

KEYWORD: Financial

DIGEST: Applicant received a Chapter 7 bankruptcy discharge in June 1990. He was unemployed while attending college from January 2000 to February 2004, and accumulated several delinquent debts that remained unresolved. In June 2005, his wife was laid off from her job, causing them to default on a home equity line of credit. To avoid foreclosure, they filed for Chapter 13 bankruptcy. Security concerns based on financial considerations are not mitigated. Clearance is denied.

CASENO: 06-23748.h1

DATE: 05/03/2007

DATE: May 3, 2007

In re:)	
)	
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SSN: -----)	ISCR Case No. 06-23748
)	
Applicant for Security Clearance)	
)	

**DECISION OF ADMINISTRATIVE JUDGE
LEROY F. FOREMAN**

APPEARANCES

FOR GOVERNMENT

Stephanie C. Hess, Esq., Department Counsel

FOR APPLICANT

Pro se

SYNOPSIS

Applicant received a Chapter 7 bankruptcy discharge in June 1990. He was unemployed while attending college from January 2000 to February 2004, and accumulated several delinquent

debts that remained unresolved. In June 2005, his wife was laid off from her job, causing them to default on a home equity line of credit. To avoid foreclosure, they filed for Chapter 13 bankruptcy. Security concerns based on financial considerations are not mitigated. Clearance is denied.

STATEMENT OF THE CASE

On January 30, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny Applicant a security clearance. This action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified, Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified (Directive), and the revised adjudicative guidelines approved by the President on December 29, 2005, and implemented effective September 1, 2006 (Guidelines). The SOR alleged security concerns raised under Guideline F (Financial Considerations).

Applicant answered the SOR in writing on February 12, 2007, and elected to have a hearing before an administrative judge. The case was assigned to me on March 28, 2007, and was heard on April 17, 2007, as scheduled. On my own motion, I amended the SOR to correctly reflect the suffix to Applicant's name (Transcript (Tr.) 46). I kept the record open until May 2, 2007, to enable Applicant to submit additional documentary evidence. I received his additional evidence on April 26, 2007, and it has been admitted as Applicant's Exhibit (AX) D. DOHA received the hearing transcript on April 26, 2007.

FINDINGS OF FACT

Applicant's admissions in his answer to the SOR and at the hearing are incorporated into my findings of fact. I make the following findings:

Applicant is a 40-year-old employee of a federal contractor. He has worked for his current employer since April 2006. He is regarded as hard-working, honest, family-oriented, and reliable (Applicant's Exhibit (AX) A and B).

Before his current employment, Applicant worked for a private employer from February 2004 to January 2005, was briefly unemployed from January to March 2005, and then worked for another private company from March 2005 to March 2006. He held a security clearance from 1992 to about 1999, but it was administratively terminated when he was laid off. He currently holds an interim clearance (Tr. 8).

Applicant was married in November 1986 and divorced in August 1987. He married his current spouse in December 1989, and they have two children, ages 16 and 14.

After his divorce in August 1987, his ex-wife kept an automobile, but Applicant remained liable for payment of the loan. When his ex-wife defaulted on the payments, the creditor sought payment from Applicant. Applicant and his second wife were expecting their first child. He consulted a lawyer, who advised filing a petition for Chapter 7 bankruptcy. He followed his lawyer's advice and received a discharge in bankruptcy in June 1990 (Government Exhibit (GX) 5; Tr. 24-25).

After Applicant was laid off from his job around 1999, he decided to begin college. He was unemployed and supported by his wife from January 2000 to February 2004. He and his wife had

no medical insurance, and they incurred the medical bills alleged in SOR ¶ 1.d, 1.g, 1.h, and 1.i (Tr. 54), which remain unpaid.

At some time before December 2005, Applicant owned a lawn service business. When he sold the business, he neglected to pay the phone bill (Tr. 34). The delinquent phone bill is alleged in SOR ¶ 1.c.

In June 2005, Applicant used a home equity line of credit to borrow about \$29,000, to purchase a \$9,000 motorcycle and remodel his home. He fell behind on the payments when his wife lost her job and was unemployed from April to July 2006. Applicant and his wife also incurred several medical bills not covered by insurance that were referred to collection agencies in November and December 2006 (SOR ¶¶ 1.d and 1.i). When he learned that foreclosure was imminent, he consulted a credit counselor, who advised filing a Chapter 13 bankruptcy petition (Tr. 26, 52). Although his payments on the first mortgage and his automobiles were current, his lawyer advised that he stop making payments on them and include all his debts in the Chapter 13 bankruptcy (Tr. 27). He filed the Chapter 13 petition in October 2006 (GX 2), and he began making payments to the bankruptcy trustee in November 2006 (Tr. 29). All debts alleged in the SOR were included (Tr. 35-36). At first, his payments to the trustee were \$1,832 per month, but they have increased to \$2,450 (Tr. 28-29). As of the date of the hearing, Applicant had made all required payments to the bankruptcy trustee (AX C; Tr. 30). Two money orders were lost in the mail, and he is in the process of tracing them (Tr. 30).

Applicant and his wife usually have a net monthly remainder of between \$100 and \$200 after paying all household expenses and the payments to the bankruptcy trustee (Tr. 32). This calculation is consistent with the personal financial statement he filed in connection with his Chapter 13 bankruptcy (AX D at 3). They have no contingency funds to rely on if either of them is laid off again.

Applicant hopes to terminate the bankruptcy early if he can refinance his house and use his equity to pay off the delinquent debts (Tr. 31). He estimates he has about \$75,000 in equity (Tr. 40).

POLICIES

“[N]o one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has “the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information.” *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified. Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the Guidelines. Each clearance decision must be a fair, impartial, and commonsense decision based on the relevant and material facts and circumstances, the whole person concept, the disqualifying conditions and mitigating conditions under each specific guideline, and the factors listed in the Guidelines ¶¶ 2(a)(1)-(9).

A person granted access to classified information enters into a special relationship with the government. The government must be able to have a high degree of trust and confidence in persons with access to classified information. However, the decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the government must establish, by substantial evidence, conditions in the personal or professional history of the applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” *See v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The Guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability. *See* ISCR Case No. 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. *See* 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 security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; *see* Guidelines ¶ 2(b).

CONCLUSIONS

Guideline F (Financial Considerations)

The concern under this guideline is 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.” Guidelines ¶18.

Several disqualifying conditions under this guideline could raise a security concern and may be disqualifying in this case. Guidelines ¶ 19(a) applies where there is an “inability or unwillingness to satisfy debts.” Guidelines ¶ 19(c) applies when there is “a history of not meeting financial obligations.” These two disqualifying conditions are established by the evidence in this case.

Since the government produced substantial evidence to raise the disqualifying conditions in Guidelines ¶¶ 19(a) and 19(c), the burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. Applicant has the burden of proving a mitigating condition, and the burden of disproving it is never shifted to the government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

Security concerns based on financial problems can be mitigated by showing that “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." Guidelines ¶ 20(a). This is a compound mitigating condition, with three disjunctive prongs and one conjunctive prong. It may be established by showing the conduct was "so long ago," or "so infrequent," or "occurred under such circumstances that it is unlikely to recur." If any of the three disjunctive prongs are established, the mitigating condition is not fully established unless the conduct "does not cast doubt on the individual's current reliability, trustworthiness, or good judgment."

Applicant's Chapter 7 bankruptcy was "long ago," more than 17 years ago. It also occurred under circumstances unlikely to recur, i.e., a divorce and his ex-wife's default on a car note on which Applicant was jointly responsible. Applicant acted responsibly at the time, and sought bankruptcy relief so that he and his current wife could start with a clean financial slate. I conclude the mitigating condition in Guidelines ¶ 20(a) is established, and I resolve SOR ¶ 1.a in Applicant's favor.

Security concerns under this guideline also can be mitigated by showing that "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." Guidelines ¶ 20(b). Both prongs, i.e., conditions beyond the person's control and responsible conduct, must be established.

The delinquent phone bill alleged in SOR ¶ 1.c was not due to circumstances beyond Applicant's control, but to neglect or forgetfulness. The remaining debts alleged in the SOR and the Chapter 13 bankruptcy were the result of Applicant's unemployment from January 2000 to February 2004 and his wife's unemployment from April to July 2006. Applicant's initial layoff in January 2000 was beyond his control, but his decision to attend college rather than seek new employment was voluntary and within his control. His wife's loss of employment for three months in 2006 was beyond his control. However, Applicant has been employed since February 2004, except for the three-month period in 2005, but he took no action to resolve the delinquent installment accounts alleged in SOR ¶ 1.g or the medical bills alleged in SOR ¶ 1.i until he included them in his Chapter 13 bankruptcy in October 2006. All these debts were delinquent before his wife lost her job. I conclude the mitigating condition in Guidelines ¶ 20(b) is not established for the phone bill in SOR ¶ 1.c, installment accounts in SOR ¶¶ 1.g and 1.h, or the medical bills in SOR ¶ 1.i, and I resolve those debts against Applicant. However, it is established for the default on the home equity line of credit in SOR ¶ 1.f, and the medical bill in SOR ¶ 1.d, and I resolve these debts in his favor.

Security concerns under this guideline also can be mitigated by showing that "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." Guidelines ¶ 20(c). This mitigating condition also has two prongs that may be either disjunctive or conjunctive. If the person has received counseling, there must be clear indications the problem is being resolved or under control. However, if the person has not received counseling, this mitigating condition may still apply if there are clear indications that the problem is being resolved or under control.

Applicant received financial counseling before and during the Chapter 13 bankruptcy process, and the problem will be under control so long as he continues to make the required payments. I conclude the mitigating condition in Guidelines ¶ 20(c) is established.

Finally, security concerns under this guideline can be mitigated by showing that “the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.” Guidelines ¶ 20(d). The concept of good faith “requires a showing that a person acts in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation.” ISCR Case No. 99-0201, 1999 WL 1442346 at *4 (App. Bd. Oct. 12, 1999). Evidence of past irresponsibility is not mitigated by payment of debts only under pressure of qualifying for a security clearance.

Applicant’s Chapter 13 bankruptcy petition was not prompted by his desire to obtain a clearance, but rather it was a means of avoiding foreclosure on the family home. He has included all his debts in the bankruptcy, and thus far he has made all required payments. I conclude the mitigating condition in Guidelines ¶ 20(d) is established.

Applicant’s home mortgage, alleged in SOR ¶ 1.e, was current until he decided to file his petition for Chapter 13 bankruptcy. At that time, on the advice of his lawyer, he stopped making payments. I resolve SOR ¶ 1.e in his favor.

However, Applicant receives limited benefit from Guidelines ¶ 20(d). He took no action to resolve most of the debts in the SOR until foreclosure on his home was imminent. He has been making payments under the Chapter 13 bankruptcy for only about six months. His delinquent debts cover a span of more than five years.

Whole Person Analysis

In addition to considering the specific disqualifying and mitigating conditions under each guideline, I have also considered: (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 applicant’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. Guidelines ¶¶ 2(a)(1)-(9). Several of these factors are incorporated in the above discussion of Guideline F, but some merit additional comment.

Applicant is a mature adult and a dedicated husband and father. He was articulate, candid, and sincere at the hearing. He sincerely desires to right his financial ship. Whether he has the financial acumen and discipline to do so remains to be seen. He has lived on the financial edge since he was laid off and decided to attend college in January 2000. When he returned to work, he did nothing to take care of several old debts. In June 2005, his financial situation was sufficiently secure that he decided to borrow money against the family home to remodel it and purchase a \$9,000 motorcycle, but he did nothing to resolve his old debts. He is making his monthly payments required by the Chapter 13 bankruptcy, but he is still living paycheck-to-paycheck. He hopes to use his home equity to pay off the delinquent debts and terminate the Chapter 13 bankruptcy, but it is not clear that he will be able to afford increased house payments at his current income level. He is not currently vulnerable to coercion, exploitation, or duress, because his debts are under control. However, based on his record of financial indiscipline, the likelihood of recurrence remains a concern. He has not yet established a track record of financial responsibility. “Only with the passage of time will there be a track record that shows whether a person, through actions and conduct, is willing and able to

adhere to a stated intention to refrain from acting in a way that the person has acted in the past.” ISCR Case No. 97-0727, 1998 DOHA LEXIS 302 at *7 (App. Bd. Aug. 3, 1998). Applicant’s financial track record may well improve with the passage of time, but a conditional or probationary clearance is not authorized. . See ISCR Case No. 99-0901, 2000 WL 288429 at *3 (App. Bd. Mar. 1, 2000). *But see* Directive ¶¶ E3.1.37-E3.1.39 (reconsideration after one year).

This case is a close call, but close cases must be resolved against an applicant. Guidelines ¶2(b). After weighing the disqualifying and mitigating conditions under Guideline F, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns based on financial considerations. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the national interest to grant him a clearance.

FORMAL FINDINGS

The following are my conclusions as to each allegation in the SOR:

Paragraph 1. Guideline F (Financial Considerations):	AGAINST APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	For Applicant
Subparagraph 1.e:	For Applicant
Subparagraph 1.f:	For Applicant
Subparagraph 1.g:	Against Applicant
Subparagraph 1.h:	Against Applicant
Subparagraph 1.i:	Against Applicant

DECISION

In light of all of the circumstances in this case, it is not clearly consistent with the national interest to grant Applicant a security clearance. Clearance is denied.

LeRoy F. Foreman
Administrative Judge