



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



In the matter of:)
)
-----) ISCR Case No. 07-12324
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Candace Le'i, Esquire, Department Counsel
For Applicant: *Pro Se*

September 30, 2008

Decision

HARVEY, Mark W., Administrative Judge:

Applicant did not mitigate financial considerations security concerns. Clearance is denied.

Statement of the Case

On May 30, 2007, Applicant submitted an Electronic Questionnaires for Investigation Processing (e-QIP) or Security Clearance Application (SF 86) (Government Exhibit (GE) 1). On March 26, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to him,¹ pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended, modified and revised. The SOR alleges security concerns under Guideline F (Financial Considerations). The SOR detailed reasons why DOHA could not

¹Government Exhibit (GE) 8 (Statement of Reasons (SOR), dated March 26, 2008). GE 8 is the source for the facts in the remainder of this paragraph unless stated otherwise.

make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for him, and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.²

On June 26, 2008, Applicant responded to the SOR allegations, and elected to request a hearing (GE 9). On August 19, 2008, the case was assigned to me. At the hearing held on September 18, 2008, Department Counsel offered six exhibits (GEs 1-6) (Transcript (Tr.) 18-19), and Applicant did not offer any exhibits (Tr. 9-10). There were no objections, and I admitted GE 1-6 (Tr. 19). Additionally, I admitted the SOR, response to the SOR and Hearing Notice (GE 7-9). I received the transcript on September 25, 2008.

Findings of Fact³

Applicant admitted responsibility for all financial problems listed in the SOR with explanations (SOR ¶¶ 1.a to 1.l). His admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence of record, I make the following findings of fact.

Applicant is 43 years old (Tr. 5, 43).⁴ He graduated from high school and then attended a technical school in electronics, achieving the equivalent of an associate's degree (Tr. 5). He does not hold a clearance (Tr. 6). Applicant was married from 1986 to 1996 (Tr. 20). He had two children during this marriage (Tr. 20-21). His marriage ended in an acrimonious divorce (Tr. 15). Applicant remarried in January 2002 and has a four-year-old son and a 14-year-old step son from his current marriage (Tr. 35).

Applicant held a good job for 19 years, and had an annual salary of about \$60,000 (GE 3 at 3). In late 2002, he moved to a different state to be closer to his daughter, who was living with Applicant's former spouse (Tr. 15-16, 24, 30, GE 3 at 3).⁵ His income was reduced by over half because he left his high-paying job to live near his daughter, who needed his support (Tr. 52, G3 at 3). He eventually obtained custody of

²On Aug. 30, 2006, the Under Secretary of Defense (Intelligence) published a memorandum directing application of revised Adjudicative Guideline to all adjudications and other determinations made under the Directive and Department of Defense (DoD) Regulation 5200.2-R, *Personnel Security Program* (Regulation), dated Jan. 1987, as amended, in which the SOR was issued on or after Sep. 1, 2006. The revised Adjudicative Guidelines are applicable to Applicant's case.

³Some details have not been included in order to protect Applicant's right to privacy. Specific information is available in the cited exhibits. GE 9 (Response to SOR) is the source for the facts in this section unless stated otherwise.

⁴GE 1 (2007 security clearance application) is the source for the facts in this paragraph, unless stated otherwise.

⁵There was no objection, and I approved admission of Applicant's opening statement as substantive evidence (Tr. 20).

his daughter; however, his former spouse retained custody of Applicant's son (Tr. 28, 30). In October 2006, his former spouse obtained a contempt citation because Applicant was allegedly \$6,800 behind in paying his child support (Tr. 28, 34). Appellant felt that the order for support should have been nullified because he had physical custody of his daughter (Tr. 31). He also believed his former wife deliberately failed to cash a support payment check so that he would be cited for contempt (Tr. 32). He brought his check book to court to prove he had money in his account to cover her support check (Tr. 32-34). He was unsuccessful in challenging the \$6,800 support order (Tr. 32). Applicant was released from custody when his wife's grandfather paid the support obligation on Applicant's behalf (Tr. 34). He is now current on all child support obligations (Tr. 35).

Applicant's former wife became involved in an abusive relationship (Tr. 16, 28). His son was physically and emotionally abused (Tr. 22-23). His former wife had very poor judgment, and was a violent person (Tr. 34). Applicant's daughter, who is now 22 and married, accepted physical custody of Applicant's 16-year-old son (Tr. 23-24). Applicant engaged in additional expensive litigation with his former wife, and recently gained physical custody of his son from his daughter (Tr. 16-17, 20-25). His 16-year-old son now lives with Applicant and his current wife (Tr. 23-24). There have been medical expenses and school expenses of \$500 for his son (Tr. 25, 27). He is going to court in October 2008 to litigate gaining legal custody of his son (Tr. 25).

Applicant's current spouse earns about \$1,500 monthly and Applicant's net pay is about \$2,500 monthly (Tr. 35-36). His monthly rent is \$1,600 (Tr. 36). His spouse's monthly car payment is \$179; however, the car payment is about two months delinquent (Tr. 37, 39). This car is solely in his spouse's name (Tr. 51). Applicant's other car is paid off (Tr. 37). Monthly day care costs are \$400 (Tr. 37). He has no savings or other assets (Tr. 37). He and his spouse do not have any credit cards (Tr. 43).

In October 2007, Applicant told an investigator from the Office of Personnel Management (OPM) that he expected to receive about \$6,000 from a tax refund (Tr. 38). He intended to use this refund to resolve some of his delinquent debts. At his hearing, he advised the refund was actually less than \$6,000. It was not used to pay any of his delinquent debts. Instead, it was used for current bills, and to buy a new mattress (Tr. 38). Additionally, Applicant and his spouse moved to a more expensive rental (rent increased from \$1,250 to \$1,600) (Tr. 47). They moved because utilities were less, the new residence was larger, and the old residence had a roach problem (Tr. 47-48). Other than the delinquent car loan, he does not have any other delinquent, non-SOR debts (Tr. 43).

Applicant's financial problems began in 2002 (Tr. 39). He has not contacted any of his creditors about the delinquent accounts (Tr. 39, 41). He has not had credit or financial counseling (Tr. 41). In 2002, Applicant used the money from his 401K account and did not file his tax return (Tr. 40). He went four of five years without filing his tax return, and then filed all his tax returns in 2007 (Tr. 40, 43). He subsequently learned that he did not owe as much in taxes as he expected because of his filing status and other deductions (Tr. 41, 44). He missed some tax refunds because he did not file his

tax returns (Tr. 44). He concluded that he lost about \$150,000 over the years to contest custody of his son and daughter (Tr. 41). He did not have any money to address his delinquent SOR debts (Tr. 45). He planned to resolve the custody issues before doing anything on his delinquent debts (Tr. 42). He disputed the debt related to his eviction, asserting that the rental-residence had asbestos and the roof leaked (Tr. 45). He was not sure whether he owed the landlord any money. The landlord retained the security deposit, and the last month's rent (Tr. 46). He did not believe he was being sued over the rent problem (Tr. 46).

Applicant's 12 delinquent debts or financial problems, include a total of about \$15,000 in delinquent debt, which is summarized as follows (GE 6):

SOR PARAGRAPH AND TYPE OF DEBT	AMOUNT	STATUS
¶ 1.a Taxes	None	Paid (Tr. 40-45, GE 9)
¶ 1.b Judgment	\$1,266	Delinquent-credit card (GE 3 at 4, 9)
¶ 1.c Store	\$69	Payment Plan-bad check (GE 3 at 4, 9)
¶ 1.d Store	\$217	Returned Check-groceries (GE 3 at 4, 9)
¶ 1.e Medical	\$269	Delinquent-medical bill (GE 3 at 4, 9)
¶ 1.f Store	\$526	Delinquent-wedding bands (GE 3 at 4, 9)
¶ 1.g Vehicle Repossession	\$8,837	Delinquent (GE 3 at 4, 9)
¶ 1.h Telephone	\$1,875	Delinquent-cell phone (GE 3 at 4, 9)
¶ 1.i Credit Card	\$421	Delinquent (GE 9)
¶ 1.j Landlord	None	Evicted in August 2003 for nonpayment of rent (GE 9)-Disputed debt
¶ 1.k Collection Law Firm	\$888	Delinquent-credit card (GE 3 at 4, 9)
¶ 1.l Telephone	\$633	Delinquent (GE 9)

Applicant was honest when he completed his security clearance application and responded to interrogatories about his debts, a prior domestic violence incident, and his marijuana use (Tr. 17). As indicated above, Applicant's employment after 2002 was at significantly lower pay (Tr. 16-17). He endeavored to work overtime to try to raise additional income (Tr. 17). He thought if he had a clearance he could increase his annual income by about \$15,000 (Tr. 18). His long-term goal was to continue to support his children and to purchase a house (Tr. 49). He promised to never do anything to jeopardize national security (Tr. 51).

Policies

When evaluating an Applicant's suitability for a security clearance, the Administrative Judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful in evaluating an Applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The Administrative Judge's over-arching adjudicative goal is a fair, impartial and common sense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept." The Administrative Judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

In the decision-making process, the Government has the initial burden of establishing controverted facts alleged in the SOR by "substantial evidence,"⁶ demonstrating, in accordance with the Directive, that it is not clearly consistent with the national interest to grant or continue an applicant's access to classified information. Once the Government has produced substantial evidence of a disqualifying condition, the burden shifts to Applicant to produce evidence "to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and [applicant] has the ultimate burden of persuasion as to obtaining a favorable clearance decision." Directive ¶ E3.1.15. The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).⁷

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the Applicant may deliberately or inadvertently fail to 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.

⁶ See Directive ¶ E3.1.14. "Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the record." ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). "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).

⁷ "The Administrative Judge [considers] the record evidence as a whole, both favorable and unfavorable, evaluate[s] Applicant's past and current circumstances in light of pertinent provisions of the Directive, and decide[s] whether Applicant ha[s] met his or her burden of persuasion under Directive ¶ E3.1.15." ISCR Case No. 04-10340 at 2 (App. Bd. July 6, 2006).

Section 7 of Executive Order 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* Executive Order 12968 (Aug. 2, 1995), Section 3.

Analysis

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, including those described briefly above, I conclude one relevant security concern is under Guideline F (Financial Considerations). AG ¶ 18 articulates the security concern relating to financial problems:

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.

AG ¶ 19 provides two financial considerations disqualifying conditions that could raise a security concern and may be disqualifying in this case, “(a) inability or unwillingness to satisfy debts,” and “(c) a history of not meeting financial obligations.” ISCR Case No. 03-20327 at 3 (App. Bd. Oct. 26, 2006) provides, “Applicant’s credit report was sufficient to establish the Government’s prima facie case that Applicant had . . . SOR delinquent debts that are of security concern.” Applicant’s history of delinquent debt is documented in his credit reports (GE 4-6), his OPM interview, his response to DOHA interrogatories (GE 3), and his SOR response (GE 9). However, his denial that he owes any tax debt and that he owes money from the eviction is sufficient to refute the allegations in SOR ¶¶ 1.a and 1.j. As indicated in his statement at his hearing and in his response to SOR ¶¶ 1.b to 1.i, and 1.k and 1.l (GE 9), ten creditors have not been paid and there is currently no ability to initiate delinquent debt resolution. The government established the disqualifying conditions in AG ¶¶ 19(a) and 19(c).

Five Financial Considerations Mitigating Conditions under AG ¶¶ 20(a)-(e) are potentially applicable:

(a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual’s current reliability, trustworthiness, or good judgment;

(b) the conditions that resulted in the financial problem were largely beyond the person’s control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation), and the individual acted responsibly under the circumstances;

(c) the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control;

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

(e) the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue.

Applicant's conduct does not warrant full application of AG ¶¶ 20(a) or 20(b) because he did not act more aggressively and responsibly to resolve ten delinquent SOR debts. Applicant has not made any progress resolving his ten delinquent debts totaling about \$15,000. His financial problems are not isolated. The ongoing nature of his delinquent debts is "a continuing course of conduct" under the Appeal Board's jurisprudence. See ISCR Case No. 07-11814 at 3 (App. Bd. Aug. 29, 2008) (citing ISCR Case No. 01-03695 (App. Bd. Oct. 16, 2002)). He receives partial credit under AG ¶ 20(a) because the debt "occurred under such circumstances that it is unlikely to recur and does not cast doubt on the [his] current reliability, trustworthiness, or good judgment." He has been paying his non-SOR debts, except his spouse's car payment is also currently delinquent. Under AG ¶ 20(b), he receives partial mitigation because his financial situation was damaged through his move away from a good job, which was related to his divorce and custody issues. His divorce was in 1996. He had problems paying his child support and his current spouse's grandfather paid his back child support of about \$6,800. However, he did not provide sufficient information to establish that he acted responsibly under the circumstances or made sufficient efforts to address his delinquent debts.⁸ He admitted that he has not maintained contact with his creditors, and made no recent efforts to set up payment plans.

AG ¶¶ 20(c) and 20(d) have limited application. Applicant did not receive financial counseling. There are some indications that "that the problem is being resolved or is under control" because the amount of delinquent debt is not that large, and there is very little new delinquent debt. There is insufficient information to establish that Applicant showed good faith⁹ in the resolution of his delinquent SOR debts.

⁸"Even if Applicant's financial difficulties initially arose, in whole or in part, due to circumstances outside his [or her] control, the Judge could still consider whether Applicant has since acted in a reasonable manner when dealing with those financial difficulties." ISCR Case No. 05-11366 at 4 n.9 (App. Bd. Jan. 12, 2007) (citing ISCR Case No. 99-0462 at 4 (App. Bd. May 25, 2000); ISCR Case No. 99-0012 at 4 (App. Bd. Dec. 1, 1999); ISCR Case No. 03-13096 at 4 (App. Bd. Nov. 29, 2005)).

⁹The Appeal Board has previously explained what constitutes a "good faith" effort to repay overdue creditors or otherwise resolve debts:

AG ¶ 20(e) mitigates his tax debt and his landlord's eviction. Although he did not provide "documented proof to substantiate the basis of the dispute" with respect to these debts, I will give him credit for mitigating them. The SOR does not list any amount owed, and I found him to be credible concerning these debts. I will find "For Applicant" with respect to SOR ¶¶ 1.a and 1.j in the decretal paragraph of this decision.

I conclude Applicant's overall conduct with his creditors casts doubt on his current reliability, trustworthiness, and good judgment. His ten delinquent SOR debts total about \$15,000 and likely will remain at that level for the foreseeable future. He is an honest, hard-working employee and a good father. Notwithstanding these positive attributes, he has not established his financial responsibility and that he has the judgment necessary to hold a security clearance. Based on my evaluation of the record evidence as a whole, I conclude no mitigating conditions fully apply.

Whole Person Concept

Under the whole person concept, the Administrative Judge must evaluate an Applicant's eligibility for a security clearance by considering the totality of the Applicant's conduct and all the circumstances. The Administrative Judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

- (1) the nature, extent, and seriousness of the conduct;
- (2) the circumstances surrounding the conduct, to include knowledgeable participation;
- (3) the frequency and recency of the conduct;
- (4) the individual's age and maturity at the time of the conduct;
- (5) the extent to which participation is voluntary;
- (6) the presence or absence of rehabilitation and other permanent behavioral changes;
- (7) the motivation for the conduct;
- (8) the potential for pressure, coercion, exploitation, or duress; and
- (9) the likelihood of continuation or recurrence.

The ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole person concept. AG ¶ 2(c).

In order to qualify for application of [the "good faith" mitigating condition], an applicant must present evidence showing either a good-faith effort to repay overdue creditors or some other good-faith action aimed at resolving the applicant's debts. The Directive does not define the term 'good-faith.' However, the Board has indicated that 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.' Accordingly, an applicant must do more than merely show that he or she relied on a legally available option (such as bankruptcy [or statute of limitations]) in order to claim the benefit of [the "good faith" mitigating condition].

(internal citation and footnote omitted) ISCR Case No. 02-30304 at 3 (App. Bd. Apr. 20, 2004) (quoting ISCR Case No. 99-9020 at 5-6 (App. Bd. June 4, 2001)).

There is some evidence tending to mitigate Applicant's conduct under the whole person concept. He is not financially sophisticated. He went through years of litigation concerning custody and support issues from his failed marriage. He paid his back taxes in 2007. His dedication to his current family and his children from his previous marriage is a very positive indication of his good character and trustworthiness. He is a patriot and is completely loyal to his country. Applicant's record of good employment weighs in his favor. There is no evidence of any security violation. Except for his spouse's car loan, his other non-SOR debts are current and being paid.

The mitigating evidence under the whole person concept and the adjudicative guidelines are not sufficient to warrant a clearance at this time. The overall amount of his delinquent debts at about \$15,000 is substantial. He has been aware of his delinquent debts since at least 2007. His failure to file his taxes from 2002 to 2007 shows avoidance of lawful responsibilities as a citizen and tax payer over those five years. For the remaining \$15,000 of his SOR debt, he has done little to address that debt. Applicant learned of the security significance of his delinquent debt when he had his interview by an OPM investigator on July 23, 2007 (GE 3). He said he was going to use a refund of about \$6,000 to address his delinquent debts. He used the refund for a more expensive rental, a new mattress and other current debts. The government's security concern about his delinquent debts was reinforced when he received the DOHA interrogatories, and again when he responded to the SOR (GE 9). Yet, he made no real progress in resolving his delinquent SOR debts. His handling of his delinquent SOR debt shows lack of responsibility, rehabilitation, and mitigation. After weighing the disqualifying and mitigating conditions, and all the facts and circumstances, in the context of the whole person, I conclude he has not mitigated the financial considerations security concerns.

I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my careful consideration of the whole person factors and supporting evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under the Guidelines. Applicant has not mitigated or overcome the government's case. For the reasons stated, I conclude he is not eligible for access to classified information.

Formal Findings

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline F:	AGAINST APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraphs 1.b to 1.i:	Against Applicant
Subparagraph 1.j:	For Applicant
Subparagraphs 1.k and 1.l:	Against Applicant

Conclusion

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue Applicant's eligibility for a security clearance. Eligibility for a security clearance is denied.

Mark W. Harvey
Administrative Judge