



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



In the matter of:)
)
) ISCR Case No. 12-05931
)
Applicant for Security Clearance)

Appearances

For Government: Robert Kilmartin, Esquire, Department Counsel
For Applicant: James Cumbie, Esquire

10/01/2014

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant failed to mitigate the Government’s security concerns under Guideline F, financial considerations. Applicant’s eligibility for a security clearance is denied.

Statement of the Case

On April 28, 2014, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline F, financial considerations. 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 adjudicative guidelines (AG) effective within the DOD on September 1, 2006.

On May 28, 2014, Applicant answered the SOR and requested a hearing before an administrative judge. The case was assigned to me on August 18, 2014. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on August

29, 2014. I convened the hearing as scheduled, by video teleconference, on September 17, 2014.

The Government offered exhibits (GE) 1 through 4. In Applicant's Answer to the SOR, he requested the Government's investigative file be produced. It was produced and supplemented with additional information.

Applicant's Counsel objected to all of the Government's exhibits. He first objected to GE 4, stating:

The [SOR] addressed the February 14, 2014 credit report, not the March 30, 2012 report, which we submit is therefore irrelevant and immaterial because that's not what he was charged with in the [SOR].¹

He next stated:

The other objections are –they may be procedural, but I'm objecting to the admissions, because when [Applicant] filed his answer, sworn answer to the [SOR], he requested what they referred to as the investigative file, that is, all materials that were used by the Government in support of its [SOR], and he got a series of documents and a transmittal letter [from] a Government employee saying these were all the documents that were used.²

When asked if Applicant received the investigative file, his Counsel stated:

Well, that's what we're here about today. We have the documents that he was provided. Then, in a later point in time, another month later, additional information was sent, that was not sent with the original production. It was sent by a different person. Okay. At that point, that's when I sent the email to [Department Counsel] saying, will you produce, will the Government produce these two witnesses that signed the letters producing different documents on this case. He said no, and that's – we got an email to that effect.

So we submit that any documents that were not produced the first time, that we requested, and the Government stated these are the documents we used, for example, the 2012 report was not in the first batch-should not be used.³

¹ Tr. 28-29.

² Tr. 29-30.

³ Tr. 30-31.

Applicant's Counsel confirmed that Applicant received the entire investigative file in two different mailings. The first included the 2014 credit bureau report along with other documents. The second mailing included the 2012 credit bureau report along with 168 pages of other documents. He objected that information in the second mailing that was not in the SOR or that related to a 2014 credit report should not be admissible.⁴

Applicant's Counsel further stated:

Number one, they-the Government should only be able to use what's listed in the [SOR], which was the 2014 investigative file, which is number-Exhibit No. 3.

Second. When the Government produces the documents pursuant to his request, they should not be able to supplement that later, without an explanation, and go back to 2012, when they haven't amended the [SOR] and the 2014, the first production stated this is all that's there.

The Government did not state, in the transmittal letters, that documents were being withheld. I then asked to ask questions from the two witnesses that signed the letters that work for the Government, and of course I was declined pursuant to the rules of this court.⁵

When asked if there were further objections, Applicant's Counsel stated:

No. Just for the record, I'd like to note that not being able to subpoena those witnesses or compel their production, you know, I realize it's the process of this court, but we would submit, that it's not constitutional due process.⁶

Department Counsel's responded as to the relevancy of the documents and that the Government was not bound by the four corners of the SOR, and could address matters regarding the whole person.⁷

There was no objection claiming Applicant was not provided the entire investigative file. Applicant's objections were overruled and GE 1 through 4 were admitted into evidence. Applicant's Counsel moved to dismiss the SOR for lack of evidence. The objection was overruled.⁸

⁴ Tr. 32-34.

⁵ Tr. 34-35.

⁶ Tr. 35.

⁷ Tr. 35-37.

⁸ Tr. 41.

Applicant and one witness testified. Applicant Exhibits (AE) A through D were offered and admitted into evidence without objection. DOHA received the hearing transcript (Tr.) on September 25, 2014.

Findings of Fact

Applicant denied all of the SOR allegations. After a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is 50 years old. He served in the Navy from 1985 to 1995 and was honorably discharged. He married in 1987 and has two children, ages 20 and 15. He worked for the same employer since 1998. He held a security clearance while in the Navy and has held one with his present employer for 16 years.⁹

Applicant filed Chapter 7 bankruptcy sometime between 1995 and 1998. He could not recall the specific year. At the time, he was working in the corrections field, did not have medical insurance, and was earning \$9 an hour. He experienced financial difficulties and approximately \$20,000 to \$30,000 of debt was discharged. When Applicant began working for his present employer, his earnings increased. He was able to meet his financial obligations.¹⁰

In March 2009, Applicant sent an email to his security officer advising him that Applicant's wife was going to be laid off from her job in the next month and his family's household income was going to be reduced by approximately \$2,000 a month. He noted in the email that he was going to speak to a debt counselor or a lawyer to discuss how to proceed regarding his obligations. He also reinforced to his security manager that he would never use his protected information to help him resolve his financial situation. He indicated he would use proper channels to handle the matter legally and through the least painful method. He further advised that he would keep his security manager informed if there were any changes. Shortly thereafter, Applicant's wife was laid off from her job and their income was reduced. He adopted an emergency budget, reducing unnecessary services and recreational expenses. He stated that before 2009 their finances were tight, but manageable. He also admitted that he and his wife overused credit cards.¹¹

Applicant testified that after his wife lost her job, at some point, they were unable to make the minimum payments on their credit card accounts. The interest rates on all

⁹ Tr. 45-47.

¹⁰ Tr. 104-107; Conduct not alleged in the SOR may be considered to assess an applicant's credibility; to decide whether a particular adjudicative guideline is applicable; to evaluate evidence of extenuation, mitigation, or changed circumstances; to consider whether an applicant has demonstrated successful rehabilitation; or as part of a whole-person analysis. ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006) (citations omitted). I have considered Applicant's bankruptcy that was not alleged in the SOR for these limited purposes.

¹¹ Tr. 47-53, 71, 101-102; AE B.

of their credit cards were raised, and some were doubled. He discussed with friends the different options that were available to resolve their financial problems, as he believed it was becoming somewhat hopeless. Creditors contacted him regarding the delinquent debts. His wife would speak with the creditors in an attempt to work out a payment plan, but they refused to negotiate. Applicant admitted he never reached out to the creditors to offer a settlement. He stated he was unaware the creditor could negotiate a lower interest rate or payoff amount. He stated his primary goal was maintaining his residence, and providing food and medical care for his family. Applicant stated his wife was unable to obtain unemployment benefits, but he was not sure why. Applicant's wife found new employment sometime in the middle of 2010. She earned approximately \$1,400 a month. Applicant admitted that once his wife began working again they would have been able to pay some of their delinquent debts, but they were waiting for their bankruptcy attorney to provide them with some type of resolution.¹²

In April 2009, Applicant sought assistance from a bankruptcy attorney. On his client intake questionnaire he noted he had eight accounts, which included four credit cards. The cost to file bankruptcy with attorney's fees was \$2,002.¹³ Applicant was unable to pay the amount at one time and paid the fees through installments from April 2009 to October 2009. He completed the payments. He completed the mandatory debt counseling required to file bankruptcy. He indicated that he was told he earned too much money to file Chapter 7 and was advised to wait and see if had any additional debts that would make him eligible to file Chapter 7. He was told filing Chapter 13 was an option, and he indicated he was open to that possibility, but at that time he did not have the money to pay the creditors. When he received letters from creditors, Applicant would give them to his attorney. He stopped answering the phone because creditors would harass him. If he did answer, he would refer the creditor to the bankruptcy attorney. After the bankruptcy fees were paid, Applicant's wife maintained contact with the bankruptcy attorney for about six or seven months, and then stopped. Applicant's intention was to file bankruptcy, but he never did. He admitted he was at fault for not being proactive. He never followed through with contacting the attorney to pursue the bankruptcy. He stated he was waiting for somebody to sue him, basically to force his hand, and then he would have gone back to the bankruptcy attorney to resolve the matter.¹⁴

The SOR alleges 14 delinquent debts totaling approximately \$52,423. Applicant testified that all of the debts belonged to him. The credit bureau reports support he owes these delinquent debts.¹⁵ He answered "yes" to questions on his security clearance application (SCA) dated March 27, 2012, that he had debts that were turned over to a collection agency; he had accounts or credit cards suspended, charged off, or canceled

¹² Tr. 51-56, 72-75, 83, 86-89.

¹³ AE C.

¹⁴ Tr. 56, 62-70, 77-78, 80, 89-94, 96-97.

¹⁵ GE 3 and 4.

for failing to pay as agreed; and that he was currently over 120 delinquent on a debt. He specifically disclosed he had various credit card debts that were delinquent and estimated the total amount owed was approximately \$55,000. He disclosed the reason for the delinquent debts was that he was “unable to provide the necessities of life for family and make the credit card payments.” He admitted he overused credit cards. He listed the current status of the debts as: “Consulted a lawyer to look into bankruptcy. Issue is still in limbo. Paid the lawyer and issue was never filed or resolved.” He disclosed the financial issues began in approximately January 2010. In response to the SCA inquiry as to what actions he had taken to resolve the debt or if he had not taken any action, he wrote: “Looking into getting our money refunded from the [lawyer] and finding an agency that can negotiate a settlement for us so we can pay off our debt at an affordable rate.” He never pursued finding an agency to assist him in negotiating settlements. He never contacted the bankruptcy attorney again. He testified he had no excuse except that he lost track of the debts.¹⁶

Applicant’s bankruptcy attorney testified on his behalf. He did not remember any specific information about Applicant’s case, other than the notes he made on the client intake questionnaire. He confirmed Applicant paid his fee in installments from April 2009 to October 2009. He confirmed that state law barred creditors with written contracts from pursuing claims after five years.¹⁷

Applicant was not sued for payment by any of his creditors. Applicant is aware that there is a statute of limitations for pursuing legal action on delinquent debts that are more than five years old. If he was to make any payment toward his delinquent debts that are over five years old, it would reaffirm the debt, and the five year statute of limitations would start over. Applicant admitted he out-waited the creditors, but he was unaware of the statute of limitations provision until recently. He stated he was waiting for the creditors to contact him or sue him. None of the delinquent debts are paid. It appears under state law the creditors are barred from suing Applicant for payment.¹⁸

Applicant indicated the statement he made to the Government investigator during his background investigation is accurate.¹⁹ Applicant testified that he has learned his lesson and changed his living habits. He maintains a budget and does not use credit cards any longer. He has not incurred any new delinquent debt in the past five years. He lives paycheck to paycheck and has about \$100 in savings. He stated he was amendable to resolving the delinquent debts now that he cannot be sued and he is in a better negotiating position.²⁰

¹⁶ Tr. 60, 93; GE 1 pages 27-29.

¹⁷ Tr. 116, 120-133.

¹⁸ Tr. 58, 68-69, 78-79, 95, 98-100, 113.

¹⁹ GE 2.

²⁰ Tr. 59-60, 97-98, 102, 109.

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are used 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 overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have not drawn inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, 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 and has the ultimate burden of persuasion to obtain a favorable security decision."

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 10865 provides that decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline F, Financial Considerations

The security concern for financial considerations is set out in AG ¶ 18:

Failure or inability to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

The guideline notes several conditions that could raise security concerns. I have considered all of the disqualifying conditions under AG ¶ 19, and the following two are potentially applicable:

- (a) inability or unwillingness to satisfy debts; and
- (c) a history of not meeting financial obligations.

Applicant has 14 delinquent debts totaling approximately \$52,423 that are unpaid. Applicant was unwilling and unable for a period of time to satisfy his debts. The debts have been delinquent since approximately 2009. I find there is sufficient evidence to raise the above disqualifying conditions.

The guideline also includes conditions that could mitigate security concerns arising from financial difficulties. The following mitigating conditions under AG ¶ 20 are potentially applicable:

- (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;
- (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;
- (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;

(d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts; and

(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.

Applicant incurred credit card debts that he was unable to pay when his wife lost her job in 2009. His intention was to file bankruptcy, but he never completed it. The creditors were unwilling to negotiate with him. He admitted he was waiting for the creditors to sue him. When they did not contact him or sue him, he did not pursue resolving the delinquent debts, and they remain unpaid. The creditors are barred by state statute from suing Applicant for payment. This does not negate Applicant's obligation and responsibility to pay his just debts. His failure to address the debts and wait out the creditors cast doubt on his current reliability, trustworthiness and good judgment. His behavior is recent because the debts remain unpaid or unresolved. AG ¶ 20(a) is not established.

When Applicant's wife lost her job they were unable to make payments on their credit cards, which caused the interest rates to increase. This was beyond his control. In order to fully apply AG ¶ 20(b), Applicant must have acted responsibly under the circumstances. He acted responsibly by notifying his security officer that he anticipated having financial problems due to the loss of his wife's income. Applicant is given credit for complying with the security rules and regulations as required. His wife got another job in the middle of 2010, but was earning less. He contacted an attorney, discussed filing bankruptcy, paid the fee, but never followed through. Instead, despite being aware he had over \$50,000 of credit card debt, and receiving phone calls and letters from creditors, he chose to wait until the creditors sued him. When he was not sued, he did not pursue resolving any of his delinquent debt. At this point, both he and his wife were working, but she was earning less than she had been. Applicant did not act responsibly. AG ¶ 20(b) only partially applies.

The only financial counseling Applicant participated in was that which was required in order to file bankruptcy. He has not had any other financial counseling. He did not initiate a good-faith effort to repay overdue creditors or otherwise resolve his delinquent debts. Although the creditors are barred by statute from suing him, it does not mean he no longer has an obligation to pay the debt. He has taken no action to resolve his delinquent debts. AG ¶¶ 20(c) and 20(d) do not apply. Applicant did not dispute any of the alleged debts. AG ¶ 20(e) is not raised.

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 relevant 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) 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.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense 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. I have incorporated my comments under Guideline F in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

Applicant is 50 years old. He served in the Navy for ten years and received an Honorable Discharge. He had debts discharged through bankruptcy in the mid-1990s. He was given a clean financial slate to start over debt-free. When his wife lost her job in 2009, they were unable to meet the minimum payments on numerous credit cards. The interest rates increased and their debt escalated. They contacted a bankruptcy attorney with the intention of having their debts discharged, but Applicant's income was too high, and they were advised to wait and see if anything changed that might make them qualify. They failed to follow through with filing bankruptcy. Applicant's wife got a new job that paid less. Despite the fact she was working again, they did not attempt to pay any of the delinquent debts. They waited to be sued by the creditors. The creditors may be barred by state law from suing Applicant, but it does not negate that Applicant failed to act responsibly even after his finances improved. Applicant ignored his obligations because the creditors chose not to sue him. The creditors' failure to sue Applicant does not mean he is no longer obligated to pay what he owes. The Government expects employees with security clearances to do the right thing, even when no one is watching. It expects those holding security clearances to act responsibly. Applicant chose to walk away from his obligation to pay his delinquent debts. Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising under the financial considerations guideline.

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
Subparagraphs 1.a-1.n:	Against Applicant

Conclusion

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

Carol G. Ricciardello
Administrative Judge