



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



In the matter of:)	
)	
SSN:)	ISCR Case No. 08-06926
)	
Applicant for Security Clearance)	

Appearances

For Government: Emilio Jaksetic, Esquire, Department Counsel
For Applicant: William F. Savarino, Esquire

May 28, 2010

Decision

METZ, John Grattan, Jr., Administrative Judge:

On 12 February 2009 the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline F, Financial Considerations.¹ Applicant answered the SOR 3 March 2009, requesting a hearing. DOHA assigned the case to me 2 April 2009, and I convened a hearing 21 May 2009. DOHA received the transcript (Tr.) 2 June 2009.

Findings of Fact

Applicant denied the SOR allegations, except for 1.g.–1.j., on some of which he disputed the balance owed. He is a 42-year-old test engineer employed by a defense contractor since September 2007. He has not previously held a clearance. He has a

¹DOHA acted under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1990), as amended; Department of Defense (DoD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive), and the adjudicative guidelines (AG) effective within the DoD on September 1, 2006.

bachelor's degree in management, a master's degree in business administration, and is working on a master's degree in information technology. He also holds a real-estate license.

The SOR originally alleged, and government exhibits confirmed, 15 delinquent debts totaling nearly \$68,000. Applicant admitted four debts (1.g–1.j) totaling nearly \$34,000, although he disputes some of the amounts alleged to be delinquent.

Applicant's evidence (GE 2, AE A) proved that he paid the debts at SOR 1.a, 1.c, 1.d,² and 1.m before the SOR was issued.³ Accordingly, I resolve those allegations for Applicant. Applicant asserts, with incomplete corroboration, that a payment made to a medical collection agent (AE A, Tab B) represents payment for the medical debts alleged at SOR 1.b, 1.f, and 1.k. On balance, I conclude the evidence supports Applicant's claim and find those three allegations for him.⁴ Applicant also provided evidence that he disputed the debts at SOR 1.g, 1.j, n, and 1.o, without response from the credit reporting agency (AE A, Tab O, P).

Applicant's financial difficulties are rooted in a business venture he undertook with a partner in 1998 or 1999. At the time, Applicant was selling real estate. He and his partner decided to purchase marginal properties, perform minimal repairs on the properties to make them habitable, rent them for 2–2½ years, then sell them for a substantial profit—assuming substantial appreciation on the properties. This is commonly known as “flipping,” although Applicant and his partner seem to have held the properties longer than usual, reflecting their minimal investment in repairs or renovations.

Initially, Applicant and his partner operated informally as a partnership. He claims, without corroboration, that they incorporated in 2004 or 2005, but none of the debts alleged in the SOR appear to be debts of the corporation. Applicant funded this enterprise with his savings, credit cards, lines of credit, and his income from his real estate job. His partner apparently relied on similar funding sources. After a few successful purchases, the enterprise became his sole source of income.

²In March 2008, the creditor offered a settlement based on prompt payment of approximately half the amount due, but Applicant was unable to take advantage of the offer. However, the creditor repeated the offer in September 2008, albeit at a higher figure, and Applicant paid the agreed amount in September 2008.

³Although they were paid after Applicant's April 2008 interview with a government investigator.

⁴AE A, Tab B documents a \$738 payment on a delinquent medical account in August 2008. The collection agent was collecting a medical debt for a provider who is not identified in the record credit reports (GE 3, 4), using what appears to be his internal account number for collection purposes. Thus, the payment acknowledgment does not confirm Applicant's claim that three accounts owed to the same creditor had been combined. GE 3 shows three separate account numbers, but does not identify the medical provider, each account having already gone to an unidentified collection agent. GE 4 shows only the account at SOR 1.b. However, the debt was reported in January 2008, well before Applicant's August 2008 payment. Nevertheless, given the vagaries of credit reports, the total debt paid by Applicant is consistent with the totals alleged in SOR 1.b, 1.g, and 1.k.

Applicant estimates that he and his partner eventually bought as many as 20 houses, although Applicant also bought some properties as an individual. Initially, they obtained commercial mortgages for their purchases, but eventually went to seller financing. According to Applicant, he and his partner would sell two or three properties per year, pocket enough money to cover living expenses for the next year, and put the rest of the profit into more properties. They appear to have not made any provision for paying their annual income taxes.

Applicant has given varying explanations for his financial difficulties. In his April 2008 interview (GE 2), he stated that he and his partner overextended themselves and became unable to carry the debt load they had taken on to improve the properties. He also acknowledged owing most of the debts in the SOR. He had previously disclosed over \$52,000 in delinquent debt on his clearance application (GE 1), including a debt (SOR 1.o) that he later claimed was not his. In April 2008, Applicant was still upbeat about the prospects of selling his remaining properties and satisfying his delinquent debt.

At hearing, he largely attributed his financial difficulties to the decline in the housing market in the mid-2000s. Applicant and his partner began to notice declines in the market in 2004 or 2005. Properties that had sold in a matter of days with minimal investment were now requiring six months to sell—and repairs and renovations of more than \$12,000 to get them market ready.

Applicant's August 2008 personal financial statement (GE 2) reflects \$2,500 positive monthly cash flow, not including any payments on his delinquent accounts. His ongoing financial difficulties are best exemplified by his efforts to address four large debts that remain outstanding. He reached a settlement agreement for each, but did not make the payments as promised despite the apparent means to do so.

Applicant owed about \$7,000 on a revolving account (SOR 1.e) that he used to finance repairs on his properties. In August 2008, he reached an agreement with the creditor to settle the account for less than half the outstanding balance if he would make 36 monthly payments of \$90 beginning in September 2008 (GE 2; AE A, Tab E). Applicant documented one \$90 payment made in August 2008 (GE 2). Thereafter, he has only documented payments of \$15 in January 2009 and March 2009 (AE A, Tab E). He made one other payment, illegible in both date and amount.

Applicant owed nearly \$26,000 on a revolving account (SOR 1.h) that he also used to finance repairs on his properties. In August 2008, the creditor agreed to settle the account for 50% of the balance due, conditioned on receipt of monthly \$260 payments at the end of August, September, and October 2008, with a lump-sum payment of \$12,180 by the end of November 2008 (GE 2; AE A, Tab H). At the time Applicant agreed to this repayment schedule, he anticipated the imminent sale of the property. He made the scheduled August 2008 payment of \$260, but the sale did not materialize. Applicant then rented the property. He made token payments to the creditor in October 2008 (\$60), January 2009 (\$15), and March 2009 (\$15). He documented one other

payment, illegible in both date and amount. He has not documented his claim that the creditor has agreed to accept token payments until he can sell the property.

Applicant was over \$3,100 behind on a mortgage (SOR 1.i) of \$125,000. In August 2008, he made his regular monthly payment (\$1,270) when he owed a total of \$4,119 (GE 2). In March 2009, the creditor offered Applicant a temporary repayment plan to bring the account current, conditioned on a \$2,000 lump-sum payment by April 2009 and 12 \$1,500 payments beginning May 2009 (AE A, Tab I). Applicant claims, without corroboration, to have made the required payments.

Applicant owed over \$17,000 to a collection agent for state income taxes (SOR 1.1) Applicant incurred because he did not withhold any income taxes when he sold properties for a profit. He made payments to the creditor in early July 2008 (\$300), late July 2008 (\$250), August 2008 (\$250), and mid-December 2008 (\$250). He documented two other payments, both illegible in date and amount. Despite these payments, the mid-December 2008 statement from the creditor reflects that Applicant still owes over \$17,000. He made a token \$15 payment in March 2009 (AE A, Tab L). Applicant asserts, without corroboration, that he owes less than the \$17,000 alleged because the state seized a \$6,000 income tax refund for tax year 2007. He also asserts, without corroboration, that his tax accountant believes that losses in later tax years will satisfy any outstanding tax balance (Tr. 59-60, 96).

Applicant still owns two properties with his partner. They are upside down (owe more than they can sell the property for) on the mortgages, but both properties are rented for enough to cover the mortgage payments. Applicant owns four properties by himself, one of which he lives in. The other three are rented for enough to cover the mortgage payments. Of these four houses, he believes he is upside down in two and would break even if he sold the other two.

Applicant got some financial counseling a couple of weeks before the hearing, and the counselor recommended Applicant continue to work directly with his creditors. He has a current financial statement (AE A, Tab Q) that shows \$1,000 positive monthly cash flow after making \$1,900 monthly debt payments to unidentified creditors. Applicant's supervisor since August 2007 considers him an honest and trustworthy employee, and recommends him for his clearance. He is aware of the allegations of the SOR, but has not seen any indications of financial issues at work (AE A, Tab R).

Applicant acknowledges being legally and morally obligated to pay his delinquent debts. For this reason, he has not sought bankruptcy protection. He recently rented out a room in his house to defray expenses, and is economizing by not taking vacations as he did in the past. However, he admits that he will not really be able to resolve his remaining debts unless the housing market improves and he is able to sell his rental properties.

Policies

The adjudicative guidelines (AG) list factors to be considered in evaluating an applicant's suitability for access to classified information. Administrative judges must assess both disqualifying and mitigating conditions under each issue fairly raised by the facts and circumstances presented. Each decision must also reflect a fair and impartial commonsense consideration of the factors listed in AG ¶ 2(a). The presence or absence of a disqualifying or mitigating condition is not determinative for or against applicant. However, specific adjudicative guidelines should be followed where a case can be measured against them, as they represent policy guidance governing the grant or denial of access to classified information. Considering the SOR allegations and the evidence as a whole, the relevant adjudicative guideline is Guideline F (Financial Considerations).

Security clearance decisions resolve whether it is clearly consistent with the national interest to grant or continue an applicant's security clearance. The government must prove, by something less than a preponderance of the evidence, controverted facts alleged in the SOR. If it does so, it establishes a *prima facie* case against access to classified information. Applicant must then refute, extenuate, or mitigate the government's case. Because no one has a right to a security clearance, the applicant bears a heavy burden of persuasion.

Persons with access to classified information enter 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 judgement, reliability, and trustworthiness of those who must protect national interests as their 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.⁵

Analysis

The Government established a case for disqualification under Guideline F, and Applicant did not mitigate the security concerns. Applicant has significant delinquent debt dating back to 2004-5 for which he has no ameliorating explanation.⁶ Setting aside for the moment the debts he now contests despite having previously acknowledged them to be his, and viewing the evidence in the light most favorable to Applicant, he has financial difficulties that he has not addressed in meaningful ways. In the final analysis, he has four delinquent debts totaling nearly \$54,000 that he acknowledges owing, for which he had repayment agreements that he could not meet, and that he cannot realistically expect to pay unless the housing market recovers substantially or his tax accountant is correct in his opinion that Applicant's remaining tax liability will be offset by later year losses.

⁵See, *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

⁶¶ 19.(a) inability or unwillingness to satisfy debts; (c) a history of not meeting financial obligations.

The mitigating factors for financial concerns provide Applicant little relief. His financial difficulties are both recent and multiple, and did not occur under circumstances unlikely to recur.⁷ Assuming for the moment that the debts can be attributed to the decline in the housing market, and thus due to circumstances beyond his control, he has only partially acted responsibly in addressing his debts.⁸ He has repeatedly entered into repayment agreements with his creditors, only to make one (or a few) of the required payments before devolving to token payments. While the SOR 1.h debt had a lump-sum payment that was clearly contingent on Applicant's ability to sell the related property, the other agreed-upon payments seemed well within Applicant's financial means. Yet, he has not adequately explained his inability to keep up with, for example, a \$90 monthly payment.

The above analysis assumes that Applicant's financial difficulties were largely due to the decline in the housing market, and that Applicant had entered into a prudent financial enterprise with his partner. However, neither of these assumptions are foregone conclusions. The record evidence shows that whatever the decline in the housing market, Applicant and his partner had overextended themselves in investing in properties. Further, the evidence shows that despite degrees in management and business administration, and a real estate license, Applicant and his partner invested in real estate with little or no equity in the properties and little margin for error. The fact that Applicant and his partner were successful for a time does not obscure the fact that they engaged in a high-risk, highly leveraged enterprise. They used unsecured credit to fund repairs and renovations, and made no provision for satisfying their tax liabilities when properties sold.

Applicant has not sought meaningful credit counseling, made a budget that demonstrates how he will pay his delinquent debts, or devised a plan to address his debts, so I cannot conclude he has brought the financial problem under control.⁹ While I cannot conclude that his efforts to pay his creditors were made in bad faith, in the final analysis those efforts have been sporadic and ineffective.¹⁰ Although, DOHA is not the collection agent of last resort, Applicant has failed to demonstrate why he has not come up with a viable plan for his delinquent debt, if he has the means. If he lacks the means of addressing his delinquent debt now, he will not be in a position to do so unless and until the housing market recovers and he is able to sell his investment properties. I cannot speculate when that may be. I conclude Guideline F against Applicant.

⁷¶ 20.(a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur .

⁸¶ 20.(b) the conditions that resulted in the financial problem were largely beyond the person's control . . . and the individual acted responsibly under the circumstances.

⁹¶ 20.(c) the person has received or is receiving counseling for the problem and there are clear indications that the problem is being resolved or is under control.

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

Formal Findings

Paragraph 1. Guideline F:	AGAINST APPLICANT
Subparagraphs a–d, f-g, j-k, and m-o:	For Applicant
Subparagraphs e, h, i, and l:	Against 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 a security clearance for Applicant. Clearance denied.

JOHN GRATTAN METZ, JR
Administrative Judge