



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



In the matter of:	)	
	)	
	)	ISCR Case No. 08-04682
SSN:	)	
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Kathryn MacKinnon, Esquire, Department Counsel  
For Applicant: Leon A. Maryland, Esquire

April 20, 2009

**Decision**

HENRY, Mary E., Administrative Judge:

Based upon a review of the case file, pleadings, exhibits, and testimony, I conclude that Applicant's eligibility for access to classified information is denied.

Applicant submitted his Security Clearance Application (SF 86), on September 26, 2007. On August 11, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing 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 revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant acknowledged receipt of the SOR on August 13, 2008. He answered the SOR in writing on September 16, 2008, admitted all the SOR allegations and

requested a hearing before an administrative judge. DOHA received the request on September 19, 2008. Department Counsel was prepared to proceed on October 6, 2008, and I received the case assignment on January 22, 2009. DOHA issued a notice of hearing on January 30, 2009, and I convened the hearing as scheduled on February 26, 2009. The government offered four exhibits (GE) 1 through 4, which were received and admitted into evidence without objection. Applicant testified on his own behalf. He submitted 18 exhibits (AE) A through R, which were received and admitted into evidence without objection. The record closed on February 26, 2009. DOHA received the transcript of the hearing (Tr.) on March 10, 2009.

## **Procedural and Evidentiary Rulings**

### **Motion to Amend SOR**

At the hearing, Applicant's counsel proffered to stipulate to the fact "that at some point in 2007, the debts listed in the SOR went into collection. After much discussion, the parties agreed to amend the SOR allegations 1.a through 1.i. by deleting the language "placed for collection" with a date for collection, which is near the end of the first sentence in each allegation. The language identifying the creditor and the amount of the debt would remain as would the second sentence, which read: "As of June 18, 2008, this debt had not been paid." I granted the change in the SOR as agreed by the parties. (Tr. 34)

### **Findings of Fact**

Applicant is 33 years old and single. At the time he completed his SF-86, Applicant worked for a Department of Defense Contractor. He has been offered another position with a different Department of Defense contractor which requires a security clearance.<sup>1</sup>

Applicant worked with temporary agency in the fall 2006. His job ended at the end of December 2006. In January 2007, Applicant became seriously ill with pneumonia. He did not work the entire month of January 2007. Applicant obtained a 90-day temporary job in February 2007. When this job ended in May 2007, he did not work for two weeks.<sup>2</sup>

On June 1, 2007, Applicant began working for a major United States (U.S.) airline as a baggage handler. On June 30, 2007, he suffered a heart attack on the job. His doctor released him to return to work in October 2007. He had no insurance at this

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<sup>1</sup>GE 1 (Applicant's security clearance application, dated September 26, 2007); Tr. 23, 100.

<sup>2</sup>GE 3 (Interrogatories) at 3; GE 4 (Interrogatories) at 5; Tr. 35-36, 110-111.

time and workers compensation benefits did not pay his medical expenses. He paid his medical bills related to his heart attack.<sup>3</sup>

On October 1, 2007, Applicant began employment with a Department of Defense contractor. In November 2007, Applicant began a second job to help pay the expenses he had incurred while unemployed. On December 12, 2007, he suffered a stroke. His medical insurance provider paid his medical bills. Applicant did not return to work until April 2008. Subsequent to his stroke, Applicant has been diagnosed with trigeminal neuralgia.<sup>4</sup>

Applicant started a position with a contractor in April 2008. His net earnings with this employer totaled \$1,300 a month, which is \$700 less than he was earning prior to his stroke in December 2007. His most recent employer laid him off in January 2009 when the work contract ended. Prior to his most recent layoff, Applicant could pay his monthly living expenses, but not his unpaid debts as he lacked sufficient income. He has not purchased a car, new or used, has not taken a vacation, has not purchased any big ticket items, or acquired new credit cards. In 2007, many of his creditors turned his unpaid debts over to collection agencies. His parents helped pay his bills during periods of unemployment and he received unemployment benefits during some of this time. He has not provided documents showing his income and payment of living expenses during his times of unemployment. The record is not clear as to how he paid his rent, food, and other necessary living expenses and his medical bills in 2007.<sup>5</sup>

The SOR identifies 12 debts, totaling \$15,750, owed by Applicant. At the hearing, he acknowledged that he had not paid any of these debts. Applicant received settlement offers from the creditors in SOR allegations 1.b through 1.e, 1.h through 1.j, and 1.l. Three creditors made offers when Applicant was unemployed, the most recent on February 5, 2009. Four creditors made offers less than 60 days after he returned to work in April 2008. Applicant accepted none of the settlement offers. I infer that his refusal to accept the settlement offers was because he lacked funds to pay the amount of money requested and he decided not to pay old debt with credit cards.<sup>6</sup>

In his answers to interrogatories in June 2008, he indicated he would pay many of his debts within 90 days. Instead, in October 2008, Applicant mailed letters to the creditors identified in SOR allegations 1.a through 1.c and 1.h through 1.k. Referencing the Fair Credit Reporting Act and the Fair Debt Collection Act, Applicant notified each creditor that he was disputing the creditors debt claim and was requesting validation, not verification, of the debt. Specifically, he requested information on the name of the

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<sup>3</sup>GE 4, *supra* note 2, at 3; Tr. 37-38, 111.

<sup>4</sup>GE 4, *supra* note 2; Tr. 102-104.

<sup>5</sup>GE 4, *supra* note 2, at 4-5; Tr. 100-104.

<sup>6</sup>SOR; GE 3, *supra* note 2, attachments; AE G (Settlement offer); Tr. 49, 56-57, 60-65, 73, 75, 79, 83, 83-86, 90, 105.

original creditor, documents showing his debts, agreements to pay and calculation of the amount of debt. He did not deny the debt or refuse to pay. He received no response from these creditors nor has he established that the creditors received these letters. He has not developed a plan to pay these debts or his other old debts once he returns to work.<sup>7</sup>

Finally, Applicant denies that he owes the debts alleged in SOR allegations 1.a, 1.f and 1.g. He did not recognize these debts. He wrote to the creditor in 1.a, but has not received a response. Without a response, Applicant cannot identify this debt. The \$180 medical bill is not recognized by Applicant as a medical debt he owes. His medical bill are paid. These SOR allegations are generic allegations that have not been plead with specificity and thus, fail to give Applicant notice as to whom he owes these debts. The government has not established a prima facie case as to the debt identified in SOR allegations 1.a and 1.g. He provided a receipt, which he believes shows he paid this debt. I find that his receipt is valid verification that he paid the debt in allegation 1.f, which is found in favor of Applicant.<sup>8</sup>

On September 26, 2007, Applicant completed his security clearance application. He answered “no” to the following questions in his e-QIP:<sup>9</sup>

#### Section 28: Your Financial Delinquencies

- a. In the last 7 years, have you been over 180 days delinquent on any debts?
- b. Are you currently over 90 days delinquent on any debts?

Applicant denies that he intentionally falsified his answers to these questions. He admits that he was aware of his bills when he completed his security clearance application. He offered no clear explanation for his answer, except to say that in haste, he just provided the wrong information. Applicant did provide information on his E-QIP about an arrest in 2004 and a job termination under unfavorable circumstances in 2007, indicating he was willing to provide derogatory information with potentially adverse security implications.<sup>10</sup>

Applicant provided three letters of recommendation from two friends and a former co-worker. All three recommend him for a clearance, stating that he is trustworthy,

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<sup>7</sup>AE H through AE M; Tr. 48.

<sup>8</sup>SOR; GE 2; GE 3; GE 4, *supra* note 2, at 4; AE O; Tr. 45-46, 56-57, 79-82.

<sup>9</sup>GE 1, *supra* note 1, at 33.

<sup>10</sup>GE 1, *supra* note 1, at 27-29; GE 3, *supra* note 2, at 5; Tr. 107-108.

patriotic, and a person of integrity. All hold clearances and believe that Applicant would protect the nation's secrets.<sup>11</sup>

## Policies

When evaluating an Applicant's suitability for a security clearance, the administrative judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful 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 factors listed in the adjudicative process. The administrative judge's over-arching adjudicative goal is a fair, impartial and common sense 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, the Applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." The Applicant has the ultimate burden of persuasion as to obtaining 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 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.

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<sup>11</sup>AE C; AE D; AE E.

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 relating to the guideline 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. Under AG ¶ 19(a), an “inability or unwillingness to satisfy debts” is potentially disqualifying. Similarly under AG ¶ 19(c), “a history of not meeting financial obligations” may raise security concerns. Applicant accumulated delinquent debt when he was unemployed and ill. He has been unable to pay his obligations for a period of time. The evidence is sufficient to raise these potentially disqualifying conditions, requiring a closer examination.

The guideline also includes examples of conditions that could mitigate security concerns arising from financial difficulties. Under AG ¶ 20(a), the disqualifying condition may be mitigated where “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.” Applicant’s financial worries arose in 2007 and 2008. His unpaid debts are recent and frequent. This mitigating condition does not apply.

Under AG ¶ 20(b), it may be mitigating where “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.” Applicant’s financial problems arose from his medical problems, which led to eight months of unemployment between January 2007 and April 2008. He returned to work in April 2008, earning \$700 a month less in income than he earned at the time he suffered a stroke. Clearly, these factors are beyond his control. Before determining the applicability of this mitigating condition, I must determine if Applicant acted reasonably under the circumstances. For a period of 15 months, Applicant worked less than 50% of the time. He could not pay his bills, He relied upon family and unemployment to pay his basic bills, such as rent,

utilities, food and his car payment. Payment of all his debts by his family was not an option. He had no choice but to forgo many of his debt payments. When he returned to work, he earned enough money to pay his basic bills. He did not incur new, unpaid debts. He, however, did not pay his old debts nor did he accept any the offers to settle his debts as he lacked the money to do so. He did not settle these debts by acquiring new debt. Under these circumstances, Applicant acted reasonably. Using new debt to pay old debt or failing to pay current expenses as a means to pay old debt is not reasonable. This mitigating condition applies. However, financial considerations are not fully mitigated because Applicant has not made sufficient progress or provided a viable plan for delinquent debt resolution. See whole person concept, *infra*.

Evidence 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” is potentially mitigating under AG ¶ 20(c). Similarly, AG ¶ 20(d) applies where the evidence shows “the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.” Applicant has not received counseling nor has he resolved any of his delinquent debts. His letters to seven creditors are not sufficient evidence to fully establish a good faith effort to resolve his debts. He has not developed a plan to repay his debts when he returns to work. I conclude these two potentially mitigating conditions do not apply.

Finally, an Applicant may mitigated security concerns under AG ¶ 20 (e) if “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 notified seven creditors that he disputed their claim he owed a debt and requested validation of the debt. He did not refuse to pay the debt. Nonetheless, the creditors failed to respond to his request for validation of their debt. He does not deny owing some of these debts, but disputes the actual amount owed. He, however, has not taken sufficient action to resolve these debts. This mitigating condition has partial applicability.

## **Guideline E, Personal Conduct**

AG ¶ 15 expresses the security concern pertaining to personal conduct:

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.

AG ¶ 16(a) describes conditions that could raise a security concern and may be disqualifying:

(a) 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.

For AG ¶ 16(a) to apply, Applicant's omission must be deliberate. The government established that Applicant omitted a material fact from his SF-86 when he answered "no" to Question 28, sections a and b, about his past due debts. This information is material to the evaluation of Applicant's trustworthiness to hold a security clearance and to his honesty. In his response, he denies, however, that he had an intent to hide information about his finances. When a falsification allegation is controverted, the government has the burden of proving the omission was deliberate. Proof of an omission, standing alone, does not establish or prove an applicant's intent or 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 intent or state of mind at the time the omission occurred.<sup>12</sup> For DC ¶ 16 (a) to apply, the government must establish that Applicant's omission, concealment or falsification in his answer was deliberate.

Applicant denied intentionally leaving out information about his overdue debts. Even though he had knowledge of past due debts, Applicant's failure to answer "yes" about his overdue debts in light of this knowledge is not proof that he intentionally falsified his SF-86. The government has not established that Applicant intended to hide his financial situation from the government. Applicant testified that he was trying to make sure his answers were correct and that he must have unintentionally inputted the incorrect information. His testimony reflects that he sought to provide honest and correct information. He provided other negative information in his SF-86, which supports his position that he did not act intentionally, but carelessly. Guideline E is found in favor of Applicant.<sup>13</sup>

### **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

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<sup>12</sup>See ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004)(explaining holding in ISCR Case No. 02-23133 at 5 (App. Bd. Jun. 9, 2004)).

<sup>13</sup>Even if I were to find the government had established disqualifying condition AG ¶ 16(a), mitigating condition AG 18(f), *the information was unsubstantiated or from a source of questionable reliability* would apply as the allegation of intentional falsification was unsubstantiated.



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. The decision to grant or deny a security clearance requires a careful weighing of all relevant factors, both favorable and unfavorable. In so doing, an administrative judge must review all the evidence of record, not a single item in isolation, to determine if a security concern is established and then whether it is mitigated. A determination of an applicant's eligibility for a security clearance should not be made as punishment for specific past conduct, but on a reasonable and careful evaluation of all the evidence of record to decide if a nexus exists between established facts and a legitimate security concern.

In reaching a conclusion, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant's financial problems became serious when he started missing time from work because of major health issues. He lost income each time his serious health problems kept him from working. In November 2007, he took a second job to help pay his bills. Only a month later, he suffered a stroke, causing him to again miss significant time from work. Once his health improved, he returned to work, but at a lower salary than previously earned.

Applicant disputes seven of the debts listed in the SOR. He, however, has not contacted any of the creditors listed in the SOR to work out a repayment plan once he returns to work nor has he made sufficient efforts to verify if the debts are his or not. In his answers to interrogatories, he said he would pay many of his debts with 90 days of returning to work, but he did not do so. Because he is currently unemployed, he has no ability to repay his old debts. He has not provided any concrete plan to resolve his debts nor has he provided documented information on how he is paying his living expenses when unemployed. Of course, the issue is not simply whether all his debts are paid—it is whether his financial circumstances raise concerns about his fitness to hold a security clearance. His debts remain unpaid and he is unemployed. His present circumstances raise a security concern because he has no income. (See AG ¶ 2(a)(1).) Based on an overall review of the evidence of record, I am unable to conclude that Applicant has mitigated the security concerns of the government even though he has established some financial mitigating conditions.

Overall, the record evidence leaves me with questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the security concerns arising from his personal conduct, but has not fully mitigated the security concerns arising under 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:	AGAINST APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	Against Applicant
Subparagraph 1.e:	Against Applicant
Subparagraph 1.f:	For Applicant
Subparagraph 1.g:	For Applicant
Subparagraph 1.h:	Against Applicant
Subparagraph 1.i:	Against Applicant
Subparagraph 1.j:	Against Applicant
Subparagraph 1.k:	Against Applicant
Subparagraph 1.l:	Against Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Subparagraph 2.b:	For Applicant

## Conclusion

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

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MARY E. HENRY  
Administrative Judge