

KEYWORD: Financial

DIGEST: Applicant filed Chapter 13 bankruptcy petitions in 1991 and 1992, both of which were dismissed. The first was dismissed for failing to file a required confirmation certification and the second for nonpayment. She now has eight delinquent debts, including a federal income tax debt of \$53,189. She did not disclose a federal tax lien when she executed her security clearance application (SF 86), because she was unaware of it. She has refuted the allegation of falsifying her SF 86, but she has not mitigated the security concerns raised by her financial problems. Clearance is denied.

CASENO: 06-19106.h1

DATE: 05/31/2007

DATE: May 31, 2007

In re:)	
)	
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-----)	ISCR Case No. 06-19106
SSN: -----)	
)	
Applicant for Security Clearance)	
)	

**DECISION OF ADMINISTRATIVE JUDGE
LEROY F. FOREMAN**

APPEARANCES

FOR GOVERNMENT

Stephanie C. Hess, Esq., Department Counsel

FOR APPLICANT

Pro se

SYNOPSIS

Applicant filed Chapter 13 bankruptcy petitions in 1991 and 1992, both of which were dismissed. The first was dismissed for failing to file a required confirmation certification and the second for nonpayment. She now has eight delinquent debts, including a federal income tax debt of \$53,189. She did not disclose a federal tax lien when she executed her security clearance application (SF 86), because she was unaware of it. She has refuted the allegation of falsifying her SF 86, but she has not mitigated the security concerns raised by her financial problems. Clearance is denied.

STATEMENT OF THE CASE

On November 29, 2006, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny Applicant a security clearance. This action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified, Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified (Directive), and the revised adjudicative guidelines approved by the President on December 29, 2005, and implemented effective September 1, 2006 (Guidelines). The SOR alleged security concerns raised under Guideline F (Financial Considerations) and Guideline E (Personal Conduct).

Applicant answered the SOR in writing on December 22, 2006, and elected to have a hearing before an administrative judge. The case was assigned to me on March 28, 2007 and heard on April 25, 2007, as scheduled. I kept the record open until May 9, 2007, to enable Applicant to submit documentary evidence. I received her evidence on May 9, 2007, and it has been admitted without objection as Applicant's Exhibits (AX) A through U. DOHA received the hearing transcript (Tr.) on May 14, 2007.

FINDINGS OF FACT

Applicant's admissions in her answer to the SOR and at the hearing are incorporated into my findings of fact. I make the following findings:

Applicant is a 52-year-old instructional designer for a defense contractor. She has worked for her current employer since November 2004. She served for 20 years in the U.S. Navy, retiring in February 1994 as a chief petty officer (E-7). She received a security clearance in February 1974 and was cleared for sensitive compartmented information in August 1975. She currently holds an interim clearance.

Applicant and her husband, also retired from the U.S. Navy, have been married since August 1977. They purchased a condominium in the late 1980's while they were both on active duty and assigned in the U.S. After they were reassigned overseas, they had difficulty selling it because of litigation between the homeowners' association and the developers (Tr. 86). They found themselves paying expenses for two households (Answer at 2). They also incurred unexpected funeral expenses in December 1990 when Applicant's father-in-law died. Applicant and her husband filed a Chapter 13 bankruptcy petition in June 1991 (SOR ¶ 1.j). The petition was dismissed in November 1991 for failure to file a required confirmation certification (Government Exhibit (GX) 4).

Applicant and her husband filed a Chapter 13 bankruptcy petition again in November 1992 (SOR ¶ 1.k). This petition was dismissed in December 1992 after they missed two required payments to the bankruptcy trustee (GX 5). By the time this petition was dismissed, they had paid approximately \$80,000 to the trustee. Shortly afterwards, the mortgage on their home was foreclosed (Answer at 2).

When Applicant was laid off from her job with a federal contractor in October 1999, she used her veteran's benefits to continue her education. She received a master of education degree in August 2003 and a master of science in educational leadership and instructional technology in January 2004.

Applicant testified she and her husband were advised that they could not take a federal income tax deduction for the mortgage interest paid on their home while the Chapter 13 bankruptcy was ongoing. The source and basis for this advice are not reflected in the record. As a result, they incurred a large federal income tax debt. According to Applicant, when they finally gathered the documentation to support a tax deduction, it was too late to claim it. They spent about \$6,000 in legal fees for unsuccessful attempts to settle or compromise the tax debt. At one time, their attorneys offered to settle the debt for about \$9,000, but the IRS rejected the offer. Applicant and her husband decided to negotiate directly with the Internal Revenue Service, and they began a payment plan in March 2006, providing for monthly payments of \$930. They made five payments. On April 16, 2007, they were notified by the IRS that the payment agreement was terminated for nonpayment. They are now awaiting a packet of forms and instructions from the IRS to resubmit an offer of compromise (Tr. 62). Applicant's husband testified he and Applicant share responsibility for family finances, but she takes care paying the household bills and he has taken responsibility for dealing with the insurance companies and the IRS because, in his words, "[T]hat's my mess and I need to get out of it." (Tr. 85).

In August 2004, the IRS placed a tax lien against Applicant's property for \$53,189. She executed her SF 86 on November 22, 2004. She answered "no" to question 36, asking if a lien had been placed against her property during the past seven years. She denied intentionally falsifying her SF 86, explaining that she was unaware of the lien until late December 2004 or early January 2005, when she applied for a car loan and discovered the tax lien (Tr. 41). Applicant's husband called their tax lawyers, who informed them they had tried to have the lien released but were unsuccessful (Answer to SOR at 3).

After retiring from the Navy, Applicant's husband obtained an associate's degree in forestry. He worked for the state as a forestry technician for about five years, until the state required that foresters be able to fight forest fires. He could not work as a fire fighter because of a respiratory ailment, and he lost his job in September 2004 (Tr. 72). After he left his forestry job, he worked in a home improvement store, but he has been unable to work since December 2006 because of a back problem. He is scheduled for back surgery in May 2007 (Tr. 56-57, 77-78).

Applicant and her husband have owned their current home since August 1997, and they have considerable equity in the property. They also own an adjoining lot on which there is no mortgage debt (Tr. 69). Applicant believes they could sell the adjoining lot or obtain an equity loan and pay off the tax debt if the federal tax lien were lifted. (Tr. 65-66).

Applicant and her husband suffered about \$45,000 hurricane damage to their home during Hurricane Ivan on September 16, 2004. The hurricane hit about a week after Applicant's husband lost his job. All but the \$4,000 deductible was covered by insurance, but they incurred about \$10,000 in other out-of-pocket expenses not covered by insurance. They financed most of their out-of-pocket expenses with credit cards (Tr. 84-85).

At some time in 2005, Applicant and her husband incurred more than \$3,000 in emergency veterinary expenses to save the life of their dog. They incurred the credit card debt alleged in SOR ¶ 1.c to pay the bill.

In December 2005, Applicant and her son-in-law purchased a “hobby car,” a 1983 Excalibur, for about \$37,000 (Tr. 58, 67). They owe about \$30,000 on it. Applicant estimates its current market value at about \$40,000 (Tr. 67). She makes the monthly payments of \$679 on this car (Tr. 58-59). Her monthly expenses include about \$1,500 for insurance on three cars, including the hobby car (Tr. 59).

The evidence concerning the debts alleged in the SOR is summarized in the table below.

SOR	Debt	Amount	Status and Dates of Action	Record
1.a	Federal tax lien for tax year 2002	\$53,189	Paid \$930 per month for five months; plan terminated 4-16-07 for nonpayment; awaiting receipt of application packet to resubmit offer of compromise	Answer to SOR; AX C; Tr. 80-81
1.b	Credit card	\$865	Unpaid	Tr. 48
1.c	Pet surgery	\$2,306	\$200 payment on 5-8-07 (after hearing)	AX B
1.d	Loan for new air conditioning units	\$5,713	Unpaid, attempting to negotiate settlement	AX B; Tr. 49
1.e	Credit card	\$945	Paid in full, but no documentation	AX B; Tr. 47-48
1.f	Credit card	\$1,064	\$305 payment on 4-19-07	AX D
1.g	Credit card	\$713	Creditor agreed on 4-28-07 (after hearing) to accept \$200 per month	AX E
1.h	Gasoline credit card	\$849	Settlement offer received on 4-21-07 (after hearing)	AX F
1.i	Credit card	\$1,083	Unpaid, attempting to negotiate payment plan	AX B

Applicant’s military retired pay is about \$987 per month, and she receives \$339 in veteran’s disability pay (AX H at 3). Her monthly contractor pay is about \$2,800 (Tr. 57). She has received only two-thirds of her contractor pay since March 2007 because of health problems (Tr. 42, 57). Her husband receives \$1,324 in military retired pay (AX G; AX H at 1). After paying monthly expenses, they have no remainder and sometimes fall short (Tr. 61-63).

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 has authorized the Secretary of Defense or his designee to grant applicants 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, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified. Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the Guidelines. Each clearance decision must be a fair, impartial, and commonsense decision based on the relevant and material facts and circumstances, the whole person concept, the disqualifying conditions and mitigating conditions under each specific guideline, and the factors listed in the Guidelines ¶¶ 2(a)(1)-(9).

A person granted access to classified information enters into a special relationship with the government. The government must be able to have a high degree of trust and confidence in persons with access to classified information. However, 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.

Initially, the government must establish, by substantial evidence, conditions in the personal or professional history of the applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified information. *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. *See* 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). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; *see* Guidelines ¶ 2(b).

CONCLUSIONS

Guideline F (Financial Considerations)

The concern under this guideline is as follows: “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.” Guidelines ¶18.

Several disqualifying conditions under this guideline could raise a security concern and may be disqualifying in this case. Guidelines ¶ 19(a) applies where there is an “inability or unwillingness to satisfy debts.” Guidelines ¶ 19(b) is a two-pronged condition that applies where there is “indebtedness caused by frivolous or irresponsible spending and the absence of any evidence of willingness or intent to pay the debt or establish a realistic plan to pay the debt.” Guidelines ¶ 19(c) applies when there is “a history of not meeting financial obligations.” Guidelines ¶ 19(e) applies when there is “consistent spending beyond one’s means, which may be indicated by excessive indebtedness, significant negative cash flow, high debt-to-income ratio, and/or other financial analysis.” All these disqualifying conditions are raised by the evidence in this case.

Since the government produced substantial evidence to raise the disqualifying conditions in Guidelines ¶¶ 19(a), 19(b), 19(c), and 19(e), the burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it is never shifted to the government. *See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).*

Security concerns based on financial problems can be mitigated by showing that “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.” Guidelines ¶ 20(a). Applicant’s delinquent debts are numerous, recent, and likely to continue. Her purchase of an expensive “hobby car,” and her decision to pay for the car and insurance for her son-in-law did not reflect good judgment in light of her long-standing and persistent financial problems. I conclude this mitigating condition is not established.

Security concerns under this guideline also can be mitigated by showing that “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, or a death, divorce or separation), and the individual acted responsibly under the circumstances.” Guidelines ¶20(b). Both prongs, i.e., conditions beyond the person’s control and responsible conduct, must be established.

Applicant has encountered numerous conditions beyond her control: her inability to sell her condominium because of litigation, her husband’s inability to work, her reduced income because of illness, emergency veterinary expenses, and out-of-pocket expenses related to hurricane damage. Both Applicant and her spouse incurred educational expenses, but they were reasonable measures at the time because they made themselves more employable. However, her purchase of the hobby car, her agreement to be solely responsible for the car loan and insurance, and her failure to sell it,

even though it has a market value considerably greater than the loan balance, were not responsible acts under the circumstances. At the hearing, she stated her willingness to sell the car, but she has offered no evidence of actions demonstrating that willingness. Her reduced income because of illness and her husband's loss of employment after his back injury occurred after the debts alleged in the SOR were already delinquent. I conclude this mitigating condition is not established.

Security concerns under this guideline also can be mitigated by showing that "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." Guidelines ¶ 20(c). This mitigating condition has two prongs that may be either disjunctive or conjunctive. If the person has received counseling, it must also be shown that there are clear indications the problem is being resolved or under control. However, if the person has not received counseling, this mitigating condition may still apply if there are clear indications that the problem is being resolved or under control.

Applicant has not sought or obtained debt counseling. She and her husband obtained legal advice, but it was limited to the federal tax debt and there are no indications the tax problem is being resolved. They have negotiated a payment plan for the credit card debt alleged in SOR ¶ 1.g; but they have made no payments, and it is questionable whether they have the funds to carry out the plan. They received a settlement offer for the credit card debt alleged in SOR ¶ 1.h, but there is no evidence that they have accepted the offer or made any payments, and it is questionable whether they can. I conclude this mitigating condition is not established.

Finally, security concerns under this guideline can be mitigated by showing that "the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts." Guidelines ¶ 20(d). The record reflects a good-faith effort to resolve the federal tax lien, but it does not reflect an overall good-faith effort to resolve her financial situation, in part because Applicant has not availed herself of the opportunity to reduce her monthly expenses and generate funds by selling the hobby car. I conclude this mitigating condition is not established.

Guideline E (Personal Conduct)

The concern under this guideline is as follows: "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." Guidelines ¶ 15. The relevant disqualifying condition in this case is "deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities." Guidelines ¶ 16(a).

When a falsification allegation is controverted, as in this case, the government has the burden of proving it. An omission, standing alone, does not prove an applicant's 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 concerning an applicant's state of mind

at the time of the omission. *See* 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)).

The federal tax lien was filed in August 2004, two months before Applicant executed her SF 86. Both she and her husband testified that they were not aware of the tax lien until they inquired about a car loan, a month or two after she executed the SF 86. In the ordinary course of business, the IRS would have sent Applicant and her husband a copy of the Notice of Federal Tax Lien, as required by the Internal Revenue Manual, Part 5, Chapter 12, § 5.12.2.13.¹ The record does not reflect the exact date the lien was filed, nor does it reflect actual receipt of the notice by Applicant. Applying the presumption of regularity, however, I have presumed the notice was sent to Applicant and her husband as required.

Whether Applicant realized that a lien had been filed is a separate factual issue. She and her husband knew they owed taxes, and they had received many documents from the IRS, which they gave to their lawyers. Applicant relied on her husband to deal with the IRS. The lien was filed during a chaotic period in Applicant's life. It was filed some time in August 2004, Applicant's husband lost his job in early September, Hurricane Ivan hit their home in mid-September, and Applicant filed her SF 86 in November 2004.

After considering the circumstances in which Applicant executed her SF 86, hearing her testimony and her husband's testimony, and observing their demeanor at the hearing, I found Applicant's testimony plausible and credible. I am satisfied she did not realize a lien had been filed. Therefore, I conclude she did not intentionally falsify her SF 86. No disqualifying conditions under this guideline are raised.

Whole Person Analysis

In addition to considering the specific disqualifying and mitigating conditions under each guideline, I have also considered: (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 applicant'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. Guidelines ¶¶ 2(a)(1)-(9). Several of these factors are discussed above, but some merit additional comment.

Applicant and her husband have given many years of dedicated service to the U.S. She held a clearance for many years, apparently without incident. Her loyalty, honesty, and sincerity are not at issue. However, unless and until she can resolve the federal tax problem, she will remain financially overextended and vulnerable to pressure. She has encountered numerous obstacles to restoring their financial health. However, she also has made some unwise financial decisions, such as the "hobby car" purchase.

After weighing the disqualifying and mitigating conditions under Guideline F, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the

¹This document is available on the IRS web site, www.irs.gov.

security concerns raised by her financial problems. Accordingly, I conclude she has not carried her burden of showing that it is clearly consistent with the national interest to grant her a security clearance.

FORMAL FINDINGS

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

Paragraph 1. Guideline F:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	Against Applicant
Subparagraph 1.e:	For Applicant
Subparagraph 1.f:	Against Applicant
Subparagraph 1.g:	Against Applicant
Subparagraph 1.h:	Against Applicant
Subparagraph 1.i:	Against Applicant
Subparagraph 1.j:	Against Applicant
Subparagraph 1.k:	Against Applicant
Paragraph 2. Guideline E:	FOR APPLICANT
Subparagraph 2.a:	For Applicant

DECISION

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

LeRoy F. Foreman
Administrative Judge