

KEYWORD: Financial; Personal Conduct

DIGEST: Applicant is a 55-year-old employee of a defense contractor. He incurred delinquent debts and has not filed his taxes for the years 2003 and 2004. He has two unpaid tax liens. He has not mitigated the security concern under the financial considerations guideline. He did not falsify his answers on his security application form. He has mitigated the personal conduct concern. Clearance is denied.

CASENO: 06-18756.h1

DATE: 09/12/2007

DATE: September 12, 2007

In re:)	
)	
-----)	
SSN: -----)	ISCR Case No. 06-18756
)	
Applicant for Security Clearance)	
)	

**DECISION OF ADMINISTRATIVE JUDGE
NOREEN A. LYNCH**

APPEARANCES

FOR GOVERNMENT

Daniel F. Crowley, Esq., Department Counsel

FOR APPLICANT

Pro se

SYNOPSIS

Applicant is a 55-year-old employee of a defense contractor. He incurred delinquent debts and has not filed his taxes for the years 2003 and 2004. He has two unpaid tax liens. He has not mitigated the security concern under the financial considerations guideline. He did not falsify his answers on his security application form. He has mitigated the personal conduct concern. Clearance is denied.

STATEMENT OF THE CASE

On January 3, 2006, Applicant applied for a security clearance and submitted a Security Clearance Application (SF 86). On February 8, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to him, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified. The SOR detailed reasons why, under Guideline F (Financial Considerations) and Guideline E (Personal Conduct) of the revised Adjudicative Guidelines issued on December 29, 2005, and implemented by the Department of Defense, effective September 1, 2006, DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to continue a security clearance for Applicant. The revised guidelines were provided to Applicant when the SOR was issued. Applicant answered the SOR on April 2, 2007, and elected to have a hearing before an administrative judge. The case was assigned to me on July 5, 2007. I scheduled a hearing for August 7, 2007.

The hearing was convened as scheduled on August 7, 2007 to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Government exhibits (GE 1-5) were admitted. Applicant's exhibits (AE A-G) were admitted into the record without objection. Testimony was taken from Applicant and three witnesses on Applicant's behalf, as reflected in the hearing transcript (Tr.) received on August 23, 2007. I left the record open for Applicant to supplement the record. He timely submitted a packet of information which is marked as AE H. Department Counsel had no objection. The record closed on August 21, 2007.

FINDINGS OF FACT

Applicant's admissions to the allegations in the SOR ¶¶1.f, 1.g, and 1.i are incorporated herein. He denied all other allegations under subparagraphs 1 and 2 because he disputed he was liable.¹ In addition, after a thorough and careful review of the evidence and exhibits, I make the following findings of fact:

Applicant is a 55-year-old who works for a defense contractor.² He graduated from high school in 1972.³ He is married with one step daughter. Applicant has worked in the trucking business since 1979. He progressed in his field and in 1982 became an agent for a major company. For the

¹Applicant's response to the SOR, dated April 2, 2007.

²GE 1 (Security Clearance Application, dated January 3, 2006).

³Tr. 36.

past 23 years he has been a successful agent.⁴ On January 3, 2006, he completed a security clearance application (SF 86).⁵

Applicant's business career was thriving. He generated millions of dollars in revenue as an agent for his company, even earning a plaque for his endeavors. He was earning a significant amount of money and his credit was excellent. In or about 1995, Applicant agreed to form a business with his accountant/ attorney after being approached by him. He also considered this man his friend. They incorporated for the purpose of entering a trucking business.⁶ They had trucks leased to the large company and hauled freight for the company. The partner received the money from the corporation profits but did not pay its bills. Applicant learned this approximately one year after the start of the business.⁷

Applicant's business closed in or about 1997 or 1998.⁸ He had many business debts on credit cards issued for the company. He had a lawyer write to credit card companies to explain the situation. Many accounts were charged off.⁹ Applicant denied any personal liability for the accounts because they were incurred as part of his incorporated business.¹⁰

At the hearing, Applicant acknowledged that his brother advised against the corporation because the future partner did not have good credit and wanted to use Applicant's credit for the startup of the business. He was very vague about the actual beginning and end of the business. In fact, at one point in answer to a question, he responded that he has always worked for the trucking company.¹¹ Applicant paid on some of the credit cards for a period of time but could not keep up the payments. Applicant acknowledged that he would get calls from various credit card companies and they would offer him credit. He accepted the credit card and after the business had ended, he tried to pay some of the debts. He also acknowledged that the credit was offered so that he could pay off other bills. It is not clear what business expenses the cards were used for.¹²

The state filed a tax lien against Applicant in March 2005, in the amount of \$4,774, which Applicant acknowledges. A second state tax lien, in the amount of \$4,964, for nonpayment of taxes is also acknowledged. Applicant's credit reports reflected the two tax liens filed by the state. He thought they had been satisfied earlier, but it is apparent that he was referring to something in the

⁴Tr. 37.

⁵GE 1 *supra* at note 2.

⁶Tr. 38.

⁷*Id.*

⁸Tr. 39.

⁹Tr. 40.

¹⁰GE 2 (Interrogatories from Applicant).

¹¹Tr. 82.

¹²Tr. 53.

earlier years.¹³ His answers at the hearing were inconsistent with his admissions in his response to the SOR. He stated that he would look into the matter and if he owed, he would try to work it out. No additional information was submitted on this matter.

As of the date of the hearing, Applicant had not filed tax returns for 2003 and 2004. He stated he would like to mail them at the same time. He recently gave them to a CPA. Applicant stated that he probably owes taxes on them.¹⁴

Applicant completed a security clearance application on January 3, 2006. In response to Section 11, which requested information about employment activities, he did not disclose his joint ownership in his corporation. Applicant explained that the corporation (a trucking concern) was not separate in his mind from his work as an agent for the large company he worked for. He believed since the endeavor with the corporation only did business with the trucking company and that his business had closed, he did not have to list it under his employment.

On the same application, Applicant answered "no" to **Section 28: Your Financial Delinquencies - 180 Days**. In the last 7 years, have you been over 180 days delinquent on any debt(s)? Applicant stated he answered the questions to the best of his ability. Since he did not consider that he was personally liable for the business debts, he answered "no" to the question. He explained that he was not delinquent on any of his personal debts in the last 7 years.

Applicant answered "no" to **Section 28: (a) Your Financial Delinquencies - 90 Days**, which asked if Applicant was more than 90 days delinquent on any debts. He answered "no" for the very same reasons that are discussed above.

Applicant explained at the hearing he has not been delinquent on his personal accounts. Thus, he answered no the various questions on the security clearance. He thought it referred to a home loan or something along those lines. He admitted that he never had to fill out anything so detailed as the security questionnaire and that he became very confused.

At the present time, Applicant is doing business as an agent for the large trucking company that he represented earlier. His business is mainly with government contractors. He earned approximately \$60,000 in commission last year. The prior year, he estimates he earned \$49,000. His net monthly pay is around \$1,400.¹⁵ He is current on his mortgage and other accounts.

Applicant's responses to all the debts alleged in the SOR were the same. He did not consider them his own personal debts. He was adamant that because the corporation closed, the accounts were written off as a business loss. He did dispute the debt in 1.a as having been paid, but he had no documentation. He admitted there were tax liens and that the two returns in question were not yet filed. Applicant submitted a post hearing document with a corporate credit card bill from 1999, but

¹³Tr. 57.

¹⁴Tr. 64.

¹⁵Tr. 78.

it was in his own name. He did not have any other evidence to support the fact that the charged off accounts were from the failed corporation.

The current status of Applicant's alleged debts listed in the SOR is as follows:

SOR ¶	Type of Account/Amount	Status	Evidence
1.a	Phone \$72	Disputed	Tr. 43.
1.b	credit card \$30,030	Charged off (2002)	GE 4 and 5
1.c	credit card \$16,045	Charged off (2003)	TR. 52; GE 4 and 5
1.d	credit card \$13,881	Charged off (2004)	Tr. 53
1.e	credit card \$5,094	Collection (2004)	Tr. 53
1.f	state tax lien (2005)	Unpaid	GE 4, 5.
1.g	state tax lien (2005)	Unpaid	same as above
1.h	gas bill \$129	Paid	Tr. 65; GE 5
1.i	tax returns (2003-2004)	Not filed	Tr. 58

Applicant is highly recommended by his friends and social associates. His long time family friends attest to his honesty and loyalty. Each witness praised Applicant as a family man. He is professional in his dealings with others.¹⁶ He is honest and forthright. He is also involved in community activities and helped in a project after Hurricane Katrina. Applicant submitted seven letters of recommendation.¹⁷

POLICIES

The revised Adjudicative Guidelines (AG) set forth set forth both disqualifying conditions and mitigating conditions applicable to each specific guideline. Additionally, each security clearance decision must be a fair and impartial commonsense decision based on the relevant and material facts and circumstances, the whole-person concept, along with the factors listed in the Directive. Specifically these are: (1) the nature, extent and seriousness of the conduct and surrounding circumstances; (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

¹⁶Testimony from three witnesses as reflected in Tr.

¹⁷AE A-G.

recurrence. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance.

The sole purpose of a security clearance determination is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.¹⁸ The government has the burden of proving controverted facts.¹⁹ The burden of proof is something less than a preponderance of evidence.²⁰ Once the government has met its burden, the burden shifts to an applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him.²¹ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.²²

No one has a right to a security clearance²³ and “the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”²⁴ Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting such classified information.²⁵ The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of an applicant.²⁶ It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a security clearance.

CONCLUSIONS

I have carefully considered all the facts in evidence and the legal standards discussed above. I reach the following conclusions regarding the allegations in the SOR.

Guideline F - Financial Considerations. *The Concern: 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*

¹⁸ ISCR Case No. 96-0277 at 2 (App. Bd. Jul 11, 1997).

¹⁹ ISCR Case No. 97-0016 at 3 (App. Bd. Dec 31, 1997); Directive, Enclosure 3, ¶ E3.1.14.

²⁰ *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

²¹ ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug 10, 1995); Directive, Enclosure 3, ¶ E3.1.15.

²² ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan 27, 1995); Directive, Enclosure 3, ¶ E3.1.15.

²³ *Egan*, 484 U.S. 518, at 531.

²⁴ *Id.*

²⁵ *Id.*; Directive, Enclosure 2, ¶ E2.2.2.

²⁶ Executive Order 10865 § 7.

*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.*²⁷

In this matter, the government provided substantial evidence that Applicant accrued delinquent debts that are still outstanding debts. He also has two state tax liens from 2005 that have not been paid. He admits that he has not yet filed his taxes for several years. Consequently, Financial Considerations Disqualifying Condition (FC DC), AG ¶ 19(a), (*inability or unwillingness to satisfy debts*) FC DC, ¶ 19(c), (*a history of not meeting financial obligations*) and FC DC, ¶ 19(g) (*failure to file annual Federal, state or local income tax returns*) apply.

With the government's case established, the burden shifts to Applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him. Applicant formed a corporation with a partner, whom he described as a friend and his lawyer. The fact that his partner did not pay the corporation's bills does not qualify as a condition beyond his control. Therefore, FC MC, AG ¶ 20(b), (*the conditions that resulted in the behavior 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*) does not apply.

The tax liens are still not resolved. He has not filed his 2003 and 2004 tax returns. Therefore, Financial Considerations Mitigating Condition (FC MC), ¶ AG 20(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*) does not apply.

Applicant has not received financial counseling. Applicant has not shown that his problems are being resolved or are under control. FC MC, AG ¶ 20(c) (*the person has received or is receiving counseling for the problem and/ or there are clear indications that the problem is being resolved or is under control*) does not apply.

Applicant denied any personal liability for the charged off accounts. He paid two bills listed in the SOR. He has not yet paid his tax liens and his taxes. This has been ongoing. He has not initiated any kind of repayment plan. Therefore, FC MC, ¶ 20(d) (*the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts*) does not apply.

FC MC, AG ¶ 20(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*) does not apply. Applicant has presented some documentation concerning his corporation. However, he has not presented sufficient documentation that the debts were business expenses. His one statement from 1999 from a corporate credit card has his name on it, not the corporate name. Applicant did not meet his burden of proof in the case.

Personal Conduct. The Concern: *Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an*

²⁷ AG ¶ 18.

*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 process or any other failure to cooperate with the security clearance process.*²⁸

In response to Section 11: Your Employment Activities, Applicant listed only his employment with the trucking company from 1985 to the present. He did not list the failed corporation. He explained that he thought since the work was basically the same, he did not think of listing the corporation. The question does not specifically mention any corporate endeavors or partnerships. He stated that he was a bit confused by the long, detailed security form. I find this credible and thus, I do not find that this was an intentional misrepresentation.

On January 3, 2006, Applicant, in response to **Section 28: Your Financial Delinquencies - 180 Days answered "no."** When he responded to the question, he believed it referred to his personal credit under his own social security number. Since he had none (except the tax liens) he answered "no." He answered "no" also to the question concerning 90 days delinquent for the same reason.

Under DC 16 (a), the government established that Applicant omitted a material fact from his answer to Section 28. He denies however that he deliberately falsified his answer to this question. When a falsification allegation is controverted, the government has the burden of proving it. Proof of an omission, standing alone, does not establish or prove an Applicant's intent or state of mind when the omission occurred. An administrative judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence regarding an Applicant's intent or state of mind at the time the omission occurred.²⁹ For DC 16 (a) (*deliberate omission, concealment, or falsification of relevant and material facts from an personnel security questionnaire . . .*) to apply, the government must establish that Applicant' omission, concealment or falsification in his answer was deliberate. I do not find that this was a deliberate falsification. I find in favor of Applicant for personal conduct.

Whole Person

I have considered both the record and Applicant in light of the "whole person" concept. He is an earnest, trusting individual who has worked hard all his life. However, he did not take the necessary financial vigilance in his corporation. He has not been financially responsible with the tax liens or the filing of his taxes. He has an excellent reputation in his community, however that does not absolve him from meeting his financial responsibilities.

Applicant has two unpaid tax liens. He also has not filed his tax returns. He has not persuaded me that the delinquent debts are for the corporation. He submitted information that he used a credit card in 1999 but that is not sufficient to overcome the government's case. He plans to have his CPA file his taxes when he gets the paperwork together. His failure to pay his state tax debt is not outweighed by the favorable findings. Accordingly for the reasons stated, I find that it is not clearly consistent with the national interest to grant a security clearance to Applicant.

²⁸AG ¶ 15.

²⁹See ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004) (explaining holding in ISCR Case No. 02-23133 at 5 (App. Bd. Jun. 9, 2004)).

In weighing the disqualifying and mitigating conditions, and all the facts and circumstances, in the context of the whole person, I conclude he has not mitigated the security concerns pertaining to financial considerations.

Substantial evidence does not support Applicant's eligibility and suitability for a security clearance. I take this position based on the law, my "careful consideration of the whole person factors"³⁰ and supporting evidence, as well as my application of the pertinent factors under the Adjudicative Process and my interpretation of my responsibilities. For the reasons stated, I conclude Applicant is not eligible for his security clearance.

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 (Financial Considerations):	AGAINST APPLICANT
Subparagraphs 1.a.- 1.i:	Against Applicant
Paragraph 2. Guideline E (Personal Conduct)	FOR APPLICANT
Subparagraph 2.a: - 2.c:	For Applicant

DECISION

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

Noreen A. Lynch.
Administrative Judge

³⁰ See ISCR Case No. 04-06242 at 2 (App. Bd. June 28, 2006).