



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



In the matter of:

SSN: -----

Applicant for Security Clearance

)
)
)
)
)
)

ISCR Case No. 07-09236

Appearances

For Government: Eric H. Borgstrom, Esquire, Department Counsel

For Applicant: *Pro se*

March 28, 2008

Decision

FOREMAN, LeRoy F., Administrative Judge:

Applicant submitted his Security Clearance Application (SF 86) on October 19, 2006. On November 7, 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 13, 2007; answered it on November 27, 2007; and requested a hearing before an administrative judge. DOHA received the request on November 30, 2007. 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, 2007, scheduling the hearing for

February 12, 2008. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 4 were admitted in evidence without objection. GX 5 was not admitted, for the reasons set out below. Applicant testified on his own behalf and submitted Applicant's Exhibits (AX) A and B, which were admitted without objection. I granted Applicant's request to keep the record open until February 29, 2008 to enable him to submit additional evidence. Applicant timely submitted AX C through F. AX D was unsigned, and Applicant was given additional time to obtain a signed copy. He submitted AX G and H (the signed version of AX D) on March 6, 2008, and they were admitted without objection. Department Counsel's responses to AX C through H are attached to the record as Hearing Exhibits (HX) I and II. DOHA received the transcript of the hearing (Tr.) on February 22, 2008. The record closed on March 6, 2008. Eligibility for access to classified information is denied.

Procedural and Evidentiary Rulings

Unauthenticated Report of Investigation

Department Counsel offered GX 5, 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. 36-38). I did not admit GX 5.

Amendment of SOR

Department Counsel moved to amend the allegations in SOR ¶¶ 1.c, 1.d, 1.e, 1.f, 1.h, and 1.i, to allege the specific collection agencies to which the medical debts alleged had been transferred. Applicant did not object, and I granted the motion to amend (Tr. 27-28).

Findings of Fact

In his answer to the SOR, Applicant admitted all the delinquent debts alleged under Guideline F, except the debt alleged in SOR ¶ 1.p. He denied the conduct alleged under Guideline E. 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 38-year-old help desk technician employed by a federal contractor. He has worked for his current employer since October 2007. He worked for another federal contractor from July 2006 to October 2007 (Tr. 54-55). He was married in December 1990. He has a 22-year-old stepdaughter and two daughters, ages 16, and 15. He received a security clearance in April 1991.

Applicant began accumulating delinquent debts around 2002 or 2003, when the debts alleged in SOR ¶¶ 1.k, 1.n, 1.o, and 1.s became delinquent. His financial problems were exacerbated when both he and his wife were laid off. He was unemployed for about two years, ending with his employment in July 2006. His wife was

laid off from her job in late 2004 after working for eight years (GX 2 at 3; Tr. 96), and she was unemployed for about two and a half years (Tr. 55). In response to DOHA financial interrogatories, he attributed his financial problems to the long periods of unemployment suffered by his wife and himself, college tuition for his stepdaughter, and the cost of his stepdaughter's wedding (GX 2 at 6). He suffered an injury in June 2007 and had no medical insurance, resulting in the medical debt of \$1,282 alleged in SOR ¶ 1.f.

In a personal financial statement executed in October 2007, Applicant listed net monthly income of \$3,082, monthly expenses of \$2,550, no debt payments, and a net remainder of \$532 (GX 2 at 5). This personal financial statement did not include any income earned by his spouse.

On November 27, 2007, the day Applicant answered the SOR, he enrolled in a credit counseling service (Enclosure to Answer to SOR). The debts alleged in SOR ¶¶ 1.a, 1.b, 1.f, 1.n, 1.o, 1.q, 1.r, and 1.x are being managed through this service. The credit counseling service will receive \$443 each month, beginning in February 2008, which will be automatically deducted from Applicant's bank account (AX B). His debt payment plan is designed to pay off the delinquent debts in about 39 months (Tr. 50).

Applicant purchased a home with his mother-in-law and father-in-law in May 2003. His in-laws obtained the mortgage, but Applicant and his spouse pay the mortgage, taxes, and upkeep on the house (Tr. 49). His monthly mortgage payment is \$350, plus taxes of about \$1,595 per year. His payments on the home have been made on time (AX H).

When Applicant executed his security clearance application on November 19, 2006, he answered "yes" to question 27b, asking if he had his wages garnished or had any property repossessed in the last seven years, and he disclosed a repossession in May 2005, alleged in SOR ¶ 1.a. He did not disclose that two vehicles were repossessed.

Applicant answered "no" to question 27c, asking if any tax liens were placed against his property in the last seven years. He did not disclose the state tax lien alleged in SOR ¶ 1.p. The lien was imposed after Applicant moved from one state to another in the same tax year and was liable for taxes in both states. He trusted a friend to prepare his tax returns. He testified he was unaware of the tax lien until he received the Statement of Reasons (Tr. 76, 82).

Applicant also answered "no" to question 28a, asking if he had been more than 180 days delinquent on any debt in the last seven years, and question 28b, asking if he was currently more than 90 days delinquent on any debt. He did not disclose the debts alleged in SOR ¶¶ 1.e and 1.h through 1.u. After giving several vague reasons for not disclosing the debts, he admitted he answered "no" to questions 28a and 28b to avoid the hassle of obtaining the information about all his debts (Tr. 92-93).

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

SOR	Debt	Amount	Status	Evidence
1.a	Car Repossession	\$7,511	Credit Counseling	AX B
1.b	Cable Service	\$367	Credit Counseling	AX B
1.c	Medical	\$81	Uncertain, no documentation	Tr. 66
1.d	Medical	\$199	Unpaid	Tr. 67
1.e	Medical	\$75	Uncertain, no documentation	Tr. 68
1.f	Medical	\$1,282	Credit Counseling	AX B
1.g	Cell Phone	\$671	Unpaid	Tr. 69
1.h	Medical	\$100	Paid	AX A; Tr. 70
1.i	Medical	\$75	Paid	GX 4; AX A; Tr. 70
1.j	Unknown	\$80	Uncertain, no documentation	Tr. 70-71
1.k	Trash Collection	\$51	Uncertain, no documentation	Tr. 71
1.l	Trash Collection	\$75	Paid	GX 2, 3, and 4; AX A; Tr. 70
1.m	Credit Card	\$855	Credit Counseling	AX B; Tr. 72
1.n	Credit Card	\$1,220	Credit Counseling	AX B; Tr. 73-74
1.o	Utilities	\$1,048	Credit Counseling	AX B
1.p	State tax lien	\$481	Paid	AX A; Tr. 70
1.q	Payday loan	\$470	Credit Counseling	AX B; Tr. 77
1.r	Credit card	\$685	Same debt as l.n	AX B; Tr. 23
1.s	Insurance	\$793	Unpaid, disputed, no documentation	Tr. 78
1.t	Car repossession	\$4,899	Car sold, balance unpaid	Tr. 79
1.u	Car repossession	\$958	Car sold, balance unpaid	Tr. 80
1.v	Medical	\$1,282	Same debt as 1.f	Tr. 23, 81
1.x ¹	Cable Service	\$367	Same debt as 1.b	Tr. 23, 64, 81
1.y	Medical	\$70	Uncertain, may be same debt as 1.c	AX B
1.z	Medical	\$607	Unpaid,	AX B; Tr. 82

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

¹ There is no paragraph 1.w in the SOR.

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 25 delinquent debts. Applicant admitted all the debts except for the state tax lien alleged in SOR ¶ 1.p. The concern under this guideline 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.” AG ¶ 19(g) is raised by “failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same.”

The same debts are alleged twice in SOR ¶¶ 1.b and 1.x, 1.f and 1.v, and 1.n and 1.r. Applicant suspected the medical debts in SOR ¶¶ 1.c and 1.y were the same debts, but he was uncertain and could provide no documentation. 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.r, 1.v, and 1.x. in Applicant's favor.

Applicant's history of delinquent debts raises AG ¶¶ 19(a), (c), and (e). AG ¶ 19(b) is not raised because there is no evidence of “frivolous or irresponsible spending.” AG ¶ 19(g) is not raised because there is no evidence that the state tax lien was imposed for failure to file a return or for filing a fraudulent return. The evidence shows only that the taxes due were not paid.

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 several of 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 several 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 person’s control and responsible conduct, must be established.

The long periods of unemployment suffered by Applicant and his wife were conditions beyond his control. However, some of the debts alleged in the SOR were delinquent before they became unemployed. For those debts (SOR ¶¶ 1.k, 1.n, 1.o, 1.s), AG ¶ 20(b) is inapplicable. For the debts that became delinquent because of their unemployment, the evidence shows that Applicant returned to work in July 2006, but he did not begin a systematic program for resolving his delinquent debts until November 2007, after he received the SOR. Thus, I conclude the second prong, responsible conduct, is not established. Accordingly, I conclude AG ¶ 20(b) is not established.

Security concerns under this guideline also can be mitigated by showing that “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.” AG ¶ 20(c). This mitigating condition also has two prongs that may be either disjunctive or conjunctive. If the person has received counseling, as in this case, it must also be shown that there are clear indications the problem is being resolved or under control.

Applicant's enrollment in a credit counseling program is a promising first step. However, he receives only limited mitigation under AG ¶ 20(c), because his program only applies to the debts alleged in SOR ¶¶ 1.a, 1.b, 1.f, 1.m, 1.n, 1.o, and 1.q.

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 has paid the debts alleged in SOR ¶¶ 1.h, 1.i, 1.l, and 1.p, and he has initiated a payment plan to pay the debts alleged in SOR ¶¶ 1.a, 1.b, 1.f, 1.m, 1.n, 1.o, and 1.q. AG ¶ 20(d) is established for these debts.

Security concerns under this guideline also can be mitigated 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 suggested that the insurance debt alleged in SOR ¶ 1.s was disputed, and he was uncertain about the debts alleged in SOR ¶ 1.c, 1.e, 1.j, 1.k, and 1.y, but he offered no evidence of a legitimate basis for any disputes. I conclude AG ¶ 20(e) is not established.

Guideline E, Personal Conduct

The SOR alleges Applicant falsified his answer to question 27c on his security clearance application by deliberately failing to disclose a state tax lien. It also alleges he falsified his answer to questions 28a and 28b by deliberately failing to disclose his delinquent debts. 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." 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's failure to disclose that two vehicles were repossessed in May 2005 is not alleged in the SOR. Both vehicles apparently were repossessed at the same time. I am satisfied he did not intentionally omit relevant and material information in response to question 27b. Likewise, I found his explanation for not disclosing the state tax lien in response to question 27c plausible and credible. However, I find that he intentionally omitted his delinquent debts in response to questions 28a and 28b, because he admitted he omitted them to avoid the hassle of obtaining and providing the information about them. Thus, I conclude the disqualifying condition is 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). There is no evidence of any effort by Applicant to correct the record before he was 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 not a minor dereliction. It was a felony, violating 18 U.S.C. § 1001. It was recent, involving his current application for a clearance. It did not occur under "unique circumstances," but rather as part of a routine security clearance application. 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 under Guidelines F and E above, but some warrant additional comment.

Applicant is a mature adult, gainfully employed and devoted to his job and his family. Now that his stepdaughter has graduated from college and married, his financial obligations are lessened. He has taken significant steps to resolve his debts, but many of them are still unresolved. His lack of candor on his security clearance application raises serious questions about his reliability, trustworthiness, and good judgment.

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

Subparagraph 1.p:	For Applicant
Subparagraph 1.q:	For Applicant
Subparagraph 1.r:	For Applicant
Subparagraph 1.s:	Against Applicant
Subparagraph 1.t:	Against Applicant
Subparagraph 1.u:	Against Applicant
Subparagraph 1.v:	For Applicant
Subparagraph 1.x:	For Applicant
Subparagraph 1.y:	Against Applicant
Subparagraph 1.z:	Against Applicant

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

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

LeRoy F. Foreman
Administrative Judge