



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



In the matter of:	)	
	)	
SSN:	)	ISCR Case No. 09-04658
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Alison O'Connell, Esq., Department Counsel  
For Applicant: *Pro se*

April 29, 2010

**Decision**

LOUGHRAN, Edward W., Administrative Judge:

Applicant mitigated Personal Conduct security concerns, but he has not mitigated the Financial Considerations concerns. Eligibility for access to classified information is denied.

**Statement of the Case**

On October 13, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines F (Financial Considerations) and E (Personal Conduct). The action was taken under Executive Order (EO) 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 received the SOR on October 27, 2009. He answered the SOR on November 10, 2009. He did not specify whether he wanted a hearing or the case decided on the written record. On November 17, 2009, he requested a hearing before

an administrative judge. The case was assigned to me on January 14, 2010. DOHA issued a notice of hearing on January 22, 2010, and the hearing was convened as scheduled on February 22, 2010. The Government offered Exhibits (GE) 1 through 4, which were received without objection. Applicant testified on his own behalf and submitted Exhibits (AE) A through V, which were admitted without objection. The record was held open until April 12, 2010, for Applicant to submit additional information. Applicant submitted a document, which was marked AE W and admitted without objection. Applicant requested that the record be held open an additional four weeks. Department Counsel objected. I orally granted Applicant an additional ten days and held the record open until April 22, 2010. Applicant submitted additional documents, which were marked AE X through AA and admitted without objection. Department Counsel's memorandums are marked Hearing Exhibits (HE) I, II, and III. DOHA received the transcript of the hearing (Tr.) on March 2, 2010.

### **Findings of Fact**

Applicant is a 63-year-old employee of a defense contractor. He has worked for his current employer since 2007. He is seeking to obtain a security clearance. Applicant served on active duty in the U.S. Air Force from 1966 until he was honorably discharged as a staff sergeant (E-5) in 1970. He earned a Master of Business Administration degree in 1991. He was married from 1979 to 1981. He married again in 1984. He has two children, ages 20 and 18, and two adult stepchildren.<sup>1</sup>

The SOR alleges a \$15,884 state tax lien and a \$128 delinquent medical debt. Applicant denied owing the \$128 debt. He was unable to locate the collection company handling the debt despite writing the Equifax credit reporting agency for contact information. The debt is listed on a February 2009 credit report, but not the more recent September 2009 credit report.<sup>2</sup>

Applicant lived in state A from 1984 to 1993. He was self-employed for much of this period. He did not pay his state tax debt for tax year 1990. A notice from the state dated April 14, 2010, showed tax liability for tax year 1990 at \$2,075, plus a penalty of \$2,041 and interest of \$6,889, for a total amount due of \$11,006.<sup>3</sup>

Applicant was unable to find work in state A in 1992. He obtained work in state B across the country from state A. He worked in state B while his family stayed in state A. He owned a house in state A and was staying in state B on a temporary basis. State A sent Applicant a letter on November 30, 1992, notifying him that they had not received a state income tax return for tax year 1991. The state sent a Notice of Proposed Assessment on February 16, 1993. This letter indicated the state still had not received a tax return for 1991. The state indicated that Applicant was required, within 60 days, to file a return and pay any taxes due or explain in writing why he was not required to file a

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<sup>1</sup> Tr. at 12, 15, 72, 95; GE 1.

<sup>2</sup> Applicant's response to SOR; GE 3, 4; AE C.

<sup>3</sup> Tr. at 39; GE 1, 2.

return. The state noted that if Applicant did not respond within 60 days, the state would calculate his tax liability at \$32,249, based upon income of \$240,623, plus penalties, interest, and fees, minus his withholding.<sup>4</sup>

Applicant responded to the Notice of Proposed Assessment on April 5, 1993. He wrote:

I commuted to [state B] for the last six months of 1992 to secure employment. Between job hunting prior to that, long distance commuting and out of state employment, I had little, if any, time to finalize a 1991 return.<sup>5</sup>

Applicant further wrote that he always withheld sufficient funds and received refunds, and he believed there would be no tax liability for 1991. He indicated that the 1991 return was almost complete and would be “filed upon completion of an IRS audit for 1990, presumably within the next 60 days.”<sup>6</sup>

Applicant testified that he filed his state income tax return for 1991 and his state taxes for that year have been paid. There is apparently no liability for tax year 1991, because subsequent documents from state A address tax years 1990 and 1992, but not 1991.<sup>7</sup>

Applicant did not file a state A income tax return for the 1992 tax year until November 8, 2009. He stated that he did not believe he had to file a return in state A because he did not work in state A for any part of 1992. His W-2 from 1992 indicated that his wages for 1992 were \$200,000. The address on the W-2 was Applicant’s home in state A. The W-2 reflected that there was \$11,960 withheld from his wages for state A income tax. Applicant continued to argue at his hearing that he should not have been required to file a 1992 income tax return in state A because he did not work in the state. He testified that his “belief is that it was - - essentially a sham that [state A] made up and that [he] didn’t owe it because [he] didn’t work in [state A].” He stated that the \$11,960 was improperly withheld from his wages. Applicant did not file income tax returns for tax year 1992 in state B, the state where he worked in 1992. He failed to adequately address why, if as he asserted he did not believe he had to file returns or pay taxes to state A, he did not file returns or pay state taxes to state B.<sup>8</sup>

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<sup>4</sup> Tr. at 75-76; GE 2; AE K, L.

<sup>5</sup> AE L.

<sup>6</sup> *Id.*

<sup>7</sup> Tr. at 44-46, 75.

<sup>8</sup> Tr. at 47-51, 65-72, 77, 82; GE 2; AE U, V. Any tax issues that were not alleged in the SOR will not be used for disqualification purposes. They will be considered in assessing Applicant’s credibility; in the application of mitigating conditions; and in evaluating the “whole person.”

Applicant started working in state C in 1993. He has lived in the same house in state C since May 1994. State A filed a tax lien against Applicant in June 1995. The tax lien was for tax years 1990 and 1992. It reflected tax owed of \$19,653, plus a penalty of \$5,799, interest of \$2,264, costs of \$231, minus payments and adjustments of \$11,960, for a total due of \$15,987. The Notice of State Tax Lien listed Applicant's address as his home address in state C. State A extended the tax lien in March 2005. The Notice of State Tax Lien again listed Applicant's address as his home in state C.<sup>9</sup>

Applicant indicated he retained an attorney in state A in the early 1990s to address his federal and state tax issues but he stated that he lost touch with the attorney after he moved to state C, and the issue was never resolved.<sup>10</sup>

Applicant received a Notice of State Income Tax Due from state A dated November 28, 2006. The Notice stated that he owed, with penalties and interest, \$8,806 for tax year 1990 and \$37,479 for tax year 1992, for a total of \$46,285.<sup>11</sup>

Applicant submitted a Questionnaire for National Security Positions (SF 86) on December 30, 2008. He answered "No" to Question 27c, which asked "In the last 7 years, have you had a lien placed against your property for failing to pay taxes or other debts?" Applicant denied intentionally falsifying the SF 86. He knew there was a lien filed in 1995. He testified that he was unaware the lien was extended and he did not receive a copy of the Notice of State Tax Lien until about August 2009.<sup>12</sup> He wrote in his response to the SOR:

I had no personal knowledge at the time of filing the [SF 86] on December 30, 2008 that [state A] had "extended" the 1995 tax lien. [State A] did not provide notification of the original 1995 lien or the "extended" 2005 lien via certified mail.

This is contradicted by his statement to a background investigator in April 2009. A signed statement was not obtained, but the interview was summarized in a report of investigation (ROI). The ROI states that Applicant told the investigator that he forgot about the tax debt until he was notified by mail that the lien was extended in March 2005. Applicant responded to DOHA interrogatories on September 5, 2009. He was asked to verify the accuracy of the ROI, make corrections, and submit additional information, if necessary. He submitted seven typed pages of corrections and additions. He did not correct the ROI about receiving the tax lien in the mail in March 2005. He wrote:

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<sup>9</sup> GE 1, 2; AE B, K, N

<sup>10</sup> Tr. at 67-68, 81; GE 2.

<sup>11</sup> GE 2.

<sup>12</sup> Tr. at 36, 83-84, 88; GE 1.

As noted in the interview, the [state A] tax lien initially filed in 06/95 and re-filed on 03/05 are the same lien. The initial lien is based upon a contrived tax liability, since I did not work in [state A] in 1992 or 1993. . . .

I did not file [state A] Income Tax returns in 1992 and 1993, since I did not work in that state. As noted, I do not owe the tax claimed by [state A]. Since the lien is for tax years 1992 and 1993, it is also beyond the ten year scope of the Single-Scope Background Investigation and is the reason it was not shown on my SF-86. Here again, there was no attempt at deception in the Personal Interview. I believed the 10-year limitation on a Single-Scope Background meant 10-years.<sup>13</sup>

Applicant also stated that he did not have to list the lien because he does not own any property in state A, and state A has no legal authority to place a lien on his property in state C. I find that Applicant received notice in 2005 that the tax lien was extended. The question specifically asks if there was a “lien placed against [his] property.” While there was a tax lien filed against Applicant in 1995 and extended in 2005, it arguably was not “placed against [his] property.” Also, the original lien was filed in 1995, which was outside the seven-year range of the question. Applicant argued that an extension did not fit the exact terms of the question. He also stated that he did not “believe it’s a legitimate claim by [state A].”<sup>14</sup> I did not find Applicant to be credible. His answers at times were evasive and nonresponsive. However, after considering all the evidence, there is insufficient evidence for a determination that he intentionally falsified his answer to this particular question on the SF 86.

Applicant did not submit a copy of his W-2 when he filed his 1992 state A income tax return in November 2009. State A revised his income tax return for the 1992 tax year and issued a statement on January 11, 2010. The statement showed a tax liability for that year of \$6,535, plus penalties, interest, and fees of \$34,329, for a balance due of \$40,864. Applicant indicated that because he did not submit the W-2, the state did not credit him with the \$11,960 withheld from his wages that year for state A income taxes. He indicated that if the \$11,960 was calculated, he would have rated a refund of \$5,425. He has forwarded the W-2 to state A but has not received a recalculation in writing. He stated that state A agrees that he does not owe anything for tax year 1992. He will not receive a refund, and the state will not credit the amount of what would have been a refund to his tax liability for 1990.<sup>15</sup>

Applicant stated before and at the hearing that he did not owe state A for either tax year 1990 or 1992. He wrote in his response to DOHA interrogatories that “[state A] just makes this stuff up as they go along,” and “[s]imply put, I do not owe any [state A] income tax and will not be paying any.” He testified that “the original tax lien was contrived and will be shown in this hearing to be illegitimate.” He testified that state A

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<sup>13</sup> GE 2.

<sup>14</sup> Tr. at 34-38; Applicant’s response to SOR; GE 1, 2.

<sup>15</sup> Tr. at 35, 64; Applicant’s response to SOR; GE 2; AE T-V.

was only concerned with the taxes from 1992 and they “apparently have figured out and/or waived 1990.” As addressed above, Applicant conceded after the hearing that he owed state A \$11,006 for tax year 1990. He agreed to pay the state \$500 per month until the taxes were paid. He sent a \$500 check to state A on April 18, 2010.<sup>16</sup>

Applicant submitted evidence and numerous documents attesting to his patriotism and loyalty to this country. With the exception of his taxes, his finances are in order.<sup>17</sup>

## **Policies**

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are to be used 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, administrative judges apply the guidelines in conjunction with the factors listed in the adjudicative process. The administrative judge’s overarching 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. 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.” The applicant has the ultimate burden of persuasion to obtain a favorable 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

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<sup>16</sup> Tr. at 35, 42, 45-46; Applicant’s response to SOR; GE 2; AE W-AA.

<sup>17</sup> Tr. at 11-25; GE 2-4; AE D-J, O-S.

the possible risk 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 EO 10865 provides that adverse 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* Executive Order 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

## **Analysis**

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

The security concern for Financial Considerations is set out in AG ¶ 18, as follows:

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. Two are potentially applicable in this case:

- (a) inability or unwillingness to satisfy debts; and
- (c) a history of not meeting financial obligations.

Applicant did not pay his 1990 state income tax for almost 20 years. The evidence is sufficient to raise the above disqualifying conditions. The \$128 medical debt does not raise any disqualifying conditions. SOR ¶ 1.b is concluded for Applicant.

Four Financial Considerations 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; and

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

Applicant's tax problems are from the early 1990s, but he still owes more than \$10,000, which he only recently started addressing. His financial issues are current and ongoing. AG ¶ 20(a) is not applicable.

There is no evidence that Applicant's tax problems resulted from anything that was beyond his control. AG ¶ 20(b) is not applicable.

The SOR alleges a state tax lien of \$15,584. The tax lien is for tax years 1990 and 1992. Applicant submitted evidence that he resolved his 1992 taxes. He still owes more than \$10,000 for his 1990 state taxes. Applicant knew he had tax issues in 1992, when the state sent him notices about his 1991 returns. He knew there was a tax lien filed in 1995. He received notice in 2005 that the tax lien was extended. He received a Notice of State Income Tax Due from state A in November 2006, stating he owed his 1990 and 1992 taxes. The SF 86 submitted in December 2008 had specific questions about tax liens. He was asked about his taxes by a background investigator in April 2009. In September 2009, he responded to DOHA interrogatories that asked about his taxes. He received the SOR in October 2009. At his hearing, he continued to deny owing taxes from 1990. After the hearing, Applicant conceded that he owed state A \$11,006 for tax year 1990 and agreed to pay the state \$500 per month until the taxes were paid. He sent a \$500 check to state A on April 18, 2010.

Based upon Applicant's longstanding recalcitrance toward paying his state taxes, I find one payment of \$500 made after the hearing is insufficient to qualify as a good-faith effort to pay or resolve his debts. AG ¶ 20(d) is not applicable. It is also not enough to establish clear indications that his financial problems are being resolved or are under control. AG ¶ 20(c) is not applicable.

### **Guideline E, Personal Conduct**

The security concern relating to the guideline for Personal Conduct is set out in AG ¶ 15:

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.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying condition is potentially applicable:

(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.

There is insufficient information for a determination that Applicant intentionally falsified his SF 86. AG ¶ 16(a) is not applicable. Personal Conduct security concerns are concluded for Applicant.

### **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 relevant 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 considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. 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. I considered Applicant's service to this country in the U.S. Air Force, his patriotism, and his favorable character evidence. Applicant has known that his state taxes have been an issue for almost 20 years. His dispute with state A over his 1992 taxes, because he did not work in the state that year, does not explain or excuse his failure to pay his 1990 taxes, when he did work in the state. He finally admitted after the hearing that he owed state A \$11,006 for tax year 1990. He agreed to pay the state \$500 per month until the taxes were paid. He sent a \$500 check to state A on April 18, 2010. Applicant has

obvious disdain for the state A taxing authority. His actions do not convince me that he will continue with his stated plan to pay the state \$500 per month until the taxes are paid.

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated Personal Conduct security concerns, but he has not mitigated the Financial Considerations concerns.

### **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:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	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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Edward W. Loughran  
Administrative Judge