



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



In the matter of:)	
)	
-----)	ISCR Case No. 08-04977
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Tovah Minster, Esq., Department Counsel
For Applicant: *Pro se*

September 21, 2009

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 August 13, 2007. On March 17, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny his application, citing security concerns under Guideline F. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) promulgated by the President on December 29, 2005.

Applicant received the SOR on March 27, 2009, and answered it on April 30, 2009. DOHA received his response on May 9, 2009. Department Counsel was ready to proceed on June 8, 2009, and the case was assigned to an administrative judge on June 11, 2009. It was reassigned to me on July 15, 2009. DOHA issued a notice of hearing on July 21, 2009, scheduling the hearing for August 18, 2009. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 7 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibits (AX) A through C, which were admitted without objection. I kept the record open until August 26, 2009, to enable Applicant to submit additional documentary evidence. He timely submitted AX D through G, which were admitted without objection. Department Counsel's response to AX D through G is attached to the record as Hearing Exhibit I. DOHA received the transcript (Tr.) on August 24, 2009. The record closed on August 26, 2009.

Amendment of SOR

The SOR ¶ 1.q alleged three counts of larceny. Both sides agreed that SOR ¶ 1.q did not allege a financial concern and would be more appropriately alleged as personal conduct under Guideline E. I granted Department Counsel's motion, without objection from Applicant, to amend the SOR by renumbering SOR ¶ 1.q as SOR ¶ 2.a under Guideline E (Tr. 96). The amendment is handwritten on the SOR. Applicant stated he did not need or desire additional time to prepare his response to the amended SOR (Tr. 97).

Findings of Fact

In his answer to the SOR, Applicant admitted the allegations in SOR ¶¶ 1.a, 1.g, and 1.q (renumbered as ¶ 2.a). His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is 33 years old. He was married in August 1999, and has a nine-year-old child. He and his wife separated in November 2003, but are not divorced (Tr. 31).

Applicant served on active duty in the Army from September 1994 to November 2003. He held a security clearance while on active duty, but it was withdrawn in January 2003, after he received nonjudicial punishment under Article 15, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 815, for wrongful appropriation in violation of Article 121, UCMJ, 10 U.S.C. § 921 (GX 7). The misconduct occurred when Applicant found a wallet in a parking lot. The wallet contained identification cards, a credit card, and \$63. He decided to take the cash in the wallet because he needed money. At the time, he was the sole support for five people: himself, his wife and their child, and two children from his wife's previous relationship. He kept the cash and discarded the wallet and its other contents. After a few hours, he reconsidered, contacted the Military Police, and helped them retrieve the wallet (Tr. 34-38). His misconduct also was the basis for his administrative discharge from the Army. He received a general discharge under honorable conditions (AX E at 2).

After his discharge in November 2003, Applicant was unemployed until May 2004. He and his son lived with his parents some of the time and in a friend's apartment some of the time (Tr. 38-40). He then worked at various jobs but was unemployed from June to October 2005. He was employed until December 2005 and again unemployed until July 2006, when he was hired by a federal contractor as a systems analyst. He attended college part-time from August 2005 to March 2006. When he dropped out of school, his student loans (SOR ¶ 1.a) became due. He began working as a senior computer systems analyst for his current employer in January 2007. He does not have a clearance (Tr. 13-14, 24).

Applicant testified he had negotiated a payment agreement for the tuition debt alleged in SOR ¶ 1.a, and he made two or three payments of \$150 (Tr. 68). He admitted this debt in his answer to the SOR. He did not produce any documentation of the payment agreement or his payments at the hearing or in his post-hearing submission.

The debt for unpaid rent (SOR ¶ 1.b) arose while Applicant was in the Army. He terminated his lease when he was reassigned overseas, and he provided his landlord with a copy of his orders. The landlord sued, but the lawsuit was dismissed when neither party appeared. Applicant was unaware of the lawsuit until he found out there was an eviction on his record that made him unable to rent an apartment after he was discharged from the Army (Tr. 56). The landlord obtained a second judgment for a substantially reduced amount in March 2008, long after Applicant left the Army. The original landlord is no longer in business and Applicant has been unable to contact him (Tr. 54-59). Applicant has not attempted to negotiate with the collection agency to which the debt was referred.

Applicant testified that the debts alleged in SOR ¶¶ 1.c, 1.d, 1.f, 1.h, 1.k, 1.l, and 1.m were for accounts opened by his wife in his name and without his permission after they separated. He has not disputed any of the debts (Tr. 100-01). The account listed in SOR ¶ 1.n was opened by his wife with his permission, and it is unpaid (Tr. 85). He testified he placed a security alert on his credit record in 2007, and his wife has not been able to open any more accounts in his name (Tr. 89). The security alert is reflected on his credit report dated September 15, 2007 (GX 4 at 1).

The debt alleged in SOR ¶ 1.e arose when Applicant agreed to pay his parents' utility bill while he was living with them, and he put the account in his name. His parents have resumed paying their own utilities, but Applicant has not paid the charges that accrued while he was responsible for the account (Tr. 74-75).

The debt alleged in SOR ¶ 1.g is a delinquent student loan and is unpaid. Applicant admitted this debt in his answer to the SOR.

The debt alleged in SOR ¶ 1.i was for a video that was not returned (Tr. 79-80). Applicant testified the account was resolved, but he presented no documentation at the hearing or in his post-hearing submission.

The debt alleged in SOR ¶ 1.j arose when Applicant’s mother opened an account in his name, with his permission, to purchase a washer and dryer. She promised to make the payments and told him she was making the minimum payment each month (Tr. 80-82). The debt is unresolved.

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

SOR	Debt	Amount	Status	Evidence
1.a	College books and fees	\$1,426	Unpaid	GX 2 at 2; Tr. 68
1.b	Unpaid Rent	\$7,197	Judgment entered Mar. 2008 for \$2,312; unpaid	AX A; Tr. 54-59
1.c	Cable Service	\$1,113	Wife’s debt; unpaid	Tr. 70-71
1.d	Telephone	\$351	Wife’s debt; unpaid	Tr. 72-73
1.e	Utilities	\$309	Unpaid	Tr. 74
1.f	Cell phone	\$819	Wife’ debt; unpaid	Tr. 75-76
1.g	Student loan	\$2,781	Unpaid	Tr. 77-78
1.h	Telephone	\$307	Wife’s debt; unpaid	Tr. 78-79
1.i	Video rental	\$210	No documentation of settlement	Tr. 79-80
1.j	Credit card	\$1,810	Unpaid	Tr. 80-81
1.k	Cell phone	\$2,077	Wife’s debt; unpaid	Tr. 83-84
1.l	Telephone	\$383	Wife’s debt; unpaid	Tr. 84
1.m	Telephone	\$78	Wife’s debt; unpaid	Tr. 84
1.n	Telephone	\$477	Unpaid	Tr. 85
1.o	Charge account	\$548	Disputed	AX G; Tr. 87-88
1.p	Charge account	\$274	Disputed	AX G

Applicant currently earns about \$52,000 per year, and his net pay is about \$36,000 to \$38,000. He does not own a home or a car. He lives paycheck-to-paycheck. He spends about \$680 per month for child care and sends his mother \$200-\$250 every two weeks. He is contributing to a retirement account and has about \$200 in savings (Tr. 46-52).

Applicant’s parents recently agreed to accept legal custody of his son and care for him (Tr. 90-91). This agreement will relieve Applicant of the monthly expenditure of \$680 for child care. Applicant also is advertising for a roommate to help pay the rent on his apartment (Tr. 63-64). He testified he intends to use the additional income to pay off his debts.

Policies

“[N]o one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to

“control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information.” *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the revised adjudicative guidelines (AG). These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Clearance decisions must be made “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is not necessarily a determination as to the loyalty of the applicant. It is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). “[S]ecurity

clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Guideline F, Financial Considerations

The SOR alleges 15 delinquent debts totaling about \$20,000. Applicant has admitted the two largest debts. The concern under this guideline is set out in AG ¶ 18 as follows:

Failure or inability to live within one’s means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual’s reliability, trustworthiness and ability to protect classified information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

Three disqualifying conditions under this guideline are relevant. AG ¶ 19(a) is raised by an “inability or unwillingness to satisfy debts.” AG ¶ 19(c) is raised by “a history of not meeting financial obligations.” AG ¶ 19(e) is raised by “consistent spending beyond one’s means, which may be indicated by excessive indebtedness, significant negative cash flow, high debt-to-income ratio, and/or other financial analysis.” Applicant’s financial history raises these three disqualifying conditions, shifting the burden to him to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

Security concerns based on financial problems can be mitigated by showing that “the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual’s current reliability, trustworthiness, or good judgment.” AG ¶ 20(a). Applicant’s delinquent debts are numerous and not yet resolved. Some of the debts (SOR ¶¶ 1.c, 1.d, 1.f, 1.h, and 1.k -1.m) were incurred by his wife without his knowledge or consent. This circumstance is unlikely to recur. I conclude AG ¶ 20(a) is applicable to the debts incurred by his wife without his knowledge or consent.

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. Applicant’s unemployment from the date of his discharge from the Army in November 2003 until May 2004 was due to

his own misconduct, but his subsequent periods of unemployment and his wife's fraudulent conduct were beyond his control. He minimized his housing expenses by living with parents or friends. He has been continuously employed since July 2006, but has made little effort to resolve his financial situation. He has not disputed or resolved the debts he attributes to his wife's fraudulent behavior. I conclude AG ¶ 20(b) is established for the debts incurred by his wife without his knowledge or consent.

Security concerns under this guideline also can be mitigated by showing that "the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control." AG ¶ 20(c). This mitigating condition is not established because Applicant has not sought or received counseling since his discharge from the Army and his financial problems are not 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 each and every debt alleged in the SOR. See ADP Case No. 06-18900 (App. Bd. Jun. 6, 2008). An applicant need only establish a plan to resolve financial problems and take significant actions to implement the plan. ISCR Case No. 07-06482 at 2-3 (App. Bd. May 21, 2008). There also is no requirement that an applicant make payments on all delinquent debts simultaneously, nor is there a requirement that the debts alleged in the SOR be paid first. *Id.*

Applicant testified he was making payments on the debt alleged in SOR ¶ 1.a and that the debt to the video store was resolved, but he produced no documentation to support his testimony. The remaining debts are unresolved. I conclude AG ¶ 20(d) is not established.

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 has disputed the debts alleged in SOR ¶¶ 1.o and 1.p and provided documentation of the dispute. AG ¶ 20(e) is established for these two debts.

Guideline E, Personal Conduct

The SOR alleges that Applicant wrongfully appropriated another person's wallet and its contents while he was in the Army, and he has admitted this allegation. The concern under this guideline is set out in AG ¶ 15 as follows: "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."

Three disqualifying conditions under this guideline are relevant to Applicant's dishonest conduct:

AG ¶ 16(c): [C]redible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information.

AG ¶ 16(d): [C]redible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information in the workplace.

AG ¶ 16(e): [P]ersonal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as . . . engaging in activities which, if known, may affect the person's personal, professional, or community standing.

Applicant's conduct raises all three of these disqualifying conditions.

Security concerns raised by personal conduct may be mitigated if "the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment. AG ¶ 17(c). Applicant's commander appeared to treat his offense as minor, disposing of it by nonjudicial punishment rather than a court-martial. Whether that disposition was in recognition of Applicant's nine years of honorable service cannot be determined from this record. Nevertheless, it was an isolated incident that occurred almost nine years ago. Applicant has not repeated his dishonest conduct despite his continuing need for additional income. Under all the circumstances, his conduct does not cast doubt on his current reliability, trustworthiness, or good judgment. I conclude AG ¶ 17(c) is established.

Whole Person Concept

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

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

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole person concept. I have incorporated my comments under 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 was candid and sincere at the hearing. He was remorseful for his dishonest conduct while in the Army. 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 mitigated the security concerns based on his personal conduct, 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 grant him eligibility for access to classified information.

Formal Findings

I make the following formal findings on the allegations set forth in the SOR, as required by Directive ¶ E3.1.25:

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

Subparagraphs 1.a-1.b:	Against Applicant
Subparagraphs 1.c-1.d:	For Applicant
Subparagraph 1.e:	Against Applicant
Subparagraph 1.f:	For Applicant
Subparagraph 1.g:	Against Applicant
Subparagraph 1.h:	For Applicant
Subparagraph 1.i-1.j:	Against Applicant
Subparagraphs 1.k-1.m:	For Applicant
Subparagraph 1.n:	Against Applicant
Subparagraphs 1.o-1.p:	For Applicant

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

Subparagraph 2.a:	For Applicant
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Conclusion

In light of all of the circumstances, 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.

LeRoy F. Foreman
Administrative Judge