



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



In the matter of: )  
 )  
----- ) ISCR Case No. 08-12122  
SSN: ----- )  
 )  
Applicant for Security Clearance )

**Appearances**

For Government: Francisco Mendez, Esq., Department Counsel  
For Applicant: *Pro se*

November 17, 2009

**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 March 26, 2008. On May 28, 2009, the Defense Office of Hearings and Appeals (DOHA) sent Applicant 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 June 9, 2009; answered it on June 22, 2009; and requested a hearing before an administrative judge. DOHA received the request on

June 24, 2009. Department Counsel was ready to proceed on July 24, 2009, and the case was assigned to me on July 27, 2009. DOHA issued a notice of hearing on August 6, 2009, scheduling the hearing for September 2, 2009. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 7 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibits (AX) A through C, which were admitted without objection. I kept the record open until September 18, 2009, to enable Applicant to submit additional documentary evidence. He timely submitted AX D through F. Department Counsel's response to AX D through F is attached to the record as Hearing Exhibit I. DOHA received the transcript (Tr.) on September 14, 2009. The record closed on September 18, 2009.

### **Amendment of SOR**

On my own motion and without objection from either party, I amended the SOR to insert Applicant's middle name, which was omitted from the SOR (Tr. 5).

### **Findings of Fact**

In his answer to the SOR, Applicant admitted all the factual allegations in the SOR. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 44-year-old employee of a defense contractor, working in a shipyard (Tr. 34). He has worked for his current employer since March 2008. He served on active duty in the U.S. Army from July 1983 to November 2003, retiring as a staff sergeant (GX 2). He received a security clearance in December 1983, while on active duty. He received a clearance as a contractor in 2005 (Tr. 12). He has worked on three defense-related contracts since his retirement (Tr. 33).

Applicant was married in May 1987 and divorced in June 1992. He remarried in June 1997 and was divorced in August 2004. He has three daughters, ages 21, 20, and 11.

In July 2001, Applicant and his then wife filed a joint Chapter 13 bankruptcy petition. When they divorced in August 2004, Applicant's ex-wife agreed to make no claims for a share of his military retired pay, and she agreed to make the payments to the bankruptcy trustee, because most of the debts included in the bankruptcy were hers. She failed to make the payments as agreed, resulting in the bankruptcy being dismissed in April 2006 (Tr. 44-45; GX 1 at 28; GX 7 at 4). The bankruptcy is alleged in SOR ¶ 1.w.

In January 2002, Applicant was arrested for a bad check offense, pleaded *nolo contendere*, and was sentenced to probation for 30 days. In May 2002, he was arrested for a bad check offense, pleaded *nolo contendere*, and was sentenced to probation for 12 months (GX 3).

Applicant was given partial custody of his youngest daughter in 2007. He quit one of his two jobs to take care of his daughter, and he fell behind on his monthly installment payments (GX 5 at 1-3).

In February 2009, Applicant hired a “credit repair and restoration” expert. (GX 7 at 7-8). He terminated the relationship when the expert stopped taking his calls (Tr. 49).

In March 2009, Applicant submitted a personal financial statement in response to DOHA interrogatories. He reported monthly net income of \$2,749, expenses of \$2,031, debt payments of \$960, and a net monthly remainder of \$718. He inadvertently listed his child support payments of \$360 twice and neglected to include his car payments of \$600. It appears that the actual net remainder should have been listed as \$118 (GX 7 at 5).

In August 2009, Applicant contacted a credit counseling agency (AX B). On September 9, 2009, one week after the hearing, he agreed to a payment schedule, managed by the credit counseling agency, for the debts alleged in SOR ¶¶ 1.a, 1.i, 1.k, and 1.m. The agency recomputed his monthly expenses to be \$3,244, and it suggested ways he could reduce his monthly expenses from \$3,244 to \$2,867 (AX E). The agency’s computation of expenses would result in a monthly shortfall of about \$118 unless Applicant’s net income increased from the amount reported in his March 2009 personal financial statement.

Applicant was unable to work for the three weeks preceding the hearing due to a work-related injury (AX C). His pay was reduced from \$700 a week to \$300 a week during this period of disability (Tr. 37). He expected to return to full pay in mid-September and to work four hours of overtime every day on a ship undergoing overhaul (Tr. 50).

The table below summarizes the evidence concerning the delinquent debts alleged in the SOR.

<b>SOR</b>	<b>Debt</b>	<b>Amount</b>	<b>Status</b>	<b>Evidence</b>
1.a	Judgment	\$782	Payment plan	AX E at 6; Tr. 35
1.b	Cell phone	\$409	Paid Sep 09	AX A at 1; Tr. 35-36
1.c	Bank loan	\$995	Not included in payment plan; will start payments in Dec 09	Tr. 36
1.d	Utility	\$269	Not included in payment plan; will start payments in Nov 09	Tr. 36
1.e	Credit card	\$611	Not included in payment plan; will start payments in Oct 09	Tr. 39
1.f	Cable	\$262	Unresolved	Tr. 40
1.g	Cable	\$191	Unpaid	Tr. 40

1.h	Unemployment overpayment	\$316	Unpaid	Tr. 40
1.i	Loan	\$2,591	Payment plan	AX E at 6
1.j	Jewelry	\$2,525	Unpaid	Tr. 41
1.k	Cell phone	\$486	Payment plan	AX E at 6
1.l	Utility	\$53	Paid Jul 09	AX A at 1
1.m	Jewelry	\$1,970	Payment plan	
1.n	Bad check	\$576	Unpaid	Tr. 42-43
1.o	Bad check	\$66	Paid Jul 09	AX A at 1
1.p	Bad check	\$51	Paid Jul 09	AX A at 1
1.q	Bad check	\$55	Paid Jul 09	AX A at 1
1.r	Collection	\$570	Unpaid	Tr. 43
1.s	Credit card	\$441	Unpaid	Tr. 43
1.t	Credit card	\$1,198	To be combined with payments on 1.e	Tr. 43
1.u	Collection	\$176	Duplicate of 1.e	Tr. 45
1.v	Car insurance	\$94	Paid	AX A at 2

### 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 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(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.” Applicant’s financial history raises all three 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).

The evidence indicates that the debts alleged in SOR ¶¶ 1.e and 1.u are duplicates. When the same conduct is alleged twice in the SOR under the same guideline, one of the duplicative allegations should be resolved in Applicant's favor. See ISCR Case No. 03-04704 (App. Bd. Sep. 21, 2005) at 3 (same debt alleged twice). I will resolve SOR ¶ 1.u in Applicant's favor.

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 because Applicant's delinquent debts are numerous, not yet resolved, and did not arise from circumstances unlikely to recur.

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 has encountered circumstances beyond his control, i.e., periods of unemployment or underemployment and a divorce, but he has not acted responsibly. He took no significant actions to resolve his debts until July 2009, after he received the SOR. He did not finalize his payment plan until after the hearing. 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). Applicant has received counseling, but insufficient time has passed for him to establish a track record of responsible behavior. The evidence falls short of the "clear indications" required to establish this mitigating condition.

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). Evidence of past irresponsibility is not mitigated by payment of debts only under pressure of qualifying for a security clearance.

An applicant is not required, as a matter of law, to establish resolution of each and every debt alleged in the SOR. See ADP Case No. 06-18900 (App. Bd. Jun. 6, 2008). An applicant need only establish a plan to resolve financial problems and take significant actions to implement the plan. ISCR Case No. 07-06482 at 2-3 (App. Bd. May 21, 2008). There also is no requirement that an applicant make payments on all

delinquent debts simultaneously, nor is there a requirement that the debts alleged in the SOR be paid first. *Id.*

After a long history of financial neglect, Applicant finally initiated a plan to resolve his debts, but the catalyst for taking action was the SOR. Applicant was motivated primarily by the threat to his job, not a sense of duty or obligation. I conclude that the element of “good faith” is not established by the evidence.

Applicant cannot keep his job without a clearance, but the financial impact of losing his clearance is not relevant. See ISCR Case No. 02-09220 (App. Bd. Sep. 28, 2004). In his closing statement, he suggested the possibility of placing him on probation for six months or a year. The Appeal Board has made it clear that administrative judges do not have authority to grant conditional clearances. ISCR Case No. 99-0901, 2000 WL 288429 at \*3 (App. Bd. Mar.1, 2000). See *also* ISCR Case No. 01-24328, 2003 WL 21979745 at \*2 (App. Bd. May 23, 2003).

### **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 adult who served on active duty in the Army for 20 years. He has held a clearance for most of his adult life, but he has not been attentive to his personal obligations. The SOR appears to have convinced him to start working on his financial obligations. His track record, unfortunately, is one of inattention and neglect. He appears to have a workable plan, but he has not yet begun to execute it.

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 grant him eligibility for access to classified information.

### **Formal Findings**

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

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

Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	For Applicant
Subparagraphs 1.c-1.k:	Against Applicant
Subparagraph 1.l:	For Applicant
Subparagraphs 1.m-1.n:	Against Applicant
Subparagraphs 1.o-1.q:	For Applicant
Subparagraphs 1.r-1.t:	Against Applicant
Subparagraphs 1.u-1.v:	For Applicant
Subparagraph 1.w:	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