



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



In the matter of:)	
)	
-----)	ISCR Case No. 08-01218
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

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

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guidelines F (Financial Considerations) and E (Personal Conduct). Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted his security clearance application on May 18, 2007. On March 24, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny his application, citing security concerns under Guideline F (Financial Considerations) and E (Personal Conduct). The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant acknowledged receipt of the SOR on April 2, 2008; answered it on April 15, 2008; and requested a hearing before an administrative judge. DOHA received the request on April 17, 2008. Department Counsel was ready to proceed on April 21, 2008, and the case was assigned to me on May 8, 2008. DOHA issued a notice of hearing on May 12, 2008, scheduling the hearing for May 29, 2008. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 5 were admitted in evidence without objection. Applicant testified on his own behalf and submitted Applicant's Exhibits (AX) A through I, which were admitted without objection. I granted Applicant's request to keep the record open until June 13, 2008 to enable him to submit additional documentary evidence. Applicant timely submitted AX J through O, and they were admitted without objection. Department Counsel's response to AX J through O is attached to the record as Hearing Exhibit I. DOHA received the transcript (Tr.) on June 5, 2008. The record closed on June 13, 2008.

Evidentiary Ruling

Department Counsel offered GX 5, a personal subject interview extracted from a report of investigation, without calling an authenticating witness as required by the Directive ¶ E3.1.20. I explained the authentication requirement to Applicant, and he waived it (Tr. 27-29). Accordingly, I admitted GX 5.

Findings of Fact

In his answer to the SOR, Applicant admitted the allegations in SOR ¶¶ 1.c, 1.d, 1.f, and 2.a. At the hearing, he denied the allegation of falsifying his security clearance application alleged in SOR ¶ 2.a (Tr. 16). His admissions in his answer to the SOR and at the hearing are incorporated in my findings of fact.

Applicant is a 30-year-old configuration and data management analyst for a defense contractor. He served in the U.S. Marine Corps (USMC) from July 1996 to July 2001. He held a clearance while in the USMC, but he does not currently have a clearance (Tr. 9).

Applicant was employed as a radar technician for a private company from July 2001 to December 2002. He has been self-employed as a digital media developer from January 2003 to the present. He began working for his current employer in November 2005. He had a brief period, from May to July 2007, when he had no income except for his USMC disability pay.

Applicant's delinquent debts arose while he was in college and working part time (Tr. 52; GX 5). He attended a community college from May 2003 to December 2004, and completed the requirements for a bachelor's degree in business administration at a local university in May 2007 (AX H). He received certification from the Institute of Certified Professional Managers in February 2008 (AX I). Since July 2007, he has been enrolled in his employer's leadership development program (Tr. 39). He intends to enroll

in graduate school in January 2009 to obtain a master's degree in business administration (Tr. 8).

Applicant purchased a new 2005 Nissan Altima while in school, despite his reduced income. The purchase was necessitated when his old 1999 Ford became inoperable and required expensive repairs. He was still making payments on the old car and could not afford a second car loan. After researching the market and consulting with knowledgeable family members, he concluded he could obtain a more favorable loan by trading in his old car and purchasing a new car (Tr. 80-83). His car payments are current, and this debt is not among the delinquent debts alleged in the SOR.

Applicant's manager and mentor in the leadership development program describes him as mature, trustworthy, highly ethical, reliable, responsible, and a strong leader (AX G). His roommate and coworker for the past six months considers him trustworthy, responsible, very capable, and highly motivated. He also describes him as devoted to his family and attentive to his financial obligations (AX K). Two of his supervisors wrote letters of recommendation supporting his application for graduate school. One commented that Applicant was "the most promising individual [he has] worked with" in the leadership development program (AX M). The other commented on his maturity, poise, problem-solving skills, and leadership (AX N).

The debt for telephone service alleged in SOR ¶ 1.a arose while Applicant was on active duty in the USMC. When he was contacted by a collection agency, he did not remember the debt because it was so old, and he disputed it. Since the debt was so old and for such a small amount, the collection agency decided not to pursue its collection efforts any further (Tr. 41; AX A).

The delinquent telephone bill alleged in SOR ¶ 1.b arose when Applicant moved out of an apartment because of roommate problems, but the telephone was not disconnected. Applicant has settled the debt (Tr. 42; AX B; AX L).

Applicant was married in February 1998, separated in 2002, and divorced in August 2005. They had two cars, both in Applicant's name. When they separated, his ex-wife agreed to take possession of one car and make the payments. She was unable to make the payments and unable to refinance the car in her name. In 2003 Applicant and his ex-wife agreed to let the car be repossessed, resulting in the delinquent debt alleged in SOR ¶ 1.c (Tr. 43-46; AX C). Applicant contacted the creditor shortly after the repossession and was informed he could settle the debt for about \$6,000. He was in school, had limited income, and could not afford to pay the entire debt (Tr. 67-68). In January 2008, Applicant contacted the creditor and requested that a monthly payment plan be established for the debt (GX 4). When he did not receive a response, he called the creditor, who told him that he could make voluntary partial payments if he wished, but they would not establish a formal payment plan (Tr. 63). Applicant had made no partial payments as of the date the record closed.

The debt alleged in SOR ¶ 1.d arose when Applicant leased an apartment after his divorce and shared it with a friend. Applicant moved out before the end of the lease and agreed to allow his roommate to continue living in the apartment. The friend damaged the apartment and departed without cleaning it. The debt represents the cost of repairs and cleaning. Applicant has negotiated a payment plan for this debt and made two payments in May 2008, one for \$200 and one for \$253 (Tr. 46-48); AX E). The collection agency has informed Applicant that it will compromise the amount due and settle the debt for about \$1,600, if he continues to make regular payments (Tr. 90).

The debt alleged in SOR ¶ 1.e arose from Applicant’s purchase of a vacuum cleaner from a door-to-door salesman while he was still in the USMC (GX 5). He testified he and his then-wife had “buyer’s regret” immediately after the purchase and returned it, relying on a 30-day money back guarantee. He testified he received a letter acknowledging return of the vacuum cleaner, but he no longer has a copy of it (Tr. 91). Applicant wrote two letters to the collection agency in May 2008, asking for verification of the debt and offering to make arrangements for payment of any outstanding balance (AX F). He has received no response to his letters (Tr. 50-52).

In a personal financial statement executed in February 2008, Applicant reported a gross monthly salary of \$3,923.08, net monthly income (including USMC disability pay) of \$3,684.64, expenses of \$2,368.64, debt payments of \$905, and a net monthly remainder of \$411 (GX 4). As of June 1, 2008, his gross monthly salary had increased to about \$4,300 (AX O). Applicant has not sought credit counseling (Tr. 92).

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

SOR	Debt	Amount	Status at Hearing	Evidence
1.a	Telephone	\$75	Collection Abandoned	AX A; Tr. 41
1.b	Telephone	\$288	Settled	AX B; AX L
1.c	Auto repossession	\$7,506	Not resolved	AX C; Tr. 63
1.d	Damage to apartment	\$3,237	Monthly payments	AX E; Tr. 46-48, 90
1.e	Vacuum Cleaner	\$2,054	Not resolved; no response from collection agency	AX F; Tr. 50-52, 91

On his security clearance application dated May 18, 2007, Applicant answered “yes” to question 27d, asking if he had any judgments against him in the last seven years that were unpaid, and he disclosed a small claims court judgment entered against him in May 2001. However, he answered “no” questions 27b, 28a, and 28b concerning delinquent debts. Question 27b asked if he had any property repossessed for any reason in the last seven years. Question 28a asked if he had been more than 180 days delinquent on any debt in the last seven years. Question 28b asked if he was currently more than 90 days delinquent on any debt. He did not disclose any of the delinquent debts alleged in the SOR.

Applicant had obtained a copy of his credit report in the summer of 2006, and he was aware that several collection accounts were listed (GX 5; Tr. 69). In November 2007, he told a security investigator that his omission of the delinquent debts from his security clearance application was an oversight (GX 5). At the hearing, he testified he answered “no” to questions 28a and 28b because he was not delinquent on any current accounts, and he did not think the questions applied to collection accounts (Tr. 52-54). He also testified he was taking final exams, working part time, under a lot of stress when he filled out the application (Tr. 54). On cross-examination he testified it took him “a few days” to complete the application (Tr. 71). He admitted he was aware of several delinquent debts when he completed it (Tr. 77).

Policies

“[N]o one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information.” *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the revised adjudicative guidelines (AG). These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge’s over-arching adjudicative goal is a fair, impartial and common sense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk the Applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Clearance decisions must be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is not necessarily a determination as to the loyalty of the applicant. It is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance

Initially, the government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Guideline F, Financial Considerations

The SOR alleges five delinquent debts (SOR ¶¶ 1.a-1.e). It also alleges Applicant did not subtract payments for the debts in SOR ¶¶ 1.c, 1.d, and 1.e from the net monthly remainder reported on his personal financial statement executed on February 15, 2008 (SOR ¶ 1.f). The concern under this guideline is set out in AG ¶ 18 as follows:

Failure or inability to live within one’s means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual’s reliability, trustworthiness and ability to protect classified information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

SOR ¶ 1.f does not allege that the personal financial statement was intentionally falsified. At the time it was executed, the personal financial statement was accurate, because Applicant was not making payments on the debts in SOR ¶¶ 1.c, 1.d, and 1.e. I resolve this allegation in Applicant’s favor.

Several disqualifying conditions under this guideline could raise a security concern and may be disqualifying in this case. AG ¶ 19(a) is raised where there is an “inability or unwillingness to satisfy debts.” AG ¶ 19(b) is a two-pronged condition that is raised where there is “indebtedness caused by frivolous or irresponsible spending and the absence of any evidence of willingness or intent to pay the debt or establish a realistic plan to pay the debt.” AG ¶ 19(c) is raised when there is “a history of not

meeting financial obligations.” AG ¶ 19(e) is raised when there is “consistent spending beyond one’s means, which may be indicated by excessive indebtedness, significant negative cash flow, high debt-to-income ratio, and/or other financial analysis.” Applicant’s financial history raises AG ¶¶ 19(a), (c), and (e).

Even though Applicant purchased a new car in 2005, when he was on a limited income, the purchase was not “frivolous or irresponsible” under the circumstances. His old vehicle was inoperable and required expensive repairs. After researching the market and consulting with family and friends, he determined it was more economically prudent to purchase a new car with more favorable loan terms. Accordingly, I conclude AG ¶ 19(b) is not raised by this purchase.

The purchase of a \$2,000 vacuum cleaner was arguably “frivolous,” but Applicant and his then-wife quickly recognized their mistake and returned it. Even though Applicant no longer has any documentation of the return, I found his testimony on this point plausible and credible. He has tried in good faith to determine if there is any remaining balance on the ill-advised purchase. Since Applicant returned the frivolous purchase within days and in accordance with the purchase agreement, I conclude AG ¶ 19(b) is not raised by this purchase.

Since the government produced substantial evidence to raise the disqualifying conditions in AG ¶¶ 19(a), (c), and (e), the burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

Security concerns based on financial problems can be mitigated by showing that “the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual’s current reliability, trustworthiness, or good judgment.” AG ¶ 20(a). This is a compound mitigating condition, with three disjunctive prongs and one conjunctive prong. It may be established by showing the conduct was “so long ago,” or “so infrequent,” or “occurred under such circumstances that it is unlikely to recur.” If any of the three disjunctive prongs are established, the mitigating condition is not fully established unless the conduct “does not cast doubt on the individual’s current reliability, trustworthiness, or good judgment.”

The first two prongs (“so long ago” and “so infrequent”) are not established because Applicant incurred multiple delinquent debts, some of which remain unresolved. The third prong (“unlikely to recur”) is established for the auto repossession (SOR ¶ 1.c) because that debt resulted from the marital breakup and the consequent reduction in Applicant’s income, but it is not established for the other debts. The final prong is not established because Applicant has not yet established a track record of financial responsibility.

Security concerns under this guideline also can be mitigated by showing that “the conditions that resulted in the financial problem were largely beyond the person’s control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation), and the individual acted responsibly under the circumstances.” AG ¶ 20(b). Both prongs, i.e. conditions beyond the persons’s control and responsible conduct, must be established.

Applicant’s separation and eventual divorce, the damage to an apartment by a former roommate, and his brief period without income from May to July 2005 were conditions beyond his control. His reduced income while attending college, while not imprudent, was a voluntary act on his part. The two delinquent telephone bills arose before the conditions beyond his control. Thus, I conclude AG ¶ 20(b) is not applicable to the debts alleged in SOR ¶¶ 1.a and 1.b.

Applicant attempted to verify the debt attributable to the vacuum cleaner purchase, and he has negotiated a payment plan for the apartment damage. However, he has made no partial payments on the repossession deficiency alleged in SOR ¶ 1.c, even though the creditor is willing to accept partial payments and Applicant now has the apparent ability to make partial payments. I conclude AG ¶ 20(b) is established for the debts alleged in SOR ¶¶ 1.d and 1.e, but not for ¶ 1.c.

Security concerns under this guideline also can be mitigated by showing that “the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control.” AG ¶ 20(c). This mitigating condition is not established because Applicant has not sought counseling.

Security concerns under this guideline also can be mitigated by showing that “the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.” AG ¶ 20(d). The concept of good faith “requires a showing that a person acts in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation.” ISCR Case No. 99-0201, 1999 WL 1442346 at *4 (App. Bd. Oct. 12, 1999). Evidence of past irresponsibility is not mitigated by payment of debts only under pressure of qualifying for a security clearance. Applicant has resolved the debts in SOR ¶¶ 1.a and 1.b and is making the agreed payments on the debt in SOR ¶ 1.d. However, as of the date the record closed, Applicant had finished school and had been working full time for nearly a year, but he had not made any payments on the debt in SOR ¶ 1.c, even though the creditor informed him it would accept voluntary partial payments. I conclude AG ¶ 20(d) is established for SOR ¶¶ 1.a, 1.b, and 1.d, but not for 1.c.

Security concerns under this guideline also can be mitigated by showing “the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue.” AG ¶ 20(e). Applicant disputed the debt for the vacuum cleaner in SOR ¶ 1.e. He asked the collection agency to verify whether any balance is due, but has not received a response. I conclude AG ¶ 20(e) is established for the vacuum cleaner debt.

Guideline E, Personal Conduct

The SOR alleges Applicant falsified his security clearance application by answering “no” to questions 28a and 28b and failing to disclose the delinquent debts alleged in SOR ¶¶ 1.a-1.e.

The concern under this guideline is set out in AG ¶ 15 as follows:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

The relevant disqualifying condition in this case is “deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, 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.” AG ¶ 16(a).

When a falsification allegation is controverted, as in this case, the government has the burden of proving it. An omission, standing alone, does not prove an applicant's state of mind when the omission occurred. An administrative judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning an applicant's state of mind at the time of the omission. See ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004).

At the time Applicant executed his security clearance application, he was a mature adult with a college degree in business administration. He had been through the security clearance process when he was in the USMC. He demonstrated at the hearing that he was intelligent and articulate. His mental acumen is verified by the glowing recommendations he has received from his supervisors. He had examined his credit report in 2006 and was aware of his delinquent debts. He knew delinquent debts raised a security concern. I found his explanations for his failure to disclose his delinquent debts implausible and not credible. I conclude AG ¶ 16(a) is raised, shifting the burden to Applicant to rebut, explain, extenuate, or mitigate the facts.

Security concerns raised by false or misleading answers on a security clearance application may be mitigated by showing that “the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts.” AG ¶ 17(a). Applicant made no effort to correct his omissions until he was confronted with the facts by a security investigator in November 2007. AG ¶ 17(a) is not established.

Security concerns under this guideline also may be mitigated if “the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment.” AG ¶ 17(c). Intentional falsification is a felony under 10 U.S.C. § 1001, and not “minor.” Applicant’s conduct is recent because it occurred during his current application for a clearance. It is not “infrequent” because Applicant has persisted in offering implausible and inconsistent explanations for his failing to disclose his delinquent debts on his security clearance application. It did not happen under “unique circumstances,” but rather as part of a routine security clearance application. Finally, it casts doubt on Applicant’s reliability, trustworthiness, and good judgment. I conclude AG ¶ 17(c) is not established. No other enumerated mitigating conditions are established.

Whole Person Concept

Under the whole person concept, an administrative judge must evaluate an applicant’s eligibility for a security clearance by considering the totality of the applicant’s conduct and all the circumstances. An administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

- (1) the nature, extent, and seriousness of the conduct;
- (2) the circumstances surrounding the conduct, to include knowledgeable participation;
- (3) the frequency and recency of the conduct;
- (4) the individual’s age and maturity at the time of the conduct;
- (5) 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 common sense judgment based upon careful consideration of the guidelines and the whole person concept. Some of the factors in AG ¶ 2(a) were addressed above, but some warrant additional comment.

Applicant is a talented and highly motivated employee. He served honorably in the USMC, and he has worked hard to continue his education and improve his professional qualifications. He held a security clearance for many years, apparently without incident. Even if Applicant had mitigated the security concern based on financial considerations, his lack of candor on his security clearance application would leave me with doubts about his reliability and trustworthiness. After weighing the disqualifying and mitigating conditions under Guidelines F and E, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns based on financial considerations and personal conduct. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

Formal Findings

I make the following formal findings for or against Applicant on the allegations set forth in the SOR, as required by Directive ¶ E3.1.25 of Enclosure 3:

Paragraph 1, Guideline F (Financial Considerations): AGAINST APPLICANT

Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	For Applicant
Subparagraph 1.e:	For Applicant
Subparagraph 1.f:	For Applicant

Paragraph 2, Guideline C (Personal Conduct): AGAINST APPLICANT

Subparagraph 2.a:	Against Applicant
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Conclusion

In light of all of the circumstances, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

LeRoy F. Foreman
Administrative Judge