



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



In the matter of:	)	
	)	
-----, -----	)	ISCR Case No. 08-09374
SSN: -----	)	
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Jeff A. Nagel, Esquire, Department Counsel  
For Applicant: *Pro Se*

April 28, 2009

**Decision**

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WHITE, David M., Administrative Judge:

After the owners and financial manager of a medical clinic, where Applicant worked as the operations manager for one year in the early 1990s, failed to make payroll tax deposits, the Internal Revenue Service (IRS) filed tax liens against all the owners and managers, including him. He was advised by counsel that the he did not owe any debt to the IRS and should not pay his former employers' tax obligation. The IRS never contacted him seeking payment, and has refunded income taxes to him since then. Based upon a thorough review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

Applicant submitted his Electronic Questionnaires for Investigations Processing (e-QIP), on July 22, 2008. On November 20, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines F and E. 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 (DoD) for SORs issued after September 1, 2006. Applicant acknowledged receipt of the SOR on November 26, 2008. He answered the SOR in writing on December 1, 2008, and requested a hearing before an administrative judge. Department Counsel was prepared to proceed on January 5, 2009, and DOHA assigned the case to me on the following day.

DOHA issued a notice of hearing on February 4, 2009, and I convened the hearing as scheduled on February 24, 2009. Department Counsel offered Government Exhibits (GE) 1 through 6, which were admitted without objection. Applicant testified on his own behalf, and offered no Applicant's Exhibits. DOHA received the transcript of the hearing (Tr.) on March 4, 2009.

### **Findings of Fact**

Applicant is a 68-year-old employee of a federal contractor, where he has worked for one year as a truck driver. He is legally separated, pending divorce, and has an adult son and a 20-year-old daughter attending college. In his answer to the SOR, he denied all allegations. At the beginning of the hearing, Department Counsel formally withdrew the Guideline E allegation against Applicant because it was improperly charged. (Tr. at 4, 46.)

Applicant had been working in healthcare management for 17 or 18 years when he agreed to a one-year contract in the early 1990s to manage operations at a medical clinic. The clinic had been closed by the county for providing substandard care. The owners of this clinic were four attorneys from a distant major city. Applicant corrected the problems and reopened the clinic in about six months. He spent the remaining six months of his contract managing the ongoing operation while a full time administrator was recruited and hired. He left the position at the end of the one year contract. (Tr. at 28-30.)

The owners of the clinic encountered some serious financial difficulties and their financial manager, located in the lead attorney's office, failed to make timely deposits of payroll taxes that were withheld from the clinic's employees' pay. Applicant had no responsibility for handling the clinic's finances, and had no knowledge of these problems at the time. When the IRS discovered the failure to make the required deposits, they filed a demand for payment of \$32,923.63, that included a 100% penalty. Identical demands for the entire amount, and associated tax liens, were filed against all administrative employees of the facility, including Applicant. Liens were also filed against each of the four attorneys, the local representative of their partnership, the accountant, the bookkeeper, and the director of nursing services, who also had no involvement with the financial aspects of clinic operations. Applicant found out about the problem when the IRS notified him of the filing of their collection action and lien, some three or four months after he left that job. (Tr. at 29-32.)

Applicant did not have sufficient funds to personally pay the demand and satisfy the lien, nor did he consider it to be legitimately his personal debt. He consulted an attorney who agreed to handle the matter for him. The attorney filed some papers for him, and later advised him that the issue was resolved and he need not worry about any property or tax refunds being attached, or other collection action being taken. He was advised that the lien could remain on credit reports for some time, however. Over the past 15 years, the IRS has never contacted Applicant concerning this lien or the underlying debt, nor have they filed a lien against any of his property including the home he owns with his wife. He has filed all of his annual income tax returns, and when due a refund the IRS has paid it to him. He has never been denied credit as a result of this lien, including a 2003 first mortgage and a 2008 second mortgage on his home. (Tr. at 33-36; GE 6 at 2.)

Applicant has more than sufficient income to meet his regular living expenses, and continues to provide financial assistance to his daughter in college. He is current on all debt payments, and has never had an account placed for collection or charged off. (Tr. at 25-26.) The tax lien appeared as a Trans Union entry on Applicant's July 29, 2008 full data credit report (covering all three major reporting agencies). (GE 4 at 3.) It does not appear on either of his subsequently obtained Equifax credit reports dated October 3, 2008, and February 19, 2009. (GE 5 and 6.) Based on all the evidence of record in this case, I find as a fact that the tax lien recorded against Applicant in July 1993 does not represent a debt that he owes. I further find that Applicant's testimony and demeanor throughout his hearing were entirely forthright and credible.

### **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 used to evaluate 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(a) and 2(c), the entire process is a conscientious scrutiny of applicable guidelines in the context 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 "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the 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 the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision.” Section 7 of Executive Order 10865 provides that “Any determination under this order adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.”

A person applying for access to classified information seeks to enter 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.

## **Analysis**

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

AG ¶ 18 expresses the security concern pertaining to financial considerations:

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 over-extended is at risk of having to engage in illegal acts to generate funds. Compulsive gambling is a concern as it may lead to financial crimes including espionage. Affluence that cannot be explained by known sources of income is also a security concern. It may indicate proceeds from financially profitable criminal acts.

AG ¶ 19 describes conditions that could raise a security concern and may be disqualifying. Department Counsel asserted the applicability of two of these potentially disqualifying conditions: “(a) inability or unwillingness to satisfy debts;” and “(c) a history of not meeting financial obligations.” (Tr. at 13-14.) One other disqualifying condition could also be implicated by the existence of a tax lien: “(g) failure to file annual Federal, state, or local income tax returns as required, or fraudulent filing of the same.” Applicant

admitted the existence of the tax lien, but it does not correspond to any debt that he legally owes. The undisputed evidence demonstrated Applicant's ability and willingness to satisfy all of his debts, so no security concerns arise under AG ¶ 19(a). The evidence also failed to establish any history of not meeting financial obligations that might support security concerns under AG ¶ 19(c). Finally, the lien did not result from any personal failure by Applicant to comply with his Federal tax obligations and was unrelated to his income taxes. Accordingly, no security concerns arise under AG ¶ 19(g). The evidence of record raises no questions about Applicant's self-control, judgment, and willingness to abide by rules and regulations under which people are expected to fulfill their lawful obligations.

AG ¶ 20 provides conditions that could mitigate security concerns should any be found to arise from the mere existence of this tax lien, independent of any legitimate debt. The two applicable conditions are:

(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;

AG ¶ 20(a) supports mitigation because the lien was filed more than 15 years ago, and there has been no effort by the IRS to pursue any collection action in connection therewith. It arose under unique circumstances entirely unrelated to Applicant's present employment or living circumstances. Applicant had neither involvement in nor responsibility for the failure to deposit payroll tax withholdings that caused the lien to be filed, so it supports no doubt at all about his current reliability, trustworthiness and good judgment. AG ¶ 20(b) also applies since the lien resulted from events of which he had no knowledge. Once he learned of the problem, he followed the advice of a tax attorney, who helped absolve him of any underlying debt obligation, but could not prevent its presence on one of the three credit bureau reports.

### **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 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. Applicant's conduct of potential concern involves the presence of a 15-year-old Federal tax lien on his Trans Union credit report. This lien does not correspond to any underlying personal tax obligation on his part, and arose due to actions of others about which he had no knowledge. This one-time incident, viewed in context of his life-long record of meeting his financial obligations, creates no potential for pressure, coercion or duress. The unique circumstances under which the lien arose make recurrence most unlikely.

On balance, Applicant presented sufficient evidence to fully mitigate any judgment, reliability, or trustworthiness security concerns arising from the appearance of this tax lien on one of his credit reports. His willingness and ability to satisfy his debts, and his history of consistently meeting his financial and tax-related obligations are clearly established. The record evidence leaves no doubt as to Applicant's present eligibility and suitability for a security clearance. For all these reasons, Applicant has mitigated security concerns related to 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

### **Conclusion**

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

DAVID M. WHITE  
Administrative Judge