



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



In the matter of: )  
)  
) ISCR Case No. 14-03288  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Robert J. Kilmartin, Esq., Department Counsel  
For Applicant: *Pro se*

04/14/2015

**Decision**

LOUGHRAN, Edward W., Administrative Judge:

Applicant did not mitigate the financial considerations security concerns. Eligibility for access to classified information is denied.

**Statement of the Case**

On September 12, 2014, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline F, financial considerations. 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 (AG) implemented by the DOD on September 1, 2006.

Applicant responded to the SOR on October 13, 2014, and requested a hearing before an administrative judge. The case was assigned to me on January 8, 2015. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on January 16, 2015, scheduling the hearing for February 12, 2015. The hearing was convened as scheduled. Government Exhibits (GE) 1 and 2 were admitted in evidence without

objection. Applicant testified and submitted Applicant's Exhibits (AE) A and B, which were admitted without objection. The record was held open for Applicant to submit additional information. He submitted documents that were marked AE C and D and admitted without objection. DOHA received the hearing transcript (Tr.) on February 23, 2015.

### **Findings of Fact**

Applicant is a 57-year-old engineer for a defense contractor. He has worked for his current employer since 2002. He has worked off and on for the company, either as a direct employee or as a subcontractor, since 1986. He seeks to retain his security clearance, which he has held for many years. He has a master's degree. He has been married for more than 35 years. He does not have children.<sup>1</sup>

The SOR alleges a state tax lien of \$10,466 entered against Applicant in 2009. Applicant admits the state filed the tax lien against him, but he denies owing the underlying taxes.

Applicant lived and worked from 1989 through February 1996 in a state that does not have state income taxes (State A). He and his wife moved to State B in February 1996 for a job. State B does have state income taxes. From June 1997 through May 1998, they lived in a third state (State C). They moved back to State B in June 1998. Applicant and his wife built a house in State B in 1999. Applicant and his wife were working in State B, and he thought they would be living there for another three or four years.<sup>2</sup>

In 1999, Applicant accepted a 36-month assignment in a foreign country, working as a subcontractor for his current employer. He actually spent about 33 months in the foreign country. He spent two weeks in State A for training before moving to the foreign country in March 1999. His wife moved to the foreign country at a later date. Applicant's sister-in-law lived in their house in State B while Applicant and his wife were in the foreign country.<sup>3</sup>

Applicant was hired as a direct employee of his company in January 2002. He moved from the foreign country back to State B where he lived and worked from January 2002 until the company transferred him to State A about nine months later in 2002. He has lived in State A ever since.<sup>4</sup>

Applicant's employer withheld State B income tax from Applicant's paycheck in 1999 and 2000. It appears that \$3,589 was withheld for State B income taxes during

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<sup>1</sup> Tr. at 26, 42; GE 1; AE C.

<sup>2</sup> Tr. at 13-14, 18, 27; AE B.

<sup>3</sup> Tr. at 13-15; AE B.

<sup>4</sup> Tr. at 15-16, 19-20; AE B.

2000. It is unclear whether state income taxes were withheld for 2001. Applicant's wife handled their income tax returns.<sup>5</sup>

Applicant went to the State B Department of Revenue on March 28, 2002, to dispute his state taxes for 2000. The State B representative told Applicant that he would research the matter. The representative called Applicant on April 2, 2002, and told him that after researching the issue the state taxes would stand.<sup>6</sup>

On April 8, 2002, Applicant sent a letter to the Commissioner of the State B Department of Revenue. He requested "a conference and a hearing to vacate an erroneous tax return and obtain a refund of the \$3,589.00." Applicant stated that in "2000, [he and his wife] were legal residents and domiciliaries of [foreign country], and therefore, not subject to taxation in [State B]."<sup>7</sup>

In May 2002, Applicant filed an amended return for tax year 2000, seeking a refund of \$3,589. In October 2002,<sup>8</sup> Applicant sent a letter to the State B tax examiner explaining his circumstances and requesting his refund for tax year 2000. He claimed that in 2000 he and his wife were "legal residents and domiciliaries of [foreign country] with a tax home in [foreign country]."<sup>9</sup>

In November 2002, the State B Department of Revenue replied to Applicant's letter and expanded the examination of Applicant's state taxes to tax years 1998 through 2002. Applicant was requested to complete a Residency Questionnaire and submit any other documentation he believed would "support [his] position of a change of domicile from [State B]." The letter further noted:

Domicile is not something easily abandoned once established. A person may have more than one residence but only one domicile. Basically, the established, fixed, permanent or ordinary dwelling place of a person as distinguished from his temporary and transient place of residence. It is his legal residence, as distinguished from his temporary place of abode, as distinguished from a place to which business or pleasure may temporarily call him. The term domicile is defined in [State B] as generally held to equal the concurrence of (1) physical presence in a place with (2) an intent to make that place your permanent home. The term sojourn applies to a temporary residence. As a sojourner, it is possible for a person to travel away from his domicile or resident state without breaking the relationship of domiciliary or residence.

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<sup>5</sup> AE B.

<sup>6</sup> AE B.

<sup>7</sup> AE B.

<sup>8</sup> The letter is incorrectly dated 2001.

<sup>9</sup> AE B.

As you may have noticed, I have broadened the examination period to cover the period prior to the move to [foreign country]. It is important to understand that the year a change occurs can be the most important and relevant data in evaluating a change of domicile. It is also important to note that once you are deemed to be a resident of our state then you remain in such status until you demonstrate you have become a legal resident or domiciliary elsewhere.<sup>10</sup>

Applicant and his wife responded to the State B Department of Revenue letter in December 2002. He and his wife sent a formal dispute to the State B Department of Revenue in December 2005. That letter noted that State B assessed them as owing \$4,019 in state taxes. The state's response to that dispute is not in the record, but it must have ruled against them because it filed the \$10,466 state tax lien against him in 2009. There is no evidence that Applicant ever received a hearing or utilized the additional appellate processes available in State B.<sup>11</sup>

Applicant testified that he understands State B's position, but he disagrees with it. With the exception of the state tax lien, Applicant's finances are sound. His credit score is reported as "Good."<sup>12</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.

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 access to classified information will be resolved in favor of national security."

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<sup>10</sup> AE B.

<sup>11</sup> Tr. a 16-17; AE B.

<sup>12</sup> Tr. at 16-24, 27-39; Applicant's response to SOR; GE 2; AE A-D.

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 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 information. 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:

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

Applicant lived, worked, and bought a home in State B before he went to a foreign country for a 36-month assignment for which he stayed about 33 months. His sister-in-law lived in his home while he and his wife were in the foreign country. They returned from the foreign country to State B where they lived and worked until they moved to State A. State B filed a \$10,466 tax lien against Applicant in 2009. Applicant

does not believe he owes State B income taxes. He sent several letters to the state attempting to dispute the matter. Applicant's efforts did not dissuade State B, and he has not convinced me that he does not owe taxes to State B. Applicant's arguments are insufficient to overcome the state's tax determination. The above disqualifying conditions are applicable.

In making this analysis, I have considered cases before the State B Tax Tribunal. A case decided on December 10, 2014, Docket No. 1345974, (specific citation not provided so as not to identify State B) had somewhat similar facts to Applicant's, and upheld the tax determination. The individual in that case left State B for a two-year assignment in a foreign country at a U.S. Embassy. The assignment was later extended to five years. The State B Tax Tribunal wrote in its decision:

As noted at the outset of this decision, there are significant policy arguments that U.S. citizens, including those residing in [State B], ought not to be taxed on income earned outside of the United States while residing abroad. But that is not the law. To the contrary, the law is well settled that to escape liability for [State B] income tax, a [State B] domiciliary who is working abroad must establish a new domicile. Otherwise, the taxpayer will continue to be a legal resident for [State B] tax purposes taxable on the taxpayer's world-wide income. Merely residing in a foreign country, even for a significant period of time, is not sufficient.

Conditions that could mitigate 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, 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; and
- (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.

Applicant does not believe he owes State B. However, the evidence and the law contradict his belief. There are no applicable mitigating conditions.

### **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(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 considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my comments under Guideline F in my whole-person analysis.

I considered Applicant's long and stable work history. His unpaid state taxes appear to be the only blemish on his record. However, it is a telling blemish. His decision to disregard the findings of a government entity leads me to question his judgment, trustworthiness, and ability to comply with laws and regulations.

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. I conclude Applicant did not mitigate the financial considerations 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
Subparagraph 1.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 national interest to continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

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Edward W. Loughran  
Administrative Judge