



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



In the matter of: )  
)  
) ISCR Case No. 13-00728  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Eric Borgstrom, Esq., Department Counsel  
For Applicant: *Pro se*

05/23/2014

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**Decision**

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MATCHINSKI, Elizabeth M., Administrative Judge:

As of October 2013, Applicant owed \$28,573 in delinquent state tax penalties and interest for tax years 1989 and 1990. The debt was written off due to the statute of limitations on October 19, 2013, leaving him with no outstanding tax liability for those years. He asserts that a \$2,570 tax lien from May 1992 has been satisfied, and it does not appear on his credit record as of February 2013. A write-off is not a substitute for payments. His handling of these tax matters continues to raise concerns about his financial judgment. Clearance denied.

**Statement of the Case**

On August 7, 2013, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) to Applicant, detailing the security concerns under Guideline F (Financial Considerations), and explaining why it was unable to find that it is clearly consistent with the national interest to grant or continue his security clearance. The DOD CAF took action under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review*

*Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the Department of Defense on September 1, 2006.

Applicant submitted an undated Answer to the SOR, in which he indicated that he wanted a decision based upon review of the written record by a Defense Office of Hearings and Appeals (DOHA) administrative judge. On January 8, 2014, the Government submitted a File of Relevant Material (FORM) consisting of seven exhibits (Items 1-7). On January 13, 2014, DOHA forwarded a copy of the FORM to Applicant and instructed him to respond within 30 days of receipt. Applicant received the FORM on March 4, 2014. He submitted no rebuttal by the April 3, 2014 deadline. On May 9, 2014, the case was assigned to me to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.

### **Findings of Fact**

The SOR alleges under Guideline F that as of August 7, 2013, Applicant owed a state tax board \$18,652.13 for tax year 1990 (SOR 1.a), \$9,463.86 for tax year 1989 (SOR 1.b), and \$2,570 for a state tax lien filed against him in May 1992 (SOR 1.c). (Item 1.) In his Answer, Applicant admitted that he owes the state tax board interest and penalties from tax years 1990, while the taxes due have been paid. The state tax board has been unwilling to compromise on the interest and penalties assessed. He has retained an attorney to pursue an abatement of the penalties and interest, or to arrange for a reasonable repayment schedule. Applicant denied the \$2,570 state tax debt (SOR 1.c) in that it was paid when he and his spouse settled a mortgage on their current residence. (Item 2.)

After considering the Government's FORM, including Applicant's Answer (Item 2), I make the following findings of fact.

Applicant is 51 years old and married to his third wife. He has an adult daughter with his second wife. His spouse has two adult daughters from a previous marriage. Since May 2005, Applicant has been the executive vice president and chief operating officer of a staffing services company he co-founded with his spouse, who is the principal owner. From 1999 to May 2005, he was employed part-time as the vice president of operations for a staffing company in the commercial sector. Applicant seeks his first DOD security clearance. (Items 3, 5.)

Applicant did not file timely state tax returns for at least 1989 and 1990, due to his "youth and inexperience and lack of responsibility at that time." (Items 2, 3, 5.) In May 1992, the state filed a tax lien against him in the amount of \$2,570 (SOR 1.c). (Item 7.) Available information does not reflect for which tax year or years the lien was filed. By 1995, the state was pursuing him for delinquent tax debt. He retained legal counsel, who tried to resolve the debt without success. The state wanted a lump sum, which Applicant could not afford. (Items 2, 5.) In February 2003, the state franchise tax board assessed a lien of \$1,914 against him (not alleged). Around 2005, Applicant received an offer of tax amnesty from the state. He made a one-time payment and then contacted his former attorney, who advised him not to pay the tax debt because the statute of limitations had

run. The lien was released in May 2006 (Item 6), so the one-time payment may well have resolved the \$1,914 lien.

In April 2006, the state tax authority issued a lien of \$12,752 (SOR 1.a), apparently for unpaid taxes, penalties, and interest for tax year 1990. (Items 2-6.) Applicant owed delinquent taxes for tax year 1989 as well (SOR 1.b), although the state did not file a tax lien for that year. Applicant had not filed returns for either 1989 or 1990. In 2007, Applicant retained a new attorney, who operated a local tax solutions business, for assistance in resolving his state tax issues. On October 15, 2007, Applicant filed his delinquent return for tax year 1989. On April 23, 2008, Applicant paid \$1,258 for tax year 1989 and \$2,327 for tax year 1990 to cover taxes owed, but expressly not penalties or interest assessed. The payments were by check drafted on the trust account of the attorney's tax solutions company. (Item 5.) This attorney failed to secure an abatement or compromise of interest and penalties, or to arrange installment payments for Applicant with the state. Applicant asserts that he did not have the funds to pay the debts in lump sums (Item 2), although the evidence also shows that he went on cruises with his current wife in November 2008 and again in March 2011. (Items 3, 5.)

On February 5, 2013, Applicant completed and certified to the accuracy of an Electronic Questionnaire for Investigations Processing (e-QIP) for a security clearance so that the company can contract with the DOD. He responded affirmatively to whether he had a lien placed against his property in the last seven years for failing to pay taxes or other debts and disclosed a state tax lien placed in 2006 for \$12,752, "for interest and penalties only" from tax years in the late 1980s. He explained that he had paid the taxes owed, but that the state had declined to settle on the interest and penalties. Applicant added that the lien will be satisfied upon the sale of his property or when the state offers amnesty. He indicated that he had declined an earlier offer of amnesty in 2005 on the advice of an attorney. In 2007, he retained a new attorney who had no success in settling or arranging repayment terms for the penalties and interest with the state tax board. (Item 3.)

As of February 14, 2013, the \$12,752 tax lien had not been released. Applicant was reportedly making payments according to terms on approximately \$35,855 in outstanding credit card balances in his name and on two cars. In April 2010, he signed a \$19,687 car loan as co-maker with repayment at \$435 per month for four years. In July 2011, he took out a joint three-year car lease of \$9,115, to be repaid at \$253 monthly. In March 2012, he paid off a three-year car loan (monthly payments \$735) of \$50,741, and he and his spouse paid off a \$312,000 mortgage opened in May 2003. In April 2012, he and his spouse satisfied a \$216,766 home equity loan. (Item 6.)

On March 22, 2013, Applicant was interviewed by an authorized investigator for the Office of Personnel Management (OPM). About the \$12,752 tax lien, Applicant indicated that he had "a side business and had direct income that did not get taxed" around the late 1980s or early 1990s. Applicant asserted that he paid the taxes owed around 2006 or 2007, but not the interest and penalties. Applicant indicated that he planned to pay off the debt by 2015. Previous efforts to arrange a repayment plan were rebuffed by the state tax board, which wanted a lump sum. Applicant averred that he had received poor legal advice in 2005 from an attorney, who told him not to pay the tax debt because of the statute of limitations. Applicant denied being late on any consumer credit payments in the past 20

years. He had filed for bankruptcy in the early 1990s. He lived above his means at the time and filed a Chapter 13 petition, which was converted to a Chapter 7. (Item 5.)

As of May 2013, Applicant's spouse held the mortgage on their residence, which has a market value around \$650,000. Her loan of \$468,000 is being repaid at \$3,842 per month. The mortgage is scheduled to mature in 2025. (Item 5.) She had taken out a \$239,000 mortgage on commercial property, which is being repaid at \$1,973 monthly and is scheduled to mature in 2014. (Item 5.) On May 8, 2013, Applicant filed his delinquent return for tax year 1990 with the state franchise tax board. (Item 4.)

On June 3, 2013, the DOD CAF sent interrogatories to Applicant, asking him about any efforts to resolve a reported \$9,463.86 tax debt balance for 1989 and the \$12,752 tax lien for 1990. By letter dated June 20, 2013, Applicant asked the state tax board to confirm that he owed only interest and penalties for those tax years. He also requested to pay off his debt over a 60-month period. At the request of the DOD CAF, Applicant completed a Personal Financial Statement showing that he and his spouse had a net monthly remainder of \$1,181 after paying personal expenses and \$4,433 toward credit obligations. They received rental income from the commercial property of \$80,000 annually and business income around \$120,000 annually. Their car loans and life insurance costs are paid by the business. (Item 5.)

On October 19, 2013, the state franchise tax board wrote off Applicant's tax debts of \$9,623.88 tax for 1989 and \$18,949.20 for 1990, because of the state's statute of limitations. On October 22, 2013, the state released the tax lien for tax year 1990. As of November 22, 2013, Applicant had no outstanding tax liability subject to collection by the state for tax years 1989 or 1990. (Item 4.)

## **Policies**

The U.S. Supreme Court has recognized the substantial discretion the Executive Branch has in regulating access to information pertaining to national security, emphasizing that "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are required to be considered in evaluating an applicant's eligibility for access to classified information. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overall adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." In reaching this decision, I have

drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . .” The applicant has the ultimate burden of persuasion to obtain a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information. Section 7 of Executive Order 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

## **Analysis**

### **Guideline F, Financial Considerations**

The security concerns about financial considerations are set out in AG ¶ 18:

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.

About the \$2,570 state tax lien filed in May 1992 (SOR 1.c), the record does not show which tax year was covered by the lien or that it was still outstanding as of the SOR. The evidence relied on by the Government to prove the lien does not include a report of its current status, and the lien was not on Applicant’s February 2013 credit report. Applicant disputes that it was still owed as of the SOR date in that he paid the tax lien when he and his spouse settled a mortgage on their residence. (Item 2.) Applicant has apparently lived at his residence since November 2000. (Item 3.) His credit record shows that he and his spouse paid off a joint mortgage loan in October 2008. (Item 6.) He does not hold their current mortgage (see Item 5), so the lien may have been resolved in 2008. If it was paid, it was paid late.

In addition, state franchise tax board records show that Applicant did not file timely returns for tax years 1989 or 1990. He filed his delinquent tax return for 1989 on October

15, 2007, around the time that he hired an attorney to resolve his state tax debt for 1990.<sup>1</sup> He did not file his delinquent tax return for 1990 until May 2013. Applicant paid \$1,258 to the state for 1989 and \$2,327 for 1990 in April 2008. Applicant's uncorroborated assertion is that these payments covered the taxes owed for those years, but not penalties or interest. Likely due to accrual of interest and penalties, he owed the state \$9,623.88 for 1989 (SOR 1.b) and \$18,949.20 for 1990 (SOR 1.a) as of early October 2013. (Item 4.) Three disqualifying conditions under AG ¶ 19 apply:

- (a) inability or unwillingness to satisfy debts;
- (c) a history of not meeting financial obligations; and
- (g) failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same.

Mitigating condition 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," is not established. While the tax returns and payments were initially due more than 20 years ago, his noncompliance with his filing obligation persisted until October 2007 for the 1989 return and May 2013 for the 1990 return, and he has not paid any of the penalties or interest.

AG ¶ 20(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," is not implicated. Applicant admitted in his Answer to the SOR that the "root cause of this [tax debt] was youth and inexperience and a lack of responsibility at that time." He relied on poor legal advice not to accept the terms of a tax amnesty program in 2005. In response to the \$12,752 April 2006 tax lien, he made payments only toward the tax debt and expressly excluded interest and penalties. On learning that the state wanted a lump sum payment from him, he did nothing to address his tax debt between April 2008 and May 2013, when his return for 1990 was filed.

Applicant's efforts to address his tax debt with legal help in 2007 and 2008 only partially implicate 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," and AG ¶ 20(d), "the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts." Applicant indicated around October 2013 that he had again retained an attorney to pursue an abatement of the interest and penalties or to arrange for a reasonable repayment schedule of the penalties and interest. He did not

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<sup>1</sup> Applicant indicated in response to the SOR that he hired attorneys on three separate occasions, in 1995, in 2007, and presently, to negotiate a settlement to the interest and penalties for tax year 1990. The attorney who acted on his behalf in 2007 apparently contacted the state franchise tax board and discovered that a tax return had not been filed for one of the tax years. It appears that the tax year was 1989 in that the state franchise tax board is reporting that his return for 1989 was filed in October 2007. He asserts that he paid the tax amount owed, although not the penalties and interest. His tax delinquency for 1990 may have been at issue in 1995 and 2007, although it is noted that he did not file his return for 1990 until May 2013.

have the funds to pay the tax penalties and interest for 1989 and 1990, which evidence shows had accrued to about \$9,623.88 and \$18,949.20, respectively. Whether due to the actions of this attorney or in response to Applicant's letter of June 20, 2013, asking the state franchise tax board for a five-year repayment plan, the state wrote off his debt on October 19, 2013. While AG ¶ 20(c) applies in that the financial burden of some \$28,573.13 in delinquent tax penalties and interest has been alleviated, a write-off is not a good-faith effort to resolve his tax issues.

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," only minimally applies. Applicant did not provide any corroboration for his claimed satisfaction of the May 1992 tax lien. However, it does not appear on his recent credit report. He submitted documentation of the tax payments made in 2008 for 1989 and 1990, but they were considerably short of the balances owed the state.

### **Whole-Person Concept**

Under the whole-person concept, the administrative judge must consider the totality of an applicant's conduct and all relevant circumstances in light of the nine adjudicative process factors in AG ¶ 2(a).<sup>2</sup>

Applicant brought on the tax issue in that he did not file timely returns and report his income to the state for at least tax years 1989 and 1990. He shows some rehabilitation in that returns have been filed and taxes paid for subsequent years. On the whole, he does not demonstrate an attitude of disregard or disdain for his legal obligation to file tax returns and pay taxes owed. That being said, he failed to make consistent efforts to resolve his known outstanding state tax issues. He asserts that he lacked the funds in 2007 and now to satisfy the debts in the lump sums demanded by the state, which may well be accurate, given his record of extensive reliance on consumer credit. As of February 2013, he was making payments, albeit timely, on credit card balances totaling \$35,855 in his name. He and his wife also went on cruises in November 2008 and March 2011. Applicant had not yet applied for a security clearance when he took those vacations, but one has to question his financial priorities. He knew that the state had a \$12,752 tax lien against him that was not satisfied. Applicant largely ignored his tax debts after April 2008 until May/June 2013, when it clearly became an issue for his security clearance eligibility. As executive vice president and chief operating officer for his spouse's company, Applicant can reasonably be expected to make decisions impacting the company and its classified DOD contracts,

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<sup>2</sup>The factors under AG ¶ 2(a) are as follows:

- (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.

should he be granted security clearance eligibility. It is well settled that once a concern arises regarding an applicant's security clearance eligibility, there is a strong presumption against the grant or renewal of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9<sup>th</sup> Cir. 1990.). For the reasons noted above, based on the facts before me and the adjudicative guidelines that I am required to consider, I am unable to conclude that it is clearly consistent with the national interest to grant Applicant a security clearance 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
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	For Applicant

### **Conclusion**

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

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Elizabeth M. Matchinski  
Administrative Judge