manipulation, or duress where he has not been forthcoming with his spouse about the nature of his inappropriate Internet use. Although he indicates that if an incident were to arise he would fully disclose all information to his spouse, there is little assurance that he will do so given his concealment to date.

Guideline J—Criminal Conduct

Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations. (AG ¶ 30). Applicant and his spouse did not file their income tax returns, federal or state, starting with tax year 2002 when she failed to get her W-2 from an employer. Although they filed for an extension of time to file that return, they did not file for that year or subsequent tax years through 2004, if not 2005. Although Applicant was laid off in early 2002, he did not dispute that he had earned income that year. By summer 2003, he had rejoined the defense contractor. Applicant now claims to not have known whether he should have filed without the W-2, and to have been informed in 2003 that he could not file his income tax return without the previous year. Yet, when asked by the DSS agent in March 2005 about the non filing, Applicant did not claim the loss of a W-2 or not knowing he had to file. Instead, he responded:

My wife is an independent contractor and thus her taxes are somewhat difficult for use to file. We have not filed our 2002 or 2003 federal or state tax returns. We do not believe we owe either the federal or state government money, but its been difficult to find all the receipts and paperwork that goes along with my wife's occupation, and we seem to keep putting it off.

He knew he had an obligation to file and had not complied by March 2007. By willfully not filing his federal income tax returns for tax years 2002, 2003, and 2004, Applicant committed misdemeanor criminal conduct.² Under pertinent state law, his failure to file his state income tax returns for those years is also punishable as a crime if he had the intent to defraud.³ I am not

²Title 26, Section 7203 of the United States Code provides in relevant part:

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return, keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulation, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than \$25,000 (\$100,000 in the case of a corporation), or imprisoned not more than 1 year, or both, together with the costs of prosecution. (Item 11)

³Under Section 143.011 of the Missouri Revised Statutes, a tax is imposed for every taxable year on the Missouri taxable income of every resident. The willful failure to file is punishable as a crime under Section 143.931, which provides:

Any person required under sections 143.011 to 143.996 to pay any tax, or required by sections 143.011 to 143.996 to make a return (other than a return of estimated tax), keep any records, or supply any information, who willfully with intent to defraud fails to pay such tax, make such return, keep such records, keep such records, or supply such information, at the time or times required by law, shall, in addition to other penalties provided by law, and upon conviction thereof, be fined not more than ten

persuaded of a benign motive where Applicant has yet to make any effort to address his delinquent filings. The DOHA Appeal Board held in ISCR Case No. 97-0176 (Jan. 22, 1998), "The legal obligation to file income tax returns is independent and distinct from whether the taxpayer is entitled to receive a refund or not." DC ¶ 31(a) *a single serious crime or multiple lesser offenses*, and ¶ 31(c) *allegations or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted, or convicted*, apply.

None of the mitigating conditions apply. The record is silent as to whether Applicant filed his federal and state income tax returns for tax year 2005. Even if he filed his returns for 2005 on time, MC ¶ 32(d) *there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement*, does not apply. Despite an expressed desire to address his tax situation ("We desperately want to rectify this situation, file our tax returns, and if any outstanding taxes are owed, work out a plan to meet our obligations."), he had taken no action toward filing his delinquent returns.

Whole Person Analysis

The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is eligible for a security clearance. AG ¶ 2(a). Applicant's service in the Marines is viewed favorably (¶ 2(a) Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination). Yet, his behavior since 2003 has not been what one would expect from someone with 12 years in the military, where he was required to follow orders and to comply with rules and regulations. Considerable judgment concerns persist because of his ongoing disregard of his obligation to file income tax returns, his recent financial delinquency, and his violation of his employer's policies regarding the use of a company-owned computer.

FORMAL FINDINGS

The following are my conclusions as to each allegation in the SOR:

Paragraph 1. Guideline F:	AGAINST APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	Against Applicant
Paragraph 2. Guideline E:	AGAINST APPLICANT

thousand dollars, or be imprisoned in the county jail for not more than one year or by not less than two nor more than five years in the state penitentiary or by both fine and imprisonment together with the cost of prosecution. (Item 12)

Subparagraph 2.a:	Against Applicant
Paragraph 3. Guideline J:	AGAINST APPLICANT
Subparagraph 3.a:	Against Applicant
Subparagraph 3.b:	Against Applicant

DECISION

In light of all of the circumstances in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is denied.

Elizabeth M. Matchinski
Administrative Judge