

KEYWORD: Financial

DIGEST: Applicant failed to pay debts totaling more than \$96,000 arising from a failed business venture. Although the debts were corporate debts, he had personally guaranteed payment. He did not disclose the debts on his security clearance application. Security concerns based on financial considerations and personal conduct are not mitigated. Clearance is denied.

CASENO: 06-16159.h1

DATE: 08/23/2007

DATE: August 23, 2007

In re:)	
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SSN: -----)	ISCR Case No. 06-16159
)	
Applicant for Security Clearance)	
)	

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

APPEARANCES

FOR GOVERNMENT

John B. Glendon, Esq., Department Counsel

FOR APPLICANT

Alan V. Edmunds, Esq.

SYNOPSIS

Applicant failed to pay debts totaling more than \$96,000 arising from a failed business venture. Although the debts were corporate debts, he had personally guaranteed payment. He did

not disclose the debts on his security clearance application. Security concerns based on financial considerations and personal conduct are not mitigated. Clearance is denied.

STATEMENT OF THE CASE

On October 16, 2006, 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 (AG). The SOR alleged security concerns raised under Guideline F (Financial Considerations) and Guideline E (Personal Conduct).

Applicant answered the SOR in writing on December 4, 2006, and elected to have a hearing before an administrative judge. The case was assigned an administrative judge on April 11, 2007, and reassigned to me based on workload on July 9, 2007. It was heard on July 19, 2007, as scheduled. DOHA received the hearing transcript (Tr.) on July 27, 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 46-year-old high school graduate. He has been married since August 1992. He has two children, including a son in the U.S. Navy (Tr. 36). He has never held a security clearance.

In 1999, Applicant formed a construction company in which he was the president and sole corporate shareholder. He was licensed as a general contractor (Tr. 27). He entered into a contract with a leaseholder at local airport to build aircraft hangars. He contracted with four vendors for construction supplies and equipment, and the vendors required that he personally guarantee payment for the supplies and equipment. The leaseholder went broke, leaving Applicant personally responsible for the debts (Tr. 27-28). Relying on the leaseholder's assurances that he could obtain additional funds, Applicant continued to order supplies and equipment. Applicant wrote the leaseholder a letter demanding payment, but received no response (AX D; Tr. 29). Applicant contacted the bank where the leaseholder claimed he could obtain a loan, and he learned that the bank had declined to fund the project (Tr. 30; Applicant's Exhibit (AX) D).

The vendors obtained default judgements against the corporation and against Applicant individually (Government Exhibits (GX) 6-9), and the judgments were unsatisfied as of the date of the hearing (SOR ¶¶ 1.a, 1.b, 1.e, and 1.f). Applicant did not file for bankruptcy, but instead he dissolved the company at some time in late 2001 (Tr. 27, 44-45, 93). He testified he believed it would be better for his creditors if he closed the company and let the creditors pursue the leaseholder (Tr. 46). He testified he is able to pay the judgments, but he has not done so because he does not believe they are his personal debts (Tr. 35).

Applicant also used a company credit card for incidental expenses connected to the construction contract (Tr. 33). Applicant was the personal guarantor for charges to this account (Tr. 62). A credit card debt of \$13,691 was charged off in April 2001, and it remains unpaid (SOR ¶ 1.c).

Applicant negotiated an installment payment plan to pay off the default judgment alleged in SOR ¶ 1.e. However, his check for the first payment was dishonored, and he did not redeem the check or make any further payments (Tr. 74-75).

Applicant also used his personal credit card for some company expenses. A debt of \$4,151 on this credit card was charged off in November 2001, and it remains unpaid (SOR ¶ 1.g). He testified he did not pay the debt because he regarded it as a corporate debt (Tr. 81).

Applicant received a parking ticket sometime in 1999, while on vacation (SOR ¶ 1.d). He thought the ticket was unfair, because he returned to his car and tried to move it before the ticket was completely executed. He received a letter stating that the ticket was unpaid. After he was interviewed about the unpaid ticket by a security investigator in March 2006, he wrote a letter contesting the ticket (Tr. 67, 69). He testified he received no response to his letter and assumed the matter had been dropped, until it appeared on his credit report (Tr. 66; GX 3). In response to DOHA interrogatories in July 2006 (GX 2 at 4), he stated: "I wrote a letter to the parking bureau explaining my position. They never responded to it. I assumed they dropped it. Guess not. Will pay if required." Applicant presented no evidence that the ticket was ever paid.

Applicant is now the president and sole shareholder in a company seeking to provide aircraft to fly sensors over various locations for the Department of Defense (Tr. 25). Ninety percent of Applicant's business is with the Department of Defense (Tr. 37). He started the company in November 2004, and initially capitalized it with about \$10,000 of his own money (Tr. 41-42). After the company started making money he purchased six aircraft at a total cost of about \$500,000. The aircraft were "junk" when he purchased them, but he rebuilt them for use in his current business, and he estimates they are now worth about \$1,000,000 each (Tr. 43-44). He estimates that his net equity in the company is about \$7,000,000 (Tr. 26).

In November 2005, Applicant executed an Electronic Questionnaire for Investigations Processing (eQIP). Even though he was the sole owner and president of the construction company and received a salary as president from 1999 until the company closed in 2001, he did not list the company in Section 11, pertaining to his employment record. The omission is not alleged in the SOR.

Applicant answered "no" to the question in Section 27d of the eQIP, asking if there were any unpaid judgments against him in the last seven years. He did not disclose the judgments alleged in SOR ¶¶ 1.a, 1.b, 1.e, and 1.f. In response to two questions in Section 28 regarding debts more than 180 days delinquent during the last seven years and debts currently more than 90 days delinquent, he disclosed one satisfied judgment, but he did not disclose the debts alleged in SOR ¶¶ 1.d, 1.e, and 1.g.

In response to DOHA interrogatories and at the hearing, Applicant maintained that the debts and judgments alleged in the SOR, except for the parking ticket, were corporate debts and not personal debts. He testified he did not pay the debts because he hoped the vendors would seek

payment from the leaseholder. He also testified he did not disclose the debts and judgments on his eQIP because he thought the questions pertained only to personal debts and not to corporate debts (Tr. 34). He admitted he knew the creditors would look to him for payment if the corporation could not pay its corporate debts (Tr. 92).

Applicant owns his home and estimates his equity is about \$400,000. His current net monthly income is about \$4,800 and his net monthly expenses are about \$4,000 (Tr. 89). He presented letters from three business associates attesting to his trustworthiness and reliability (AX A, B, E).

The facility security officer at his current company, who has known him for thirteen years, considers him a person of high integrity and honesty, deeply involved in the local community. She described one incident in which Applicant decided not to litigate the award of a multimillion dollar contract because he believed that the litigation would have created a break in coverage for the troops supported under the contract (AX F).

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 AG. 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 AG ¶¶ 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* AG ¶ 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.” AG ¶18.

Several disqualifying conditions under this guideline could raise a security concern and may be disqualifying in this case. AG ¶ 19(a) is raised where there is an “inability or unwillingness to satisfy debts.” This condition is raised because Applicant admitted he was able to pay the debts but was unwilling to pay them.

AG ¶ 19(b) is a two-pronged condition that is raised where there is “indebtedness caused by frivolous or irresponsible spending and the absence of any evidence of willingness or intent to pay the debt or establish a realistic plan to pay the debt.” This condition is not raised, because Applicant’s debts were caused by a deadbeat client rather than frivolous or irresponsible spending.

AG ¶ 19(c) is raised when there is “a history of not meeting financial obligations.” This condition is raised by Applicant’s record of unpaid debts and judgments.

AG ¶ 19(e) is raised when there is “consistent spending beyond one’s means, which may be indicated by excessive indebtedness, significant negative cash flow, high debt-to-income ratio, and/or other financial analysis.” This condition is not raised. Although Applicant took business risks, they were reasonable under the circumstances. What he did not anticipate was his client’s financial irresponsibility.

Since the government produced substantial evidence to raise the disqualifying conditions in AG ¶¶ 19(a) and (c), the burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An 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.” AG ¶ 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.” I am satisfied Applicant’s debts are recent and frequent, but they are not likely to recur. Applicant incurred his debts due in large part to business naivete. He learned his lesson and is now involved in a highly successful business venture. However, his refusal to pay debts that he personally guaranteed, including charges on his personal credit card, casts doubt on his current reliability, trustworthiness, or good judgment. Thus, I conclude this mitigating condition is not established.

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.” AG ¶ 20(b). Both prongs, i.e., conditions beyond the persons’s control and responsible conduct, must be established. The evidence establishes the first prong but not the second, because Applicant did not act responsibly when his client defaulted on his payments.

Security concerns under this guideline also can be mitigated by showing that “the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.” AG ¶ 20(d). As of the date of the hearing, Applicant had made no effort to pay any of the debts alleged, even though he had the means to do so. I conclude this mitigating condition is not established.

Security concerns under this guideline also can be mitigating by showing “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.” AG ¶ 20(e). Applicant testified he disputed the parking ticket, but he presented no “documented proof” of his dispute and no evidence that the ticket was either paid or dismissed. I conclude this mitigating condition is not established.

Guideline E (Personal Conduct)

The concern under this guideline is as follows: “Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual’s reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.” AG ¶ 15.

The relevant disqualifying condition in this case is “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.” AG ¶ 16(a).

When a falsification allegation is controverted, as in this case, the government has the burden of proving it. An omission, standing alone, does not prove an applicant's 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 state of mind at the time of the omission. *See* 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)).

Applicant admitted that he knew his vendors would hold him personally responsible for the corporate debts if the corporation failed to pay them. He knew he had been individually sued for the unpaid debts and that default judgments were entered against him as well as his company. He knew his personal credit card account had been charged off as a bad debt and remained unpaid. I find his explanation for not disclosing the judgments and debts implausible.

Applicant's failure to disclose the existence of his construction company and his employment as president of that company suggests an attempt to conceal the entire financial misadventure involving his construction company. This omission from his employment record was not alleged in the SOR. However, conduct not alleged in the SOR may be considered: "(a) to assess an applicant's credibility; (b) to evaluate an applicant's evidence of extenuation, mitigation, or changed circumstances; (c) to consider whether an applicant has demonstrated successful rehabilitation; (d) to decide whether a particular provision of the Adjudicative Guidelines is applicable; or (e) to provide evidence for whole person analysis under Directive Section 6.3." ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006) (citations omitted). I have considered his failure to disclose his involvement in the construction company for the limited purpose of assessing the credibility of his denial of intentional falsification and to determine whether the disqualifying condition in AG ¶ 16(a) applies. I conclude the disqualifying condition in AG ¶ 16(a) is raised, shifting the burden to Applicant to rebut, explain, extenuate, or mitigate the facts.

Security concerns raised by false or misleading answers on a security clearance application may be mitigated by showing that "the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts." AG ¶ 17(a). Applicant made no effort to correct his omissions and misleading answers until he was confronted with the evidence. I conclude this mitigating condition is not established. No other mitigating conditions under this guideline are established.

Lack of candor in the security clearance application process is a matter of "special interest" under this guideline. Applicant has not rebutted or mitigated the security concern raised by his lack of candor.

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. AG ¶¶ 2(a)(1)-(9).

Applicant is a mature adult. He presented himself as intelligent and articulate at the hearing. All the debts except the parking ticket arose from one failed construction contract. He has learned from his business mistakes, but has not changed his attitude about personal responsibility for corporate debts that he personally guaranteed. Absent a change of attitude, the likelihood of recurrence remains a concern. His debts are significant, but he is not financially overextended. Because he is financially secure, there is minimal potential for pressure, coercion, exploitation, or duress. However, his lack of candor about his involvement in the construction business and the debts arising from it are a serious concern that remains unmitigated.

After weighing the disqualifying and mitigating conditions under Guidelines F and E, 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 and personal conduct. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the national interest to grant him a security clearance.

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
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
Paragraph 2. Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	Against Applicant
Subparagraph 2.c:	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