



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



In the matter of:

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Applicant for Security Clearance

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ISCR Case No. 10-02969

**Appearances**

For Government: Jeff Nagel, Esquire, Department Counsel  
For Applicant: Shawn Potter, Esquire

06/26/2012

**Decision**

WESLEY, Roger C., Administrative Judge:

Based upon a review of the pleadings, exhibits, and testimony, I conclude that Applicant has not mitigated financial consideration concerns, but has mitigated personal conduct concerns. Eligibility for access to classified information is denied

**Statement of the Case**

On June 21, 2011, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to Applicant, which detailed reasons why DOHA was unable to find that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The SOR recommended referral to an administrative judge to determine whether his clearance should be granted, continued, denied, or revoked. 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, 1962), as amended (Directive); and the

Adjudicative Guidelines (AGs) implemented by the Department of Defense on September 1, 2006.

Applicant responded to the SOR on February 16, 2012, and requested a hearing. The case was assigned to me on March 30, 2012, and was scheduled for hearing on May 9, 2012. At the hearing, the Government's case consisted of 11 exhibits (GEs 1-11); Applicant relied on one witness (himself) and 13 exhibits (AEs A-M). The transcript (Tr.) was received on May 16, 2012.

### **Procedural Issues**

Before the close of the hearing, Applicant requested the record be kept open to afford him the opportunity to supplement the record with documented payments of his federal taxes covered by the federal tax lien listed in subparagraph 1.a of the SOR. There being no objections, and for good cause shown, Applicant was granted 14 days to supplement the record. The Government was afforded one day to respond. For good cause shown, Applicant was granted an additional 14 days to supplement the record. Applicant did not provide any additional documentation and later affirmed that the IRS did not maintain records back to the years in issue.

### **Summary of Pleadings**

Under Guideline F, Applicant allegedly (a) incurred an IRS federal tax lien in August 2002 covering unpaid taxes totaling \$22,800; (b) incurred a state tax lien covering unpaid state taxes of \$82; (c) accrued three judgments (unsatisfied) totaling \$670, \$1,625, and \$5,000, respectively; and (d) accumulated a delinquent medical account of \$364 and traffic fine of \$150. Under Guideline E, Applicant allegedly falsified material facts in the security clearance application he completed in December 2009 by omitting his entered tax liens.

In his response to the SOR, Applicant denied each of the covered allegations. He claimed the IRS lien was released because of the expiration of the relevant statute of limitations in 2000. He claimed the state tax lien was recorded in error and was acknowledged as such. Applicant also claimed the recorded judgment covered by subparagraph 1.d is no longer enforceable. He claimed the listed judgment covered by subparagraph 1.c has been paid, and the judgment covered by subparagraph 1.e was resolved by a previous bankruptcy discharge. Applicant claimed the remaining two debts covered by subparagraphs 1.f and 1.g have been paid.

Addressing the falsification allegations in the SOR, Applicant claimed he considered the federal tax lien to have been filed in error and is no longer actionable. He claimed one of the listed judgments (the one covered by subparagraph 1.c) was not known to him at the time, and the remaining two listed judgments (covered in subparagraphs 1.d and 1.e) were beyond the seven-year scope of questioning and are no longer actionable. He claimed he was not aware of the other listed debts and did not

find them reported in the credit report he pulled in December 2009. And he explained he was not aware of any delinquent federal debts when he completed his e-QIP in December 2009.

### **Findings of Fact**

Applicant is a 46-year-old analyst for a defense contractor. He seeks a security clearance. Additional findings follow.

#### **Background**

Applicant married in January 1998 and has two step-children from this marriage (ages 24 and 26). He has a high school diploma and no claims to college credits. (Tr. 34)

Applicant enlisted in the Army in January 1980 and served a brief period of active duty in the Army and a number of years of inactive duty before he received an honorable discharge in January 1986. (AE M) He joined his state's Army National Guard in November 1989 and several years of active duty before transferring to the inactive reserve. (AE M; Tr. 29) He received his honorable discharge in March 1993. (GE 1 and AE M)

#### **Applicant's finances**

Between 1991 and 2004, Applicant did not file federal and state tax returns. (Tr. 80-81) He claims that he later filed his back federal and state returns but provided no documentation to corroborate his claims. (Tr. 81-82) In August 2002, the IRS filed a federal tax lien covering unpaid taxes for tax years 1991-1994, totaling \$22,800. (GEs 3 and 4) In July 2011, he received a letter from the IRS's tax advocate advising that the expiration date for collection of the listed underlying taxes expired in 2005. (AE A)

Because of the federal lien's expiration by operation of law, Applicant's taxes covered by the lien are no longer due. The tax advocate's 2011 letter made no mention of any paid taxes or credited taxes for the covered years of 1991-1994, and no tax payments or credit can be implied from the tax advocate's letter.

Applicant claimed tax refunds for a number of years prior to 2005 and indicated the tax advocate advised him he could expect tax returns (i.e., IRS generated returns from available tax information from the tax payer) from "2006 forward." (Tr. 42) However, Applicant could not estimate what he owed in back federal and state taxes or what refunds for tax years 1999-2005 were withheld to cover his owed back taxes. (Tr. 83-84) Afforded a post-hearing opportunity to document his paid back federal taxes, he communicated that he could produce no documentary proof of his payments.

Besides the federal tax lien in place, his county taxing authority filed a state tax lien for \$82 in April 2006. (GE 4) Applicant claimed this lien was filed in error and provided proof to back his claims. (AE B) County records document that this lien was released in January 2007, freeing Applicant of any liability for any taxes covered by this lien.

Three judgments were entered against Applicant between April 1999 and August 2005. (GE 4) One of the judgments involves a hospital claim against Applicant in the amount of \$670. Applicant disputed this judgment but paid it off in July 2011. (AE C) A judgment entered against Applicant in December 2000 for \$1,625, and covered by subparagraph 1.d, expired by operation of law in December 2010 after the judgment creditor failed re-register its judgment following the expiration of his state's 10-year judgment enforcement allowance. A third judgment, covered by subparagraph 1.e of the SOR, was entered against Applicant in April 1999 and was discharged in his 2000 Chapter 7 bankruptcy. (AE E; Tr. 38) Applicant is no longer liable on this judgment. His creditor 1.d judgment was not scheduled in his Chapter 7 bankruptcy and was not discharged. (AE E)

The remaining debts covered in the SOR (creditors 1.f and 1.g) for \$150 and \$364, respectively, were paid by Applicant. (AEs F and K; Tr. 56-59) Applicant's credit report reveals he is current with his other debts and obligations. (AE K)

### **Applicant's e-QIP omissions**

Asked to complete a security clearance application (e-QIP) in December 2009, Applicant answered "No" to Section 26 inquiries about his financial obligations accumulated within the past seven years. Section 26 covered federal and state tax debts, failure to file federal and state tax returns, adverse judgments, debts over 90 days delinquent, and and delinquencies on federal debts. (GE 1)

Citing uncertainty over whether he needed to list tax liens and judgments that are no longer enforceable due to time expirations on collection, he denied any deliberate intent to omit the information. (Tr.81) He assured he did not mean to lie or deceive the Government about his finances.

Although the questions posed to Applicant in his e-QIP are straight forward, clearly stated, and leave little objective room for confusion or misunderstanding, specific intent and materiality are key elements of falsification in omission cases. Applicant impresses as honest and forthcoming about his business and personal affairs, and reported his answers based on his best interpretations of the questions at the time. So, while the questions posed to Applicant are material ones requiring honest responses, no deliberate falsification can be inferred from his answers.

Considering Applicant's explanations for his omissions, Applicant's explanations are accepted. Inferences warrant that his omissions of his tax liens, judgments, tax

filings, and underlying debt delinquencies were the result of his misreading of the questions. Applicant's omissions were not motivated by any specific intent to falsify or deceive the Government.

### **Endorsements**

Applicant is highly regarded by his superiors and colleagues who have worked with him in combat situations in Afghanistan. His military program superiors credit his valuable leadership in providing exceptional and unique support to the overall mission (AE G) Former military and civilian superiors and colleagues credit Applicant with superb analysis and recommendations on the foreign missions he supported. (AE J) Applicant's employment evaluations contain superior assessments in most of the listed categories and credit Applicant with overall excellent judgment, thinking outside of the box, and superior execution of all of his assignments. (AE H) His military separation records note numerous decorations, medals, and citations. (AE M)

### **Policies**

The AGs list guidelines to be used by administrative judges in the decision-making process covering DOHA cases. These guidelines take into account factors that could create a potential conflict of interest for the individual applicant, as well as considerations that could affect the individual's reliability, trustworthiness, and ability to protect classified information. These guidelines include "[conditions that could raise a security concern and may be disqualifying]" (disqualifying conditions), if any, and many of the "[conditions that could mitigate security concerns." These guidelines must be considered before deciding whether or not a security clearance should be granted, continued, or denied. The guidelines do not require administrative judges to place exclusive reliance on the enumerated disqualifying and mitigating conditions in the guidelines in arriving at a decision. Each of the guidelines is to be evaluated in the context of the whole person in accordance with AG ¶ 2(c)

In addition to the relevant AGs, administrative judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in AG ¶ 2(a) of the AGs, which are intended to assist the judges in reaching a fair and impartial commonsense decision based upon a careful consideration of the pertinent guidelines within the context of the whole person. The adjudicative process is designed to examine a sufficient period of an applicant's life to enable predictive judgments to be made about whether the applicant is an acceptable security risk.

When evaluating an applicant's conduct, the relevant guidelines are to be considered together with the following AG ¶ 2(a) factors: (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 chances; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Viewing the issues raised and evidence as a whole, the following adjudication policy concerns are pertinent herein:

### **Financial Considerations**

*The Concern:* 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. 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 , ¶ 18.

### **Personal Conduct**

*The Concern:* Conduct involving questionable judgment, untrustworthiness, unreliability, 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.

### **Burden of Proof**

By virtue of the principles and policies framed by the AGs, a decision to grant or continue an applicant's security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires administrative judges to make a commonsense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a security clearance depends, in large part, on the relevance and materiality of that evidence. See *United States v. Gaudin*, 515 U.S. 506, 509-511 (1995). As with all adversarial proceedings, the judge may draw only those inferences which have a reasonable and logical basis from the evidence of record.

The Government's initial burden is twofold: (1) it must prove by substantial evidence any controverted facts alleged in the SOR, and (2) it must demonstrate that the facts proven have a material bearing to the applicant's eligibility to obtain or maintain a

security clearance. The required materiality showing, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a security clearance. Rather, the judge must consider and weigh the cognizable risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the evidentiary burden shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation, or mitigation. Based on the requirement of Exec. Or. 10865 that all security clearances be clearly consistent with the national interest, the applicant has the ultimate burden of demonstrating his or her clearance eligibility. “[S]ecurity-clearance determinations should err, if they must, on the side of denials.” See *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988). And because all security clearances must be clearly consistent with the national interest, the burden of persuasion must remain with the Applicant.

### **Analysis**

Applicant is a meritorious defense analyst who accumulated a federal tax lien covering unpaid taxes for several back years, several judgments, and a couple of small delinquent debts. While several of the listed obligations have been paid (creditors 1.c, 1.f, and 1.g) or discharged in bankruptcy (creditor 1.e), others have not. For the most part, Applicant relies on statutes of limitation to exempt him from any continuing liability on these remaining debts.

Security concerns are raised under the financial considerations guideline of the AGs when an individual applicant is so financially overextended as to indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, which can raise questions about the individual’s reliability, trustworthiness, and ability to protect classified information, and place the person at risk of having to engage in illegal acts to generate funds. Applicant’s accumulation of unpaid federal taxes covered by a federal tax lien (since expired by operation of law), adverse judgments (one paid, one discharged in a prior bankruptcy, and one expired by operation of law) and his inability to furnish corroborating proof that he resolved all of his back federal and state taxes accrued through years of failing to file federal and state tax returns warrant the application of two of the disqualifying conditions (DC) of the Guidelines: ¶ DC 19(a), “inability or unwillingness to satisfy debts,” and ¶19(c) “a history of not meeting financial obligations.”

Because Applicant’s failure to file federal and state tax returns were not included in the SOR, they are not subject to specific disqualifying conditions. They may be considered, however, in evaluating Applicant’s evidence of extenuation, mitigation, or changed circumstances, his claims of demonstrated financial rehabilitation, and his whole-person claims. See ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006) (citing

ISCR Case No. 02-07218 at 3 (App. Bd. March 15, 2004) and ISCR case No. 00-0633 at 3 (App. Bd. Oct. 24, 2003)).

Holding a security clearance involves the exercise of important fiducial responsibilities, among which is the expectancy of consistent trust and candor. Financial stability in a person cleared to access classified information is required precisely to inspire trust and confidence in the holder of the clearance. While the principal concern of a clearance holder's demonstrated financial difficulties is vulnerability to coercion and influence, judgment and trust concerns are implicit in financial cases.

Extenuating circumstances are difficult to find. Applicant offered no excuses for his failure to file his federal and state tax returns for tax years 1991-2004, or corroborating proof that he paid the assessed taxes for those filing years. He provided no reasons for why he failed to address the SOR 1.e judgment before this creditor permitted its judgment to expire by operation of law. Military-related deployments provide good reasons for obtaining federal and state filing and payment extensions, but Applicant provided no evidence of whether he ever sought or obtained any filing waivers. MC ¶ 20(b), "the conditions that resulted in the behavior 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," has little application to Applicant's situation without more compelling proof.

For Applicant to be able to take advantage of other mitigating conditions like MC ¶ 20(d), "the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts," and the counseling/control requirements of MC ¶ 20(c), "the person has received counseling for the problem and/or there are clear indications that the problem is being resolved or is under control," he would need to offer updated payment information on his federal and state taxes and his use of counseling services.

While he likely obtained counseling in connection with his Chapter 7 bankruptcy petition, he provided no evidence of any recent counseling. As a result, he is entitled to very limited application of MC ¶ 20(c). Because of his limited repayment efforts, MC ¶ 20(d) is only partially applicable to Applicant's situation. For while an applicant need not have paid or resolved every one of his proven debts or addressed all of his debts simultaneously, he needs a credible plan to resolve his financial problems, accompanied by implementing actions. See ISCR Case No. 07-06488 (App. Bd. May 21, 2008) By the proofs presented, Applicant has no current plan in effect to pay any of his back federal and state taxes or the underlying debt covered by creditor 1.d's expired judgment.

To be sure, virtually all of Applicant's SOR debts are now time-barred by pertinent federal and state statutes of limitations. Over time, the Appeal Board has shown general consistency in disallowing applicant claims to mitigation based on charge-offs and limitation bars on debts previously unpaid due to cited extenuating circumstances and other reasons. *Cf.* ISCR Case No. 07-16427 at 3-4 and n.6 (App. Bd. Feb. 4, 2010);



ISCR Case No. 08-01122 at 5 and n.3 (App. Bd. Feb. 9, 2009) No different application of the mitigation guidelines are warranted in Appellant's situation with respect to his now expired federal tax lien and state laws covering back state taxes and expired judgments.

Consideration of Applicant's background and circumstances surrounding his debt accumulations and his lack of corroborating proofs of his paying his back federal and state taxes makes it very difficult to credit Applicant with the degree of good judgment, reliability, and trustworthiness necessary to security clearance eligibility criteria. While Applicant's superb record of military and civilian service (both in and out of combat zones) is noted and commended, his corrective efforts taken to date to resolve his finances are insufficient to enable him to meet his evidentiary burden.

From a whole-person standpoint, the evidence is insufficient to demonstrate that Applicant has mounted sufficient good-faith efforts to resolve his tax and judgment-covered debts. In making a whole-person assessment, careful consideration was given to the respective burdens of proof established in *Egan (supra)*, the AGs, and the facts and circumstances of this case in the context of the whole person. Unfavorable conclusions warrant with respect to the allegations covered by the financial considerations guideline.

### **Personal conduct concerns**

Security concerns over Applicant's judgment, reliability and trustworthiness are raised under Guideline E as the result of his omissions of his tax liens, judgments, and debts over 90 days delinquent in the e-QIP he completed in December 2009. By omitting his tax liens and judgments, and other debts over 90 days delinquent, Applicant failed to furnish potentially material background information about his financial history that was needed for the Government to properly process and evaluate his security clearance application. DC ¶ 16(a), "deliberate omission, concealment, or falsification of relevant facts to 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.

Because Applicant's omissions of his covered financial obligations in his completed e-QIP are considered to be the result of mistakes in reading and interpreting the question, no acts of falsification may be imputed to him. In evaluating all of the circumstances surrounding Applicant's e-QIP omissions, his explanations, and whole-person considerations, his disclosures are sufficient to enable him to convincingly refute or mitigate the deliberate falsification allegations. Questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations, are each core policy concerns of the personal conduct guideline (AG ¶ 15). Overall, Applicant's explanations are persuasive that his omissions of his financial obligations in the 2009 e-QIP he completed were the result of mistake. Favorable conclusions warrant with respect to the allegations covered by the personal conduct guideline.

## Formal Findings

In reviewing the allegations of the SOR and ensuing conclusions reached in the context of the findings of fact, conclusions, conditions, and the factors listed above, I make the following formal findings:

GUIDELINE F: (FINANCIAL CONSIDERATIONS):      AGAINST APPLICANT

Subparas 1.a and 1.d :                                      Against Applicant  
Subparas. 1.b, 1.c, 1.e, 1.f, and 1.g                      For Applicant

GUIDELINE E (PERSONAL CONDUCT):                      FOR APPLICANT

Subpara. 2.a :    For Applicant

## Conclusions

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 Applicant's security clearance. Clearance is denied.

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Roger C. Wesley  
Administrative Judge

