



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



In the matter of: )  
 )  
 ) ISCR Case No. 18-00749  
 )  
Applicant for Security Clearance )

**Appearances**

For Government: Aubrey M. De Angelis, Esq., Department Counsel  
For Applicant: *Pro se*

10/17/2018  
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**Decision**  
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GLENDON, John Bayard, Administrative Judge:

This case involves security concerns raised under Guideline F (Financial Considerations). Applicant has not mitigated those security concerns. Eligibility for access to classified information is denied.

**Statement of the Case**

On March 26, 2018, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent Applicant a Statement of Reasons (SOR) alleging security concerns under Guideline F. The DOD CAF acted under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended (Exec. Or.); DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) promulgated in Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (December 10, 2016), for all adjudicative decisions on or after June 8, 2017.

Applicant received the SOR on April 3, 2018, and responded on April 17, 2018. He requested a hearing before an administrative judge. The case was assigned to me on

June 15, 2018. DOHA issued a Notice of Hearing on June 21, 2018, scheduling the hearing on August 8, 2018. I convened the hearing as scheduled. The Government offered seven documents into evidence, which I marked as Government Exhibits (GE) 1-7. These exhibits were admitted into evidence without objection. Applicant offered four documents, which I marked as Applicant Exhibits (AE) A-D. Applicant's exhibits were also admitted into the record without objection. I held the record open until August 28, 2018, for both parties to submit post-hearing exhibits.

On August 22, 2018, Department Counsel submitted 17 documents consisting of 18 pages, which I have marked as GE 8-24. These exhibits are documents Applicant submitted to the investigator who conducted Applicant's background interview on July 27, 2017. Applicant had no objection to the Government's evidence. I admitted these exhibits into the record. Applicant submitted no additional evidence after the hearing. DOHA received the transcript of the proceedings (Tr.) on August 23, 2018.

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

In his response to the SOR, Applicant admitted all of the allegations, except SOR ¶ 1.a regarding his failure to file tax returns. His admissions are incorporated in my findings of fact.

Applicant is a 50-year-old employee of a defense contractor. He has been employed by this company as a technician since February 2017. He has been continuously employed since at least 2002, except for a period of unemployment from January to October 2015. He worked for two companies at the same time from June 2011 through April 2014. In 1986 he earned a General Equivalency Diploma, or GED, and in 1985, he was awarded an associate's degree. He never served in the military.

Applicant married in 1997 and separated in 2007 or 2008. (Tr. 28.) He and his wife have not divorced. They have three adult children between the ages of 18 and 25. Appellant also has a stepchild. After the separation, Applicant paid child support of \$1,400 per month until 2013. (Tr. 30.)

In or about the time of his separation from his wife, Applicant began to experience financial difficulties. He had purchased a house in 2004 or 2005 with substantial debt. He lived there with his family for about a year or two. Then he rented it. After the separation, he could not afford to pay for the house without his wife's assistance. In 2008, he lost the house in a foreclosure. (Tr. 27, 29.)

**SOR ¶ 1.a: Failure to file federal and state tax returns in 2010-2012.** In his July 27, 2017 background interview, Applicant stated that he had not filed his tax returns for 2010-2012, but he thought his wife had done so. (GE 4 at 3-4.) He contradicted himself by testifying that he had filed his tax returns as required for these years. (Tr. 31-33.) At

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<sup>1</sup> Applicant's personal information is extracted from his security clearance application, dated August 10, 2017 (GE 1), unless otherwise indicated by a parenthetical citation to the record.

the hearing, Applicant blamed his confusion on the fact that his wife used to take care of filing their tax returns. When they separated, he was unclear what, if anything, was filed. For tax year 2012, he testified that he started to self-prepare and file his own returns. (Tr. 34.)

On April 11, 2018, Applicant sought clarification from the IRS. He asked for a tax return transcript for the years 2010 and 2011. (Tr. 34-35; response to SOR, Exhibit A.) The IRS advised Applicant that it had no record of any tax returns filed for those two years. (Tr. 35.) Applicant presented no evidence that substantiates his belief that he, or perhaps his wife, filed his 2010 and 2011 federal tax returns.<sup>2</sup> Applicant's testimony about the IRS response to his tax return transcript request and his admission in his background interview establish the Government's allegation that Applicant failed to file his federal tax returns in 2010 and 2011.

Applicant also provided an undated, unsigned copy of a federal tax return for tax year 2012, which he prepared on his computer. At the hearing, he claimed that he filed this tax return, which was in the record as attachment A to his response to the SOR, and paid the taxes due in the amount of \$6,146. (Tr. 36-37.) I provided him with additional time to provide proof of filing and payment of the taxes due. He submitted nothing further to support his claims. I find that in 2012, he continued his pattern of failing to file his federal tax returns.

With respect to his state tax returns, Applicant testified that he believed he filed his state tax returns in 2010 and 2011 using the services of a tax preparer. (Tr. 43-44.) He provided no substantiating documentation. He testified that he began to use a computer program in 2012 to self-prepare his state tax returns as well as his federal returns. (Tr. 43.) He did not produce a copy of his 2012 state tax return. Also, he has not asked his state tax authorities to provide documentation confirming his tax filings in tax years 2010-2012. I find that he failed to file his state income tax returns in 2010, 2011 and 2012, just as he failed to file his federal income tax returns in those years.

**SOR ¶¶ 1.c and 1.d: Two federal tax liens, dated 2014 and 2011, in the amounts of \$43,767 and \$4,638, respectively.** The IRS filed two tax liens against Applicant, one in 2011 for \$4,638 (SOR ¶ 1.d), and a second in 2014 for \$43,767 (SOR ¶ 1.c). (GE 2.) Applicant testified that he believed he owes the IRS about \$43,000 for tax years 2010 and 2011. He does not know why he owes so much in taxes, but he suggests that it might be due to working two jobs at one point. (Tr. 42-43; GE 1 at 14-15.)

He testified further that he hired a tax consultant in 2016 and paid him \$5,000 to "redo" his 2010 and 2011 federal tax returns to make sure they were accurate and to submit an offer in compromise to the IRS to settle the debt. (Tr. 39.) He met with the advisor twice in 2016 and has not heard further from him. He believed that the advisor

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<sup>2</sup> Applicant submitted at the hearing an IRS Wage and Tax Statement for the year 2010, but that document provides no information about a tax filing for that year. It does indicate that he received an early distribution from a retirement account in the gross amount of \$23,244. (AE A.)

had taken care of his tax problem at that time because he heard nothing further from the IRS. (Tr. 41.) Applicant testified that he tried to reach the IRS in 2018, but was unsuccessful. (Tr. 65.) He admitted at the hearing that he did not have a plan to pay his substantial tax debt. (Tr. 43.) Applicant has not resolved his federal tax debts.

**SOR ¶¶ 1.b and 1.e: State tax lien and garnishment.** In 2012 and 2013, Applicant's wages were garnished by his state for unpaid taxes. The garnishment stopped when he was laid off in April 2013. The state garnished his wages for unpaid 2009 taxes in the amount of at least \$1,558. (GE 3.) His taxes were garnished again by the state in 2014. At that point, he owed the state in excess of \$16,000 for tax years 2010-2013. (Tr. 44, 46.) Through the wage garnishment, he pays the state \$301 each pay period. (Tr. 45; response to SOR, Exhibit B.) According to a state tax form, dated February 22, 2017, Applicant's state tax debt was about \$13,800 at that time. (GE 8.) He believes he presently owes about \$6,000. (Tr. 45.) This debt is being involuntarily resolved through garnishment.

**SOR ¶ 1.f: Auto loan charged off in the amount of \$8,664.** In 2012, Applicant opened a car loan account with a bank to purchase a vehicle. He defaulted on the loan about a year later (GE 7 at 2), and the lender repossessed the vehicle. (Tr. 50-51.) The lender charged off the portion of the loan that was not paid through the repossession. Applicant initially thought that the repossession resolved the debt. (Tr. 51.) In his background interview, he learned that he still owed the lender \$8,664 and that this debt was on his credit report. He has done nothing to pay this debt. (Tr. 51.) This debt is not resolved.

**SOR ¶¶ 1.g through 1.n: Seven collection accounts and one medical account, totaling about \$7,500.** According to the Government's credit reports in the record, Applicant failed to pay eight accounts during the period of about July 2013 through July 2017. (GE 5, 6, and 7.) Applicant was questioned about these debts during his July 2017 background interview, and he was unable to provide much information about them. (GE 4 at 4-7.) At the hearing, he explained that he did not have the necessary funds to pay these bills at that time. (Tr. 55.)

After receiving the SOR, Applicant borrowed funds from his retirement account and paid each of these debts. He provided documentation to establish that each debt was paid. (Response to the SOR, Exhibits G, H, J, K, L, and N.) He made these payments during the period April 6-17, 2018, after his receipt of the SOR and before he submitted his response. These debts were resolved, but only after he was advised that his security clearance was in jeopardy.

### **Policies**

"[N]o 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 applicants 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 § 2.

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, an administrative judge applies these guidelines 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 and 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 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.

Clearance decisions must be made “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance 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. 15-01253 at 3 (App. Bd. Apr. 20, 2016).

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 burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531.

## Analysis

### Guideline F (Financial Considerations)

The security concern under this guideline is set out in AG ¶ 18:

Failure 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 . . . . An individual who is financially overextended is at greater risk of having to engage in illegal or otherwise questionable acts to generate funds . . . .

This concern is broader than the possibility that a person might knowingly compromise classified information to raise money. It encompasses concerns about a person's self-control, judgment, and other qualities essential to protecting classified information. A person who is financially irresponsible may also be irresponsible, unconcerned, or negligent in handling and safeguarding classified information. See ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012).

Applicant's admissions and the documentary evidence in the record establish the following potentially disqualifying conditions under this guideline: AG ¶ 19(a) ("inability to satisfy debts"); AG ¶ 19(c) ("a history of not meeting financial obligations"); and AG ¶ 19(f) (failure to file . . . or failure to pay annual Federal or state . . . income tax as required").

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 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 indication 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 creditors or otherwise resolve debts; and

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

AG ¶ 20(a) is not established. Even though Applicant's federal and state tax debts date back six to eight years, as does his failure to file his federal and state income tax returns, his tax debts remain outstanding and his tax returns have not yet been filed. His auto-loan default and repossession was a number of years ago, but his indebtedness on the post-repossession deficiency is also continuing. Applicant's additional eight debts demonstrate that his financial irresponsibility was not infrequent. His payments of these debts after receiving the SOR provide limited mitigation weight. ISCR Case No. 16-03122 at 4 (App. Bd. Aug. 17, 2018). The circumstances surrounding Applicant's behavior, as set forth in the SOR allegations, cast serious doubt about his current reliability, trustworthiness and judgment. As the DOHA Appeal Board has observed, "A person who fails repeatedly to fulfill his or her legal obligations does not demonstrate the high degree of good judgment and reliability required of those granted access to classified information." See, e.g., ISCR Case No 14-04437 at 3 (App. Bd. Apr. 15, 2016).

AG ¶ 20(b) is partially established. Applicant blames his failure to file his tax returns during the period 2010 to 2012 on his separation from his wife, which is arguably a condition beyond his control that may have caused this problem. However, the fact that he claims that he started self-preparing his returns for 2012, which he could have done earlier, suggests that his separation was not a serious condition beyond his control. Also, Applicant did not establish that he indeed filed his 2012 return and paid the taxes due for that year, and the record evidence of the tax liens reflects a pattern of Applicant's failure to pay his taxes. He has not, and cannot reasonably, blame his indebtedness on his 2012 car loan on his 2007-2008 separation. Applicant's failure to address his old federal tax obligations at this point and his car loan deficiency evidence a serious lack of responsible conduct.

AG ¶ 20(c) is not established. There is no documentary evidence in the record that Applicant has received any counseling from any source, including his claim that he hired and paid a tax counselor in 2016 to help him "redo" his 2010 and 2011 tax returns and seek a compromise on his tax debt with the IRS. Applicant's testimony on this point is not credible. Also, there is no evidence that Applicant's large, federal tax indebtedness and his deficiency on the repossessed car loan are being resolved or are otherwise under control. Similarly, there is no corroborating evidence to support Applicant's claim that he hired a tax preparer to help him file his state tax returns for 2010 and 2011.

AG ¶ 20(d) is partially established with respect to his collection accounts. The fact that his payments on his state tax debt are being made through a garnishment does not establish that these payments are being made in good faith. ISCR Case No. 16-03122 at 4 (App. Bd. Aug. 17, 2018). Moreover, Applicant has produced no evidence to show that he has initiated a good-faith effort to repay his large federal tax indebtedness or his car loan.

AG ¶ 20(g) is not established with respect to his federal tax returns or indebtedness. The fact that his wages are being garnished by the state tax authorities undercuts the mitigating value of his payments of his back taxes to the state because these payments are involuntary.

### **Whole-Person Concept**

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. In applying the whole-person concept, an 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 and applying the adjudicative factors in AG ¶ 2(d).<sup>3</sup>

I have incorporated my comments under Guideline F in my whole-person analysis and applied the adjudicative factors in AG ¶ 2(d). After weighing the disqualifying and mitigating conditions under Guideline F, and evaluating all the evidence in the context of the whole person, I conclude that Applicant has not mitigated the security concerns raised by his past actions.

### **Formal Findings**

I make the following formal findings on the allegations in the SOR:

Paragraph 1. Guideline F:           AGAINST APPLICANT

Subparagraphs 1.a-1.f:   Against Applicant

Subparagraphs 1.g-1.n:   For Applicant

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<sup>3</sup> The factors are: (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.

### **Conclusion**

I conclude that it is not clearly consistent with the national security interests of the United States to grant Applicant eligibility for access to classified information. Clearance is denied.

John Bayard Glendon  
Administrative Judge