



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



In the matter of:

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ISCR Case No. 16-00370

Applicant for Security Clearance

**Appearances**

For Government: Alison O'Connell, Esq., Department Counsel

For Applicant: Leon J. Schacter, Esq.

05/03/2018

**Decision**

Curry, Marc E., Administrative Judge:

Although Applicant has made progress towards reducing his delinquencies, it is too soon to conclude that he has mitigated the financial considerations security concern given the nature of the delinquencies and the amount outstanding. Clearance is denied.

**Statement of the Case**

On June 13, 2016, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) to Applicant, detailing the security concerns under Guideline F, financial considerations, explaining why it was unable to find it clearly consistent with the national interests of national security to grant security clearance eligibility. The DOD CAF took the action 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 *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG) effective within the DOD on June 8, 2017.

On July 6, 2016, Applicant answered the SOR, admitting subparagraphs 1.a and 1.b, and denying subparagraphs 1.c through 1.p. He requested a hearing. On August 16, 2016, Department Counsel filed an amended SOR, adding subparagraphs 1.r through 1.cc. On September 25, 2016, Applicant answered the amended SOR, admitting subparagraphs 1.r through 1.z, and denying 1.aa through 1.cc.

The case was assigned to me on April 7, 2017. On September 18, 2017, DOHA scheduled the hearing for November 8, 2017. On November 3, 2017, Department Counsel moved to amend the SOR again, withdrawing subparagraphs 1.s through 1.v, and adding subparagraphs 1.dd through 1.mm. Later that day, Applicant's counsel e-mailed a denial of the motion to amend the SOR. On November 6, 2017, I granted the second motion to amend the SOR, and continued the hearing, rescheduling it to January 25, 2018, to allow Applicant an opportunity to prepare a response to the new allegations. Applicant admitted all of the allegations in the second amended SOR. (Tr. 8)

The hearing was held as rescheduled. I received 20 Government exhibits (GE 1 through GE 20), and 27 Applicant exhibits (AE A through AA). Also, I took administrative notice of two spreadsheets Department Counsel submitted, summarizing her argument (HE I and II), and a copy of Department Counsel's discovery letter mailed to Applicant on August 16, 2016. At the close of the hearing, I left the record open, at Applicant's counsel's request, to afford him the opportunity to submit additional exhibits. Within the time allotted, he submitted 23 additional exhibits that I marked as AE BB through AE XX. DOHA received the transcript on February 2, 2018.

### **Preliminary Rulings**

1. Applicant satisfied the debts alleged in subparagraphs 1.c through 1.i, 1.k through 1.q, and 1.bb through 1.cc. (Answer; HE I, HE II) I resolve these in Applicant's favor.

2. Although SOR pleadings need not be drafted with the specificity required for criminal pleadings, they must, at minimum, be specific enough to enable applicants to prepare a response. SOR subparagraph 1.j, which alleges a medical debt owed to an unidentified creditor does not meet this threshold. In light of Applicant's denial, I resolve this allegation in his favor.

### **Findings of Fact**

Applicant is a 41-year-old man with three children, ages 16, 14, and 12. He and his wife are separated. He is a high school graduate who has taken multiple college courses. From 1996 to 2004, Applicant worked for various state agencies and private companies as a corrections officer. (AE A at 4-6) Since then, he has been working as a federal government contractor providing corrections, law enforcement services and counseling in "hostile and austere environments" in support of U.S. government initiatives. (AE A at 3)

Applicant is highly respected by his colleagues. (AE B) According to a former supervisor, his morals and ethics are above reproach. (AE B at 3) He is active in multiple charitable organizations. (Tr. 46)

Applicant has a history of not timely filing his federal income tax returns or not paying his income tax debts on time, beginning in 2008 when he incurred late fees and penalties of \$400. (AE C1 at 4) He filed his 2010 income tax return in November 2012, exceeding the extension date the IRS had granted him by more than a year and incurring penalties of more than \$40,000. (AE C1 at 9) He was penalized approximately \$700 for paying his income taxes late for tax year 2011, and approximately \$800 of penalties for filing his 2012 income tax return late. (AE C1 at 12-15) Applicant's delinquent tax debts led to the issuance of multiple liens against his property between 2013 and 2015, as alleged in subparagraphs 1.a through 1.d.

In 2010, Applicant started a business and structured it as a limited liability company. (Tr. 138) Initially it was successful. At its peak, he employed 50 to 60 people and worked with 50 subcontractors. (Tr. 58) In 2011, Applicant procured a contract to provide security for convoys moving supplies through a war zone and another contract to provide law enforcement advice to foreign nationals in the same war zone. In 2012, the federal program that managed such contracts came under Congressional scrutiny. (Tr. 52, 83) During this period, the government temporarily stopped paying the contractors. Consequently, Applicant lost more than a million dollars of revenue. Although Applicant attempted to recoup his losses through settlement negotiations and litigation, his efforts have been unsuccessful, thus far. (Answer at 2)

Subsequently, Applicant's business and personal finances began worsening, as he struggled to pay overhead expenses and meet payroll. Moreover, at or about this time, Applicant experienced serious medical problems that required several major surgeries. (Answer at 3) Faced with dissolving the company or filing for bankruptcy protection, Applicant chose to keep his company afloat by paying corporate expenses using his employees' money held in trust fund accounts (Tr. 63; Tr. 124) By 2015, Applicant owed approximately \$1.5 million of delinquent federal personal and corporate income taxes for tax years 2012 through 2015. (Amended Answer at 1) This amount included multiple late fees and civil penalties, as alleged in SOR subparagraphs 1.ee - 1.mm. (Answer to Amended SOR at 1); Answer to Second Amended SOR at 1-2).

In addition to not paying his employees' federal taxes, Applicant did not pay taxes held in trust and owed to his employees' respective states of residence. (Tr. 121) This generated a debt of approximately \$200,000 to four state revenue authorities, as alleged in subparagraphs 1.c, and 1.w through 1.aa. (Answer to Amended SOR at 2-3; Tr. 121)

Applicant incurred \$140,000 of commercial debt and medical bills, as alleged in subparagraphs 1.e through 1.i, 1.k through 1.q, 1.bb and 1.cc. By 2015, Applicant's financial situation began improving, enabling him to focus on debt reduction. He either satisfied or disputed all of the commercial and medical debts. (See Preliminary Ruling,

above) In addition, in September 2015, he began to make \$15,000 monthly payments towards the satisfaction of his corporate income tax through an installment plan. (AE M)

By September 2016, Applicant had made approximately \$225,000 of federal and state income tax payments. (Tr. 125) Applicant's business experienced another financial downturn after difficulties with another one of his government contracts led to major revenue loss. (Tr. 70, 131) This rendered him unable to continue complying with the IRS installment agreement. Applicant's efforts at renegotiating the installment agreement were unsuccessful.

Since January 2017, Applicant has been making sporadic payments towards his federal income tax delinquency, but they have been "nowhere near the \$15,000 payments" that he was making before his most recent business downturn. (Tr. 126) Applicant has satisfied state revenue tax delinquencies, alleged in subparagraphs 1.c, totaling \$4,267, and 1.y, totaling \$687. (Answer at 9: AE LL) He satisfied a \$17,537 state tax lien, as alleged in 1.x, through a wage garnishment. (AE X)

In February 2016, Applicant completed a financial management course. (AE R) He has also retained a company that helps individuals and businesses resolve their tax liabilities. (AE Z) Through this company, Applicant is negotiating an installment agreement and seeking an abatement of some of the penalties he incurred. Per a representative from the company, all of Applicant's income tax filings are up to date. He owes the IRS approximately \$1.2 million, and a state revenue authority \$14,500. His business owes the IRS approximately \$1.3 million, and approximately \$54,000 to two state revenue authorities. (AE BB) Applicant's business no longer employs anyone; therefore, he has not been generating any employee payroll tax liability. (Tr. 126) In 2016, he earned approximately \$62,000. (AE BB) During the peak years of his business, he earned up to \$250,000 annually. (Tr. 119)

## **Policies**

The U.S. Supreme Court has recognized the substantial discretion the Executive Branch has in regulating access to information pertaining to national security, emphasizing that "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). 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 required to be considered 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 overall adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(a), 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.” In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . .” The applicant has the ultimate burden of persuasion to obtain a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk that 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. 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* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Under the whole-person concept, the administrative judge must consider the totality of an applicant’s conduct and all relevant circumstances in light of the nine adjudicative process factors in AG ¶ 2(a).<sup>1</sup>

## **Analysis**

### **Guideline F: Financial Considerations**

The security concerns about financial considerations are set forth 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

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<sup>1</sup> The factors under AG ¶ 2(a) are as follows:

(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.

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 financial problems triggers the application of disqualifying conditions AG ¶ 19(a), "inability to satisfy debts," AG ¶ 19(c), "a history of not meeting financial obligations" and AG ¶ 19(f), ". . . failure to pay annual federal, state, or local income tax returns as required."

The following mitigating conditions are potentially applicable:

AG ¶ 20(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.

AG ¶ 20(c) the individual has received or is receiving financial 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;

AG ¶ 20(d) the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts; and

AG ¶ 20(g) the individual has made arrangements with the appropriate tax authority to file or pay the amount owed and is in compliance with those arrangements.

Applicant's financial problems occurred after his business began struggling at or about the time he suffered a medical condition that required multiple surgeries. Once his business improved, Applicant began paying his commercial debts and addressing his tax delinquencies, contacting the IRS and relevant state taxing authorities, and developing installment agreements. He made significant progress at debt reduction before another major business downturn compelled him to stop making payments towards his federal income tax installment plan.

Conversely, Applicant's history of filing his income tax returns late and failing to pay them on time, incurring penalties, predated his business struggles. Moreover, Applicant's voluntary, intentional decision to pay his other creditors and his overhead expenses rather than the money held in escrow for his employees' taxes was a serious transgression. Specifically, payroll taxes withheld from one's employees does not belong to the company or the employees. Rather, it belongs to, and is held in trust for the government. (26 U.S. Code § 6672) Using this money for purposes that serve the business rather than remitting the money to the government constitutes a violation of the trust the government has that the money that the employer holds in escrow will be paid for the respective employees.

(See, *Godfrey v. U.S.*, 748 F. 2d 1568, 1575-1576 (Fed. Cir. 1984)) Consequently, although significant circumstances beyond Applicant's control contributed to his financial problems, he did not act responsibly under the circumstances, rendering AG ¶ 20(b) only partially applicable.

Applicant has satisfied all of his commercial delinquencies alleged in the SOR totaling in excess of \$140,000, together with the state tax delinquencies alleged in 1.c, 1.x, and 1.y. Although he has retained a company to help him either pay or otherwise resolve his tax delinquency, there is no evidence that this company is providing counseling services. AG(c) does not apply.

Applicant has filed all of his income tax returns, and his tax consultant is negotiating a plan to satisfy his tax debt. AG ¶ 20(g) applies. Applicant's efforts at debt reduction before his second business downturn and his retaining of a tax consultant constitute good-faith efforts to resolve his debts, triggering the first prong of AG ¶ 20(d). Although Applicant's tax consultant is working on a debt reduction plan, no plan is currently in place. Consequently, AG ¶ 20(d) is only partially applicable.

### **Whole-Person Concept**

Applicant deserves credit for his community involvement. The struggles of his business were beyond his control. However, his decision to forego paying income and payroll taxes has extremely serious security significance as it indicates that he may "have a problem abiding by well-established rules and regulations." (ISCR Case No. 15-01031 (June 15, 2016) at 4)

Applicant has made demonstrable progress in satisfying delinquencies, satisfying all of the commercial delinquencies and four of the state income tax delinquencies. However, his remaining tax delinquencies total more than \$2.5 million, and he is still in the process of developing a plan to resolve them. Consequently, the nature and seriousness of the problem, together with the length of time that the income tax delinquencies have been outstanding and their recurrent nature, outweigh the positive security significance of the favorable evidence and the circumstances that were beyond Applicant's control. Under these circumstances, I conclude Applicant has failed to mitigate the 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 F:	AGAINST APPLICANT
Subparagraphs 1.a – 1.b:	Against Applicant
Subparagraphs 1.c – 1.q:	For Applicant

Subparagraph 1.r:	Against Applicant
Subparagraphs 1.s-1.v:	WITHDRAWN
Subparagraph 1.w:	Against Applicant
Subparagraphs 1.x-1.y:	For Applicant
Subparagraph 1.z:	Against Applicant
Subparagraphs 1.aa-1.cc:	For Applicant
Subparagraphs 1.dd-1.mm:	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. Eligibility for access to classified information is denied.

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Marc E. Curry  
Administrative Judge