



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



In the matter of:)
)
-----) ISCR Case No. 08-04804
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Eric H. Borgstrom, Department Counsel
For Applicant: *Pro Se*

November 12, 2008

Decision

HARVEY, Mark W., Administrative Judge:

Applicant failed to mitigate the financial considerations security concern because he did not present sufficient information about his efforts to pay or resolve his six delinquent debts, totaling about \$15,500. Personal conduct security concerns are mitigated. Access to classified information is denied.

Statement of the Case

On August 29, 2007, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP) or Security Clearance Application (SF 86) (Item 5). On July 23, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) (Item 1) to him, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended, modified and revised.¹ The SOR alleges security concerns under

¹Revised Adjudicative Guidelines promulgated by the President on December 29, 2005, apply to Applicant's adjudication and other determinations made under the Directive and Department of Defense (DoD) Regulation 5200.2-R, *Personnel Security Program* (Regulation), dated Jan. 1987, as amended.

Guidelines F (Financial Considerations) and E (Personal Conduct). The SOR detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for him, and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

On August 1, 2008, Applicant responded to the SOR allegations, and elected to have his case decided on the written record in lieu of a hearing (Item 2). A complete copy of the file of relevant material (FORM), dated September 5, 2008, was provided to him, and he was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation.² Applicant did not provide additional documents within the 30 days. On November 5, 2008, the case was assigned to me.

Findings of Fact

Applicant admitted the allegations in SOR ¶¶ 1.a (\$324), 1.c (\$486), 1.d (\$14,078), 1.e (\$55), 1.f (\$177), and 1.h (\$554) and he denied responsibility for the debts in SOR ¶¶ 1.b (\$88) and 1.g (\$33) (Item 2). He admitted the allegation in SOR ¶ 1.i, which indicated he had the resources make payments on his delinquent debts (Item 2). He said payments on the debts in SOR ¶¶ 1.e and 1.f were deferred until July, and he is seeking deferment of the payments on the debt in SOR ¶ 1.c (Item 2). He also explained that he was not paying his debts because he wanted the divorce court to decide the allocation of his marriage's assets and liabilities. His admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence of record, I make the following findings of fact.

Applicant is 51 years old.³ He has worked for a federal contractor since October 2003 as an over the road (OTR) truck driver. For the last 10 years all of his employment has been as a truck driver. He married in 1977, and divorced on May 14, 2007. His three children or stepchildren were born in 1978, 1981 and 1981. He is currently divorced. He served in the military from January to February 1976.⁴ He attended a vocational/ technical school and received a certificate in 1982. He has no police record. He has not used or trafficked in illegal drugs in the last seven years, and has never used illegal drugs while in a sensitive position.

²Defense Office of Hearings and Appeals (DOHA) transmittal letter is dated September 11, 2008, and Applicant's receipt is signed and dated September 15, 2008. The DOHA transmittal letter informed Applicant that he had 30 days after Applicant's receipt to submit information.

³Item 3 (Aug. 29, 2007 SF 86) is the source for the facts in this paragraph, unless stated otherwise.

⁴ In Section 19 of his SF 86, Applicant said he received a dishonorable discharge and explained, "The discharged (sic) was classified as dishonorable for 2 years. After the 2 years, it is now classified as Honorable." Because a dishonorable discharge cannot be approved unless a general court-martial adjudges it as part of the sentence and Applicant denied being charged with any criminal offenses in Section 23, and there is no such automatic upgrade provision for punitive discharges, I will assume Applicant is mistaken about the characterization of his brief period of military service.

Financial Considerations

Applicant admitted responsibility for six delinquent debts and denied responsibility for two debts (Item 2). The details of the six delinquent debts are outlined in the following table.

SOR ¶ and Amount	Credit Bureau Report Sept. 12, 2007	Credit Bureau Report June 24, 2008	Source
1.a--\$324 Indiv Acct	Last activity on account in July 2003	Delinquent since July 2003	Items 5 & 6
1.c--\$486 Joint Acct	Not listed	90 days delinquent	Item 6 (Second Mortgage)
1.d--\$14,078 Indiv Acct	Delinquent since March 2006	Delinquent since March 2006 ⁵	Items 5 & 6
1.e--\$55	Not listed	Delinquent since March 2008	Item 5
1.f--\$177	Not listed	Delinquent since March 2008	Item 5
1.h--\$554 Indiv Acct	Delinquent since July 2007	Not listed	Item 6

Applicant's personal financial statement (PFS) lists a gross salary of \$5,300 and a net salary of \$4,500 (Item 4). His monthly expenses total of \$1,590 included \$690 for alimony/child support/daycare (Item 4). After deduction of his monthly expenses and debt payments from his monthly income, \$892 remained (Item 4). His PFS showed the following debt and payment information:

Account Type	Debt Status	Total Amount Owed	Actual Monthly Payment
Mortgage	Not Listed	\$65,000	\$700
2 nd Mortgage (SOR ¶ 1.c)	Not Listed	\$23,000	\$243
Truck Payment	Not Listed	\$14,000	\$302
Personal Loan	Not Listed	\$13,000	\$605
Personal Loan	Not Listed	\$1,700	\$102
Jewelry Debt	Not Listed	\$400	\$45
Computer Debt	Not Listed	\$500	\$24
Total		\$117,600	\$2,021

Applicant admitted he had the means to resolve his debts. He said he had been advised not to pay the delinquent debts until his divorce court allocated responsibility for these debts (Item 2). He promised to pay the delinquent debts allocated to him stating,

⁵ The only SOR debt delinquent over \$1,000 is the \$14,078 debt alleged in SOR ¶ 1.d. Applicant explained the SOR ¶ 1.d debt resulted from 2003 vehicle repossession (Item 6). On August 1, 2008, he said he wanted the divorce court judge to decide whether half of this debt should be allocated to his former spouse (Item 2).

“Once a ruling has been made on what I am legally responsible for[,] all debts will either be paid in full or monthly payment arrangements will be made.” (Item 2 at 3).

The FORM at pages 4-5 highlights the importance to Applicant of providing documentation supporting his good faith in the resolution of his delinquent debts:

More importantly, Applicant has failed to provide any documentation to corroborate his claims, including his claim that he was advised not to pay any of these delinquent debts. In addition, there is no documentary evidence that Applicant has contacted any of these creditors either to explain the situation, make payment plans, or defer payments. Nearly all of Applicant’s alleged accounts are individual accounts and are of minimal amounts, yet Applicant has taken no actions to resolve th[ese] debts. . . There is no documentary evidence of any payments or payment arrangements made on these accounts.

The FORM emphasized at page 7, “Applicant has failed to explain and provide documentary evidence as to how he has been unable to take any steps to rectify his financial situation, given his high net monthly remainder [, p]articularly with respect to the vehicle repossession which remained unresolved since 2003.” The record does not contain any correspondence from Appellant after receipt of the FORM.

Personal Conduct (Guideline E)

Applicant disclosed he was fired from a job for a log violation in October 2006 (Item 3, Section 22). He revealed a state tax garnishment in September 2006 for \$587.91 (Item 3, Section 27). He answered, “No” on his SF 86, executed on August 29, 2007, to two questions that are relevant to the issue of whether Applicant falsified his SF 86. **Question 28a. “Your Financial Delinquencies-180 Days** In the last 7 years, have you been over 180 days delinquent on any debt(s)?” and **Question 28b. “Your Financial Delinquencies-90 Days** Are you currently over 90 days delinquent on any debt(s)?”

In his SOR response Applicant said he was truthful when he provided information on his SF 86. He explained why he did not disclose the information above about his delinquent debts:

When I answered those questions, I thought that all the debts were placed on “HOLD” status until a ruling had been made by the Judge as to what I am responsible to pay. During the course of my marriage, my former spouse handled all financial matters. It wasn’t until she filed for divorce, was I aware that some of these debts even existed. I may have [been] mistaken in how the debts were being handled but I did not deliberately withhold any information.

Item 2 at page 2.

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.

In the decision-making process, the Government has the initial burden of establishing controverted facts alleged in the SOR by "substantial evidence,"⁶ demonstrating, in accordance with the Directive, that it is not clearly consistent with the national interest to grant or continue an Applicant's access to classified information. Once the Government has produced substantial evidence of a disqualifying condition, the burden shifts to Applicant to produce evidence "to rebut, explain, extenuate, or mitigate facts admitted by Applicant or proven by Department Counsel, and [Applicant] has the ultimate burden of persuasion as to obtaining a favorable clearance decision." Directive ¶ E3.1.15. The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).⁷

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This

⁶ See Directive ¶ E3.1.14. "Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the record." ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). "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).

⁷ "The Administrative Judge [considers] the record evidence as a whole, both favorable and unfavorable, evaluate[s] Applicant's past and current circumstances in light of pertinent provisions of the Directive, and decide[s] whether Applicant ha[s] met his burden of persuasion under Directive ¶ E3.1.15." ISCR Case No. 04-10340 at 2 (App. Bd. July 6, 2006).

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.

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 [A]pplicant concerned.” See *also* Executive Order 12968 (Aug. 2, 1995), Section 3.

Analysis

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, including those described briefly above, I conclude two relevant security concerns are under Guidelines F (Financial Considerations) and E (Personal Conduct).

Financial Considerations

AG ¶ 18 articulates the security concern relating to financial problems:

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.

AG ¶ 19 provides two Financial Considerations Disqualifying Conditions that could raise a security concern and may be disqualifying in this case, “(a) inability or unwillingness to satisfy debts,” and “(c) a history of not meeting financial obligations.” Applicant’s history of delinquent debt is documented in his credit reports and in his SOR response. He has six delinquent debts totaling approximately \$15,500. His vehicle was repossessed in 2003, eventually resulting in a \$14,000 delinquent debt. These six debts remain delinquent today. The government established the disqualifying conditions in AG ¶¶ 19(a) and 19(c).

Five Financial Considerations Mitigating Conditions under AG ¶¶ 20(a)-(e) are potentially applicable:

(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's conduct does not warrant application of any mitigating conditions. He has not described any recent actions to resolve his delinquent debts. Because there are six delinquent debts, the financial problems are not isolated. The ongoing nature of the six delinquent debts for about \$15,500 debt is "a continuing course of conduct" under the Appeal Board's jurisprudence. See ISCR Case No. 07-11814 at 3 (App. Bd. Aug. 29, 2008) (citing ISCR Case No. 01-03695 (App. Bd. Oct. 16, 2002)). There is no evidence supporting a conclusion that his debts "occurred under such circumstances that it is unlikely to recur." Moreover, his delinquent debts do cast doubt on his "current reliability, trustworthiness, or good judgment." Under AG ¶ 20(b), he said he was going through a difficult divorce, but he did not show his delinquent debts were "largely beyond his control." He did not establish that he acted responsibly under the circumstances.⁸

AG ¶¶ 20(c) and 20(d) do not apply. Applicant did not provide evidence of financial counseling. Moreover, there are not "clear indications that the problem is being resolved or is under control." There is insufficient information to establish that Applicant showed good faith⁹ in the resolution of his delinquent SOR debts.

⁸"Even if Applicant's financial difficulties initially arose, in whole or in part, due to circumstances outside his [or her] control, the Judge could still consider whether Applicant has since acted in a reasonable manner when dealing with those financial difficulties." ISCR Case No. 05-11366 at 4 n.9 (App. Bd. Jan. 12, 2007) (citing ISCR Case No. 99-0462 at 4 (App. Bd. May 25, 2000); ISCR Case No. 99-0012 at 4 (App. Bd. Dec. 1, 1999); ISCR Case No. 03-13096 at 4 (App. Bd. Nov. 29, 2005)).

⁹The Appeal Board has previously explained what constitutes a "good faith" effort to repay overdue creditors or otherwise resolve debts:

In order to qualify for application of [the "good faith" mitigating condition], an applicant must present evidence showing either a good-faith effort to repay overdue creditors or some other good-faith action aimed at resolving the applicant's debts. The Directive does not define the term 'good-faith.' However, the Board has indicated that the concept of good-faith 'requires a showing that a person acts in a way that shows reasonableness,

AG ¶ 20(e) is not applicable to mitigate any debts because Applicant did not dispute any debts. He did not provide “documented proof to substantiate the basis of the dispute” with respect to any delinquent SOR debts.

Applicant did not provide correspondence with his creditors to establish he acted responsibly and in good faith. He said two delinquent debts were deferred until July 2008 (Item 2), but he did not provide evidence of the deferment. After he received the FORM, he did not provide the current status of any debts, or provide any divorce court filings showing his efforts to allocate marital debt. He should have been more diligent and made greater efforts to resolve his delinquent debt, especially after receipt of the SOR and FORM. His overall conduct with his creditors casts doubt on his current reliability, trustworthiness, and good judgment. He has not carried his burden of proving his financial responsibility. Based on my evaluation of the record evidence as a whole, I conclude no mitigating conditions fully apply.

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 describes two conditions that could raise a security concern and may be disqualifying in this case:

- (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; and,
- (b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative.

prudence, honesty, and adherence to duty or obligation.’ Accordingly, an applicant must do more than merely show that he or she relied on a legally available option (such as bankruptcy [or statute of limitations]) in order to claim the benefit of [the “good faith” mitigating condition].

(internal citation and footnote omitted) ISCR Case No. 02-30304 at 3 (App. Bd. Apr. 20, 2004) (quoting ISCR Case No. 99-9020 at 5-6 (App. Bd. June 4, 2001)).

The SOR alleges that Applicant deliberately provided false information or omitted required information on his 2007 SF 86 about his delinquent debts. Applicant admitted he did not disclose six debts that were delinquent on his 2007 SF 86. AG ¶¶ 16(a) and 16(b) apply, requiring further analysis.

AG ¶ 17(f) provides a condition that could mitigate security concerns in this case, stating, “the information was unsubstantiated or from a source of questionable reliability.” AG ¶ 17(f) fully applies to SOR ¶¶ 2.a and 2.b. Although he admitted preparing his SF 86, and failing to disclose any delinquent debts, he either did not know the status of his debts or believed he was not legally responsible for the delinquencies until he received a ruling from the divorce court.¹⁰

On his SF 86, Applicant disclosed negative information such as a garnishment, a job termination, and he erroneously disclosed a dishonorable discharge from the Army. These disclosures show his state of mind and willingness to provide derogatory information and his lack of financial and legal sophistication. I conclude he did not knowingly attempt to mislead the government about his financial situation. Applicant’s alleged falsification of his SF 86 is not substantiated.

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.

¹⁰The Appeal Board has cogently explained the process for analyzing falsification cases, stating:

(a) when a falsification allegation is controverted, Department Counsel has the burden of proving falsification; (b) proof of an omission, standing alone, does not establish or prove an applicant’s intent or state of mind when the omission occurred; and (c) a Judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning the applicant’s intent or state of mind at the time the omission occurred. [Moreover], it was legally permissible for the Judge to conclude Department Counsel had established a prima facie case under Guideline E and the burden of persuasion had shifted to the applicant to present evidence to explain the omission.

ISCR Case No. 03-10380 at 5 (App. Bd. Jan. 6, 2006) (citing ISCR Case No. 02-23133 (App. Bd. June 9, 2004)).

The ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the AGs and the whole person concept. AG ¶ 2(c).

There is some mitigating evidence under the whole person concept. Applicant's record of good employment with a government contractor weighs in his favor. There is no evidence of any security violation. Aside from the delinquent SOR debt (which is a civil, non-criminal issue), he is a law-abiding citizen. He does not have any record of involvement with illegal drugs. His other debts are current. The overall amount of his current delinquent debt at about \$15,500 is relatively low. His credit reports shows that he has paid numerous debts over the years. These factors show some responsibility, rehabilitation, and mitigation.

There is substantial evidence against mitigating Applicant's conduct. In 2003 he had a vehicle repossessed. The debt resulting from that repossession is currently delinquent and amounts to about \$14,000. His six delinquent debts now total about \$15,500. The FORM made it clear that he needed to resolve his delinquent SOR debts and provide documentation to corroborate his actions to resolve those debts. Waiting for a divorce court to address his delinquent debts, especially when his divorce apparently became final in May 2007, does not convincingly allay security concerns about financial considerations. After weighing the disqualifying and mitigating conditions, and all the facts and circumstances, in the context of the whole person, I conclude he has not mitigated the financial considerations security concerns.

I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my careful consideration of the whole person factors and supporting evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under the Guidelines. Applicant has not mitigated or overcome the government's case. For the reasons stated, I conclude he is not eligible for access to classified information.

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:	Against Applicant
Subparagraph 1.b:	For Applicant
Subparagraphs 1.c to 1.f:	Against Applicant
Subparagraph 1.g:	For Applicant
Subparagraphs 1.h and 1.i:	Against Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraphs 1.a and 1.b:	For Applicant

Conclusion

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

Mark W. Harvey
Administrative Judge