



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



In the matter of:)
)
-----) ISCR Case No. 08-09437
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Gina L. Marine, Esquire, Department Counsel
For Applicant: *Pro se*

May 7, 2010

Decision

MATCHINSKI, Elizabeth M., Administrative Judge:

Applicant relied on consumer credit cards to pay for living expenses during a period of inconsistent employment from May 2002 until September 2005. As of November 2009, he owed delinquent credit card debt of about \$22,911 and 2007 federal and state income taxes totaling about \$6,346. He is making regular payments on his income tax debt, but financial concerns are not fully mitigated. He has yet to address his credit card delinquencies, and he has no discretionary income despite an annual salary of \$72,000. Clearance is denied.

Statement of the Case

Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) on June 18, 2008. On July 27, 2009, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a statement of reasons (SOR) detailing the security concerns under Guideline F, Financial Considerations, that provided the basis for its preliminary decision to deny him a security clearance and to refer the matter to an administrative judge. 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 adjudicative guidelines (AG) effective within the Department of Defense as of September 1, 2006.

On August 17, 2009, Applicant answered the SOR and requested a hearing. The case was assigned to me on September 15, 2009, to conduct a hearing and to determine whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. On October 16, 2009, I scheduled a hearing for November 5, 2009.

I convened the hearing as scheduled. Five Government exhibits (Ex. 1-5) and three Applicant exhibits (Ex. A-C) were admitted into evidence without an objection. Applicant and three witnesses testified, as reflected in a transcript (Tr.) received on November 18, 2009.

At Applicant's request, I held the record open for additional documentation until November 20, 2009. On November 18, 2009, Applicant submitted four documents that were entered as exhibits D through G without an objection.

Findings of Fact

DOHA alleged under Guideline F, Financial Considerations, that Applicant owes credit card debt totaling \$22,911 (SOR 1.a and 1.b), federal taxes of about \$9,327.24 (SOR 1.c) and state (hereafter, state X) taxes of \$1,280 (SOR 1.d). Applicant admitted the debts. However, the balance owed the Internal Revenue Service (IRS) had been reduced through interception of his income tax refund for 2008, and by monthly payments of \$147. He also was paying \$50 per month to state X. He explained that he relied on consumer credit cards to cover living expenses while unemployed from May 2002 until September 2005. The tax debts were incurred because his ex-wife claimed their son as a dependent on her income tax returns and he had to pay taxes on about \$10,000 in credit card debt that had been cancelled by a creditor. After considering the pleadings, exhibits, and transcript, I make the following factual findings.

Applicant is a 52-year-old college graduate, who has worked as a senior quality control engineer for his current employer, a defense contractor, since June 2007. (Ex. 1) He was granted an interim secret-level security clearance for his duties in June 2008. It was withdrawn on issuance of the SOR (Tr. 26-27.) Applicant has custody of a teenage son, who was born to him and his ex-wife in June 1996. Applicant and his ex-wife were divorced by order dated March 31, 2009, after 26 years of marriage. (Ex. 1, C.)

From September 1987 to February 1998, Applicant worked as a senior engineer for a computer manufacturer. In early 1998, Applicant's work unit was sold. Applicant stayed on with a new employer in the position of test engineer at a salary of about \$60,000 annually. (Tr. 56.) He was laid off in May 2002. (Ex. 1, 2, 3, Tr. 56.)

Applicant had no full-time employment from May 2002 to September 2005. He collected unemployment compensation of about \$500 weekly from May 2002 to

February 2003. (Tr. 98-99.) He then worked sporadically as a substitute teacher, as a newspaper delivery person, and as a landscaper (Tr. 55, 98.), but his earnings were insufficient to cover the family's expenses.¹ For two years, he earned less than \$6,000 annually. (Tr. 101) His ex-wife worked only about 15 hours per week. (Tr. 55.) Applicant and his ex-wife relied on consumer credit cards that they had taken out jointly to cover some expenses such as groceries and gasoline. (Ex. 1, 2.) Eventually, they were unable to make even the minimum payments on some of their accounts. (Tr. 97.) In November 2003, a past due credit card balance of \$8,800 was charged off by a bank and sold to a collection agency (SOR 1.b). In February 2004, their joint account with a credit union, that they had held since November 1988, was charged off in the amount of \$11,074 (not alleged). The following month, the credit card lender identified in SOR 1.a cancelled their account for nonpayment of a \$12,663 balance. (Ex. 2, 5.) The creditor refused to make any accommodations concerning repayment while Applicant was unemployed. (Tr. 73.) In May 2005, Applicant paid a bankruptcy attorney about \$500, but he never completed the paperwork to file a bankruptcy petition. (Tr. 74-75.)

Applicant worked as a project engineer for a pharmaceutical company on a one-year contract from September 2005 to September 2006. He was paid about \$70,000 in wages. (Ex. 1, 2, Tr. 55-56.) Applicant did not incur any new credit card debt, but he also made no payments on the credit card debts charged off or placed for collection. Out of work through the fall of 2006, Applicant accepted a contract position at \$55 per hour with his present employer starting in January 2007. (Tr. 96.) At the end of three to six months working in state X, he was promised a full-time position in state Y. In April 2007, his ex-wife resigned from her part-time job in state X in anticipation of their relocation. In June 2007, Applicant started working full-time with the company in state Y at an annual salary of \$69,000. (Tr. 96.) Two days before Applicant's start date, Applicant's ex-wife told Applicant that she would not move, and that she wanted a divorce. (Ex. 2, Tr. 58.)

Applicant began a protracted and costly custody battle over his son, who wanted to live with him in state Y. (Tr. 58.) He spent about \$800 per month traveling between states Y and X to see his son, in addition to paying separate living expenses (housing, groceries, utility costs) for himself in state Y and for his ex-wife and son in state X. (Tr. 58-59, 105-06.) In October 2007, Applicant filed for divorce. (Ex. C.) In November 2007, he was ordered to pay child support, which he complied with by paying his ex-wife's rent at \$1,200 per month. Beginning in January 2008, Applicant was also required to pay alimony to his ex-wife at \$140 weekly. (Ex. 2, 3, Tr. 58-59.) Because of these expenses, Applicant did not have the funds to make payments on the delinquent credit card debts accumulated during the marriage. (Ex. 2.)

In January 2008, Applicant was notified by the IRS that his federal taxable income for 2007 had increased by \$11,074 because the credit union had cancelled ("forgiven") his delinquent credit card balance. Applicant's ex-wife then filed her income tax returns for tax year 2007 as married filing separately, and she claimed their son as a

¹Applicant testified that his income went from \$60,000 per year to between \$5,000 and \$6,000 per year. (Tr. 56.)

dependent on her returns. Consequently, Applicant was allowed to claim only himself as an exemption on an adjusted gross income of \$103,734. He ended up owing about \$10,000 in federal taxes, \$276 in state Y taxes, and \$1,280 in state X taxes for tax year 2007.² (Ex. 2, 3, D, Tr. 59-60.)

On June 18, 2008, Applicant completed an e-QIP. He responded “No” to the financial record inquiries, but he added that he had some financial difficulties while unemployed. He answered “Yes” to questions 28.a, “In the last 7 years, have you been over 180 days delinquent on any debt(s)?” and 28.b, “Are you currently over 90 days delinquent on any debt(s)?,” and disclosed that he owed \$25,000 in delinquent credit card debt. (Ex. 1.)

On July 22, 2008, Applicant was interviewed by a government investigator about his financial issues. He admitted owing delinquent credit card balances of about \$12,663 (SOR 1.a) and \$8,800 (SOR 1.b).³ He admitted that one creditor (SOR 1.b) had pursued collection, but he did not have the funds to satisfy the debt. Applicant estimated his federal and state tax debts totaled \$11,450 for tax year 2007, although he and his ex-wife were scheduled for mediation in August 2008, in part over their joint tax liability. Due to his support payments for her rent and alimony, Applicant was living from paycheck to paycheck. (Ex. 2.) At a court hearing on November 4, 2008, Applicant’s ex-wife indicated she had no intention of repaying any of their marital debt. (Ex. 2.)

In August 2008, Applicant was granted physical custody of his son, who joined him in state Y. Applicant was no longer obligated to pay his ex-wife’s rent, but alimony payments to her continued at \$140 per week. Between September 2008 and January 2009, Applicant spent \$100 every other week to take his son to his ex-wife for visits. (Ex. 2.) His ex-wife has not seen their son since then. (Tr. 61.)

In December 2008, Applicant began repaying his \$9,327.24 debt to the IRS at \$147 per month, his \$1,280 debt to state X at \$50 per month, and his \$276.89 debt to state Y at \$30 per month. (Ex. 3, D, G, E, F.) In response to DOHA financial interrogatories, Applicant indicated on January 8, 2009, that he was pursuing his spouse for half of the credit card and tax debts since they were incurred during their marriage. (Ex. 3.) In late January 2009, Applicant was informed by state X that he owed an additional \$198.28 in state X taxes (Ex. 3), apparently following an audit of a return filed before 2007. (Ex. D, Tr. 92.)

²In his summary of Applicant’s interview, the government investigator indicated that Applicant owed \$10,000 in federal taxes, \$250 in state Y taxes, and \$1,200 in state X taxes for tax year 2007. (Ex. 2) Documentation submitted by Applicant to DOHA in January 2009 showed tax debts of \$198.28 to state X and \$1,279.51 to state Y (Ex. 3). But the same firm collecting the state Y tax debt indicated in a letter of October 9, 2009, that payments totaling \$276.89 represented payment in full. (Ex. E.) Furthermore, Applicant provided copies of payments by check at \$50 monthly from December 2008 through October 2009 (Ex. G.) to state X which would substantiate that state X and not state Y was owed the higher balance.

³Applicant recognized the debt under the name of the original lender rather than the collection agency alleged in SOR 1.b.

When Applicant filed his 2008 federal income tax return in March 2009, he claimed his son as a dependent. His return was rejected by the IRS because his ex-wife had already claimed their son on her return. Applicant filed a dispute with the IRS, and he proved that he was entitled to an exemption. It resulted in a tax overpayment that the IRS intercepted and applied to his 2007 tax debt. (Ex. 2, D, Tr. 103.)

Applicant was granted a divorce from his ex-wife by court order dated March 31, 2009.⁴ Between legal and guardian fees, he spent about \$15,000 to gain custody of his son and to divorce his ex-wife. (Tr. 78.) He paid less than half of that amount from his funds. The rest was gifted to him by a family member. (Tr. 79-80.) Beginning April 3, 2009, Applicant was entitled to child support payments of \$25 weekly from his ex-wife, who was employed part-time at a public library. (Tr. 69-70.) She was also ordered to pay half of their son's out-of-pocket medical costs. Applicant was ordered to continue alimony payments to his ex-wife, at \$150 per week, and he was held solely responsible for repaying the marital debts. (Ex. C, Tr. 71.)

In April 2009, Applicant took out a vehicle loan of \$8,757, to be repaid at \$174 per month, for a 2002 model-year vehicle. (Ex. 4, Tr. 76) He borrowed \$8,000 from a family member that he put toward the car and he financed the remainder. (Tr. 77.) The balances of his outstanding credit card delinquencies continued to mount. As of May 2009, the creditor in SOR 1.a was claiming an unpaid balance of \$14,134. (Ex. 4.)

As of October 2009, the balance of his federal tax debt was \$5,418.41, after the interception of his 2008 refund and his monthly payments of \$147 since December 2008. (Ex. F.) Applicant had paid off his state Y tax debt as of October 9, 2009. (Ex. D, E.) He had paid \$550 toward his state X tax delinquency. (Ex. G.) Applicant has been making timely payments on his living expenses, including an automobile loan, since his divorce (Tr. 60.), with the exception of his cable television bill from December 2007. He believes it "got lost in the holiday shuffle." He was paying a little extra each month to cover the debt. (Tr. 111.) He has not used any credit cards since 2005. (Tr. 64.) He has made no effort to repay the credit card delinquencies in SOR 1.a and 1.b, or to repay the interest-free loan for his car (Tr. 78), because he does not have the funds. He intends to make repayment arrangements once his federal income tax debt is satisfied. (Tr. 73.) Applicant reported having no discretionary income as of November 2009 (Tr. 76.), despite a current annual salary of \$72,000. (Tr. 95.)

Applicant has incurred about \$500 in medical debt for his son since the divorce. As of November 2009, his ex-wife had not paid her share of those costs. (Tr. 65-67.) Nor has she paid him the \$25 in child support per week, even though she opened a bookstore in June 2009. (Tr. 69.) Applicant has been timely in his alimony payments. (Tr. 61.) In October 2009, Applicant reported his ex-wife to state X's child support enforcement for noncompliance with the support order. (Tr 62-63.)

⁴Applicant indicates he was divorced in April 2009. The judge's order was dated March 31, 2009. (Ex. C.) It is unclear when the judgment of divorce was filed.

Applicant proved to be a quick learner and performed very well in a fast-paced environment in his current employment. He was given an overall rating of “meets expectations” for his performance in 2007 (Ex. A.) and in 2008 (Ex. B.) In the opinion of his supervisor, Applicant was making “great progress” in learning the aspects of quality engineering. Applicant’s productivity and timeliness were within established time frames. He demonstrated a good understanding of potential ethics issues, and asked for guidance when issues arose. (Ex. B.) Applicant’s employer’s facility security officer testified that Applicant complied with the requirements of the National Industrial Security Program Operating Manual before his interim clearance was withdrawn. (Tr. 26-27.)

Policies

The U.S. Supreme Court has recognized the substantial discretion the Executive Branch has in regulating access to information pertaining to national security, emphasizing that “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are required to be considered 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, 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 grants access to classified information. Decisions include, by necessity, consideration of the possible risk that 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 about finances 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.

Applicant used credit cards to pay for living expenses during a period of inconsistent employment from May 2002 to September 2005. Three accounts became seriously delinquent in the aggregate amount of \$32,537. While about \$11,074 of the debt was forgiven, Applicant had to pay taxes on the cancelled debt. As of the date of his subject interview in July 2008, he owed about \$9,327.24 in federal taxes, \$1,280 in state X taxes, and \$276.89 in state Y taxes, in addition to credit card delinquency of at least \$21,440. AG ¶ 19(c), “a history of not meeting financial obligations,” and AG ¶ 19(a), “inability or unwillingness to satisfy debts,” clearly apply.

As of November 2009, Applicant had not resolved the debts in the SOR. While he had been making monthly payments toward his tax debts to the IRS and state X, and had satisfied his state Y tax debt, he had made no effort to contact the creditors in SOR 1.a and 1.b. 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,” cannot reasonably apply where there are ongoing financial issues.

There is credible evidence that would implicate unemployment and inconsistent employment as the primary causes of Applicant's credit card delinquencies. After he was laid off in May 2002, Applicant was unable to find full-time employment until September 2005. For two of those years, he earned less than \$6,000 annually and his spouse worked only about 15 hours a week. Loss of employment is a mitigating condition. See AG ¶ 20(b) (stating, “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”). For AG ¶ 20(b) to fully apply, Applicant must have acted responsibly once he was in a position to do so. He earned

about \$70,000 at contract employment with a pharmaceutical company from September 2005 to September 2006. His neglect of the credit card debts during that time is understandable. He needed some time to regain financial stability. Applicant also had no guarantee of income after the one-year contract ended, and as it turned out, he was without a job until early January 2007, when he began his contract position with his current employer at \$55 per hour. While he began full-time employment at \$69,000 a year in June 2007, he incurred unexpected expenses of the type contemplated in AG ¶ 20(b) thereafter.

Applicant and his ex-wife separated when he moved for his current employment, and he paid his ex-wife's living expenses as well as his own. In January 2008, he was ordered by the divorce court to pay his ex-wife alimony at \$140 per week. Applicant had travel costs to visit his son as well. Later that spring, he was assessed additional tax liabilities of about \$10,885 for 2007, in part because of the cancellation of \$11,024 in credit card debt incurred to support himself and his family while he lacked a full-time job, but also because his ex-wife claimed their son as a dependent on her income tax returns. He incurred about \$15,000 in fees for his divorce and the custody battle, although he paid more than half of the fees with monies gifted to him by a family member.

However, Applicant's financial situation should have improved after he was granted primary custody of his son in August 2008. He no longer had to pay child support to his ex-wife. Travel expenses for his son to see his ex-wife ceased in January 2009. In December 2008, he began repaying his tax debts, but the total payments were only \$227. While AG ¶ 20(b) has some applicability, Applicant cannot be said to have acted responsibly when he made no effort to contact the credit card lenders in SOR 1.a and 1.b after he was held solely liable for repayment on his divorce.

AG ¶ 20(d), "the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts," applies in part because of Applicant's efforts to resolve his tax debts starting in December 2008. Due to interception of his tax refund for 2008, but also because of his \$147 monthly payments, he had reduced his federal income tax debt to \$5,418.41 as of October 2009. He had paid \$550 toward his state X tax debt and had satisfied his state Y tax debt.

Applicant has not received financial counseling that would qualify under AG ¶ 20(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." However, he has taken some steps to ensure no recurrence of the credit card delinquencies by maintaining no active credit card accounts. Available credit reports corroborate his testimony that he has not used any credit cards since his divorce. He took out a loan for a used car in April 2009, and he has apparently been timely in his \$174 monthly payments for the car. But it would be premature to conclude that his financial problems are being resolved or are under control. He is still paying for a delinquent cable company debt from December 2007. Moreover, he testified he was living from paycheck to paycheck, despite the fact that his salary has increased to \$72,000 annually and he is not paying \$1,200 to his ex-wife each month. His alimony increased only slightly, from

\$140 to \$150 per week. School expenses for his son, clothing, and food do not fully explain where his money has gone. It is unclear when he will be able to make payments toward his \$22,911 in delinquent credit card debt.

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 conduct and all the relevant circumstances in light of 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.

Available credit information reflects outstanding balances totaling about \$29,257 on the debts listed in the SOR. Applicant used credit cards to support his family during a prolonged period of low income. Unforeseen costs related to a divorce and custody battle prevented him from taking timely steps to address his delinquent credit card debts or the tax debts related in part to cancellation of old credit card debt.

Nothing in the Directive requires that an applicant be debt free before he can be granted access. The DOHA Appeal Board has addressed a key element in the whole-person analysis in financial cases stating, in part, "an applicant is not required, as a matter of law, to establish that he has paid off each and every debt listed in the SOR. All that is required is that an applicant demonstrate that he has . . . established a plan to resolve his financial problems and taken significant actions to implement that plan." ISCR Case No. 07-06482 at 2-3 (App. Bd. May 21, 2008) (internal citations omitted). Applicant has made five months of payments on his tax debts, and he intends to resolve his credit card debts. Despite an annual salary of about \$72,000, he has yet to put aside any significant amount to address his old credit card balances, which represent \$22,911 of his outstanding delinquent debt at this point. Based on the evidence before me, I cannot conclude that it is clearly consistent with the national interest to grant Applicant a security clearance at this time. Should he continue to make his tax payments and begin to address his consumer credit debts, he may be a good candidate for a security clearance when again eligible a year from the date of this decision.

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:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	For Applicant

Conclusion

In light of 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.

Elizabeth M. Matchinski
Administrative Judge