



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 14-03492

Appearances

For Government: Gina Marine, Esq., Department Counsel

For Applicant: *Pro se*

06/22/2015

Decision

DUFFY, James F., Administrative Judge:

Applicant mitigated the security concerns under Guideline F (financial considerations), but failed to mitigate those concerns under Guideline E (personal conduct). Clearance is denied.

Statement of the Case

On September 2, 2014, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines F and E. This action was taken under Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive); and the adjudicative guidelines (AG) implemented on September 1, 2006.

The SOR detailed reasons why DOD adjudicators could not make the affirmative finding under the Directive that it is clearly consistent with the national interest to continue Applicant's security clearance. On December 18, 2014, Applicant answered

the SOR and requested a hearing. The case was assigned to me on February 2, 2015. DOHA issued a notice of hearing on February 11, 2015, and the hearing was convened as scheduled on February 24, 2015. Applicant waived the 15-day notice of hearing requirement in ¶ E3.1.8 of the Directive.¹

At the hearing, Department Counsel offered Government Exhibits (GE) 1 through 5. Applicant testified and submitted Applicant Exhibits (AE) A through F. The record of the proceeding was initially left open until March 10, 2015, and later extended to March 24, 2015, to provide Applicant the opportunity to submit additional matters. Applicant submitted AE G through J. All proffered exhibits were admitted into evidence, including some submitted after the post-hearing submission deadline. DOHA received the hearing transcript (Tr.) on March 4, 2015.

Findings of Fact

Applicant, 45, has been working for a defense contractor since February 2004. He graduated from high school in 1988, earned a bachelor's degree in business management in 1992 and a master's degree in business administration in 1999, and has been pursuing a doctorate degree since 2006. In April 2014, he retired from the active Army Reserve in the grade of major (O-4) after 21 years of service. He is married and has two children, ages 15 and 16. He has held a security clearance since 1992 and has submitted at least one security clearance application in the past.²

Under Guideline F, the SOR alleged that Applicant had four delinquent debts totaling \$49,104 (SOR ¶¶ 1.a-1.d). Under Guideline E, the SOR alleged Applicant deliberately falsified his responses to financial questions in an Electronic Questionnaire for Investigations Processing (e-QIP) that he signed on September 20, 2013, by failing to disclose the four debts alleged under Guideline F (SOR ¶ 2.a). In his Answer to the SOR, Applicant denied each allegation.³

Applicant attributed his financial problems to various reasons. First, Applicant's wife was unemployed for about a year from early 2013 to early 2014. She was earning about \$85,000 annually before her unemployment. She became unemployed because of a downturn in the economy and because she was experiencing some medical problems. She did not receive unemployment compensation during her unemployment. Second, his son had medical problems that generated significant bills. Applicant had health insurance with a \$5,000 deductible and his insurance did not cover the payment of all of his son's medications. Applicant indicated that he was paying \$300 to \$400 a week for his son's medicine before he started buying generic drugs. Third, Applicant

¹ Tr. 10-11.

² Tr. 4-7; GE 1, 2; AE E.

³ Applicant's Answer to the SOR. The SOR incorrectly stated that Applicant executed his e-QIP on November 20, 2013. It, however, was certified on November 18, 2013.

experienced his own medical problems. He was diagnosed with post-traumatic stress disorder (PTSD), prolonged and secondary to combat. He also had other medical problems. To address his medical problems, he had to take time off work, some of which was unpaid sick leave. Consequently, there were periods when his pay was reduced due to his medical problems.⁴

SOR ¶ 1.a – mortgage 120 days or more past due for \$29,188 with a total balance of \$492,690. Applicant purchased this home in 2004. After the purchase, he took out a second mortgage to make some home improvements. In 2006, both mortgages were combined into one mortgage during a refinancing that resulted in monthly mortgage payments of \$3,649. In 2008, he moved to another state for work and began renting this home. He encountered problems with some renters and had to make repairs after they left the leased property. Applicant further indicated that he stopped making payments for 90 days to qualify for a loan modification, but then was told by the lender that he earned too much money to qualify for a loan modification. A credit report dated November 6, 2013, revealed that this mortgage account had a date of last activity of March 2013. Applicant received a couple of short sale offers that fell through before he eventually sold this home through a short sale. The home sold for \$347,000 on May 13, 2014. The short sale agreement indicated the creditor would not pursue a deficiency judgment for any resulting loan deficiency. A credit report dated January 15, 2015, reflected this account had a zero balance.⁵

SOR ¶ 1.b – repossessed timeshare with a delinquent balance of \$19,522. In 2008, Applicant purchased a vacation condo timeshare for \$48,000. His monthly payments on the timeshare were \$535. He stated that he made the payments in a timely manner until 2013, when he encountered the financial problems discussed above. A credit report dated November 6, 2013, reflected that the date of last activity on this account was April 2013, that the creditor closed the account, and that the timeshare was repossessed by at least October 2013. This credit report also reflected that the account was past due \$2,675 and had an outstanding balance of \$19,522. At the hearing, Applicant indicated that he contacted the creditor's attorneys in about November 2014 in an attempt to begin making payments again, but was told the debt was "discharged." He indicated that he was waiting to hear from the creditor if this debt could be settled. His goal was to resume making the payments again. A credit report dated January, 15, 2015, listed this account as 120 days or more past due for \$2,140 with a balance of \$19,522 and the date of last activity was June 2013. In a post-hearing submission, Applicant stated, "[the creditor's] debt amount was inaccurate the total dollar amount is \$5,856.74 (sic) I am working a payment structure currently. I should have the updated information payment structure from [the creditor] by the end of next week." However, Applicant provided no additional information about this debt.⁶

⁴ Tr. 37-39, 43-48, 50-52, 56-58; AE A, F.

⁵ Tr. 39-42, 53-56, 59-64; GE 2, 3, 5; AE D.

⁶ Tr. 42-47, 64-70; GE 2, 3; AE H.

SOR ¶¶ 1.c and 1.d – collection accounts for \$347 and \$47, respectively. Applicant testified that these medical bills arose from his son's health problems. The debt in SOR ¶ 1.c was assigned for collection in April 2013, while the debt in SOR ¶ 1.d was assigned for collection in June 2013. He testified that these bills were paid, but did not provide proof of the payments at the hearing. In his post-hearing submission, Applicant presented documentation showing these bills arose from when he received emergency room treatment during a Reserve training weekend in December 2012. An email from a Defense Health Agency specialist indicated the two bills were paid in March 2015.⁷

Falsification allegation. In his e-QIP of September 20, 2013, Applicant answered "No" to questions that asked whether, in the last seven years, he had any possessions or property voluntarily or involuntarily repossessed or foreclosed, had bills or debts turned over to a collection agency, and had been over 120 days delinquent on any debt; or whether he was currently over 120 days delinquent on any debt. In the e-QIP, Applicant answered "No" to all the financial questions and did not disclose that he was experiencing any financial problems. At the time he signed the e-QIP, his payments on his mortgage (SOR ¶ 1.a) had been over 120 days delinquent and the medical debts in SOR ¶¶ 1.c and 1.d had been turned over to a collection agency.⁸

At the hearing, Applicant indicated that he did not disclose his delinquent mortgage on the e-QIP because he had a short sale contract to sell the home. He also noted that two previous short sale contracts had fallen through. He stated,

I didn't know I had to put that down. I mean, I had, when I filled it, at the time I filled it out initially, I had a contract on the house and I had something worked out with [the creditor], as well, where if I sold the house right there, before this short sale, you know, everything would be cleared.

He also stated that he knew he was behind on his timeshare payments when he submitted his e-QIP. However, he stated that he was talking to the creditor when he began experiencing financial problems. The creditor supposedly told him that, because he had significant equity in the timeshare, he needed only to pay a maintenance fee of \$116 to avoid having his account become delinquent. He claimed that he paid the maintenance fees, but provided no proof of those payments. Despite his claim of making the maintenance fee payments, the timeshare was repossessed. At the hearing, he was informed that he could present proof that he made the maintenance fee payments in his post-hearing submission. He did not provide proof of those payments.⁹

⁷ Tr. 47-48, 66-67; GE 3; AE G-J.

⁸ GE 1, 2, 3. Applicant did disclose in the e-QIP that he had a civil court action against him for child support payments in 2002, and indicated that matter was resolved.

⁹ Tr. 52-56, 59-70. Applicant also indicated that the Service Member Civil Relief Act (SCRA) provided him protection regarding his mortgage. He failed to explain how the SCRA protected him since he had been discharged from active duty in 2010, well before his default on the mortgage payments. See Tr. 60-

Financial Situation. In early 2014, Applicant's wife returned to work. At the time of the hearing, she was working two jobs and earning about \$105,000 annually. Applicant's annual income was about \$86,000. He also received about \$1,537 a month in VA benefits. He did not provide a monthly budget, but indicated that he had about \$400 left over each month after paying his expenses. He also testified that he had about \$300 in a saving account and put most of his saving in a 401(k) account. His most recent credit report indicated that he had a credit card account that was \$629 past due with a balance of \$4,165, which was not alleged in the SOR. He indicated the credit card account was used to pay medical expenses for his son and he was working with the creditor to resolve this debt.¹⁰

Character Evidence. Applicant completed two tours of duty in Iraq and three in Afghanistan. A DD-214 reflected that he served in Afghanistan from September 2009 to June 2010 and was released from active duty in July 2010 with an honorable characterization of his service. He has been awarded the Afghanistan Campaign Medal with Campaign Star, Army Achievement Medal, Army Reserve Components Achievement Medal as well as other ribbons and medals.¹¹

Policies

The President of the United States 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. *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988). The President has authorized the Secretary of Defense to grant 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, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended. The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch 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).

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These AGs are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge's

63. The SCRA does not relieve service members of their legal or financial obligations, but in certain circumstances may give them time to address such issues. Typically, protection under the Act must be requested during the service member's active duty or within 30-180 days after military duty ends. Applicant failed to establish that the SCRA applied to any of the debts alleged in the SOR.

¹⁰ Tr. 45-51; AE C. The debt not alleged in the SOR will not be considered in analyzing the application of the disqualifying condition, but may be considered in analyzing the application of the mitigating conditions and in making a whole-person assessment.

¹¹ GE 2; AE B

adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in reaching a decision.

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 of potential, rather than actual, risk of compromise of classified information. Clearance decisions must be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See Exec. Or. 10865 § 7. See also Executive Order 12968 (Aug. 2, 1995), Section 3. Thus, a clearance decision is merely an indication that the Applicant has or 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 and an applicant’s security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

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 ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue [his or her] security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Guideline F, Financial Considerations

The security concern for financial considerations is set out in AG ¶ 18 as follows:

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 under AG ¶ 19 that could raise security concerns. Two are potentially applicable in this case:

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

Applicant accumulated delinquent debts that he was unable to pay for an extended period. The evidence is sufficient to raise the above disqualifying conditions.

Five financial considerations 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;
- (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 resolved the delinquent mortgage in SOR ¶ 1.a through a short sale in May 2014. By contacting the Defense Health Agency, he resolved the medical debts in SOR ¶¶ 1.c and 1.d.

While the vacation timeshare in SOR ¶ 1.b still appears as a delinquent debt on Applicant's most recent credit report, he most likely does not owe anything further on that debt. He purchased the timeshare for \$48,000 in 2008. He made payments on the

timeshare for about five years and reduced the account's balance to \$19,522. In November 2013, the creditor reported the timeshare was repossessed. No evidence was presented to establish the value of the timeshare at the time of the repossession or to show the creditor later sold the timeshare. However, given the amount of equity Applicant had in the timeshare, it is unlikely the creditor would incur a loss if the timeshare is resold, but instead would most likely realize a gain in such a transaction. Based on these facts, I find the delinquent timeshare no longer presents a financial security concern.

Applicant's and his wife's combined annual income is about \$200,000. They appear to be living within their means. In the past, they experienced conditions beyond their control that contributed to their financial problems, but they worked through those problems. Their financial problems are being resolved and are under control. AG ¶¶ 20(b) and 20(c) apply. AG ¶ 20(a) partially applies. AG ¶¶ 20(d) and 20(e) do not apply.

Guideline E, Personal Conduct

The security concern for personal conduct is set out in AG ¶ 15, as follows:

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 one condition that could raise a security concern and may be disqualifying in this case:

(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 stopped making payments on his mortgage in March 2013. When he signed his e-QIP on September 20, 2013, his mortgage payments were over 120 days delinquent. At that time, he knew his wife had been out of work for a number of months; that his income had been significantly reduced; that he was struggling financially; and that his mortgage was over 120 days delinquent.

Applicant's explanation for not reporting the delinquent mortgage on his e-QIP is difficult to believe. He claimed that he thought he did not have to report the delinquent mortgage because he had a contract for a short sale of the property pending that would resolve the mortgage. He noted that he had two other short sale contracts that had fallen through. Consequently, he knew there was a possibility this latest short sale contract could also fall through. The questions in the e-QIP that asked whether he had

been over 120 delinquent on any debt in the past seven years or whether he was currently over 120 days delinquent on any debt are not complicated or confusing. Applicant has a bachelor's degree in business management and a master's degree in business administration. He is pursuing a doctorate degree. He served in the military as an officer. He has held a security clearance for over 20 years and submitted a security clearance application in the past. He has the intelligence, maturity, and experience to understand those e-QIP questions. No reasonable basis exists for Applicant to have interpreted those questions as not requiring disclosure of the delinquent mortgage because a short sale contract was pending. Even if the mortgage had been resolved through a short sale when he signed the e-QIP, he still would have been required to report that delinquency because of its occurrence in the past seven years. I do not find Applicant's explanation credible. I find that Applicant deliberately falsified his response to those e-QIP questions by failing to disclose the delinquent mortgage.

Applicant stopped making payments on his timeshare in either April or June 2013. Given the periods involved here, I cannot find that the timeshare was over 120 days delinquent when he signed his e-QIP on September 20, 2013. Furthermore, the date the timeshare was repossessed is unknown. It is possible the repossession may have occurred after he submitted the e-QIP in September 2013 and before his credit report was pulled in November 2013. Accordingly, I find insufficient evidence was presented to conclude that Applicant falsified his e-QIP responses by not disclosing the delinquent timeshare in SOR ¶ 1.b.

Additionally, it is plausible that Applicant was not aware of the debts in SOR ¶¶ 1.c and 1.d when he signed his e-QIP. No evidence was presented that he reviewed his credit report before submitting his e-QIP. Absent such a review, he most likely would not have known that the Defense Health Agency did not pay the bills arising from the emergency medical treatment he received while performing Reserve duty. I find that Applicant did not falsify his e-QIP responses by not disclosing the delinquent debts in SOR ¶¶ 1.c and 1.d.

Six personal conduct mitigation conditions under AG ¶ 17 are potentially applicable:

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

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(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;

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress; and

(f) the information was unsubstantiated or from a source of questionable reliability.

Applicant's e-QIP falsification, as discussed above, is recent and significant. In falsifying his e-QIP, he seriously undermined the security clearance adjudication process. I find that none of the mitigating conditions apply to his falsification.

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.

My comments under Guidelines F and E are incorporated in this whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Applicant retired from the Army Reserve after serving honorably for over 20 years. He has served our country in Iraq and Afghanistan. He has held a security clearance for many years without incident. Nevertheless, his falsification of e-QIP responses raises serious security concerns that have not been mitigated. Overall, the

record evidence leaves me with questions and doubts as to his eligibility and suitability for a security clearance. Applicant mitigated the security concerns under the financial considerations guideline, but failed to present sufficient evidence to mitigate the security concerns under personal conduct guideline.

Formal Findings

Formal findings as required by Section E3.1.25 of Enclosure 3 of the Directive are:

Paragraph 1, Guideline F:	For Applicant
Subparagraphs 1.a-1.d:	For Applicant
Paragraph 2, Guideline E:	Against Applicant
Subparagraph 2.a:	Against Applicant

Decision

In light of all 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. Clearance is denied.

James F. Duffy
Administrative Judge