



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



In the matter of:)
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SSN: -----)
Applicant for Security Clearance)

ISCR Case No. 07-12807

Appearances

For Government: Robert E. Coacher, Esquire, Department Counsel
For Applicant: *Pro Se*

April 30, 2008

Decision

GALES, Robert Robinson, Chief Administrative Judge:

Applicant mitigated the security concerns regarding financial considerations. Eligibility for a security clearance and access to classified information is granted.

Statement of the Case

On February 23, 2007, Applicant applied for a security clearance and submitted an e-QIP version of a Security Clearance Application (hereinafter SF 86). On January 28, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to him, pursuant to Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended and modified; and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended and modified (Directive). The SOR alleged security concerns under Guideline F (Financial Considerations), and detailed reasons why DOHA could not make a preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant, and recommended referral to an Administrative Judge to determine whether a clearance should be granted, continued, denied, or revoked.

It should be noted that on December 29, 2005, the President promulgated revised *Adjudicative Guidelines for Determining Eligibility For Access to Classified Information*, and on August 30, 2006, the Under Secretary of Defense (Intelligence) published a memorandum directing implementation of those revised Adjudicative Guidelines (hereinafter AG) for all adjudications and other determinations made under the Directive and Department of Defense (DoD) Regulation 5200.2-R, *Personnel Security Program* (January 1987), as amended and modified (Regulation), in which the SOR was issued on or after September 1, 2006. The AG are applicable to Applicant's case because his SOR was issued after September 1, 2006.

Applicant acknowledged receipt of the SOR on February 5, 2008. In two separate sworn, written statements, dated February 12, 2008, and February 21, 2008, respectively, Applicant responded to the SOR allegations and requested a hearing before an Administrative Judge. Department Counsel indicated the Government was prepared to proceed on February 26, 2008, and the case was assigned to me on February 27, 2008. A Notice of Hearing was issued on February 28, 2008, and I convened the hearing, as scheduled, on March 20, 2008. During the hearing, three Government exhibits were received without objection. Applicant testified, but offered no exhibits. The transcript of the hearing (Tr.) was received on March 28, 2008.

Procedural and Evidentiary Rulings

Motion to Amend SOR

Department Counsel noted that Applicant's SSN in the SOR was incorrect and moved to amend the SOR. Applicant acknowledged the error and the correction was made without objection.

Findings of Fact

In his Answers to the SOR, Applicant admitted all of the factual allegations in ¶¶ 1.a. through 1.d. of the SOR, with explanations.

Applicant is a 53-year-old self-employed, independent defense contractor, and he is seeking to obtain a security clearance, the level of which has not been divulged. He is married and has two adolescent children.

From August 1995 until June 2000, Applicant had a successful career as an account executive for a large U.S. corporation. In July 2000, and continuing until November 2001, he was a channel sales manager with another large corporation, earning about \$180,000 in annual salary and commissions.¹ Life was good and Applicant acquired the trappings and playthings of the wealthy, enjoying timeshares on a lake and owning the boat which he had purchased in May 1994 for over \$145,000.²

¹ Tr. at 45.

² Government Exhibit 3 (Experian Credit Report, dated October 19, 2007, at 2, attached to Interrogatories, dated October 23, 2007).

Applicant's finances were apparently unremarkable until the terrorist attacks of September 11, 2001 (9/11). Shortly thereafter, the division in which Applicant worked was basically shut down by his employer and Applicant was given a 90-day severance package.³ His financial position collapsed into a downward spiral⁴ and he was unemployed (September 2001 to December 2003,⁵ and again from March 2004 to January 2006)⁶ or under-employed. His financial condition improved briefly in December 2003 until March 2004 when he secured a position as a sales manager with another company with a salary of \$110,000 per year, annualized.⁷

With his own diminished or zero income, and his wife earning very little as a substitute teacher, his finances took an enormous hit. Payments were delayed and some of Applicant's bills became delinquent. Several tax liens were filed (and ultimately satisfied and released).⁸ After having made timely payments for about 10 years, he defaulted on his California boat loan and the boat was repossessed in about June 2004, and the timeshares, located in Nevada by Lake Tahoe, were foreclosed upon in June 2005. His wife's medical conditions (knee replacement and diagnosis of Bipolar Disorder) generated other bills.⁹ At one point, his indebtedness was in excess of \$200,000.00.¹⁰ Applicant discussed his plight with an attorney and considered declaring bankruptcy, but decided not to do so because, in his mind, it was not the right option, morally.¹¹ Instead, he chose to attempt to satisfy his creditors.

In June 2004, Applicant was able to sell his residence in a western state and relocate to a southern state closer to the residence of his parents. With the funds realized from the sale of his residence, he was able to pay off many of his delinquent debts.¹²

Although the SOR identified four purportedly continuing delinquencies, prior to June 2004, he apparently had an unspecified number of other debts. The four debts listed in the SOR, and their respective current status, according to the Credit Report, dated October 19, 2007 (the most current one in evidence), are described below:

³ Tr. at 40-41.

⁴ *Id.* at 41.

⁵ *Id.*

⁶ *Id.* at 45.

⁷ *Id.*; Government Exhibit 1 (SF 86, dated February 23, 2007, at 3).

⁸ Government Exhibit 3 (Interrogatories, dated October 23, 2007, at pp. 50-52).

⁹ Tr. at 48-49.

¹⁰ *Id.* at 47.

¹¹ *Id.* at 48, 53.

¹² *Id.* at 45, 50.

SOR ¶	TYPE DEBT	AMOUNT	STATUS¹³
1.a.	boat loan (\$145,700) opened May 1994	\$73,808.00	repossessed Jun 2004 “charged off”
1.b.	Visa card opened Aug 1994	\$21,537.00	“charged off” Nov 2004
1.c.	timeshare loan opened Nov 2000	\$10,187.00	foreclosed Jun 2005 zero balance
1.d.	timeshare loan opened Nov 2000	\$13,501.00	foreclosed Jun 2005 zero balance

While not as substantial as they were before 9/11, Applicant’s earnings have rebounded to a more reasonable level. In 2006 he earned about \$45,000.00, and the following year, he earned about \$85,000.00.¹⁴ As a result of his financial situation, Applicant has changed his lifestyle and curtailed discretionary spending. He maintains only one credit card (which has been in a current status since 1983), his vehicles are 12 years old and paid off, and he no longer takes expensive vacations to Europe or Hawaii. He generally remains within a budget,¹⁵ and he has a monthly balance of about \$2,341.00 in discretionary funds available for his use.¹⁶

Policies

When evaluating an Applicant’s suitability for a security clearance, the Administrative Judge must consider the 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.

An Administrative Judge need not view the guidelines as inflexible, ironclad rules of law. Instead, acknowledging 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 meaningful decision.

Since 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

¹³ Government Exhibit 3 (Experian Credit Report, at 2, 4-6), *supra* note 2, is the source for all information in this table. Government Exhibit 2 (Experian/Trans Union/Equifax Combined Credit Report, dated March 20, 2007) was also reviewed but that report was older than the Experian Credit Report of October 2007, and not as easy to decipher.

¹⁴ Tr. at 46.

¹⁵ *Id.* at 55-56.

¹⁶ Government Exhibit 3 (Personal Financial Statement, dated October 23, 2007), *supra* note 2.

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, facts must be established by “substantial evidence.”¹⁷ The Government initially has the burden of producing evidence to establish a potentially disqualifying condition under the Directive. Once the Government has produced substantial evidence of a disqualifying condition, under Directive ¶ E3.1.15, the Applicant has the heavy burden of persuasion to present evidence in refutation, explanation, extenuation or mitigation, sufficient to overcome the doubts raised by the Government’s case. The burden of disproving a mitigating condition never shifts to the Government.

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 as well. It is because of this special relationship that the Government must be able to repose a high degree of trust and confidence in those 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.

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.” Accordingly, nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant’s allegiance, loyalty, or patriotism.

Analysis

Guideline F, Financial Considerations

The security concern relating to the guideline for Financial Considerations is set out in AG ¶ 18:

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

¹⁷ “Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all contrary evidence in the record.” ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1).

overextended is at risk of having to engage in illegal acts to generate funds. . . .

The guideline notes several conditions that could raise security concerns. Under AG ¶ 19(a), an “inability or unwillingness to satisfy debts” is potentially disqualifying. Similarly, under AG ¶ 19(c), “a history of not meeting financial obligations” may raise security concerns. Applicant’s financial condition collapsed after 9/11 when his financial obligations, which had previously been addressed without difficulty in a timely manner, became overextended, and payments became delayed. He accumulated substantial delinquent debt and was unable to attend to those obligations for an extended period of time. The repossession of the boat and the foreclosures on his timeshares, as well as the debts being “charged off” all led credence to a conclusion that the evidence is sufficient to raise these potentially disqualifying conditions, requiring a closer examination.

The guideline also includes examples of conditions that could mitigate security concerns arising from financial difficulties. Under AG ¶ 20(a), the disqualifying condition may be mitigated where “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.” Applicant’s financial situation prior to 9/11 was such that he could enjoy expensive activities without causing disruption to his finances. However, shortly after September 11, 2001, his financial situation unexpectedly collapsed and spiraled out of control generally until 2004 when it leveled off. He accumulated substantial delinquent debt due, in large measure, to lengthy and sporadic unemployment and underemployment, as well as to his wife’s medical issues. These circumstances are no longer extant. I find the behavior occurred under such unusual circumstances that it is unlikely to recur, and it does not raise concerns about his current reliability, trustworthiness, or good judgment. The evidence establishes this mitigating condition.

Under AG ¶ 20(b), financial security concerns may be mitigated where “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.” As noted above, the financial problems arose because of the devastating impact 9/11 had on the economy, in general, and his employer, specifically, his lengthy and sporadic periods of unemployment and underemployment, and his wife’s medical issues. He acted responsibly in identifying and eventually resolving his debts. I find this mitigating condition applies in this case.

Evidence 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” is potentially mitigating under AG ¶ 20(c). Similarly, AG ¶ 20(d) applies where the evidence shows “the individual initiated a good-faith effort to repay overdue creditors or

otherwise resolve debts.”¹⁸ Applicant consulted with an attorney regarding his financial delinquencies and considered filing bankruptcy to eliminate those debts. Rather than taking the easy way out, he rejected such action on moral grounds. Instead, he sold his residence and resolved nearly all the delinquent debts, either by payment or settlement. While his level of income may not have reached the one he had before 9/11, his actions in addressing his debts, while too slow or incomplete for the Government, indicate good-faith efforts on his part as well as showing clear indications the problem is now largely under control. I find these mitigating conditions partially apply in this case.

The Government attributes substantial importance and credibility to entries in the Credit Reports and appears concerned that Applicant permitted the \$73,808.00 balance of the loan for his repossessed boat, and the unpaid \$21,537.00 balance of his credit card to be “charged off.”¹⁹ Also, that he defaulted on a combined \$23,688.00 balance on his foreclosed timeshares.

As to the boat repossession (and its “charged off” balance) and the “charged off” credit card balance, it appears the debts were never reduced to judgments and, in the case of the boat, the repossession served to give title to the boat to the creditor, the original lender, a bank located in California.

In the case of the credit card or open-ended contract, the creditor, also a bank located in California, merely charged the delinquent balance off in November 2004. While the credit report may reflect the balances as delinquent, as of September 2007, it appears the debts are barred by California’s 4-year statute of limitations,²⁰ making them legally uncollectible.²¹

¹⁸ The Appeal Board has previously explained what constitutes a “good faith” effort to repay overdue creditors or otherwise resolve debts:

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)).

¹⁹ It is commonly acknowledged that a “charge off” is a practice where the creditor gives up on collection efforts, takes a tax write-off on the debt, and/or sells the debt to a third party. The debt still exists, but the creditor has received a tax benefit and possibly sold the debt to the third party.

²⁰ See Cal. Code Ann. § 337 (2008) (written obligation; four years) and *Lynch v. Watson*, 78 Cal. App. 2d 96, 177 P. 2d 657 (1947) (action for breach of contract is barred where it commenced more than four years after execution and breach of contract).

²¹ The South Carolina Court of Appeals succinctly explained the societal and judicial value of application of the statute of limitations:

Statutes of limitations embody important public policy considerations in that they stimulate activity, punish negligence and promote repose by giving security and stability to human affairs. The

As to the Applicant's interests in the Nevada timeshares that have been foreclosed in June 2005, those foreclosure actions appear to have been accomplished as non-judicial foreclosures under deeds of trust,²² and they caused him to forfeit the equity in those timeshares he had held prior to the foreclosures. The creditor took ownership of the timeshares, and as reflected in the credit report, there are no outstanding balances. If there had been, that fact does not appear in the Credit Reports and the creditor never approached the Applicant seeking payment for any purported deficiency. Any such action at this late date are barred by Nevada's 6-month statute of limitations pertaining to deficiencies,²³ making them legally uncollectible.

I have reviewed the two Credit Reports in evidence, and even with extensive experience in deciphering the entries, found them to be garbled and internally inconsistent, with minimum indicia of reliability. There is no indication as to the source(s) of the information appearing therein, for as the Experian Credit Report states: "Experian collects and organizes information about you and your credit history from public records, your creditors and other reliable sources."²⁴ The combined report does not disclose even that much information. Thus, the factual or legal accuracy, currency, or reliability of the information is left to mere speculation. Accordingly, they are unreliable and untrustworthy, and in this particular instance, inaccurate as well.

Applicant is now financially sound and prepared for future contingencies. I conclude these potentially mitigating conditions 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

cornerstone policy consideration underlying statutes of limitations is the laudable goal of law to promote and achieve finality in litigation. Significantly, statutes of limitations provide potential defendants with certainty that after a set period of time, they will not be ha[iled] into court to defend time-barred claims. Moreover, limitations periods discourage plaintiffs from sitting on their rights. Statutes of limitations are, indeed, fundamental to our judicial system.

Carolina Marine Handling, Inc. v. Lasch, 363 S.C. 169, 175-76, 609 S.E.2d 548, 552 (S.C. Ct. App. 2005) (internal quotation marks and citations omitted).

²² See Nev. Rev. Stat. § 119A.170 (4) (2001) (The "real property" and "real estate" as used in Nev. Rev. Stat. Ch. 645 shall be deemed to include a timeshare, whether it is an interest in real property or merely a contractual right to occupancy). See also Nev. Rev. Stat. § 107.080 (2007) (discussing default and sale under deeds of trust).

²³ See Nev. Rev. Stat. § 40.455 (1987) (The deficiency judgment must be sought within six months after the date of foreclosure).

²⁴ Government Exhibit 3 (Experian Credit Report, at 1), *supra* note 2.

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.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. When these problems first began, Applicant was a very successful professional earning \$180,000.00 per year. (See AG ¶ 2(a)(4).) He accumulated extensive debt due to circumstances largely beyond his control, including the negative economic impact on the national economy and his employer, as well as lengthy and sporadic periods of unemployment and underemployment, and his wife's medical issues. (See AG ¶ 2(a)(2).) Although limited by his circumstances, since that time, Applicant has undergone significant behavioral changes. He changed his lifestyle and curtailed discretionary spending. But most significantly, he has taken affirmative action and made substantial good-faith efforts to pay off or resolve most of his delinquent debts, including those raising security concerns. (See AG ¶ 2(a)(6).) While it is the Government's contentions that he still has the four outstanding debts identified in the SOR, those debts were never reduced to judgments and the Statute of Limitations for each of the debts has expired, making them uncollectible. (See AG ¶ 2(a)(8).) Thus, these debts cannot be sources of improper pressure or duress.

Of course, the issue is not simply whether all his debts are resolved; it is whether his financial circumstances raise concerns about his fitness to hold a security clearance. I am mindful that while any one factor, considered in isolation, might put Applicant's credit history in a sympathetic light, I have evaluated the various aspects of this case in light of the totality of the record evidence and have not merely performed a piecemeal analysis.²⁵ Considering what Applicant has gone through financially and emotionally, and mindful of his refusal to simply walk away from his debts through bankruptcy, and aware of his continuing good-faith efforts, and altered lifestyle, his past financial situation is insufficient to raise continuing security concerns. (See AG ¶ 2(a)(1).)

Overall, the record evidence leaves me without questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the security concerns arising from his financial considerations.

²⁵ See *U.S. v. Bottone*, 365 F.2d 389, 392 (2d Cir. 1966); See also ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006)

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: **FOR APPLICANT**

Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

ROBERT ROBINSON GALES
Chief Administrative Judge