



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



In the matter of: )  
 )  
 [NAME REDACTED] ) ISCR Case No. 15-08578  
 )  
 Applicant for Security Clearance )

**Appearances**

For Government: Chris Morin, Esq., Department Counsel  
For Applicant: *Pro se*

10/13/2017

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**Decision**

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BORGSTROM, Eric H., Administrative Judge:

The Government did not establish security concerns under the criminal conduct and sexual behavior adjudicative guidelines. Applicant did not mitigate the security concerns about his financial problems and falsification. Eligibility for access to classified information is denied.

**Statement of the Case**

On June 9, 2016, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline J (criminal conduct), Guideline D (sexual behavior), Guideline F (financial considerations), and Guideline E (personal conduct).<sup>1</sup> Applicant responded to the SOR on July 13, 2016, and he elected a decision on the written record in lieu of a hearing. On August 11, 2016, Department Counsel submitted his file of relevant material (FORM) and provided a complete copy to Applicant. Applicant received the FORM on August 23, 2016. He was

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<sup>1</sup> The action was taken under Executive Order (EO) 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 implemented by the DOD on September 1, 2006.

afforded an opportunity to respond within 30 days of its receipt and to file objections to and submit material to refute, extenuate, or mitigate the security concerns. Applicant did not respond to the FORM. The case was assigned to me on June 2, 2017.

### **Procedural Issues**

On September 11, 2017, I issued an order informing both parties that although the SOR referenced the adjudicative guidelines implemented by the DOD on September 1, 2006, I would be applying the revised adjudicative guidelines (AG) effective as of June 8, 2017, pursuant to Security Executive Agent Directive 4 (SEAD 4). I also permitted the parties to supplement the record with additional evidence and argument. Both parties received my order, and neither party raised an objection or submitted additional documents.<sup>2</sup>

In the FORM, Department Counsel references FORM Items 1-3.<sup>3</sup> FORM Items 2-3 are admitted into evidence as Government Exhibits (GE) 2-3 without objection.

### **Findings of Fact**

The SOR alleges security concerns based upon Applicant's arrest for aggravated child molestation (SOR ¶¶ 1.a. and 2.a.); his failure to file his federal income tax returns for tax years 2009, 2011, and 2013 (SOR ¶ 3.a.); two delinquent debts (SOR ¶¶ 3.b.-3.c.); and a falsification on his security questionnaire (SOR ¶ 4.a.). In his response to the SOR, Applicant admitted the criminal charges but denied any criminal behavior. He admitted failing to file the returns and the two delinquent debts, and he denied deliberately falsifying his security clearance application (SCA).<sup>4</sup> After a thorough and careful review of the pleadings and exhibits, I make the following findings of fact:

Applicant is 51 years old. From 1984 to 2006, he served on active duty in the U.S. military, from which he honorably retired. He was unemployed from November 2006 to March 2007. After working for several months for a private company, he began working for a DOD contractor in August 2007. Since October 2007, he has been employed full time as an electronic technician for a different DOD contractor. From October 2010 to at least January 2015, he attended undergraduate-level courses. He was married in 1986 and divorced in 1995. He married his second wife in 1998 and has been separated since 2003. He has two adult children.<sup>5</sup>

On his January 2015 SCA, Applicant admitted that he had been charged with two counts of aggravated child molestation in June 2013 (SOR ¶¶ 1.a. and 2.a.). In his

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<sup>2</sup> Hearing Exhibit I includes my order and the parties' emails acknowledging receipt. Department Counsel reaffirmed its prior arguments in its emailed response.

<sup>3</sup> FORM Item 1 consists of the the SOR and Applicant's answer, which are pleadings and are included in the administrative record.

<sup>4</sup> I interpreted Applicant's admission that he "erred" on his SCA as a denial of a deliberate falsification.

<sup>5</sup> GE 2.

response to the SOR, Applicant claimed innocence and stated the charges were taken to trial twice, resulting in two hung juries and two mistrials. There is no further information in the record as to the alleged criminal conduct and sexual behavior security concerns.<sup>6</sup>

Applicant admitted that he failed to file his federal income tax returns for tax years 2009, 2011, and 2013 (SOR ¶ 3.a.). In his response to the SOR, he claimed to have paid restitution in 2013; however, he has not provided any documentary evidence demonstrating that he filed the missing income tax returns. Applicant attributed his failure to file his federal income tax returns to a terminated personal relationship in 2008 and his mother's illness in 2009.<sup>7</sup>

Applicant's May 2016 credit report lists two charged-off credit card accounts (SOR ¶¶ 3.b.-3.c.). Both accounts – totaling approximately \$25,760 – have been delinquent since December 2011. There is no documentary evidence of any payments or debt-resolution efforts with respect to these accounts. Applicant attributed these financial delinquencies to the legal expenses for his two trials.<sup>8</sup>

On his January 2015 SCA, Applicant omitted the two charged-off accounts set forth in SOR ¶¶ 3.b. and 3.c. He responded "NO" to the following questions:

### **Section 26 – Financial Record**

In the past seven (7) years, [have] you had bills or debts turned over to a collection agency?

In the past seven (7) years, [have] you had any account or credit card suspended, charged off, or cancelled for failing to pay as agreed?

Both accounts became delinquent in December 2011. Applicant admitted that he ceased paying these accounts due to his legal expenses. In his response to the SOR, he stated that he "erred when he did not accurately disclose [his] financial record," but he provided no further information.<sup>9</sup>

### **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 are to be used in evaluating an applicant's eligibility for access to classified information.

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<sup>6</sup> Response to SOR; GE 2.

<sup>7</sup> Response to SOR; GE 2.

<sup>8</sup> Response to SOR; GE 3.

<sup>9</sup> Response to SOR; GE 2-3.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, administrative judges apply the guidelines 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 national security eligibility will be resolved in favor of the 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 the 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 EO 10865 provides that adverse 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* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

## **Analysis**

### **Guideline J, Criminal Conduct**

The security concern for criminal conduct is set out in AG ¶ 30:

Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules, and regulations.

The guideline notes several conditions that could raise security concerns under AG ¶ 31. The Government showed only that Applicant was charged and not that he

engaged in criminal conduct. The record does not reflect the factual basis for the charges. None of the criminal conduct disqualifying conditions under AG ¶ 31 applies.<sup>10</sup>

#### **Guideline D, Sexual Behavior**

The security concern for sexual behavior is set out in AG ¶ 12:

Sexual behavior that involves a criminal offense; reflects a lack of judgment or discretion; or may subject the individual to undue influence of coercion, exploitation, or duress. These issues, together or individually, may raise questions about an individual's judgment, reliability, trustworthiness, and ability to protect classified or sensitive information. Sexual behavior includes conduct occurring in person or via audio, visual, electronic, or written transmission. No adverse inference concerning the standards in this Guideline may be raised solely on the basis of the sexual orientation of the individual.

The guideline notes several conditions that could raise security concerns under AG ¶ 13. The Government did not provide any evidence raising security concerns based on Applicant's sexual behavior. None of the disqualifying conditions under AG ¶ 13 applies.

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

The security concern for financial considerations is set out in AG ¶ 18:

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 or sensitive information. Financial distress can also be caused or exacerbated by, and thus can be a possible indicator of, other issues of personnel security concern such as excessive gambling, mental health conditions, substance misuse, or alcohol abuse or dependence. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

The guideline notes several conditions that could raise security concerns under AG ¶ 19. The following are potentially applicable in this case:

- (a) inability or unwillingness to satisfy debts;
- (c) a history of not meeting financial obligations; and

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<sup>10</sup> Assuming *arguendo* that the Government established a credible allegation under AG ¶ 31(b), there is "no reliable evidence to support that [Applicant] committed the offense." AG ¶ 32(c) applies.

(f) failure to file or fraudulently filing annual Federal, state, or local income tax returns or failure to pay annual Federal, state or local tax as required.

Applicant failed to file his federal income tax returns for tax years 2009, 2011, and 2013. He has two delinquent debts totaling approximately \$25,760, and they have been delinquent since 2011. The Government produced substantial evidence to raise the disqualifying conditions in AG ¶¶ 19(a), 19(c), and 19(f).

Conditions that could mitigate the financial considerations security concerns are provided under AG ¶ 20. The following 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, a death, divorce, or separation, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances;

(c) the individual has received or is receiving counseling for the problem from a legitimate and credible source, such as a non-profit credit counseling service; and there are clear indications that the problem is being resolved or is under control; and

(d) the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts.

There is no documentary evidence that Applicant filed the unfiled tax returns. Applicant has not provided any documentary evidence of debt-resolution efforts or to show that the circumstances leading to the unfiled returns and financial delinquencies are unlikely to recur. AG ¶ 20(a) does not apply.

Applicant attributed his financial delinquencies to his legal expenses. Although these circumstances may have been beyond his control, they did not prevent him from timely filing his income tax returns. More importantly, he has provided no documentary evidence that he filed the unfiled returns or of any debt-resolution efforts. AG ¶ 20(b) does not apply.

Applicant has not sought credit counseling. Nor is there evidence of his monthly income or expenses to establish that his financial problems are under control. AG ¶ 20(c) does not apply.

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.”<sup>11</sup> Applicant has provided no documentary evidence of any debt-resolution efforts nor evidence demonstrating Applicant’s financial responsibility. AG ¶ 20(d) does not apply. I find that Applicant did not mitigate the financial considerations security concerns.

### **Guideline E, Personal Conduct**

The concern under this guideline is set out in AG ¶ 15:

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 or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes. The following will normally result in an unfavorable national security eligibility determination, security clearance action, or cancellation of further processing for national security eligibility.

The guideline notes several conditions that could raise security concerns under AG ¶ 16. The following disqualifying condition is potentially applicable in this case:

(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 national security eligibility or trustworthiness, or award fiduciary responsibilities.

The SOR alleges that Applicant deliberately falsified his responses to Section 26 on his January 2015 SCA (SOR ¶ 4.a.). Both debts had been delinquent since 2011, thereby shifting the burden of persuasion to Applicant to present evidence to explain the omission.<sup>12</sup> Applicant was aware of these delinquent accounts because he admitted that he stopped paying these accounts due to his legal expenses. In his response to the SOR, Applicant merely stated that he “erred” but he provided no further evidence or explanation. Given his knowledge of his delinquent accounts, Applicant failed to provide a credible explanation as to why he omitted these accounts on his SCA. The Government established that Applicant deliberately falsified his responses to Section 22. AG ¶ 16(a) applies.

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<sup>11</sup> See ISCR Case No. 08-12184 at 10 (App. Bd. Jan. 7, 2010) (Good-faith effort to resolve debts must be evidenced by a meaningful track record of repayment).

<sup>12</sup> See ISCR Case No. 02-12586 at 2 (App. Bd. Jan. 25, 2005).

The following mitigating condition under AG ¶ 17 is potentially relevant:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts.

There is no evidence that Applicant made prompt, good-faith efforts to correct the omissions of his delinquent debts. AG ¶ 17(a) does not apply. Applicant has not mitigated the personal conduct security concerns arising from this falsification.

### **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(d):

(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. I have incorporated my comments under Guidelines J, D, F, and E and the factors in AG ¶ 2(d) in this whole-person analysis.

Applicant failed to file multiple federal income tax returns, and the two alleged debts have remained delinquent since 2011. He has provided no documentary evidence of any debt-resolution efforts or evidence demonstrating financial responsibility and good judgment. Furthermore, he deliberately omitted his delinquent debts on his SCA. I conclude Applicant did not mitigate the financial considerations and personal conduct security concerns.

### **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 J:

FOR APPLICANT

Subparagraph 1.a.:

For Applicant



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|---------------------------|-------------------|
| Paragraph 2, Guideline D: | FOR APPLICANT     |
| Subparagraph 2.a.         | For Applicant     |
| Paragraph 3, Guideline F: | AGAINST APPLICANT |
| Subparagraphs 3.a.-3.c.:  | Against Applicant |
| Paragraph 4, Guideline E: | AGAINST APPLICANT |
| Subparagraph 4.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 interests of national security to grant Applicant eligibility for a security clearance.<sup>13</sup> Eligibility for access to classified information is denied.

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Eric H. Borgstrom  
Administrative Judge

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<sup>13</sup> See SEAD 4, Appendix A, ¶¶ 1(d) and 2(c).