



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



In the matter of:

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Applicant for Security Clearance

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ISCR Case No. 12-11227

**Appearances**

For Government: David F. Hayes, Esquire, Department Counsel  
For Applicant: *Pro se*

08/01/2013

**Decision**

HARVEY, Mark, Administrative Judge:

Applicant's statement of reasons (SOR) lists nine delinquent debts owed to the Internal Revenue Service (IRS), totaling \$382,585. Applicant admitted to seven IRS liens. The IRS is seeking \$263,456 for tax years 1999-2005, 2008, and 2011 from him. He did not make sufficient progress resolving his financial problems. He intentionally failed to disclose his tax debts on his July 29, 2011 Electronic Questionnaires for Investigations Processing (e-QIP) (SF 86). Financial considerations and personal conduct concerns are not mitigated. Eligibility for access to classified information is denied.

**Statement of the Case**

On July 29, 2011, Applicant submitted an SF 86 (Item 5). On January 3, 2013, 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) promulgated by the President on December 29, 2005.

The SOR alleged security concerns under Guidelines F (financial considerations) and E (personal conduct). (Item 1) The SOR detailed reasons why DOD could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant and recommended referral to an administrative judge to determine whether Applicant's clearance should be granted, continued, denied, or revoked. (Item 1)

On January 3, 2013, Applicant responded to the SOR allegations and waived his right to a hearing. (Item 3) A complete copy of the file of relevant material (FORM), dated April 4, 2013, was provided to him on June 4, 2013. He was afforded an opportunity to file objections and to submit material in refutation, extenuation, or mitigation.<sup>1</sup> Applicant did not respond to the FORM. The case was assigned to me on July 25, 2013.

### **Findings of Fact<sup>2</sup>**

In Applicant's response to the SOR, he admitted the allegations in SOR ¶¶ 1.a-1.c, 1.e, 1.g-1.i, and 2.a. He denied the remaining allegations in SOR ¶ 1. He also provided extenuating and mitigating information. His admissions are accepted as findings of fact.

Applicant is a 58-year-old site civil and structural engineer, who has worked for a defense contractor since March 2011.<sup>3</sup> He was awarded a bachelor's degree in 1977. He has two children, who were born in 1982 and 1983. There is no evidence of arrests or convictions. There is no evidence of use of illegal drugs or alcohol abuse.

### **Financial Considerations**

The credit reports and SOR allege the following federal tax liens: (1) \$34,361 for tax years 2000-2002; (2) \$26,737 for tax years 2003-2005;<sup>4</sup> (3) \$101,000 for tax years 1998 and 1999;<sup>5</sup> (4) \$101,000;<sup>6</sup> (5) \$7,521 for tax year 2011; (6) \$54,094 for tax year

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<sup>1</sup>The DOHA transmittal letter is dated May 28, 2013, and Applicant's receipt is dated June 4, 2013. The DOHA transmittal letter informed Applicant that he had 30 days after his receipt to submit information.

<sup>2</sup>Some details have not been included in order to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

<sup>3</sup>Applicant's July 29, 2011 SF 86 is the basis for the facts in this paragraph. (Item 5)

<sup>4</sup> Applicant concedes that the correct amount should be \$37,737. (FORM at 4)

<sup>5</sup> The 1998 portion was paid off based on Applicant's agreement with the IRS, in which he agreed to pay \$2,000 monthly. (FORM at 4)

<sup>6</sup> Department Counsel concedes that SOR ¶ 1.d is a duplication of the debt in SOR ¶ 1.c. (FORM at 4, 7)

2008;<sup>7</sup> (7) \$10,363 for tax year 2008; (8) \$46,058 for tax year 2008; and (9) \$1,451 for tax year 2011. Estimates of Applicant's total federal tax liability range from \$263,456, based on Applicant's meeting with the IRS in October 2012 (FORM at 7; SOR response at 2), to about \$227,000, based on the seven liens listed in the SOR that Applicant admitted in his SOR response.

A spreadsheet for October 24, 2012, shows taxes, penalties and interest, totaling \$263,456 for the following years: 1999 (\$79,048); 2000 (\$27,098); 2001 (\$9,186); 2002 (\$10,128); 2003 (\$9,910); 2004 (\$12,046); 2005 (\$32,827); 2008 (\$75,241); 2011 (\$7,972). (SOR response)

There is no evidence of financial counseling. There is limited evidence of progress resolving his SOR debts, consisting primarily of filing his tax returns and conducting negotiations with the IRS.

The May 28, 2013 DOHA letter conveying the FORM to Applicant invited him to "submit any material you wish the Administrative Judge to consider or make any objection you may have as to the information in the file." Applicant did not provide any response to the FORM.

## **Personal Conduct**

Applicant answered, "No" in response to 16 questions in Section 26 concerning financial issues on his July 29, 2011 SF 86. (Item 5) He did not disclose the delinquent taxes owed to the IRS in response to four questions relating to taxes: (1) Section 26.c asks in the last seven years, "Have you failed to pay Federal, state, or other taxes, or to file a tax return when required by law or ordinance?"; (2) Section 26.m asks in the last seven years, "Have you been over 180 days delinquent on any debts?"; (3) Section 26.n asks, "Are you currently over 90 days delinquent on any debts?"; and (4) Section 26.p asks, "Are you currently delinquent on any Federal debt?"

On October 25, 2011, an Office of Personnel Management (OPM) Investigator completed Applicant's personal subject interview (PSI).<sup>8</sup> Initially, Applicant said in April 2011, when he filled out his SF 86, he was unaware of his tax problems. When he signed his SF 86 in July 2011, he did not review it. He did not file his tax return in 2008 because he believed his income was tax exempt, as he was working overseas. From 2008 to May 2011, Applicant believed that income earned overseas was tax free. In May 2008, Applicant received a letter from the IRS seeking \$80,000. In May 2011, Applicant learned that the first \$85,000 received in overseas income is tax exempt, and income above \$85,000 is fully taxable. In May or June 2011, Applicant filed his tax

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<sup>7</sup> Applicant concedes that the correct amount is \$57,872, and that the liens in SOR ¶¶ 1.g-1.i are included in this amount. (FORM at 5)

<sup>8</sup> The source for the information in this paragraph is Applicant's October 25, 2011 Office of Personnel Management Investigator (OPM) personal subject interview (PSI) of Applicant. (Item 6)

returns for 2008, 2009, and 2010.<sup>9</sup> Applicant's accountant said Applicant owed \$40,000 to \$50,000. Applicant filed an appeal with the tax court. In September 2011, Applicant agreed to go to arbitration in lieu of tax court. Applicant said he wanted to settle the IRS debt and begin a payment plan.

Later during the October 25, 2011 OPM interview, Applicant was confronted with the tax liens in the SOR. Applicant admitted that in 2005, he met with an IRS employee about not filing his tax returns or filing late from 2002 to 2005. Applicant signed a payment plan and made payments until 2006. He said he stopped making payments because he could not afford them. Applicant said that his accountant told him that the IRS liens expire after six years and he should not mention them to the IRS. He admitted that he did not file his federal tax return in 2007; however, he said he did do so because he did not make enough income. He also said that he did not disclose his tax liens because he thought that they had expired.

### **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.

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<sup>9</sup> Applicant's SOR does not allege that Applicant failed to file his federal income tax returns as required or that he failed to disclose on his SF 86 that he failed to file his federal income tax returns as required. In ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006), the Appeal Board listed five circumstances in which conduct not alleged in an SOR may be considered stating:

- (a) to assess an applicant's credibility; (b) to evaluate an applicant's evidence of extenuation, mitigation, or changed circumstances; (c) to consider whether an applicant has demonstrated successful rehabilitation; (d) to decide whether a particular provision of the Adjudicative Guidelines is applicable; or (e) to provide evidence for whole person analysis under Directive Section 6.3.

*Id.* (citing ISCR Case No. 02-07218 at 3 (App. Bd. Mar. 15, 2004); ISCR Case No. 00-0633 at 3 (App. Bd. Oct. 24, 2003)). The allegation that he failed to file his federal tax returns as required would implicate AG ¶ 19(g), which indicates "failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same" is a disqualifying condition. However, AG ¶ 19(g) will not be applied in this case because Applicant has not had adequate notice and a full opportunity to collect and present evidence of mitigation regarding this allegation. Additionally, there is evidence that he intentionally failed to disclose on his SF 86 that he failed to file his federal income tax returns as required. An independent basis for denying a security clearance would be his failure to disclose on his SF 86 his failure to file federal tax returns as required. These two non-SOR allegations will be considered for the five limited purposes announced in the above quoted case law, and not for any other purpose.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the revised 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 his 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.

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 tax debt is documented in his credit reports, OPM PSI, and SOR response. Applicant's SOR lists nine delinquent debts owed to the IRS, totaling \$382,585. Applicant admitted seven IRS liens, totaling about \$227,000. The Government established the disqualifying conditions in AG ¶¶ 19(a) and 19(c), requiring additional inquiry about the possible applicability of mitigating conditions.

Five 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;<sup>10</sup> and

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<sup>10</sup>The Appeal Board has previously explained what constitutes a "good faith" effort to repay overdue creditors or otherwise resolve debts:

(e) the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue.

Applicant's conduct in resolving his delinquent debt does not warrant full application of any mitigating conditions to all of his SOR debts. He admitted responsibility for the seven SOR federal tax liens, totaling approximately \$227,000. As of October 24, 2012, the IRS is seeking \$263,456 from Applicant for tax years 1999-2005, 2008, and 2011. He was irresponsible in his manner of handling his federal income taxes. After years of having tax problems, culminating in his settlement discussions with the IRS in 2005, he failed to file his tax returns from 2008 to 2011 until May or June 2011. He was negligent in his research of the overseas exemption. There is no evidence of financial counseling. He did not provide documentation proving that he maintained contact with the IRS from 2006 to 2011.<sup>11</sup> There is insufficient evidence of progress resolving his SOR debts, resolution of his financial problems, or control of his finances. He did not establish his financial responsibility.

## **Personal Conduct**

AG ¶ 15 expresses the security concern pertaining to 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.

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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)).

<sup>11</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 or she maintained contact with creditors and attempted to negotiate partial payments to keep debts current.

AG ¶ 16 describes one condition that could raise a security concern in this case:

(a) 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;

AG ¶ 16(a) applies. Applicant deliberately answered “No” in response to 16 questions in Section 26 concerning financial issues on his July 29, 2011 SF 86. More specifically, he did not disclose the delinquent taxes owed to the IRS in response to any of following four questions: (1) Section 26.c asks in the last seven years, “Have you failed to pay Federal, state, or other taxes . . . ?”; (2) Section 26.m asks in the last seven years, “Have you been over 180 days delinquent on any debts?”; (3) Section 26.n asks, “Are you currently over 90 days delinquent on any debts?”; and (4) Section 26.p asks, “Are you currently delinquent on any Federal debt?” He deliberately failed to disclose derogatory financial information about his federal income tax debts. Consideration of mitigating conditions is required.

AG ¶ 17 provides seven conditions that could mitigate security concerns including:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(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;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress;

(f) the information was unsubstantiated or from a source of questionable reliability; and



(g) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

None of the mitigating conditions apply. Applicant deliberately denied on his July 29, 2011 SF 86 that he had delinquent tax debts currently owed or owed more than 180 days in the last seven years. He made these false statements in an attempt to mislead the Government about his tax problems. He failed to pay his taxes in the last seven years, and he had seven tax liens, totaling about \$227,000. No one misled him into thinking complete information about his tax debts should not be reported on his SF 86. The questions are clear; he is intelligent, a college graduate, and an engineer; and he understood that all negative financial information requested was reportable on his SF 86. His explanation for failing to fully disclose all of his tax debts is not credible. His false statement on his July 29, 2011 SF 86 is serious and relatively recent. Personal conduct concerns are not mitigated.

### **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.

Under AG ¶ 2(c), 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. I have incorporated my comments under Guidelines F and E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

There is some evidence supporting approval of Applicant's clearance. There is no evidence of criminal conduct or abuse of alcohol or drugs. Applicant is intelligent as shown by his educational background and history of employment as an engineer. He clearly has the capability of understanding and taking reasonable actions to resolve financial consideration concerns. He contributes to his company and the Department of Defense. There is no evidence of disloyalty or that he would intentionally violate national security.

The evidence against approval of Applicant's clearance is more substantial at this time. Applicant has a long history of financial problems. He failed to mitigate seven tax liens, totaling about \$220,000. As of October 24, 2012, the IRS is seeking \$263,456 for tax years 1999-2005, 2008, and 2011 from Applicant. He could have made greater progress resolving and documenting resolution of his tax problems. His failure to establish his financial responsibility shows lack of judgment and raises unmitigated questions about Applicant's reliability, trustworthiness and ability to protect classified information. See AG ¶ 15. Applicant intentionally failed to disclose derogatory tax information on his July 29, 2011 SF 86. Full disclosure of relevant security-related information is crucial to national security. More documented financial progress and honest, frank disclosure on security documents is necessary to fully mitigate security concerns.

I have carefully applied the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. Financial considerations concerns are not mitigated. For the reasons stated, I conclude he is not eligible for access to classified information at this time.

### **Formal Findings**

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline F:	AGAINST APPLICANT
Subparagraphs 1.a to 1.c:	Against Applicant
Subparagraph 1.d:	For Applicant
Subparagraph 1.e:	Against Applicant
Subparagraph 1.f:	For Applicant
Subparagraphs 1.g to 1.i:	Against Applicant
Paragraph 2, Guideline F:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant

### **Conclusion**

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

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Mark Harvey  
Administrative Judge