



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



In the matter of:)	
)	
)	ISCR Case No. 08-11432
SSN:)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Candace Le'i Garcia, Esquire, Department Counsel
For Applicant: Eric A. Eisen, Esquire

January 12, 2010

Decision

HOGAN, Erin C., Administrative Judge:

Applicant submitted his Questionnaire for Sensitive Positions (SF-86) on October 23, 2007. On July 9, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concern under Guideline F, Financial Considerations. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive), and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

On September 8, 2009, Applicant answered the SOR and requested a hearing before an administrative judge. Department Counsel was ready to proceed on October 14, 2009. The case was assigned to another administrative judge on October 16, 2009. On October 22, 2009, the case was transferred to me. On October 26, 2009, a Notice of Hearing was issued, scheduling the hearing for November 16, 2009. The case was heard on that date. The Government offered five exhibits which were admitted as Government Exhibits (Gov) 1 – 5. The Applicant testified and offered one exhibit which was marked as Applicant Exhibit (AE) A. The record was held open until November 30,

2009, to allow Applicant to submit additional documents. He timely submitted an 18-page document that was admitted as AE B. Department Counsel's response to AE B is marked as Hearing Exhibit (HE) I. The transcript was received on November 25, 2009. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Findings of Fact

In his Answer to the SOR, Applicant denies the sole SOR allegation, ¶ 1.a. He admits that he had the credit card but claims his former employer is responsible for the debt.

Applicant is a 36-year-old senior field service representative employed by a Department of Defense contractor seeking to maintain his security clearance. He has worked for his current employer since October 2007. From July 10, 1991, to October 16, 1999, he served on active duty in the United States Army. He separated with an honorable discharge in the pay grade of E-5. He has worked for numerous defense contractors after separating from active duty. He is divorced and has two children, a daughter, age 15, and a son, age 10. (Tr at 46-48; Gov 1; Gov 3.)

The sole allegation in the SOR is a \$63,519 AMEX credit card that was opened in August 2002 and placed for collection in January 2003. It is listed as an individual account on a credit report dated October 23, 2007. (SOR ¶ 1.a: Gov 2; Gov 3 at 2; Gov 4 at 3; Gov 5 at 2; Gov 6 at 4)

Applicant claims the AMEX card was a company credit card account which was issued to him during his employment with Company S from August 2002 to August 2003. Applicant worked for Company S in Colombia. He claims the AMEX card was used for official expenses. Although the AMEX card was in his name, he claims he never received a bill from the credit card company. (In his response to the SOR, his lawyer indicates that the AMEX credit card statements were mailed to his address in the United States instead of to his residence in Colombia.) He claims he would file expense reports with Company S and assumed Company S paid the credit card bill. (Tr at 34; Gov 2 at 5)

He did not discover the delinquent credit card account until 2004 when he attempted to purchase a house. He retained Mr. C., a family friend, to serve as his mortgage broker and financial advisor. Applicant provided a power of attorney to Mr. C.'s company to act on his behalf. Mr. C. disputed the delinquent accounts that were listed on Applicant's credit reports. Ten delinquent accounts were listed. Nine of the accounts were successfully removed under the Fair Credit Reporting Act. The AMEX credit card account was not removed. Mr. C. advised Applicant not to contact the credit card company directly because he might be held liable for the account and/or toll the statute of limitations. Mr. C.'s company did not directly contact AMEX or Company S about the AMEX debt. (Tr at 37, 41; AE B; Gov 2 at 4-5; Gov 3 at 5)

After Applicant left his employment with Company S, he obtained a job as a contract employee for the State Department working in Columbia. At some point, the government of Colombia threatened to jail Applicant and deport him because he failed to pay income taxes to the government of Columbia. He claimed Company S did not pay tax withholding to the Colombian government. Applicant claims he contacted Company S to inquire about the taxes owed to the Colombian government and about the AMEX debt. Applicant says that after a long protracted battle with the Colombian government, he paid the Colombian government \$18,000 in unpaid taxes. It took him over three years to be reimbursed by Company S for the unpaid taxes. He testified that he inquired about the AMEX debt at the same time. He claims Company S told him they would look into the credit card issue. After Company S reimbursed him for the taxes, Applicant claims that they stopped answering his telephone calls and e-mails. He contacted his senator to get Company S to pay the tax debt. (Tr at 41-44)

Under cross examination, Applicant stated that he began contacting Company S about the tax debt owed to the Colombian government in 2002/2003. He stated he was not aware of the AMEX debt at the time. Company S paid him the money for the tax debt in 2004. After Company S reimbursed the money owed for the Colombian tax debt, he became aware of the AMEX debt when he attempted to purchase a house. (Tr at 66-67)

Applicant has no documentation of his interaction with Company S about these issues. Most of the communication was done over the telephone. (Tr at 69-70) Shortly after receiving the SOR, Applicant contacted his senator's office to ask for help in resolving the issue with the AMEX debt, noting that it was a government contract matter and it is prejudicing his ability to remain employed in the defense of the U.S. The senator's office contacted Applicant about three weeks prior to the hearing and told him they were pursuing the matter. He claims that Company S contacted him and told him he could resubmit the expense reports for reconsideration. He claims he cannot resubmit the expense reports because he no longer has them. He saved copies of his expense reports but he has lost them after moving several times. (Tr at 70-72)

Applicant is waiting for a response from his senator's office. In October 2009, Applicant's counsel contacted AMEX on two occasions and tried to negotiate a compromise on Applicant's behalf. No agreement had been reached at the close of the record. (Tr at 72; AE A)

When Applicant filed monthly expense reports to Company S, he does not recall receiving notice that payment was received for the expense reports. He claims he never received statements from the AMEX credit card company directly. When he left his employment with Company S, he returned the AMEX card to the company. He does not believe Company S checked the AMEX card to make sure there was no outstanding balance. (Tr at 92-93)

As of August 24, 2008, Applicant's net monthly income was \$10,300. His monthly expenses include: \$1,000 child support, \$50 for a credit card, and \$100 for a cell phone.

His total monthly expenses were \$1,150. His employer pays all other expenses for him. After expenses, he has approximately \$9,150 left over each month. He has approximately \$14,000 in a 401K account. (Gov 2 at 5)

In his post-hearing submission, Applicant provided an e-mail from Colonel M. Colonel M. has 41 years combined active duty and reserve service in the United States Army. He retired in 2006. Colonel M. was Applicant's manager from April 2001 to July 2002. Applicant was a team leader for maintenance of UH-60L Blackhawk helicopters in support of the Colombian Army in their efforts for combating the rebel-army FARC. Colonel M. states Applicant is a loyal and dedicated American with the highest integrity and strength of character. They worked in a hostile environment. Colonel M. trusted Applicant with his life and well-being and would do so again without hesitation. Colonel M. supervised a team of mechanics in the maintenance of a very complex piece of equipment. (AE B at 3-4)

Colonel M. stated that company S's accounting practices were "a shambles." It took him three years for his personal affairs to be correctly aligned with the U.S. Internal Revenue Service. Colonel M. attributes most of the errors to the inaction and repeated errors of Company S. He claims Applicant's situation with the lack of AMEX payments fits the behavior of Company S's management. (AE B at 3)

Applicant's awards and decorations during his active duty military service include the Joint Service Commendation Medal, the Army Commendation Medal, the Army Achievement Medal, the Army Superior Unit Award (2nd Award), the Army Good Conduct Medal, the National Defense Service Medal, and the Humanitarian Service Medal. (Gov 3 at 7)

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the revised adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which must be considered when 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.

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 the applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline F, Financial Considerations

The security concern relating to the guideline for Financial Considerations is set out in AG ¶ 18:

Failure or inability to live within one’s means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual’s reliability, trustworthiness and ability to protect classified information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

The guideline notes several disqualifying conditions that could raise security concerns. I find Financial Considerations Disqualifying Condition (FC DC) ¶19(a) (an inability or unwillingness to satisfy debts); and FC DC ¶19(c), (a history of not meeting financial obligations) apply to Applicant’s case. Applicant incurred a \$63,519 credit card debt that was placed for collection in January 2003. He became aware of the debt in 2004. At the close of the record, the debt remains unresolved.

The Government's substantial evidence and Applicant's own admissions raise security concerns under Guideline F. The burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the security concerns. (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. September 22, 2005))

The guideline also includes examples of conditions that could mitigate security concerns arising from financial difficulties. Financial Considerations Mitigating Condition (FC MC) ¶ 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) is not applicable. Although Applicant claims this credit card account was a business account, there is nothing in the file to corroborate his assertions. Even if it were to be established that this was a business credit card account, Applicant could still be responsible for paying the account. He provided no evidence pertaining to Company S's procedures for filing expense reports. He provided no evidence pertaining to who was responsible for paying the credit card account. I cannot rule out the possibility that Applicant was reimbursed directly by the company after he submitted the expense reports and that he was responsible for paying the credit card account. Nor can I rule out the possibility that Applicant made unauthorized charges on the account which Company S refused to pay. Applicant was aware of this account since 2004. While he retained Mr. C. as his mortgage broker and financial advisor, Mr C.'s company essentially helped Applicant dispute items on his credit report under the Fair Credit Reporting Act. The credit reporting agencies did not remove the AMEX card account from Applicant's credit report after the dispute because it was established as a valid debt. Mr C. advised Applicant not to contact the credit card company directly because he could find himself liable for the debt. During the five-year period that he was aware of the debt, Applicant did not establish that he took proactive steps to resolve this debt. While he has worked out of the country for long periods of time, one would assume he would have been more involved in resolving what he claims to be an unpaid business expense of such magnitude. His lack of action in attempting to get this debt resolved raises questions about his reliability, trustworthiness, and good judgment.

FC MC ¶ 20(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) does not apply. It was within Applicant's control to monitor his expense reports and his credit card balance to insure that he was being properly reimbursed. Once he discovered the unpaid AMEX account in 2004, it was his responsibility to contact both Company S and AMEX to resolve the account. While Colonel M. states Company S's accounting practices were "a shambles", no specific details were provided. (I also note Colonel M. was not subject to cross-examination, as such, his statement is given less weight.) He describes an issue that he had with the Internal Revenue Service, but he also indicates he worked the issue for three years until it was resolved. I cannot conclude Applicant worked the issue with his

AMEX card diligently to get it resolved. While he claims he contacted Company S, there is no corroboration in the record evidence that he was in contact with AMEX or Company S to resolve this issue. A reasonable person, upon discovering a \$63,000 unpaid business credit card account would take more proactive steps to get the company to reimburse such a large amount.

FC MC ¶20(d) (the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts) does not apply. Applicant retained Mr. C.'s company to assist in disputing several delinquent accounts on his credit report under the Fair Credit Reporting Act. The \$63,519 credit card debt was established as a valid debt. Applicant became aware of this debt in 2004. Mr. C.'s company did not dispute the account until mid-2007. Applicant's attorney contacted the credit card company directly to negotiate an offer in compromise on two occasions in October 2009, about one month after Applicant responded to the SOR in this proceeding. I cannot conclude Applicant made a good-faith effort to resolve the AMEX credit card debt.

FC MC ¶20(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) does not apply. Applicant disputes the legitimacy of the past-due debt claiming it was a business credit card that Company S was responsible for paying. He provided no documentation to substantiate that the AMEX card was a business credit card. It may be, but it was listed as an individual account on the credit report. He provided no documentation to substantiate that Company S is responsible for paying the balance on the account. Company S recently gave him the opportunity to resubmit the expense reports for reconsideration. Applicant claims that he lost the expense reports and is unable to resubmit the request. While he provided a compelling story, he has been unable to provide sufficient corroboration to substantiate his basis for dispute.

Applicant has not mitigated the concerns raised under Guideline F.

Whole Person Concept

Under the whole person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all the circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

- (1) the nature, extent, and seriousness of the conduct;
- (2) the circumstances surrounding the conduct, to include knowledgeable participation;
- (3) the frequency and recency of the conduct;
- (4) the individual's age and maturity at the time of the conduct;
- (5) the extent to which participation is voluntary;
- (6) the presence or absence of rehabilitation and other permanent behavioral changes;
- (7) the motivation for the conduct;
- (8) the potential for pressure, coercion, exploitation, or duress; and
- (9) the likelihood of continuation or recurrence.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole person concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I considered Applicant's service in the military and his employment with various defense contractors since his separation from the military. I considered Applicant's claims that the AMEX credit card balance should have been paid by his former employer, Company S. There is insufficient evidence to conclude the AMEX debt is Company S's responsibility. Although Applicant claims he filed expense reports, he no longer has copies of the expense reports submitted. He did not keep an accurate accounting to ensure that he was being reimbursed for expenses during his employment with Company S. He discovered the debt in 2004. While he took some steps to resolve the issue, he does not appear to have been proactive in his efforts to be reimbursed for what he believes is a legitimate business expense. His behavior is at odds with what a reasonable person would do if a \$63,000 debt was discovered on their credit report which they know is not their debt but the responsibility of a former employer.

At the close of the record, doubts remain because Appellant provided insufficient evidence to mitigate the security concerns raised under financial considerations. Mindful of my responsibility to rule in favor of national security in cases where there is doubt, I find Applicant did not meet his ultimate burden of persuasion to obtain a favorable clearance 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

Conclusion

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

ERIN C. HOGAN
Administrative Judge