



DEPARTMENT OF DEFENSE  
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of: )  
 )  
----- ) ISCR Case No. 08-10397  
SSN: ----- )  
 )  
Applicant for Security Clearance )

**Appearances**

For Government: James F. Duffy, Esquire, Department Counsel  
For Applicant: *Pro se*

September 30, 2010

**Decision**

CURRY, Marc E., Administrative Judge:

Applicant mitigated the criminal and personal conduct security concerns, but failed to mitigate the financial considerations security concern. Clearance is denied.

**Statement of the Case**

On March 31, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines F (Financial Considerations), E (Personal Conduct), and J (Criminal Conduct). 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 adjudicative guidelines (AG).

Applicant answered the SOR on April 20, 2010, admitting all of the allegations. He requested a hearing, and the case was assigned to me on May 28, 2010. On June 3, 2010, DOHA issued a notice of hearing for June 30, 2010. The hearing was held as

scheduled. I received eight Government exhibits marked as Government Exhibits (GE) 1 to 8, five Applicant exhibits, marked as Applicant's Exhibits (AE) A to E, and Applicant's testimony. I left the record open at the conclusion of the hearing, at Applicant's request, to allow him to submit additional exhibits. Within the time allotted, he submitted eight additional exhibits that I received. (AE F to M) DOHA received the transcript on July 9, 2010.

### **Procedural Ruling**

At the close of the hearing, Department Counsel moved to amend the SOR as follows:

1.c. You are indebted to the United States Internal Revenue Service for approximately \$20,000 for the time period of 2001-2005.

Applicant did not object, and I granted the motion.

### **Findings of Fact**

Applicant is a 43-year-old married man with three children, ages 20, 16, and seven. His two oldest children are from prior relationships. His 20-year-old son currently serves in the United States Navy.

Applicant works in the information technology field. Since 2004, he has worked for a defense contractor that focuses on making information technology more accessible for the disabled. The program particularly targets disabled military veterans. (GE 6 at 4)

As a teen, Applicant used and sold illegal drugs. In June 1987, Applicant was arrested and charged with possession of cocaine, marijuana and PCP. (Tr. 59). He was sentenced to five years in jail (suspended) and three years of probation.

In November 1988, Applicant was charged with manufacture/distribution of a controlled dangerous substance, possession of cocaine, possession of cocaine with the intent to distribute, and carrying a concealed knife. (Tr. 60) In February 1990, Applicant was found guilty of the first charge. In April 1990, he was sentenced to ten years in prison. (Tr. 62)

While Applicant was incarcerated, the state charged him with eluding an officer and resisting arrest. (Tr. 65) These offenses related to an incident that occurred between the incidents of June 1987 and November 1988. (Tr. 65) Under the terms of a plea bargain, Applicant pleaded guilty to lesser offenses and was sentenced to an additional three years to run concurrent to the sentence he was already serving.

Applicant was a model prisoner, earning a bachelor's degree in general studies in 1994 while incarcerated. (Tr. 28) Because of his good behavior, he was released after six years. In one rehabilitation class that Applicant took while in prison, he learned what

he characterized as the “people, places, and things,” philosophy of life. (Tr. 86) Specifically, if one avoids people who are involved in illegal activities, and places where illegal activities occur, one’s likelihood of staying out of trouble is increased.

Since leaving prison, Applicant has abided by this creed, foregoing illegal drug use and avoiding his old social milieu. He is highly respected on the job and in his community. According to his supervisor from 2004 to 2006, Applicant was “an excellent technician” who was “always up to date on whatever he was working on.” (AE C)

Currently, Applicant manages a staff of 15 desktop and network support administrators. His employer, on his yearly evaluation, noted that he was highly productive and demonstrated solid leadership skills. (AE B at 1, 2)

Applicant is active in local political campaigns and is the chairman of his homeowner’s association. (GE 3 at 5; Tr. 88) He is an assistant coach on his son’s little league baseball team, and is a booster for his daughter’s high school cheerleading squad. (Tr. 88)

Two of Applicant’s friends are police officers. Both provided references for him. One of the officers characterized him as “an exceptionally intelligent person whom [the officer] leans on for financial business, and spiritual guidance.” (AE F) The other officer, who characterized himself as “highly selective of [his] personal circle of friends” because of the nature of his profession, described Applicant as dependable, honest, and trustworthy. (AE G)

Applicant completed a security clearance application in March 2004. He failed to disclose his felonies in response to **Question 21. Your Police Record - Felony Offenses** - Have you ever been charged with or convicted of any felony offense? Applicant misread the question, thinking that he only had to report felonies within seven years of the date he completed the security clearance application. (Tr. 73) Applicant disclosed his criminal record to an investigative agent in 2005. (Tr. 76)

Applicant completed another security clearance application in June 2008.<sup>1</sup> This time, he read it more thoroughly, and “took [his] time completing it. (Tr. 80) In response to **Section 23D - Alcohol/Drug Charges**, he answered “yes,” and described them at length.

In 2001, Applicant purchased a laundromat. (Tr. 56) The business was unsuccessful, prompting Applicant to sell it in 2004 (Tr. 33) In 2005, the local municipality where Applicant operated the business obtained a tax lien against applicant for \$53,497 for unpaid sales and use taxes for tax years 2001 through 2004. Later that year, the municipality filed another tax lien against Applicant. This lien covered tax year

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<sup>1</sup>It is unclear why Applicant completed two security clearance applications. He suspects that after leaving his job in 2004 to take his current job, the original investigative process was terminated, and that he did not have a need for a clearance on his current job until 2008. (Tr. 79)

2005 and totalled \$6,748 . (GE 3 at 4) Applicant had filed his taxes his taxes timely during the years in dispute, but miscalculated them. (Tr. 31)

Shortly after receiving the notice of tax liens, Applicant called the local taxing authority to arrange a payment plan. (Tr. 33) In April 2009, Applicant “went down physically” to the local taxing authority and made a \$100 payment toward the delinquency. (GE 4 at 4) He has not made any additional payments since then.

At or about the time the local municipality filed the tax liens against Applicant, the federal government audited his tax returns from 2003 through 2005 and concluded he owed an additional \$41,864 (AE H; Tr. 55, 95) In June 2010, Applicant consulted a certified public accounting firm to help develop a payment plan for his income tax delinquencies. (Tr. 39; AE A) He retained the firm a month later, approximately three weeks after the hearing. (AE J)

In 2004, Applicant and his wife financed the purchase of a home with a variable rate mortgage. (Tr. 42) Shortly after the purchase, Applicant discovered the recordation fees were calculated incorrectly at the settlement, causing the bank to underestimate the escrow portion of their mortgage payment. Also, over the next four years, the monthly mortgage payments began to steadily increase. By 2007, it had more than doubled from \$3,800 to \$8,000. (Tr. 92) In 2007, Applicant and his wife successfully refinanced their loan. Under the new loan, the monthly mortgage was fixed at \$4,000 monthly.

In 2009, Applicant’s wife, who worked in the real estate industry, was laid off. Applicant was unable to manage the family’s finances on his income alone. Consequently, both his mortgage payments and his car payments fell behind.

Currently, Applicant and his wife are receiving counseling through a state program that seeks to prevent foreclosures. (Tr. 50) Also, a week before the hearing, they met with a debt counselor to consider consolidating their debts. (Tr. 50) Recently, Applicant’s wife obtained another job in the real estate profession. She will be paid a nominal salary in addition to a commission for any homes sold. As of the date of the hearing, she had not received her first pay check.

Applicant earns \$75,000 per year. He has approximately \$15,000 invested in a 401k plan. (Tr. 58) He intends to apply this money toward his mortgage if his efforts at preventing foreclosure are unsuccessful. (Tr. 58) Both Applicant’s mortgage and car payments remain delinquent.

In June 2010, Applicant and his wife applied for a home loan modification. (AE M) If approved, the bank will reduce their monthly mortgage payment to 31 percent of their gross income. (*Id.*)

## **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.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied together with the factors listed in the adjudicative process. 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."

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 for obtaining a favorable security decision.

## **Analysis**

### **Financial Considerations**

Under this guideline, "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" (AG ¶ 18). Applicant's history of financial problems triggers the application of AG ¶¶ 19(a), "inability or unwillingness to satisfy debts," and 19(c), "a history of not meeting financial obligations."

The following mitigating conditions under AG ¶ 20 are potentially applicable:

(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; and

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

Applicant's financial problems began when his laundromat business failed, and were exacerbated when he discovered that he had miscalculated his state and federal income taxes while the business was in operation. His ability to address these problems was hampered by the drastic increase in his adjustable rate monthly mortgage payment and his wife's subsequent unemployment.

In the past four months, Applicant has retained an accounting firm to help him resolve his tax delinquency, sought help through a state program for distressed homeowners, applied for a mortgage loan modification, and met with a credit counselor about consolidating their debts. AG ¶¶ 14(b) and 14(d) apply.

AG ¶ 14(c) only applies partially. Although there is ample evidence that Applicant is receiving counseling, it is too soon to conclude that the problem is being resolved or is under control.

### **Personal Conduct**

The security concern under this guideline is as follows:

[c]onduct 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 (AG ¶ 15).

Applicant's omission of his criminal record from a 2004 security clearance application raises the issue of whether AG ¶ 16(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," applies.

Applicant's contention that he misread the question is credible in light of his subsequent disclosure of his arrests to an investigator and his inclusion of the arrest and the surrounding details on another security clearance application completed four years later. I conclude AG ¶ 16(a) does not apply, and there are no personal conduct security concerns.

### **Criminal Conduct**

Under this guideline, "criminal activity creates doubt about a person's judgment, reliability, and trustworthiness" (AG ¶ 30). Also, "by its very nature, it calls into question a person's ability or willingness to comply with laws, rules, and regulations" (*Id.*).

Applicant was incarcerated for six years in the 1990s after being convicted of several drug-related charges. AG ¶¶ 31(a), “a single serious crime or multiple lesser offenses,” and 31(c), “allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted,” apply.

Although Applicant admittedly was involved in using and dealing drugs, this conduct occurred more than 20 years ago when he was in his late teens to early twenties. While in prison, Applicant earned a bachelor’s degree. Since leaving prison Applicant has avoided the drug culture, pursued gainful employment, and gotten married. He is highly respected on the job and is a pillar of his community. The following mitigating conditions under AG ¶ 32 apply:

(a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual’s reliability, trustworthiness, or good judgment; and

(d) there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training, or higher education, good employment record, or constructive community involvement.

### **Whole-Person Concept**

Under the whole-person concept, 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 seriousness of Applicant’s criminal conduct is outweighed by his immaturity when it occurred, the passage of time that has elapsed since it occurred, and the significant evidence of rehabilitation. Under these circumstances the likelihood of recurrence is minimal.

Applicant is an exceedingly productive member of society. Applicant testified persuasively that his motivation to excel on the job stemmed not only from a desire to earn a lucrative salary, but to his dedication to the people whom he is serving.

However, these positive attributes cannot overcome the vulnerability to coercion generated by Applicant’s ongoing financial difficulties. His income tax delinquencies

accrued because of good-faith mistakes made when he filed his returns. His ability to address this problem was hampered first by the drastic increase in his monthly mortgage payments, then by his wife's job loss. Although Applicant is aggressively taking steps to remedy his financial problems, too much uncertainty about his long-term financial situation exists for me to conclude that it poses no security concern. Consequently, upon considering Applicant's case in the context of the whole-person concept, I conclude that he has not mitigated the security concern.

### **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 - 1.c:	Against Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Paragraph 3, Guideline J:	FOR APPLICANT
Subparagraphs 3.a - 3.b:	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.

MARC E. CURRY  
Administrative Judge