



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



In the matter of:	)	
	)	
	)	ISCR Case No. 15-04145
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Braden Murphy, Esq., Department Counsel  
For Applicant: *Pro se*

05/31/2016

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**Decision**

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RICCIARDELLO, Carol G., Administrative Judge:

Applicant failed to mitigate the security concerns under Guideline F, financial considerations, and the security concerns under Guideline E, personal conduct. Applicant's eligibility for a security clearance is denied.

**Statement of the Case**

On December 13, 2015, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline F, financial considerations, and Guideline E, personal conduct. The action was taken under Executive Order 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) effective within the DOD on September 1, 2006.

Applicant answered the SOR on January 11, 2016. He did not request a hearing before an administrative judge. On February 11, 2016, the Government requested a

hearing before an administrative judge. The case was assigned to me on February 17, 2016. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on February 22, 2016. I convened the hearing as scheduled on March 15, 2016. The Government offered exhibits (GE) 1 through 5, which were admitted into evidence without objection. Applicant testified and offered Applicant Exhibits (AE) A through O, which were admitted into evidence without objection. The record remained open until March 22, 2016, to permit Applicant an opportunity to submit additional documents. He provided AE P. The Government did not object to the exhibit and it was admitted into evidence. The record closed as scheduled.<sup>1</sup> DOHA received the hearing transcript (Tr.) on March 24, 2015.

On May 2, 2016, I issued an Order in accordance with Executive Order 10865, as amended, that permits an administrative judge on her own motion, to amend the SOR to conform with the evidence admitted or for other good cause. When such amendments are made, the administrative judge may grant either party's request for such additional time as the administrative judge may deem appropriate for further preparation or other good cause.

**The following amendment is made to SOR 2.a:**

Due to a presumably typographical error in the SOR allegation ¶ 2.a that alleges the Electronic Questionnaires for Investigations Processing (e-QIP) was executed by Applicant on or about November 21, 2012, the SOR is amended to conform with the evidence that the e-QIP was executed on May 23, 2013. The phrase "November 21, 2012" is deleted and the phrase "May 23, 2013" is substituted.

**SOR 2.b is added to read:**

You deliberately falsified material facts on an Electronic Questionnaires for Investigations Processing (e-Qip) executed by you on or about May 23, 2013, in response to Section 26 – Financial Record:

**Delinquency Involving Enforcement**

Other than previously listed, have any of the following happened to you? (You will be asked to provide details about each financial obligation that pertains to the items identified below)

- **In the past seven (7) years**, you had a lien placed against your property for failing to pay taxes or other debts. (Include financial obligations for which you were the sole debtor, as well as those for which you were a cosigner or guarantor);

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<sup>1</sup> HE I and II are the Government's email memoranda.

- You are currently delinquent on any Federal debt. (Include financial obligations for which you are the sole debtor, as well as those for which you are a cosigner or guarantor).

To which you answered “No,” whereas in truth, you deliberately failed to list that you had a federal tax debt of approximately \$155,000 for unpaid payroll taxes and a federal tax lien was imposed on you on August 3, 2010, for the same amount.

**2.c is added to read:**

You deliberately falsified material facts on an Electronic Questionnaires for Investigations Processing (e-Qip) executed by you on or about May 23, 2013, in response to Section 26 – Financial Record:

- **Delinquency Involving Routine Accounts** You are currently delinquent on any Federal debt. (Include financial obligations for which you are the sole debtor, as well as those for which you are a cosigner or guarantor).

Other than previously listed, have any of the following happened?

- You are currently over 120 days delinquent on any debt? (Include financial obligations for which you are the sole debtor, as well as those for which you are a cosigner or guarantor)

To which you answered “No,” whereas in truth you were currently over 120 days delinquent on a federal tax debt for unpaid payroll taxes.

In my May 2, 2016 Order, I advised the following:

Each party may object to the SOR amendments in whole or in part, stating specifically the basis of the objection. Each party may submit additional documents that they wish to be considered and entered into evidence, subject to objection by the opposing party. Each party may move to reopen the hearing to provide additional testimonial evidence.

Both parties will have 15 days from the date of the email to respond to this notice and advise the Administrative Judge by email if they wish (1) to object to any matters; (2) to submit additional documents, and (3) to request the hearing be reopened. If a request to provide additional documents is made, a time schedule will be provided to advise both parties when the record will close and the due dates for submission of documents.<sup>2</sup>

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<sup>2</sup> HE III is the original Order and email.

The same day the Order was entered, Department Counsel sent a response to it indicating he had no objection to the amendments; did not intend on offering additional documents; and did not intend on requesting the hearing be reopened.<sup>3</sup>

On May 4, 2016, Applicant sent a response to the Order indicating he had received Department Counsel's response; he had no objection to the amendments; did not intend on offering additional documents; and did not wish to reopen the hearing.<sup>4</sup>

### **Findings of Fact**

Applicant denied the allegations in the original SOR. After a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is 60 years old. He served in the military from 1975 to 1981 and received an honorable discharge. He married in 1975 and has four grown children. He currently owns a Company (B) that contracts with the federal government.<sup>5</sup>

Applicant owned Company A from 2003 to 2007. In 2003 three senior employees of that company left to start their own business. Applicant stated these officers took proprietary information with them. Company A struggled to survive. Applicant sought the assistance of legal counsel and was advised to reorganize Company A. Applicant was aware at the time that his company had not paid Federal employee payroll taxes for 2004, 2005, and two quarters of 2006 as required. These taxes were being withheld from the employees pay during said periods, but were not being sent to the government as legally required. Applicant testified that he was aware in 2004 that he was responsible for paying these taxes. He explained that Company A did not have the money at that time to pay the taxes. He testified that Company A resumed paying the payroll taxes in the second quarter of 2006 and 2007.<sup>6</sup>

In 2007, Applicant started Company B. Applicant stated that he discussed with his partners in Company B, a certified public accountant, and two attorneys about the payroll tax issue from Company A. He stated that in 2008, his attorney began discussing the delinquent payroll taxes with the Internal Revenue Service (IRS) for the first time. Applicant testified that he was aware, and it was repeatedly confirmed, that he was responsible for the delinquent taxes. He testified: "I knew that I had a personal obligation to pay the taxes when I didn't pay the taxes."<sup>7</sup> He further stated: "I would say I really knew back in 2004, when the taxes were unpaid, that I was going to need to pay

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<sup>3</sup> HE IV is Department Counsel email and written response.

<sup>4</sup> HE V is Applicant's email and written response.

<sup>5</sup> Tr. 29-31.

<sup>6</sup> Tr. 32-35, 38-39, 53-54, 78-82.

<sup>7</sup> Tr. 36.

the taxes. So I knew all the way back that I needed to pay the taxes.”<sup>8</sup> Applicant stated Company B became marginally successful in 2011, and more profitable by 2013.<sup>9</sup> Applicant stated that from 2008 to 2010 he and his attorney worked with the IRS, to resolve the tax issue.<sup>10</sup>

With his answer to the SOR, Applicant provided an IRS letter, dated August 3, 2010, sent directly to him (and not Company A). The heading on the letter in large bold letters states: “**Notice of Federal Tax Lien Filing and Your Right to a Hearing Under IRC 6320.**” The letter indicated the amount of tax that was due for four quarters in 2004, four quarters in 2005, and two quarters in 2006 as of November 2009, totaling \$155,008, at that time.<sup>11</sup>

A letter, dated May 17, 2010, from the IRS was sent to Company A and Applicant as the addressee. In bold it stated: “Please Call Us About your Overdue Taxes or Tax Returns.”<sup>12</sup>

Applicant completed a security clearance application (SCA) and signed it on May 23, 2013. Question 26 asked: “In the past seven (7) years, you had a lien placed against your property for failing to pay taxes or other debts. (Include financial obligations for which you were the sole debtor, as well as those for which you were a cosigner or guarantor). He answered “no.” Question 26 also inquired if: “You are currently delinquent on any Federal debt. (Include financial obligations for which you are the sole debtor, as well as those for which you are a cosigner or guarantor).” Applicant answered “no.” Question 26 also inquired if: “You are currently over 120 days delinquent on any debt? (Include financial obligations for which you are the sole debtor, as well as those for which you are a cosigner or guarantor).” Applicant answered “no.”

Applicant stated in his answer to the SOR:

In 2012, when I applied to have my secret security clearance renewed, I answered the question regarding taxes owed to the government as “no” during my security questionnaire because I believed that the question applied to personal taxes owed-not to civil penalties as a “responsible party” to the IRS.”

In his May 2013 SCA, Applicant disclosed that he was the “President and CEO of [Company B], formerly [Company C], since June 2011 to the present.”<sup>13</sup> Applicant did

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<sup>8</sup> Tr. 37.

<sup>9</sup> Tr. 38.

<sup>10</sup> Tr. 35-37, 54; AE C.

<sup>11</sup> Tr. 55-57; Answer to SOR.

<sup>12</sup> AE F.

not disclose that he owned and worked at Company A from 2003 to 2007.<sup>14</sup> Applicant provided a copy of his professional resume, which also does not mention that he owned and worked for Company A. During his personal subject interview with a government investigator in June 2013, he advised the investigator that he failed to list Company A on his SCA due to an oversight. Applicant testified that he did not disclose the correct information about his employment on his SCA.<sup>15</sup>

During his PSI, Applicant advised the investigator that in 2006, as the majority shareholder of Company A, he received a letter from the IRS indicating that Company A owed "corporate taxes." Applicant contacted his attorney to investigate the matter with the IRS. Applicant stated to the investigator that he was advised by his attorney that the IRS considered Applicant the responsible party because he was the majority shareholder. Applicant told the investigator that his attorney never heard back from the IRS. Applicant further told the investigator that in 2013, after receiving a notice from the Office of Personnel Management (OPM) that a credit report had been obtained, it was then he learned there was a federal tax lien that had been entered against him in 2010. He further stated that at that point he contacted his security manager and advised him that he had just learned about the tax lien. He also contacted his attorney with the information and the attorney filed a motion with the IRS. Applicant testified that although he knew he owed the payroll taxes, he thought all of the questions relating to delinquent federal debt and tax liens in the SCA were referring to personal taxes, so he did not think he had to disclose it.<sup>16</sup>

I find Applicant knowingly and deliberately failed to disclose in his May 2013 SCA that he had a federal tax lien of \$155,000 entered against him on August 3, 2010, for failing to pay payroll taxes. He deliberately failed to disclose on the SCA that he was currently delinquent on a federal debt and that he was currently over 120 days delinquent on any debt.

In February 2014, Applicant began an installment payment plan with the IRS to pay his delinquent federal tax lien. He has made consistent payments, totaling \$23,646. The balance on the tax lien as of December 2015 was \$169,126. Applicant explained he did not start repaying this debt sooner because he did not have the money.<sup>17</sup>

## **Policies**

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief

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<sup>13</sup> GE 1. Company C is the name of a different company.

<sup>14</sup> Tr. 67; GE 1.

<sup>15</sup> Tr. 67-72; GE 3.

<sup>16</sup> Tr. 51-52, 63-65; GE 3.

<sup>17</sup> Tr. 37, 40-44; AE G, H, I, J, P; Answer to SOR.

introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are 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, these guidelines are applied 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." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have not drawn inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an "applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel and 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 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).

## **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.

This concern is broader than the possibility that an individual might knowingly compromise classified information in order to raise money. It encompasses concerns about an individual's self-control, judgment, and other qualities essential to protecting classified information. An individual who is financially irresponsible may also be irresponsible, unconcerned, or negligent in handling and safeguarding classified information.<sup>18</sup>

The guideline notes several conditions that could raise security concerns. I have considered all of the disqualifying conditions under AG ¶ 19, and the following three are potentially applicable:

- (a) inability or unwillingness to satisfy debts;
- (c) a history of not meeting financial obligations; and
- (d) deceptive or illegal financial practices such as embezzlement, employee theft, check fraud, income tax evasion, expense account fraud, filing deceptive loan statements, and other intentional financial breaches of trust.

Applicant was responsible for paying federal payroll taxes for his business for 2004, 2005 and two quarters of 2006. He was aware of his responsibility to pay the taxes and deliberately did not pay them. He was aware in 2010 that a federal tax lien was entered against him for \$155,000. In February 2014 he entered into an installment plan with the IRS regarding the payment of his delinquent tax debt. The above disqualifying conditions apply.

The guideline also includes conditions that could mitigate security concerns arising from financial difficulties. The following four mitigating conditions under AG ¶ 20 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;

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<sup>18</sup> See ISCR Case No. 11-05365 at 3 (App.Bd. May 1, 2012).

(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; and

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

Applicant was aware of his responsibility to withhold federal taxes from his employees and to pay those taxes to the federal government. He withheld the taxes, but did not pay the government. In 2014 he began making payments toward a federal tax lien that was entered against him. AG ¶ 20(a) does not apply because his conduct was intentional and he still owes a significant debt. His willingness to violate the rules, by failing to pay payroll taxes, casts doubt on his current reliability, trustworthiness and good judgment.

In order to establish mitigation under AG ¶ 20(b), Applicant must provide proof that there were conditions beyond his control that caused or contributed to the financial hardship. Applicant did not provide evidence of a condition that was beyond his control. The business downturn of Company A may have affected its profitability, but it did not prevent Applicant from transferring the payroll taxes he and his company withheld from its employees to the federal government for taxes that were owed or establishing a payment plan with the IRS when he could not make the payments. AG ¶ 20(b) does not apply.

Applicant sought advice from his attorney about how to resolve his tax lien. He now has a payment plan with the IRS to repay the debt. AG ¶ 20(c) applies to the extent that he has been making consistent payments since February 2014 and the debt is slowly being resolved.

Applicant has been aware since 2004 when he failed to pay the payroll taxes for his company, that he was responsible for this federal debt. He has been aware since August 2010 that there was a federal tax lien entered against him. It was not until February 2014 that he began to make payments to the IRS for this debt. I cannot find that he made a good-faith effort to repay the IRS. AG ¶ 20(d) provides minimal mitigation.

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

AG ¶ 15 expresses the security concern for personal conduct;

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 information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

AG ¶ 16 describes a condition that could raise a security concern and may be disqualifying. I find the following potentially applicable:

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

Applicant deliberately failed to disclose he had a delinquent federal tax lien in his May 2013 SCA. He had an opportunity to disclose it in several sections under Question 26 on the SCA and did not. The above disqualifying condition applies.

The guideline also includes conditions that could mitigate security concerns arising from personal conduct. I have considered the following two mitigating conditions under AG ¶ 17:

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

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

Applicant deliberately omitted on his SCA that he had not paid the required payroll taxes for his company in 2004, 2005 and 2006, and a tax lien that was entered against him. He did not promptly correct his omission. His explanation that he believed he was required to only disclose a personal tax liability was not credible. Applicant's conduct is not minor, infrequent, and it did not happen under unique circumstances. His failure to be honest casts doubt on his reliability, trustworthiness, and good judgment. AG ¶¶ 17(a) and 17(b) do not apply.

### **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 Guidelines F and E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Applicant is 60 years old. He honorably served in the military, and knew or should have known the importance of honesty and disclosure of requested information. In 2004, 2005 and two quarters in 2006, he failed to pay payroll taxes to the federal government, which he knew were his responsibility. In 2010 he learned the IRS filed a federal tax lien of \$155,000 against him. Four years later, he began resolving that tax liability. As of December 2015, the balance on the debt was approximately \$169,126. Applicant's questionable financial practices are a cause of concern. He still has a substantial federal tax debt. However, what is more concerning is his deliberate failure to disclose that debt on his SCA. Applicant's lack of candor throughout the SCA process raises serious questions about his judgment, reliability, and trustworthiness. Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising under the financial considerations and personal conduct guidelines.

### **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
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a-2.c:	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 grant Applicant a security clearance. Eligibility for access to classified information is denied.

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Carol G. Ricciardello  
Administrative Judge