



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



In the matter of: )  
 )  
XXXXXXXXXX, XXXXX ) ISCR Case No. 11-13878  
 )  
Applicant for Security Clearance )

**Appearances**

For Government: Robert J. Kilmartin, Esq., Department Counsel  
For Applicant: *Pro se*

01/09/2014

**Decision**

TUIDER, Robert J., Administrative Judge:

Applicant mitigated security concerns under Guideline E (personal conduct), but failed to mitigate security concerns under Guideline F (financial considerations). Clearance is denied.

**Statement of the Case**

On July 20, 2011, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP). On June 24, 2013, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a statement of reasons (SOR) to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information within Industry*, dated February 20, 1960, as amended; DOD 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, and effective within DOD for SORs issued after September 1, 2006.

The SOR alleged security concerns under Guidelines F and E. The SOR detailed reasons why DOD CAF was unable to find that it is clearly consistent with

the national interest to continue a security clearance for Applicant, and it recommended that his case be submitted to an administrative judge for a determination whether his clearance should be continued or revoked.

Applicant answered the SOR on August 8, 2013, and elected to have his case decided on the written record in lieu of a hearing. A complete copy of the Government's file of relevant material (FORM), dated September 5, 2013, was provided to him by letter dated September 10, 2013. Applicant received the FORM on September 23, 2013. He was given 30 days to file objections and submit material in refutation, extenuation, or mitigation. Applicant did not submit any information within the 30 days after receipt of copy of the FORM. The case was assigned to me on November 25, 2013.

### **Findings of Fact**

Applicant admitted all of the SOR allegations under Guideline F, SOR ¶¶ 1.a through 1.q, as well as two allegations under Guideline E, SOR ¶¶ 2.a and 2.b. He denied the third allegation under Guideline E, SOR ¶ 2.c. After a thorough review of the record, I make the following findings of fact.

### **Background Information**

Applicant is a 31-year-old product support representative, who has worked for a defense contractor since January 2011. He seeks a security clearance in conjunction with his current employment. He was previously granted a secret security clearance, when he enlisted in the Air Force Reserve in 2009. (Items 4 and 8.)

Applicant graduated from high school in June 2000. He married in July 2005, and has a 19-year-old stepson and a 6-year-old son. Applicant has been continuously affiliated with the Air Force Reserve since April 2009, and as a result of that affiliation, has maintained a security clearance since then. (Items 4 and 8.)

### **Financial Considerations**

In February 2013, an Office of Personnel Management (OPM) investigator interviewed Applicant about his background and delinquent debts listed on his credit report. During that interview, he discussed many accounts, but did not recognize several debts. Applicant told the investigator he intended to research those debts for which he had no knowledge and otherwise resolve his debts. He understood the importance of resolving his credit problems. Applicant attributed the delinquent debts to being unemployed from September 2008 to September

2009, his misplaced reliance on his wife to pay their bills, and his own irresponsibility. (Item 8.)

According to Applicant's credit reports, dated December 19, 2012, and April 9, 2013, his delinquent debts began accumulating in 2009 and continued into 2013. Based on those credit reports, the SOR alleged 17 delinquent debts exceeding over \$50,000, of which \$19,968 of that amount is for delinquent federal taxes and \$11,732 for state taxes. The debts include two state tax liens filed against Applicant in 2009 in the amounts of \$6,825 and \$1,879, credit card debts, consumer loans, telephone bills, medical debts, and a student loan. (Items 5 and 6, SOR ¶¶ 1.a, 1.b, 1.p and 1.q.)

Applicant states that he has contacted his state department of revenue to set up payment arrangements starting in July 2013 for the two state tax liens. He also asserts that he has made arrangements to pay \$265 per month to the U.S. Treasury until his tax debt is paid in full. Applicant further explained in his SOR answer that he has paid some of the delinquent debts, and has made payment arrangements for others. The only documentation that Applicant provided to substantiate his claims of payment were some debits from his checking account reflecting payments to the U.S. Treasury, and a few other creditors. It is unclear what the current status of his SOR debts are and whether they are paid or being paid. (Items 3, 7, and 8.)

Applicant provided a copy of his May 2013 budget. He claims his net monthly income is \$8,961, and he has a net remainder of \$4,448 after paying monthly expenses and payments. (Item 7.) It is unclear why he would have such a substantial net monthly remainder and so many unpaid debts. Applicant has not provided evidence of credit counseling or debt consolidation services. (Item 8.)

### **Personal Conduct**

Three separate allegations are alleged under this concern -- that he failed to file his federal tax returns from 2006 to 2008, that he failed to file his state tax returns from 2008 to 2011, and that he deliberately failed to disclose his federal and state tax debts and failed to file federal and state tax returns on his July 2011 e-QIP. (SOR ¶¶ 2.a - 2.c.) As noted, he admitted the allegations of failure to file federal and state tax returns, but denied deliberate falsification.

His explanation for failing to file his federal and state income tax returns was that he relied on his wife to file tax returns. (Item 8.) I do not find this explanation persuasive given the importance of filing federal and state returns. While he may have "relied" on his wife, it does not relieve him of his individual responsibility to jointly file and pay his federal and state taxes. However having

said this, failure to file federal or state income taxes is more appropriately pled under Guideline F, which lists a specific disqualifying condition under AG ¶ 19: “(g) failure to file annual Federal, state, or local income tax returns as required or fraudulent filing of the same.” This pleading issue is further discussed in the Analysis section, *infra*.

However, with regard to SOR ¶ 2.c, this is the only allegation of the 20 allegations that Applicant denied. In reviewing Applicant’s February 2013 OPM interview, I note that he failed to list several other items such as a judgment, his delinquent accounts, two previous addresses, a 2011 letter of counseling, two previous supervisors, and middle names for his parents. Applicant explained that all of these discrepancies were oversights. It is clear that he did not exercise due diligence in completing his July 2011 e-QIP, to include important and less important information. Given his 19 admissions and willingness to “own up” to his other mistakes in his SOR answer, I accept his oversight explanation that he did not deliberately fail to list these federal and state income taxes and federal and state tax debts on his e-QIP. (Item 8.)

### **Character Evidence**

Applicant provided no evidence concerning the quality of his professional performance, the level of responsibility his duties entail, or his track record with respect to handling sensitive information and observation of security procedures. He submitted no character references describing his judgment, morality, trustworthiness, integrity, or reliability. I was unable to evaluate his demeanor or character in person since he elected to have his case decided without a hearing.

### **Policies**

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the AGs. In addition to brief introductory explanations for each guideline, the AGs list potentially disqualifying conditions and mitigating conditions, which are useful 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 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.” In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

In the decision-making process, the Government has the initial burden of establishing controverted facts alleged in the SOR by “substantial evidence,”<sup>1</sup> demonstrating, in accordance with the Directive, that it is not clearly consistent with the national interest to grant or continue an applicant’s access to classified information. Once the Government has produced substantial evidence of a disqualifying condition, the burden shifts to applicant to produce evidence “to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and [applicant] has the ultimate burden of persuasion for obtaining a favorable clearance decision.” Directive ¶ E3.1.15. 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).<sup>2</sup>

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 protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

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<sup>1</sup> See Directive ¶ E3.1.14. “Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the record.” ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). “This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent [a Judge’s] finding from being supported by substantial evidence.” *Consolo v. Federal Maritime Comm’n*, 383 U.S. 607, 620 (1966). “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).

<sup>2</sup> “The Administrative Judge [considers] the record evidence as a whole, both favorable and unfavorable, evaluate[s] Applicant’s past and current circumstances in light of pertinent provisions of the Directive, and decide[s] whether Applicant ha[s] met his burden of persuasion under Directive ¶ E3.1.15.” ISCR Case No. 04-10340 at 2 (App. Bd. July 6, 2006).

Section 7 of Executive Order 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* Executive Order 12968 (Aug. 2, 1995), Section 3.

## **Analysis**

### **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.

Since at least 2009 Applicant has been accumulating debts that he has been unable or unwilling to satisfy. Included among those debts are tax debts owed to the U.S. Government as well as his state tax authority.

AG ¶ 19 provides two disqualifying conditions that could raise a security concern and may be disqualifying in this case: “(a) inability or unwillingness to satisfy debts;” and “(c) a history of not meeting financial obligations.” Applicant’s history of delinquent debt is documented in his credit reports, his OPM interview, and in his SOR answer.

The evidence establishes the disqualifying conditions in AG ¶¶ 19(a) and 19(c), requiring additional inquiry about the possible applicability of mitigating conditions.

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.

Considering the record evidence as a whole,<sup>3</sup> I conclude none of the five financial considerations mitigating conditions fully apply. However, partial application of the mitigating condition in ¶ 20(b) is warranted as a result of Applicant's unemployment from September 2008 to September 2009. To receive full credit under this mitigating condition, the Applicant must demonstrate that he also "acted responsibly under the circumstances." Admittedly, unemployment can be expected to adversely affect one's ability to remain financially afloat. There is no evidence in the record to suggest that Applicant remained in contact with his creditors in any meaningful way. Furthermore, Applicant's unemployment was over four years ago and there is no persuasive evidence in the record that he has shown a reasonable good-faith effort to resolve his debts.

### **Personal Conduct**

AG ¶ 15 articulates the security concern relating 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.

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<sup>3</sup> See ISCR Case No. 03- 02374 at 4 (App. Bd. Jan. 26, 2006) (citing ISCR Case No. 02-22173 at 4 (App. Bd. May 26, 2004)). When making a recency analysis for AG ¶ 20(a), all debts are considered as a whole.

The Government's evidence does not establish that Applicant deliberately falsified his July 2011 e-QIP. As noted, Applicant was forthcoming in admitting culpability in 19 out of 20 allegations and it is clear from the record that he was less than attentive in completing his e-QIP. While he should have shown greater diligence in accurately completing a document as important as an e-QIP, his negligence does not establish that he was attempting to conceal his financial situation from the Government. Based on Applicant's denial and explanation, I find that Applicant did not deliberately attempt to deceive the Government or security officials on his security clearance application.

The two allegations under SOR ¶¶ 2.a and 2.b of failing to file federal and state income tax returns raise three potentially disqualifying conditions under AG ¶ 16 as follows:

(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 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.

A failure to file tax returns is more appropriately alleged as a disqualifying condition under Guideline F, AG ¶ 19: “(g) failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same.” The poor judgment encompassed in failure to file tax returns when required is also encompassed under the “Concern” in AG ¶ 15, and under AG ¶¶ 16(c), 16(d), and 16(e).

It is unclear why Applicant’s failure to file federal and state income was not alleged under Guideline F when Guideline F has a specific provision addressing that concern. What is clear is that failing to file federal and state incomes taxes is *explicitly* covered under Guideline F. As indicated in the previous section, the primary security concern is caused by Applicant’s financial irresponsibility and not by his lack of integrity or that he was attempting to defraud the federal or state tax authorities. In light of my finding against Applicant under Guideline F, and the clear focus of this case being on financial matters, there is no need to utilize the general disqualifying conditions under AG ¶¶ 16(c), 16(d), or 16(e), and I find in Applicant’s favor for SOR ¶¶ 2.a and 2.b. Additionally, for reasons discussed above, I also find in Applicant’s favor for SOR 2.c. Having reached that conclusion, there is no need to discuss disqualifying or mitigating conditions under this concern.

To conclude, Applicant presented insufficient evidence to explain, extenuate, or mitigate the financial considerations security concerns. Applicant did not meet his ultimate burden of persuasion to obtain a favorable clearance decision. In reaching this conclusion, the whole-person concept was given due consideration and that analysis does not support a favorable decision.

### **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 – 1.q:	Against Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraphs 2.a – 2.c:	For Applicant

## **Conclusion**

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

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ROBERT J. TUIDER  
Administrative Judge