



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 17-00378

**Appearances**

For Government: Benjamin Dorsey, Esq., Department Counsel

For Applicant: *Pro se*

07/17/2018

**Decision**

Curry, Marc E., Administrative Judge:

Neither Applicant's 2013 security clearance application responses, nor the information he provided on a 2013 bankruptcy petition generated any security concern. Conversely, Applicant's remaining delinquencies generate financial considerations security concerns that he failed to mitigate. Clearance is denied.

**Statement of the Case**

On March 29, 2017, 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, and Guideline E, personal conduct, explaining why it was unable to find it clearly consistent with the 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 *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG) effective within the DOD on September 1, 2006.

On April 18, 2017, Applicant answered the SOR, admitting all of the allegations except subparagraphs 1.c through 1.e, and subparagraph 1.n. He requested a hearing, whereupon the case was assigned to me on December 4, 2017. On February 21, 2018, the Defense Office of Hearings and Appeals issued a notice of hearing, scheduling Applicant's case for March 7, 2018. The hearing was held as scheduled. I received ten Government exhibits (GE 1 – GE 10) and one Applicant's exhibit (AE A). At the close of the hearing, I extended the record, at Applicant's request, for him to submit additional exhibits. Within the time allotted, he submitted five exhibits that I marked and received as AE B through AE D. The transcript (Tr.) was received on May 14, 2018.

While this case was pending a decision, Security Executive Agent Directive 4 was issued establishing National Security Adjudicative Guidelines (AG) applicable to all covered individuals who require initial or continued eligibility for access to classified information or eligibility to hold a sensitive position. The AG supersede the adjudicative guidelines implemented in September 2006 and are effective for any adjudication made on or after June 8, 2017. Accordingly, I have adjudicated Applicant's security clearance eligibility under the new AG.

### **Findings of Fact**

Applicant is a 52-year-old single man with one child, age 19. He was married from 2008 to 2012. The marriage ended in divorce. His child is from a previous relationship. Applicant is a high school graduate who has earned professional certifications in the fields of communications and fiber optics. (Tr. 19) Since November 2015, he has been working for a defense contractor. He has held a security clearance since 2007. (GE 1 at 28)

Applicant has been struggling to make ends meet since approximately 2007 when his monthly mortgage payment on the home he purchased in 2007 increased by \$600. At or about this time, he was working a temporary job that paid a lower salary than the salary that he earned when he purchased the home. (Tr. 25) By December 2008, Applicant had stopped making mortgage payments. (GE at 10 at 1)

In an attempt to avoid foreclosure, Applicant filed for bankruptcy protection multiple times between 2009 and 2014. Specifically, he filed Chapter 13 bankruptcy protection in August 2009, as alleged in subparagraph 1.f. (Answer at 2) Later that year, he withdrew the petition. (Ex. 3 at 2) In May 2010, Applicant filed for Chapter 7 bankruptcy protection, as alleged in subparagraph 1.g. The court dismissed the case after Applicant failed to make the required filings. (GE 4 at 3)

Applicant's trouble keeping up with his mortgage payments was compounded when he was laid off from his job in December 2013. He was subsequently unemployed or underemployed for the next 11 months. (Answer at 1; Tr. 23)

By 2014, Applicant's mortgage payments were more than \$120,000 past due, as alleged in SOR subparagraph 1.k. (Answer at 2) In July 2014, he filed for Chapter 13 bankruptcy protection, as alleged in subparagraph 1.h. The petition was dismissed in

August 2014. (Answer at 2) In November 2014, Applicant filed a petition for Chapter 13 bankruptcy, together with a motion to pay the court application fee in installments. (GE 5 at 11) He withdrew the petition in December 2014 after the court denied the installment fee motion.

In 2016, Applicant's mortgage went into foreclosure. (Answer at 2) He filed for bankruptcy protection again that year, and the court again dismissed the pleading. (Answer at 2) The foreclosure process was completed in early 2017, and Applicant moved from the home in August 2017. (Tr. 29) He owes no deficiency. (Tr. 29)

Applicant did not file his federal income tax returns timely from tax years 2012 to 2014, as alleged in subparagraph 1.a. He did not file his state income tax returns timely for tax years 2013 and 2014, as alleged in subparagraph 1.b. He attributes his failure to file his tax returns timely to an inability to afford to retain an accountant. (Answer at 1; Tr. 22) By February 2016, he had filed his federal and state income tax returns for 2013 and 2014. (AE C and AE D) He filed his 2012 federal and state income tax returns in March 2018, after the hearing.<sup>1</sup> (AE B)

As of February 2017, he owed approximately \$4,800 in delinquent federal income taxes. (GE 2 at 4) Applicant contends that he has been making \$100 monthly payments towards the satisfaction of this debt since approximately December 2017. (Tr. 36) He provided no corroborating documentary evidence.

SOR subparagraph 1.d alleges that Applicant owed \$2,200 in delinquent state income taxes for tax years 2013 and 2014, as of March 2017. Applicant denies this allegation. Per his 2013 and 2014 tax returns, he owed \$485 in 2013, and was entitled to a \$767 refund in 2014. (AE C at 10; AE D at 12)

In 2012, a state tax lien was entered against Applicant's property for delinquent income taxes totaling \$1,072. (Answer at 2) The year that the tax lien covered is unknown from the record. Applicant paid this debt through automatic withdrawals from his paycheck. (Answer at 2)

Applicant owes \$513 to a credit card company, as alleged in subparagraph 1.l He contends that he is making payments toward the debt's satisfaction, but provided no supporting documentary evidence. (Tr. 30)

Applicant owes \$244 to a creditor alleged in SOR subparagraph 1.m. He acknowledges the debt and is attempting to contact the creditor. Thus far, his efforts have been unsuccessful.

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<sup>1</sup> I am personally acquainted with Applicant's accountant who prepared his income tax returns. Because Applicant did submit these returns until after the hearing, I was unaware of this mutual acquaintance. My acquaintance with Applicant's accountant has not affected my ability to fairly and impartially adjudicate this case.

Subparagraph 1.n alleges that Applicant owes \$1,952 in delinquent child support payments. Applicant denied this allegation and provided confirmation from the state office of child support enforcement that he owed no delinquency. (AE A)

Subparagraph 2.a alleges that Applicant falsified his security clearance application, completed in February 2013, when he answered “no” to the question asking whether he had either failed to file or pay his income taxes within seven years before completing the application. None of the tax returns that would later become the subject of the SOR were due when Applicant completed his security clearance application.

Subparagraph 2.b alleges that Applicant falsified the bankruptcy petition completed in January 2016 when he answered “no” in response to the question of whether he had filed a bankruptcy petition in the previous eight years. Applicant denies the allegation. There is no record evidence of any intent to deceive, and there is no record evidence that Applicant was ever confronted about this omission.

### **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(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.” 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>2</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 questions about an individual’s reliability, trustworthiness and ability to protect classified information.

Applicant owes no child support delinquency, therefore, I resolve subparagraph 1.n in his favor. Conversely, Applicant has a lengthy history of failure to pay his debts, including his home mortgage and his federal and state income taxes. AG ¶ 19(a), “inability to satisfy debts,” AG ¶ 19(c), “a history of not meeting financial obligations” and AG ¶ 19(f), “. . . failure to file pay annual federal, state, or local income tax returns as required,” apply.

The following mitigating conditions are potentially applicable:

AG ¶ 20(a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not

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<sup>2</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.

cast doubt on the individual's current reliability, trustworthiness, or good judgment;

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; and

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

Applicant attributes his financial problems to an escalation of his monthly mortgage payment in 2007, compounded by a lengthy unemployment between 2013 and 2014. These factors constitute circumstances beyond his control, triggering the first prong of AG ¶ 20(b).

Applicant not only failed to pay his income taxes for three consecutive years; he failed to file his tax returns during the same period. An excusable inability to pay income taxes does not mitigate one's failure to submit income tax returns. (ISCR Case No. 16-01726 (App. Bd. Feb. 28, 2018) at 5) In fact, the failure to submit income tax returns, alone, can be grounds for a security clearance denial. (*Id.*) Moreover, a state tax lien was entered against Applicant's property in 2012, the year before he was laid off from his job.

Applicant has filed his tax returns alleged in the SOR. He satisfied the 2012 tax lien through a wage garnishment. Conversely, he just filed his 2012 tax returns after the hearing. Moreover, although it appears that he has reduced the federal and state income tax delinquencies, judging by his tax returns, he provided no evidence supporting his contention that he has been paying them steadily through monthly payment plans.

Applicant's failure to provide evidence documenting his assertion that he has either satisfied, or is making payments towards the satisfaction of the remaining SOR debts is similarly problematic. Considering the lack of documentary evidence supporting debt payments, the length of the financial problems, and their nature and severity, I conclude that none of the mitigating conditions, other than the first prong of AG ¶ 20(b) applies.

### **Guideline E: Personal Conduct**

Under this guideline, "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."

None of the tax returns that would later become the subject of the SOR were due when Applicant completed his security clearance application in 2013. Therefore, he was being truthful when he answered "no" to the portion of Section 26, asking if he had ever failed to file or pay his federal or state income taxes.

Applicant had filed for bankruptcy protection twice when he completed the security clearance application. Consequently, his omission of these two bankruptcy filings from the application and his "no" answer on the 2016 bankruptcy petition in response to the question of whether he had previously filed for bankruptcy protection, raises the question of whether the following mitigating condition applies under AG ¶ 16(a):

(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.

There is no record evidence establishing that Applicant deliberately intended to mislead when he completed his security clearance application, nor is there any evidence he was ever confronted with the omissions. In light of his denial, I conclude that Applicant's omissions do not generate any personal conduct security concerns.

### **Whole-Person Concept**

Given the ongoing nature of Applicant's financial problems, their nature and severity, and the lack of concrete evidence documenting his progress at resolving them, it is too soon to conclude Applicant has mitigated the security concern.

### **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.m:	Against Applicant
Subparagraph 1.n:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraphs 2.a-2.b:	For 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