



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



In the matter of:	)	
	)	
	)	ISCR Case No. 10-10016
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Daniel Crowley, Esq., Department Counsel  
For Applicant: *Pro se*

November 30, 2011

**Decision**

HEINY, Claude R., Administrative Judge:

Applicant did not file his federal income tax returns in a timely manner for the tax years 2003 through 2009 nor did he pay taxes for those years. Additionally, he used marijuana from 1998 to 2008 and cocaine from 1998 to 2000. Applicant has rebutted or mitigated the security concerns under financial considerations and drug involvement. Clearance is granted.

**Statement 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

---

<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.

a Statement of Reasons (SOR) on May 25, 2011, detailing security concerns under Guideline F, Financial Considerations, and Guideline H, Drug Involvement.

Applicant's answer to the SOR was received June 28, 2011, in which he requested a hearing. On August 1, 2011, I was assigned the case. On August 16, 2011, DOHA issued a Notice of Hearing for the hearing held on August 26, 2011.

The Government offered exhibits (Ex.) 1 through 5, which were admitted into evidence without objection. Applicant testified and submitted Exhibits A through O, which were admitted into evidence without objection. The record was held open to allow Applicant to submit additional information. Additional material was submitted. Department Counsel had no objection to the material, which was admitted into the record as Ex. P. On September 6, 2011, DOHA received the hearing transcript (Tr.).

### **Findings of Fact**

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

Applicant is a 44-year-old electronics technician who has worked for a defense contractor since March 2010, and he seeks to obtain a security clearance. His annual salary is approximately \$36,500. (Tr. 49) Applicant called no witnesses other than himself. He submitted three character letters from his wife, a friend, and his former employer. (Ex. M, N, O) They indicate he is loyal, honest, trustworthy, and a leader.

Applicant was married from August 1985 through December 1993. During his marriage, he worked as a carpenter for the school district. (Tr. 40) During his marriage, his wife filed their tax returns. (Tr. 40) After his divorce, he could not figure out how to file his taxes, so he stopped filing. (Tr. 40) From 1997 or 1998 through 2008, Applicant worked for a home improvement firm. He was paid as an independent contractor and did not have taxes withheld from his weekly wages. (Ex. 3, Tr. 52)

Applicant's state of residence does not have a state income tax. (Ex. 3) He anticipated receiving a \$900 refund from his 1997 or 1998 federal tax return. When the anticipated refund was not received, he called the IRS. He was told he that had not filed a return and owed \$2,700. (Tr. 41) Not only was he unable figure out how to prepare his tax returns, he did not have the money to pay the tax owed. (Tr. 42, 56) He did not file any tax returns until he filed his 2009 tax return which was due in 2010. In his June 2010 Electronic Questionnaires for Investigations Processing (e-QIP), he acknowledged he had not filed tax return for several years. He indicated he owed approximately \$13,323: \$471 (2003), \$4,176 (2004), \$2,739 (2005), \$2,447 (2006), \$2,383 (2007), \$813 (2008), and \$294 (2009). (Ex. 1)

In March 2010, Applicant hired a tax firm that advertises heavily on late night television. (Ex. 3, Ex. D, Tr. 42) He made \$630 payments to the tax firm every two

weeks for eight weeks, paying them \$4,400 to prepare his returns. (Tr. 47) They charged an additional \$1,640 to prepare an Offer in Compromise, \$420 for an action to stay collections, and \$360 for a professional staff recommendation report. (Tr. 48) After the company filed his returns, the firm estimated he owed the IRS approximately \$32,000. (Tr. 43)

In June 2010, the IRS told Applicant that he owed \$22,490 for tax, interest, and penalties for years 2003 through 2009: \$953 (2003), \$5,312 (2004), \$7,051 (2005), \$4,232 (2006), \$3,533 (2007), \$1,098 (2008), and \$311 (2009). (Ex. 4) As of the hearing, he had saved \$5,000 to pay on his tax obligation. (Tr. 44) On September 7, 2011, Applicant submitted copies of five money orders of \$1,000 each showing payment to the IRS. (Ex. P)

In November 2010, the IRS issued an \$8,783 Notice of Levy to Applicant for the tax year 2002. (Ex. C) The levy froze \$1,185 he had in his account. He paid the tax firm \$420 for a federal stay of collection, which failed to prevent the accounts assets from being taken by the IRS. (Tr. 48) On December 3, 2010, Applicant made an Offer in Compromise to the IRS whereby he agreed to pay \$8,523. (Ex. A, G) He was required to make an immediate \$1,705 payment, which he did, and to pay an additional \$6,818 within five months of the acceptance of the offer. (Ex. A) He believed he still owed the IRS between \$1,600 and \$1,800. (Tr. 46)

In March 2011, Applicant sought the services of a reputable tax firm to prepare his 2010 tax return. He made a \$921 payment to the IRS, which paid his 2010 federal taxes. (Ex. K) He intends to continue using this tax firm to prepare his future returns. In July 2011, the IRS accepted his Offer in Compromise dated November 2010. (Ex. A)

In Applicant's e-QIP, he acknowledged smoking marijuana from July 1998 to November 2008 and using cocaine from July 1998 through January 2000. (Ex. 1) In May 1999, he paid a \$500 fine after pleading guilty to possession of marijuana. (Ex. 1) He revealed his cocaine use on his e-QIP even though it was beyond the seven-year scope of the question. (Tr. 59) Applicant stated he used marijuana in high school, but stopped when he got married. (Tr. 59-60) After his divorce, he met an old girlfriend with whom he smoked marijuana. (Tr. 60) He no longer sees that woman nor any other individuals with whom he smoked marijuana. (Tr. 62) He has not smoked marijuana since obtaining his current job. He last used it approximately three years ago. (Tr. 60) There are drug tests at his current job. (Tr. 61) He stated he would not use marijuana in the future and does not drink alcohol. (Tr. 63)

Applicant is not delinquent on any other debts. (Tr. 39) He has no bad credit and no outstanding credit card debt. His 2000 Mazda truck is paid. (Tr. 39) He has no rent expenses. (Tr. 51)

## 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 *also* 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 failed to timely file his federal tax returns for tax years 2003 through 2009. He did so because he did not understand how to complete his tax returns and did not have the money to pay his taxes. Disqualifying Conditions AG ¶ 19(a), "inability or unwillingness to satisfy debt," AG ¶ 19(c), "a history of not meeting financial obligations," and AG ¶ 19(g), "failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same" apply.

Five 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;

(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 did not file his tax returns or pay his federal tax in a timely manner. An applicant is not required to establish that he has paid off each and every debt listed in the SOR. All that is required is for him to demonstrate he has established a plan to resolve his delinquent debt and has taken significant action to implement that plan. His returns have now been filed, the IRS has accepted an Offer in Compromise, and he has paid all but \$1,800 of his past due taxes. He paid his 2009 tax in a timely manner.

The mitigating condition listed in AG ¶ 20(a) does not apply because his failure to file returns for seven years was not infrequent. The returns were filed in 2010, so his failure to file is recent. AG ¶ 20(b) does not apply. His failure to file was not caused by factors beyond his control. He failed to file because he did not understand the tax returns and did not have the money to pay his taxes. Failing to understand the tax returns or saving sufficient funds through out the year to pay one's taxes are not conditions beyond one's control.

Although he has not received financial counseling, the problem is being resolved and is under control. AG ¶ 20(c) applies. The IRS has accepted his Offer in Compromise on which he paid \$1,705 in December 2010 and \$5,000 in September 2011. The offer was for \$8,523, which leaves a balance of approximately \$1,800 yet to be paid. His actions represent a good-faith effort to repay the IRS. AG ¶ 20(d) applies. AG ¶ 20(e) does not apply because he is not disputing any of his debt.

The remaining \$1,800 yet to be paid does not raise concerns about his current reliability, trustworthiness, or good judgment. Having paid the majority of the debt, I believe he will pay the remaining balance. He has no other outstanding obligations.

## **Drug Involvement**

AG ¶ 24 expresses the security concern pertaining to drug involvement: Use of an illegal drug or misuse of a prescription drug can raise questions about an individual's reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations.

AG ¶ 25 describes two conditions that could raise a security concern and may be disqualifying:

- (a) any drug abuse, and
- (c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia;

Applicant used marijuana in high school and again following his divorce. In May 1999, he paid a \$500 fine after pleading guilty to possession of marijuana. (Ex. 1) In AG ¶ 25(a) drug use and AG ¶ 25(c) for possessed drugs, apply.

AG ¶ 26 provides conditions that could mitigate security concerns:

- (a) the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;
- (b) a demonstrated intent not to abuse any drugs in the future, such as:
  - (1) disassociation from drug-using associates and contacts;
  - (2) changing or avoiding the environment where drugs were used;
  - (3) an appropriate period of abstinence; and,
  - (4) a signed statement of intent with automatic revocation of clearance for any violation;

There are no “bright line” rules for determining when conduct is “recent.” The determination must be based “on a careful evaluation of the totality of the record within the parameters set by the directive.” ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). For example, the Appeal Board determined in ISCR Case No. 98-0608 (App. Bd. Aug. 28, 1997), that an applicant's last use of marijuana occurring approximately 17 months before the hearing was not recent. If the evidence shows “a significant period of time has passed without any evidence of misconduct,” then an administrative judge must determine whether that period of time demonstrates “changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation.”<sup>2</sup>

---

<sup>2</sup> ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). In ISCR Case No. 04-09239 at 5 (App. Bd. Dec. 20, 2006), the Appeal Board reversed the judge's decision denying a clearance, focusing on the absence of drug use for five years prior to the hearing. The Appeal Board determined that the judge excessively emphasized the drug use while holding a security clearance, and the 20 plus years of drug use, and gave too little weight to lifestyle changes and therapy. For the recency analysis, the Appeal Board stated:

Applicant did not attempt to hide his arrest or illegal drug usage on his e-QIP. Applicant used cocaine from July 1998 to January 2000. This use was outside the scope of inquire on his e-QIP, but he revealed it anyway. His last use of cocaine is approximately 12 years ago. His last use of marijuana was in November 2008, approximately three years ago. He has not used marijuana since obtaining his current job. He no longer associates with those individuals with whom he used marijuana. Due to the passage of time since his last cocaine and marijuana use, AG ¶ 26(a) applies. This period of abstinence and disassociation from drug-using associates allows AG ¶ 26(c) to 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.

---

*Compare* ISCR Case No. 98-0394 at 4 (App. Bd. June 10, 1999) (although the passage of three years since the applicant's last act of misconduct did not, standing alone, compel the administrative judge to apply Criminal Conduct Mitigating Condition 1 as a matter of law, the Judge erred by failing to give an explanation why the Judge decided not to apply that mitigating condition in light of the particular record evidence in the case) with ISCR Case No. 01-02860 at 3 (App. Bd. May 7, 2002) ("The administrative judge articulated a rational basis for why she had doubts about the sufficiency of Applicant's efforts at alcohol rehabilitation.") (citation format corrections added).

In ISCR Case No. 05-11392 at 1-3 (App. Bd. Dec. 11, 2006) the Appeal Board, considered the recency analysis of an administrative judge stating:

The administrative judge made sustainable findings as to a lengthy and serious history of improper or illegal drug use by a 57-year-old Applicant who was familiar with the security clearance process. That history included illegal marijuana use two to three times a year from 1974 to 2002 [drug use ended four years before hearing]. It also included the illegal purchase of marijuana and the use of marijuana while holding a security clearance.



I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. His illegal drug use is sufficiently old as not to be a current security concern. He has reached an agreement with the IRS to pay his past-due taxes. He paid one tax firm almost \$7,000 to address his past failures to file timely returns. He now employs a different tax firm to file his returns and intends to continue using that firm in the future. It is unlikely Applicant will be late in filing his tax returns.

Other than the remaining \$1,800 he owes the IRS, he has no additional past-due obligations. He is not living beyond his means. He is driving a 2000 Mazda truck. The issue is not simply whether all his taxes are paid or are being paid – which 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 and illegal drug use.

### **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.c: For Applicant

Paragraph 2, Drug Involvement: FOR APPLICANT

Subparagraphs 2.a and 2.b: 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.

---

CLAUDE R. HEINY II  
Administrative Judge