



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



In the matter of:

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) ISCR Case No. 08-07264
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Applicant for Security Clearance

Appearances

For Government: Braden Murphy, Esq., Department Counsel

For Applicant: James Q. Butler, Esquire

May 7, 2009

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant failed to mitigate the Government's security concerns under Guideline F, Financial Considerations. Applicant's eligibility for a security clearance is denied.

On October 22, 2008, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) detailing the security concerns under Guidelines 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 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 answered the SOR in writing on November 4, 2008, and requested a hearing before an administrative judge. The case was assigned to another judge on January 22, 2009. DOHA issued a Notice of Hearing on February 10, 2009, and the hearing was scheduled for March 9, 2009. The hearing was canceled and an amended

Notice of Hearing was issued March 9, 2009, rescheduling the hearing for April 2, 2009. The case was assigned to me on March 12, 2009. Applicant through his attorney requested a continuance on March 26, 2009. It was granted and an amended Notice of Appearance was issued on March 31, 2009. The hearing took place as scheduled on April 22, 2009. The Government offered Exhibits (GE) 1 through 6. Applicant did not object and they were admitted. Applicant testified and offered Exhibits (AE) A and B. Department Counsel did not object and they were admitted. The record was held open until April 30, 2009, to allow Applicant to submit additional documents. A document was received and marked as AE C. Department Counsel did not object and it was admitted.¹ DOHA received the transcript of the hearing (Tr.) on April 29, 2009.

Procedural Matters

Based on testimony provided by Applicant during his hearing, Department Counsel moved to amend the Statement of Reasons and add the following allegation:

1. e. You failed to file your 2006 and 2007 federal income taxes.

I offered Applicant an opportunity to request a continuance to the hearing so he would have notice of the allegation and time to prepare. I also offered to keep the record open to allow Applicant to submit additional documents. Applicant waived his right to continue the hearing and asked that the record remain open, which was granted.

Findings of Fact

Applicant denied all of the allegations in the SOR. After a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is 59 years old. He is a college graduate, single and has no dependents. He began working for a federal contractor in March 2008, worked for five months and was furloughed for a period of time. He has since resumed work.²

Applicant admitted he received credit cards or a line of credit from the four creditors listed in the SOR. Applicant worked in the information technology (IT) industry for many years. He stated that in 2001 to 2002, there was a severe depression in the industry and it went from a situation where jobs were plentiful and abundant to a severe shortage of jobs. Applicant was affected by this economic downturn. He stated salaries and contracts fell by 40%. His salary prior to the "crash" was in the middle \$90,000 range. He had been working overseas from 1983 to 1999 when he returned to the U.S. He admitted he saved his money and from February 1999 to October 2001 he did not work by choice and used money he had saved to live on. He also used credit cards, but was confident that when he chose to go back to work he would be able to get a job and pay his bills. According to Applicant's security clearance application (SCA) in

¹ HE I.

² Tr. 27-30, 89-90, 129-130.

approximately October 2001 until February 2005 he had a series of jobs in the IT industry. In February 2005 he was unemployed for a short period of time. He was next unemployed from November 2006 to December 2006. During his periods of employment Applicant was earning less than he had previously earned when the industry was at its peak. During this time he primarily did contract work. When he was not working he would use his credit cards to help pay his expenses. He had difficulty finding work and was intermittently employed in contract work. The work would continue until the contract ran out.³

Applicant was paying at least the minimum payments on his credit cards during this time and was never late. He stated that the credit card companies began looking at all his accounts and his debt to income ratio and increased the interest payments. He decided to stop making any payments to any of his credit cards in November 2003 because it would take him too many years to repay the debts if he continued to make minimum payments. He admitted that with his current salary he could afford to make more than the minimum payment.⁴

Applicant does not accept the validity of any of the collection companies that have assumed his delinquent debts. He has made demands on them to provide proof of their legitimacy.⁵

The debt in SOR ¶ 1.a (\$20,000) is a credit card debt. Applicant has not paid anything on this debt since November 2003. He stated he has not been sued. He believed the actual amount of debt he incurred was \$20,000. Applicant was asked if he made an attempt with this creditor to begin a repayment plan. He stated: "I neither originated communication to them on that, nor did they originate communication to me."⁶ He believed because his credit report shows the balance to the original creditor as zero he does not owe anything to the collection company who holds the account because they have failed to provide him proof of ownership. Applicant disputed how the collection company calculated the amount owed. He advised the collection company that if they did not provide substantiated proof of their claim within 30 days it would be viewed as evidence of their waiver of all collection claims. He has not contacted the creditor to legitimately and fairly resolve the debt.⁷

Regarding the debt listed in SOR ¶ 1.b, Applicant admitted he incurred this credit card debt (\$24,000). He believed the amount of items actually purchased if he had paid cash was about \$15,000. He never contacted this creditor to set up a repayment plan

³ Tr. 36-45, 99-103, 130-133.

⁴ Tr. 46-49, 73-77; AE A.

⁵ AE A.

⁶ Tr. 105.

⁷ Tr. 37-48, 58, 105; AE A.

after he stopped making payments in November 2003. He sent a novation⁸ letter on February 4, 2005, and a \$100 check dated February 10, 2005, advising the company that this was a settlement offer and if they cashed the check it would constitute acceptance and unequivocal assent to the novation/offer without recourse. He dictated that the creditor was to notify him within 30 days if they did not agree. He admitted he received a letter and bill from a collection company for this debt in October 2008. Applicant indicated the creditor cashed the check. Applicant has not made any other payments to resolve this debt. Applicant admitted he never received any documentation from the creditor that they considered the matter closed.⁹

Applicant provided identical novation letters and \$100 checks to the creditors listed in SOR ¶¶ 1.c (\$16,000, actual amount incurred approximately \$10,000) and 1.d (\$49,000, actual amount owed with interest \$45,000). He stated the creditors cashed the checks. Applicant stated at one time he received an offer to settle the debt in SOR ¶ 1.d from the creditor for \$12,000. He did not accept it because he could not afford it. Applicant also provided documentation that he believes the statute of limitations is applicable to these debts. He stated he believed the debts were satisfied and no one ever sued him. Applicant has not made any other payments to legitimately and fairly resolve these debts. Applicant never received documentation from the creditor that they considered the matter closed.¹⁰

Applicant has paid a total of \$300 since November 2003 on the four debts listed in the SOR totaling over \$109,000.

Applicant stopped paying his credit card debts in November 2003. He stated:

The important thing to understand is that the rules of the game changed. In other words, yea, I decided to get into the IT profession. That's what I've been doing for a very long time, and I got these credit cards and I made charges on them that I was fully able to cover the payments and fully able to pay them off much earlier on when I made the charges. But then the rules of the game changed.¹¹

⁸ Black's Law Dictionary defines novation as follows: Substitution of new contract between same or different parties. The substitution of a new debt or obligation for an existing one. The substitution by mutual agreement of one debtor for another or of one creditor for another whereby the old debt is extinguished. The requisites of a "novation" are a previous valid obligation, an agreement of all the parties to a new contract, the extinguishment of the old obligation, and the validity of the new one.

⁹ Tr. 49-65; 103, 105-109; AE A

¹⁰ Tr. 65-73; 104-108; AE A.

¹¹ Tr. 78.

He then went on to say:

Because the numbers no longer added up, and what I mean by that is I had a certain amount of income, and then I had debt that I had to pay, and the calculated payoff for that debt was some fantastic amount of time into the future.¹²

Applicant admitted while he was accruing his credit card debt he was making minimum payments on the debts. He stated he went on the internet and did legal research. He contacted a company that specialized in handling credit card debt and he followed legal advice of an attorney that was associated with the company. He then used novation letters to reduce his credit card debts.¹³

Applicant's current income is \$138,000. His income last year was approximately \$125,000. He stated he has no financial problems except his debts from six years ago. He has never had financial counseling and has not filed for bankruptcy. He has one credit card and maintains a balance owed of approximately \$2,000 each month.¹⁴

On his security clearance application (SCA) submitted on April 14, 2008, which asked if in the last 7 years, he was over 180 days delinquent on any debts, Applicant answered "no." He also answered "no" when asked if he was "currently over 90 days delinquent on any debt."¹⁵ He stated the following:

Because when I answered those questions, you know, I answered the question asked. In other words, debt refers to something financial. When you're operating in the financial world, if someone says you owed me money, there must be a contract there, a valid contract. There was no valid contract and I did not owe any debt, and that's why I answered no.¹⁶

He went on to explain the following:

When I hired on this firm to handle my credit card debts, they took the legal position that there was no valid, legal debt there and they offered up, you know, a legal argument for it. So in filling out that form, I took the same perspective, that there was no legal debt there, and that was why I answered those questions the way I did. In terms of what has actually

¹² Tr. 79.

¹³ Tr. 73, 82-83.

¹⁴ Tr. 76-77, 87-88, 93-94, 109.

¹⁵ I have not considered Applicant's answers on his SCA for disqualifying purposes, but have considered them when analyzing the whole person and for purposes of determining credibility.

¹⁶ Tr. 111-112.

occurred in life, the fact that none of these companies ever sued or even threatened to sue, demonstrated their timidity in asserting.¹⁷

There is no indication from a review of Applicant's documents that a law firm prepared the document on his behalf or represented him. Applicant's stated that through his legal research on the internet and his association with "this company" the credit card debts were not legal debts. Applicant's position regarding divulging his past delinquent debts is as follows:

When I filled the form out, I had full obligation to convey past debts. But my perspective was that if these were not debts of legal validity, legal enforceability, then they were not debts under the law.¹⁸

Applicant was asked if he had filed all of his tax returns on time. He admitted he had not yet filed his 2006 and 2007 tax returns. He stated he has been "well beyond busy."¹⁹ When it was brought to his attention that he had stated he was unemployed during some of this time, he stated:

Well, I didn't feel a compelling necessity. I mean I'm tardy on those two because I didn't feel the compelling necessity to get them done, because I don't owe any money. I'm due refunds.²⁰

He further stated:

Because I'm due a refund, and I figured and this is actually correct. If you don't owe the federal government money and you're tardy on the filing, they don't like it, but it really doesn't add up to much. They may or may not assess a penalty for late filing.²¹

Applicant stated he had not yet filed his 2008 taxes, but filed for an extension. When asked by his attorney about his intentions regarding his delinquent tax filings he explained he intended to file them very soon. He admitted he had not yet completed the paper work on these taxes. He stated he has an accountant that handles his taxes. When asked why the accountant did not file them he explained he did not provide the accountant the information required to file them. On April 30, 2009, Applicant's attorney provided a letter that stated Applicant's 2006 and 2007 tax information were in the hands of his accountant. His attorney further stated "The returns are in the process of

¹⁷ Tr. 113.

¹⁸ Tr. 114-117.

¹⁹ Tr. 121.

²⁰ Tr. 122.

²¹ Tr. 123.

being completed, and we anticipate them being finished within one week. At that time they will be promptly sent to the IRS.”²²

Applicant does not believe he has a financial obligation to any of the creditors listed in the SOR. I have considered all of the documents Applicant provided. I considered his interpretation of the rules and law. I have considered his entire testimony and arguments regarding the legitimacy of his claims.²³

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. . . .” The applicant 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

²² Tr. 123-124; 134-136; AE C.

²³ Tr. 125-127.

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. I have considered all of the disqualifying conditions under AG ¶ 19 and especially considered:

- (a) inability or unwillingness to satisfy debts;
- (c) a history of not meeting financial obligations; and
- (g) failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same.

Applicant failed to responsibly satisfy his delinquent debts. The debts are more than six years old and total approximately \$109,000. Applicant failed to file his federal income tax returns for 2006 and 2007. I find the above disqualifying conditions apply.

The guideline also includes examples of conditions that could mitigate security concerns arising from financial difficulties. I have considered the following mitigating conditions under 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;

(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 admitted he incurred the debts listed in the SOR. He admitted he received merchandise for his expenditures. He stopped paying these debts in November 2003 because he was dissatisfied with how the creditors calculated interest. He has made \$100 payments to three of the creditors and declared it as his settlement offer and if they cashed the check it would constitute their acceptance to settle the debt in full. I find his actions were not good faith offers to pay his just debts, but rather were a tool for him to renege on his responsibility to pay his exorbitant delinquent debts. He has not set up payment plans to resolve the debts and his actions cast serious doubts about his judgment, reliability and trustworthiness. I find mitigating condition (a) does not apply.

Applicant was in an industry that went from high paying salaries to a bust in the industry. The crash in the industry was a condition beyond Applicant's control. However, Applicant chose not to work for two years, spent his savings and used credit cards because he thought he would be able to resume a good paying job. I do not find he acted responsibly under the circumstances. He accumulated \$109,000 in credit card debt. He does not own a house, he has no dependents to support and although the job market did not offer the same type of wages he had been accustomed to, he is also partially responsible for his plight. Instead of conserving and saving, he made a choice to not work. He then experienced periods of unemployment. This is not a case where Applicant has done the best he can to repay the debts. To the contrary his attitude has been one of hostility towards his creditors. I find (b) only partially applies.

Applicant did not provide evidence that he has received financial counseling. He did not provide evidence that the problem is being resolved. He did not provide any proof that his creditors considered the debts resolved. Applicant contends the statute of

limitations applies to his debts. In security clearance cases, the statute of limitations is not a shield from acting responsibly. I find Applicant did not initiate a good faith effort to pay his creditors or resolve his debts. Instead he looked for a way to renege on them. Applicant admitted he made purchases with his credit cards and then failed to pay them. I find mitigating conditions (c), (d) and (e) do not apply.

Applicant failed to file his 2006 and 2007 income tax returns. His cavalier attitude about his responsibilities reflects a pattern of questionable judgment. After his hearing his attorney provided a letter stating he was in the process of filing his delinquent tax returns. His post-hearing submission is not a substitute for his failure to abide by the law. Rather it is another instance of Applicant defying rules and applying them as he sees fit, a dangerous trait when dealing with national security.

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.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall common sense 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 is a mature person who worked in an industry where he earned a good salary. He chose to live off his savings and use his credit cards to pay his expenses for a period of 32 months. When he chose to return to work the market had changed and Applicant had difficulty finding a job similar to what he had before he stopped working. He did contractual work and experienced periods of unemployment. Applicant continued to make minimum payments on his credit cards and decided in November 2003 that he would stop paying them. Two years later he sent letters to his some of his creditors with \$100 payments to totally resolve his debts. Applicant has not made any other payments, nor has he made any other effort to resolve these delinquent debts. Applicant's attitude toward his financial responsibility is troubling. He believes he is not responsible for all the debt he incurred. He does not accept the collection companies' claims. Applicant also failed to

file his 2006 and 2007 tax returns, believing the IRS does not care because he believes he is entitled to a refund. Applicant's attitude towards following rules, acting responsibly, and exercising good judgment is troubling and a serious security concern. Overall, the record evidence leaves me with serious questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising from financial considerations.

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
Subparagraphs 1.a-1.e:	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 grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Carol G. Ricciardello
Administrative Judge