



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



In the matter of:)	
)	
)	ISCR Case No. 07-00766
SSN:)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Gina Marine, Esquire, Department Counsel
For Applicant: Pro Se

September 5, 2008

Decision

HENRY, Mary E., Administrative Judge:

Applicant completed his Security Clearance Application (SF 86), on March 17, 2006. On January 20, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines F, E and J for Applicant. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive), and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant acknowledged receiving the SOR, answered the SOR in writing on April 11, 2008, and requested a hearing before an Administrative Judge. DOHA received the request on April 14, 2008. Department Counsel was prepared to proceed on May 20, 2008, and I received the case assignment on May 27, 2008. DOHA issued a notice of hearing on June 9, 2008, and I convened the hearing as scheduled on July 1, 2008. The government offered Exhibits (GE.) 1 through 18, which were received without

objection. Applicant testified on his own behalf, but did not submit any Exhibits. DOHA received the transcript of the hearing (Tr.) on July 15, 2008. I held the record open until July 31, 2008 for Applicant to submit additional matters. He did not. The record closed on July 31, 2008. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Procedural and Evidentiary Rulings

Notice

At the hearing, Applicant indicated he received the hearing notice more than 15 days prior to the hearing as required under ¶ E3.1.8 of the Directive. (Tr. at 8.)

Motion to Amend SOR

Department Counsel amended the SOR by adding ¶ 1.v through 1.aa, alleging additional debts owed by Applicant and mailed the amendment to Applicant in April 2008. Applicant submitted his response to the amendment on May 13, 2008 without objection to the additional allegations. The amendment to the SOR and Applicant's answer are part of the record in this case.

Findings of Fact

In his Answer to the SOR, dated April 11, 2008, Applicant admitted the allegations in ¶¶ 1.a. - 1.g, 1.i. - 1.aa, and 2.a. He denied the allegations ¶¶ 1.h. - 1.k. He did not admit or deny the allegation in ¶ 3.a., which is deemed denied.

Applicant, who is 44 years old, works as site manager for a Department of Defense contractor. He began his employment in March 2006. He completed his security clearance application on April 27, 2006.¹

Applicant married 18 years ago. He has four children, two sons and two daughters. He attended college for three years, but did not graduate. From 1988 until 2006, he worked for a sheriff's department. He sustained a work-related injury to his knee in March 2003. He completed his medical treatment for this injury in 2005. In June 2006, he officially retired from his job. He decided on a one-time lump-sum payment of \$81,000 instead of a monthly benefit. After he paid his federal taxes on this money, he used it to pay \$8,000 in outstanding medical bills not covered by workers compensation and \$40,000 in bills.²

In 1995, Applicant and his wife filed a Chapter 13 petition for bankruptcy because serious debt problems arose after Applicant had paid \$20,000 in attorney fees to secure custody of his daughter from a relationship. Two years later, on September 11, 1997,

¹GE 1 (Security Clearance application) at 1-2; Tr. 17.

²GE 1, *supra* note 1, at 3-5; Tr. 17-21.

the court dismissed this case. Five days later, Applicant and his wife filed a second Chapter 13 petition for bankruptcy. On November 11, 1999, the bankruptcy court discharged their debts.³

Just over one year later, on December 29, 2000, Applicant and his wife again filed a Chapter 13 petition for bankruptcy, which the court dismissed on July 6, 2001. Immediately thereafter, on July 10, 2001, Applicant and his wife filed a Chapter 7 petition for bankruptcy. The court discharged all his debts on November 29, 2001.⁴

Approximately two and one-half years later, Applicant and his wife filed their fourth Chapter 13 petition for bankruptcy, which the court administratively dismissed on July 7, 2004. Three days later, Applicant and his wife filed their fifth Chapter 13 petition for bankruptcy, which the court dismissed on January 24, 2005 when they did not comply with the payment terms of their Chapter 13 plan. Applicant states that the repayment plan had been based on two incomes and that because his income had declined significantly because of his injury, he could not meet the terms of his repayment plan. Three days later Applicant and his wife filed their most recent Chapter 13 petition for bankruptcy. They developed a repayment plan with their creditors, which they paid for a period of time. They eventually stopped making regular monthly payments and the court dismissed their case for noncompliance with the plan terms on July 19, 2006.⁵

Applicant's debt problems continue to exist. For a number of years, Applicant claimed a high number of exemptions on his W-2, which he no longer does. When he completed his tax returns, he owed the state or federal government money, which he did not have. Some years he did not timely file his tax returns. In May 2002, the State filed two tax liens against him for \$1,070 and \$2,395 respectively. In October 2003, the State filed two tax liens against him for \$2,074 and \$777 respectively. The state filed additional tax liens against Applicant, totaling \$13,862 in August 2006 and twice in October 2006. Applicant testified that he developed a repayment plan with the State. Under the terms of this plan, he pays the State \$100 a month and the State takes any refund he receives for a tax year and applies the amount to his unpaid taxes. He has not provided any documentation which supports his testimony, thus, I find that he has not established his compliance with this payment plan or that he has satisfied any of his state tax debts.⁶

³GE 12 (Bankruptcy court case summary for 1997 filing); GE 13 (Bankruptcy court case for 1995 filing); Tr. 22-26.

⁴GE 10 (Bankruptcy court case summary for 2001 filing); GE 11 (Bankruptcy court case summary for 2000 filing); Tr. 27.

⁵GE 7 (Bankruptcy court case summary for 2005 filing); GE 8 (Bankruptcy court case summary for 2004 filing); GE 9 (Bankruptcy court case summary for 2004 filing); Tr. 28-30, 86-87.

⁶GE 2 (Credit Report, dated April 29, 2008); GE 3 (Credit report, dated December 20, 2007); GE 14 (Copy of tax lien filing October 2003); GE 15 (Copy of tax lien filing August 2006); GE 17 (Copy of tax lien filing October 2006); GE 17 (Copy of tax lien filing October 2006); Tr. 31-32, 76-78, 81-82.

On November 20, 2006, the Internal Revenue Service (IRS) filed a tax lien against Applicant in the amount of \$31,213. He testified that he reached an agreement with the IRS to repay his tax debt in 2006. He agreed to pay the IRS \$200 a month and that the IRS would retain any refunds he would receive in a tax year. He did not provide any documentation on this agreement or information which shows his compliance with the terms of the agreement. I find that he has not established his compliance with his federal tax payment plan.⁷

Applicant admitted all the remaining debts listed in the SOR and amended SOR in his responses. At the hearing, he acknowledged that these debts are not paid, except for the allegation in ¶ 1.z., which he stated was paid. He provided no supporting documentation to show that this debt is paid. Thus, I find that he has not established that he paid this debt. He denied knowing the medical provider in allegation ¶¶ 1.p and 1.r. The credit reports indicated that he challenged the debt in ¶1.r. He also denied knowing the creditors who obtained a judgment against him in the allegations contained in ¶¶ 1.e, 1. f and 1.g, despite admitting that he owed these debts. He also acknowledged that he had not attempted to determine the creditor through court records.⁸

Applicant's wife is currently on short-term disability as she suffers from severe depression. She has applied for long-term disability, but has not yet been approved. Her medical insurance expired in April 2008. Applicant has medical insurance for himself as his employer pays the premiums. His wife and children do not have insurance because he cannot afford to pay the premiums. His wife's medicines cost \$200 a month and her medical treatment totals \$80 a month.⁹

Applicant's net monthly income is \$2,200 and his wife's short-term disability income is \$1,900 a month for a total monthly income of \$4,100. His monthly expenses, including her medical bills and his tax payments, total \$3,617. He and his wife have developed a budget and try to live within their budget. Applicant admits that his financial problems have been the result of money mismanagement and irresponsibility.¹⁰

The government mailed interrogatories to Applicant in May 2007. Question two States: "Please provide a Bankruptcy Trustee Report or other documentation from the Bankruptcy Trustee reflecting your Chapter 13 bankruptcy payments are current." In his response to the interrogatory, applicant stated that his bankruptcy had been discharged and that currently all money owed due to bankruptcy is being paid, including all state and federal taxes owed. The government contends that his answer was not truthful

⁷GE 16 (Copy of IRS tax lien filing November 2006); Tr. 33-34, 76-78, 80, 81, 83.

⁸Response to SOR and amendment to SOR; Tr. 37-42, 49-62.

⁹Tr. 43-44, 63-67.

¹⁰Tr. 26, 43-47, 65-68.

because his most recent bankruptcy had been dismissed because he failed to comply with monthly payments. Applicant agreed, but denies any intent to deceive the government because he did not know the difference between dismissed, discharged and terminated. He thought he gave the correct answer. He states he now knows the difference. The allegation does not allege intentional falsification, only that he had not been truthful in his answer.¹¹

Policies

When evaluating an Applicant's suitability for a security clearance, the Administrative Judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful 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 over-arching adjudicative goal is a fair, impartial and common sense 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 avoided drawing 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, the Applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." The Applicant has the ultimate burden of persuasion as to obtaining 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 protect or

¹¹GE 6 (Interrogatories and answers, dated May 21, 2007); Tr. 48, 90-91.

safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to 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 relating to the guideline 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(a), an “inability or unwillingness to satisfy debts” is potentially disqualifying. Similarly under AG ¶ 19(c), “a history of not meeting financial obligations” may raise security concerns. Despite having his debts discharged in 1999 and 2001, he continues to have significant unpaid debts.

I have considered all the mitigating conditions and concluded that none apply in this case. Applicant has disputed one medical debt for \$524 and this allegation is found in his favor. Although he testified that he has a repayment plan for his federal and state taxes, he has not provided documentation to show that he has made the required payments and is in compliance with the plan. Given his long history of unpaid debts, I can not find that he has mitigated the government’s concerns about his tax liens without adequate documentation of his payments. He acknowledges his other debts are unpaid.

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern pertaining to 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.

The following will normally result in an unfavorable clearance action or administrative termination of further processing for clearance eligibility:

(a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, and cooperation with medical or psychological evaluation; and,

(b) refusal to provide full, frank and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying:

(b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative;

The government established that Applicant incorrectly provided information regarding his 2007 bankruptcy when answering the interrogatories propounded to him. This information is material to the evaluation of Applicant's trustworthiness to hold a security clearance and to his honesty. For this guideline to apply, Applicant's incorrect answer must be deliberate. In his response, he agreed that the information provided was incorrect. He denies, however, that he deliberately falsified his answer to these questions. When a falsification allegation is controverted, the government has the burden of proving it. Proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred. An administrative judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning an applicant's intent or state of mind at the time the omission occurred.¹ For DC ¶ 16 (a) to apply, the government must establish that Applicant's omission, concealment or falsification in his answer was deliberate.

Applicant had no intent to deceive. His carelessness about learning the difference among the various legal terms employed in bankruptcy cases is not enough to show intentional falsification. His lack of understanding about these differences does not show he lied; only that he misused the terminology. Government has not established its case of intentional falsification. Guideline E is found in favor of Applicant.

¹See ISCR Case No. 03-09483 at 4 (App. Bd. Nov.17, 2004)(explaining holding in ISCR Case No. 02-23133 at 5 (App. Bd. Jun. 9, 2004)).

Guideline J

Since I found Guideline E in Applicant's favor, I find in favor of Applicant on this Guideline.

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 the 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) 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 common sense 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. For many years, Applicant and his wife have made very poor decisions about money. As a result, they have filed numerous bankruptcy petitions. Twice their debts have been discharged. They, however, did not change spending habits. They continued to get into serious debt by over spending their income and making poor financial choices. With his lump sum payment from his work related disability, Applicant paid debts, but could not or did not resolve all his debts. In fact, he accumulated more unpaid debt. He has done little to resolve his debt issues and given his past history, it is unlikely he will do so in the future. He has not demonstrated that he has control over his spending habits and his finances. Applicant has not mitigated the government's security concerns under Guideline F.

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the security concerns arising under Guideline F, Financial Considerations.

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-1.p:	Against Applicant

Subparagraph 1.q:	For Applicant
Subparagraph 1.r-1.aa:	Against Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Paragraph 3, Guideline E:	FOR APPLICANT
Subparagraph 3.a:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

MARY E. HENRY
Administrative Judge