



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



In the matter of:)	
)	
-----)	ISCR Case No. 08-09569
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: John B. Glendon, Esq., Department Counsel
For Applicant: Carolyn C. Eaglin, Esq.

October 14, 2009

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guideline F (Financial Considerations). Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application on March 18, 2008. On March 27, 2009, the Defense Office of Hearings and Appeals (DOHA) sent him a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny his application, citing security concerns under Guideline F. 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 April 2, 2009; answered it on May 8, 2009; and requested a hearing before an administrative judge. DOHA received the request on May 11, 2009. Department Counsel was ready to proceed on July 8, 2009, and the case was assigned to me on July 9, 2009. DOHA issued a notice of hearing on July 15, 2009, scheduling the hearing for August 19, 2009. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 5 were admitted in evidence without objection. Applicant testified, presented the testimony of one witness, and submitted Applicant's Exhibits (AX) A through U, which were admitted without objection. I granted Applicant's request to hold the record open until August 31, 2009, to enable him to submit additional documentary evidence. He timely submitted AX V through X, which were admitted without objection. Applicant's transmittal letter is attached to the record as Hearing Exhibit (HX) I. Department Counsel's response to AX V through X is attached to the record as HX II. DOHA received the transcript (Tr.) on August 27, 2009. The record closed on August 31, 2009.

Findings of Fact

In his answer to the SOR, Applicant admitted all the factual allegations in the SOR. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 34-year-old senior software engineer employed by a federal contractor. He is a high school graduate. He has worked for various federal contractors since March 1997 (AX A). He has worked for his current employer since June 2009 (Tr. 15, 24). He has held a clearance for about 13 years (Tr. 5).

Applicant was married in March 1998. He and his wife both were employed. He began accumulating debt shortly after his marriage, due in part to his interest in expensive motor vehicles. He and his wife leased a Nissan Murano SUV in 1999 (GX 4 at 4). They purchased a new BMW and an Audi in April 2000. In 2001, they traded in the BMW for a Porsche (Tr. 151-52). In September 2001, he borrowed about \$16,500 to purchase a motorcycle. In May 2002, he traded the first motorcycle for a more expensive Ducati motorcycle and borrowed about \$23,500 (GX 4 at 12; Tr. 159-60). He borrowed about \$46,000 to purchase a used BMW in April 2005. He purchased a second Porsche in December 2005 and a Land Rover in July 2005 (Tr. 135-36).

Applicant and his wife separated in 2001, reconciled, and separated again in 2003. His wife was employed from 2001 to 2003 and she paid the utilities and one of the car notes (Tr. 79). After they were separated, his wife stopped working, and Applicant was responsible for all the marital debts (Tr. 77).

An elder in Applicant's church began counseling him and his first wife in 2000. The counseling included financial advice, because Applicant and his wife were accumulating considerable debt. He strongly advised Applicant to work toward being debt free (Tr. 51-55).

In 2004, Applicant consulted an attorney for assistance, because he had negotiated a payment arrangement for the delinquent debt alleged in SOR ¶ 1.i, to be paid by automatic withdrawals from his bank account, but the withdrawals suddenly stopped without explanation (Tr. 87-88). His attorney sent a letter to the collection agency handling the delinquent debt after Applicant tried to contact the agency and found the number had been disconnected. He heard nothing further from the creditor or the collection agency (Tr. 87-90; AX I).

Applicant and his wife were divorced in February 2006 (AX G). At the time he was earning about \$93,000 per year (AX C). As part of the property settlement, Applicant and his former wife agreed that the Audi, Nissan Murano, the Ducati motorcycle, and the Porsche, all titled in both names, would be surrendered to the creditors. They agreed that the wife would be solely responsible for any deficiency on the Audi and the Nissan, and Applicant would be solely responsible for any deficiency on the Ducati motorcycle and the Porsche. Applicant also agreed to refinance the marital home and to pay his ex-wife 40% of the equity in the home. They also agreed which party would assume full responsibility for several loans and credit card accounts. Applicant is not required to pay any support to his ex-wife and is not entitled to any support from her.

After his divorce, Applicant refinanced his house and obtained an adjustable-rate mortgage (Tr. 82-84). He used some of the equity in his house to pay off the loan on the BMW, which he sold after about a year (Tr. 151). In October 2007, his mortgage rate adjusted upward, increasing his monthly payments from \$2,400 to \$3,200 (Tr. 85). He was unable to make the increased payments.

Applicant's mother passed away in April 2003. He helped his disabled father manage his affairs until he passed away in 2007. Except for incidental transportation costs, He did not incur any expenses in taking care of his father (Tr. 102-06). Applicant suffers from gastro-intestinal problems, and they flared up in 2006, around the time of his divorce. He was concerned because his mother had similar medical problems before her death (Tr. 107). He has received medical treatment and has not been impeded in his ability to continue working (Tr. 110). Although Applicant presented evidence of the deaths of his parents and his medical condition as matters in mitigation, there is no evidence that they contributed significantly to his financial problems.

In September 2007, Applicant contacted a credit and financial counseling service for assistance (Tr. 96; AX T). Among other things, the counseling service recommended that he dispose of the Land Rover and the Porsche and try to negotiate a payment plan to resolve the remaining debts related to them (Tr. 94). He surrendered the Land Rover to the lien-holder in December 2007 and he surrendered the Porsche in 2008 (Tr. 94). The deficiency after the sale of the Land Rover was about \$31,000 (Tr. 136). The deficiency on the Porsche was about \$46,000 (GX 4 at 6).

After surrendering the Porsche to the lien-holder in 2008, Applicant purchased a 1995 Acura and financed it with the seller. He disposed of this vehicle, apparently

without incurring any additional debt. In February 2009, before receiving the SOR, Applicant purchased a 1995 Land Rover for \$2,500 (Tr. 144) and a 1989 Jaguar for about \$4,000, paying cash for both vehicles (Tr. 146). He testified he needs two cars because he is a drummer and needs a large vehicle to transport his instruments (Tr. 146).

Applicant remarried in October 2007, but he and his second wife separated in November 2007 and were divorced in 2009 (GX 5 at 25; Tr. 110). He has no children from either of his marriages (Tr. 186). He is not responsible for supporting anyone but himself.

Applicant's current annual salary is \$106,000 (AX C). His net monthly income per two-week pay period is \$2,799 (AX B). He has no savings, no investments, and no retirement accounts (Tr. 179, 189). He has filed all his state and federal income tax returns on time. His federal return for 2006 was audited and he owes about \$4,000 for that year (Tr. 185).

Applicant was interviewed about his delinquent debts in April and May 2008, and he received financial interrogatories from DOHA in late March 2009 (GX 5 at 21-28). He paid the judgment alleged in SOR ¶ 1.a in January 2009 (AX K).

On March 3, 2009, Applicant signed a contract with a consulting service to assist him in modifying his home mortgage (AX S; Tr. 100-102). He was successful, and the lender modified the loan to a lower rate in July 2009 (Tr. 101).

In August 2009, Applicant negotiated a settlement of the credit card debt alleged in SOR ¶ 1.b and agreed to pay it in installments beginning on August 30, 2009. If he complies with the payment schedule, the debt will be satisfied in January 2010 (AX L; Tr. 118-20).

Also in August 2009, Applicant negotiated a payment plan for the delinquent auto loan alleged in SOR ¶ 1.g. The agreement provides for monthly payments of \$875 beginning in September 2009, with the last payment scheduled for August 2012 (AX Q; Tr. 120-21). At about the same time, Applicant negotiated a settlement of the delinquent auto loan alleged in SOR ¶ 1.h and agreed to make monthly payments of \$1,000 in September and October 2009, \$350 in November and December 2009, and \$175 per month until the debt is satisfied (AX R; Tr. 122-25).

At the time of the hearing, Applicant had reached an agreement to resolve the delinquent auto loan alleged in SOR ¶ 1.i, along with several other debts to the same creditor, but he had not received written confirmation of the agreement. A week after the hearing, he received confirmation of an agreement (AX W), and he mailed three post-dated checks: one for \$100 and post-dated September 4, 2009; one for \$100 and post-dated October 2, 2009; and one for \$1,200 and post-dated November 6, 2009 (AX X).

Applicant has adopted a budget that will enable him to carry out his obligations under his modified mortgage and negotiated payment agreements, but it leaves a monthly remainder of only about \$42 (AX V). To generate additional income, Applicant has rented his house for \$700 per month (AX D). He also has been hired as a musician by his church and will be paid \$500 per month (AX E). His pastor has known him for about five years and considers him a person of integrity and exemplary moral character (AX U).

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

SOR	Debt	Amount	Status/Date	Evidence
1.a	Credit card (judgment)	\$410	Satisfied, Jan 09	AX K; Tr. 114-15
1.b	Credit card	\$3,286	Payment plan, Aug 09	AX L; Tr. 118-20
1.c	Telephone	\$132	Paid, Aug 09	AX J; Tr. 112-13
1.d	Telephone	\$63	Paid, Aug 09	AX J; Tr. 112-13
1.e	Past due 2 nd mortgage payments	\$3,669	Loan modified, Jul 09	AX M, N, O; Tr. 115
1.f	Past due 1 st mortgage payments	\$30,560	Loan modified, Jul 09	AX M,N; O Tr. 115
1.g	Auto loan	\$31,517	Payment plan, Aug 09	AX Q; Tr. 120-21
1.h	Auto loan	\$47,540	Payment plan, Aug 09	AX R; Tr. 122-25
1.i	Auto loan	\$41,652	Payment plan, Aug 09	AX W, X; Tr. 125-26

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 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 made “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 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.

Several disqualifying conditions under this guideline are relevant. AG ¶ 19(a) is raised by an “inability or unwillingness to satisfy debts.” AG ¶ 19(b) is a two-pronged condition that is raised by “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 by “a history of not meeting financial obligations.” AG ¶ 19(e) is raised by “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). The first prong of AG ¶ 19(b) (“frivolous or irresponsible spending”) is raised, but the second prong is not, because Applicant has established a realistic plan to pay his debts.

Since the government produced substantial evidence to raise the disqualifying conditions in AG ¶¶ 19(a), (c), and (e), the burden shifted to Applicant 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 mitigating condition is not established because Applicant’s delinquent debts were numerous, recent, did not occur under circumstances that are unlikely to recur, and they cast doubt on his reliability and good judgment.

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). Applicant has been divorced twice, suffered some serious medical problems, and lost both of his parents. This mitigating condition is not established, however, he did not adjust his lifestyle to his income and did not take timely, reasonable actions to pay his creditors.

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 fully established, because the payment plans for most of his debts have not been in effect long enough to establish a solid track record of financial responsibility.

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). An applicant is not required, as a matter of law, to establish

resolution of each and every debt alleged in the SOR. See ADP Case No. 06-18900 (App. Bd. Jun. 6, 2008). An applicant need only establish a plan to resolve financial problems and take significant actions to implement the plan. ISCR Case No. 07-06482 at 2-3 (App. Bd. May 21, 2008). There also is no requirement that an applicant make payments on all delinquent debts simultaneously, nor is there a requirement that the debts alleged in the SOR be paid first. *Id.*

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). Payment of debts because of the pressure of qualifying for a security clearance does not constitute good faith.

In 2004, Applicant initiated a payment plan for the debt alleged in SOR ¶ 1.i and he consulted with an attorney after his payments by automatic withdrawal were stopped. He took no further action, however, after his attorney wrote one letter and apparently received no response. He paid the \$410 judgment for a delinquent credit card account (SOR ¶ 1.a) in January 2009. About three weeks before he received the SOR, he signed the contract with the company that successfully renegotiated his home mortgages. Even though he was questioned twice about his delinquent debts by a security investigator in April and May 2008, he did not address his remaining debts until August 2009, within two weeks of the hearing. The evidence indicates Applicant's recent actions were not motivated by a sense of obligation to his creditors, but rather by a desire to save his home from foreclosure and retain his clearance. Although Applicant has initiated a plan to resolve all his debts, I conclude AG ¶ 29(d) is not fully established, because Applicant has not carried his burden of establishing the element of good faith.

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). This mitigating condition is not established, because Applicant has not disputed any of the debts alleged in the SOR.

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 relevant 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 commonsense judgment based upon careful consideration of the guidelines and the whole person concept. I have incorporated my comments under Guideline F in my whole person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

Applicant presented himself at the hearing as articulate and intelligent. He acknowledged his bad judgment. He has resolved the debts in SOR ¶¶ 1.a, 1.c, and 1.d. He presented a realistic plan to resolve his remaining delinquent debts. His plan, however, was not fully developed until just before the hearing, leaving no time for him to establish a track record of financial responsibility. Given his long record of living beyond his means and exercising bad financial judgment, more time is needed to evaluate whether he can demonstrate responsible conduct and carry out his plan. See Directive ¶¶ E3.1.37 through E3.1.41 (reconsideration authorized after one year).

In her closing statement, Applicant's counsel suggested the possibility of a conditional clearance (Tr. 202). The Appeal Board has made it clear that administrative judges do not have authority to grant conditional clearances. See ISCR Case No. 99-0901, 2000 WL 288429 at *3 (App. Bd. Mar. 1, 2000); see also ISCR Case No. 01-24318 at 3, 2003 WL 21979745 at *2 (App. Bd. May 23, 2003).

After weighing the disqualifying and mitigating conditions under Guideline F, 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. Accordingly, I conclude he has not 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 findings on the allegations in the SOR:

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

Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	Against Applicant
Subparagraphs 1.c-1.d:	For Applicant
Subparagraphs 1.e-1.i:	Against Applicant

Conclusion

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

LeRoy F. Foreman
Administrative Judge