



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



In the matter of:)	
)	
-----)	ISCR Case No. 06-11901
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Ray T. Blank, Jr., Esq., Department Counsel

For Applicant: *Pro se*

December 10, 2008

Decision

MARSHALL, Jr., Arthur E., Administrative Judge:

Applicant completed a Standard Form 86 (SF-86) security clearance application, dated December 1, 2004.¹ On March 6, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) stating security concerns under Guideline F (Financial Considerations), Guideline E (Personal Conduct), and Guideline J (Criminal Conduct). 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 for SORs issued after September 1, 2006.

¹ Although page one of the SF-86 indicates Applicant signed the form on December 23, 2004, the handwritten signatures on the actual SF-86 and attached releases are dated December 1, 2004.

In a response notarized on June 4, 2008, Applicant admitted twelve of fourteen allegations regarding finances, one of six allegations concerning personal conduct, two of four allegations raised under the guideline for criminal conduct, and requested a hearing before a DOHA administrative judge. DOHA initially assigned the case to another administrative judge on July 11, 2008, but the case was transferred to me on August 18, 2008, for caseload considerations. Applicant and Department Counsel agreed on a September 17, 2008, hearing date and a notice to that effect was issued on August 25, 2008. That notice was amended on August 27, 2008, to correct an error in the hearing venue address.

The hearing took place as scheduled. Department Counsel moved to amend SOR allegations 3b and 3c by correcting a date. With no objection, the motion was granted. Department Counsel submitted eight exhibits (Ex.), accepted into the record as Exs. 1-7 and Demonstrative Exhibit (DE) 1. Applicant testified on his own behalf. No witnesses were called and no exhibits were offered into evidence. Applicant was given until September 26, 2008, to submit any additional materials. On October 3, 2008, Department Counsel forwarded one document, timely submitted by Applicant on September 22, 2008. Without objection, it was accepted into evidence as exhibit (Ex.) A. The transcript (Tr.) was received on October 7, 2008, and the record was closed. Based upon a review of the case file, exhibits, and testimony, security clearance is denied.

Findings of Fact

Applicant is a 42-year-old heavy equipment mechanic working for a government contractor. He has worked for the same employer for four years. Applicant has a high school diploma and has completed some college-level courses. Divorced, Applicant is the father of two adult children.

From 1984 through 1997, Applicant served in the U.S. Navy. While in the service, in 1994, he visited his estranged first wife to fix one of their children's bicycles. When his wife's boyfriend appeared, an altercation ensued. He was charged with carrying a concealed weapon, misdemeanor simple assault, and misdemeanor second degree trespass. Although a trial date was set, the case ultimately was dismissed.

After Applicant was honorably discharged in 1997, he was given custody of his children. His first wife, from whom he was divorced in January 1995,² was ordered to pay him \$365 a month for child support. About 18 months later, the court ordered that the parents share custody jointly. Up to this point, Applicant was in good standing with his creditors. While Applicant retained physical custody of the children during the school year, child support payments were discontinued. Applicant's finances became strained as he struggled to raise the children on his single salary. Then, in August 2002, he experienced a seven month period of unemployment. Although unemployed, he went

² Ex. 1 (SF-86, dated Dec. 23, 2004, at 3).

through with his marriage to his second wife in April 2002. Finances were tight, however, and he almost lost his home. Some of his accounts became delinquent.

While unemployed, Applicant received unemployment compensation. Compensation was granted and received based on his certification of unemployment. When he returned to work in about February 2003, funds continued to be deposited into his bank account for the weeks ending March 8, 2003, March 13, 2003, March 22, 2003, and April 26, 2003. Applicant was initially unaware of these deposits.³ Once they were discovered, he kept the funds because he feared he might lose his house.⁴

Applicant's new job paid less than his prior employer. Meanwhile, his new wife, who had two children of her own, was unemployed. Providing for six family members was nearly impossible and more accounts went unpaid. He filed for bankruptcy protection in May 2004. A month later, he was arrested and charged with knowingly making a false statement and representation and failing to disclose a material fact to the unemployment commission for the four weeks of unemployment compensation paid out after he returned to work. At a July 2004 hearing, Applicant advised the tribunal he had filed for bankruptcy. It was his understanding that if he pled guilty, the matter would be dropped.⁵ He was sentenced to 60 days in jail, placed on probation for a year, and ordered to pay court costs. Applicant testified that garnishment was put into place to repay the approximately \$2,000 in overpayments noted in SOR allegation ¶ 1n, but he failed to provide evidence showing garnishment had paid off or reduced this debt.

In December 2004, Applicant completed an SF-86 and answered "no" to questions as to whether he had any delinquent debts. Although he gave full answers regarding his bankruptcy petition and liens, he failed to indicate his delinquent debts. This was due to oversight caused by his rush to complete the form and his failure to understand the question.⁶ He similarly failed to disclose the convictions related to the unemployment compensation overpayments and related misrepresentations. He believed the charges had been "dropped."⁷ Applicant does not completely understand either the process of recoupment or his conviction.⁸

In 2005, Applicant reconsidered his bankruptcy filing. While he thought it would "look better" to pay off his debt himself, he also had property taxes that could be

³ Tr. 41-42.

⁴ Tr. 49.

⁵ Tr. 59.

⁶ Tr. 48.

⁷ Tr. 60.

⁸ Tr. 56-60.

included if he re-filed.⁹ A consumer credit counseling service advised him to pay off what he could and he moved to dismiss the bankruptcy action. He was told they could not help him because he had insufficient funds to start making significant payments. He intends to return to counseling when he has more bills paid or under control.¹⁰ Meanwhile, his wife left with her children the following year and they divorced in 2006.

Applicant has struggled to keep up with child and household expenses. His lack of financial savvy has made the attempt more difficult. He stated, albeit without documentary proof, that he has satisfied four delinquent accounts not noted in the SOR. He denied the medical account noted as SOR allegation ¶ 1g is his, arguing that, as former military personnel, all of his medical care is provided and paid through the Veteran's Administration.¹¹ There is no evidence that he has formally disputed the inclusion of this account on his credit report with the credit reporting bureaus. He made substantial progress, however, paying down one account at issue in the SOR,¹² SOR allegation ¶ 1k. That debt was reduced from \$2,513 to \$954 through regular payments. He admits the remaining nine accounts noted in the SOR, amounting to an additional sum in the approximate amount of \$7,000, remain outstanding.¹³ Consequently, that balance, along with the balance owed on SOR allegation ¶ 1k, is currently around \$8,000. This sum does not include any balance owed toward the \$2,000 in workers compensation debt he alleged he is currently satisfying through garnishment.

Much of Applicant's money over the past years has been expended on his two children. Without child support, the burden was onerous. They are both finished with college now, and he intends to devote the money formerly spent on them to his delinquent debts.¹⁴

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

⁹ Tr. 24.

¹⁰ Tr. 67.

¹¹ Tr. 31 regarding ¶ 1.g for \$320.

¹² SOR ¶ 1k states a balance of \$2,513 remained as of February 5, 2008, on account ending – 0473. See Ex. 3, Interrogatories, at 4. Applicant had two to four accounts with this same creditor. There is some evidence that one or two entries may be duplicates. Tr. 50-56. One account was taken over by another creditor, as shown on Ex. A. Ex. A shows a history of regular payments not inconsistent with those prior payments shown in Ex. 3, with a current balance of \$954. In the absence of the original February 5, 2008, credit report, and in light of the ultimate disposition in this case, I find regular payments were paid on the account noted in the SOR (account ending – 0473).

¹³ Tr. 29-30.

¹⁴ Tr. 28-29, 67.

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. Under AG ¶ 2(c), this 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.

The Government must present evidence to establish controverted facts alleged in the SOR. An applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." ¹⁵ The burden of proof is something less than a preponderance of evidence. ¹⁶ The ultimate burden of persuasion is on the applicant. ¹⁷

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 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). "The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."¹⁸ Any reasonable doubt about whether an applicant should be allowed access

¹⁵ See also ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug. 10, 1995).

¹⁶ *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

¹⁷ ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

¹⁸ *Id.*

to sensitive information must be resolved in favor of protecting such sensitive information.¹⁹ The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of an applicant.²⁰ It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Based upon consideration of the evidence, I find Guideline F (Financial Considerations), Guideline E (Personal Conduct), and Guideline (Criminal Conduct) to be the most pertinent to the case. Conditions pertaining to these adjudicative guidelines that could raise a security concern and may be disqualifying, as well as those which would mitigate such concerns, are set forth and discussed below.

Analysis

GUIDELINE F – Financial Considerations

Under Guideline F, failure or an 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.²¹ The Regulation sets out several potentially disqualifying conditions under this guideline.

Between 1998 and 2004, Applicant acquired a number of debts which ultimately became delinquent. They currently amount to about \$8,000 to \$10,000. Of the accounts at issue, represented in the SOR as allegations ¶¶ AG 1(a)-1(k) and ¶ 1(n), the evidence only reflects payment on the account noted at SOR allegation ¶ 1(k). Consequently, Financial Considerations Disqualifying Condition (FC DC) AG ¶ 19(c) ("a history of not meeting financial obligations") and FC DC AG ¶ 19(a) ("inability or unwillingness to satisfy debts") apply.²² With such conditions raised, the burden shifts to Appellant to overcome the case against her and mitigate security concerns.

In 1997, Applicant was given custody of his two children and his ex-wife provided child support. That support was curtailed by 1999, although Applicant substantially retained physical custody of the children. He also experienced periods of unemployment in 2002 and 2003. In 2005, he moved to dismiss his bankruptcy petition, a strategy that could have helped resolve his debts. He decided to tackle his delinquent debts alone, without the help and guidance of a finance professional. Lacking such

¹⁹ *Id.*

²⁰ Executive Order 10865 § 7.

²¹ Revised Adjudicative Guideline (AG) ¶ 18.

²² Neither the filing for nor the voluntary dismissal of a single bankruptcy action is, by itself, sufficient to raise security concerns to the extent that both are legal and valid options for addressing debt.

guidance, his delinquent debts remain largely unaddressed. Therefore, Financial Considerations Mitigating Condition (FC MC) AG ¶ 20(b) (“the conditions that resulted in the behavior 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”) cannot apply.

While Applicant showed that he has substantially paid a little over a third of one of the debts at issue, he presented no documentary evidence demonstrating his efforts toward any of the many other debts at issue. Consequently, FC MC AG ¶ 20(d), (“the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts”) cannot apply.

Applicant did not complete financial counseling. He did not present an established plan or articulate a new approach for addressing his many remaining delinquent debts. Further, there is no indication that continuing with his current method for addressing his debts without professional guidance or oversight will result in any significant results in the near future. Therefore, FC MC AG ¶ 20(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”) does not apply. None of the other mitigating conditions apply.

Guideline J – Criminal Conduct

With respect to Guideline J (Criminal Conduct), the Government has established its case. Under 18 U.S.C. ¶ 1001, it is a crime to knowingly and willfully make any materially false, fictitious, or fraudulent statement or representation in any matter within the jurisdiction of the executive, legislative, or judicial branch of the United States. Applicant admits he failed to note his arrest and conviction for knowingly making false statements, and failing to disclose material facts to the unemployment compensation commission. Such conduct and admissions are sufficient to raise security concerns, invoke Criminal Conduct Disqualifying Conditions (CC DC) AG ¶ 31(a) (“a single serious crime or multiple lesser offenses”), and CC DC AG ¶31(c) (“allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted, or convicted”), and initiate inquiry.

Applicant failed to disclose on his SF-86 form that he had been arrested and convicted over the unemployment compensation overpayments. He testified that it was his understanding that if he pled guilty, the matter would be dropped. Consequently, it was not at the forefront of his thoughts when he completed the SF-86.

Overall, Applicant’s testimony was highly credible. His depiction of the legal proceedings regarding the overpayments shows how little he understands those proceedings and the significance of his plea. He believes the matter was “dropped.” Therefore, it was not in his thoughts when he completed the SF-86. While this raises questions regarding his judgment, such questions are better considered under the “whole person” analysis below in light of evidence indicating his failure to note these incidents was neither a knowing or willing attempt to defraud or mislead.

Guideline E – 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.

Under this guideline, examination is made of an Applicant's reliability, trustworthiness, and ability to protect classified information based on his past personal conduct and actions. 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. Applicant denied having any financial delinquencies on his December 2004 SF-86. He also denied having been convicted of any offense in the seven years preceding his execution of that application. Consequently, Personal Conduct (PC) Disqualifying Condition (DC), ¶ 16(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") applies.

Applicant credibly testified that he was in a hurry to complete his SF-86 and that he may not have understood the questions at issue. He did, however, provide complete information about his liens and his then-pending bankruptcy petition. The information about the bankruptcy was more than sufficient to give notice that he had delinquent accounts and money issues. Moreover, there is no evidence he deliberately omitted, concealed, or falsified relevant facts regarding the fact he had delinquent debts. As for not listing his convictions for the unemployment compensation, Applicant's testimony and demeanor make it more than plausible that he did not and does not completely comprehend either the process or the plea he entered. Again, there is no indication of deliberate omission, concealment, or falsification.

Lacking a disqualifying condition, I find that Guideline E does not apply. These facts and his explanations, however, do raise questions of judgment. Such questions are thoroughly considered under the "whole person" analysis, below.

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 public trust position 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, as well as the “whole person” factors. Applicant is a forthright and mature man who is devoted to his children. He has made great sacrifices to raise and educate them. Lacking a background in finance and failing to adhere to a coherent approach for tackling his delinquent debts, however, he relied on a haphazard approach to address the debts at issue. He also put off to the future much needed financial counseling. As a result, almost all the debts at issue in the SOR remain unaddressed. Moreover, he failed to provide documentary evidence of those efforts he testified he has made. As a consequence of these factors, Applicant failed to mitigate security concerns regarding his finances. In failing to provide documentation reflecting his efforts to date, he failed to mitigate financial considerations security concerns.

Further, while the guidelines for personal conduct and criminal conduct are an ill fit for consideration of Applicant’s judgment and reliability, those qualities are inherent to the analysis of the “whole person.” Despite his best intentions and efforts to raise and educate his children without financial help from their mother, his actions and inactions demonstrate questionable judgment. Substituting his own repayment scheme for his bankruptcy petition only served to protract repayment of his debts. Failing to complete financial counseling resulted in a haphazard approach to rectifying his financial situation. Not documenting his efforts to resolve his finances undermined his burden to mitigate security concerns. While seeking aid from a financial expert might help reverse his course, demonstrate solid judgment, and help mitigate financial considerations security concerns, at present, genuine security concerns remain. Therefore, I conclude it is not clearly consistent with the national security to grant Applicant a security clearance. Clearance is denied.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline F:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	Against Applicant
Subparagraph 1.e:	Against Applicant
Subparagraph 1.f:	Against Applicant
Subparagraph 1.g:	Against Applicant
Subparagraph 1.h:	Against Applicant

Subparagraph 1.l	Against Applicant
Subparagraph 1.j:	Against Applicant
Subparagraph 1.k:	For Applicant
Subparagraph 1.l:	For Applicant
Subparagraph 1.m:	For Applicant
Subparagraph 1.n:	Against Applicant
Paragraph 2, Guideline J:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	For Applicant
Paragraph 1, Guideline E:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	For Applicant

Conclusion

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

ARTHUR E. MARSHALL, JR.
Administrative Judge