



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



In the matter of:	)	
	)	
XXXXXXXXXXXX, XXXXX	)	ISCR Case No. 12-11048
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Braden M. Murphy, Esq., Department Counsel  
For Applicant: *Pro se*

09/29/2015

**Decision**

TUIDER, Robert J., Administrative Judge:

Applicant failed to mitigate security concerns under Guideline F (financial considerations). Clearance is denied.

**Statement of the Case**

On June 5, 2012, Applicant submitted a Questionnaire for National Security Positions (SF 86). On January 20, 2015, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued an SOR to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended; and the adjudicative guidelines (AG), which became effective on September 1, 2006.

The SOR alleged security concerns under Guideline F. The SOR detailed reasons why the DOD CAF was unable to find that it is clearly consistent with the national interest to grant a security clearance for Applicant, and it recommended that his case be submitted to an administrative judge for a determination whether his clearance should be granted or denied.

On February 5, 2015, Applicant responded to the SOR. On April 2, 2015, Department Counsel was ready to proceed. On April 4, 2015, DOHA assigned Applicant's case to me. On April 21, 2015, the Defense Office of Hearings and Appeals (DOHA) issued a hearing notice, setting the hearing for May 27, 2015. Applicant's hearing was held as scheduled.

At the hearing, Department Counsel offered Government Exhibits (GE) 1 through 3, which were received into evidence without objection. Applicant testified, and offered Applicant Exhibits (AE) A through O, which were received into evidence without objection. I held the record open until June 5, 2015, to afford the Applicant an opportunity to submit additional evidence. Applicant timely submitted AE P through AE GG, which were received into evidence without objection. On June 2, 2015, DOHA received the hearing transcript (Tr.).

### **Findings of Fact**

Applicant admitted SOR ¶ 1.a, and denied or constructively denied SOR ¶¶ 1.b through 1.e, with explanations. He did acknowledge, however, that he owed the Internal Revenue Service (IRS) an unspecified sum to be determined and stated that he intended to pay his taxes. After a thorough review of the record, I make the following findings of fact.

### **Background Information**

Applicant is a 64-year-old quality, safety, flight director employed by a defense contractor since January 2011. He seeks a security clearance as a condition of his continued employment. (Tr. 13-16; GE 1)

Applicant graduated from high school in May 1970. He was awarded a bachelor of science degree in business administration in May 2005. (Tr. 16-18; GE 1) Applicant served in the U.S. Army from August 1970 to December 1990, and retired with over 20 years of honorable service as a chief warrant officer 3. (Tr. 18-20; GE 1; AE U, AE V)

Applicant married in August 1973, and has three adult children. Applicant's wife was formerly a high school English teacher and is now a self-employed author. (Tr. 20-22; GE 1)

### **Financial Considerations**

This case focuses on Applicant's long-standing tax problems with the IRS. Source documents indicate that the IRS filed three liens on Applicant's personal residence on: (1) August 4, 2010 in the amount of \$208,154.65 for tax periods ending in 2001, 2002, 2003, 2004, and 2005; (2) August 11, 2010 in the amount of \$202,780.95 for tax periods ending in 2001, 2002, 2003, 2004, and 2005; (3) September 21, 2011 in the amount of \$2,984.40 for the tax period ending in 2009; and (4) and an approximate \$149,000 delinquent tax debt for tax years 2001 to 2005. (SOR answer) Applicant's July

10, 2012 and November 13, 2014 credit reports corroborate these liens and tax debt as well as a \$144 cell phone collection account. (SOR ¶¶ 1.a - 1.e; Tr. 50-51; GE 2, GE 3)

Applicant submitted documentation dated May 20, 2015 that his \$144 cell phone collection account was paid in full. **DEBT RESOLVED.** (Tr. 31-21; AE H)

Applicant attributes his tax problems to a series of mishaps to include a failed business, job-related moves after his business failed, a disagreement with the IRS over deductions, and a missed IRS audit. (SOR answer) From 1997 to 2007,<sup>1</sup> Applicant owned a labor relations and safety issue consulting business (CB). (SOR answer; Tr. 22-28, 33)

Applicant's tax problems derive from disputed deductions he took while he owned CB. Applicant claims that he missed a 2008 IRS audit because he did not receive notice. The IRS placed the two largest liens against his personal residence after his 2008 audit. Applicant was able to reschedule another audit three years later in 2011 with the assistance of the Taxpayer Advocate Office. After his 2011 audit, the IRS placed the third smaller lien against his personal residence. Applicant disputes the amounts and validity of the IRS liens. (SOR answer; Tr. 28-31, 33-43)

In May 2012, Applicant requested to pay his tax arrearages in installments, and in July 2012, the IRS notified him that his request was approved. The IRS noted in their approval letter that as of July 17, 2012 the amount of taxes he owed was \$147,859.30 (emphasis added), and he agreed to make his first payment of \$727 by August 27, 2012, with subsequent monthly payments of \$727 due by the 26<sup>th</sup> of each following month until he paid the full amount owed. The letter further noted that the \$147,859.30 amount did not include all accrued penalties and interest, adding that penalties and interest would be charged until the full amount was paid, because he did not pay his total tax when it was due. Applicant paid the IRS a total of \$4,035 from August 2012 to May 2013. During that time, he missed two payments. In March 2013, Applicant submitted an Offer in Compromise (Form 656) in the amount of \$30,000 to cover his tax liability for tax-years 2001, 2002, 2003, 2004, 2005, and 2009. (Tr. 43-44; AE K, AE L)

It is Applicant's understanding, after reviewing Form 656 Booklet, Offer in Compromise, that if he was on an approved installment plan, he could stop making payments when submitting an offer. If his offer was not accepted, his installment agreement with the IRS would be reinstated with no additional fee. In June 2014, the IRS notified Applicant that they could not consider an installment agreement without reviewing his financial information and requested that he complete a Form 433-F, Collection Information Statement. (SOR answer; Tr. 44-45; AE J, AE M)

Applicant provided copies of letters dated January 2014 and December 2014 in which he wrote to his Congresswoman, the IRS, and Tax Payer Advocate Office outlining his ongoing dispute with the IRS and requested assistance in resolving his tax

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<sup>1</sup> On his June 2012 SF 86, Applicant listed the dates he owned his business as October 1997 to April 2007 (Estimated) in contrast to dates of 2000 to 2007 he provided in his February 2015 SOR answer.

problems. He has not made any payments to the IRS since May 2013 and his liens are still outstanding. (SOR answer; Tr. 45-46; AE N, AE O)

As of his hearing, Applicant had not heard anything from the IRS. He asserted that he is willing to pay what he owes, but requires further clarification from the IRS. Applicant is not holding his previously agreed \$727 monthly payments in escrow while his dispute is pending. (SOR answer, Tr. 46-49, 51-53) In his February 2015 SOR answer, Applicant stated, *“I will continue to pursue the interest deduction and may be required to obtain an attorney to accomplish the correct money owed. I will continue to make payments to the IRS. I am currently waiting for an updated payment.”* (emphasis added) (SOR answer)

Post-hearing, Applicant submitted seven documents related to his ongoing tax problems with the IRS. They are: (1) Form 433-D, Installment Agreement, dated July 18, 2012. This form reflected, in part, that Applicant owes \$147,859.30 for tax years 2001, 2002, 2003, 2004, 2005, and 2009, and was required to make monthly payments of \$727 beginning on August 27, 2012, and on the 26<sup>th</sup> of each month thereafter. Form 433-D noted that a tax lien had already been filed. (AE P, AE Y); (2) Letter from Applicant to Tax Payer Advocate Office, dated June 3, 2015, attempting to clarify how to make installment payments. (AE P, AE Z); (3) Ten-page letter from the IRS, dated June 3, 2013, with proposed changes to Applicant’s 2011 Form 1040, Amount due: \$10,490. (AE P, AE CC); (4) Four-page letter from the IRS, dated December 15, 2014, with notice of intent to seize (“levy”) Applicant’s state tax refund or other property, Amount due immediately: \$2,008.41. (AE P, AE DD); (5) Copy of checking account ledger reflecting two payments of \$1,000 and \$1,008 paid to the IRS on January 12, 2015 and December 29, 2014, respectively. (AE P, AE EE); (6) Copy of Form 656-L, Offer in Compromise (Doubt as to Liability) booklet. (AE P, AE FF); and (7) Applicant’s Form 656-L, Offer in Compromise (Doubt as Liability), dated May 31, 2015, offering to pay \$47,500 in 48 monthly instalments of \$989.58, for tax years 2001, 2002, 2003, 2004, 2005, and 2009. (AE P, AE GG)

At his hearing, Applicant submitted proof of payment for non-SOR debts. (AE C - AE G) Applicant’s post-hearing monthly budget, dated June 1, 2015, reflects a gross salary of \$9,333, a total net monthly income of \$8,654, and a total net remainder of \$2,366. (AE AA)

## **Character Evidence**

Applicant submitted numerous reference letters from professional and personal sources. Applicant also submitted a performance evaluation from his current employer as well as awards and certificates. The collective sense of these documents is very favorable as pertaining to his character, work performance, and accomplishments. (AE A, AE B, AE P – AE X, AE BB)

## Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information.” *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicant’s eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

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

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information. Clearance decisions must be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See Exec. Or. 10865 § 7. See also Executive Order 12968 (Aug. 2, 1995), § 3.1. Thus, nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination about applicant’s allegiance, loyalty, or patriotism. It is merely an indication the applicant has not met the strict guidelines the President 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 that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4<sup>th</sup> Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the

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

## **Analysis**

### **Financial Considerations**

AG ¶ 18 articulates the security concern relating to financial problems:

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.

As noted above and discussed in further detail, Applicant failed to timely pay a cell phone bill, has three pending and unresolved IRS liens filed against him in the amounts of \$208,000, \$202,000, and \$2,948, and is indebted to the IRS in the amount of approximately \$149,000.

AG ¶ 19 provides two disqualifying conditions that could raise a security concern and may be disqualifying in this case: “(a) inability or unwillingness to satisfy debts;” and “(c) a history of not meeting financial obligations.” In ISCR Case No. 08-12184 at 7 (App. Bd. Jan. 7, 2010), the Appeal Board explained:

It is well-settled that adverse information from a credit report can normally meet the substantial evidence standard and the government’s obligations under [Directive] ¶ E3.1.14 for pertinent allegations. At that point, the burden shifts to applicant to establish either that [he or] she is not responsible for the debt or that matters in mitigation apply. (internal citation omitted). Applicant’s history of delinquent debt is documented in his credit reports and in the evidence presented.

The evidence establishes the disqualifying conditions in AG ¶¶ 19(a) and 19(c) requiring additional inquiry about the possible applicability of mitigating conditions.

Five financial considerations mitigating conditions under AG ¶¶ 20 are potentially applicable:

(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, or a death, divorce or separation), and the individual acted responsibly under the circumstances;

(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;

(d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts; and

(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.

Applicant's conduct does not warrant application of AG ¶ 20(a) because there is more than one delinquent debt and his financial problems are not isolated. His debt is a "continuing course of conduct" under the Appeal Board's jurisprudence. See ISCR Case No. 07-11814 at 3 (App. Bd. Aug. 29, 2008) (citing ISCR Case No. 01-03695 (App. Bd. Oct. 16, 2002)).

Furthermore, the evidence does not warrant application of AG ¶ 20(b). Applicant's explanation for failing to timely resolve his federal tax arrearages do not support the notion that he encountered conditions largely beyond his control or that he acted responsibly. He closed his business in 2007. Applicant's tax problems for disallowed business deductions cover six tax years – 2001, 2002, 2003, 2004, 2005, and 2009. Applicant acknowledges that he owes the IRS money, but disagrees with the amounts they have assessed him. He attributes a missed 2008 audit due the fact he did not receive notice. For a savvy businessman like the Applicant, it is unclear why he did not exercise greater diligence in filing correct tax returns, particularly if he had questionable deductions, and why he did not exercise greater diligence in correcting his long ongoing tax problems once they came to light.<sup>2</sup> He stated in his SOR answer that he may be required to hire an attorney, but there is no evidence of his having done so or of having consulted with a subject matter expert.

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<sup>2</sup>"Even if Applicant's financial difficulties initially arose, in whole or in part, due to circumstances outside his [or her] control, the Judge could still consider whether Applicant has since acted in a reasonable manner when dealing with those financial difficulties." 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)). A component is whether he maintained contact with his creditors and attempted to negotiate partial payments to keep his debts current.

AG ¶ 20(c) is not applicable because Applicant did not seek or receive financial counseling nor is there evidence that his financial problems are under control. Applicant receives full credit for resolving his cell phone bill under AG ¶ 20(d).<sup>3</sup> However, Applicant's efforts to resolve his IRS debts have been disappointing. His substantial and lingering IRS debts remain unresolved. Had Applicant followed through with his 2012 payment arrangement with the IRS, this mitigating condition would have been applicable. Applicant briefly made monthly payments of \$727 on an agreed amount owed of \$147,859 from August 2012 to May 2013 and during that time missed two payments. His June 2015 post-hearing offer to settle his debt rings hollow given the amount of IRS debt and length of time involved. Applicant's efforts to date to resolve his long standing and significant IRS debt do not constitute good-faith. AG ¶ 20(e) is not applicable because Applicant did not produce evidence that establishes that he did not owe the IRS a large amount for delinquent taxes.

### **Whole-Person Concept**

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all the circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

- (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.

The ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. AG ¶ 2(c). The discussion in the Analysis section under

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<sup>3</sup>The Appeal Board has previously explained what constitutes a "good-faith" effort to repay overdue creditors or otherwise resolve debts:

In order to qualify for application of [the "good-faith" mitigating condition], an applicant must present evidence showing either a good-faith effort to repay overdue creditors or some other good-faith action aimed at resolving the applicant's debts. The Directive does not define the term 'good-faith.' However, the Board has indicated that the concept of good-faith 'requires a showing that a person acts in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation.' Accordingly, an applicant must do more than merely show that he or she relied on a legally available option (such as bankruptcy) in order to claim the benefit of [the "good-faith" mitigating condition].

(internal citation and footnote omitted) ISCR Case No. 02-30304 at 3 (App. Bd. Apr. 20, 2004) (quoting ISCR Case No. 99-9020 at 5-6 (App. Bd. June 4, 2001)).



Guideline F is incorporated in this whole-person section. However, further comments are warranted.

Applicant's 20 years of honorable Army service, reference letters and certificates, and record of employment with a defense contractor employer weigh in his favor. He is a law-abiding citizen and a productive member of society. There is no evidence to suggest that he is not current on his day-to-day expenses.

However, it is troubling to encounter someone with Applicant's background as a former Army warrant officer and savvy businessman who knew or should have known of his legal obligation to file timely and correct federal tax returns for six tax years. If he had doubts about the validity of deductions, it would have behooved him to seek timely professional assistance. Applicant's efforts to address his long standing tax debts have been underwhelming. As things stand, he has three outstanding IRS liens in substantial amounts and owes the IRS a significant amount of back taxes. Unfortunately, these concerns, taken as a whole, leave me with doubts regarding Applicant's security worthiness. After 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 financial considerations security concerns.

I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my careful consideration of the whole-person factors and supporting evidence, my application of the pertinent factors under the adjudicative process, and my interpretation of my responsibilities under the adjudicative guidelines. Applicant has not fully mitigated or overcome the Government's case. For the reasons stated, I conclude he is not eligible for access to classified information.

### **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
Subparagraph 1.a:	For Applicant
Subparagraphs 1.b – 1.e:	Against Applicant

### **Conclusion**

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

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ROBERT J. TUIDER  
Administrative Judge