



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



In the matter of:)	
)	
XXXXXXXXXX, XXXXX)	ISCR Case No. 08-09291
SSN: XXX-XX-XXXX)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Caroline H. Jeffreys, Esq., Department Counsel
For Applicant: *Pro Se*

June 29, 2009

Decision

TUIDER, Robert J., Administrative Judge:

Applicant failed to mitigate security concerns regarding Guidelines F (Financial Considerations), and E (Personal Conduct). Clearance is denied.

Statement of the Case

On September 15, 2006, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP). On February 6, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to him, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended, modified and revised.¹ The SOR alleges security

¹ On Aug. 30, 2006, the Under Secretary of Defense (Intelligence) published a memorandum directing application of revised Adjudicative Guidelines to all adjudications and other determinations made under the Directive and Department of Defense (DoD) Regulation 5200.2-R, Personnel Security Program

concerns under Guidelines F (Financial Considerations), and E (Personal Conduct). The SOR detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for him, and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

On February 23, 2009, Applicant responded to the SOR allegations, and elected to have his case decided on the written record in lieu of a hearing. A complete copy of the file of relevant material (FORM), dated March 17, 2009, was provided to him, and he was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation.² Applicant did not submit any information within the 30-day time period after receiving a copy of the FORM. The case was assigned to me on June 18, 2009.

Findings of Fact

Applicant admitted all of the SOR allegations. His admissions are incorporated herein as findings of fact. I make the following additional findings of fact:

Applicant is a 33-year-old Training and Doctrine Specialist, who has worked for his government contractor employer since October 2004.³ He served in the U.S. Army as an enlisted person from November 1996 to September 2004. Applicant was married in March 1995 and that marriage ended by divorce in August 2006. He has two children from that marriage, a 15-year-old son and a 12-year-old daughter.

Applicant's background investigation addressed his financial situation and included the review of his e-QIP, and his October 2006, September 2007, October 2008, and March 2009 credit bureau reports.⁴ The Government established by Applicant's admissions and evidence presented that Applicant had or has nine delinquent debts totaling \$12,315.00 and foreclosure proceedings initiated against him in February 2006 for an undisclosed amount. (SOR ¶¶ 1.a. – 1.j.) The nine accounts are either collection or charged off accounts. Applicant admitted SOR ¶ 1.j., which refers to

(Regulation), dated Jan. 1987, as amended, in which the SOR was issued on or after Sep. 1, 2006. The revised Adjudicative Guidelines are applicable to Applicant's case.

² DOHA transmittal letter is dated March 19, 2009; and Applicant received the FORM on March 31, 2009. The DOHA transmittal letter informed Applicant that he had 30 days after Applicant's receipt to submit information.

³ All background information pertaining to the Applicant, which is limited, was derived from his September 2006 e-QIP, unless otherwise stated.

⁴ Items 5 – 9.

the foreclosure proceedings, but added that the case against him was resolved.⁵ These delinquent debts were incurred in the 2004 to 2009 timeframe.

Applicant offered no documentation that any of his debts with the exception of the foreclosure, discussed *supra*, have been paid, that he has set up payment plans, nor has he submitted any evidence that he contacted any creditors or sought credit counseling or that his debts are or will be resolved. In his Response to SOR, he indicated that he was coming out of a difficult divorce in which his former wife was “actively trying to ruin” his life. He added that he was trying to resolve his debts, but has “not been able to collect the money necessary” to complete this process.⁶

In his September 2006 e-QIP, Applicant answered “No” to Sections 28(a) and 28(b) (asking whether in the last seven years he had been 180 days delinquent on any debts, and whether he was currently over 90 days delinquent on any debts, respectively.) Although he admitted falsifying his e-QIP, he did not provide any explanation for doing so nor did he offer any mitigating evidence.

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.

⁵ Item 4.

⁶ *Id.*

In the decision-making process, the Government has the initial burden of establishing controverted facts alleged in the SOR by “substantial evidence,”⁷ demonstrating, in accordance with the Directive, that it is not clearly consistent with the national interest to grant or continue an applicant’s access to classified information. Once the Government has produced substantial evidence of a disqualifying condition, the burden shifts to Applicant to produce evidence “to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and [applicant] has the ultimate burden of persuasion as to obtaining a favorable clearance decision.” Directive ¶ E3.1.15. The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).⁸

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* Executive Order 12968 (Aug. 2, 1995), Section 3.

Analysis

Guideline F, Financial Considerations

Under Guideline F (Financial Considerations),⁹ the Government’s concern is:

⁷ See Directive ¶ E3.1.14. “Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the record.” ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). “This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent [a Judge’s] finding from being supported by substantial evidence.” *Consolo v. Federal Maritime Comm’n*, 383 U.S. 607, 620 (1966). “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994).

⁸ “The Administrative Judge [considers] the record evidence as a whole, both favorable and unfavorable, evaluate[s] Applicant’s past and current circumstances in light of pertinent provisions of the Directive, and decide[s] whether Applicant ha[s] met his burden of persuasion under Directive ¶ E3.1.15.” ISCR Case No. 04-10340 at 2 (App. Bd. July 6, 2006).

⁹ Guideline ¶ 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.

Applicant admitted all allegations under Guideline F. (SOR ¶¶ 1.a. – 1.j.). As noted *supra*, he indicated in his Response to SOR that the 2006 foreclosure proceedings initiated against him had been resolved. His admissions and evidence submitted by the Government substantiate the allegations under this concern. In the absence of credible evidence, I am unable to glean any further information, favorable or unfavorable, with regard to identified financial concerns.

¶ 19. Conditions that could raise a security concern and may be disqualifying include:

- (a) inability or unwillingness to satisfy debts;
- (b) indebtedness caused by frivolous or irresponsible spending and the absence of any evidence of willingness or intent to pay the debt or establish a realistic plan to pay the debt;
- (c) a history of not meeting financial obligations;
- (d) deceptive or illegal financial practices such as embezzlement, employee theft, check fraud, income tax evasion, expense account fraud, filing deceptive loan statements, and other intentional financial breaches of trust;
- (e) consistent spending beyond one's means, which may be indicated by excessive indebtedness, significant negative cash flow, high debt-to-income ratio, and/or other financial analysis;
- (f) financial problems that are linked to drug abuse, alcoholism, gambling problems, or other issues of security concern;
- (g) failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same;
- (h) unexplained affluence, as shown by a lifestyle or standard of living, increase in net worth, or money transfers that cannot be explained by subject's known legal sources of income; and
- (i) compulsive or addictive gambling as indicated by an unsuccessful attempt to stop gambling, "chasing losses" (i.e. increasing the bets or

returning another day in an effort to get even), concealment of gambling losses, borrowing money to fund gambling or pay gambling debts, family conflict or other problems caused by gambling.

Of the Financial Considerations Disqualifying Conditions listed *supra*, two are applicable: ¶ 19(a): “inability or unwillingness to satisfy debts;” and 19(c): “a history of not meeting financial obligations.” These debts became delinquent in the 2004-2009 timeframe. Furthermore, Applicant did not submit a payment plan, a budget, nor did he show that he has the ability to begin making payments on any of these debts.

¶ 20. Conditions that could mitigate security concerns include:

(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;

(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; and

(f) the affluence resulted from a legal source of income.

Guideline ¶ 20(a) does not provide a temporal or specific definition of what constitutes “recent” conduct. In the absence of any evidence, Applicant has nine delinquent debts, which remain unpaid and not in a payment plan. Moreover, he has not shown sufficient effort and/or unusual circumstances to establish his financial problems are “unlikely to recur.” His overall conduct with his creditors casts doubt on his current reliability, trustworthiness, and good judgment. Based on my evaluation of the record evidence as a whole,¹⁰ I conclude Guideline ¶ 20(a) does not apply.

¹⁰See ISCR Case No. 03- 02374 at 4 (App. Bd. Jan. 26, 2006) (citing ISCR Case No. 02-22173 at 4 (App. Bd. May 26, 2004)). When making a recency analysis all debts are considered as a whole.

The record disclosed sufficient information to support partial application of Guideline ¶ 20(b). Applicant did go through a contentious divorce in 2006, but offered little evidence as to how his divorce caused his debts or precluded him from resolving his debts. The record did not disclose any information indicating his actions were in bad faith. However, Applicant's conduct does not warrant full application of Guideline ¶ 20(b) because he did not act more aggressively and responsibly to resolve his delinquent debts or if he did so, failed to submit evidence documenting that he did.¹¹

Applicant does not receive credit under Guideline ¶ 20(c) because he did not receive financial or credit counseling, and he has no payment plans with his creditors. There is no record evidence of "clear indications that the problem is being resolved or is under control."

Guideline ¶ 20(d) does not fully apply because there is insufficient information to establish that Applicant showed good faith in the resolution of his debts.¹² However, he is able to receive partial credit for resolving the foreclosure proceedings against him alleged in SOR ¶ 1.j. Guideline ¶ 20(e) is not applicable. He did not provide "documented proof to substantiate the basis of the dispute or [provide] evidence of actions to resolve the issue" with respect to any debts, except the foreclosure. In sum, he has not demonstrated sufficient effort to resolve financial concerns to merit full application of any mitigating conditions under the adjudicative guidelines.

Considering the record evidence as a whole,¹³ I conclude none of the six Financial Considerations Mitigating Conditions (FC MC) are fully applicable. Based on

¹¹"Even if Applicant's financial difficulties initially arose, in whole or in part, due to circumstances outside his control, the Judge could still consider whether Applicant has since acted in a reasonable manner when dealing with those financial difficulties." ISCR Case No. 05-11366 at 4 n.9 (App. Bd. Jan. 12, 2007) (citing ISCR Case No. 99-0462 at 4 (App. Bd. May 25, 2000); ISCR Case No. 99-0012 at 4 (App. Bd. Dec. 1, 1999); ISCR Case No. 03-13096 at 4 (App. Bd. Nov. 29, 2005)).

¹²The Appeal Board has previously explained what constitutes a "good faith" effort to repay overdue creditors or otherwise resolve debts:

In order to qualify for application of [the "good faith" mitigating condition], an applicant must present evidence showing either a good-faith effort to repay overdue creditors or some other good-faith action aimed at resolving the applicant's debts. The Directive does not define the term 'good-faith.' However, the Board has indicated that the concept of good-faith 'requires a showing that a person acts in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation.' Accordingly, an applicant must do more than merely show that he or she relied on a legally available option (such as bankruptcy [or statute of limitations]) in order to claim the benefit of [the "good faith" mitigating condition].

(internal citation and footnote omitted) ISCR Case No. 02-30304 at 3 (App. Bd. Apr. 20, 2004) (quoting ISCR Case No. 99-9020 at 5-6 (App. Bd. June 4, 2001)).

¹³ See ISCR Case No. 03- 02374 at 4 (App. Bd. Jan. 26, 2006) (citing ISCR Case No. 02-22173 at 4 (App. Bd. May 26, 2004)). When making a recency analysis for FC MC 1, all debts are considered as a whole.

the available evidence, his financial problems are likely to be a concern in the future. Moreover, his financial problems are recent, not isolated, and ongoing.

Guideline E (Personal Conduct)

Under Guideline E (Personal Conduct),¹⁴ the government's concern is as follows:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

As noted, Applicant provided no explanation for failing to disclose truthful responses to questions 28(a), and 28(b). Considering the record as a whole, I am convinced Applicant deliberately failed to disclose the information. Numerous factors weighed in my analysis to reach that conclusion, including: Applicant's age, his level of education, his employment history, the number and value of the debts, his long term disregard of the debts, and his admission. He knew the importance of accurate completion of his-QIP, and nevertheless failed to provide information that was material to making an informed security decision.

¶ 16. Conditions that could raise a security concern and may be disqualifying include:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities;

(b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative;

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information;

¹⁴ Guideline 18.

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of:

(1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or other government protected information;

(2) disruptive, violent, or other inappropriate behavior in the workplace;

(3) a pattern of dishonesty or rule violations;

(4) evidence of significant misuse of Government or other employer's time or resources;

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing, or (2) while in another country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group;

(f) violation of a written or recorded commitment made by the individual to the employer as a condition of employment; and

(g) association with persons involved in criminal activity.

Of the Personal Conduct Disqualification Conditions listed *supra*, two are applicable ¶ 16(a) “deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire . . .”, and ¶ 16(e): “personal conduct or concealment of information about one’s conduct, that creates a vulnerability to exploitation, manipulation, or duress . . .”

¶ 17. Conditions that could mitigate security concerns include:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of

authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress;

(f) the information was unsubstantiated or from a source of questionable reliability; and

(g) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

I specifically considered all Guideline E Mitigating Conditions and conclude that none apply. Applicant's falsification is recent, and his favorable information is not sufficient to apply any of the MCs.

For the reasons outlined under the discussions of Guidelines F and E, I conclude Applicant's behavior shows questionable judgment, lack of reliability, and untrustworthiness.

To conclude, Applicant presented little or no evidence to explain, extenuate, or mitigate the financial considerations and personal conduct security concerns. Applicant did not meet his ultimate burden of persuasion to obtain a favorable clearance decision. In reaching this conclusion, the whole person concept was given due consideration and that analysis does not support a favorable decision.

I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my "careful consideration of the whole person factors"¹⁵ and supporting evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under the Guidelines. Applicant

¹⁵ See ISCR Case No. 04-06242 at 2 (App. Bd. June 28, 2006).

has not mitigated or overcome the Government's case. For the reasons stated, I conclude he is not eligible for access to classified information.

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.i.:	Against Applicant
Subparagraph 1.j.:	For Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a.:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national security to grant Applicant eligibility for a security clearance. Clearance is denied.

ROBERT J. TUIDER
Administrative Judge