



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



In the matter of:)	
)	
XXXXXXXXXX, XXXXX)	ISCR Case No. 09-05238
SSN: XXX-XX-XXXX)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Gregg A. Cervi, Esq., Department Counsel
For Applicant: *Pro se*

July 15, 2010

Decision

TUIDER, Robert J., Administrative Judge:

Applicant failed to mitigate security concerns pertaining to financial considerations and personal conduct. Clearance is denied.

Statement of the Case

On May 13, 2009, Applicant submitted his Electronic Questionnaire for Investigations Processing (e-QIP).¹ On January 13, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under Guidelines F (financial considerations) and E (personal 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) effective within the Department of Defense on September 1, 2006.

¹ Item 5.

On January 30, 2010, Applicant acknowledged receipt of the SOR. On February 1, 2010, Applicant submitted his Answer to the SOR. He elected to have his case decided on the written record in lieu of a hearing. A complete copy of the file of relevant material (FORM), dated April 14, 2010, was provided to him by letter on the same day. Applicant received the FORM on May 3, 2010. He was afforded a period of 30 days to file objections and submit material in refutation, extenuation, or mitigation. Applicant timely submitted additional information, which was received without objection from the Department Counsel. The case was originally assigned to another administrative judge on June 4, 2010, and was reassigned to me on June 18, 2010, due to caseload considerations.

Findings of Fact

Applicant admitted the allegations in SOR ¶¶ 1.a. and 1.b., and denied the allegations in SOR ¶¶ 2.a. through 2.c. His admissions are incorporated herein as findings of fact. After a thorough review of the evidence of record, I make the following additional findings of fact.

Background Information

Applicant is a 58-year-old defense contract employee, who at the time he submitted his Response to FORM in May 2010, was deployed to Iraq and in support of U.S. Forces. The record does not contain information regarding his start or projected end date in Iraq.

The only information regarding Applicant's educational background is that he attended a vocational school from March 1980 to October 1982. Applicant was married from August 1995 to August 1998, which ended by divorce. He did not list any dependents on his e-QIP.² In his Responses to the SOR and FORM, Applicant makes reference his "27+ years of military service" and the fact that he held a secret clearance during his National Guard service.³ The record does not contain specific information regarding his military service.

Financial Considerations

Applicant filed for Chapter 7 bankruptcy protection in September 1999, and was awarded a discharge in January 2000. (SOR ¶ 1.b.) The record does not contain details regarding this bankruptcy such as assets, liabilities, or amount discharged.

More significantly, the Internal Revenue Service (IRS) filed a lien against Applicant in July 2006 in the amount of \$45,204. In addition to Applicant's admissions,

² *Id.*

³ Item 4.

his Chapter 7 bankruptcy and debt to the IRS are evidenced by official court records and a January 2009 credit report.⁴

In February 2009, when interviewed by a DoD investigator, Applicant said he cashed out his employer "savings account" of approximately \$110,000 in 2000. He added that the IRS took approximately \$40,000 in taxes from this "cash out" because of an early withdrawal, and after that, he still owed an additional \$30,000 to the IRS. This amount increased to \$45,204 due to interest and penalties.⁵ In July 2006, the IRS filed a tax lien against him for \$45,204. (SOR ¶ 1.a.) In August 2006, he hired a tax resolution firm to resolve his tax liability with the IRS. At that time, according to Applicant, the firm submitted an Offer in Compromise to the IRS. Applicant stated that he and the firm are still waiting for a response from the IRS.⁶ Applicant is unable to provide any documentation regarding communication between his tax firm and the IRS because he is currently located in Iraq.⁷

Applicant is current on his bills and has the money to pay off his IRS debt "whenever [tax firm] and the IRS reach an agreement with my Offer in Compromise."⁸ According to his Personal Financial Statement attached to DOHA's second set of Interrogatories and signed by him in September 2009, he has a net monthly remainder of \$568. The same set of Interrogatories requested documentation from him, which he did not provide. At the time he signed these Interrogatories, he was not overseas and appears to have been drawing unemployment stateside.⁹

I find that Applicant has owed \$45,204 to the IRS since at least 2006. His efforts to resolve this debt have been disappointing given the apparent importance of securing a security clearance. Applicant's undocumented assertions that his tax firm is attempting to resolve this debt for the past four years is insufficient to show good faith on this debt.

Personal Conduct

When completing his May 2009 e-QIP, Applicant answered "No" to Section 27 thereby denying that in the last seven years he had a lien placed against his property for failing to pay taxes or other debts. He answered "No" to Section 28 denying that in the

⁴ Items 7 - 9.

⁵ Item 6.

⁶ *Id.*

⁷ Response to FORM

⁸ Response to FORM and Item 6.

⁹ *Id.*

last seven years he had ever been over 180 days delinquent on any debt. Lastly, he answered “No” to Section 29 denying was that he is currently over 90 days delinquent on any debt. These responses are clearly false given the fact the IRS filed a lien against him in July 2006 in the amount of \$45,204, an amount that remains past due. (SOR ¶¶ 2.a. – 2.c.)

Applicant’s explanation for failing to list his IRS tax lien was, “I answered ‘no’ on the security clearance application for these paragraph subjects due to my Offer in Compromise with the IRS.”¹⁰

Policies

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the AG. 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 controlling 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.

In the decision-making process, the Government has the initial burden of establishing controverted facts alleged in the SOR by “substantial evidence,”¹¹ demonstrating, in accordance with the Directive, that it is not clearly consistent with the national interest to grant or continue an applicant’s access to classified information.

¹⁰ Item 4.

¹¹ See Directive ¶ E3.1.14. “Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the record.” ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994).

Once the Government has produced substantial evidence of a disqualifying condition, the burden shifts to applicant to produce evidence “to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by department counsel, and [applicant] has the ultimate burden of persuasion as to obtaining a favorable clearance decision.” Directive ¶ E3.1.15. The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).¹²

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* Executive Order 12968 (Aug. 2, 1995), Section 3.

Analysis

Guideline F, Financial Considerations

Under Guideline F, the security concern is that an applicant’s 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. AG ¶ 18.

Applicant accumulated a significant debt with the IRS in the amount of \$45,204, which has remained unpaid since at least 2006. Additionally, he filed for Chapter 7 bankruptcy in 1999 and was awarded a discharge in 2000. Applicant admitted these allegations. He presented no documentary evidence of efforts to pay or resolve his debt to the IRS.

AG ¶ 19(a): inability or unwillingness to satisfy debts, and AG ¶ 19(c): a history of not meeting financial obligations, apply in this case.

¹² “The administrative judge [considers] the record evidence as a whole, both favorable and unfavorable, evaluate[s] Applicant’s past and current circumstances in light of pertinent provisions of the Directive, and decide[s] whether applicant ha[s] met his burden of persuasion under Directive ¶ E3.1.15.” ISCR Case No. 04-10340 at 2 (App. Bd. July 6, 2006).

AG ¶ 20 lists six conditions that could mitigate the financial considerations security concerns:

- (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;
- (d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts;
- (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; and
- (f) the affluence resulted from a legal source of income.

Applicant has not produced evidence sufficient to warrant the application of any of the above mitigating conditions. He has not shown that his financial situation has resulted from circumstances beyond his control, has not shown he has ever sought or received financial counseling of any type, and has not established a track record of financial responsibility sufficient to mitigate the financial considerations that give rise to a security concern in this case. What is clear from the record evidence is that, while Applicant may well intend to resolve his debt with the IRS at some unspecified time in the future, he has not made any demonstrated effort to do so thus far.

Despite being questioned about his financial situation in February 2009 by the DoD investigator, and despite being questioned again in DOHA interrogatories in September 2009, Applicant has produced no evidence documenting that he has made any attempts to pay his delinquent debt with the IRS or to attempt a good-faith effort to resolve this debt. In short, Applicant's history of financial problems is recent and not isolated. He has not produced evidence showing he has exhibited good judgment and responsible conduct in managing this portion of his finances. Based on record evidence, Applicant's financial difficulties with the IRS appear likely to be a continuing concern. His 2000 Chapter 7 bankruptcy filing lacks security significance because of the passage of time.

Personal Conduct

AG ¶ 15 articulates the security concern pertaining to personal conduct:

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 two conditions that could raise a security concern and may be disqualifying in this case:

(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; and

(b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative.

Applicant failed to disclose his 2006 \$45,204 tax lien with the IRS when answering pertinent questions on his May 2007 e-QIP. The Government established through the evidence presented the disqualifying conditions in AG ¶¶ 16(a) and 16(c).¹³

AG ¶ 17 provides seven conditions that could potentially mitigate security concerns about his personal conduct:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

¹³Deliberate and materially false answers on a security clearance application may violate 18 U.S.C. § 1001. The Supreme Court defined "materiality" in *United States v. Gaudin*, 515 U.S. 506, 512 (1995): as a statement having a "natural tendency to influence, or [be] capable of influencing, the decision making body to which it is addressed." See also *United States v. McLaughlin*, 386 F.3d 547, 553 (3d Cir. 2004). If Applicant had provided accurate answers on his security clearance applications, his accurate answers are capable of influencing the government to deny his security clearance. His failure to disclose financial problems are sufficiently serious to potentially jeopardize approval of his security clearance. Making a false statement under 18 U.S.C. § 1001 is a serious crime, a felony (the maximum potential sentence includes confinement for five years and a \$10,000 fine). In light of my ultimate decision, and the absence of an allegation of a violation of 18 U.S.C. § 1001 in the SOR, it is unnecessary for me to decide whether or not Applicant actually violated 18 U.S.C. § 1001.

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress;

(f) the information was unsubstantiated or from a source of questionable reliability; and

(g) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

None of the mitigating conditions fully apply. Applicant does receive some credit for truthfully disclosing his tax lien when confronted by a DoD investigator. However, his contention that a pending "Offer in Compromise" somehow absolved him from disclosing the lien, as well as past and current delinquencies is not plausible.¹⁴ Applicant's purported explanation that the Offer in Compromise filed with the IRS nearly

¹⁴The Appeal Board has cogently explained the process for analyzing falsification cases, stating:

(a) when a falsification allegation is controverted, Department Counsel has the burden of proving falsification; (b) proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred; and (c) a Judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning the applicant's intent or state of mind at the time the omission occurred. [Moreover], it was legally permissible for the Judge to conclude Department Counsel had established a prima facie case under Guideline E and the burden of persuasion had shifted to the applicant to present evidence to explain the omission.

ISCR Case No. 03-10380 at 5 (App. Bd. Jan. 6, 2006) (citing ISCR Case No. 02-23133 (App. Bd. June 9, 2004)).

three years prior to the completion of his e-QIP relieves him from truthfully disclosing the debt rings hollow. There is no exception in the e-QIP process from reporting liens or delinquencies based on a pending offer to settle a debt.

While he did acknowledge his IRS lien during his February 2009 interview, that does not take away from the fact at the time he completed his e-QIP he was well aware of his unfavorable financial history. Applicant was no neophyte to the security clearance process – he had over 27 years of military experience and previously held clearances in the National Guard. He knowingly and deliberately chose not to disclose full information about his unfavorable financial history.

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 commonsense judgment based upon careful consideration of the guidelines and the whole-person concept.

The comments in the Analysis section of this decision are incorporated in the Whole-Person Concept. Applicant's indebtedness has been ongoing since at least 2006. His deliberate falsifications, if relied upon, could have adversely affected or influenced the security clearance adjudication process to the detriment of the Government.

Applicant receives substantial credit for his 27 years of military service. His work for a Government contractor overseas is noted, and aside from the SOR allegations no other disciplinary or security-related problems surfaced. His record of employment and military service weigh in his favor. There appears to be a dichotomy between how Applicant handled his financial affairs and his work-related performance. I am convinced that he is loyal to his company and his country.

Applicant's failure to resolve a significant debt with the IRS and his deliberate failure to disclose information on his security clearance application is serious, recent,

and not mitigated. I have questions about his current ability or willingness to comply with laws, rules, and regulations. After weighing the disqualifying and mitigating conditions, and all the facts and circumstances, in the context of the whole-person, I conclude he has not mitigated security concerns pertaining to financial considerations and personal conduct.

I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my “careful consideration of the whole person factors” and supporting evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under the Guidelines. Applicant has failed to mitigate or overcome the government’s case. For the reasons stated, I conclude he is not eligible for access to classified information.

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:	AGAINST APPLICANT
Subparagraphs 2.a. to 2.c.:	Against Applicant

Conclusion

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

Robert J. Tuidor
Administrative Judge