



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



In the matter of:)
)
) ISCR Case No. 07-13152
)
)
Applicant for Security Clearance)

Appearances

For Government: Emilio Jaksetic, Esquire, Department Counsel
For Applicant: *Pro Se*

August 26, 2006

Decision

RIVERA, Juan J., Administrative Judge:

Applicant has a history of failing to meet his financial obligations. As of the date of the hearing, he had 11 accounts, owing approximately \$95,700 all of which had been delinquent for many years. His evidence is insufficient to show that he has a track record of financial responsibility. He failed to mitigate security concerns regarding Guideline F (Financial Considerations). Clearance is denied.

Statement of the Case

On May 9, 2005, Applicant submitted an Office of Personnel Management Security Clearance Application or Standard Form (SF) 86.¹ On December 21, 2007, 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*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review*

¹ GE 1.

Program (Directive), dated January 2, 1992, as amended, modified and revised.² The SOR alleges security concerns under Guideline F (Financial Considerations) and Guideline E (Personal Conduct). The SOR detailed reasons why DOHA could not 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.

Applicant answered the SOR on January 15, 2008, and requested a hearing before an Administrative Judge. The case was assigned to me on February 14, 2008. DOHA issued a notice of hearing on February 26, 2008. The hearing was convened as scheduled on March 14, 2008. The government offered Government Exhibits (GE) 1 through 4, which were admitted without objection (Tr. 21). Applicant testified on his own behalf, and presented no witnesses or documentary evidence (Tr. 23). DOHA received the transcript of the hearing (Tr.) on March 24, 2008.

Procedural Issues

The Government elected not to pursue, and presented no evidence, concerning the allegations in SOR ¶ 2 (Tr. 14-15).

Findings of Fact

Applicant denied all the SOR allegations with the exception of SOR ¶ 1.o, which he admitted with an explanation. SOR ¶ 1.j and SOR ¶ 1.k alleged the same debt. The allegations were consolidated under SOR ¶ 1.j. His admission is incorporated herein as a finding of fact. After a complete and thorough review of the evidence of record, I make the following additional findings of fact.

Applicant is a 43-year-old sheet metal journeyman (ductwork installer) working for a Government contractor (Tr. 86). In 1986, he completed his Associate's Degree in computer programming (Tr. 5). He has been continuously employed as a sheet metal journeyman since 1995 for different employers (GE 1). Applicant has had only two breaks in his employment history. He was laid off in 1995 and 2000 on each occasion for a three month period (Tr. 62). He has worked for his current employer, a Government contractor, since February 2002. He has no police record, and there is no evidence he has used or trafficked in illegal drugs.

² On Aug. 30, 2006, the Under Secretary of Defense (Intelligence) published a memorandum directing application of revised Adjudicative Guidelines 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.

Applicant has been married twice. He married his first wife in 1986, and they were divorced in 1992. He has a 21-year-old son of this marriage, who is attending college. Applicant does not contribute financially to his son's college education. He married his current wife in 1995. She has medical problems related to her diabetic condition, and a stroke she suffered in 2001 (Tr. 63). After her stroke, his wife was unemployed for six months. She tried to go back to work in 2002, but she never fully recovered and her medical condition did not allow her to go back to work (Tr. 72, 94-95). She also suffers from gout; bone spurs, and is blind in one eye (Tr. 65).

Applicant's wife was sick again in 2004. She was unable to work for two years and had no earnings. She applied for social security disability payments, but it took her two years to receive her payments. During his wife's unemployment, Applicant has been forced to use his credit cards to pay for his wife's medications—approximately \$350 a month insurance co-payment, and their day-to-day living expenses. His wife receives \$1,200 a month in social security disability payments, and \$175 monthly retired pay from her prior employer (Tr. 64).

Financial Considerations

Applicant's background investigation addressed his financial situation and included the review of his SF 86, and three credit bureau reports (CBRs) from September 2005 (GE 2), October 2007 (GE 3), and January 2008 (GE 4). The SOR alleges 13 delinquent/charged off accounts totaling approximately \$98,000.

Applicant has disputed most of the debts alleged in the SOR for several reasons. Concerning SOR ¶¶ 1.a (\$9,439), 1.c (\$12,444), 1.d (\$23,209), 1.e (\$2,792), 1.f (\$13,313), 1.g, (\$8,494), 1.h (\$47), 1.i (\$6,631), and 1.m (\$7,082), Applicant explained these were his credit card debts which became delinquent because of his three month period of unemployment in 2000, and his wife's inability to work after 2001 due to her severe medical problems. He claimed his financial problems were aggravated in October 2004 because of the additional expenses created by his wife's medical condition and her inability to work and contribute to the household finances.

In 2004, Applicant and his wife went on a week vacation to Florida. When they returned, he did not have the money to pay for many of his credit card debts and missed payments. The creditors imposed over the limit fees, late fees, and raised the interest rate on his credit card debts. Applicant became upset and refused to pay the principal or any additional credit card charges. The debts have been in collection or sold to different collection agencies. Applicant admitted most of the debts alleged in the SOR were originally his debts. He is disputing the total of the debts (limit fees, late fees, and high interest rates) and challenging the collecting agencies' ownership of his debts because he does not recognize the creditors (Tr. 24, 70-72).

He disputed SOR ¶ 1.a and the creditor requested arbitration to resolve the dispute (Tr. 29-32). He also disputed SOR ¶¶ 1.i and 1.m and the creditors filed suit against Applicant to recover the debts. Applicant retained counsel to represent him in

these legal proceedings in April 2004. Applicant stated that if he were to lose the suit, his wife would give him the money to pay the debts from her inheritance money. SOR ¶ 1.b alleged a \$158 medical bill; however, the provider, creditor or debt holder is not identified. Applicant has no means to determine whether this is his debt or whether the debt is valid. He promised he would take care of the debt if he could identify the provider (Tr. 32-33). Applicant claimed he settled the debt alleged in SOR ¶ 1.i (\$2,073) in December 2007 (Tr. 39-40).

Regarding SOR ¶ 1.h (\$47), he claimed the telephone service provider promised to give him credit for lack of services and did not follow through with his promise (Tr. 38). Concerning the debt alleged in SOR ¶ 1.j (\$12,439), Applicant claimed he did not recognize the creditor and that this was not his debt. Regarding SOR ¶ 1.n (\$312), he claimed he had a contractual dispute with the telephone service provider.

Applicant's take home pay is around \$3,200 a month without overtime. He works overtime whenever he can; however, the overtime opportunities fluctuate and he has no control over it (Tr. 46-47). His monthly expenses are as follows (Tr. 50-52): \$600 mortgage (he is current on his payments); \$200 home owners association fees; \$300 utilities (gas and electricity); \$800 food; and \$400 commuting expenses. He has approximately \$60,000 in a 401(k) retirement plan (Tr. 54). As of the hearing date, Applicant was carrying three credit cards: an American Express card owing \$8,000; a Visa with no balance; and a Costco credit card with a \$1,200 balance (Tr. 98). Applicant and his wife have three paid off vehicles. He drives a 1999 Tahoe. His wife drives a 1999 Mercury Grand Marquis and a 2006 Scion XB (Tr. 100). He has approximately \$100 monthly remaining after paying his day-to-day living expenses (Tr. 100).

In addition to owning his home, Applicant owns two time share properties. He bought the first time share property in 2002 (Tr. 57) for a closing fee of \$3,000 (Tr. 77). He bought the second time share in South Africa in 2003 for \$1,000. He pays approximately \$1,000 a year in maintenance fees for both time share properties (Tr. 78). He exchanges his time shares for vacation time in other vacation resorts. Since purchasing his time share properties in 2002-2003, Applicant and his wife have been on vacation at least three weeks a year during 2002, 2003, 2004, 2005, and 2006. In 2007, they vacationed for two weeks (Tr. 78).

In 2007, Applicant sought the advice of a bankruptcy attorney seeking to resolve his debts. However, he was advised that filing for bankruptcy protection would not be in his best interests (Tr. 68, 75). He has retained counsel to represent him in two pending law suits from creditors. Notwithstanding, Applicant testified he has not participated in any financial counseling. At most, the financial counseling he has received is quite limited. He presented no budget or plans to pay his delinquent debts. Applicant believes most of his delinquent debts are time-barred, and he intends to rely on the statute of limitations to resolve his debts (Tr. 75). He also claimed he looked into consolidating his debts, but did not pursue the consolidation because he did not trust the consumer credit counseling company (Tr. 96).

Applicant was advised not to make any payments on his old debts because that would reaffirm his debts and begin anew the statute of limitations (Tr. 115). He is waiting for his creditors to bring suit against him to then resolve the delinquent debts in court. He averred he is working on resolving his delinquent debts, but that it will take some time.

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 controlling 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,"³ 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."

³ 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).

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).⁴

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.

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 the 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.” Applicant’s history of delinquent debt is well documented in his credit reports and his testimony. As of the hearing date, he had 11 outstanding debts totaling approximately \$95,700. The government established the disqualifying conditions in AG ¶¶ 19(a) and 19(c).

⁴ “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 burden of persuasion under Directive ¶ E3.1.15.” ISCR Case No. 04-10340 at 2 (App. Bd. July 6, 2006).

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.

Considering the record evidence as a whole,⁵ I conclude that none of the mitigating conditions apply. Applicant presented little evidence of good-faith efforts taken to contact creditors, or to resolve his debts since he acquired them. Although there is evidence that he has participated in some financial counseling (consulting with a bankruptcy attorney and the attorney representing him in the law suits), there are no indications that Applicant's financial problems are being resolved or are under control.

I specifically considered Financial Considerations Mitigating Condition AG ¶ 20(b): "The conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation), and the individual acted responsibly under the circumstances", and conclude it applies, but only to a limited extent.

Applicant's testimony established factors that may be considered as circumstances beyond his control contributing to his inability to pay his debts, i.e., his two three month periods of unemployment; his wife's medical condition and the financial expenses associated with it; the lack of financial assistance from his wife; and the bad

⁵ See ISCR Case No. 03- 02374 at 4 (App. Bd. Jan. 26, 2006) (citing ISCR Case No. 02-22173 at 4 (App. Bd. May 26, 2004)). When making a recency analysis for AG ¶ 20(a), all debts are considered as a whole.

decision to purchase and retain two time share properties as well as taking vacations that were unaffordable.

Applicant's evidence is not sufficient to show he has dealt responsibly with his financial obligations before, or especially after receipt of the SOR. Applicant has been consistently employed, except for two three month periods he was laid off in 1995 and 2000. Since 2002, he has continuously worked for his current employer. He presented little evidence to show paid debts, settlements, documented negotiations, payment plans, budgets, or financial assistance/counseling. Applicant's financial history and lack of favorable evidence preclude a finding that he has established a track record of financial responsibility, or that he has taken control of his financial situation. Based on the available evidence, he is overextended financially because of his failure or inability to live within his means. His financial problems are recent, not isolated, and are likely to be a concern in the future.

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).

Applicant's years of working for Government contractors weighs in his favor. He is considered a valued employee. Aside from his delinquent debts (which are a civil, non-criminal issue), he is a law-abiding citizen, a good father, and loving husband. He expressed regrets for his financial mistakes and claimed he is trying to correct them.

Considering the totality of the circumstances in his case, including Applicant's age, education, maturity, his years working for the Government contractors, he demonstrated a lack of judgment and trustworthiness in the handling of his financial affairs. He failed to deal responsibly with his financial obligations, especially after receipt of the SOR. His failure or inability to live within his means and to meet his financial obligations indicates poor self-control or an unwillingness to abide by rules and

regulations. His behavior raises questions about his reliability, and ability to protect classified information.

After weighing the disqualifying and mitigating conditions, and all the facts and circumstances, in the context of the whole person, I conclude Applicant has failed to mitigate the security concerns pertaining to financial considerations.

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
Subparagraphs 1.a; 1.c- 1.h; 1.j; and 1.l – 1.o:	Against Applicant
Subparagraphs 1.b; 1.i; and 1.k:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraphs 2.a and 2.b:	For 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 eligibility for a security clearance for Applicant. Eligibility for a security clearance is denied.

Juan J. Rivera
Administrative Judge