



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



In the matter of:)
)
) ISCR Case No. 08-06389
)
)
Applicant for Security Clearance)

Appearances

For Government: Emilio Jaksetic, Esquire, Department Counsel

For Applicant: *Pro se*

June 4, 2009

Decision

O'BRIEN, Rita C., Administrative Judge:

Based on a review of the case file, pleadings, exhibits, and testimony, I conclude that Applicant has not mitigated the security concerns raised under the guideline for financial considerations. Accordingly, his request for a security clearance is denied.

Applicant requested a security clearance by submitting an Electronic Questionnaire for Investigations Processing (e-QIP) on December 20, 2007. After reviewing the results of the ensuing background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) were unable to make a preliminary

affirmative finding¹ that it is clearly consistent with the national interest to grant Applicant's request.

On December 5, 2008, DOHA issued to Applicant a Statement of Reasons (SOR) that specified the basis for its decision: security concerns addressed in the Directive under Guideline F (Financial Considerations) of the Revised Adjudicative Guidelines (AG).² In his Answer to the SOR, signed and notarized on January 8, 2009, Applicant admitted all allegations except allegations 1.c. and 1.d. He also requested a hearing before an administrative judge.

Department Counsel was prepared to proceed on February 6, 2009, and the case was assigned to me the following day. DOHA issued a Notice of Hearing on February 25, 2009, and I convened the hearing as scheduled on March 18, 2009.

During the hearing, the government offered 13 exhibits, marked as Government Exhibits (GE) 1 through 13, which were admitted. Applicant testified and offered 21 exhibits, which were admitted as Applicant's Exhibits (AE) A through U. I held the record open to allow Applicant to submit additional documents. On March 31, 2009, Applicant offered two additional documents. Department Counsel forwarded the documents, and I admitted them into the record as AE V and W. DOHA received the transcript on March 26, 2009.

Findings of Fact

After a thorough review of the pleadings, Applicant's response to the Statement of Reasons, and the record evidence, I make the following additional findings of fact.

Applicant, 50 years old, earned a bachelor's degree in business in 1982. He married in 2002 and has a three-year-old son and a two-month old daughter (Tr. 46). He also has a 20-year-old stepchild (GE 1).

¹ Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.

² Adjudication of this case is controlled by the Revised Adjudicative Guidelines, approved by the President on December 29, 2005, which were implemented by the Department of Defense on September 1, 2006. The Revised Adjudicative Guidelines supersede the guidelines listed in Enclosure 2 to the Directive, and they apply to all adjudications or trustworthiness determinations in which an SOR was issued on or after September 1, 2006.

Applicant has worked as a security officer for several firms since 1998 (GE 1).³ Currently, he holds two positions. He is employed full-time by a security firm, and also part-time at another security firm (Tr. 51-53). Applicant earns \$30,000 annually in his full-time position. However, his W-2 for 2008 shows annual income of \$37,618 from this position because he works overtime (AE V; Tr. 52). He earns \$13.50 per hour at his part-time position. His income from this job varies depending on the number of hours he works; for the first two weeks of March 2009, he earned a gross income of \$972, and net income of \$840 (AE V). Applicant estimates his total 2009 income from both jobs will be approximately \$50,000 to \$60,000 (Tr. 89-90).

Applicant's wife also works. However, she stopped working during her first pregnancy in 2006 (GE 3). She is currently on leave because of the recent birth of their second child. Applicant expects that she will return to work in a few months. He testified that she made \$17,000 in 2008, but her 2008 W-2 shows gross annual earnings of \$8,629.50 (AE W). Applicant testified that when his wife works, he has about \$200 or more remaining each month after paying expenses, but when she is not working, he does not have money remaining at the end of the month. (Tr. 97-98). However, his Personal Financial Statement of September 2008 shows that, even with his spouse's salary of \$1,300 per month included, Applicant had a negative monthly remainder of \$482 (GE 2).

Applicant denied allegation 1.c., which alleges that he owes a debt of \$4,461 to a leasing company. In 2004, Applicant operated a small business chartering his boat for hire. He testified that he was pressured into a contract with a leasing company under which the company would provide him with a website for his business, internet advertising, and a credit card machine if he paid a fee of \$100 per month. He realized after several months that the business would not be profitable, and sought to be released from the contract. The company refused and claimed that he owed them approximately \$4,248. Applicant claimed that, "I was pressured into signing a misleading contract with the promise of huge rewards." (GE 2). In May 2005, a law firm hired by the company issued a demand letter seeking full payment. Applicant believes that he does not owe this debt because his agreement was based on false information from the company (GE 12; AE E; Tr. 54-58).

Applicant also denied allegation 1.d., relating to a state tax lien. He lives in State B, and bought a boat in State C. He testified that he registered the boat in State B, paid the sales tax, and uses the boat there. However, he used a marina in State A when he was operating his charter boat business (Tr. 64-65). When he realized the charter business was not profitable, he moved the boat to State B. In December 2004, State A informed him that he owed \$1,261.90 because "use has been established in [State A]; therefore, the tax balance is due." In February 2005, State A filed a judgment against

³ Applicant testified that he was unemployed for six months around 2008, but his security clearance application did not indicate any periods of unemployment (GE 1; Tr. 78).

Applicant for \$1,552 in unpaid tax (AE F; G). He has not paid the tax. He attempted to pay a penalty, but it was not accepted (Tr. 105). He does not believe he owes tax to State A: "This bill is for sales taxes--however they are not entitled since a (*sic*) live in [State B]--I kept the boat in [State A] waters—they are only entitled to a penalty or fine." (GE 2; 5; 12; Tr. 58-64).

Applicant retained a debt-payment company from 2004 to 2006 to help resolve his debts (GE 2; 3; Tr. 66).⁴ He planned to pay his credit card debts, hospital bills related to a miscarriage and his son's birth in 2006, and other debts through a three-year payment plan (GE 2; Tr. 37). He also hoped to improve his credit score so that he could lower the interest rate he paid on his home mortgage (Tr. 42). Applicant paid approximately \$3,000 in up-front fees, at a rate of \$225 per month (AE D, N, T; Tr. 41). The company promised to negotiate settlements of 20 to 50 percent less than the amount he owed (AE A). In 2004, the company obtained from one creditor a lower settlement offer than Applicant had obtained (AE U).⁵ Applicant thought that the company would have the same success with his other creditors. He decided to stop paying the creditors, with the expectation of receiving settlement offers (Tr. 39). However, several creditors, including the credit card companies, would not agree to settle and the debt-payment company failed to negotiate any other settlements. The debt-payment company did not return Applicant's \$3,000 fee (Tr. 40-41), and he severed his relationship.

The debt-payment company also told Applicant that paying the credit card debts is not a priority. Applicant agrees, stating that they charge exorbitant interest (Tr. 44). He stated in September 2008 that he was "unable to pay any credit cards due to financial reasons. Also, when I was able to pay they refused a settlement and put me deeper into debts [*sic*]." (GE 3). Applicant stated in his Interrogatory response that he would "try to offer a settlement in the future if I can afford it and if they take it." (GE 2). However, at the hearing, when asked if he had done anything since he stopped using the debt-payment company, he answered, "No, I basically let time go by, you know, and see what's going happen [*sic*]." (Tr. 99).

Applicant filed a Chapter 7 bankruptcy petition in 1999, before his current marriage, which was discharged the same year (GE 4). His current debts became delinquent because he has had two children since 2006, and his income has not significantly increased (Tr. 99). He maintains that he showed good faith by using the debt-payment company and obtaining a hardship loan from his 401k to make his mortgage payment (Tr. 43; AE S). His failure to pay his debts resulted from inability, rather than a refusal to pay (Tr. 47; 120). He believes "some of the small debts can be paid if I continue working and if has (*sic*) a positive effect on keeping my clearance."

⁴ AE O shows that payments were deducted from Applicant's account in March and April 2007 as well.

⁵ This debt is not alleged in the SOR.

(GE 2). He also testified at the hearing that he “is willing to pay if I can keep the clearance.” (Tr. 127).

The Statement of Reasons alleges 12 debts, totaling \$23,232. Applicant's delinquencies started in 2004 (allegation 1.e.) and continued to occur until at least 2007 (allegation 1.i.) (GE 12).

- **Medical debts** (allegations 1.b., 1.j., and 1.k.) totaling \$2,266
- **Credit cards** (allegations 1.e. through 1.i.) – totaling \$13,983
- **Cable and telephone debts** (allegations 1.l. and 1.m.) – totaling \$970
- **Leasing company** (allegation 1.c.) – totaling \$4,461
- **State tax lien** (allegation 1.d.) – totaling \$1,552.

Policies

Each security clearance decision must be a fair, impartial, and common-sense determination based on examination of all available relevant and material information, and consideration of the pertinent criteria and adjudication policy in the Revised Adjudicative Guidelines (AG).⁶ Decisions must also reflect consideration of the “whole person” factors listed in ¶ 2(a) of the Guidelines.

The presence or absence of a disqualifying or mitigating condition under a Guideline does not determine a conclusion for or against an Applicant. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information. In this case, the pleadings and the information presented by the parties require consideration of the security concerns and adjudicative factors addressed under Guideline F (Financial considerations).

A security clearance decision is intended only to resolve the question of whether it is clearly consistent with the national interest⁷ for an Applicant to have access to classified information. The government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance. Additionally, the government must be able to prove controverted facts alleged in the SOR. If the government meets its burden, it then falls to the Applicant to

⁵ Directive. 6.3.

⁶ See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

refute, extenuate or mitigate the government's case. Because no one has a "right" to a security clearance, an Applicant bears a heavy burden of persuasion.⁸ A person who has access to classified information enters into a fiduciary relationship with the government based on trust and confidence. Therefore, the government has a compelling interest in ensuring each Applicant possesses the requisite judgment, reliability and trustworthiness to protect the national interests as his or her own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an Applicant's suitability for access in favor of the government.⁹

Analysis

Guideline F, Financial Considerations

AG ¶18 expresses the security concern pertaining to financial considerations:

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 over-extended is at risk of having to engage in illegal acts to generate funds. Compulsive gambling is a concern as it may lead to financial crimes including espionage. Affluence that cannot be explained by known sources of income is also a security concern. It may indicate proceeds from financially profitable criminal acts.

The facts presented support application of AG ¶19(a) (*inability or unwillingness to satisfy debts*) and AG ¶19(c) (*a history of not meeting financial obligations*). Applicant was unable to meet his debts because of a combination of facts: he earned a relatively low income; his wife did not work during her two pregnancies; and his income did not keep pace with the rising expense of his growing family. However, Applicant's statements also indicate that he is unwilling to pay certain debts: the high credit card debts, because the companies charge exorbitant interest rates; the leasing company debt, because the company did not perform as he expected; and State A, because it should not have taxed him for using his boat in their waters. Both elements of AG ¶19(a)—inability and unwillingness—apply. AG ¶19(c) also applies because many of Applicant's debts, which started becoming delinquent around 2004, still appear in his

⁷ See *Egan*, 484 U.S. at 528, 531.

⁸ See *Egan*; Revised Adjudicative Guidelines, ¶ 2(b).

latest credit bureau reports, and remained unpaid as of the date of the hearing, demonstrating a five-year history of failure to meet his financial obligations.

The financial considerations guideline also includes factors that can mitigate disqualifying conditions. The following mitigating conditions are relevant:

AG ¶20(a): the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;

AG ¶20(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;

AG ¶20(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;

AG ¶20(d): the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

Applicant's debts are numerous, amounting to approximately \$23,000, and they are recent, as they currently remain unpaid. Given his negative monthly net remainder in his September 2008 financial statement, and the fact that his wife might not be returning to work for some time, I conclude that Applicant's debts will likely continue. In addition, Applicant's statement that he has simply let time pass, doing nothing about the debts, raises questions as to his trustworthiness and reliability. AG ¶20(a) does not apply.

The key element in mitigating condition AG ¶20(b) is that the factors that caused the financial problems were beyond an Applicant's control. The circumstances that affected Applicant's ability to meet his debts were his growing family, the resulting increased expenses, and his wife's inability to work during her pregnancies. Once Applicant married in 2002, he could anticipate these events. They are not the kind of unforeseen events--such as death or unemployment--that are contemplated under AG ¶20(b) and this mitigating condition cannot be applied.

AG 20 ¶(c) and 20(d) relate to efforts to resolve debts. Although Applicant has not sought financial counseling, he did make a good-faith effort to deal with his debts in 2004, when he retained a debt-payment service. He made payments for approximately two years, paying a total of about \$3,000. AG 20 ¶(d) applies. However, the company did not obtain settlements, and the relationship ended with none of his debts resolved. Applicant remains in debt for more than \$20,000. AG 20 ¶(c) does not apply. Overall, the mitigation available is under AG 20 ¶(d) is insufficient to overcome the fact that he

remains substantially indebted, and has not taken any further steps in the past three years to meet his financial obligations. I resolve Guideline F against Applicant.

Whole Person Analysis

Under the whole person concept, an administrative judge must evaluate the Applicant's security eligibility by considering the totality of the Applicant's conduct and all the 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.

AG ¶ 2(c) requires that the ultimate determination of whether to grant a security clearance must be an overall common-sense judgment based upon careful consideration of the guidelines and the whole person concept. Under each guideline, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case.

At the time his debts started to become delinquent in 2004, Applicant was a mature and experienced adult approximately 45 years of age. His actions and his attitude toward his debts raise questions as to his good judgment. He denies responsibility for certain debts that appear to be legitimate debts: the leasing company debt, where he contractually obligated himself to pay for services; the credit card debt, which he disputes because of the additional interest that has been added to the original debt; and the state tax on his boat, which he disputes even though he agrees that he operated his chartering business in the waters of that state. In addition, Applicant appears to believe that he should only pay debts when the creditor agrees to settle for significantly less than the balance owed. His statement that he has let his debts go unpaid, waiting to see what would happen, indicates a negligent attitude about his legitimate financial obligations, and a likelihood that they will remain unpaid. Finally, his statement that he would make payments on his debts if it would result in obtaining a security clearance underscores that he is motivated by his own desires rather than by a desire to meet his obligations. His attitude and conduct demonstrate a lack of reliability and good judgment.

Overall, the record evidence fails to satisfy the doubts raised about Applicant's suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the security concerns arising from the cited guideline.

Formal Findings

Paragraph 1, Guideline F AGAINST Applicant

 Subparagraph 1.a through 1.m. Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the interests of national security to allow Applicant access to classified information. Applicant's request for a security clearance is denied.

RITA C. O'BRIEN
Administrative Judge