



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



In the matter of: )  
)  
) ISCR Case No. 09-06931  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Ray Blank, Esq., Department Counsel  
For Applicant: Sarah M. Kneisel, Esq.

02/29/2012

**Decision**

HEINY, Claude R., Administrative Judge:

Between 1992 and 1995, five state tax warrants were filed against Applicant, which totaled approximately \$9,500. All the warrants have been paid and released. Applicant has rebutted or mitigated the security concerns under financial considerations. Clearance is granted.

**History of the Case**

Applicant contests the Department of Defense's (DoD) intent to deny or revoke his eligibility for an industrial security clearance. Acting under the relevant Executive Order and DoD Directive,<sup>1</sup> the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) on May 5, 2011, detailing security concerns under Guideline F, financial considerations.

<sup>1</sup> Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense (DoD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the DoD on September 1, 2006.

On July 6, 2011, Applicant answered the SOR and requested a hearing. On September 30, 2011, I was assigned the case. On October 7, 2011, DOHA issued a Notice of Hearing for the hearing held on October 21, 2011.

The Government offered exhibits (Ex.) 1 through 6, which were admitted into evidence without objection. Applicant testified, as did four witnesses on his behalf, and submitted Exhibits A through N, which were admitted into evidence without objection. The record was held open to allow Applicant to submit additional information. On November 10, 2011, additional material was submitted. Department Counsel had no objection to the material; it was admitted into the record as Exs. O. through T. On October 31, 2011, DOHA received the hearing transcript (Tr.).

### **Request for Administrative Notice**

Department Counsel submitted a formal request that I take administrative notice of certain facts relating to the state revenue and taxation statutes. (Tr. 14) There being no objection the documents were included in the record as Hearing Exhibit I.

### **Findings of Fact**

In Applicant's Answer to the SOR, he denied the factual allegations in the SOR. After a thorough review of the pleadings and exhibits, I make the following findings of fact.

Applicant is a 38-year-old information technology (IT) specialist who has worked for a defense contractor since July 2008. From January 2008 through July 2008, he worked as an IT specialist for the Army Corps of Engineers in Afghanistan. (Ex. 3) For his work there he received certificates of appreciation and also received the civilian combat service pin. (Exs. K, L, M)

Applicant's co-workers, supervisors, and friends state: Applicant is hard working, intelligent, dedicated, compassionate, honest, and trustworthy. He places the value of his employer and work assignment at the same level as his personal wants and needs. (Exs. C – J, Tr. 32-33, 36, 39, 44, 51-53) Applicant does volunteer work for his church and has done church volunteer work in Haiti and Mexico. (Tr. 60)

Applicant owned four businesses including an unsuccessful night club. (Tr. 63, 67) He regrets ever being involved with the night club. (Tr. 67) He was also president, and sole share holder of an electronic service corporation. (Tr. 72) In 1990, he was president of a second computer electronics corporation. (Tr. 72) Two or three people were involved with these two computer-related corporations that dealt in sales, services, and repairing equipment. (Tr. 73, 103) He was also the president of another computer electronics corporation, which operated for two or three years until 1992. (Tr. 73, 104) None of the businesses are currently operating. He operated the night club for two years. (Tr. 99)

Approximately 19 years ago, while operating the night club, various taxes were not paid, including sales, beverage, tourism, and employee withholding taxes. The club was not open daily, but would open periodically as a venue for bands or other events. (Tr. 100, 114) The state tax warrants were generated not by returns he had submitted, but by assessments made by the state tax commission. (Tr. 68) While the night club was in operation, Applicant received numerous letters from the state tax commission. (Tr. 77)

In March 1983, the night club, an entertainment business, was incorporated. (Ex. N) In November 1991, the past president of the corporation resigned as president, secretary, and director of the corporation. (Ex. 7) At the same time, Applicant was elected president, secretary, and sole director of the entertainment corporation. All 500 shares of the corporation were transferred to Applicant. (Tr. 74) In November 1992, Applicant applied for a state beer license as president of the corporation.

In November 2010, five state tax warrants were issued against Applicant. (Ex. 6) A \$140 tax warrant was issued for withholding tax for July 1991 through December 1991 against him and an electronics company he owned. The warrant lists tax as "zero" with \$117 interest and a delinquent penalty of \$23. (Ex. 6) The remaining four tax warrants related to the club. A \$2,004 tax warrant was issued for a mixed beverage tax for June 1992 through November 1992 and March 1995. A \$2,079 tax warrant was issued for unpaid sales tax for March 1992 through November 1992. A \$120 tax warrant was issued club for unpaid tourism tax for August 1992 through December 1992 and January 1993 through December 1993. A \$5,059 tax warrant was issued for unpaid mixed beverage tax for March 1992 through November 1992. The total amount owed on the four night club related tax warrants was approximately \$9,300 of which \$2,500 was actual taxes owed, \$5,500 in interest, and \$1,300 for delinquent penalty.

Applicant had numerous talks with the state tax commission trying to establish the amount owed with interest on the tax warrants. (Tr. 62) At various times, he arranged to make payments and did make payments on the warrants. (Tr. 84) Also his income tax refunds would be intercepted to address the warrants. (Tr. 92) In June 2009, he hired a CPA firm to investigate the tax warrants and assist him in determining how much he owed for taxes on the night club. (Ex. 3, Tr. 63, 82)

Applicant had the opportunity to work for a contractor in Afghanistan with an annual salary of approximately \$150,000. (Tr. 64, 107) He knew his tax refunds were being intercepted by the state tax commission and he chose to increase the amount being withheld from his pay for taxes so that the past-due taxes would be paid sooner. (Tr. 64) In November 2010, he wrote a large check to the tax commission to address past due taxes. He has paid approximately \$30,000 on tax warrants. (Tr. 65, 80, 86)

He was told by the state tax commission that all the past due taxes had been satisfied. Under the state law, all delinquent taxes must be paid before one can buy a home, which Applicant did. (Tr. 66) Until he received the SOR, he believed that all delinquent taxes had been paid. (Tr. 68)

In October 2011, Applicant paid the state tax commission \$7,120. (Ex. O) All of the tax, interest, and penalties associated with the five tax warrants listed in the SOR was resolved. (Ex. P through T)

As of November 2010, Applicant's net monthly income was \$3,104, his monthly expenses were \$1,395, and his net monthly remainder was \$1,709. (Ex. 3)

### **Policies**

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which must 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 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 interests of 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.

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 to obtain 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 safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order (EO) 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 *a/so* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

## **Analysis**

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

Adjudicative Guideline (AG) ¶ 18 articulates the security concerns relating to financial problems:

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.

Additionally, an individual who is financially irresponsible may also be irresponsible, unconcerned, negligent, or careless in properly handling and safeguarding classified information. Behaving responsibly or irresponsibly in one aspect of life provides an indication of how a person may behave in other aspects of life.

A person's relationship with his creditors is a private matter until evidence is uncovered demonstrating an inability or unwillingness to repay debts as agreed. Absent substantial evidence of extenuating or mitigating circumstances, an applicant with a history of serious or recurring financial difficulties is in a position of risk that is inconsistent with holding a security clearance. An applicant is not required to be debt free, but is required to manage his finances to meet his financial obligations.

Applicant has a history of financial problems. The state tax commission filed five tax warrants against Applicant that totaled approximately \$9,500. Disqualifying Conditions AG ¶ 19(a), “inability or unwillingness to satisfy debts” and AG ¶ 19(c), “a history of not meeting financial obligations,” apply.

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.

In the early 1990s, Applicant was president of four corporations, which are no longer in business. During the two or three years the corporations were required to pay employee tax, tourism tax, beverage tax, and sales tax. Some of the taxes were paid, some were not. The state tax commission issued five tax warrants against Applicant: one in 1992, three in 1994, and one in 1995. The amount of actual tax owed was approximately \$2,500, but with interest and delinquent penalty the five warrants totaled approximately \$9,500. The tax owed is not personal income tax, but corporate tax. Except for these five warrants listed in the SOR there was no indication Applicant had other financial problems.

Over the next 15 or so years, Applicant had contact with the state tax commission, made payments on the delinquent taxes, and his tax refunds were intercepted to address the tax debt. In June 2009, he hired a CPA firm to investigate the tax warrants and assist him in determining the amount of tax owed. In November 2010, he wrote a large check to the tax commission, which he believed paid all past due tax obligations. This was six months before the SOR was issued. He later learned more tax was yet due. In October 2011, he made a \$7,120 payment and all the tax warrants were released.

Applicant's financial problems were related to a night club and another corporation, both of which went out of business in the mid-1990's. He owed \$2,500 in various taxes. He is no longer the president of any operating corporations and the circumstances related to corporate taxes are unlikely to recur. Since the tax warrants have been paid and released, the debts do not cast doubt on the individual's current reliability, trustworthiness, or good judgment. AG ¶ 20(a) applies.

The corporations all went out of business, which was a factor beyond his control. He maintained contact with the state tax commission, made payments on the delinquent taxes, and has now paid all of the warrants. He has acted responsibly under the circumstances. AG ¶ 20(b) applies.

In November 2010, Applicant thought he had paid all of the tax warrants. When he discovered not all the tax had been paid, he paid them in October 2011. He made a

good-faith effort to repay the overdue tax. There is clear indication that the problem is being resolved or is under control. AG ¶ 20 (c) and ¶ 20 (d) apply.

### **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. Applicant is a hard-working employee who volunteers his time with the church and was employed in Afghanistan, which earned him the civilian combat service pin. The unpaid corporate taxes were not the type of debts that indicates poor self-control, lack of judgment, or unwillingness to abide by rules and regulations. Money was not spent frivolously. The only debts in question are the five tax warrants, which have now been paid. Applicant was president of a number of corporations. He tried unsuccessfully to address these taxes with the state tax commission for a number of years and thought all were paid in 2010, six months before the SOR was issued.

When he learned corporate taxes were still owed, he paid them. Since they are now paid they cannot be a source of improper pressure or duress. Of course, the issue is not simply whether all his debts are paid – they are – it is whether his financial circumstances raise concerns about his fitness to hold a security clearance. (See AG ¶ 2 (a)(1)) Overall, the record evidence leaves me without questions or doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant 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, Financial Considerations: FOR APPLICANT

Subparagraphs 1.a – 1.e: 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 a security clearance. Eligibility for access to classified information is granted.

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CLAUDE R. HEINY II  
Administrative Judge