



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



In the matter of:)	
)	
-----)	ISCR Case No. 07-08754
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Eric H. Borgstrom, Esquire, Department Counsel
For Applicant: *Pro se*

March 24, 2008

Decision

FOREMAN, LeRoy F., Administrative Judge:

Applicant submitted his security clearance application on September 23, 2005. On September 18, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny his application, citing security concerns under Guidelines F (Financial Considerations) and E (Personal 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 within the Department of Defense for SORs issued after September 1, 2006.

Applicant acknowledged receipt of the SOR on November 8, 2007 and answered it on November 21, 2007. On November 28, 2007, he requested a hearing before an administrative judge. The date of DOHA's receipt of the request for a hearing is not reflected in the record. Department Counsel was ready to proceed on December 7, 2007, and the case was assigned to me on December 12, 2007. DOHA issued a notice of hearing on January 18, 2008, scheduling the hearing for February 11, 2008. I

convened the hearing as scheduled. Government Exhibits (GX) 1 through 5 were admitted in evidence without objection, except for part of GX 3, which was excluded for the reasons set out below. Applicant testified on his own behalf and submitted Applicant's Exhibit (AX) A, which was admitted without objection. I granted Applicant's request to keep the record open until February 25, 2008, to enable him to submit additional documentary evidence. Applicant timely submitted AX B and C, and they were admitted without objection. Department Counsel's response to AX B and C is attached to the record as Hearing Exhibit I. DOHA received the transcript of the hearing (Tr.) on February 19, 2008. The record closed on February 25, 2008. Eligibility for access to classified information is denied.

Evidentiary and Procedural Rulings

Personal Representative

Applicant stated at the hearing that a union representative had agreed to represent him but could not attend the hearing because of a medical appointment (Tr. 5). I informed Applicant that I would postpone the hearing if necessary to enable his personal representative to attend. Applicant responded that he preferred to continue with the hearing (Tr. 6). Based on his affirmative waiver of his right to the assistance of his personal representative, I conducted the hearing with the Applicant representing himself.

Unauthenticated Report of Investigation

Department Counsel offered GX 3, DOHA interrogatories that included a personal subject interview extracted from a report of investigation, without calling an authenticating witness as required by the Directive ¶ E3.1.20. I explained the authentication requirement to Applicant, and he declined to waive it (Tr. 37). I excluded the part of GX 3 containing the personal subject interview (Tr. 38). However, I permitted Department Counsel to cross-examine Applicant about the interview (Tr. 84-87).

Findings of Fact

In his answer to the SOR, Applicant admitted the allegations in SOR ¶¶1.b, 1.d through 1.l, and 1.n. He denied SOR ¶¶ 1.a, 1.c, 1.m, 1.o, and 2.a. At the hearing he admitted all the delinquent debts alleged except SOR ¶¶ 1.a and 1.k (Tr. 43). His admissions in his answer to the SOR and at the hearing are incorporated in my findings of fact. I make the following findings:

Applicant is a 39-year-old employee of a federal contractor. He has worked for his current employer since August 2004. He was unemployed from May 2003 to August 2004. He served in the U.S. Army Reserve from December 1984 to April 2003. During his last year in the Army Reserve, he was on full-time active duty, serving as an ammunition sergeant (Tr. 44-45). He received a security clearance in June 1994 and held it until it was suspended after issuance of the SOR (Tr. 9).

Applicant was married in October 2001. He has no children from this marriage but pays child support of about \$100 a month for a 13-year-old son from a previous relationship (Tr. 50-51). His spouse does not work outside the home.

Around 1990, Applicant moved in with his seriously ill grandmother to care for her. Around 2000, his grandmother was placed in a nursing home by her children, and he was forced to move out when her home was sold (Tr. 94). While living with his grandmother, he lost his job because he was taking too much time off to care for her (Tr. 95-96). The combination of losing his place to live and losing his job caused him to fall behind on his debts, and two cars he owned were repossessed (Tr. 94-95).

After moving out of his grandmother's house, Applicant rented a room for three or four months from the creditor alleged in SOR ¶ 1.a (Tr. 67). Because she kept increasing the rent, Applicant moved out. After they disagreed about whether Applicant owed any rent, she kept some of Applicant's property and eventually obtained a judgment against him. Applicant considers the rent paid because she kept his property. He has had no contact with her and no recollection of any notices regarding the judgment (Tr. 53-55). He did not provide any documentation of his dispute about the rent.

Applicant has not resolved the debts alleged in the SOR, except for SOR ¶¶ 1.d, 1.j, 1.k, and 1.m. At the hearing, he presented a money order for the medical bill alleged in SOR ¶ 1.d and stated he intended to deliver it immediately after the hearing, and obtain a receipt for the payment (Tr. 59-60). The debts alleged in SOR ¶¶ 1.j and 1.k appear to be the same debt (Tr. 22), and it was settled after the hearing (GX 5; AX B at 2). After the hearing, Applicant also presented evidence that the telephone bill alleged in SOR ¶ 1.m had been resolved.

The evidence concerning the delinquent debts alleged in the SOR is summarized in the table below.

SOR	Debt	Amount	Status	Evidence
1.a	Judgment (Rent)	\$500	Unpaid	GX 4; GX 5
1.b	Medical	\$1,249	Unpaid	GX 4
1.c	Credit card	\$647	Unpaid	GX 4
1.d	Medical	\$133	Paid	GX 4; AX A; Tr. 59-60
1.e	Credit card	\$1,494	Unpaid	GX 4
1.f	Car loan	\$2,409	Unpaid	GX 4; GX 5
1.g	Credit card	\$5,252	Unpaid	GX 4
1.h	Personal loan	\$4,070	Unpaid	GX 4
1.i	Personal loan	\$1,768	Unpaid	GX 4
1.j	Credit card	\$635	Settled	GX 5; AX B at 2
1.k	Credit card	\$561	Same debt as ¶ 1.j	GX 5; AX B at 2; Tr. 22
1.l	Medical	\$280	Unpaid	GX 5
1.m	Telephone	\$100	Resolved	AX B at 3
1.n	Medical	\$68	Unpaid	GX 5

On his security clearance application, Applicant answered “yes” to question 28a, asking if he had been more than 180 days delinquent on any debts in the last seven years, and he answered “yes” to question 28b, asking if he was currently more than 90 days delinquent on any debts. He disclosed a delinquent credit card account and the delinquent medical bill alleged in SOR ¶ 1.b, but he did not disclose the delinquent debts alleged in SOR ¶¶ 1.a, 1.c, 1.d, 1.e, 1.g, 1.h, 1.j, 1.k (a duplication of 1.j), 1.m, and 1.n. He admitted he understood the two questions about delinquent debts and testified he did not know why he failed to list his other delinquent debts (Tr. 81-82).

After Applicant submitted his security clearance application, he was interviewed by a security investigator. This interview is the basis for the allegation in SOR ¶ 1.o. which alleges, “[Y]ou said that your financial situation could possibly be used against you for the purpose of blackmail and coercion.” I excluded the report of investigation containing the investigator’s summary of the interview. However, at the hearing Applicant testified the investigator asked if he could be blackmailed, and he responded: “It could be possible but it ain’t gonna happen on my part. I can guarantee it.” He testified his delinquent debts would have a negative impact on his reputation among his supervisors and coworkers if they knew about them (Tr. 86-87).

In response to DOHA interrogatories in September 2007, Applicant submitted a personal financial statement reflecting net monthly income of \$1,400 and monthly expenses of about \$770, leaving a net monthly remainder of about \$630 (GX 3 at 6). However, his testimony at the hearing indicates this personal financial statement is inaccurate. He testified his net pay is about \$2,800 per month (Tr. 78). Although he listed his car expenses on the personal financial statement as about \$150 per month, he testified he spends about \$400 per month to buy gas for his large four-wheel-drive truck (Tr. 79). His financial statement does not list his car loan payment of \$308 per month (Tr. 76-77). Based on his testimony, it appears that his net monthly remainder is around \$1,300. His financial statement reflects no payments on the debts alleged in the SOR.

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 have 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 revised adjudicative guidelines (AG). These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An

administrative judge's over-arching adjudicative goal is a fair, impartial and common sense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. 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.

Clearance decisions must be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is not necessarily a determination as to the loyalty of the applicant. 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 that may disqualify the applicant from being eligible for access to classified information. The government has the burden of establishing controverted facts alleged in the SOR. 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. 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).

Analysis

Guideline F, Financial Considerations

The SOR alleges fourteen delinquent debts totaling more than \$19,000 (SOR ¶ 1.a-1.n). It also alleges Applicant admitted during a personal subject interview that his financial situation could possibly be used against him for blackmail and coercion (SOR ¶ 1.o). The security concern relating to Guideline F is set out in AG ¶ 18 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.

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." 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." AG ¶ 19(c) is raised when there is "a history of not meeting financial obligations." 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." Applicant's financial history raises AG ¶¶ 19(a), (c), and (e). AG ¶ 19(b) is not raised because there is no evidence of frivolous or irresponsible spending.

Although Applicant did not provide a receipt for payment of the \$133 medical bill for which he presented a money order at the hearing, I have taken Applicant at his word and resolved SOR ¶ 1.d in his favor.

The same debt is alleged twice in SOR ¶¶ 1.j and 1.k. 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.k. in Applicant's favor.

SOR ¶ 1.o, alleging Applicant's admission that his financial situation could possibly be used to blackmail or coerce him, does not allege any conduct encompassed by Guideline F. It merely sets out Applicant's acknowledgment of the nexus between financial problems and security concerns. Applicant's acknowledgment has no independent security significance. Furthermore, the allegation was based on the report of investigation that I excluded for lack of authentication. I resolve SOR ¶ 1.o for Applicant.

Since the government produced substantial evidence to raise the disqualifying conditions in AG ¶¶ 19(a), (c), and (e), 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 never shifts 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.”

The first prong (“so long ago”) is not established because Applicant’s delinquent debts are not yet resolved. The second prong (“so infrequent”) is not established because he has numerous delinquent debts. The third prong (“unlikely to recur”) also is not established because Applicant is still financially overextended and has not resolved many of his delinquent debts. I conclude AG ¶ 20(a) 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.

Applicant’s loss of a rent-free home and his extended period of unemployment were conditions beyond his control. However, he has not contacted most of his creditors or attempted to negotiate with them, even though he has been employed continuously since August 2004. He has not sought professional assistance through credit counseling services. I conclude AG ¶ 20(b) is not established.

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). 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 had resolved only one debt, the telephone bill alleged in SOR ¶ 1.m, before learning his security clearance was in jeopardy. He settled the medical bill alleged in SOR ¶ 1.b on the day of the hearing, and the credit card debt in SOR ¶¶ 1.j and 1.k after the hearing. He has done nothing regarding the other debts, even though some of them are for small amounts. For example, the medical debts alleged in SOR ¶¶ 1.l and 1.n are for \$280 and \$68, respectively. I conclude AG ¶ 20(d) 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 disputed the judgment for rent at the hearing, but provided little information about the basis for the dispute and no documentation. He has not disputed any of the other debts. I conclude AG ¶ 20(e) is not established.

Guideline E, Personal Conduct

The SOR alleges Applicant deliberately failed to disclose all his delinquent debts on his security clearance application. The concern under this guideline is set out in AG ¶ 15 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.

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 understood the questions about delinquent debts, as evidenced by his disclosure of two delinquent debts. He had no explanation for omitting the rest of his delinquent debts. I conclude AG ¶ 16(a) is raised, shifting the burden to Applicant to 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). There is no evidence Applicant made any effort to correct his omissions until he was interviewed by a security investigator in November 2006 and

confronted with the evidence of his delinquent debts. I conclude AG ¶ 17(a) is not established.

Security concerns under this guideline also may be mitigating by showing “the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment.” AG ¶ 17(c). Applicant's intentional omission of relevant and material information from his SF 86 was a felony, violating 18 U.S.C. § 1001. It involved his current application to continue his clearance. Although it is the only instance of its kind in his record, it raises doubt about his reliability, trustworthiness, and judgment. I conclude AG ¶ 17(c) is not established. No other enumerated mitigating conditions under this guideline are established.

Whole Person Concept

Under the whole person concept, an 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. An 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 security clearance must be an overall common sense judgment based upon careful consideration of the guidelines and the whole person concept. Some of the factors in AG ¶ 2(a) were addressed above, but some warrant additional comment.

Applicant is a mature adult. He has been gainfully employed since August 2004. He earns a modest income and appears to have a net monthly remainder available for debt payments. Some of his debts are for small amounts, e.g, SOR ¶¶ 1.l for \$280 and 1.n for \$68, but they were unpaid as of the date of the hearing. He has not sought credit counseling and has no firm plan for resolving his debts.

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 eligibility for access to classified information.

Formal Findings

I make the following formal findings for or against Applicant on the allegations set forth in the SOR, as required by Directive ¶ E3.1.25 of Enclosure 3:

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:	For Applicant
Subparagraph 1.e:	Against Applicant
Subparagraph 1.f:	Against Applicant
Subparagraph 1.g:	Against Applicant
Subparagraph 1.h:	Against Applicant
Subparagraph 1.i:	Against Applicant
Subparagraph 1.j:	For Applicant
Subparagraph 1.k:	For Applicant
Subparagraph 1.l:	Against Applicant
Subparagraph 1.m:	For Applicant
Subparagraph 1.n:	Against Applicant
Subparagraph 1.o:	For Applicant

Paragraph 2, Guideline E (Personal Conduct): AGAINST APPLICANT

Subparagraph 2.a:	Against Applicant
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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 eligibility for a security clearance. Eligibility for access to classified information is denied.

LeRoy F. Foreman
Administrative Judge