



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



In the matter of:)
)
 [Redacted]) ISCR Case No. 08-03870
)
 Applicant for Security Clearance)

Appearances

For Government: David F. Hayes, Esq., Department Counsel
For Applicant: *Pro se*

June 7, 2011

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 a security clearance application on April 13, 2007. On December 22, 2010, 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 Guidelines F and E. DOHA acted 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) implemented by the Department of Defense on September 1, 2006.

Applicant received the SOR on January 4, 2011; answered it on January 25, 2011; and requested a hearing before an administrative judge. DOHA received the

request on January 27, 2011. Department Counsel was ready to proceed on February 25, 2011, and the case was assigned to me on March 4, 2011. DOHA issued a notice of hearing on March 17, 2011, scheduling it for April 6, 2011. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 14 were admitted without objection. Applicant testified and submitted Applicant's Exhibits (AX) A through E, which were admitted without objection. I kept the record open until April 22, 2011, to enable Applicant to submit additional documentary evidence. He timely submitted AX F through I, which were admitted without objection. Department Counsel's comments regarding AX F through I are attached to the record as Hearing Exhibit I. DOHA received the transcript (Tr.) on April 13, 2011.

Findings of Fact

In his answer to the SOR, Applicant admitted the allegations in SOR ¶¶ 1.a, 1.b, 1.e-1.i, and 1.o. He denied the allegations in SOR ¶¶ 1.c, 1.d, 1.j-1.n, 1.p-1.s, and 2.a. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 49-year-old employee of defense contractor. He served in the U.S. Navy from June 1980 to June 2003 and retired as a chief petty officer. He has worked continuously for defense contractors since his retirement. He is a high school graduate and has completed about three years of college, working toward a bachelor's degree in organizational management. (Tr. 49-50.) He received a security clearance early in his Navy career and has held a clearance continuously until the present.

Applicant married in June 1989. He and his wife have a daughter who is in college. Applicant paid her college expenses of about \$2,400 per month for two years. She now has a scholarship, and Applicant pays about \$500 per month for her room and board. (Tr. 49.)

Applicant and his wife were both employed while he was in the Navy. Relying on two incomes, they purchased a home, an automobile, and furniture for their home. Even with two incomes, they were "house poor." (Tr. 54.) Applicant's wife became ill, was diagnosed with multiple sclerosis, and became unable to work. Her income had accounted for about 38% of the family income, and they fell behind on their financial obligations. (Tr. 37-38.)

Applicant and his wife filed a Chapter 13 petition for bankruptcy in May 1996, and they completed the payment plan in November 2000. (GX 5 at 67; GX 7 at 2; Answer to SOR.) This bankruptcy is alleged in SOR ¶ 1.a.

When Applicant completed his first Chapter 13 bankruptcy, he still owned his home, and he was obligated to pay his first and second mortgages. (Tr. 56.) He filed a second Chapter 13 petition for bankruptcy in March 2006, after he fell behind on his home mortgage payments and the lender took steps to foreclose on the property. (GX 5; GX 6; GX 8 at 4.) This bankruptcy was dismissed in May 2008 for failure to make the required payments. (GX 5 at 77-78.) This bankruptcy was alleged in SOR ¶ 1.b.

Applicant presented evidence that medical problems cause about 62% of bankruptcies, and that it can take 10 to 20 years to recover from a bankruptcy. (AX A; AX B.)

The SOR ¶ 1.d alleges that Applicant willfully failed to file federal tax returns for tax years 1999, 2000, 2002, 2003, 2005, and 2006. Applicant submitted IRS account transcripts for tax years 1999 through 2005, showing that he filed his 1999 and 2005 returns in 2006, and that the IRS prepared substitute returns for 2000, 2002, and 2003. (GX 4 at Enclosure 2.)

A summary of an interview with a security investigator in June 2007 reflects that Applicant told the investigator that he had filed his federal and state taxes every year and did not owe any penalties or taxes. In response to DOHA interrogatories asking him to verify the accuracy of the investigator's interview summary, Applicant submitted numerous additions and corrections but did not dispute the accuracy of the summary regarding his state and federal tax returns. (GX 4, Enclosure 2.) At the hearing, he denied saying that he filed his returns "every year." He testified he intended to say that all his tax returns had been filed as of the date of the interview. (Tr. 98-99.)

In March 2010, Applicant responded to DOHA interrogatories by submitting copies of federal tax returns for 2000, 2002, 2003, and 2006 through 2009. None of those copies are signed, dated, or bear indicia of mailing or receipt. (GX 4 at Document (5).) Applicant contends that he owed \$724 for 2000, owed \$143 for 2007, and owed \$1,110 for 2009; and he was entitled to refunds of \$593 for 2001, \$1,558 for 2002, \$1,971 for 2003, \$2,188 for 2006, and \$2,901 for 2008. These computations, if accurate, would produce a net refund rather than an unpaid tax debt, but they do not include any penalties or interest. In May 2011, he negotiated a payment plan of \$100 per month while the amount of delinquent taxes, if any, is being computed. (AX G.)

The SOR ¶ 1.e alleges Applicant failed to file state tax returns for 2003, 2004, and 2005. He admitted this allegation, explaining that he was a legal resident of a state that has no state income tax until he retired from the Navy in June 2003. After he moved to another state that has an income tax, he did not timely file his returns. He testified that he had filed all his state tax returns, but he submitted no documentary evidence of filing.

Applicant testified that he is "chronically late" in filing his tax returns. When he knows he owes money, he tends to delay filing until he can accumulate what he owes. He admitted deliberately filing his federal income tax returns late, but he denied that he intended to not file his tax returns. (Tr. 61-62.)

Shortly before the hearing, Applicant received a settlement offer on the repossession deficiency alleged in SOR ¶ 1.g, and he negotiated a payment agreement for the repossession deficiency alleged in SOR ¶ 1.h. However, he had not made any payments on either debt as of the date the record closed. (AX H; AX I; Tr. 66-68.)

Applicant was unsure when he purchased the foreclosed time-share property alleged in SOR ¶ 1.k, but he “assumed” that it was before his bankruptcy in 2006. (Tr. 76-77.) His December 2004 credit report reflects that his account with the lender was opened in February 2003 and the last activity was in April 2003. (GX 7 at 3.)

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

SOR	Debt	Amount	Answer To SOR	Status	Evidence
1.c	Federal income tax	\$8,106	Disputes amount	Making payments	AX G
1.f	Cable service	\$322	Admit	Unresolved	Tr. 65
1.g	Car repossession	\$2,802	Admit	Settlement offer for \$1,000; no proof of payment	AX I; Tr. 66-68
1.h	Car repossession	\$3,011	Admit	Payment agreement for \$250 per month; no proof of payments	AX H; Tr. 66-68
1.i	Medical	\$50	Admit	Unresolved	Tr. 68
1.j	Medical	\$155	Deny	Unresolved	Tr. 72-73
1.k	Time share foreclosure	\$9,526	Deny	Property sold, denies deficiency; no dispute filed with credit bureau	GX 4 at Doc (2); Tr. 74-80
1.l	Credit card	\$438	Deny	Validation requested; no response	GX 4 at Doc (5); Tr. 81-82
1.m	Credit card	\$11,607	Disputes amount	Validation requested; no response from creditor	GX 4 at Doc (5); Tr. 83
1.n	Credit card	\$14,574	Disputes amount	Unresolved	Tr. 82-83
1.o	Credit card	\$353	Admit	Unresolved	GX 4 at Doc (5); Tr. 87
1.p	Medical	\$3,162	Deny	Pending decision by insurance company and TRICARE	GX 4 at Doc (2); Tr. 87-89
1.q	Cell phone	\$342	Deny	Debt may be cancelled, but no documentation	Tr. 89
1.r	Car loan	\$11,233	Deny	May be erroneous; no dispute filed with credit bureau	Tr. 90-91
1.s	Credit card	\$469	Deny	May be included in 1.m; no documentation	Tr. 92

In October 2009, Applicant and his wife were able to sell their home and pay off their first and second mortgages. (GX 4, Documents at (3).) They now live in a rental home. Their landlord submitted a statement that Applicant and his wife have been “ideal tenants” and have paid their rent on time since they began their tenancy in August 2009. (AX D.)

Applicant was required by the bankruptcy court to complete online financial counseling, and he recalled taking a financial counseling course while on active duty. (Tr. 99-100.) There is no evidence of any recent financial counseling.

In May 2010, Applicant submitted a personal financial statement. It reflects gross household income of \$9,715 per month, taxes of \$1,597, deductions of \$906, and expenses of \$6,370, leaving a net monthly remainder of about \$842. (GX 3 at 9.) In April 2011, Applicant accepted an employment offer from a defense contractor at an annual gross pay of \$134,000, which will increase his monthly gross pay by about \$1,451 per month. (AX E.) In June 2010, Applicant submitted additional information reflecting that he would no longer be paying his daughter’s college tuition after August 2010, thereby reducing his monthly expenses by about \$1,900 per month. (GX 2.)

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.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the AG. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines 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 safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about 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 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. 92-1106 at 3, 1993 WL 545051 at *3 (App. Bd. Oct. 7, 1993).

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 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).

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

The SOR alleges two Chapter 13 bankruptcies (SOR ¶¶ 1.a and 1.b), failure to file federal and state tax returns as required (SOR ¶¶ 1.d and 1.e), and 15 delinquent debts, including a federal tax debt of about \$8,106 (SOR ¶¶ 1.c, 1.f-1.s). Applicant admitted the bankruptcies and filing his tax returns late. His credit reports and other documentary evidence show that the federal tax debt and several other debts are unresolved.

The concern under this guideline 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.

Applicant's financial history raises four disqualifying conditions under this guideline:

AG ¶ 19(a): inability or unwillingness to satisfy debts;

AG ¶ 19(c): a history of not meeting financial obligations;

AG ¶ 19(e): 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; and

AG ¶ 19(g): failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same.

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 are numerous and ongoing, and they did not occur under circumstances making them unlikely to recur. The illness of Applicant's wife was an unusual event, but it is ongoing and likely to continue.

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 illness and incapacity of Applicant's wife was a condition beyond their control, but they were living on the financial edge when she became ill, and Applicant has not acted responsibly. He neglected to file his federal tax returns even though he believed he was entitled to refunds for several years. He and his wife purchased a time-share property even though they were living on a tight budget. He did not address his financial problems until he realized that his security clearance was in jeopardy.

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). Applicant received mandatory counseling in connection with his bankruptcies and attended financial management classes while he was on active duty in the Navy, but the second prong of this mitigating condition is not established, because Applicant's financial situation is not yet under control.

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). An applicant is not required, as a matter of law, to establish resolution of every debt alleged in the SOR. An applicant need only establish a plan to resolve financial problems and take significant actions to implement the plan. There 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. See ISCR Case No. 07-06482 at 2-3 (App. Bd. May 21, 2008). Evidence of past irresponsibility is not mitigated by payment of debts only under pressure of qualifying for a security clearance.

In May 2011, Applicant made a payment agreement for his federal taxes, and he has been making \$100 payments per month while the amount of his indebtedness, if any, is determined. He negotiated agreements to settle the two car repossession deficiencies alleged in SOR ¶¶ 1.g and 1.h, but he had made no payments as of the date the record closed. He testified he had resolved his state tax problem, but he submitted no documentation to corroborate his testimony. He claimed that the time-share foreclosure alleged in SOR ¶ 1.k was resolved by sale of the property, but he provided no documentation that the debt is fully resolved. He is attempting to resolve the medical debt in SOR ¶ 1.p and related insurance issues. The remaining debts alleged in the SOR are unresolved. I conclude that AG ¶ 20(d) is established for SOR ¶¶ 1.c and 1.p, but not for the remaining debts alleged in the SOR.

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 denied the debts alleged in SOR ¶¶ 1.j-1.n, and 1.q-1.s, but he did not document the basis of the disputes or provide evidence of actions to resolve them. I conclude AG ¶ 20(e) is not established.

Guideline E, Personal Conduct

The SOR alleges that in June 2007 Applicant falsified material facts in an interview with a security investigator by claiming that he had filed federal and state tax returns every year and denying that he owed any unpaid taxes or penalties. The security concern under this guideline is set out in AG ¶ 15:

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 is AG ¶ 16(b): “deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative.” When a falsification allegation is controverted, as in this case, the Government has the burden of proving it. An omission or misstatement, standing alone, does not prove falsification. An administrative judge must consider the record evidence as a whole to determine an applicant’s state of mind at the time of the omission or misstatement. See ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004).

Applicant had an opportunity to review the personal interview summary, which recites that he “advised that he had filed his federal and state taxes every year and he does not owe any back penalty taxes or unpaid taxes,” and he did not object to the accuracy of this recital in his response to DOHA interrogatories. However, I am not satisfied that he understood the subtlety or significance of the language of the interview summary. The IRS records reflect that he filed his overdue federal returns before the interview. He had spent most of his adult life as a legal resident of a state that does not have a state income tax. He did not realize that he was required to file state tax returns in his new legal residence after he retired from the Navy. His copies of his federal tax returns indicated that he did not owe any federal taxes, and the amount of his tax liability, if any, is still undetermined. I conclude that deliberate falsification is not established by substantial evidence. Accordingly, I resolve SOR ¶ 2.a in Applicant’s favor.

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 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 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 is a mature, well-educated adult, but he is financially unsophisticated. He has been living on the financial edge for many years, and he has made some unwise decisions, such as purchasing a time-share vacation property while living on a tight budget. He is a self-admitted financial procrastinator. He has not maintained good records of his financial decisions. He was candid and sincere at the hearing, and his demeanor was a factor in my determination that he did not intentionally falsify material facts during his security interview. On the other hand, his track record of financial mismanagement and procrastination leaves me with doubts about his reliability and good judgment.

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 refuted the allegations of falsification, but he 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 formal findings on the allegations in the SOR:

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

Subparagraphs 1.a-1.b:	Against Applicant
Subparagraph 1.c:	For Applicant
Subparagraphs 1.d-1.o:	Against Applicant
Subparagraph 1.p:	For Applicant
Subparagraphs 1.q-1.s:	Against Applicant

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

Subparagraph 2.a:	For Applicant
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Conclusion

I conclude that 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