



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



In the matter of:)	
)	
)	ISCR Case No. 08-03672
)	
)	
Applicant for Security Clearance)	

Appearances

For Government: J. Theodore Hammer, Esq., Department Counsel
For Applicant: *Pro se*

November 22, 2010

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant failed to mitigate the Government’s security concerns under Guideline F, Financial Considerations. Applicant’s eligibility for a security clearance is denied.

On July 23, 2010, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing 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) effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR in writing on August 18, 2010, and requested a hearing before an administrative judge. The case was assigned to me on September 23, 2010. DOHA issued a Notice of Hearing on September 28, 2010. I convened the hearing as scheduled on October 28, 2010. The Government offered Exhibits (GE) 1 through 13. Applicant did not object and they were admitted. Applicant testified on his

own behalf. Applicant offered Exhibits (AE) A through D, which were admitted without objections. DOHA received the hearing transcript (Tr.) on November 4, 2010.

Findings of Fact

Applicant admitted all of the allegations in the SOR. After a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is 39 years and a high school graduate. He has taken some college courses. He served in the Navy from 1990 to 1999, and received a General Discharge under Honorable Conditions. He married in 1992 and divorced in 1996. He has two children from the marriage, ages 18 and 16. He remarried in 1996 and divorced in 2002. He has no children from the marriage. He remarried again in 2003, and has two children from the marriage, ages six and two, and one stepchild who is 11 years old.¹

Applicant stated that when he was married to his first wife she used a power of attorney he had given to her, to make purchases beyond their means. He was a third class petty officer (E-4) at the time. He could not afford to pay the debts. He worked for a period of time with a credit service to pay \$1,500 a month to resolve the debts, but was unable to maintain the payments. He stated he was awarded the debts in the divorce. He filed Chapter 7 bankruptcy after his divorce in 1996. He had approximately \$52,000 of consumer debt discharged.²

Applicant and his second wife both had well-paying jobs when they married. She earned approximately \$165,000, and he earned approximately \$85,000. They owned a home and due to the commute from where Applicant worked, he had an apartment. His wife boarded horses. They separated in October 2002 and divorced in July 2003. Applicant was awarded the house in the divorce. He placed it for sale sometime in 2003, and it sold a few months later. He did not make a profit on it, instead he broke even. They had approximately \$40,000 of consumer debt.³

Applicant married in October 2003. He did not have sufficient credit to get a loan to buy a house. His wife earned \$27,000, and she qualified for a \$389,000 loan to purchase a house for them. Applicant gave her \$10,000 to use as the down payment on the house. They purchased the house in December 2003. The house was in his wife's name only.⁴

In June 2004, Applicant filed Chapter 7 bankruptcy for the debts he had incurred with his second wife. He had approximately \$40,000 in consumer credit debt discharged

¹ Tr. 127-131, 157-159.

² Tr. 103-113; AE A.

³ Tr. 113-121.

⁴ Tr. 113-127, 132-134, 139.

in September 2004. Applicant stated he did not know why he did not use the \$10,000 he gave to his wife for the down payment on a house, to pay his consumer debts. Applicant and his third wife had a child in June 2004. His wife stopped working sometime in 2004.⁵

Applicant and his wife lived in the house she purchased for one year and sold it to buy another house in December 2004. She made a \$35,000 profit on the house they sold. They used the profit to pay outstanding bills incurred to improve the home before it sold and pay other debts.⁶

Applicant stated that they obtained a mortgage in 2004 for \$499,000, with an adjustable interest rate for five years to buy the house. He used \$28,000 for a down payment. He actually had two mortgages with a 80/20 split for financing. Ten months later, they refinanced a mortgage on the house for \$599,000 and took \$100,000 from the loan. Applicant stated he believed the new loan also had a five-year adjustable interest rate. However, before signing the new loan, he questioned why the contract stated it was a two-year adjustable interest rate. He was told by the realtor not to worry, it would get fixed. He anticipated refinancing the loan in the future, so he did not worry. There is some confusion regarding the debt in SOR ¶ 1.a. which Applicant stated is a second mortgage. It does not appear this debt was included when the larger loan was refinanced and it remains owed.⁷

Applicant estimated they used about \$20,000 to pay bills, and \$60,000 to upgrade the house. He did not know how they spent the remaining \$20,000. Applicant made the monthly loan payments until the adjustable rate went up. He stated he was unaware the rates would increase every six months. In January 2007, he filed Chapter 13 bankruptcy in an attempt to save the house. He paid the mortgage until November 2007. In January 2008, he and his family moved out of the house. The house was sold in April 2008. There was a deficiency on the mortgage and Applicant received an Internal Revenue Service (IRS) form 1099. His Chapter 13 bankruptcy was dismissed at his request in April 2009, because the house was foreclosed. He stated he was unaware he owed the deficiency on the second mortgage.⁸

Applicant took a \$7,000 loan from his 401(k) pension plan in 2002 to purchase a house. He repaid the loan by 2004. In 2006, he withdrew \$17,000 from his 401(k) pension plan. He received a letter from the IRS in 2009, demanding payment for the unpaid taxes. The letter also included notice that he failed to pay the amount due on his 2008 income taxes. Applicant was aware that he underpaid his 2008 taxes. He did not set up a payment plan to pay his 2008 income taxes when he filed his taxes. It was not

⁵ Tr. 124, 131, 134.

⁶ Tr. 139-143.

⁷ Tr. 26, 57-70.

⁸ Tr. 21-22, 26-50, 57, 70-73, 79-88.

until the IRS contacted him that he made a payment arrangement to pay both debts. Applicant pays \$200 a month towards the 2006 and 2008 tax debt. The 2006 tax debt is listed in SOR ¶ 1.b. He believes he currently owes approximately \$10,000 on this debt to the IRS. The 2008 tax debt is approximately \$4,000. He stated he was unaware he had to pay taxes on his 401(k) withdrawal.⁹

Applicant's 2004 Chapter 7 bankruptcy documents list unpaid income taxes for 2001 and 2002, in the amount of \$9,000. Applicant admitted this debt was because he did not have sufficient funds withheld from his income. He stated the taxes were paid by the IRS confiscating his tax refunds and his payment of the balance.¹⁰

Applicant recently took another loan of \$3,000 from his 401(k) pension plan. He used this money to move his family to another state. He stated he has no credit cards and his wife has one credit card with no balance owed. He and his family are living with relatives and plan to rent instead of buying a house. He consistently pays his child support. When he was working full-time his salary was \$110,000. He stated he has a budget.¹¹

Applicant stated he has \$29,000 on hand from his savings which includes a \$17,000 loan from his 401(k) pension plan. He wants to use this money to negotiate a settlement with the mortgage company for his second mortgage debt, for which he owes \$118,000. He hopes to resolve the debt with a lump sum settlement. The mortgage company has been unwilling to accept reduced monthly payments.¹²

Applicant provided a statement from his wife explaining their reason for filing Chapter 7 bankruptcy. She explained it was because of debts remaining from his prior marriage and his ex-wife's failure to pay debts from the marriage.¹³

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the

⁹ Tr. 50-57, 89-98.

¹⁰ Tr. 98-103; GE 6.

¹¹ Tr. 143-150, 153.

¹² Tr. 40-47, 74-79, 162; AE C, D.

¹³ AE B.

factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an "applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel and has the ultimate burden of persuasion to obtain a favorable security decision."

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 10865 provides that decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline F, Financial Considerations

The security concern for Financial Considerations is set out in AG ¶ 18:

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.

The guideline notes several conditions that could raise security concerns. I have considered all of the disqualifying conditions under AG ¶ 19 and especially considered:

- (a) inability or unwillingness to satisfy debts; and
- (c) a history of not meeting financial obligations.

Applicant filed Chapter 7 bankruptcy in 1996 and had \$56,000 of debt discharged. He filed Chapter 7 bankruptcy in 2004 and had \$40,000 of debt discharged. He filed Chapter 13 bankruptcy in 2009, and it was dismissed. Applicant failed to pay to the IRS the penalty and taxes owed on a withdrawal from his pension plan. He also failed to pay his 2008 taxes on time. He has a delinquent second mortgage that is unpaid. I find there is sufficient evidence to raise these disqualifying conditions.

The guideline also includes conditions that could mitigate security concerns arising from financial difficulties. I have considered the following mitigating conditions under AG ¶ 20:

- (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.

Applicant had \$56,000 in debt discharged under Chapter 7 bankruptcy in 1996. He owed approximately \$40,000 in consumer debt when he and his second wife divorced in 2003. Instead of paying his consumer debt, he gave his third wife \$10,000 to

use as a down payment to purchase a house. A few months later, he filed Chapter 7 bankruptcy and had \$40,000 of debt discharged. He was aware he owed his 2008 taxes and did not pay them. He also owed taxes for his 2006 pension plan withdrawal. He has a payment plan with the IRS for unpaid taxes, but did not begin the plan until he was contacted by the IRS about the delinquent taxes. The second mortgage loan is not paid. Applicant hopes to reach a settlement agreement with the creditor. I find mitigating condition AG ¶ 20(a) does not apply. Applicant has a long history of not paying his debts. He failed to modify his past behavior. I am unconvinced that his behavior will not recur. Applicant blames his first wife's irresponsible use of a power of attorney for causing him to file Chapter 7 bankruptcy in 1996. However, Applicant has a record of accumulating consumer debts and not repaying them, even though he earns a substantial salary.

To a certain extent, some of Applicant's debts, might have been beyond his control, due to his divorces. However, I find he has failed to act responsibly under the circumstances. He had funds to pay some of his delinquent debts, but chose to use the money for a down payment on a house, and shortly thereafter filed Chapter 7 bankruptcy. I find AG ¶ 20(b) partially applies.

Applicant offered no information that he has received financial counseling. He did not take action to resolve his tax debts until the IRS contacted him. He continues to owe more than \$118,000 on his second mortgage. He hopes to settle the debt, but it has not yet happened. I find Applicant has not made good-faith efforts to resolve his debts. I do not find that there are clear indications his finances are under control. I find AG ¶¶ 20(c) and 20(d) do not apply. In addition, I find there is no evidence to support application of AG ¶ 20(e).

Whole-Person Concept

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

- (1) the nature, extent, and seriousness of the conduct;
- (2) the circumstances surrounding the conduct, to include knowledgeable participation;
- (3) the frequency and recency of the conduct;
- (4) the individual's age and maturity at the time of the conduct;
- (5) the extent to which participation is voluntary;
- (6) the presence or absence of rehabilitation and other permanent behavioral changes;
- (7) the motivation for the conduct;
- (8) the potential for pressure, coercion, exploitation, or duress;
- and (9) the likelihood of continuation or recurrence.

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 considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. 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 has a history of financial problems. Twice he resolved the problems by having his debts discharged in Chapter 7 bankruptcy. Despite having a clean financial record, he again accumulated delinquent debts. He has a long record of poor financial decisions. He failed to pay his tax debt until the IRS contacted him. He repeatedly was irresponsible in how he used his resources. Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising under the guideline for Financial Considerations.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline F:	FOR APPLICANT
Subparagraphs 1.a-1.f:	Against Applicant

Conclusion

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

Carol G. Ricciardello
Administrative Judge