



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



In the matter of: )  
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----- ) ISCR Case No. 12-00019  
 )  
Applicant for Security Clearance )

**Appearances**

For Government: Philip J. Katauskas, Esq., Department Counsel  
For Applicant: *Pro se*

12/28/2012

**Decision**

HARVEY, Mark, Administrative Judge:

Applicant’s statement of reasons (SOR) alleges that he owed the Internal Revenue Service (IRS) \$38,135 for tax year 2006, and he failed to file his federal and state tax returns in 2008, 2009, and 2010. His accountant failed to file Applicant’s tax returns as promised. Applicant paid the 2006 tax lien and filed his 2008-2010 tax returns in 2012, resolving all SOR allegations. He paid all of his state tax debts, and made a substantial, good-faith payment to address his federal tax debt. Financial considerations concerns are mitigated. Eligibility for access to classified information is granted.

**Statement of the Case**

On June 20, 2011, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP) or security clearance application (SF 86) (GE 1). On March 21, 2012, 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 Guideline F (financial considerations). (Hearing Exhibit (HE) 2) The SOR detailed reasons why DOHA 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. (HE 2)

On May 2, 2012, DOHA received Applicant's response to the SOR, and he requested a hearing. (HE 3) On July 31, 2012, Department Counsel was ready to proceed on Applicant's case. On August 6, 2012, DOHA assigned Applicant's case to me. On August 14, 2012, DOHA issued a hearing notice, setting the hearing for September 6, 2012. (HE 1) Applicant's hearing was held as scheduled. At the hearing, Department Counsel offered five exhibits, and Applicant did not offer any exhibits. (Tr. 14-15; GE 1-5) There were no objections, and I admitted GE 1-5. (Tr. 15) On September 13, 2012, I received the transcript of the hearing. I held the record open until December 17, 2012, to permit Applicant to provide additional documentation. (Tr. 69, 73-74; AE J) Applicant provided ten post-hearing exhibits, which were admitted without objection. (AE A-J).

### **Findings of Fact<sup>1</sup>**

In his Answer to the SOR, Applicant admitted both of the SOR allegations, and he provided mitigating information. (HE 3) His admissions are accepted as findings of fact.

Applicant is a 50-year-old attorney, who was admitted to practice law in 1990.<sup>2</sup> (Tr. 17-18; SOR response at 5) He served in the Marine Corps from 1980 to 1986 and received an Honorable discharge as a sergeant. (Tr. 89-90; SOR response) He graduated from law school and received a Juris Doctor degree in 1988. He married in 1986 and divorced in 2006. (Tr. 20) His children were born in 1987, 1990, 1992, and 1993. Applicant married his spouse in 2010. (Tr. 23) His stepchildren from his current marriage were born in 2003 and 2005. His spouse is a paralegal, and she works for Applicant. (Tr. 24) He has been self-employed in a small legal office since 1990. He is sponsored for a security clearance to enable him to act as counsel for a government contractor.

### **Financial Considerations**

In July 2006, Applicant moved out of his residence. (Tr. 32) His former spouse worked with his bookkeeper on the firm's finances. (Tr. 32, 36) His 2006 divorce caused financial problems. Applicant was required to make monthly payments to his former spouse of \$3,000 in maintenance and \$750 in child support. (Tr. 20) Applicant paid his office expenses and his court-ordered support to his former spouse. (Tr. 21) Applicant's

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<sup>1</sup>Some details have been excluded in order to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

<sup>2</sup>The information in this paragraph is from Applicant's SF 86, unless stated otherwise. (GE 1)

legal practice involved representation of defendants in federal court, and the federal court payments to Applicant were late, sometimes a year after the services were provided. (Tr. 21-22) In 2009, Applicant received a substantial payment of attorney fees, and he used that payment to resolve many of his debts. (Tr. 23)

In December 2008, the IRS filed a \$27,911 federal tax lien against Applicant. (SOR ¶ 1.a) Applicant disclosed the tax lien on his June 20, 2011 SF 86. (GE 1) By February 2012, he owed the IRS \$38,135 for tax year 2006. (SOR ¶ 1.a) On February 21, 2012, he paid off the 2006 tax lien, and he provided a copy of the \$39,000 check to the IRS. (Tr. 38; SOR response at page 3; GE 4 at Tab 27)

Applicant admitted that he failed to file his federal and state tax returns in 2008, 2009, and 2010. (SOR ¶ 1.b; SOR response at page 3) Applicant's Certified Public Accountant (CPA) AB had been doing Applicant's taxes for about 15 years. (Tr. 25; SOR response at 3) In 2008, CPA AB had open heart surgery, and he was incapacitated for a lengthy period afterwards. (Tr. 26, 55) He is still suffering from medical difficulties. (Tr. 55) CPA AB provided a bookkeeper who worked closely with Applicant's staff. (Tr. 26) When Applicant asked for the status of his taxes, CPA AB and CPA AB's bookkeeper told him they had approved extensions from the IRS. (Tr. 27) CPA AB told Applicant he had filed Applicant's tax returns and provided electronic copies. (Tr. 27, 42, 48; SOR response at 3; GE 4 at Tabs 29-32) The 2008 tax return showed a \$55,678 tax debt; the 2009 tax return showed no tax debt; and the 2010 tax return showed a \$5,708 tax debt. (Tr. 39, 49; GE 4 at Tabs 29-32)

In February 2012, Applicant obtained transcripts of his tax filings from the IRS. (Tr. 28-29) He was "astounded" to discover that his tax returns were not filed in 2008, 2009, and 2010. (Tr. 28, 37; GE 4, Tab 28) He stressed to CPA AB the urgent necessity of getting his tax returns filed, and CPA AB did file his tax returns in March or April of 2012. (Tr. 29, 41; GE 4, Tabs 29-31; AE C-G) He subsequently learned that CPA AB and his bookkeeper failed to file the tax returns of at least three other people. (Tr. 29-30, 71-73)

Applicant hired two new accountants with excellent credentials to determine his tax liability for 2008-2011. (Tr. 51-52, 66-68) They found significant errors in CPA AB's work. (Tr. 30, 53-54, 68-69) CPA AB duplicated income by counting both invoices and deposits. (Tr. 61) CPA AB counted an entire settlement as income and failed to reduce the income to the fee Applicant received. (Tr. 62, 70) Applicant and his new accountants believed Applicant's tax returns showed a substantial overstatement of income in tax year 2008 and a large understatement of income in 2009. (Tr. 40-41, 54-63, 69-77) Applicant's new accountant discussed the problematic tax returns with an IRS agent. (Tr. 58) His new accountant believed the IRS would mitigate the IRS penalties because Applicant acted in good faith and the fault was primarily due to CPA AB's negligence. (Tr. 79)

Applicant provided copies of his tax returns filed in February 2012. (Tr. 43-44, 47; AE D) Applicant's business is healthy and profitable, and he will be able to pay his IRS debt. (Tr. 59-60) Aside from his IRS and state tax issues, Applicant did not have any

other delinquent debts. There are no allegations that he has abused his trust funds or client accounts.

On November 16, 2012, Applicant filed amended tax returns. (AE C-H) Applicant's original and amended federal and state tax returns for 2008 to 2011 (AE C-G) are summarized as follows:

|       | Original State Owed | Amended State | Original Federal Owed | Amended Federal Owed |
|-------|---------------------|---------------|-----------------------|----------------------|
| 2008  | \$10,534            | \$792         | \$55,678              | \$11,586             |
| 2009  | \$0                 | \$6,928       | \$0                   | \$39,002             |
| 2010  | \$0                 | \$0           | \$5,708               | \$5,708              |
| 2011  | not filed           | \$4,319       | not filed             | \$19,841             |
| Total | \$10,534            | \$12,039      | \$61,386              | \$76,137             |

On December 17, 2012, Applicant paid the IRS \$21,004 and the state tax authority \$12,045. (AE J) These payments were in addition to the \$39,000 payment on February 21, 2012 (to pay off the 2006 IRS tax lien). Applicant's state tax debts are paid.

### Character Evidence

Applicant has been admitted to practice before several state and federal courts since 1990. (Tr. 18-19; SOR response at 5) He has tried numerous jury trials and argued appeals in state and federal courts. (SOR response at 5) He is responsible, reliable, dedicated, and diligent. (Tr. 84-86) He conscientiously and assiduously protects classified information. (Tr. 19-20, 83-87) His security manager described an instance where Applicant showed initiative in safeguarding classified information that was compromised by a party during litigation. (Tr. 82)

### 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 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 or] her 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 concern is under Guideline F (financial considerations).

### **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."

Applicant's financial history is documented in his SF 86, his SOR response, his statement at his hearing, and his hearing exhibits. Applicant failed to pay sufficient taxes in 2006. In December 2008, the IRS filed a federal tax lien against Applicant for \$27,911. By 2012, that 2006 tax debt had increased to \$38,135. He failed to file federal and state tax returns in 2008, 2009, and 2010 until 2012. The Government established the disqualifying conditions in AG ¶¶ 19(a), 19(c), and 19(g) 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.

Applicant's conduct in resolving his financial issues warrants full application of AG ¶¶ 20(a) and 20(b). Applicant's divorce, delays in payments from the federal courts, and his accountant's negligence had a profoundly negative affect on his financial circumstances and caused the delinquent tax debt and failure to timely file accurate tax returns. His financial problems were generated by circumstances largely beyond his control. There is no evidence that he acted irresponsibly.

The Applicant used his limited resources to resolve his 2006 tax debt, and he took reasonable actions to effectuate that plan. Applicant took all reasonable actions to rectify his financial condition. On February 21, 2012, he paid the IRS \$39,000, paying off the 2006 IRS tax lien. On December 17, 2012, Applicant paid the IRS \$21,004 and the state tax authority \$12,045, resolving his state tax debts. His payment of \$21,004 is a substantial, good-faith payment to address his \$76,137 federal tax debt.

Application of AG ¶ 20(c) is warranted. Applicant does not require formal financial counseling, as he understands what he must do to establish and maintain his financial responsibility. He utilizes highly-qualified accountants to ensure compliance with the tax laws. He maintained contact with his creditors,<sup>3</sup> and his financial problem is being resolved and is under control.

AG ¶ 20(d) is applicable. Applicant admitted responsibility for and took reasonable and responsible actions to resolve his financial problems, showing good faith.<sup>4</sup> AG ¶ 20(e) is not applicable.

In sum, Applicant fell behind on his federal taxes primarily because of his divorce and delays in receipt of federal court payments. CPA AB misled Applicant about filing

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<sup>3</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.

<sup>4</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)).

his tax returns and made significant errors in his tax returns. Applicant paid the federal tax lien. When he discovered that CPA AB was untrustworthy, he replaced him with a competent CPA and re-filed Applicant's taxes. He filed amended returns and paid his state tax debts. He has paid the IRS more than \$60,000 in 2012 to address his tax debts. It is unlikely that such problems will recur. His efforts are sufficient to fully mitigate financial considerations security concerns. Assuming, financial considerations concerns are not mitigated under AG ¶ 20, security concerns are mitigated under the whole-person concept, *infra*.

### **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 Guideline F in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under Guideline F, but some warrant additional comment.

Applicant is 50 years old. He is sufficiently mature to understand and comply with his security responsibilities. He deserves substantial credit for volunteering to support the U.S. Government as an employee of a contractor, and for his U.S. Marine Corps service from 1980 to 1986. His security manager provided evidence supporting approval of his access to classified information. There is every indication that he is loyal to the United States, his employer, and his clients. There is no evidence that he abuses alcohol or uses illegal drugs. His divorce, delays in payments from the federal courts, and CPA AB's negligence contributed to his financial woes. I give Applicant substantial credit for admitting responsibility for his federal tax lien in his SF 86, responses to DOHA interrogatories, and at his hearing.

Even though Applicant lacked financial resources because of his high maintenance payments to his former spouse, Applicant paid his state tax debt, and made a substantial, good-faith payment of over \$60,000 to resolve his federal tax debts. His actions to correct his tax records are appropriate and reasonable. The Appeal Board has addressed a key element in the whole-person analysis in financial cases stating:



In evaluating Guideline F cases, the Board has previously noted that the concept of meaningful track record necessarily includes evidence of actual debt reduction through payment of debts. However, an applicant is not required, as a matter of law, to establish that he has paid off each and every debt listed in the SOR. All that is required is that an applicant demonstrate that he has . . . established a plan to resolve his financial problems and taken significant actions to implement that plan. The Judge can reasonably consider the entirety of an applicant's financial situation and his actions in evaluating the extent to which that applicant's plan for the reduction of his outstanding indebtedness is credible and realistic. See Directive ¶ E2.2(a) (Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination.) There is no requirement that a plan provide for payments on all outstanding debts simultaneously. Rather, a reasonable plan (and concomitant conduct) may provide for the payment of such debts one at a time. Likewise, there is no requirement that the first debts actually paid in furtherance of a reasonable debt plan be the ones listed in the SOR.

ISCR Case No. 07-06482 at 2-3 (App. Bd. May 21, 2008) (internal citations and quotation marks omitted).

Applicant is an intelligent person, and he understands how to budget and what he needs to do to establish and maintain his financial responsibility. There is simply no reason not to trust him. Moreover, aside from his recent issues with his federal and state taxes, his finances were excellent. Those issues were due to the negligence of his accountants. Now that he has corrected his income tax returns, paid his state tax debt, and made a substantial, good-faith payment to the IRS, there is no reason to deny his security clearance. He has established a "meaningful track record" of debt repayment. I am confident he will fully pay his taxes and maintain 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 mitigated, and eligibility for access to classified information is granted.

## **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 and 1.b:   For Applicant

## **Conclusion**

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

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MARK HARVEY  
Administrative Judge