



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



In the matter of: )  
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----- ) ISCR Case No. 10-08831  
 )  
Applicant for Security Clearance )

**Appearances**

For Government: Eric H. Borgstrom, Esquire, Department Counsel  
For Applicant: *Pro se*

October 28, 2011

**Decision**

HARVEY, Mark, Administrative Judge:

Applicant's statement of reasons (SOR) lists four delinquent tax liens totaling \$67,110. His two largest tax liens were in 2002 for \$42,547 and in 2003 for \$19,681. He failed to file his Federal and state income tax returns for tax years 1999, 2001, and 2005 through 2010. He did not provide proof of any payments to his SOR creditors. He failed to make sufficient progress in resolving his SOR debts, and financial considerations concerns are not mitigated at this time. Applicant's eligibility for access to classified information is denied.

**Statement of the Case**

On May 7, 2010, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP) or security clearance application (SF-86) (Item 3). On June 16, 2011, the Defense Office of Hearings and Appeals (DOHA) issued an SOR to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended; and the adjudicative guidelines (AG) promulgated by the President on December 29, 2005.

The SOR alleged security concerns under Guidelines F (financial considerations) and E (personal conduct). (Item 1) The SOR detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant and recommended referral to an administrative judge to determine whether Applicant's clearance should be granted, continued, denied, or revoked.

On July 14, 2011, Applicant responded to the SOR allegations and requested a decision without a hearing. (Item 2) A complete copy of the file of relevant material (FORM), dated August 25, 2011, was provided to him on September 13, 2011. He was afforded an opportunity to file objections and to submit material in refutation, extenuation, or mitigation.<sup>1</sup> Applicant did not respond to the FORM. The case was assigned to me on October 25, 2011.

### **Findings of Fact<sup>2</sup>**

In Applicant's response to the SOR, he admitted the financial considerations concerns in SOR ¶¶ 1.a-1.f and the personal conduct concerns in SOR ¶ 2.a. (Item 2) His admissions are accepted as factual findings.

Applicant is a 49-year-old external pilot employed by a defense contractor.<sup>3</sup> From January 2000 to July 2009, he was employed as a remodeling contractor, and from July 2009 to present, he has been employed by a defense contractor. In June 1980, he graduated from high school. He has never served in the military. He married his spouse in 1985. He has two children, who are ages 24 and 26, and they do not live at home.

### **Financial Considerations and Personal Conduct**

Applicant's SOR lists six financial issues: 1.a an Internal Revenue Service (IRS) tax lien entered in 2002 for \$42,547; 1.b a state tax lien entered in 2003 for \$19,681; 1.c a state tax lien entered in 2004 for \$4,681; 1.d an IRS tax lien entered in 2005 for \$201; 1.e failure to file Federal income tax return for tax years 1999, 2001, and 2005 through 2010; and 1.f . failure to file state income tax returns for tax years 1999, 2001, and 2005 through 2010. SOR ¶ 2.a cross alleged the same concerns under Guideline E that were raised under Guideline F. Applicant's May 19, 2010 and April 26, 2011 credit reports and court records of liens corroborate the allegations in SOR ¶¶ 1.a to 1.d. (Items 5-8)

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<sup>1</sup>The DOHA transmittal letter is dated September 2, 2011, and Applicant's receipt is dated September 13, 2011. The DOHA transmittal letter informed Applicant that he had 30 days after his receipt to submit information.

<sup>2</sup>Some details have not been included in order to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

<sup>3</sup>Unless stated otherwise, the information in this paragraph is from Applicant's security clearance application. (Item 3)

On his May 7, 2010 SF-86, Applicant admitted he was delinquent on at least one Federal debt.<sup>4</sup> He failed to pay Federal, state, or other taxes or failed to file a tax return. He said his personal Federal and state “tax returns are being filed for years 1997 forward.” He disclosed his state tax lien of \$41,867 and his Federal tax lien of \$42,547, which were filed against his property. In the comments section of his SF-86, he said he planned to sell his home and use his equity to satisfy the existing tax liens. He planned to start filing his state and Federal income tax returns with the most recent one first. He also indicated he is loyal to the United States. He has a son in the Marines and a “daughter married to the Army.” He is “highly motivated to retire [his] obligations.”

On June 2, 2010, an Office of Personnel Management (OPM) investigator interviewed Applicant, and he admitted that he most recently filed his taxes in 1996.<sup>5</sup> The family business failed in 1997, and his income did not cover his tax debt. He owed about \$43,000 in Federal tax and \$40,000 in state tax. He planned to sell the property where the business was located and use the funds generated to pay the tax liens and his back taxes. One reason he did not file his tax returns was because he worried that “he would be back on the IRS’ radar.” He plans to meet with an accountant in June 2010 to develop a plan to resolve his tax debts. He plans to pay his tax debts.

A letter from Applicant to DOHA was received on March 30, 2011. (Item 4 at 1) It indicates Applicant met with an accountant and bankruptcy attorney. Applicant may file for bankruptcy and set up a payment plan on his tax debt. All of the tax returns remain unfiled; however, Applicant plans to work on his financial and tax issues beginning on April 16, 2011.

The file does not include any evidence of payments of any of the state or Federal tax debts alleged in the SOR. The DOHA transmittal letter informed Applicant that he had 30 days after his receipt to submit information. Applicant did not provide proof of any payment plans or payments to the SOR creditors. He did not provide proof that he filed any of the tax returns. There is no evidence of non-tax related reportable criminal offenses, drug abuse, or alcohol-related misconduct. There is no evidence of security violations or violation of his obligations to his employer.

### **Policies**

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information.” *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant

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<sup>4</sup>The information in this paragraph is from Applicant’s SF-86. (Item 1 at 42-49)

<sup>5</sup>The information in this paragraph is from Applicant’s June 2, 2010 Office of Personnel Management (OPM) personal subject interview (PSI). (Item 4 at 4)

applicant's eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. 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 about potential, rather than actual, risk of compromise of classified information. Clearance decisions must be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See Exec. Or. 10865 § 7. See also Executive Order 12968 (Aug. 2, 1995), § 3.1. Thus, nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination about applicant's allegiance, loyalty, or patriotism. It is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. "Substantial evidence" is "more than a scintilla but less than a preponderance." See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4<sup>th</sup> Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). 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). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

## Analysis

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, I conclude the relevant security concerns are under Guidelines F (financial considerations) and E (personal conduct).

### Financial Considerations

AG ¶ 18 articulates the security concern 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.

AG ¶ 19 provides three disqualifying conditions that could raise a security concern and may be disqualifying in this case: "(a) inability or unwillingness to satisfy debts;" "(c) a history of not meeting financial obligations," and "(g) failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same." In ISCR Case No. 08-12184 at 7 (App. Bd. Jan. 7, 2010), the Appeal Board explained:

It is well-settled that adverse information from a credit report can normally meet the substantial evidence standard and the government's obligations under [Directive] ¶ E3.1.14 for pertinent allegations. At that point, the burden shifts to applicant to establish either that [he or] she is not responsible for the debt or that matters in mitigation apply.

(internal citation omitted). Applicant's history of delinquent debt is documented in his May 7, 2010 SF-86, credit reports, OPM interview, responses to DOHA interrogatories, and SOR response. Applicant's SOR lists four delinquent tax liens totaling \$67,110. His two largest liens, which were for \$42,547 and \$19,681, were filed in 2002 and 2003, respectively. He failed to file his Federal and state income tax returns for tax years 1999, 2001, and 2005 through 2010. The Government established the disqualifying conditions in AG ¶¶ 19(a), 19(c), and 19(g), and additional inquiry about the possible applicability of mitigating conditions is required.

Five 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;

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

(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.

Applicant's conduct in resolving his debts warrants very limited application of AG ¶¶ 20(b), 20(c), and 20(d).<sup>6</sup> He received some financial counseling from his accountant and his bankruptcy attorney. He showed some good faith when he admitted responsibility for his SOR debts in his May 7, 2010 SF-86, SOR response, to the OPM investigator, and in his response to DOHA interrogatories. Applicant's financial situation was damaged by his failed business in the late 1990s, insufficient income to resolve his tax debts, and the necessity that he provide financial assistance to support his family. However, Applicant's financial circumstances have been relatively stable for more than two years, and he has not provided sufficient information about efforts to start paying his tax debts to fully establish any mitigating conditions. He did not explain why he has not been using some of his monthly remainder to pay his delinquent debts. He did not describe how he is reducing his monthly expenses, which would allow him to have more money available each month to start paying his delinquent taxes.

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<sup>6</sup>The Appeal Board has previously explained what constitutes a "good faith" effort to repay overdue creditors or otherwise resolve debts:

In order to qualify for application of [the "good faith" mitigating condition], an applicant must present evidence showing either a good-faith effort to repay overdue creditors or some other good-faith action aimed at resolving the applicant's debts. The Directive does not define the term 'good-faith.' However, the Board has indicated that the concept of good-faith 'requires a showing that a person acts in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation.' Accordingly, an applicant must do more than merely show that he or she relied on a legally available option (such as bankruptcy) in order to claim the benefit of [the "good faith" mitigating condition].

(internal citation and footnote omitted) ISCR Case No. 02-30304 at 3 (App. Bd. Apr. 20, 2004) (quoting ISCR Case No. 99-9020 at 5-6 (App. Bd. June 4, 2001)).

Applicant did not establish that he acted responsibly under the circumstances. The file lacks proof that he maintained contact with his creditors.<sup>7</sup> There are no receipts or account statements, proving that he made any payments to his SOR creditors. There is insufficient evidence that his financial problem is being resolved and is under control. The file lacks evidence that he has acted responsibly on any of his SOR debts.

## **Personal Conduct**

AG ¶ 15 expresses 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 three conditions that could raise a security concern in this case:

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information;

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of: (1) untrustworthy or unreliable behavior . . . ; and (3) a pattern of dishonesty or rule violations . . . ; and

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such

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<sup>7</sup>“Even if Applicant's financial difficulties initially arose, in whole or in part, due to circumstances outside his [or her] control, the Judge could still consider whether Applicant has since acted in a reasonable manner when dealing with those financial difficulties.” ISCR Case No. 05-11366 at 4 n.9 (App. Bd. Jan. 12, 2007) (citing ISCR Case No. 99-0462 at 4 (App. Bd. May 25, 2000); ISCR Case No. 99-0012 at 4 (App. Bd. Dec. 1, 1999); ISCR Case No. 03-13096 at 4 (App. Bd. Nov. 29, 2005)). A component is whether he or she maintained contact with creditors and attempted to negotiate partial payments to keep debts current.

as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing, or (2) while in another country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group.

AG ¶¶ 16(c) and 16(d) do not apply. As indicated under the financial considerations guideline, there is credible adverse information that is sufficient for an adverse determination under Guideline F. However, AG ¶ 16(e)(1) applies because Applicant's failure to pay his state and Federal taxes creates a vulnerability to exploitation, manipulation, or duress, and such conduct adversely affects Applicant's professional standing as an employee of a Department of Defense contractor. There is substantial evidence of this disqualifying condition, and further inquiry about the applicability of mitigating conditions is required.

AG ¶ 17 provides seven conditions that could mitigate security concerns including:

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

(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.

AG ¶¶ 17(a) and 17(b) do not apply because Applicant has been candid about his failure to pay his Federal and state tax returns, and 17(f) does not apply because Applicant admitted his failure to pay his Federal and state tax returns. Applicant has met his burden of establishing AG ¶ 17(e) and the SOR allegations under Guideline E are mitigated. He plans to pay his taxes, and when his taxes are paid, he will have reduced or eliminated his vulnerability to exploitation, or duress. I do not believe that anyone could use Applicant's failure to pay his Federal and state tax returns to coerce him into compromising classified information. Personal conduct concerns raised under AG ¶ 16(e)(1) are mitigated under AG ¶ 17(e).

AG ¶ 15 indicates that poor judgment can cause reliability and trustworthiness concerns, resulting in disqualification under the personal conduct guideline. Judgment issues under the personal conduct guideline are more specifically addressed in this case under the financial considerations guideline. I find for Applicant under Guideline E because those judgment issues are a duplication of the judgment concerns previously discussed under that guideline.

### **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.

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. AG ¶ 2(c). 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.

Although the rationale for reinstating Applicant's clearance is insufficient to support a security clearance at this time, there are several factors tending to support approval of his access to classified information. Applicant is a 49-year-old external pilot employed by a defense contractor. In June 1980, he graduated from high school. He has never served in the military. He married his spouse in 1985. He has two children,

who are ages 24 and 26, and they do not live at home. He is sufficiently mature to understand and comply with his security responsibilities. He deserves some credit for volunteering to support the U.S. Government as an employee of a Department of Defense contractor. There is every indication that he is loyal to the United States and his employer. There is no evidence that he abuses alcohol or uses illegal drugs. Applicant's financial situation was damaged by his failed business in the late 1990s, and insufficient income to pay his back taxes. I give Applicant substantial credit for admitting responsibility for all of his SOR debts. He has been honest about his failure to address his financial plight. These factors show some responsibility, rehabilitation, and mitigation.

The whole-person factors against reinstatement of Applicant's clearance are more substantial at this time. Applicant's SOR lists four delinquent tax liens totaling \$67,110. His two largest tax liens, which were for \$42,547 and \$19,681, were filed in 2002 and 2003, respectively. He failed to file his Federal and state income tax returns for tax years 1999, 2001, and 2005 through 2010. Applicant's employment has been stable for two years. If he reduced his standard of living and expenses, he could increase his net funds available to address his SOR debts. He did not provide any documentation showing attempts to establish payment plans. There is no plausible rationale for his failure to file his tax returns. There is no evidence that any SOR creditors have received any payments, and no convincing evidence is in the file that he will successfully address his SOR debts in the near future. Applicant has failed to make sufficient progress resolving his delinquent SOR debts to establish his financial responsibility.

I have carefully applied the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. I conclude financial considerations concerns are not mitigated. Eligibility for access to classified information is denied.

### **Formal Findings**

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline F:	AGAINST APPLICANT
Subparagraphs 1.a to 1.f:	Against Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	For 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 Applicant's eligibility for access to classified information. Eligibility for a security clearance is denied.

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MARK HARVEY  
Administrative Judge