DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 08-07664
SSN:	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: James B. Norman, Esquire, Department Counsel[1]
For Applicant: *Pro Se*

July 7, 2010

Decision on Remand

HENRY, Mary E., Administrative Judge:

By decision dated August 29, 2008, the Appeal Board remanded this case to me to issue a new decision consistent with their opinion. Based on a review of the case file, pleadings, exhibits, and remand order, I conclude that Applicant's eligibility for access to classified information is denied.

Applicant submitted his Electronic Questionnaire for Investigations Processing (e-QIP) on February 19, 2008. The Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under Guideline F on May 15, 2009. 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

[1]The Government initially assigned Robert Coacher as Department Counsel on this case. When Mr. Coacher left his position as Department Counsel, Mr. Norman assumed representation of the Government in this case.

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 May 18, 2009. He submitted a notarized, written response to the SOR allegations on June 3, 2009, and requested a decision on the written record in lieu of a hearing.

Department Counsel prepared a File of Relevant Material (FORM) and mailed Applicant a complete copy on June 29, 2009. Applicant received the FORM on August 6, 2009. He had 30 days from receipt of the FORM to file objections and submit material in refutation, extenuation, or mitigation. He submitted a response and additional evidence on September 1, 2009. DOHA assigned this case to me on September 21, 2009. The government submitted eight exhibits, which have been marked as Items 1-8 and admitted into the record. Applicant's response to the SOR has been marked and admitted as Item 2. His response and attachment to the FORM are admitted into evidence as Applicant Exhibit A.

DOHA issued my decision on September 24, 2009. Applicant appealed it, alleging that his right to submit matters in mitigation had been impaired as he understood he need only submit, in mitigation, a letter explaining why he disagreed with the investigation and allegations in the SOR.

Procedural Rulings

On December 29, 2009, the DOHA Appeal Board remanded this case to me for further appropriate processing in light of their decision. Applicant alleged on appeal Department Counsel told him that a letter stating why he did not agree with the investigation was sufficient. Applicant further indicated that Department Counsel advised that he did not have to directly respond to each claim independently. In reliance upon advice from Department Counsel, he did not submit information in his possession which showed evidence of mitigation. The Appeal Board construed his allegations on appeal "as having made a claim that his right to submit matters to the Judge in mitigation was impaired."[2] The Appeal Board directed that I reopen the record to give the parties an opportunity to address the issue raised on appeal.[3]

On January 12, 2010, I issued an Order for the parties to confer with me to schedule a hearing date, as the legal issued raised in this case concerned credibility determinations. The parties and I held a telephone conference on January 22, 2010, where the parties requested to submit declarative statements, rather than hold a hearing. On the same date, I issued a second Order, directing the parties to submit their declarative statements no later than February 4, 2010. The parties complied with my Order.

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[2]App. Bd. Decision at 3

[3] *Id*.

After reviewing the declarations of the parties and the June 29, 2009 cover letter to Applicant, I made the following findings of fact in my February 17, 2010 order:

> The cover letter advises an applicant in a FORM case that he can object to information in the FORM and submit any additional information he wishes to be considered. The letter does not clarify what type of additional information can be submitted in a financial case. Rather, it is a generic letter which covers the variety of cases which must be decided under the adjudicative guidelines. In this case, after reviewing the letter and FORM, Applicant called Department Counsel for further information on how to respond, because he did not understand what he could include in his response.
>
> Department Counsel does not specifically recall his conversation with Applicant or the information provided. Department Counsel's usual habit is to advise an applicant that he can provide any information that he wishes the Administrative Judge to consider and that he could supplement his answer to the SOR.
>
> After his conversation with Department Counsel, Applicant understood that he could respond to the allegations in the FORM with a letter, explaining what he had done to resolve his debt problems. He also understood that he did not need to submit any additional materials because his letter would address the debt allegations.

I concluded that in this particular case, Applicant clearly misunderstood the meaning and content of his conversation with Department Counsel. His misunderstanding should not be prejudicial to a fair decision. I held the record open for 30 days for Applicant to submit all written documentation verifying his debt resolution, which he intended to submit with his response of September 1, 2009, and stated that documentation dated after September 1, 2009 will not be admitted into the record. I gave Department Counsel 30 days after the receipt of Applicant's documentation to submit a response.

Applicant timely submitted documentation to support his argument that he had mitigated the Government's security concerns. Department Counsel responded on March 31, 2010, objecting to the redaction of information in the bank statement documents submitted by Applicant, as part of his proof of payment, and Applicant Attachments 1 and 4. By e-mail dated April 6, 2010, I gave Applicant until April 20, 2010 to respond to the Government's objection.

On April 9, 2010, Applicant requested an extension of time to respond to the Government's objection. By Order dated April 16, 2010 and for good cause shown, I granted Applicant until April 30, 2010 to respond. Applicant forwarded an e-mail to me on May 4, 2010, indicating additional problems with obtaining information to respond to the Government's concerns. Because I considered the e-mail an ex-parte

communication, I conducted a telephone conference call with the parties on May 6, 2010. Based on this call, I gave Applicant until May 24, 2010 to submit the additional information. Applicant continued to experience problems with obtaining his information because he travels in his job.

Applicant submitted his last documentation on June 9, 2010. The record closed as of this date. The documentary evidence submitted by Applicant has been marked as AE A through AE H and admitted into evidence.[4] The Government's objection to Applicant's redaction of his bank statements is overruled. Likewise, the Government's objection to Attachments 1 and 4 are overruled and these documents will be accorded appropriate weight, if any.

Findings of Fact

In his Answer to the SOR, Applicant admitted the factual allegations in ¶¶ 1.a through 1.i of the SOR, with explanations. He denied the security concern under Guideline F, arguing his finances should not be a security concern.[5] He also provided additional explanations, but not documentary evidence to support his request for eligibility for a security clearance.

Applicant, who is 38 years old, works as a project manager for a Department of Defense contractor. Applicant started his employment with this company in 1998. Applicant and his wife married in 1992 and divorced in 2008. He has a son, age 15, and a daughter, age 11.[6]

In January 2004, doctors diagnosed his young daughter with diabetes. She required extensive and expensive medical treatment for a long period of time. Because insurance did not cover all of her medical costs, Applicant used credit cards to pay for her treatment. Over time, his expenses became overwhelming. In early 2007, Applicant contacted several credit management agencies to consolidate his debts. Upon the recommendation of these credit counseling companies, he allowed his debts to become 60 days delinquent. One company established a suggested repayment plan, which he

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[4]Applicant attachment 1 is marked AE A; Attachment 2 is marked AE B; Attachment 3 is marked AE C; Attachment 4 is marked AE D; Attachment 5 is marked AE E; Attachment 6 is marked AE F; Attachment 7 is marked AE G; and Applicant's June 9, 2010 fax transmittal is marked AE H. AE C showed a debt payment on September 10, 2009, 10 days after Applicant submitted his answer. Although outside of the time limit set in my February 17, 2010 Order, this evidence is admitted as the Government is not prejudiced by its admission.

[5]When SOR allegations are controverted, the government bears the burden of producing evidence sufficient to prove controverted allegations. Directive, ¶ E3.1.14. "That burden has two components. First, the government must establish by substantial evidence that the facts and events alleged in the SOR indeed took place. Second, the government must establish a nexus between the existence of the established facts and events and a legitimate security concern." *See* ISCR Case No. 07-18525 at 4 (App. Bd. Feb. 18, 2009), (concurring and dissenting, in part) (citations omitted).

[6]Item 3.

could not afford. He and his former wife then decided to file for Chapter 13 bankruptcy, which they did in September 2007 without the assistance of counsel. They met once with the bankruptcy trustee and learned that their debt-to-income ratio was not sufficient for filing bankruptcy. Based on this information, they requested the Bankruptcy court to dismiss their petition.[7]

In April 2009, Applicant's employer reduced his weekly work hours from 40 hours to 32 hours, resulting in a 20 percent reduction in his income. Applicant's current net monthly income from his work is $2,512. He also receives $857 a month in Veteran's Administration (VA) compensation for a total net monthly income of $3,369. Applicant's monthly expenses total $3,094, and include $900 for child support, cell phone, two car payments, car insurance, and other expenses. He included in his budget a $250 payment to the creditor in allegation 1.b, and two $50 payments for two debts not alleged in the SOR. After paying his expenses, Applicant has a remainder of $275 each month. He rents out the house he owns. His rental income pays the mortgage on the house. He lives with his parents. The two credit reports of record reflect that Applicant paid or pays many of his bills in a timely fashion.[8]

Applicant and his former wife purchased a travel trailer in 2005 for $18,000. They paid their monthly payments on the travel trailer, but they were late once just before their bankruptcy filing. The creditor eventually charged off the debt. Applicant entered into a stipulated judgment with the creditor's attorneys in February 2009, which was filed in and endorsed by the court on February 11, 2009 and is part of the record. Under the terms of the agreement, Applicant promised to pay $250 a month until the debt is paid in full. Applicant included this payment in his budget; however, he did not provide documentary proof that he is in compliance with the terms of the stipulated judgment. He should have provided evidence of eight payments from February 2009 to September 2009. He recently requested verification of his payments from the creditor, but has not received a response to his request. He did not provide copies of his cancelled checks, bank statements or an authorization for the creditor to automatically withdraw the payments from his checking account, documents which would show he made his monthly payments.

In his response to the FORM, Applicant stated that he resolved the remaining seven debts listed in the SOR. When he met with the security clearance investigator on October 30, 2008, he showed the investigator a bank statement regarding payments to the creditor listed in SOR allegation 1.g. The investigator verified that Applicant paid a settlement for this debt on September 29, 2008. He also provided a copy of his cancelled check to the collection agency for this creditor and the bank statement

[7]Item 5, at 5-6; Response to FORM.

[8]Response to FORM; Item 6; Item 7; Item 8.

showing a withdrawal in this amount on the above date. The debt is no longer on his credit report. This debt is paid.[9]

When Applicant and his former wife filed for bankruptcy in 2007, they listed two credit card debts. They owed approximately $4,500 on a credit card to bank one. Appellant paid a settlement on this debt on September 30, 2008 and has verified payment of this debt, which was not listed on the December 15, 2008 credit report. Applicant and his former wife also owed $2,047 on a VISA credit card with bank two, the debt listed in SOR allegation 1.e. This debt is listed in the April 8, 2008 and December 15, 2008 credit reports as a charge off. In his May 21, 2008 interview with the security investigator, Applicant acknowledged this debt as unpaid and separate from the bank one debt. In his answers to interrogatories, he indicated that he had telephoned the collection agent for bank two several times, but had not received a response. He has not provided documentary proof that this debt is paid or in a payment plan.[10]

The remaining debts listed in the SOR are discussed as follows:

1.c The bank charged off an unpaid credit card debt in the amount of $4,064. Applicant paid this debt in April 2009.[11]

1.d The bank charged off this unpaid account in the amount of $2,504. Applicant paid this debt in August 2009.[12]

1.f The April 8, 2008 credit report lists a medical bill for $115. Applicant provided proof that he paid this bill to the collection agent for the medical provider. The account number on the paid account is the same as the account number listed in the credit report.[13]

1.h Two medical bills for $78 and $73 respectively are listed in the SOR, but not on the credit reports. Applicant provided proof that he does not owe this provider any money.[14]

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[9]Item 5; AE E.

[10]Item 5, Item 6; Item 7; Item 8; AE D.

[11]AE F.

[12]AE B.

[13]Item 8; AE C.

[14]Item 7; Item 8; AE A.

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 overarching adjudicative goal is a fair, impartial, and commonsense 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, an applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." An 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 grants access to classified information. Decisions include, by necessity, consideration of the possible risk an 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 and was unable to pay some obligations for a period of time. The evidence is sufficient to raise these disqualifying conditions, requiring a closer examination.

The guideline also includes examples of 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." While Applicant's financial worries arose subsequent to his daughter's diabetes diagnosis in 2004 and the resulting medical bills, his debt problems raise concerns about his current reliability, trustworthiness and good judgment. Thus, this mitigating condition does not apply.

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 started with his daughter's health problems. His divorce increased his financial burdens. Circumstances beyond his control contributed to his financial problems. Applicant contacted refinance companies and credit management companies for help with his debts before he defaulted on them. These companies failed to provide the necessary help, so he and his former wife filed for Chapter 13 bankruptcy. They decided not proceed after meeting with the bankruptcy trustee. Since then, Applicant has paid six of the eight debts listed in the SOR and agreed to repay his largest SOR debt. He acted responsibly by seeking help to gain control over his finances. I find this mitigating condition applicable.

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). Applicant indicated that he contacted several credit counseling companies, but failed to provide documentary evidence that he did so. Likewise, the record does not contain evidence that he received debt counseling. He has resolved six of the debts listed in the SOR, plus one other debt not listed in the SOR, but which occurred in the same time period. This mitigating condition is partially applicable.

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 contacted several of his creditors and paid several of his debts before the SOR was issued. He agreed to the entry of a stipulated judgment on his largest debt which the court entered as a judgment in February 2009. He has not provided documentation which showed that he has complied with the terms of this agreement. He also paid several other debts listed in the SOR This mitigating condition applies to the debts in allegations 1.c, 1.d, and 1.f-1.i.[15]

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 an applicant's conduct and all relevant 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 commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. The decision to grant or deny a security clearance requires a careful weighing of all relevant factors, both favorable and unfavorable. In so doing, an administrative judge must review all the evidence of record, not a single item in isolation, to determine if a security concern is established and then whether it is mitigated. A determination of an applicant's eligibility for a security clearance should not be made as punishment for specific past conduct, but on a reasonable and careful evaluation of all the evidence of record to decide if a nexus exists between established facts and a legitimate security concern.

[15]AG ¶¶ 20(e) and 20(f) are not applicable in this case.

In reaching a conclusion, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant's financial problems first began when his young daughter was diagnosed with diabetes and required expensive and long-term medical treatment. He accumulated significant debt trying to pay for her medical care, which is a circumstance largely beyond his control. His recent divorce also adversely impacted his finances. Through his evidence, Applicant showed that he did not ignore his debts and that he acted to resolve his smaller debts. He also took action on his larger debt by contacting counsel for the creditor and entering into an agreement which required him to repay his debt on a monthly basis. Through his evidence, he provided proof that he paid six of the eight debts listed in the SOR. He has not shown that he paid the debt listed in SOR allegation 1.e nor has he provided proof that he has complied with his agreement to pay his largest debt, the debt in SOR allegation 1.b for $15,246. In weighing the positive evidence on the actions he has taken against the lack of evidence that Applicant is paying the largest debt listed in the SOR, I find that the lack of proof regarding payments of $250 a month from February 2009 to September 2009 on his largest debt weighs heavily against Applicant. Thus, he has not provided sufficient evidence to mitigate the government's security concerns about his finances.

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the security concerns arising from his 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
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	For Applicant
Subparagraph 1.e:	Against Applicant
Subparagraph 1.f:	For Applicant
Subparagraph 1.g:	For Applicant
Subparagraph 1.h:	For Applicant
Subparagraph 1.i:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, 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.

MARY E. HENRY
Administrative Judge