



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



In the matter of: )  
)  
) ISCR Case No. 10-10673  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Eric Borgstrom, Esquire, Department Counsel  
For Applicant: Patricia Nixon, Esquire

December 23, 2011

**Decision**

CURRY, Marc E., Administrative Judge:

Applicant mitigated the financial considerations security concern but failed to mitigate the personal conduct concern generated by his omission of an arrest from his security clearance application. Clearance is denied.

**Statement of the Case**

On June 3, 2011, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines F, financial considerations, and E, personal conduct. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented by the Department of Defense on December 1, 2006.

Applicant answered the SOR on August 29, 2011, admitting subparagraphs 1.a to 1.e, and denying subparagraphs 1.f and 2.a. He requested a hearing. The case was

then assigned to me on October 3, 2011. A notice of hearing was issued on October 19, 2011, scheduling the case for November 8, 2011. I held the hearing as scheduled, receiving 13 Government exhibits, marked as Government Exhibits (GE) 1 through 13, and 15 Applicant Exhibits marked as Applicant Exhibits (AE) D through Q, and T.<sup>1</sup> I also considered the testimony of Applicant and a witness. DOHA received the transcript (Tr.) on November 17, 2011.

### **Findings of Fact**

Applicant is a 56-year-old single man with one child, age 15. He has never been married, and has been living with his girlfriend since 2003. (Tr. 18)

Applicant served in the U.S. Marine Corps from 1975 through his honorable discharge in 1979. (GE 1 at 29) He then enlisted in the U.S. Air Force where he served on active duty from 1980 to 1982, and in the Air National Guard from 1982 through his retirement in 2010. (AE M; Tr. 98)

Applicant has spent his career working in the network security and information technology fields. (AE K; Tr. 82-86) Over the years, he has earned associates degrees in engineering technology, avionics, computer systems, and education and training. (Tr. 181) Most recently, in 2005, he earned a bachelor's degree in business management. (Tr. 181) He is currently attending college, working toward a bachelor of science degree in information technology.

For the past two years, Applicant has been working for a contractor that monitors communications links for a federal government agency. (AE P) According to Applicant's supervisor, he has a "solid and reliable work mentality," and is a role model for the younger employees. (AE P)

In the mid-1990s, Applicant experienced a volatile breakup with his then-girlfriend. In 1996, she had a child and claimed Applicant was the father. (Tr. 45) Applicant denied paternity, refused to pay child support, and requested DNA testing. (Tr. 66) Two years of protracted litigation ensued with extensive discovery involving multiple expert witnesses. (Ex. H) In 1998, DNA testing confirmed Applicant was the baby's father. (AE H at 15) The court then ordered Applicant to pay both back and ongoing child support, and ordered him to pay his ex-girlfriend's court fees.

Applicant then filed for custody of the child. (GE 6 at 4) Litigation continued for another two years. By 1999, Applicant had exhausted his savings and began withdrawing money from his 401k account. In sum, he withdrew approximately \$45,000 from his 401k account. Applicant was aware of the federal income tax consequences associated with early 401k withdrawals, but ignored them because he was in "crisis

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<sup>1</sup>Applicant's counsel identified several exhibits solely for the purpose of refreshing the witnesses' recollections. I marked them as AE A through C and AE R through S. Counsel did not move them into evidence, and I have neither considered them nor incorporated them into the file.

management mode” with his litigation. (Tr. 145) Consequently, he accrued federal income tax debt of \$33,500 for tax year 1999, as alleged in subparagraph 1.a. (Tr. 40) He was unable to pay it when due, and it subsequently became delinquent.

Applicant and his ex-girlfriend continued to aggressively litigate issues related to their child. The hostility of the relationship between Applicant and his ex-girlfriend subsided after she got married in 2007. (GE 3 at 6) Currently, Applicant’s child lives with her mother and stepfather, and Applicant shares joint custody of her. Applicant and his child’s mother have resolved their problems and are no longer in litigation. (Tr. 55)

In late 2001, Applicant’s employer went out of business. (Tr. 69) Applicant was subsequently unemployed for the next six months. (GE 1 at 41; Tr. 87) At or about that time, Applicant became increasingly concerned with his mother’s diminishing health. She lived in the home she had shared with her husband when he was living, and she did not want to move to a nursing home. After Applicant regained a job, he began providing financial assistance to his mother with the goal of helping her remain in her home. (Tr. 60) Once he regained a job, he began financially assisting her, giving her approximately \$50,000 over the next four years. (Tr. 61)

Applicant’s mother moved into an assisted living facility in approximately 2006. Because the facility manages the majority of his mother’s needs, Applicant does not need to help her as much financially. (Tr. 63) Currently, he spends approximately \$2,000 yearly on groceries and miscellaneous purchases for her. (Tr. 63)

Applicant is indebted to the IRS for past due taxes for tax years 2002, and 2005 through 2008, collectively in the amount of \$4,000. (subparagraphs 1.b - 1.e) Part of the delinquency includes late fees and penalties. (Tr. 44-45) Applicant accrued these delinquencies because he underestimated the amount that he needed to withhold, and was unable to pay the tax bills when they became due. (Tr. 41)

In February 2010, Applicant retained an income tax resolution firm to help him pay his tax delinquencies. (Tr. 149; GE F) For approximately a year, the firm attempted to negotiate an offer in compromise with the IRS, but made no progress. Gradually, Applicant became disenchanted with their efforts. Consequently, in March 2011, he retained another tax resolution firm. (AE E)

On Applicant’s behalf, the tax resolution firm negotiated an installment agreement with the IRS. (AE E) According to IRS records, Applicant owes \$38,015 for tax years 1999, 2002, and 2005 through 2007. Per the agreement, Applicant, in April 2011, made a \$1,298 payment, and has been making payments of \$1,193 since then. (AE E at 2, 8-10) Thus far, he has satisfied approximately \$9,600. Applicant anticipates that the tax delinquency will be satisfied by October 2012. (Tr. 55) According to the terms of the agreement, the IRS will continue to impose interest and penalties on the remaining balance until it is satisfied entirely.

Subparagraph 1.f, alleges Applicant owes a judgment for \$38,116. This stems from a condominium Applicant purchased in 1994. Applicant sold the property in November 2002. (AE T) Although the loan was completely satisfied at the time of the sale, it was still listed as outstanding in the mortgagee bank's records. Consequently, they retained an attorney who obtained a default judgment. After discovering the judgment on his credit report, Applicant contacted the attorney for the bank and notified him that it was listed erroneously. The attorney investigated Applicant's contention and confirmed that Applicant owed no debt to the bank. (AE D)

Applicant maintains a budget. He has approximately \$675 in after-expense income. (GE 5) Applicant's budget did not reflect his girlfriend's financial assistance. She earns \$100,000 per year. (Tr. 124, 159)

One Friday night in January 1999, Applicant was sitting in his car at a traffic stop when a woman standing on the corner looked at him, "waved . . . turned sideways . . . [and] waved her hands up and down her body." (Tr. 108) Applicant looked at her and said, "how much?" (Tr. 108)

Unbeknownst to Applicant, the woman was an undercover police officer posing as a prostitute. At the following intersection, Applicant was stopped by another police officer, arrested, and charged with prostitution or related offenses, and criminal solicitation. (Tr. 120) Later, the state dismissed the charges, and issued him a traffic ticket. (Tr. 111) Applicant never had to appear for a hearing.

Applicant completed a security clearance application in September 2000. Question 26 required him to disclose any arrests, charges, or convictions regardless of whether the case record had been sealed or "otherwise stricken from the record." (GE 3 at 7) Applicant answered, "no," and did not disclose his 1999 arrest. Applicant contends that his attorney told him, after the charges were dismissed, that "it was like it had never happened," and that Applicant would not have a police record. (Tr. 112) Relying upon this advice, Applicant did not list the arrest. During cross-examination, Applicant testified that he did not know that solicitation was a criminal offense. (Tr. 122)

## **Policies**

The adjudicative guidelines list potentially disqualifying conditions and mitigating conditions. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, they are applied together with the factors listed in the adjudicative process. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security."

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 for obtaining a favorable security decision.

## **Analysis**

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

Under this guideline, “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 (AG ¶ 18). Applicant is not indebted for a judgment as alleged in subparagraph 1.f. I resolve this subparagraph in his favor. Applicant’s remaining delinquencies trigger the application of AG ¶¶ 19(a), “inability or unwillingness to satisfy debts,” and 19(c), “a history of not meeting financial obligations.”

The following mitigating conditions under AG ¶ 20 are potentially applicable:

(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.

When Applicant’s ex-girlfriend alleged that he was the father of her daughter, he chose to contest the allegation rather than pay child support. Consequently, the financial problems that occurred as a result of that decision were not caused by circumstances beyond his control. Moreover, Applicant’s delinquencies that accrued after tax year 1999 were unrelated to the litigation against his ex-girlfriend, and occurred simply because he did not withhold enough income from his weekly pay.

Applicant’s decision to provide financial help to his elderly mother to accommodate her wish not to move to a nursing home is commendable. However, regardless of the sincerity of his desire to help his mother, he should not have foregone the legal obligation of paying his federal income taxes to do so. AG ¶ 20(b) is not applicable.

With the help of an income tax resolution firm, Applicant negotiated an installment agreement with the IRS in March 2011. Since then, he has been paying approximately \$1,200 monthly, and has satisfied approximately 20 percent of the delinquency. At this rate, Applicant's projection that he will satisfy the delinquency by October 2012 is unrealistic. Nevertheless, given the stability of Applicant's finances and his progress over the last eight months, I conclude he will ultimately satisfy the delinquency, and his financial problems will not recur. AG ¶¶ 20(c) and 20(d) apply. Applicant has mitigated the financial considerations security concern.

## **Personal Conduct**

Under this guideline, "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." (AG ¶ 15) Moreover, "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."

Applicant deliberately omitted his 1999 arrest from his security clearance application that he completed in 2000. AG ¶ 16(a), "deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities," applies.

Applicant completed the security clearance application more than ten years ago and never corrected the omission. AG ¶ 17(a), "the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts," does not apply.

Applicant contends he did not list the arrest because his attorney, shortly after the charges were dismissed, told him there would be no record of them. Applicant's reliance on this advice does not mitigate the security concern. AG ¶ 17(b)<sup>2</sup> would be applicable only if his attorney had given him erroneous advice specifically concerning the security clearance process. Applicant's attorney did not advise him to omit the arrest from the security clearance application; he merely told him that there would be no record of the charges.

The decision to omit the arrest was Applicant's alone. Given the security clearance application's comprehensive instructions, Applicant's explanation does not mitigate the security concern. In reaching this conclusion, I particularly focused on his

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<sup>2</sup>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.

credibility, and determined that it was undermined by his testimony that he was unaware solicitation was a crime.

### **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.

Applicant is an industrious individual who has honorably served the United States in the military, earned multiple degrees, and excelled on the job. Although the causes of his financial problems were not beyond his control, he has gotten them under control and mitigated the financial considerations security concern. However, Applicant had a duty to complete his security clearance application both truthfully and candidly. He breached this duty by omitting his 1999 arrest. This omission generates lingering doubts about his security worthiness and renders him an unacceptable candidate for a security clearance.

### **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:	FOR APPLICANT
Subparagraphs 1.a - 1.f:	For Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant

## **Conclusion**

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

MARC E. CURRY  
Administrative Judge