

KEYWORD: Financial

DIGEST: Applicant has not made any payments on \$10,669 (\$8,784 undisputed) in delinquent debt because it is no longer legally enforceable and has been removed from his credit record. The debt was incurred due to loss of income and expenditure of sizeable legal fees to challenge his termination from employment with an agency of the U.S. Government. His failure to pay the debt when he has the financial wherewithal to do so raises substantial Financial Considerations concerns. Clearance is denied.

CASENO: 06-08904.h1

DATE: 07/17/2007

DATE: July 17, 2007

In re:)	
)	
)	
-----)	ISCR Case No. 06-08904
SSN: -----)	
)	
Applicant for Security Clearance)	

**DECISION OF ADMINISTRATIVE JUDGE
ELIZABETH M. MATCHINSKI**

APPEARANCES

FOR GOVERNMENT

Fahryn Hoffman, Esq., Department Counsel

FOR APPLICANT

Howard E. Stempler, Esq.

SYNOPSIS

Applicant has not made any payments on \$10,669 (\$8,784 undisputed) in delinquent debt because it is no longer legally enforceable and has been removed from his credit record. The debt was incurred due to loss of income and expenditure of sizeable legal fees to challenge his termination from employment with an agency of the U.S. Government. His failure to pay the debt

when he has the financial wherewithal to do so raises substantial Financial Considerations concerns. Clearance is denied.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. As required by Department of Defense Directive 5220.6 ¶ E3.1.2 (Jan. 2, 1992), as amended, DOHA issued a Statement of Reasons (SOR) on November 27, 2006, detailing the basis for its decision—security concerns raised under Guideline F (Financial Considerations) of the revised Adjudicative Guidelines (AG) issued on December 29, 2005, and implemented by the Department of Defense effective September 1, 2006. The revised guidelines were provided to Applicant when the SOR was issued. Applicant, acting *pro se*, answered the SOR on December 15, 2006, and elected to have a hearing before an administrative judge. The case was assigned to me on February 5, 2007.

With the consent of the parties, I convened a hearing on May 9, 2007, to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Applicant appeared with counsel. Three Government exhibits (Ex. 1-3) and 13 Applicant exhibits (Ex. A-M) were admitted, and testimony was taken from Applicant, as reflected in a transcript (Tr.) received on May 21, 2007.

FINDINGS OF FACT

DOHA alleged under Guideline F that Applicant owed \$10,669 in charged off delinquent debt that had not been paid as of May 17, 2005. Applicant denied owing the two debts of \$1,885 (¶ 1.a) and \$8,784 (¶ 1.b), thereby placing the burden on the Government of proving the debts. After a thorough review of the pleadings, exhibits, and hearing transcript, I make the following findings of relevant and material facts.

Applicant is a 42-year-old lead engineer who began working for a defense contractor in December 2003. He stayed on after the company was acquired by another defense contracting firm, and he requires a security clearance for his duties.

Applicant earned his college degree in physics and mathematics in 1986. After one semester of graduate study in physics, he started working in the Washington, D.C. area as a cryptological mathematician for a U.S. Government agency in mid-December 1987. Within a few months, he was granted a TOP SECRET clearance and sensitive compartmented information (SCI) access. His starting salary was about \$25,000 annually. Single and with no dependents, Applicant lived within his means. He rented his residence, made accelerated payments on a 1995 model-year vehicle that he bought in 1994, and paid his revolving credit charges in full within the billing cycle.

Applicant was very persistent, organized, and detailed oriented on the job. In 1996, he complained to the agency's Inspector General about some perceived misconduct that he thought he

witnessed at the agency. Whether out of retaliation by the agency as Applicant claims, or for cause, his clearance and access were suspended in about December 1996. Under pressure, he resigned from his employment effective late January 1997, although he was absent from the agency for about a month. His annual salary at the time of his termination was between \$56,000 and \$57,000.

Unemployed, Applicant moved back home to Kentucky where he resided with his mother rent free. He had his household goods shipped, paying the cost out of the \$10,000 to \$20,000 in savings he had accumulated when he was working. Applicant received unemployment benefits for about six months but thereafter lived off his savings and consumer credit exclusively. Confident he had done nothing wrong, and of the opinion that his clearance had been suspended without due process, he spent his time and funds looking for an attorney to represent him on appeal of his clearance suspension and separation from federal civilian employment. He incurred travel costs to D.C. and retainer fees to meet with several attorneys who declined to take his case.

In summer 1997, Applicant relocated to Florida, joining his father who had offered to help him find legal counsel in his area. With money tight, he listed his automobile for sale with an online vehicle trading board in August 1997, at an asking price of \$17,025. Applicant had previously attempted to sell the vehicle in November 1996 when it became clear to him that his continued employment with the federal agency was in jeopardy (“I knew I was being set up for termination.” Tr. 48). It did not sell, and Applicant had trouble making the car payments. The vehicle was eventually repossessed in April 1998.

On May 11, 1998, Applicant paid a D.C. area attorney a \$10,000 retainer fee to represent him in his suit against the agency. With an attorney to handle his legal case, Applicant devoted his full attention to his job search in the field of mathematics. He relied on consumer credit regularly for meals, clothing, and books, and ran up a debt balance of about \$8,784 on an account opened when he was unemployed (¶ 1.b). When he was no longer able to make payments on the account, Applicant sent a letter to the creditor asking for patience until he found work. He even forwarded a copy of his retainer letter from his attorney, but the creditor closed the account in about July 1998. Applicant discovered the account had been closed when he tried to use his credit card for a purchase and it was denied.

In September 1998, he began working as a senior research engineer for the developer of a software business card reader program at an annual salary of \$65,000 to \$75,000. Hired to lead the redesign of the core software algorithms for the business-card reader, he arrived with “considerable recommendations” that were borne out in product innovations. Applicant relied on public transportation to get to work and did not own a vehicle during this time. While he had taken the job with the understanding that it was permanent, he was laid off in May 1999 when the project finished. Applicant did not make any payments on the \$8,784 debt because he was still paying his attorney to resolve his employment dispute with the federal agency.¹ He paid \$58.74 on August 24, 1998, and \$1,219.98 on October 26, 1998, to the D.C. area attorney he had retained.

Applicant lived off unemployment benefits and savings until August 2000. On June 21, 1999, Applicant paid a local legal firm \$5,000 to represent him as his other attorney had not yet filed a

¹Applicant testified he was still paying “thousands of dollars to attorneys” to resolve his employment dispute with the federal agency. (Tr. 83)

claim on his behalf and he wanted a second opinion. In late 1999, Applicant elected not to pursue any further a claim against his former employer.

Applicant took an extended vacation from November 1999 to April 2000 to Thailand, the native country of his future spouse. They married in the U.S. in December 2000.

From mid-August 2000 to mid-January 2003, Applicant was employed as a senior software engineer for a content distribution network Internet company. Described as “very serious, intense” by his supervisor, Applicant was very reliable even in performing the most complex work. With an annual salary that started at \$85,000, Applicant began reading publications such as *Money* magazine and the *Wall Street Journal* in about early 2001 for information as to how best to settle his delinquent consumer credit debt. He decided to make no payments on his old debt because he understood it would cause more harm to his credit record than if he did nothing:

Because it would stay on your, because on credit histories, they go for a seven year period and they have to be taken off by law, and they, the clock starts at the last transaction that you had with them and if I had repaid them in 2001-02, the debt, that would have stayed, my belief was that it would have stayed on my credit for another seven years beyond that, instead of being taken off in two years or three years.² (Tr. 61)

Applicant did not know whether the debt had been charged off or sent for collection at that time. He made no effort to contact the creditor to ascertain its status. With salary increases to just over \$100,000 as of January 2003, Applicant managed to accumulate savings of \$100,000 or more during this employment. Applicant did not incur any new consumer credit delinquency during this period, and he used public transportation to commute to work.

Applicant was laid off in mid-January 2003. He remained current in his living expenses even though he was unemployed for most of the year. In early December 2003, Applicant began working for a defense contractor as a lead engineer at an annual salary of \$110,000. Applicant bought a car, paying cash, so that he could get to work.

On December 17, 2003, Applicant executed a security clearance application (SF 86) for a security clearance. Applicant indicated in response to question 32 concerning whether he had ever had a clearance or access authorization denied, suspended, or revoked, that his clearance had been removed “extralegally, denying due process” in December 1996 in retaliation for reporting improper conduct to a federal agency Inspector General. In response to question 35 concerning any repossessions, he disclosed the April 1998 repossession of his automobile on which he had owed \$12,000, adding that he had openly communicated with the lien holder and had attempted to sell the vehicle; that the attorney, to whom he paid about \$20,000 to address due process claims and recoup lost wages from his former federal employer, never filed a claim on his behalf. He responded “No” to questions 38 (any financial delinquencies over 180 days in the last seven years) and 39 (currently over 90 days delinquent on any debt).

²Applicant testified he did not know for sure whether the debt in SOR ¶ 1.b had been charged off. He attributed his understanding to knowledge of how the system of unsecured credit works, that debts get charged off after six months after the last transaction. (Tr. 114)

By April 21, 2005, his employer had been acquired by another defense contractor. Applicant reviewed the SF 86 completed in December 2003, and added information to, or in some instances changed, his previous responses. He changed his answer to question 38 to “Yes” and added, “In 1998, see remarks in item 35. Credit rating prior to 1998 was excellent and have incurred no new debts since 1998 credit issues. Arising from job loss and legal fees.” Under the section for general remarks (question 43), Applicant added, “Always strive to be honest, ethical, reasonable, and responsible in all areas of my life. Regrettably the adverse items in 1998 (re: credit rating) were helpless result of false claims and denial of due process in 1996.”

A combined credit report from two credit reporting agencies indicated on May 17, 2005, that Applicant had two bad debts that were unpaid: a credit card debt of \$1,885 on an account likely opened in September 1998 placed for collection and later charged off by the assignee (¶ 1.a),³ and a credit card debt of \$8,784 on an account opened in November 1997 and later charged off with no activity since July 1998 (¶ 1.b).

DOHA subsequently sent Applicant a financial interrogatory, asking him to verify the current status of those two debts and any other delinquent/outstanding debts that he owed. Included with his August 10, 2006, response to the interrogatory was a letter dated August 9, 2006, in which Applicant stated, in part:

I am pleased to report that the two debts for which status updates have been requested have both expired as legal debts. The '[creditor omitted]; \$1885' account was charged off in April 1999, and the '[creditor omitted]; \$8784' was charged off in March 1999. State law dismisses such accounts from financial obligation six years after last-transaction dates; thus the former was relieved in April 2005, the latter in March 2005.

As indicated in my enclosed Personal Financial Statement, I do have more than sufficient funds to cover any valid, active account balances, if it were deemed appropriate to do so. Yet, I have been advised that since both items have fallen off of my credit report already, that any transaction on old defunct accounts would add negative credit information onto my currently clean credit history for another seven years.

He furnished a copy of his March 2006 credit report showing all accounts were in good standing, as well as a personal financial statement indicating that he had sufficient funds to repay his debts. He estimated a joint net monthly remainder of \$7,550, and \$260,000 in bank savings.

On November 27, 2006, DOHA issued an SOR to Applicant alleging Financial Considerations concerns related to his failure to pay the \$1,885 (¶ 1.a) and \$8,784 (¶ 1.b) charged off debts. Applicant claims to not recognize the debt in ¶ 1.a, but he also has made no effort to contact the creditor to determine whether it was his debt or wrongly listed on his credit report. He made no effort to repay the \$8,784 debt because it was no longer legally enforceable and he wanted

³The May 17, 2005, credit report lists a revolving credit card account, opened in September 1998, and charged off with a debt balance of \$1,884. There is a second listing under the same account number, as a collection account opened in April 2001 with a past due balance of \$1,885. (Ex. 3)

to maintain a clean credit record, in part so there would be no issues if he and his spouse decide to change residences.

In Fall 2006, Applicant and his spouse had their first child. Applicant's spouse, who earned \$36,572.75 in 2006 as a food server for a hotel, reduced her hours to three days per week. Her income decreased by about one quarter, but Applicant's salary had increased to just over \$120,000 as of Spring 2007. Applicant and his spouse take turns caring for their child. They share the car and do not spend extravagantly. Discretionary funds are placed in a savings account. As of March 2007, Applicant's take home pay was \$2,799.35 for 80 hours of work. He and his spouse had a joint online savings account with a balance of \$314,172.21 as of mid-April 2007. Applicant had retirement assets of \$14,652.07 from his employment with the Internet company from 2000 to 2003. He participates in his current employer's savings and investment plan. The value of his account, \$77,132.33 as of the end of 2006, had increased in value to about \$100,000 as of May 2007.

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 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). 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).

The revised Adjudicative Guidelines set forth potentially disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. 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.

CONCLUSIONS

Under Guideline F, *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.* AG ¶ 18. Applicant was forced to resign from his job with a federal agency, effective late January 1997, in lieu of being fired ("made to resign using threats of blacklisting me, essentially." Tr. 37). He elected to challenge the loss of his clearance and federal employment, a decision that cost him emotionally and financially.

Accumulated savings went to pay for travel back and forth to look for legal counsel in the Washington, D.C. area. About ten months into his unemployment, he opened a credit card account on which he incurred a debt balance of about \$8,784 (¶ 1.b). In April 1998, his car was repossessed for failure to make timely payments. Yet, the following month, he paid \$10,000 to an attorney to represent him in his suit against the agency. In September 1998, he began working at a job that paid between \$65,000 and \$75,000 annually, but made no effort to repay the \$8,784 debt as he was still paying legal fees. In October 1998, he paid an additional \$1,219.34 to the attorney representing his interests against the federal agency. According to his May 2005 credit report (Ex. 3), he opened another credit card account in September 1998 on which he incurred a \$1,884 balance (¶ 1.a) that was placed for collection. Shortly after he was laid off in May 1999, he paid another attorney \$5,000 in June 1999 for an opinion as to proceeding on the merits against the federal agency, knowing that he owed at least the creditor in ¶ 1.b if not both creditors. In late 1999, Applicant decided to no longer pursue the matter against the agency. He took a lengthy vacation to Thailand from November 1999 to April 2000 when he was unemployed, and aware of at least one unpaid delinquent credit card balance (¶ 1.b) on his credit record.

Applicant now claims to have no knowledge of the \$1,885 debt in SOR ¶ 1.a. However, he has not successfully met his burden of showing that the debt, which appears on his May 2005 credit report, was not his debt (*see* ¶ 20(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*). When Applicant answered the DOHA financial interrogatory, he did not deny that the debt had been incurred by him. Rather, he challenged that it was legally enforceable since it had been charged off in April 1999. He provided no documentation showing that the debt was reported on his credit record in error. He has not disputed with any of the credit bureaus the inclusion of the debt on his record. Disqualifying conditions ¶ 19(a) *inability or unwillingness to satisfy debts* and ¶ 19(c) *a history of not meeting financial obligations*, apply to the debts alleged in SOR ¶¶ 1.a. and 1.b.

The absence of any new delinquent debt since 1999 and the negative impact of his lengthy periods of unemployment (26 of the 36 months during the three-year period from 1997 through 1999 alone) merit consideration of mitigating conditions ¶ 20(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*, and ¶ 20(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*. Irrespective of whether Applicant had a legitimate claim against the federal agency, it is clear that his financial delinquencies are directly attributed to the loss of this job and his efforts to redress what he thought was unjust retaliation by the agency.

The concern in this case rather is not with the incurring of the debt, but rather with Applicant's failure to take reasonable efforts to address the delinquency. From September 1998 to May 1999, he was gainfully employed at an annual salary of between \$65,000 and \$75,000 per year. Even with the \$5,000 paid to an attorney in mid-May 1999, he should have been able to make some payment on his delinquent debt. His May 1999 layoff was unforeseen (*see* ¶ 20(b)), but the evidence also shows that he took a lengthy vacation to his spouse's native Thailand, likely incurring some travel expenses, from November 1999 to April 2000. Although he began working as a senior

software engineer at an annual salary of \$85,000 in August 2000, he did not contact his creditors. Instead, he started reading financial magazines where he learned that bad credit would remain on his credit report for seven years after the last transaction. Motivated from self-interest rather than a sense of obligation, he did nothing and the debts were subsequently dropped from his credit report.

As of August 2006, Applicant estimated he had \$7,550 in monthly net disposable income and \$260,000 in bank savings. Even if he underestimated some of his monthly expenses, such as groceries where he indicated only an expense of \$175, he was in a financial position to repay his delinquent debt in full. Yet, he indicated to DOHA, “I am pleased to report that the two items for which status updates have been requested have both expired as legal debts.” (Ex. 2) Since the debts in ¶¶ 1.a and 1.b had fallen off his credit report, any transaction on his old accounts would add negative credit information onto his clean credit history. Even as of his hearing, he showed no intent to resolve his old debts as it would negatively affect his currently good credit rating that he wanted to maintain in case he and his spouse should decide to move from their present apartment. As noted by the DOHA Appeal Board in ISCR 01-09691, decided on March 27, 2003, “even if a delinquent debt is legally unenforceable under state law, the federal government is entitled to consider the facts and circumstances surrounding an applicant’s conduct in incurring and failing to satisfy the debt in a timely manner.”

Applicant is not at risk of engaging in illegal acts to generate funds since he clearly is not financially overextended. However, failure to satisfy debts can indicate a lack of judgment or unwillingness to abide by rules and regulations. The Government must be assured that those individuals granted access can be counted on to put their fiduciary obligations ahead of their personal interest and Applicant’s handling of his financial matters cast considerable doubt as to whether it is clearly consistent with the national interest to grant him a security clearance.

*The adjudicative process is an examination of a sufficient period of a person’s life to make an affirmative determination that the person is eligible for a security clearance. AG ¶ 2(a). Each security clearance decision must be a fair and impartial common sense determination based upon consideration of all the relevant and material information and the pertinent criteria and adjudication policy. Directive ¶ 6.3. Under the whole-person concept, Applicant has shown that he can live within his means. He and his spouse live frugally, sharing one car and incurring little consumer debt. Yet, Applicant’s attitude toward his old accounts is troubling in its implication for what he would do if faced with a situation where doing the right thing would be personally inconvenient or costly. He fails to show sufficient reform (¶ 2(a)(6), *the presence or absence of rehabilitation and other permanent behavioral changes*) when he continues to justify or rationalize his failure to pay for the goods and services that he enjoyed, overstating that he needs a clean credit rating even to get an apartment (“that is a criteria for survivability”). (See Tr. 118)*

FORMAL FINDINGS

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

Paragraph 1. Guideline F:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant

Subparagraph 1.b:

Against Applicant

DECISION

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

Elizabeth M. Matchinski
Administrative Judge