



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



In the matter of: )  
 )  
----- ) ISCR Case No. 08-02698  
SSN: ----- )  
 )  
Applicant for Security Clearance )

**Appearances**

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

April 8, 2009

**Decision**

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guidelines F (Financial Considerations) and E (Personal Conduct). Applicant mitigated the security concerns based on his financial history and refuted the allegation of falsifying his security clearance application. Eligibility for access to classified information is granted.

**Statement of the Case**

Applicant submitted a Security Clearance Application (SF 86) on August 11, 2004. On November 6, 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 Guidelines F and E. 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 adjudicative guidelines (AG) promulgated by the President on December 29, 2005.

Applicant received the SOR on November 14, 2008; answered it on November 28, 2008; and requested a hearing before an administrative judge. DOHA received the request on December 1, 2008. Department Counsel was ready to proceed on December 31, 2008, and the case was assigned to me on February 10, 2009. DOHA issued a notice of hearing on February 18, 2009, scheduling the hearing for March 17, 2009. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 8 were admitted in evidence without objection. Applicant testified on his own behalf and submitted Applicant's Exhibits (AX) A through X, which were admitted without objection. I granted Applicant's request to keep the record open until March 31, 2009, to enable him to submit additional documentary evidence. He timely submitted AX Y through HH, which were admitted without objection. DOHA received the transcript (Tr.) on March 25, 2009. The record closed on March 31, 2009.

### **Findings of Fact**

In his answer to the SOR, Applicant admitted the mortgage foreclosure alleged in SOR ¶ 1.a, but he denied the allegation in SOR ¶ 2.a that he falsified his SF 86. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 48-year-old engineer technician employed by a federal contractor. He served on active duty in the U.S. Army for 21 years and retired as a sergeant first class (pay grade E-7). His service included two tours of duty in combat zones. (AX B.) While on active duty, he obtained an associate's degree from a state university. He received consistently strong evaluation reports for his performance of duty as a noncommissioned officer. (AX C.) He has held a clearance since March 1982.

Applicant began working for his current employer in December 2003, shortly after his retirement from the Army. His annual performance assessment for his current job for the year ending in July 2006 rated him as exceeding expectations in three of seven performance areas and meeting expectations in the others. (AX A.)

Applicant was married in June 1983, and he has an eight-year-old daughter from that marriage. He and his wife purchased property in a rural, mountainous area, where he built a log cabin as a vacation home. With the help of friends, he did much of the building himself, including felling the logs and taking them to the wood mill. (Tr. 91.) The exterior of the home was substantially completed in 2000. He hoped to live in the cabin after retirement, but his wife did not share his desire. Initially, there was no mortgage on the property, but he and his wife used the property as collateral for a loan of about \$68,000, which they used to purchase their primary home. (Tr. 67-70.)

In August 2003, Applicant returned from an eight-month deployment to Iraq and discovered his wife had been having an affair. His wife told him the affair was over, but she would not disclose the identity of her paramour. They argued about the affair frequently. During an argument on April 30, 2004, Applicant lost his temper and struck her once on the side of her face. Their daughter, who was then three years old, witnessed the incident. Immediately after the incident, Applicant and his daughter left

the house and walked around for about 30 minutes. After he and his daughter returned, the police came to his house in response to his wife's call. He initially refused to admit the police until he could talk to his wife, but he eventually admitted them. They arrested him and charged him with reckless endangerment, resisting arrest, terroristic threats, assault, and endangering the welfare of a child. He spent four or five days in jail because he could not post bail. (GX 3, GX 7.)

On August 5, 2004, Applicant was arraigned, pleaded not guilty, and requested a jury trial. In October 2004, he pleaded nolo contendere to charges of resisting arrest and reckless endangerment, and he was placed on probation before judgment for 18 months. He was prohibited from having any contact with his wife or daughter during the probationary period, and he was required to attend domestic intervention counseling. He completed the counseling in February 2005. (GX 8.)

Applicant and his wife separated in May 2004 and were divorced in August 2005. (AX V.) From May 2004 until May 2005, he was required to pay all of his wife's living expenses, including the mortgage payments on both properties. (AX J, EE, FF; Tr. 78-79, 81.) His wife was awarded 55% of his military retired pay, reducing his monthly gross retired pay from \$1,730 to \$690. (GX 2 at 4, 15; AX W at 9.) He also was ordered to pay child support of \$612 per month. In May 2008, his child support obligation was recalculated by the court and adjusted downward to \$517 per month, and he received a refund for the months of February through June 2008. (GX 2 at 5.) In June 2008, the state erroneously garnished his civilian pay for child support, even though the child support was being automatically withheld from his military retired pay. (GX 2 at 15-17.)

Applicant made payments on the vacation home mortgage for about two years, using his military retired pay; but his loss of more than half of his military retired pay made it impossible for him to keep up the payments. Until the final divorce decree and property settlement, he was trying to pay the mortgage on the primary home, occupied by his wife and daughter, pay the mortgage on the vacation home, and pay the rent for his own residence. He contacted the lender for the vacation home and tried to work out a loan modification, but he was unsuccessful because his payments were not current. (Tr. 71; AX BB, CC.) In an effort to raise funds, he sold two trucks that were completely paid for. He also sold his motorcycle, and used the proceeds to pay off the loan for it. (Tr. 74-75; AX GG, HH.) He and an Army friend started cutting wood and power-washing decks to generate extra money. (Tr. 79.)

In January 2007, Applicant listed the vacation home for sale, with an asking price of \$100,000. (GX 2 at 6). The property was appraised at \$82,000. (AX S.) In February 2008, he reduced the price to \$75,000. (GX 2 at 9.) His realtor advised him that the property was difficult to sell because construction was incomplete and the house was deteriorating from being unoccupied and incomplete. (AX R). The mortgage holder foreclosed on February 20, 2008. The value of the property (\$72,324) was sufficient to satisfy the outstanding balance on the mortgage (\$66,422). (AX Q, DD.) His credit bureau report dated June 24, 2008 reflects a zero balance on the loan. (GX 5 at 2.)

Applicant is now current on all obligations. He has one active credit card with a balance of about \$1,300. He has paid off the loans on a 2004 car and a 1989 truck. He has about \$4,000 in a money market account, \$350 in his bank account, and \$3,000 in his retirement fund with his current employer. (Tr. 75-76.)

Applicant submitted a SF 86 in January 2004 (AX G, H.); and he resubmitted it on August 11, 2004. He did not disclose his arrest arising from the domestic incident when he resubmitted his SF 86, nor did he disclose that the charges based on that incident were pending. (GX 1.) However, shortly after the incident, he informed his supervisor and a member of his personnel office that he had been involved in a domestic violence incident. (Tr. 59, 62, 65-66; AX Z, AA.) He disclosed the incident in detail in a handwritten sworn statement submitted to a security investigator on December 6, 2004. (GX 3.)

At the hearing, Applicant denied intentionally falsifying his SF 86. He admitted executing the signature page of his SF 86 on August 11, 2004; but he did not recall seeing his negative answers to the questions regarding his police record and pending charges. (Tr. 54, 57-58.) His explanation was that he probably signed the document without reading it carefully. (Tr. 64-65.)

### **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 a delinquent debt of about \$70,000 on a real estate mortgage that was foreclosed. 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.

Two potentially disqualifying conditions under this guideline are relevant. AG ¶ 19(a) is raised where there is an “inability or unwillingness to satisfy debts.” AG ¶ 19(c) is raised when there is “a history of not meeting financial obligations.” Applicant’s financial history raises these two conditions, shifting the burden to him 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 prong of AG ¶ 20(a) (“so long ago”) is not established because the delinquent mortgage was not resolved until recently. The second prong (“so infrequent”) and third prong (“unlikely to recur”), however, are established. Applicant did not have a history of delinquent debts until the break-up of his marriage and the resulting financial burdens imposed on him. The effects of his former wife’s infidelity and the marital break-up are not likely to recur. His finances are now in order and under control. The final prong (“does not cast doubt”) also is established. His responsible reaction to his financial problems and his current financial stability have overcome any reasonable doubt about his current reliability, trustworthiness, and good judgment. I conclude AG ¶ 20(a) is established.

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 person’s control and responsible conduct, must be established. The break-up of Applicant’s marriage was beyond his control. As noted above in the discussion of AG ¶ 20(a), he reacted responsibly to his financial situation. I conclude this mitigating condition is established.

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). Good faith means acting 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). Applicant contacted his mortgage lender and attempted to negotiate a resolution. He sold his two trucks and a motorcycle. He took on a second job in an effort to raise money. Even though the mortgage was eventually foreclosed, he demonstrated good faith in his efforts to avoid foreclosure. The debt has been satisfied, eliminating his vulnerability to pressure or coercion. I conclude AG ¶ 20(d) is established.

## **Guideline E, Personal Conduct**

The SOR alleges Applicant deliberately failed to disclose his arrest arising from the domestic violence incident and deliberately failed to disclose that the charges based on that incident were still pending when he submitted his SF 86. 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 set out in AG ¶ 16(a) as follows:

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.

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).

Applicant denied intentionally omitting the information regarding his arrest, but his only explanation was that he probably overlooked the omission when he signed the SF 86. Such an explanation might not be credible without corroboration, but in this case it is corroborated by Applicant's disclosure of the domestic violence incident to his supervisor and a member of his personnel office shortly after it happened and his detailed disclosure to a security investigator less than three months after he submitted his SF 86.

Applicant submitted his SF 86 a few days after his arraignment and while in the middle of a bitter divorce. He was still recovering from the shock of discovering his wife of 22 years had been unfaithful during his deployment to Iraq and struggling to deal with the financial consequences of his marital break-up. Under these circumstances, his inattention to the accuracy of his SF 86 is plausible. Applicant presented himself at the hearing as candid and very sincere, but somewhat unsophisticated. Under all the circumstances, I am satisfied that Applicant did not intentionally omit relevant and

material information from his SF 86. Accordingly I conclude that AG ¶ 16(a) is not raised. No other potentially disqualifying conditions under this guideline are raised.

### **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. I have incorporated my comments under Guidelines F and E in my whole person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Applicant served honorably in the U.S. Army for 21 years and held a clearance during most of his service, apparently without incident. The conduct raising security concerns was the product of his wife's unfaithfulness, the disintegration of his marriage of 22 years, and the loss of his dream of retiring to live in his mountain cabin. He has rebounded from these setbacks and is debt free. His broken marriage is behind him.

Although it was not alleged in the SOR, I have also considered Applicant's act of domestic violence as part of my whole person analysis. See ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006) (uncharged misconduct may be considered as part of whole person analysis). The evidence of record reflects that this incident was an isolated incident, triggered by his wife's infidelity and the break-up of his marriage, and it is not likely to recur.

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 mitigated the security concerns based on his financial difficulties and he has refuted the allegation of falsifying his SF 86. Accordingly, I conclude he has carried his burden of showing that it is clearly consistent with the national interest to continue his eligibility for access to classified information.



### **Formal Findings**

I make the following formal findings on the allegations set forth in the SOR, as required by Directive ¶ E3.1.25:

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

Subparagraph 1.a: For Applicant

Paragraph 2, Guideline E (Personal Conduct): FOR APPLICANT

Subparagraph 2.a: For Applicant

### **Conclusion**

In light of all of the circumstances, it is clearly consistent with the national interest to continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is granted.

LeRoy F. Foreman  
Administrative Judge