



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



In the matter of: )  
 )  
----- ) ISCR Case No. 08-06930  
SSN: ----- )  
 )  
Applicant for Security Clearance )

**Appearances**

For Government: Pamela C. Benson, Esquire, Department Counsel  
For Applicant: Todd W. Reid, Esquire

March 30, 2009

**Decision**

HOWE, Philip S., Administrative Judge:

On November 10, 2005, Applicant submitted his Security Clearance Application (SF 86). On September 18, 2008, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline F (Financial Considerations). 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 September 27, 2008. He answered the SOR in writing on October 15, 2008, and requested a hearing before an administrative judge. DOHA received the request on September 29, 2008. Department Counsel was prepared to proceed on October 22, 2008. DOHA issued a Notice of Hearing on January 12, 2009, and I convened the hearing as scheduled on January 27,

2009. The Government offered Exhibits 1 through 5, which were received without objection. Applicant testified and submitted Exhibits A through E, without objection. DOHA received the transcript of the hearing (Tr.) on February 6, 2009. I granted Applicant's request to keep the record open to submit additional matters. On February 5, 2009, he submitted Exhibits F to I, without objection. The record closed on February 10, 2009. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

### **Findings of Fact**

In his Answer to the SOR, dated October 15, 2008, Applicant admitted the factual allegations in ¶¶ 1.a to 1.e, and 1.h of the SOR, with explanations. He denied the factual allegations in ¶¶ 1.f, 1.g, 1.i, 1.j, and 1.k of the SOR. He also provided additional information to support his request for eligibility for a security clearance.

Applicant is married (in 2003), and 56 years old. He was in private business until September 2004, when his employment was terminated. He now seeks a security clearance so that he can work for a defense contractor. He signed a letter of intent with the company in September 2005, being considered a contingent hire, and the company is waiting for him to obtain his security clearance. (Tr. 63, 64, 69-73; Exhibit 1)

Applicant has a college degree he obtained in 1975. He also obtained another degree in February 2006, in an attempt to retrain himself after his prior business relationship was terminated in September 2004. Applicant was unemployed from September 2004 until May 2008. He and his wife work as title abstractors on a per diem payment basis, earning about \$75,000 before taxes and deductions annually. His wife owns a home in Toronto, Canada (she is a U.S. citizen), and Applicant owns a home in his hometown. He and his wife pay \$535 monthly on the Canadian mortgage, and the home in the United States has no mortgage debt on it. Applicant owns two high-mileage automobiles which are fully paid. He has one credit card on which there is no balance owed, and two gasoline credit cards which also have no balances on them. He pays his monthly debts on time and is current on them. Since his September 2004 termination, Applicant has not used credit cards to maintain his lifestyle, nor has he incurred any delinquent debt. He has not purchased a new car, or anything involving a substantial amount of money. He did borrow money to pay for his degree as part of his effort to retrain himself. Those student loans of \$40,000 for his latest degree are being paid on time at the rate of \$164.57 monthly. (Tr. 38-40, 43, 44, 53-55, 60-62, 68)

Applicant was the manager of an auto transmission store and the area development representative for the franchisor for the same company. He managed the store and held 49% of the stock in the corporation from 1985 to 2004. His income in 2004 was about \$90,000 from this business. He had a partner who also owned 49% of the stock. A third partner owned 2%. In September 2004, Applicant received a letter from his partners announcing the date for a stockholder's meeting, which had not occurred previously during the life of the corporation. At that meeting, Applicant was removed as a director and his employment contract was terminated. Applicant retained

attorneys in 2005 and sued his former partners for shareholder oppression and wrongful termination. The lawsuit is scheduled to be heard in April 2009 for a decision on the merits. He attempted to negotiate a settlement with his former partners from 2005 to the current time, but has been unsuccessful. (Tr. 21-27, 69-76; Exhibit D)

The SOR lists 11 delinquent debts, totaling about \$87,000. The delinquent debt on the January 2009 credit report is \$63,675. All of the debts listed in the SOR pertain to credit card debt incurred before September 2004, except the electric power debts (the final two allegations in the SOR, Subparagraphs 1.j and 1.k, for \$140 and \$282, respectively), which Applicant asserts he paid in November 2004. Applicant terminated the other credit card accounts in October 2004, and returned the credit cards to the issuers. Before 2004, Applicant had excellent credit and paid his debts in a timely manner, as shown on his 2000 and 2003 credit reports. (Tr. 19, 20, 24, 30-37, 52, 66, 67, 87; Exhibits 2-5, A, B)

Applicant owes \$7,850 on a credit card (Subparagraph 1.a). It has not been repaid. (Tr. 31, 32; Exhibits 2-5)

Applicant owes \$3,409 to a collector for a store credit card (Subparagraph 1.b). It has not been repaid. (Tr. 19, 32; Exhibits 2-5)

Applicant owes \$17,165 on a bank credit card (Subparagraph 1.c). It has not been repaid. (Tr. 19, 33; Exhibits 2-5)

Applicant owes \$11,907 on a store credit card (Subparagraph 1.d). It has not been repaid. Applicant is attempting through his attorney to negotiate a settlement on this account at 35-40% of the balance, but the creditor has not responded to the attorney's offer. (Tr. 19, 34, 82; Exhibits 2-5)

Applicant owes \$2,956 on a store credit card (Subparagraph 1.e). It has not been repaid. (Tr. 19, 35; Exhibits 2-5)

Applicant owes \$3,675 to a collector (Subparagraph 1.f). It has not been repaid. Applicant has a current offer outstanding to settle this debt at the 35-40% rate of the balance, but the creditor has not responded to the offer. (Tr. 82; Exhibits 2-5)

Applicant owes \$12,717 to a collector (Subparagraph 1.g). It has not been repaid. (Tr. 30, 36; Exhibits 2-5)

Applicant owes \$12,749 to a collector for a credit card debt (Subparagraph 1.h). It has not been repaid. It may be a duplicate billing for the debt set forth in Subparagraph 1.g because of the similarity of the amounts. This debt also has a pending settlement offer made to the creditor by Applicant's attorney, but the creditor has not responded to it yet. (Tr. 31, 36, 82; Exhibits 2-5)

Applicant owes \$9,413 to a collector on behalf of a financial institution (Subparagraph 1.i). It has not been repaid. (Tr. 37; Exhibits 2-5)

Applicant's attorney sent letters to all these creditors on January 19, 2009, seeking to negotiate a compromise and settlement of these debts. He has not received replies as of the date of the hearing to these letters with specific proposals to settle these debts for amounts less than listed in the SOR. Applicant expected his lawsuit against his former partner would be settled in 2006 or 2007, enabling him to recoup funds sufficient to repay these debts. That settlement of the lawsuit has not occurred. The case is now set for trial in April 2009. (Tr. 21-26, 49, 52; Exhibits C, D, E)

Applicant has a federal tax debt from 2004 and 2005 of \$5,225.18, resulting from the closure of his transmission businesses after his ouster from the corporation. He has an installment payment agreement with the Internal Revenue Service (IRS) through which he pays at least \$137 monthly. He owes \$4,220 to a state tax agency for the same business closures, and pays \$188.21 monthly on that installment payment agreement. (Tr. 58-60)

A long-time friend of Applicant testified for him. He considers Applicant a mathematical expert, and very trustworthy. He would employ him in a sensitive position in his company any time. (Tr. 92-108)

Applicant gave credible and persuasive testimony. He was well organized in his presentation, and was specific in his recollections of past events, and financial obligations.

### **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, and 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.

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 after he was ousted from his corporate position in 2004. He was financially unable to pay these obligations for the

past four years. The evidence is sufficient to raise these potentially disqualifying conditions.

The guideline also includes 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 after September 2004. He had credit card debt which he incurred in the normal course of his business and personal activities. He paid these debts on time each month until he lost his job in September 2004. Then he did not have any income from which to pay these debts. These circumstances are no longer extant because they were unique based on his corporate position, loss of that job, and the resultant inability to pay the debt when he was unemployed. I find the behavior occurred under such unusual circumstances that it is unlikely to recur, and it does not raise concerns about his current reliability, trustworthiness, or good judgment. The evidence raises this potentially mitigating condition.

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.” As noted above, Applicant’s financial problems arose from his lengthy period of unemployment since September 2004 to the present. He became unemployed when he was ousted from his corporate position through no fault of his own, but rather the action of his now former partner. He acted responsibly by canceling the credit cards immediately, and not accumulating any more debt, except his student loans used by Applicant to obtain retraining. I find this potentially mitigating condition is a factor for consideration in this case.

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). Since 2005 Applicant has been represented by attorneys in attempts to settle the debts and get them paid by proceeds of his lawsuit against his former partner. His attorney has the problem under control, and is attempting to resolve it with all the creditors. This mitigating condition applies.

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 retained an attorney to represent him on all the delinquent debts, and to resolve them either by payment or settlement. He paid the two energy debts in early 2005. He has nine delinquent debts remaining, and intends to pay these from the proceeds of his lawsuit against his former partner for ousting him from the corporation they both owned. I conclude this potentially mitigating condition applies. If he does obtain a satisfactory judgment in the case, he remains willing to pay the debts in accordance with the settlement offers he made when he earns the funds to do so.

The remaining two mitigating conditions have no applicability to this case, and are not relevant. Applicant is not disputing the debts, and there is no affluence resulting from a legal source of income.

Finally, the security concern stated in AG ¶ 18 is directed toward the failure or inability of an applicant to spend his income responsibly, and pay his debts in a timely manner. These actions, the concern states, show poor self-control, lack of judgment, or an unwillingness to live by certain rules. However, Applicant demonstrated he was paying his debts before his corporate termination at the shareholder's meeting in September 2004. Only that action, which surprised him, and his subsequent unemployment until May 2008, have prevented him from paying these debts. His record of responsible financial management during his business career shows this security concern is not applicable in Applicant's unique situation.

### **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.

AG ¶ 2(c) requires each case to be judged on its own merits. 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 considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant clearly explained in a credible and persuasive manner that but for the actions of his partner in 2004, which came as a complete surprise to him at the shareholder's meeting, he would have continued to pay the debts listed in the SOR on time, and they would never have been an issue. Applicant also demonstrated his efforts since 2004 to resolve these debts through legal representation on proposed settlements with the creditors. His attorney also filed a lawsuit against the former partner seeking compensation for the unlawful actions. This lawsuit, if successful, would yield sufficient funds to repay all these debts, especially if the creditors agreed to reduce the amounts sought by eliminating interest

and penalty fees accumulated on the accounts since 2004. If he is not successful, he is committed to repaying his debts from his future income. These debts are ancillary to the main issue of the corporate wrongdoing; they cannot be a source of improper pressure or duress because of their public nature. 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. While the debts remain unpaid pending the outcome of the lawsuit, they are insufficient under these unique circumstances to raise security concerns.

Overall, the record evidence leaves me without 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 financial considerations. I conclude the "whole person" concept for Applicant also.

### **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: FOR APPLICANT

Subparagraphs 1.a to 1.k: For Applicant

### **Conclusion**

After considering all of the evidence presented by the record in this case, it is clearly consistent with the interests of national security to grant Applicant eligibility for a security clearance. His eligibility for access to classified information is granted.

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PHILIP S. HOWE  
Administrative Judge