



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



In the matter of:

SSN: -----

Applicant for Security Clearance

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ISCR Case No. 07-04065

Appearances

For Government: Rita O'Brien, Esquire, Department Counsel
For Applicant: Sheldon Cohen, Esquire

March 31, 2008

Decision

MALONE, Matthew E., Administrative Judge:

Based upon a review of the pleadings, exhibits, and testimony, Applicant's request for a security clearance is granted.

On June 16, 2005, Applicant submitted a Security Clearance Application (SF 86) to request a security clearance for his employment with a defense contractor. After reviewing the results of the ensuing background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) were unable to make a preliminary affirmative finding¹ that it is clearly consistent with the national interest to grant Applicant's request. On July 27, 2007, DOHA issued to Applicant a Statement of Reasons (SOR) alleging facts which raise security concerns addressed in the Revised

¹ Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.

Adjudicative Guidelines (AG)² under Guideline F (financial considerations) and Guideline E (personal conduct).

Applicant timely responded to the SOR and requested a hearing. The case was assigned to me on November 1, 2007. After consulting with the parties and taking into consideration pre-existing schedules, I scheduled a hearing to be held on January 22, 2008. The parties appeared as scheduled. The government presented six exhibits (Gx. 1 - 6). Applicant testified in his own behalf, offered 28 exhibits (Ax. A - BB), and presented five witnesses. DOHA received the transcript (Tr.) on January 30, 2008.

Procedural Issues

1. On November 28, 2007, Applicant requested that the testimony of one of his witnesses be taken by telephone. Department Counsel objected on grounds doing so would hinder an assessment of the witness's credibility. After hearing from the parties in a telephone conference call on December 6, 2007, I granted Applicant's request. My ruling is included in the Pre-Hearing Order, dated December 7, 2007, included in the record as Judicial Exhibit (Jx.) I. In making my ruling, I relied on the provisions of Sections E3.1.9 (The Administrative Judge may require a pre-hearing conference) and E3.1.10 (The Administrative Judge may rule on questions on (sic) procedure, discovery, and evidence, and shall conduct all hearings in a fair, timely, and orderly manner) of the Directive's Enclosure 3, and on Rule 611(a) of the Federal Rules of Evidence (The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.)

2. The allegations at SOR ¶¶ 2.a and 2.b originally alleged Applicant had deliberately falsified his answers to question 28 ("Your Financial Delinquencies - 180 Days") and question 29 ("Your Financial Delinquencies - 90 Days"), respectively, in the SF 86 he submitted on June 16, 2005. A review of that document (Gx. 1) showed the allegations correctly quoted the language from SF 86 questions 38 and 39, respectively. Accordingly, after the parties completed their cases in chief, I amended the SOR *sua sponte* to conform to the evidence³ by striking the inaccurate question numbers from SOR ¶¶ 2.a and 2.b and replacing them with the correct question numbers. (Tr. 263 - 264)

² Adjudication of this case is controlled by the Revised Adjudicative Guidelines, approved by the President on December 29, 2005, which were implemented by the Department of Defense on September 1, 2006. Pending official revision of the Directive, the Revised Adjudicative Guidelines supercede the guidelines listed in Enclosure 2 to the Directive, and they apply to all adjudications or trustworthiness determinations in which an SOR was issued on or after September 1, 2006.

³ See, Section E3.1.17 of the Directive's Enclosure 3.

Findings of Fact

Under Guideline F, the government alleged in SOR ¶¶ 1.a - 1.g that Applicant was delinquent on seven debts totaling \$11,266, six of which (SOR ¶¶ 1.a - 1.d, 1.f, 1.g) had been referred to collection agencies as long ago as December 2003. The debt listed in SOR ¶ 1.e was allegedly charged off as a business loss in July 2005. The government also alleged Applicant had not acted to resolve his debt despite the fact a Personal Financial Statement (PFS) he submitted in May 2007 showed a positive monthly cash flow in excess of \$1,200 (SOR 1.h)

Under Guideline E, the government alleged that, on June 16, 2005, Applicant deliberately withheld from the government the delinquent debts listed in SOR ¶¶ 1.a - 1.d when he answered "no" in response to SF 86 question 38 ("Your Financial Difficulties - 180 Days. In the last 7 years, have you been over 180 days delinquent on any debt(s)") (SOR ¶ 2.a) and SF 86 question 39 ("Your Financial Difficulties - 90 Days. Are you currently over 90 days delinquent on any debt(s)") (SOR ¶ 2.b).

In response, Applicant admitted with explanation the SOR ¶ 1.d allegation of a delinquent Citibank credit card debt for \$7,402. He denied with explanation the remaining allegations. Applicant's testimony at hearing was straightforward, credible, and offered without reservation. After a thorough review of the pleadings, transcript, and exhibits, I make the following additional findings of fact.

Applicant is 42 years old and has been employed by a defense contractor since January 2004 as a Training Specialist (Gx 1). In 1984, he enlisted in the U.S. Army National Guard, but transferred in 1987 to the U.S. Air Force, where he served until being honorably discharged for medical reasons in 1999 as a staff sergeant (paygrade E-5). He has an associate's degree in electronics he received while in the Air Force. Applicant was married from August 1988 until June 2004, when he and his ex-wife divorced. Their two children, ages 13 and 8, live with his ex-wife.

While they were married, Applicant's wife worked outside the home until medical problems starting in April 1994 and continuing for several years thereafter limited her ability to bring in money to supplement Applicant's income. In 2003, Applicant was laid off from the defense contractor he worked for. He was unemployed for about a year before obtaining his current job. Combined with his wife's limited earning ability, his unemployment soon led to unpaid debts.

Applicant and his ex-wife separated in June 2004. (Gx. 1) In December 2004, they sold their marital residence and netted approximately \$73,000 in profit. They agreed that the proceeds would transfer to her account. It was further agreed she would use the funds to pay off their marital debts and to support herself and the children through July 2005. Thereafter, Applicant was to receive 40% of any remaining proceeds. In the spring of 2005, he received \$5,000 from his ex-wife. It was his understanding at the time that his wife had paid their debts as agreed. (Tr. 64 - 66, 195 - 197)

Applicant has held a secret clearance since 1988 and held a top secret clearance between 1993 and 1999. He had a secret clearance when he was hired for his current job, but he submitted an SF 86 on June 16, 2005, because his employer wanted him to be eligible to work on other contracts. In response to all of the SF 86 questions seeking adverse information about his finances he answered "no." (Gx. 1) He was unaware of any delinquent debts for which he was responsible after the divorce, and thought at the time he completed the questionnaire his wife had paid their old debts. Applicant and his wife had continued to communicate about their finances after the divorce and there was no indication their debts had not been resolved. (Tr., 202 - 204) In an affidavit submitted with Applicant's answer to the SOR, his ex-wife confirmed their arrangement and claimed she had paid off accounts with Citibank (SOR ¶ 1.d), Kohl's (SOR ¶ 1.e), Arrow Services (SOR ¶ 1.a), AT&T (SOR ¶ 1.g) in early 2005.

The debts listed in SOR ¶¶ 1.b, 1.c, and 1.f are the same debt reported by different collection agencies. In late 1996, Applicant paid \$500 for a digital camera through a catalogue company. He returned the camera because it was defective and paid another \$500 for a replacement. The company told him the account had been credited \$500 for the first camera. (Answer to the SOR) Applicant did not know of any reported delinquency until DOHA sent interrogatories about this and other debts in April 2007. This debt has been paid and was removed from Applicant's credit history. (Ax. J)

The \$1,504 delinquency listed in SOR ¶ 1.a was for an unpaid medical account. Applicant thought his ex-wife had paid the account in 2005, but he contacted the collection agency and paid the debt in August 2007 out of his own pocket to ensure a final resolution of the debt. (Ax. I)

The \$7,402 delinquency listed in SOR ¶ 1.d was for an unpaid Citibank credit card account. Despite his ex-wife's claim in her affidavit that she paid the account in 2005, he contacted the collection agency after receiving the SOR and made arrangements to repay the debt through mutually agreed monthly payments. (Ax. K) The \$600 debt listed in SOR ¶ 1.e was paid in full on August 2007, (Ax. L) as was the \$74 debt listed in SOR ¶ 1.g (Ax. M)

In response to a set of DOHA financial interrogatories, Applicant included a PFS that showed he had a net monthly income of about \$4,000. From this he pays about \$2,800 in monthly expenses, including \$1,280 in child support, but excluding any payments to the debts listed in the SOR. With one exception, all of the debts listed in the SOR were paid within a month of receiving the interrogatories. Applicant has a positive cash flow of \$1,200. (Gx. 2) He has two credit cards in his name. One is a corporate card used for business-related expenses, the other is a personal credit card which he pays off each month. (Tr. 37 - 38; Ax. N - P) He works a second, part-time job at an office supply store to bring in extra cash. (Gx. 2) His current finances, as summarized in Ax. BB, show a \$100 increase in his net monthly cash flow against no new debts as Applicant continues to live within his means. (Tr. 51 - 52, 153 - 156)

Applicant's performance in the military was exemplary. (Ax. Q) Likewise, his work in the civilian sector has drawn similar praise from every company he has worked for. (Ax. R; Ax. S) He is also active in his community through his work as an amateur radio

operator. He and his colleagues were instrumental in emergency responses when his community was devastated by tornadoes and other disasters in the past few years. He also volunteers his time and services in support of several community events each year. As an officer in the amateur radio clubs to which he belongs, Applicant established a record of reliability and trustworthiness through his work as treasurer. (Ax. U; Ax. V; Tr.138 - 144; 185 - 186) His reputation for honesty, reliability, and trustworthiness at work, in his church, and in the community is uniformly endorsed as beyond question. (Tr. 121 - 123; Ax. W - AA)

Policies

Each security clearance decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information, and consideration of the pertinent criteria and adjudication policy in the Revised Adjudicative Guidelines (AG).⁴ Decisions must also reflect consideration of the factors listed in ¶ 2(a) of the new guidelines. Commonly referred to as the “whole person” concept, these factor are:

(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.

The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an applicant. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information. In this case, the pleadings and the information presented by the parties require consideration of the security concerns and adjudicative factors addressed under Guideline F (financial considerations), at AG ¶ 18, and Guideline E (personal conduct) at AG ¶ 15.

A security clearance decision is intended to resolve whether it is clearly consistent with the national interest⁵ for an applicant to either receive or continue to have access to classified information. The government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for an applicant. Additionally, the government must be able to prove controverted facts alleged in the SOR. If the government meets its burden, it then falls to the applicant to refute, extenuate or mitigate the government's case.

⁴ Directive. 6.3.

⁵ See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

Because no one has a “right” to a security clearance, an applicant bears a heavy burden of persuasion.⁶ A person who has access to classified information enters into a fiduciary relationship with the government based on trust and confidence. The government, therefore, has a compelling interest in ensuring each applicant possesses the requisite judgement, reliability and trustworthiness of one who will protect the national interests as his or her own. The “clearly consistent with the national interest” standard compels resolution of any reasonable doubt about an applicant’s suitability for access in favor of the government.⁷

Analysis

Personal Conduct.

Applicant’s personal conduct may be a security concern because, as stated in AG ¶ 15,

[c]onduct 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.

The government’s information shows he answered “no” to questions 38 and 39 in the SF 86 he submitted in June 2005. However, to be disqualifying, it must be shown Applicant knowingly intended it as a false answer so as to mislead the government by concealing his financial problems.⁸ Because Applicant denied the gravamen of the allegations in SOR ¶¶ 2.a and 2.b, the government bore the burden of “presenting witnesses and other evidence to establish facts that have been controverted.” (Directive, Enclosure 3, Section E3.1.14) The record contains no statement by Applicant that would tend to show he deliberately falsified his answers. The record contains no sworn statement of subject or summary of a subject interview from his background investigation, and the government’s cross-examination of Applicant failed to produce any information to show he deliberately omitted relevant information from his SF 86. Further, DOHA adjudicators did not inquire about his SF 86 answers when they tendered the interrogatories about his finances in April 2007.

Applicant’s explanation about his lack of knowledge of the debts as of June 2005 was plausible. It was corroborated by his testimony from his ex-wife and two witnesses, as well as by documents showing the proceeds from the sale were, indeed, transferred to his ex-wife’s account. The totality of the information probative of Applicant’s intent at

⁶ See *Egan*, 484 U.S. at 528, 531.

⁷ See *Egan*; Revised Adjudicative Guidelines, ¶ 2(b).

⁸ See, AG ¶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).

the time he completed the SF 86 in question shows he lacked the requisite disqualifying intent. Accordingly, SOR ¶¶ 2.a and 2.b are resolved for the Applicant.

Financial Considerations.

The security concern about Applicant's finances, as stated in AG ¶ 18, is that

[f]ailure 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 government presented sufficient information to support the allegations in SOR ¶¶ 1.a - 1.g that Applicant was responsible for seven delinquent debts totaling \$11,266. Even though the credit reports in Gx. 4, 5 and 6 show collection referrals and charge offs after Applicant and his wife divorced, the debts were originally incurred while they were married. Despite the arrangement Applicant and his ex-wife had regarding the use of the proceeds from the sale of their house to pay their debts, the accounts were not paid or otherwise resolved until 2007. Accordingly, available information about Applicant's finances supports application of the disqualifying condition listed in AG ¶ 19(c) (a history of not meeting financial obligations).

In response to the government's information, Applicant established that his past financial problems do not reflect adversely on his judgment or reliability; that although the debts were only recently paid off or resolved, they were incurred at least three years ago under circumstances (reduced income because of illness and unemployment) that no longer exist. Further, as to the SOR ¶ 1.h allegation that he did not act to resolve his debts despite a significant positive monthly cash flow, he and his wife were aware of their debts when they separated in 2004. He took action then by essentially forfeiting his share of their home sale proceeds so she could pay those debts. Her apparent failure to repay their marital debts as agreed does not diminish the action he thought he was taking. These facts also show his non-payment of debts was due to circumstances beyond his control.

All of the foregoing supports application of the mitigating conditions listed at AG ¶ 20(a) (the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur *and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment*) (emphasis added), AG ¶ 20(b) (the conditions that resulted in the financial problem were largely beyond the person's control (e.g. loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation), *and the individual acted responsibly under the circumstances*) (emphasis added), 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*) (emphasis added), and AG ¶ 20(d) (the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts). More specifically, AG ¶ 20(d) applies on the strength of the efforts Applicant made to resolve

his debts when he and his wife separated in 2004. That the arrangement did not work through no fault of his own does not lessen the mitigation available here. The allegations in SOR ¶¶ 1.a - 1.h are resolved for the Applicant. On balance, and in consideration of the positive evidence about Applicant's current finances and instances of fiduciary responsibility, Applicant has mitigated the security concerns about his finances.

Whole Person Concept.

I have evaluated the facts presented and have applied the appropriate adjudicative factors under Guidelines E and F. I have also reviewed the record before me in the context of the whole person factors listed in AG ¶ 2(a). Applicant is 42 years old and has spent most of his adult life in either military service or in support of the defense industry. He has held a security clearance without incident since 1988 and his record of performance in the military and in his civilian has been outstanding. The circumstances that led to his indebtedness are not likely to recur, his current finances are sound, and he has established a record of reliability as a fiduciary and through his long-term access to classified information. A fair and commonsense assessment⁹ of all available information shows that the Applicant's finances do not present an unacceptable risk should he be granted access to classified information.

Formal Findings

Formal findings 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:	FOR APPLICANT
Subparagraph 1.a - 1.h:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a - 2.b	For Applicant

Conclusion

In light of all of the foregoing, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

MATTHEW E. MALONE
Administrative Judge

⁹ See footnote 4, *supra*.