



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



In the matter of:)	
)	
XXXXXXXXXXXX, XXXXX)	ISCR Case No. 08-00613
SSN: XXX-XX-XXXX)	
)	
Applicant for Security Clearance)	

Appearances

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

September 10, 2009

Decision

TUIDER, Robert J., Administrative Judge:

Applicant failed to mitigate security concerns pertaining to financial considerations and personal conduct. Clearance is denied.

Statement of the Case

Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) on January 3, 2007. On October 31, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under Guidelines F (financial considerations) and E (personal conduct) for Applicant. 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 answered the SOR in writing in an undated response, which was received by DOHA on February 19, 2009, requesting a decision without a hearing. On March 19, 2009, Department Counsel requested the case be converted to a hearing pursuant to Paragraph E3.1.7 of the Additional Procedural Guidance in enclosure (3) of DoD Directive 5220.6. Department Counsel was prepared to proceed on March 22, 2009. On April 29, 2009, the case was assigned to another administrative judge, and on May 11, 2009, the case was reassigned to me due to caseload considerations. DOHA issued a notice of hearing on April 30, 2009, scheduling the hearing for May 18, 2009. The hearing was held as scheduled.

The government offered Government Exhibits (GE) 1 through 13, which were received without objection. The Applicant offered Applicant Exhibits (AE) A through N, which were received without objection, and testified on his own behalf. DOHA received the hearing transcript (Tr.) on June 3, 2009.

Procedural Matters

At the commencement of the hearing, Applicant stated that he had retained an attorney to represent him at his hearing. Upon further questioning, I determined that this attorney was the same attorney that he retained to represent him for his bankruptcy proceedings, discussed *infra*. I further noted, and Department Counsel confirmed, that no attorney filed a notice of appearance to represent Applicant at his hearing. I ascertained that Applicant paid his bankruptcy attorney his fee, but did not pay him a fee to represent him at his DOHA hearing.

I inquired whether Applicant desired additional time to ascertain his attorney's participation in these proceedings, which he declined. Applicant affirmatively stated that he desired to go forward without an attorney present. I further inquired whether Applicant had received a copy of DOHA's Prehearing Guidance for DOHA Industrial Security Clearance (ISCR) Hearings and Trustworthiness (ADP) Hearings. He indicated that he had, and that he would inform me whether he had any questions about the proceedings. Tr. 5-15.

Department Counsel stated that debts listed in SOR ¶¶ 1.k. and 1.l.; and 1.c. and 1.o., are duplicates. He also added that the debt listed in SOR ¶ 1.i. is not included in Applicant's bankruptcy petition, discussed *infra*. Tr. 23-24.

Findings of Fact

Applicant admitted all of the SOR allegations. His admissions are incorporated herein as findings of fact. After a thorough review of the evidence, I make the following additional findings of fact:

Applicant is a 40-year-old security officer who has been employed by a government contractor since June 1997. Tr. 39, GE 1. Applicant stated that he currently holds a top secret security clearance, which he was granted "since 2000,"

and held an interim top secret security while on active duty in the Navy, discussed *infra*. Maintaining a security clearance is a requirement of his continued employment. Tr. 39-41.

Applicant graduated from high school in June 1987. Tr. 36-37. He served in the Navy on active duty from August 1987 to August 1990, and was honorably discharged as a Hull Technician Third Class (pay grade E-4). Following his release from active duty, he was a drilling member of the Naval Reserve from September 1990 to May 1999. Tr. 32-36, GE 1. Applicant attended a community college from November 1990 to August 1992, and estimates that that he has earned "20 to 26 credits." Tr. 37-38, GE 1.

Applicant has never married, but is involved in a long-term relationship with a woman, who is the mother of their two pre-school age sons. Applicant has an informal child support arrangement in which he pays the mother of his children "[a]bout 1,500 (dollars) a month." His sons' mother is employed as a safety agent for a major metropolitan school district. Tr. 30-32.

Financial Considerations

Applicant's background investigation addressed his financial situation and included the review of his January 2007 e-QIP; his February 1997 security clearance application; his two June 2008 Responses to DOHA Interrogatories; his June 2008, March 2008, and January 2007 credit reports; his Chapter 13 bankruptcy filings, and subsequent Chapter 7 request for conversion. GE 1 – 13.

Applicant's SOR identified 18 separate line items. However, as noted by Department Counsel, two debts are duplicates. Excluding those two debts (SOR ¶¶ 1.i. and 1.o.), 16 separate debts remain totaling \$55,582. As noted, Applicant admitted all debts. The remaining SOR debts consist of two judgments, eight charged off accounts, five collection accounts, and one delinquent account.

Applicant's indebtedness began in approximately 2001 and continued until 2008. After determining that his finances were "getting out of control," he decided to file bankruptcy. Tr. 58, 91-92. In August 2008, Applicant filed for Chapter 13 bankruptcy. His accompanying summary of schedules lists total assets of \$5,033 and total liabilities of \$57,800. Unable to make his payments to the trustee, Applicant converted his Chapter 13 bankruptcy to a Chapter 7 bankruptcy in March 2009. Tr. 81-82, GE 8 - 3. Applicant testified that he was awarded a discharge on May 5, 2009; however, he did not provide any documentation supporting that claim. Tr. 9-11, 73-81. Applicant underwent mandatory financial counseling in conjunction with his bankruptcy filing. GE 9.

Applicant stated his financial problems began in approximately 2001 when he invested \$1,000 in an unsuccessful pyramid scheme and "everything went downhill" from there. Tr. 46-48, 90. He also had "certain bills to help out [his] mother" and other

family members, and also contributed towards his grandfather's funeral expenses. He provided this financial assistance in approximately 2001. Tr. 49-51. This was the beginning of a financial tailspin that did not end until he filed for bankruptcy.

Personal Conduct

Applicant answered "No" to questions 28.a. and 28.b. on his January 2007 e-QIP (asking whether in last seven years he had been over 180 days delinquent on any debts); and (asking whether he was currently over 90 days delinquents on any debts), respectively. He failed to list any debts. (SOR ¶ 2.a.)

He also answered "No" to question 27.d. on his January 2007 e-QIP (asking whether in the last seven years he had any judgments against him that were not paid), and failed to disclose the two judgments filed against him by a credit union in the amount of \$20,432 and by a credit card company in the amount of \$1,891, alleged in SOR ¶¶ 1.a. and 1.b. (SOR ¶¶ 2.b. and 2.c.)

His explanation for failing to list his two judgments and debts over 180 days delinquent during the last seven years and debts currently over 90 days delinquent was:

As for when the questionnaires for my SF-86 came out, basically, truthfully, to my knowledge, when the questions came out regarding my delinquency and my financial statement, my pride took the better of me. I was totally embarrassed to put the information down. And, I was saying to myself hopefully I could take care of it, and this matter could be resolved. My pride took the better of me in not putting that information down. I was humiliated with the way my financial crisis turned about. It kind of set me back. Tr. 26.

This response is consistent with the response Applicant provided to an Office of Personnel (OPM) investigator during his background investigation interview in February 2007. Tr. 43, GE 4.

Recommendations

Applicant submitted 11 documents that included certificates of appreciation, letters of appreciation, and in-service training certificates. Of particular note, Applicant was recognized for providing protective services to senior level U.S. and foreign leaders during his assignments. He was also consistently recognized for his professionalism and courtesy. AE A – K. Three supervisory personnel submitted reference letters on Applicant's behalf. They describe him as "diligent and capable," "(his) dedication and perseverance are irreproachable and his maturity and judgment are impeccable," "sound integrity and judgment," "one of [his team's] beloved members," and "[one who] gives all of us a sense of security." AE L – N.

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information.” *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant an applicant 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 overarching adjudicative goal is a fair, impartial, and commonsense 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 [A]pplicant concerned.” See Exec. Or. 10865 § 7. See also Executive Order 12968 (Aug. 2, 1995), Section 3. Thus, 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. 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). 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). “[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

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 documented in his credit reports, his answers to DOHA interrogatories, his SOR response, and statement at his hearing. The government established through Applicant’s admissions and evidence presented the disqualifying conditions in AG ¶¶ 19(a) and 19(c).

Five financial considerations mitigating conditions under AG ¶¶ 20(a) through 20(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,¹ I am only able to give Applicant partial credit under AG ¶¶ 20(b) and 20(c) and conclude that none of the remaining mitigating conditions apply. Applicant submitted evidence of having a death in the family around the time his financial difficulties began, and he participated in the mandatory counseling required during the bankruptcy process. However, the death in the family was a number of years ago and Applicant is unable to demonstrate his current financial situation is sufficiently attributable to that event. Furthermore, enough time has not elapsed after his bankruptcy to demonstrate that financial counseling has resulted in showing his financial problems are resolved or are under control. To conclude, Applicant's sparse favorable information fails to raise full applicability of any of the mitigating conditions.

Applicant has worked continuously for his current employer since 1997 and has earned income over those 12 years. Insufficient time has elapsed since Applicant's bankruptcy discharge to evaluate his track record of financial responsibility or that he has taken control of his financial situation. Based on the available evidence, his financial problems are recent, not isolated, and it is unclear whether they will be a concern in the future. He has not carried his burden of proving his financial responsibility. His overall financial behavior casts doubt on his current reliability, trustworthiness, and good judgment.

Personal Conduct

AG ¶ 15 articulates the security concern pertaining to personal conduct:

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.

¹ 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.

AG ¶ 16 describes two conditions that could raise a security concern and may be disqualifying in this case:

- (a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities; and,
- (b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative.

Applicant failed to disclose any of his past indebtedness and judgments on his January 2007 e-QIP. The government established through Applicant's admissions and evidence presented the disqualifying conditions in AG ¶¶ 16(a) and 16(c).²

AG ¶ 17 provides seven conditions that could potentially mitigate security concerns about his personal conduct:

- (a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;
- (b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;
- (c) 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;

²Deliberate and materially false answers on a security clearance application may violate 18 U.S.C. § 1001. The Supreme Court defined "materiality" in *United States v. Gaudin*, 515 U.S. 506, 512 (1995); as a statement having a "natural tendency to influence, or [be] capable of influencing, the decision making body to which it is addressed." See also *United States v. McLaughlin*, 386 F.3d 547, 553 (3d Cir. 2004). If Applicant had provided accurate answers on his security clearance applications, his accurate answers are capable of influencing the government to deny his security clearance. His failure to disclose financial problems are sufficiently serious to potentially jeopardize approval of his security clearance. Making a false statement under 18 U.S.C. § 1001 is a serious crime, a felony (the maximum potential sentence includes confinement for five years and a \$10,000 fine). In light of my ultimate decision, and the absence of an allegation of a violation of 18 U.S.C. § 1001 in the SOR, it is unnecessary for me to decide whether or not Applicant actually violated 18 U.S.C. § 1001.

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress;

(f) the information was unsubstantiated or from a source of questionable reliability; and

(g) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

None of the mitigating conditions fully apply. He does receive some credit for truthfully disclosing his indebtedness and judgments when confronted by an OPM investigator. At his hearing, he also admitted his falsifications. He explained his failure to be completely truthful on his e-QIP was caused primarily by embarrassment.³ While he did subsequently admit his falsifications, that does not take away from the fact at the time he completed his e-QIP he was well aware of his unfavorable financial history. He knowingly and deliberately chose not to disclose full information about his unfavorable financial history on his security clearance application.

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):

³The Appeal Board has cogently explained the process for analyzing falsification cases, stating:

(a) when a falsification allegation is controverted, Department Counsel has the burden of proving falsification; (b) proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred; and (c) a Judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning the applicant's intent or state of mind at the time the omission occurred. [Moreover], it was legally permissible for the Judge to conclude Department Counsel had established a prima facie case under Guideline E and the burden of persuasion had shifted to the applicant to present evidence to explain the omission.

ISCR Case No. 03-10380 at 5 (App. Bd. Jan. 6, 2006) (citing ISCR Case No. 02-23133 (App. Bd. June 9, 2004)).

(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.

Under AG ¶ 2(c), 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.

The comments in the Analysis section of this decision are incorporated in the whole person concept. Applicant's financial responsibility spanned a minimum of eight years from 2001 to 2009. His deliberate falsifications, if relied upon, could have adversely affected or influenced the security clearance adjudication process to the detriment of the government.

Applicant receives substantial credit for his three years of active duty and subsequent service in the Naval Reserve, his responsibility to his family, and his recent efforts to recover from his financial irresponsibility. His work for a government contractor is excellent, and aside from the SOR allegations no other disciplinary or security-related problems surfaced. His record of good employment weighs in his favor. There is a definite dichotomy between how Applicant handled his financial affairs and his work-related performance. I am convinced that he is loyal to his family, his company, and his country.

Applicant's deliberate failure to disclose information on his security clearance application is serious, recent, and not mitigated. I have questions about his current ability or willingness to comply with laws, rules, and regulations. 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 security concerns pertaining to financial considerations and personal conduct.

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 failed to mitigate 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
Subparagraphs 1.a. – 1.k.:	Against Applicant
Subparagraph 1.l. (duplicate):	For Applicant
Subparagraphs 1.m. – 1.n.	Against Applicant
Subparagraph 1.o. (duplicate):	For Applicant
Subparagraphs 1.p. – 1.r.	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a. to 2.c.:	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 eligibility for a security clearance for Applicant. Clearance is denied.

Robert J. Tuidor
Administrative Judge