



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



In the matter of:

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ISCR Case No. 15-04344

Applicant for Security Clearance

**Appearances**

For Government: Aubrey M. De Angelis, Esq., Department Counsel

For Applicant: *Pro se*

02/14/2017

**Decision**

HARVEY, Mark, Administrative Judge:

Applicant's statement of reasons (SOR) alleges three federal tax liens totaling \$133,111 and three non-tax debts totaling about \$15,500. After filing his tax returns, he owed additional taxes for tax years 2005 through 2008. He currently owes the Internal Revenue Service (IRS) \$125,000 for federal income taxes. Financial considerations security concerns are not mitigated. Access to classified information is denied.

**History of the Case**

On March 26, 2014, Applicant completed and signed a Questionnaire for National Security Positions (SF 86) or security clearance application (SCA). (Government Exhibit (GE) 1) On February 26, 2016, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued an SOR to Applicant pursuant to Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry*, February 20, 1960; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), January 2, 1992; and the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), which became effective on September 1, 2006.

The SOR detailed reasons why the DOD CAF did not find under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for him, and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked. (Hearing Exhibit (HE) 2)

Specifically, the SOR set forth security concerns arising under the financial considerations guideline.

On April 27, 2016, Applicant responded to the SOR and requested a hearing. On July 20, 2016, Department Counsel indicated he was ready to proceed. On August 30, 2016, the case was assigned to me. On October 3, 2016, the Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing, setting the hearing for October 27, 2016. (HE 1) The hearing was held as scheduled.

Department Counsel offered nine exhibits; Applicant did not offer any exhibits; and all proffered exhibits were admitted without objection. (Tr. 14-22; GE 1-9) Applicant provided corrections to GE 4, an August 27, 2008 Office of Personnel Management personal subject interview (OPM PSI), and his corrections were accepted as changes to GE 4. (Tr. 14-22) On November 3, 2016, DOHA received the transcript of the hearing. Post-hearing delays were granted until December 12, 2016, and then until February 3, 2017, to permit Applicant to provide additional information about his finances. (HE 4) Applicant did not provide any post-hearing documents.

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

In Applicant's SOR response, he partially admitted the allegations in SOR ¶¶ 1.a, 1.b, 1.c, and 1.f. He admitted the allegations in SOR ¶¶ 1.d and 1.e. He also provided extenuating and mitigating information. Applicant's admissions are accepted as findings of fact.

Applicant is 59 years old, and he has worked as a tool engineer for 24 years. (Tr. 5, 33-34) In 1975, he graduated from high school, and in 1982, he received a bachelor of science degree. (Tr. 6) He has not served in the military. (Tr. 6) In 1982, he married, and his children are ages 25 and 29. (Tr. 7) He worked for one major defense contractor for 26 years and for another contractor for 2 years. (Tr. 46) He has not been unemployed for the previous 14 years. (Tr. 24) He described himself as dedicated to his family and a diligent employee who makes important contributions to his company. (Tr. 48-49) He has held a security clearance for 23 years, and there is no evidence of security violations. (Tr. 8)

### **Financial Considerations**

In 2002, Applicant failed to withhold enough from his salary for his income taxes, and when he filed his tax returns he learned he owed about \$8,000 to the IRS and \$1,500 to the state for income taxes. (Tr. 26) He believed his tax refunds in 2003 and 2004 were sufficient to pay his tax debt for tax year 2002. (Tr. 36) For tax year 2005, Applicant owed about \$5,000 in additional federal income taxes. (Tr. 27) Applicant owed taxes for 2002, 2005, 2006, 2007, and 2008. (Tr. 29, 32) He believed the 2002 taxes were resolved in his 2004 Chapter 7 bankruptcy discharge of his debts. (Tr. 38)

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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.

Applicant said he had an installment plan with the state one year ago to address a \$780 state tax debt for tax year 2015. (Tr. 29-30, 32, 38) He said he paid off his other state tax debts. (Tr. 30)

The IRS garnished Applicant's wages, and Applicant hired a law firm to negotiate resolution of his tax debt. (Tr. 31) The IRS ended the garnishment. (Tr. 31) Applicant said he took out a mortgage to pay his IRS debt. (Tr. 31) Initially Applicant made \$500 monthly payments to the IRS. (Tr. 31, 45) In 2015, he made some \$2,500 monthly payments to the IRS. (Tr. 31, 45) He was unable to continue making the \$2,500 payments. (Tr. 31) Applicant said two months before his hearing the IRS said the total owed to the federal government was \$125,000. (Tr. 32-33)

Applicant's annual salary is \$147,000, and his spouse's annual salary is \$40,000. (Tr. 33) His salary has been gradually increasing about one to two percent annually for the previous five years. (Tr. 33, 47) His spouse was unemployed for two or three years about 10 years ago. (Tr. 46) His mortgage is current, and he does not have any credit cards or car payments. (Tr. 41) He has \$209,000 in his 401(k) account. (Tr. 42)

The SOR alleges the following federal tax liens: ¶ 1.a for \$24,781 entered in August 2015; ¶ 1.b for \$39,107 entered in November 2014; and ¶ 1.c for \$69,223 entered in November 2014. The three tax liens are documented in his February 3, 2016 credit report. (GE 9)

SOR ¶¶ 1.d and 1.e allege two medical collection debts for \$85 and \$41. Applicant said his spouse's pay was garnished to pay these two debts, and she told Applicant the two medical debts are paid. (Tr. 39) Applicant is credited with mitigating these two debts.

SOR ¶ 1.f alleges a debt relating to a repossessed vehicle for \$15,483. Applicant cosigned for a vehicle that his daughter received. (Tr. 40) In 2013, the vehicle was totaled in an accident. (Tr. 40) He believed the debt was actually about \$7,000. (Tr. 41) Applicant did not make any payments to address this debt. (Tr. 41)

In sum, Applicant did not provide any documentary evidence showing the amount of his IRS debt, the years he underpaid his taxes, and the payments made under his payment plans.

### **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. Thus, nothing 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 (4th 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

### 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.

Applicant's history of delinquent debt is documented in his credit reports, SOR response, OPM PSI, and hearing record. 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." The record established 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;<sup>2</sup> and

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<sup>2</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].

(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.

The Appeal Board in ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013) concisely explained Applicant's responsibility for proving the applicability of mitigating conditions as follows:

Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in security clearance decisions is that articulated in *Egan, supra*. "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." Directive, Enclosure 2 ¶ 2(b).

No mitigating conditions fully apply; however, Applicant presented some important positive financial information. Applicant has worked for defense contractors for almost 30 years. His spouse was unemployed for a time, decreasing family income. He acknowledged his delinquent debts, and he said he intends to pay his debts. Aside from his federal tax debt, he only has one additional delinquent debt.

The negative financial considerations concerns are more substantial. Applicant said two months before his hearing the IRS said the total he owed to the federal government was \$125,000. He has owed federal income taxes for ten years with his delinquent taxes accruing from tax years 2005 to 2008. Applicant has described some steps to pay his taxes; however, he did not provide documents proving his past payments or compliance with payment plans.

Even in instances where an "[a]pplicant has purportedly corrected [his or her] federal tax problem, and the fact that [applicant] is now motivated to prevent such problems in the future, does not preclude careful consideration of [a]pplicant's security worthiness in light of [applicant's] longstanding prior behavior evidencing irresponsibility." See ISCR Case No. 15-01031 at 3 and note 3 (App. Bd. June 15, 2016) (characterizing "no harm, no foul" approach to an applicant's course of conduct and employed an "all's well that ends well" analysis as inadequate to support approval of access to classified information with focus on timing of filing of tax returns after receipt of the SOR).

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(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)).

Applicant failed to resolve his federal income tax over a 10-year period. He owes about \$7,000 to a creditor for a vehicle following an accident in 2013. His explanations are insufficient to fully mitigate financial considerations security concerns.

### **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.

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 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 59 years old, and he has worked as a tool engineer for 24 years. He has a bachelor of science degree. In 1982, he married, and his two children are ages 25 and 29. He has worked for defense contractors for 28 years. He has not been unemployed for the previous 14 years. He is dedicated to his family and a diligent employee who makes important contributions to his company. He has held a security clearance for 23 years, and there is no evidence of any security violations. Circumstances beyond his control adversely affected his finances including his spouse's unemployment for two or three years.

Applicant has owed federal income taxes since 2005. His current federal income tax debt is \$125,000. He has also owed \$7,000 for a vehicle since 2013. He mentioned several payment plans he had with the IRS; however, he did not provide documentary proof of any payments under those plans. When a tax issue is involved, an administrative judge is required to consider how long an applicant waits to file their tax returns, whether the IRS generates the tax returns, and how long the applicant waits after a tax debt arises to begin and complete making payments. The primary problem here is that Applicant has owed federal income taxes since 2005; he continues to owe substantial federal taxes;

and he has not provided any documentary proof of progress in the resolution of his federal income tax debt.<sup>3</sup>

It is well settled that once a concern arises regarding an applicant's security clearance eligibility, there is a strong presumption against the grant or renewal of a security clearance. See *Dorfmont*, 913 F. 2d at 1401. Unmitigated financial considerations concerns lead me to conclude that grant of a security clearance to Applicant is not warranted at this time. This decision should not be construed as a determination that Applicant cannot or will not attain the state of reform necessary for award of a security clearance in the future. With a track record of behavior consistent with his obligations, he may well be able to demonstrate persuasive evidence of his security clearance worthiness.

I have carefully applied the law, as set forth in *Egan*, Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. Financial considerations security concerns are not mitigated.

### 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.b, and 1.c:	Against Applicant
Subparagraphs 1.d and 1.e:	For Applicant
Subparagraph 1.f:	Against Applicant

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<sup>3</sup>The recent emphasis of the Appeal Board on security concerns arising from tax cases is instructive. See ISCR Case No. 14-05794 at 7 (App. Bd. July 7, 2016) (reversing grant of security clearance and stating, "His delay in taking action to resolve his tax deficiency for years and then taking action only after his security clearance was in jeopardy undercuts a determination that Applicant has rehabilitated himself and does not reflect the voluntary compliance of rules and regulations expected of someone entrusted with the nation's secrets."); ISCR Case No. 14-01894 at 2-6 (App. Bd. Aug. 18, 2015) (reversing grant of a security clearance, discussing lack of detailed corroboration of circumstances beyond applicant's control adversely affecting finances, noting two tax liens totaling \$175,000 and garnishment of Applicant's wages, and emphasizing the applicant's failure to timely file and pay taxes); ISCR Case No. 12-05053 at 4 (App. Bd. Oct. 30, 2014) (reversing grant of a security clearance, noting not all tax returns filed, and insufficient discussion of Applicant's efforts to resolve tax liens). More recently, in ISCR Case No. 14-05476 (App. Bd. Mar. 25, 2016) the Appeal Board reversed a grant of a security clearance for a retired E-9 and cited applicant's failure to timely file state tax returns for tax years 2010 through 2013 and federal returns for tax years 2010 through 2012. Before his hearing, he filed his tax returns and paid his tax debts except for \$13,000, which was in an established payment plan. The Appeal Board highlighted his annual income of over \$200,000 and discounted his non-tax expenses, contributions to DOD, and spouse's medical problems. See also ISCR Case No. 14-03358 at 3, 5 (App. Bd. Oct. 9, 2015) (reversing grant of a security clearance, noting \$150,000 owed to the federal government, and stating "A security clearance represents an obligation to the Federal Government for the protection of national secrets. Accordingly failure to honor other obligations to the Government has a direct bearing on an applicant's reliability, trustworthiness, and ability to protect classified information.").



## **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 or continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

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MARK HARVEY  
Administrative Judge