

KEYWORD: Financial; Personal Conduct

DIGEST: Applicant is financially overextended, has a history of delinquent debts, and has taken virtually no action to resolve them. He received nonjudicial punishment twice while in the U.S. Air Force, and he was discharged for a pattern of misconduct. He did not disclose his nonjudicial punishment on his security clearance application (SF 86). He refuted the allegation of intentionally falsifying his SF 86, and he mitigated the security concern based on personal conduct, but he did not mitigate the security concern based on financial considerations. Clearance is denied.

CASE NO: 04-05582.h1

DATE: 05/25/2006

DATE: May 25, 2006

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 04-05582

**DECISION OF ADMINISTRATIVE JUDGE**

**LEROY F. FOREMAN**

**APPEARANCES**

**FOR GOVERNMENT**

Francisco Mendez, Esq, Department Counsel

## **FOR APPLICANT**

*Pro Se*

### **SYNOPSIS**

Applicant is financially overextended, has a history of delinquent debts, and has taken virtually no action to resolve them. He received nonjudicial punishment twice while in the U.S. Air Force, and he was discharged for a pattern of misconduct. He did not disclose his nonjudicial punishment on his security clearance application (SF 86). He refuted the allegation of intentionally falsifying his SF 86, and he mitigated the security concern based on personal conduct, but he did not mitigate the security concern based on financial considerations. Clearance is denied.

### **STATEMENT OF THE CASE**

On May 25, 2005, 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. The SOR alleges security concerns under Guidelines F (Financial Considerations) and E (Personal Conduct). Under Guideline F, it alleges five delinquent debts totaling more than \$11,000 (¶¶ 1.a-1.e). Under Guideline E, it alleges Applicant falsified his SF 86 by failing to disclose two nonjudicial punishments imposed on him while he was in the U.S. Air Force (¶ 2.a), and he was discharged from the Air Force in February 2000 for a pattern of misconduct (¶ 2.b).

Applicant answered the SOR in writing on July 6, 2005, but this answer was unsworn. He submitted a properly sworn answer on October 6, 2005. He admitted three delinquent debts and denied two. He partially admitted failing to disclose the nonjudicial punishments, admitted his discharge for misconduct, and requested a hearing. The case was assigned to an administrative judge on January 12, 2006, and reassigned to me on February 6, 2006, based on workload. On February 13, 2006, DOHA issued a notice of hearing setting the case for March 29, 2006. The case was heard as scheduled. DOHA received the transcript (Tr.) on April 7, 2006.

### **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 29-year-old security officer employed by a defense contractor. He has worked for his current employer since October 2001. He received a security clearance in October 1995, while he was in the Air Force.

Applicant submitted a SF 86 on September 16, 2002, in connection with his current employment. He answered "no" to question 23e, which asks whether the applicant has been subject to court-martial or other disciplinary proceedings under the Uniform Code of Military Justice (UCMJ) in the last seven years.<sup>(1)</sup> He did not disclose two instances of nonjudicial punishment imposed under Article 15, UCMJ, 10 U.S.C. § 815, imposed on August 11, 1999, and January 4, 2000.<sup>(2)</sup> The first was for dereliction of duty by failing to register his private vehicle and wrongfully using an unauthorized vehicle pass with intent to deceive. The second was for violating a base operating instruction by driving on the grass. Applicant testified he stopped reading the question when he read the heading, "Police Record," and did not notice that the question encompassed nonjudicial punishment imposed by military authorities.<sup>(3)</sup>

In January 2000, Applicant was discharged from the Air Force for a pattern of misconduct, with a general discharge under honorable conditions.<sup>(4)</sup> The discharge was based on the two instances of nonjudicial punishment described above, as well as three other instances of minor misconduct disposed of by reprimands or counseling.<sup>(5)</sup>

Applicant was unemployed from January to May 2000, and again from July to October 2001, when he began working for his current employer.<sup>(6)</sup> During his periods of unemployment, he used his credit cards to pay living expenses but was unable to make payments on the accounts. He apparently did little to reduce his living expenses while unemployed. He attempted to obtain a debt consolidation loan after he received the SOR, but was unsuccessful.<sup>(7)</sup> He does not have a budget and lives paycheck-to-paycheck.<sup>(8)</sup> He attends a community college part-time and uses a credit card to pay his college expenses.<sup>(9)</sup> He recently moved in with a roommate to save money.<sup>(10)</sup>

Applicant is not married, but he supports a child. He originally believed he was the father of the child, but he later learned he was not. However, he became attached to the child and continues to support him.<sup>(11)</sup>

The following table summarizes the evidence concerning the delinquent debts alleged in the SOR.

SOR	Debt	Amount	Status at Hearing	Record
1.a	Credit card	\$5,927	Unpaid	Tr. 48
1.b	Credit card	\$2,081	Unpaid	GX 12 at 2
1.c	Clothing	\$492	Unpaid	GX 11 at 1
1.d	Credit card	\$885	Making minimum payments	Tr. 60; GX 12 at 1
1.e	Credit card (same as 1.b)	\$1,624	Unpaid	Tr. 60

## 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 security guidelines contained in the Directive. 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 Directive sets forth adjudicative guidelines for determining eligibility for access to classified information, and it lists the disqualifying conditions (DC) and mitigating conditions (MC) for each guideline. Each clearance decision must be a fair, impartial, and commonsense decision based on the relevant and material facts and circumstances, the whole person concept, and the factors listed in the Directive ¶¶ 6.3.1. through 6.3.6.

In evaluating an applicant's conduct, an administrative judge should consider: (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 voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent 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. Directive ¶¶ E2.2.1.1. through E2.2.1.9.

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. "[T]he Directive presumes there is a nexus or rational connection between proven conduct under any of the Criteria listed therein and an applicant's security suitability." ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996) (quoting DISCR Case No. 92-1106 (App. Bd. Oct. 7, 1993)).

Once the government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. ISCR Case No. 01-20700 at 3; *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* Directive ¶ E2.2.2.

## CONCLUSIONS

### **Guideline F (Financial Considerations)**

Under this guideline, "[a]n individual who is financially overextended is at risk of having to engage in illegal acts to generate funds." Directive ¶ E2.A6.1.1. A person who fails or refuses to pay long-standing debts or is financially irresponsible may also be irresponsible or careless in his or her duty to protect classified information.

The delinquent debts alleged in SOR ¶¶ 1.b and 1.e appear to be the same debt. When the same conduct is alleged twice in the SOR under the same guideline, one of the duplicative allegations should be resolved in Applicant's favor. *See* ISCR Case No. 03-04704 (App. Bd. Sep. 21, 2005) at 3 (same debt alleged twice). Accordingly, I resolve SOR ¶ 1.e in Applicant's favor.

Two disqualifying conditions (DC) under this guideline could raise a security concern and may be disqualifying in this case. DC 1 applies where an applicant has a history of not meeting his or her financial obligations. Directive ¶ E2.A6.1.2.1. DC 3 applies where an applicant has exhibited inability or unwillingness to satisfy debts. Directive ¶ E2.A6.1.2.3. Applicant's financial history establishes DC 1 and DC 3.

Since the government produced substantial evidence to establish DC 1 and DC 3, the burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. Applicant has the burden of proving a mitigating condition, and the burden of disproving it is never shifted to the government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

A security concern based on financial problems also can be mitigated by showing the delinquent debts were not recent (MC 1) or an isolated incident (MC 2). Directive ¶ E2.A6.1.3.1., E2.A6.1.3.2. Applicant has multiple delinquent debts that are not resolved. I conclude MC 1 and MC 2 are not established.

Security concerns arising from financial problems can be mitigated by showing they are the result of conditions beyond the person's control (MC 3). Directive ¶ E2.A6.1.3.3. Even if Applicant's financial difficulties initially arose due to circumstances outside his control, it is appropriate to consider whether he acted in a reasonable manner when dealing with his financial difficulties. ISCR Case No. 02-02116 at 4 (App. Bd. Sep. 25, 2003). Applicant's unemployment was a circumstance outside his control. However, he appears to have done little to reduce his living expenses while unemployed. Instead, he continued to use his credit cards until he reached his maximum balance. His voluntary support of a young boy and his efforts to further his education are admirable, but they are voluntary financial outlays at a time when Applicant is seriously overextended. I conclude MC 3 is not established.

A mitigating condition (MC 4) applies when an applicant "has received or is receiving counseling for the problem and there are clear indications that the problem is being resolved or is under control." Directive ¶ E2.A6.1.3.4. Applicant has not explored bankruptcy nor has he sought financial counseling. I conclude MC 4 is not established.

A security concern arising from financial problems can be mitigated by showing a good-faith effort to resolve debts (MC 6). Directive ¶ E2.A6.1.3.6. The concept of good faith "requires a showing that a person acts in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation." ISCR Case No. 99-0201, 1999 WL 1442346 at \*4 (App. Bd. Oct. 12, 1999). Evidence of past irresponsibility is not mitigated by payment of debts only under pressure of qualifying for a security clearance. Applicant unsuccessfully applied for a debt consolidation loan after receiving the SOR, but his overall reaction to his financial problems has been inaction. I conclude MC 6 is not established.

After considering the disqualifying conditions and the absence of mitigating conditions, and evaluating the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concern based on financial considerations.

### **Guideline E (Personal Conduct)**

Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate an applicant may not properly safeguard classified information.

Directive ¶ E2.A5.1.1. A disqualifying condition (DC 1) may arise from "[r]eliable, unfavorable information provided by associates, employers, coworkers, neighbors, and other associates." Directive ¶ E2.A5.1.2.1. Applicant's discharge from the Air Force for a pattern of misconduct establishes DC 1.

None of the enumerated mitigating conditions under this guideline appear applicable to Applicant's discharge from the Air Force. However, under the general adjudicative guidelines, I have considered that all the incidents on which Applicant's discharge was based were minor infractions. Directive ¶ E2.2.1.1 (nature, extent, and seriousness of the conduct). His infractions occurred more than six years ago. Directive ¶ E2.2.1.3 (frequency and recency of the conduct). His infractions occurred when he was young and immature. Directive ¶ E2.2.1.4 (age and maturity at the time of the conduct). His penchant for rule-breaking has not been exhibited since his discharge from the Air Force. Directive ¶¶ E2.2.1.6 (rehabilitation and behavioral changes), E2.2.1.9 (likelihood of recurrence). After evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concern based on his Air Force disciplinary record. Accordingly, I resolve SOR 2.b in his favor.

A disqualifying condition (DC 2) under this guideline also may be established by "deliberate omission, concealment, or falsification of relevant and material 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." Directive ¶ E2.A5.1.2.2. When a falsification allegation is controverted, the government has the burden of proving it. Proof of an omission, standing alone, does not establish or 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 the omission occurred. *See* ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004).

Applicant's explanation for answering "no" to question 23 on the SF 86, that he did not read beyond the heading, "Police Record," is plausible and consistent with the lack of attention to detail he has demonstrated in other aspects of his life. Based on his testimony, including his demeanor at the hearing, I found him credible. I am satisfied he did not intentionally falsify his SF 86. Accordingly, I conclude DC 2 is not established, and I resolve SOR ¶ 2.a in his favor.

### **FORMAL FINDINGS**

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

Paragraph 1. Guideline F (Financial Considerations): 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: For Applicant

Paragraph 2. Guideline E (Personal Conduct): FOR APPLICANT

Subparagraph 2.a: For Applicant

Subparagraph 2.b: For Applicant

### **DECISION**

In light of all the circumstances presented by the record 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

1. Government Exhibit (GX) 1 at 7.
2. GX 4, 5.
3. Tr. 61.



4. GX 7.
5. GX 6 at 1.
6. GX 1 at 3-4; GX 2 at 2-3.
7. Tr. 51.
8. Tr. 56.
9. Tr. 53.
10. Tr. 58.
11. Tr. 37.