



DEPARTMENT OF DEFENSE  
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of: )  
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----- ) ISCR Case No. 07-16267  
SSN: ----- )  
 )  
Applicant for Security Clearance )

**Appearances**

For Government: Daniel F. Crowley, Esquire, Department Counsel  
For Applicant: Terry L. Elling, Esquire

August 20, 2008

**Decision**

LYNCH, Noreen A., Administrative Judge:

Applicant submitted his Security Clearance Application (SF 86), on July 20, 2006. On April 9, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guideline F for Applicant. The action was taken 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 revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant requested a hearing before an Administrative Judge. I received the case assignment on June 6, 2008. DOHA issued a notice of hearing on June 12, 2008, and I convened the hearing as scheduled on June 30, 2008. The Government offered Exhibits (GE 1-8), which were received without objection. Applicant testified in his own behalf, and submitted Exhibits (AE A-G), which were received without objection. I left the record open until July 30, 2008, for Applicant to submit additional documentation.

He submitted a post hearing submission (31 pages) marked (AE) H. The record closed on July 30, 2008. DOHA received the transcript on July 9, 2008. Based upon a review of the record, eligibility for access to classified information is granted.

### **Findings of Fact**

In his Answer to the SOR, dated May 23, 2008, Applicant admitted the factual allegations in ¶¶ 1.a, 1.e- 1.g, of the SOR. He denied the other allegations in the SOR because he had no knowledge of them. He provided additional information to support his request for eligibility for a security clearance.

Applicant is a 53-year-old senior employee of a defense contractor. He received his undergraduate degree in 1968 and his master's degree in 1977. He has worked for his current employer since December 2005 (GE 1). Applicant served in the United States Army from 1968 until 1988 when he retired. He held a top secret clearance throughout his military and defense contractor career (Tr.39).

After his retirement from the military, Applicant worked for several government contractors. In 1999, he began working for the Joint Forces Command. He remained in that position until 2005. He has had a distinguished career.

Applicant married in August 1971 and has two grown children from that marriage. His wife opened a day school operation related to a church. When Applicant and his wife moved in 1992, she took over a school operation that was not in the best financial shape (Tr. 54). In 1993-94, Applicant and his wife decided to expand the day care program (Tr. 55). In 1996, they designed a building through a contractor and took out loans for a second operation. The school did not sustain the paying student population after a few years. In 1999, the school was losing money. Applicant could not get another loan and he put some of his own money into the school to help pay the expenses. He paid approximately \$100,000 of his own money toward the school business (Tr. 60). Applicant paid the required federal payroll taxes and the state worker' compensation premiums. He had an accounting firm handle the tax filings and payroll administration. Eventually, Applicant and his wife, filed for Chapter 7 bankruptcy in August 1999 (GE 1). Applicant claimed he filed the petition to protect the property for the builder who filed claims on the property.

Applicant filed a Chapter 13 bankruptcy in the amount of \$200,000 in October 1999, to protect his personal assets in conjunction with the business legal action. Applicant explained he filed the bankruptcy not because he could not pay any debt or personal loan, but rather to protect him from "some unscrupulous persons who sought to claim the property that he and his wife had developed for the school business." The IRS as a creditor filed an objection to the Chapter 13 plan. The reason for the objection was based on a tax claim in the amount of \$90,490.84 for unpaid pre-petition tax

liabilities.<sup>1</sup> Applicant and his wife wanted to pay \$500 monthly to the trustee. The IRS objected because the plan did not provide for the full payment of the priority tax claims. The Petition for Chapter 13 bankruptcy was dismissed by the Court in 2001 for failure to convert to a Chapter 7 bankruptcy. (GE 7).

In October 2001, Applicant learned that the Chapter 13 bankruptcy was dismissed (Tr. 66). He believed that the taxes/debts were part of the bankruptcy petitions. He had made contributions to the plan in the amount of \$ 24,650. Applicant believes he did not see the trustee's report until the security clearance investigation began in 2007. He acknowledged at the hearing that he should have been more diligent with this matter in 2001.

In 2005, Applicant received a notice from the IRS concerning taxes that he had not paid from the school business. He contacted them to clarify the issue. Applicant retained legal counsel to investigate the matter. He paid \$6,750 in legal fees. He learned that he owed taxes from the 1990's from the school business. At the same time, the IRS levied Applicant's accounts, and garnished his wages for a tax levy in the amount of \$1,668.00 per pay period

In 2005, there was a reduction in government contract work. In September of 2005, Applicant lost his employment. Thus, he could not pay the tax amount in a lump sum. He completed an offer in compromise form (656) (AE E). Applicant claimed that IRS called him back and said that the debt was not collectible because he was not working (Tr. 75). In 2006, Applicant learned that he also owed state taxes on his 2003 personal tax due to a deduction that he had taken for a business loss that turned out not to be valid (Tr. 73).

In August 2007, the IRS garnished Applicant's wages (AE E). The amount garnished is about \$43,000 total. As of May 2008, the IRS is still garnishing Applicant's wages but he is not sure why or how the payments are applied.

The SOR alleges an unpaid federal tax lien, six unpaid state tax liens and a bankruptcy in 1999. The total amount of the unpaid debts is approximately \$50,000 (GE 7).

SOR allegation 1.a is for a Chapter 13 bankruptcy filed on October 12, 1999 and dismissed in March 2001 for failure to convert to a Chapter 7 bankruptcy, per court order. Applicant claimed he was not aware that the Chapter 13 was dismissed. He then stated that his attorney notified him in late 2001 that the Chapter 13 was dismissed but not for a specific reason.

SOR 1.b is a federal tax lien in the amount of \$32,641.00. This has been satisfied and the lien released on June 27, 2008 (AE H).

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<sup>1</sup>Applicant received IRS notices about tax liability for tax years 1997, 1998, 1999 and 2000. The IRS held personal tax refunds for Applicant until 2004. He estimates the total amount retained by the IRS was approximately \$20,500.

SOR 1.c-1.g are for unpaid state tax liens from 1995 until 1999 (GE 7) for a total of approximately \$10,100. Applicant contacted the state in 2008. He resolved these state tax liens after the hearing. The state agreed to reduce the amounts owed and did not require Applicant to pay all the penalties and interest. Total of liens was reduced from \$14,469 to \$9,220. He is paying a monthly amount of \$786.14 (AE H).

SOR allegation 1.h is for \$7,700 for an unpaid lien for worker's compensation tax. Applicant learned about this when the security investigation started in 2008 by viewing his credit report. He contacted the agency and learned it had been expunged. The lien has been satisfied (AE H).

Applicant's current monthly net income is \$8,700 (GE 8). His wife is not working due to a medical condition (AE G). After monthly expenses and current debt payments, he has a net remainder of \$1,000. Applicant's credit card debt is current. He has an established budget. He has savings in his pension account of approximately \$305,800. He lists total assets as \$683,600. (GE 8)

Applicant earned three citations while in the military in Vietnam. He received an Air Medal (AE A).

### **Policies**

When evaluating an Applicant's suitability for a security clearance, the Administrative Judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful 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 over-arching adjudicative goal is a fair, impartial and common sense decision. According to AG ¶ 2, 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. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

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 as to obtaining 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 the Applicant may deliberately or inadvertently fail to protect or 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 concern relating to the guideline for Financial Considerations is 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.

The guideline notes several conditions that could raise security concerns. Under AG & 19(a), an inability or unwillingness to satisfy debts<sup>o</sup> is potentially disqualifying. Similarly under AG & 19(c), a history of not meeting financial obligations<sup>o</sup> may raise security concerns. Applicant has unpaid debt to the IRS in the amount of \$32,641 and five state tax liens from 1999. He could not meet his financial obligations from the school failure. He filed for bankruptcy in 1999. AG ¶ 19(e), “consistent spending beyond one’s means, which may be indicated by excessive indebtedness, significant negative cash flow, high debt-to-income ration, and/or other financial analysis.” The evidence is sufficient to raise these potentially disqualifying conditions, requiring a closer examination.

The guideline also includes examples of conditions that could mitigate security concerns arising from financial difficulties. Under AG ¶ 20(a), the disqualifying conditions may be mitigated where 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. Applicant's financial worries started in 1995 but continue until the present day. Because of his dedicated recent efforts to establish financial responsibility, it is unlikely that the financial difficulties will recur or that there is any doubt about his current reliability or good judgment. This potentially mitigating condition applies.

Under AG & 20(b), it may be mitigating where 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. As noted above, his financial problems initially arose from the failed school business. However, he was not vigilant with the situation concerning his bankruptcy and his taxes. He also had a few brief periods of unemployment. He acted responsibly in identifying and resolving these debts very recently. I find this potentially mitigating condition partially applies.

Evidence 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 is potentially mitigating under AG & 20(c). This applies. Similarly, AG & 20(d) applies where the evidence shows the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts. Applicant received counseling when he filed for bankruptcy. This is a legitimate means to resolve financial difficulties. In this case many of the financial problems were caused by the failed school business. He has satisfied the state liens and has a payment plan for the other debt. I conclude this potentially mitigating condition partially applies.

AG ¶ 20(e) applies where the evidence shows "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." In this case, Applicant had his wages garnished for a period of time. He is still attempting to ascertain the reason why the wages are being garnished. He has been paying the IRS and they have not told him where the garnished amount is applied. This mitigating condition partially applies in this case.

### **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) 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 common sense judgment based upon careful consideration of the guidelines and the whole person concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case and conclude they are sufficient to overcome the government's case. Applicant has served in the military and in the private defense industry with a top secret security clearance for more than 40 years. He has never had any misconduct or issues with a security clearance. He served his country and he helped his wife to operate a school venture.

The venture failed and financial problems arose from that business failure. Applicant could have been more proactive after the filing and dismissal of the bankruptcy in 2001. He has paid the federal tax lien and the state tax liens. He is in repayment status with the other debts.

Overall, the record evidence leaves me without questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has mitigated the security concerns arising from his financial considerations.

### **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:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	For Applicant
Subparagraph 1.e:	For Applicant
Subparagraph 1.f:	For Applicant
Subparagraph 1.g:	For Applicant
Subparagraph 1.h:	For Applicant

## **Conclusion**

In light of all of the circumstances presented by the record in this case, it is clearly consistent with national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

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NOREEN A. LYNCH  
Administrative Judge