



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



In the matter of: )  
)  
) ISCR Case No. 11-08713  
)  
Applicant for Security Clearance )

**Appearances**

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

02/19/2013

**Decision**

HEINY, Claude R., Administrative Judge:

Applicant contests the Department of Defense’s (DoD) intent to deny his eligibility for a security clearance to work in the defense industry. He failed to timely file his 2008, 2009, and 2010 federal income tax returns. He also had a \$5,000 charged-off account. He has paid his taxes and there is a legitimate dispute concerning the account. Clearance is granted.

**History of the Case**

Acting under the relevant Executive Order and DoD Directive,<sup>1</sup> on August 15, 2012, the DoD issued an SOR detailing security concern. DoD adjudicators could not find that it is clearly consistent with the national interest to grant or continue Applicant’s security clearance. On September 7, 2012, Applicant answered the SOR and requested

<sup>1</sup> Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; 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 hearing. On November 15, 2012, I was assigned the case. On November 20, 2012, DOHA issued a Notice of Hearing for a hearing convened on December 4, 2012. I admitted Government's Exhibits (Ex) 1 through 5 and Applicant's Exhibits A through C, without objection. The record was held open to allow Applicant to submit additional information. On December 18, 2012, December 21, 2012, and January 2, 2013, additional material was received. Department Counsel had no objection to the material, which was admitted into the record as Exs D – H. On December 12, 2012, 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 pleadings and exhibits, I make the following findings of fact.

Applicant is a 56-year-old proposal analyst who has worked for a defense contractor since December 1995. Applicant called no witnesses other than himself, and produced no work or character references.

In 2006, a credit card company offered Applicant a one-year, interest-free loan. On June 20, 2006, he transferred \$25,000 of credit on to his account and the amount first appears on his July 2006 monthly credit card account statement with his first payment due August 2006. (Tr.37) From August 2006 through November 2006, he made his monthly payments with out problems. However, in December 2006, he was informed the credit card company changed his monthly due date from the 15<sup>th</sup> of the month to the 5<sup>th</sup> of the month. In December 2006, Applicant sent in his payment on the first of the month and received notice of a late payment fee (\$39) and that his interest rate had been changed from 0% to 21.99%.

Applicant's payments from August 10, 2006 through May 4, 2007 totaled \$4,438. On July 22, 2007, he made a \$20,637 payment and also made a \$250 payment during the same month. (Ex. C, Tr. 22) He has paid the credit card company \$25,325. The creditor asserts he owes approximately \$5,187 additional on this account. Since December 2006, Applicant has been trying to resolve the dispute regarding his account. He has maintained an on-going dialogue attempting to correct the matter and provided documents showing what actions he has taken in this matter. The matter remains unresolved.

On December 17, 2012, the Internal Revenue Service (IRS) received Applicant's 2008, 2009, 2010, and 2011 federal individual income tax returns. (Ex. D) At that time, he paid all past-due taxes. For tax year 2008, his adjusted gross income (AGI) was \$74,411 and his tax obligation was \$9,684. He had had \$10,606 withheld from his wages, which resulted in a \$922 refund. (Ex. E) For tax year 2009, his AGI was \$94,629 and his tax obligation was \$15,438. \$12,242 had been withheld from his wages, which resulted in him owing \$3,233 for tax year 2009. (Ex. F) For tax year 2010, his AGI was \$94,266 and his tax obligation was \$14,623. He had \$12,725 withheld from his wages,

which resulted in \$1,884 due for the year. (Ex. G) For tax year 2011, his AGI was \$93,247 and his tax obligation was \$15,856. \$14,168 had been withheld from his wages, which resulted in \$1,690 due for the year. (Ex. I) He had filed an extension for tax year 2011. As of December 31, 2012, he owed nothing additional for tax year 2011. (Ex. H) For the three tax years listed in the SOR he owed \$5,117 and received a \$922 refund.

In Applicant's March 2011 personal subject interview and at the hearing, he told the investigator he had filed the necessary extension for tax years 2008, 2009, and 2010.<sup>2</sup> (Tr. 22) However, at the hearing, he produced no copies of his extension requests. Any extension requests would extend the filing deadline, but does not extend the time taxes are to be paid and interest on any amount owed starts to accumulate.<sup>3</sup> Applicant owed taxes for tax years 2009 (\$3,233) and 2010 (\$1,884). Ultimately the IRS may contact Applicant to inform him he owes accrued interest on these amounts. He may also have accrued a penalty for failing to file in a timely manner when taxes are owed. Having filed his returns and paid the tax owed, he is likely to pay any accrued interest or penalties when notified.

In addition to being a proposal analyst, Applicant rehabilitated (rehabbed) homes and sold them. In 2008, he rehabbed two homes and sold them to buyers with one-year balloon notes. (Tr. 25-27) Before the buyers obtained loans sufficient to purchase the homes they would make monthly payments to Applicant. These arrangements resulted in delays in getting the information necessary for him to complete his individual income tax returns in a timely manner. (Tr. 29)

As of May 2012, Applicant's net monthly income was \$4,847, his net monthly expenses were \$1,700, and he paid \$2,532 monthly on his debts, which left him a monthly net remainder of \$615. (Ex. 5) His hourly wage was \$44.21. (Ex. 5) He has \$433 of assets and \$188,000 in liabilities. (Tr. 45) He does have a \$100,000 certificate of deposit which is pledged against two house notes. (Tr. 45)

## **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.

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<sup>2</sup> In March 2011, Applicant stated he filed all necessary extension forms for 2008, 2009, and 2010. It is noted Applicant's 2010 federal individual income tax return was not due when he made the statement. His 2010 tax return was not due until April 15, 2011.

<sup>3</sup> The IRS FORM 4868, Application for Automatic Extension of Time to File U.S. Individual Income Tax Return, states that FORM 4868 does not extend the time to pay taxes. If a taxpayer does not pay the amount of tax due by the regular due date, the taxpayer will owe interest. The taxpayer may also be charged penalties for late filing and for late payment.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the interests of security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." The applicant has the ultimate burden of persuasion to obtain a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order (EO) 10865 provides that decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See *a/so* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

## **Analysis**

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

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

Failure or inability to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or

unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

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

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

Applicant did not file his individual federal income tax returns in a timely manner for tax years 2008, 2009, and 2010. He owed approximately \$5,000 for those tax years. A credit card company charged off an additional \$5,000 account. Disqualifying Conditions AG ¶ 19(a), "inability or unwillingness to satisfy debts," 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 failed to timely file of his federal individual income tax returns. In December 2012, he filed those returns and paid all past-due taxes. The behavior is recent and although limited to three separate returns it occurred over a three year period. However, it is unlikely Applicant will fail to file his income tax returns in a timely manner in the future. Having now filed his returns, his past conduct does not cast doubt on his current reliability, trustworthiness, or good judgment. AG ¶ 20(a) applies.

Under AG ¶ 20(b), Applicant's failure to file was not caused by factors beyond his control. The information needed to complete his returns was made more complicated by his second business of rehabbing and selling homes. There is no evidence of having received financial counseling. AG ¶ 20(b) and AG ¶ 20 (c) do not apply. Having paid his taxes AG ¶ 20 (d) applies.

For AG ¶ 20 (e) to apply Applicant must have both a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provide documented proof to substantiate the basis of the dispute or provide evidence of actions to resolve the issue. This mitigating factor does not apply to his failure to timely file his tax returns, but does apply to the charged-off credit card account. In December 2006, when he learned he was being charged a late fee and his interest rate was going from 0% to 21.99% he immediately contacted the creditor. Since then, he has documented his on-going problems with the creditor caused by the change of his payment due date from the 15<sup>th</sup> of each month to the 5<sup>th</sup> of each month. Applicant has a reasonable basis to dispute the past-due account and had properly documented that dispute. AG ¶ 20 (e) applies to the credit card account.

### **Whole-Person Concept**

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

- (1) the nature, extent, and seriousness of the conduct;
- (2) the circumstances surrounding the conduct, to include knowledgeable participation;
- (3) the frequency and recency of the conduct;
- (4) the individual's age and maturity at the time of the conduct;
- (5) the extent to which participation is voluntary;
- (6) the presence or absence of rehabilitation and other permanent behavioral changes;
- (7) the motivation for the conduct;
- (8) the potential for pressure, coercion, exploitation, or duress; and
- (9) the likelihood of continuation or recurrence.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant did not properly file his income tax returns. He said, but failed to document, that he had filed extension each year for the returns. He assumed he would be receiving a refund for all his unfiled tax years, but received a refund only for tax year 2008. The tax returns have now been filed, his taxes paid, and I am confident he will pay any accrued interest if so notified by the IRS that it is due. The credit card charged-off account remains unresolved, but Applicant has a legitimate dispute regarding this account.

The issue is not simply whether all his debts are paid—it is whether his financial circumstances raise concerns about his fitness to hold a security clearance. (See AG ¶ 2 (a)(1).) Overall, the record evidence leaves me without questions or doubts about Applicant’s eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the security concerns arising from his financial considerations.

### **Formal Findings**

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

Paragraph 1, Financial Considerations:	FOR APPLICANT
Subparagraphs 1.a and 1.b:	For Applicant

### **Conclusion**

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant a security clearance. Eligibility for access to classified information is granted.

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CLAUDE R. HEINY II  
Administrative Judge