



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



In the matter of:)	
)	
-----)	ISCR Case No. 08-11156
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Fahryn Hoffman, Esq., Department Counsel
For Applicant: *Pro se*

January 29, 2010

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guideline F (Financial Considerations). Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application on August 2, 2007. On July 27, 2009, the Defense Office of Hearings and Appeals (DOHA) sent him a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny his application, citing security concerns under Guideline 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 adjudicative guidelines (AG) promulgated by the President on December 29, 2005.

Applicant received the SOR on August 7, 2009; answered it on September 9, 2009; and requested a hearing before an administrative judge. Department Counsel was ready to proceed on September 28, 2009, and the case was assigned to an

administrative judge on October 2, 2009. It was reassigned to me on October 16, 2009, to consolidate the docket. DOHA issued a notice of hearing on October 27, 2009, scheduling the hearing for November 18, 2009. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 10 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibits (AX) A through O, which were admitted without objection. I kept the record open until December 4, 2009, to enable Applicant to submit additional documentary evidence. He timely submitted AX P, Q, and R, which were admitted without objection. Department Counsel's comments regarding AX P, Q, and R are attached to the record as Hearing Exhibit I. DOHA received the transcript (Tr.) on December 1, 2009.

Findings of Fact

In his answer to the SOR, Applicant admitted the allegations in SOR ¶¶ 1.a-1.f, 1.m, 1.v, 1.w, 1.x, 1.ab, and 1.ac. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 39-year-old radiological control technician employed by a defense contractor. He has worked for his current employer since August 2007. He enlisted in the Army National Guard in April 1988, and he has continued his service in the National Guard until the present (GX 2 at 17). He has held a security clearance since August 1988.

Applicant received a Chapter 7 bankruptcy discharge on January 9, 1996 (GX 9). This bankruptcy is alleged in SOR ¶ 1.ac.

Applicant was married in December 1995 and divorced in June 2007. He has a 12-year-old daughter born during that marriage. He paid child support and spousal support totaling almost \$1,000 per month until April 2009 (Tr. 135), when he was granted custody of his daughter (AX H at 1). His ex-wife is now obligated to pay \$300 per month in child support, but she has not paid it (Tr. 119).

Applicant has remarried, and his current spouse is expecting the birth of twins in early 2010 (Tr. 43). His spouse had about \$100,000 in debts, mostly for medical expenses, when they were married about three years ago. The medical expenses arose about a year before Applicant met his current spouse, as a result of her giving birth to three babies who died at birth (Tr. 25).

Applicant graduated from a state police academy and completed an associate's degree program in 1997 and 1998. He received a certificate of appreciation for his contributions to a state counter-drug procurement program in January 1999 (AX E). He earned a bachelor's degree in October 2000 (AX C). In March 2004, he was appointed as a special advocate for abused and neglected children by the juvenile and domestic family relations court for his community (AX D). He received a master's degree in business administration in 2007 and a master's degree in management in 2009 (AX A;

AX B; Tr. 43). He has about \$70,000 in student loans, on which payment is deferred (Tr. 132).

In 2002, after Applicant was released from a period of active duty with the National Guard, he received unemployment benefits. After three months he found employment, but he continued to collect unemployment benefits because he needed the money. In June 2002, he was charged with filing a false statement for unemployment benefits. The charge was dismissed after he paid restitution of about \$1,300 (GX 2 at 13, 23-24; Tr. 101-02).

Applicant worked at a naval shipyard as a radiation monitor from March 2001 to September 2004. Between October 2004 and April 2007, he worked at 17 different nuclear power plants in seven different states (AX A; Tr. 24). His security clearance application reflects unemployment from June to November 2005, March to October 2006, December 2006 to February 2007, and April to August 2007.

During an interview with a security investigator in September 2007, Applicant attributed his financial problems to mismanagement and spending more than he earned (GX 2 at 7). He admitted most of the delinquent debts reflected on his credit reports, including the debts alleged in SOR ¶¶ 1.g, 1.h, 1.n, 1.o, 1.r, 1.s, 1.t, and 1.v (GX 2 at 8-11). He later denied these debts in his answer to the SOR.

Applicant testified that many of his delinquent debts arose between 2004 and 2007, when he was moving frequently and not receiving his mail (Tr. 24). He also incurred about \$10,000 in legal expenses to gain custody of his daughter (Tr. 25, 160).

Applicant denied the debt for cell phone service alleged in SOR ¶ 1.v. He testified he contacted the service provider and was informed that they had no information on the debt and could not explain why it was listed in his credit report (Tr. 86). He presented no documentary proof of his contact with the service provider. He has not submitted written disputes of this debt or any of the debts alleged in the SOR to the credit reporting agencies (Tr. 83, 87).

The federal income tax debt alleged in SOR ¶ 1.aa includes the debt alleged in SOR ¶ 1.p, for which a tax lien was imposed and later satisfied (AX F at 2; Tr. 73). Applicant testified he filed his tax returns every year, but for several years the Internal Revenue Service (IRS) recalculated his taxes to be a greater amount. For some years, insufficient taxes were withheld from his pay, resulting in taxes due that were more than he could afford to pay when he filed his returns (Tr. 76).

Applicant estimates he currently owes the IRS about \$2,000 (Tr. 25). He has negotiated a payment agreement providing for \$100 payments each month beginning in November 2009. He also has an additional \$300 withheld from his pay each pay period so that he will accumulate a tax overpayment sufficient to pay off the tax debt when he files his income tax return for tax year 2009 (Tr. 71-72, 78; AX F at 4).

Applicant filed a petition for Chapter 7 bankruptcy on May 15, 2009 (GX 10 at 1). This petition is alleged in SOR ¶ 1.ad. The debts alleged in SOR ¶¶ 1.a-1.o, 1.q, 1.s-1.u, 1.w, and 1.x are included in the bankruptcy. He received a discharge in August 2009 (AX N at 1; AX O at 2; Tr. 24).

The table below summarizes the evidence concerning the alleged debts.

SOR	Debt	Amount	Answer	Status	Evidence
1.a	Car Loan	\$279	Admit	Included in bankruptcy	GX 10 at 58
1.b	Credit card	\$427	Admit	Included in bankruptcy	GX 10 at 43
1.c	Credit card	\$182	Admit	Included in bankruptcy	GX 10 at 43
1.d	Telephone	\$138	Admit	Included in bankruptcy	AX N at 2-3
1.e	Credit card	\$954	Admit	Included in bankruptcy	Answer at 7
1.f	Credit card	\$896	Admit	Included in bankruptcy	GX 10 at 25; AX O at 4
1.g	Telephone	\$18	Deny	Included in bankruptcy	GX 10 at 26
1.h	Bad check	\$219	Deny	Included in bankruptcy	GX 10 at 31
1.i	Overdraft fee	\$139	Deny	Included in bankruptcy	Answer at 11
1.j	Medical	\$60	Deny	Included in bankruptcy	GX 10 at 65-66
1.k	Medical	\$218	Deny	Included in bankruptcy	GX 10 at 35-36; AX O at 3
1.l	Medical	\$81	Deny	Included in bankruptcy	GX 10 at 35-36; AX O at 3
1.m	Overdraft	\$1,576	Admit	Included in bankruptcy	AX O at 5
1.n	Movie rental	\$44	Deny	Included in bankruptcy	GX 10 at 51
1.o	Electric bill	\$282	Deny	Included in bankruptcy	GX 10 at 6
1.p	Federal taxes	\$8,288	Deny	Lien released; making payments	AX F; Tr. 70-71
1.q	Charge account	\$140	Deny	Included in bankruptcy	GX 10 at 22
1.r	Bad check	\$65	Deny	Paid	GX 3; Answer at 20-21
1.s	Medical	\$353	Deny	Included in bankruptcy	GX 10 at 30
1.t	Telephone	\$91	Deny	Included in bankruptcy	GX 10 at 48
1.u	Auto insurance	\$91	Admit	Included in bankruptcy	GX 10 at 55
1.v	Cell phone	\$182	Deny	Disputed; no documentation	GX 2 at 10; AX P; Answer at 26
1.w	Furniture	\$140	Admit	Included in bankruptcy	GX 10 at 23
1.x	Medical	\$177	Admit	Included in bankruptcy	GX 10 at 35-36
1.y	Furniture	\$747	Deny	Judgment satisfied by garnishment	GX 8 at 4; Tr. 94
1.z	Judgment--auto accident	\$4,000	Deny	Making monthly \$100 payments	GX 2 at 20-22; AX I
1.aa	Federal taxes	\$13,633	Deny	Includes ¶ 1.p; making payments; owes \$2,578	AX F; Tr. 70-75

Applicant has attended money management seminars offered by his credit union, and he completed a budget and credit management course in February 2009 (GX 2 at 17, 33; Tr. 130-31). He was required to obtain debt counseling when he filed his most recent bankruptcy petition.

In a personal financial statement submitted in response to DOHA interrogatories on May 4, 2009, Applicant reported net family income of \$4,284, expenses of \$2,735, debt payments of \$67, and a net monthly remainder of \$1,482. His net family income included his spouse's net salary of about \$1,200. His spouse was injured in an automobile accident and was unable to work from December 2008 until May 2009 (GX 2 at 5; AX G). She returned to work but was laid off in July 2009. At the time of the hearing, she was unable to work outside the home because of her pregnancy (Tr. 133).

In his bankruptcy petition filed on May 15, 2009, Applicant reported average monthly income of \$5,309, and expenses of \$5,509, leaving a monthly shortfall of \$200 (GX 10 at 75). He reported net assets of \$16,216 and liabilities of \$202,950 (GX 10 at 10). He testified that the actual amount of debts discharged was considerably lower than shown on his schedule of creditors, because several debts listed were duplicates and his listing of debts included his delinquent federal taxes and about \$70,000 in student loans that were not dischargeable (Tr. 106).

In his post-hearing submission, Applicant reported that his actual net family income and expenditures for November 2009 were \$3,726. The expenditures include savings of \$70 and a \$50 payment to a prepaid college fund for his daughter (AX H at 4; AX Q).

Applicant owns a 14-year-old car and an 8-year-old van, and the loans for both have been paid in full (Tr. 125). He does not own a home, but he and his wife have purchased a \$3,000 vacation time share, on which the monthly payments are \$67 (Tr. 127). He has about \$2,000 in savings and \$1,989 in his retirement account (Tr. 130).

Policies

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to "control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the revised adjudicative guidelines (AG). These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An

administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. 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.

Clearance decisions must be made "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is not necessarily a determination as to the loyalty of the applicant. It is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. "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). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Guideline F, Financial Considerations

The SOR alleges 27 delinquent debts totaling about \$34,420 (SOR ¶¶ 1.a-1.aa). It also alleges an arrest for filing a false statement for unemployment benefits (SOR ¶¶ 1.ab), and two Chapter 7 bankruptcies (SOR ¶¶ 1.ac and 1.ad).

The federal tax debt alleged in SOR ¶ 1.p is included in the debt alleged in SOR ¶ 1.aa. When the same conduct is alleged twice in the SOR under the same guideline, one of the duplicative allegations should be resolved in the applicant's favor. See ISCR Case No. 03-04704 (App. Bd. Sep. 21, 2005) at 3 (same debt alleged twice). Accordingly, I will resolve the SOR ¶ 1.p for Applicant.

The concern under this guideline is set out in AG ¶ 18 as follows:

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.

Several disqualifying conditions under this guideline are relevant. AG ¶ 19(a) is raised by an "inability or unwillingness to satisfy debts." AG ¶ 19(c) is raised by "a history of not meeting financial obligations." AG ¶ 19(d) is raised by "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." AG ¶ 19(e) is raised by "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." The evidence and Applicant's admissions raise all four disqualifying conditions, shifting the burden to him to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

Security concerns based on financial problems can be mitigated by showing that "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." AG ¶ 20(a). This mitigating condition is not established for Appellant's delinquent debts, because his delinquent debts are numerous, not yet resolved, and did not occur under circumstances that make them unlikely to recur.

AG ¶ 20(a) is also relevant to Applicant's arrest for filing a false statement in connection with his receipt of unemployment benefits in 2001. It happened more than seven years ago, and it was a single act of misconduct that has not recurred. He promptly made restitution. On the other hand, it did not occur under circumstances making it unlikely to recur. Applicant was a mature adult at the time of the misconduct. He has continued to demonstrate financial irresponsibility. I conclude that AG ¶ 20(a) is not established for the conduct alleged in SOR ¶ 1.ab.

Security concerns under this guideline also can be mitigated by showing that “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.” AG ¶ 20(b). Applicant encountered several circumstances beyond his control. He had periodic periods of unemployment, a marital break-up, and an expensive custody battle. His spouse’s recent automobile accident and inability to work reduced the family income. On the other hand, many of his debts arose before his marital break-up and before his spouse’s injury. He has not acted responsibly. He has been continuously employed since August 2007, but he chose not to resolve most of his delinquent debts, in anticipation of filing for bankruptcy. Several of the debts were small: \$18 (¶ 1.g), \$60 (¶ 1.j), \$81 (¶ 1.l), \$44 (¶ 1.n), \$91 (¶ 1.u), and \$140 (¶ 1.w); and they could have been paid while his spouse was working. He admitted to a security investigator that his financial problems arose because of his mismanagement and overspending. I conclude AG ¶ 20(b) is not established.

Security concerns under this guideline also can be mitigated by showing 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.” AG ¶ 20(c). This mitigating condition is established because Applicant has received counseling and his financial problems are under control. Whether they are likely to remain under control is a separate issue addressed below.

Security concerns under this guideline also can be mitigated by showing that “the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.” AG ¶ 20(d). Good faith means acting in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation. ISCR Case No. 99-0201, 1999 WL 1442346 at *4 (App. Bd. Oct. 12, 1999).

AG ¶ 20(d) is not established for the judgment alleged in SOR ¶ 1.y, because it was resolved by garnishment of Applicant’s pay and not by any voluntary act on his part. It also is not established for the debts discharged in bankruptcy. Bankruptcy is a lawful, legitimate means of resolving delinquent debts, and it can ameliorate the security concern about resorting to unlawful means to obtain funds. However, it does not constitute a good-faith effort within the meaning of this guideline.

AG ¶ 20(d) is established for the debts alleged in SOR ¶¶ 1.p, 1.r, 1.z, and 1.aa. Applicant has paid the delinquent debt alleged in SOR ¶ 1.r and he is executing reasonable payment plans for the federal tax debts alleged in SOR ¶¶ 1.p and 1.aa and the judgment alleged in ¶ 1.z.

Security concerns under this guideline also can be mitigated by showing “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.” AG ¶ 20(e). Applicant admitted the cell phone debt alleged in SOR ¶ 1.v when he was interviewed by a

security investigator in September 2007, but he disputed it in his answer to the SOR and at the hearing. The basis for his dispute is that he has never had a contract with the provider. AG ¶ 20(e) is not established, however, because he has not provided any documentary proof that he has presented his dispute to the creditor or the credit reporting agencies.

Conditional Clearance

During his closing statement, Applicant suggested the possibility of being granted a conditional clearance for a year to allow him to demonstrate his financial responsibility (Tr. 161). I cannot adopt his suggestion, because I do not have authority to grant a conditional or interim clearance. ISCR Case No. 99-0901, 2000 WL 288429 at *3 (App. Bd. Mar. 1, 2000).

Whole-Person Concept

Under the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all the relevant circumstances. An 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. I have incorporated my comments under Guideline F in my whole person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

Applicant is a mature, well-educated adult. He was articulate and he seemed sincere at the hearing. He has held a security clearance for many years, apparently without incident. He has supported national defense, doing dangerous work, for many years. On the other hand, he has demonstrated financial irresponsibility for almost 15 years. Although his most recent bankruptcy discharge significantly reduces the financial pressure on him, he has not fully satisfied his federal tax debt or the judgment that arose from his auto accident. He recently assumed responsibility for his daughter and is about to become the father of twins. He has about \$70,000 in student loans that eventually must be repaid. His current budget provides virtually no discretionary funds. He has meager savings available for unexpected financial emergencies.

After weighing the disqualifying and mitigating conditions under Guideline F, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns based on financial considerations. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the national interest to continue his eligibility for access to classified information.

Formal Findings

I make the following formal findings on the allegations set forth in the SOR:

Paragraph 1, Guideline F (Financial Considerations): **AGAINST APPLICANT**

Subparagraphs 1.a-1.o:	Against Applicant
Subparagraph 1.p:	For Applicant
Subparagraph 1.q:	Against Applicant
Subparagraph 1.r:	For Applicant
Subparagraphs 1.s-1.y:	Against Applicant
Subparagraphs 1.z-1.aa:	For Applicant
Subparagraphs 1.ab-1.ad:	Against Applicant

Conclusion

In light of all of the circumstances, it is not clearly consistent with the national interest to continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

LeRoy F. Foreman
Administrative Judge