



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



In the matter of:)	
)	
XXXXXXXXXX, XXXXX)	ISCR Case No. 08-12134
SSN: XXX-XX-XXXX)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Braden M. Murphy, Esq., Department Counsel
For Applicant: *Pro se*

September 27, 2010

Decision

TUIDER, Robert J., Administrative Judge:

Applicant failed to mitigate Guidelines F (financial considerations) and E (personal conduct) security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On September 23, 2008, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP). On February 5, 2010, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines F (financial considerations) and E (personal conduct). 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 for SORs after September 1, 2006.

Applicant answered the SOR on March 17, 2010. Department Counsel was prepared to proceed on April 21, 2010. The case was assigned to me on April 27, 2010.

DOHA issued a notice of hearing on May 3, 2010, scheduling the hearing for May 18, 2010. The hearing was held as scheduled.

The Government offered Government Exhibits (GE) 1 through 5, which were received without objection. The Applicant offered Applicant Exhibits (AE) A through D, which were received without objection, and he testified on his own behalf. I held the record open until May 25, 2010, to afford the Applicant the opportunity to submit additional evidence. Applicant did not submit additional evidence. DOHA received the hearing transcript (Tr.) on May 25, 2010.

Procedural Issue

Amendment of SOR

Before the hearing, the Government moved to amend SOR ¶ 2.a., clarifying the wording as follows:

You falsified material facts on an Electronic Questionnaires for Investigations Processing (e-QIP), certified by you on about September 23, 2008, in response to '**Section 27, Financial Record c. In the last seven years, have you had a lien placed against your property for failing to pay taxes or other debts.**' You answered "no"; whereas in truth, you deliberately failed to disclose the tax liens listed in subparagraphs 1.ii and 1.mm, above.¹

Without objection from the Applicant, I granted the Government's request to amend SOR ¶ 2.a. (Tr. 11-14.)

At the hearing, based on Applicant's testimony and evidence presented, the Government moved to amend the SOR further by adding the following additional allegation:

1.yy. You failed to file your [name] state and federal tax returns as required for tax years 2006, 2007, 2008, and 2009.

After argument by both parties, I granted the Government's request to further amend and add SOR ¶ 1.yy. Additionally, I gave the Applicant the opportunity to submit additional material that would mitigate or rebut SOR ¶ 1.yy., discussed *supra*. As noted, Applicant did not submit additional evidence. (Tr. 81-85.)

Findings of Fact

Applicant admitted SOR ¶¶ 1.a. through 1.jj., 1.nn. through 1.qq., 1.ss. through 1.xx., and stated in response to 2.a. and 2.b. (falsification allegations) that after reviewing his credit report, he should have answered the questions affirmatively. He

¹ The underlined words replaced the following language in allegation 2.a. of the original SOR: "In the last 7 years, have you had any liens against you that have not been paid?"

denied SOR ¶¶ 1.kk. through 1.mm., and 1.rr. His admissions and denials were accompanied with explanations. His admissions are accepted as findings of fact.

Background Information

Applicant is a 52-year-old owner of a security consultant company, who seeks a security clearance to provide consulting services on a military installation. He held an interim secret clearance from September 2008 to February 2010 until it was revoked as a result of these proceedings. Without a clearance, Applicant is unable to bid or work on Government contract jobs. (Tr. 20-24.) Before becoming a consultant, Applicant was employed for 21 years by a defense contractor at the same military installation where he hopes to provide consulting services. During those years, he held a security clearance. (Tr. 35, 39-40.)

Applicant graduated from high school in June 1976. He has no formal education beyond high school. All his employment-related skills were acquired through on-the-job training. (Tr. 26.) Applicant married in October 1982. He and his wife have two children, a 27-year-old son, and a 19-year-old son. Their older son lives on his own, and their younger son lives at home. (GE 1, Tr. 24-26.)

Financial Considerations

Applicant's background investigation addressed his financial situation and included the review of his September 2008 e-QIP, his April 2009 Responses to DOHA Interrogatories, and his record of judgments and liens, as well as his October 2008 and October 2009 credit reports. Applicant's SOR identified 50 separate debts. (GE 1 – 5.)

Applicant's debts include a variety of creditors – 46 medical bills; one utility bill; one cell phone bill; one state tax lien for \$5,947, filed in February 2003; and one federal tax lien for \$10,998.74, filed in August 2005. The 50 debts alleged total \$50,838. (SOR ¶¶ 1.a. – 1.xx, Tr. 16.) Applicant contracted an illness in 2000, which was later diagnosed as fibromyalgia. Apart from his tax debts, he attributes the majority of his debts to uncovered medical bills. Before his hearing, Applicant submitted documentation reflecting that he made modest payments a medical debt creditor from November 2004 to March 2009. (Response to SOR.)

At his hearing, he submitted documentation showing that he made a \$50 and a \$100 payment to the same medical debt creditor in April 2010; however, the same documentation reflected a balance of \$27,035.53. His medical bills have been in a delinquent status since 2003. (GE 4.) At his hearing, Applicant was unable to discuss or provide meaningful information about the status of his delinquent medical bills. (AE C, AE D, Tr. 45-56, 78.)

Additionally, Applicant claimed the debt for a utility bill was paid, but offered no documentation to support his claim. (SOR ¶1.kk.), Tr. 50.) He has not sought financial counseling (Tr. 52.) Applicant submitted a letter from his accountant dated March 15, 2010 stating he, "is in the process of compiling and preparing [Applicant's] tax returns

for the periods of 2006 through 2009,” and further indicated “[w]e are working with the IRS to establish a payment plan to the outstanding liabilities.” (Response to SOR.) Applicant’s initial tax liability began in 2001 and has been ongoing. As of the hearing date, Applicant had not resolved his state and federal tax arrearages; had not filed tax returns for tax years 2006 through 2009; and the last time he filed a state or federal tax return was in 2005. (Tr. 56-69.)²

Applicant’s personal financial statement completed in March 2009, reflects a joint net monthly income of \$3,325, with a monthly remainder of \$590. (GE 3 at 83, Tr. 73-75.) He did not demonstrate through his documentation or testimony that he has maintained any meaningful interaction with his creditors or that he has regained financial responsibility. In short, Applicant’s financial situation has not improved in any significant way since his SOR was issued.

Personal Conduct

In September 2008, Applicant completed his e-QIP. He answered “no” to question 27 inquiring whether he had a lien placed against his property for failing to pay taxes or other debts. He also answered “no” to question 28 inquiring whether he had ever been over 180 days delinquent on any debts in the last seven years, and whether he was currently delinquent on any debts over 90 days. Both answers are clearly wrong.

Applicant denies intending to falsify his clearance application. He explained that medical debts did not “count or whatever” when obtaining credit in the past. (Tr. 70-71.) He acknowledged that he should have listed his tax liens on his e-QIP, but claimed he did not know of their existence. (Tr. 71-72.) He acknowledged that he had completed security clearance applications “every five or ten years” and was experienced with the process. He further acknowledged that his signature page on his e-QIP certified the information he provided was true and accurate. (Tr. 69-70, 72-73.) I find neither claim credible. Applicant was well versed and experienced in completing security clearance applications, so he was familiar with the forms and the process. The language of the questions is straightforward. I do not find Applicant’s explanation plausible given his security clearance experience, the number of debts involved, and knowledge of his ongoing tax problems.

Character Evidence

Applicant submitted a copy of his consulting agreement to work on base. (AE A.) He also submitted 25 certificates recognizing his contributions and training received as a defense contractor employee. These certificates were awarded to him during the years he was employed on base, discussed *supra*. (AE B (1-25).)

² Applicant’s testimony prompted Department Counsel to move to amend the SOR adding Applicant’s failure to file state and federal tax returns. See Amendment of SOR, *supra*.

Policies

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

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 for 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 classified information. Such decisions entail a certain degree of legally permissible extrapolation of 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

AG ¶ 18 articulates the security concern pertaining to financial considerations:

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.

AG ¶ 19 provides three financial considerations disqualifying conditions that could raise a security concern and may be disqualifying in this case, "(a) inability or unwillingness to satisfy debts," "(c) a history of not meeting financial obligations," and "(g) failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same." Applicant's history of delinquent debt and failure to file tax returns is established by his admissions and the evidence presented. The Government established the disqualifying conditions in AG ¶¶ 19(a), 19(c), and 19(g).

Five financial considerations mitigating conditions under AG ¶¶ 20(a) through (e) are potentially applicable:

(a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;

(b) the conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation), and the individual acted responsibly under the circumstances;

(c) the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control;

(d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts; and

(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.

Applicant's conduct does not warrant application of AG ¶ 20(a) because there is more than one delinquent debt and his financial problems are not isolated. Therefore, his debts are a "continuing course of conduct" under the Appeal Board's jurisprudence. See ISCR Case No. 07-11814 at 3 (App. Bd. Aug. 29, 2008) (citing ISCR Case No. 01-03695 (App. Bd. Oct. 16, 2002)). Applicant receives only partial credit under AG ¶ 20(b). His past medical problems no doubt contributed to his financial difficulties; however, his modest efforts to resolve his medical debts are insufficient to fully mitigate concerns. Furthermore, there is no convincing evidence that his medical problems precluded him from paying his taxes or from filing his state and federal income tax returns from 2006 to 2009.

Applicant remains heavily leveraged with no apparent plan to regain financial responsibility. Considering his conduct in the aggregate, his actions do not show that he acted responsibly under the circumstances.³ The remaining mitigating conditions under AG ¶¶ 20(c) through (e) are not applicable. Applicant did not receive financial counseling, he did not initiate a good-faith effort to repay his creditors or otherwise resolve his debts, nor did he demonstrate through documented efforts that he had a reasonable basis to dispute any past-due debts.

Personal Conduct

AG ¶ 15 articulates the security concern pertaining to personal conduct:

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

AG ¶ 16 describes two conditions that could raise a security concern and may be disqualifying in this case:

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

³"Even if Applicant's financial difficulties initially arose, in whole or in part, due to circumstances outside his [or her] control, the Judge could still consider whether Applicant has since acted in a reasonable manner when dealing with those financial difficulties." ISCR Case No. 05-11366 at 4 n.9 (App. Bd. Jan. 12, 2007) (citing ISCR Case No. 99-0462 at 4 (App. Bd. May 25, 2000); ISCR Case No. 99-0012 at 4 (App. Bd. Dec. 1, 1999); ISCR Case No. 03-13096 at 4 (App. Bd. Nov. 29, 2005)). A component of the analysis is whether Applicant maintained contact with his creditors and attempted to negotiate partial payments to keep his debts current.

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

Applicant failed to disclose his state and federal tax liens, his current debts over 90 days and past debts over 180 days delinquent when completing his September 2008 e-QIP. The Government established through the evidence presented the disqualifying conditions in AG ¶¶ 16(a) and 16(b).⁴

AG ¶ 17 provides seven conditions that could potentially mitigate security concerns about his personal conduct:

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

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

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

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

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

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

⁴Deliberate and materially false answers on a security clearance application violate 18 U.S.C. § 1001. The Supreme Court defined "materiality" in *United States v. Gaudin*, 515 U.S. 506, 512 (1995): as a statement having a "natural tendency to influence, or [be] capable of influencing, the decision making body to which it is addressed." See also *United States v. McLaughlin*, 386 F.3d 547, 553 (3d Cir. 2004). If Applicant had provided accurate answers on his security clearance applications, his accurate answers are capable of influencing the government to deny his security clearance. His failure to disclose financial problems are sufficiently serious to potentially jeopardize approval of his security clearance. Making a false statement under 18 U.S.C. § 1001 is a serious crime, a felony (the maximum potential sentence includes confinement for five years and a \$10,000 fine).

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

None of the mitigating conditions fully apply. Applicant does receive some credit for later acknowledging that he should have answered these questions affirmatively when responding to the SOR. However, his rather qualified response is not enough to overcome his willful misrepresentation of his true financial situation.⁵ His own evidence demonstrates the existence of his substantial medical debt. He was no neophyte to the security clearance process – he had over 21 years of experience as a defense contractor employee and previously held clearances in that capacity. He knowingly and deliberately chose not to disclose complete and accurate information regarding his unfavorable financial history.

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.

⁵The Appeal Board has cogently explained the process for analyzing falsification cases, stating:

(a) when a falsification allegation is controverted, Department Counsel has the burden of proving falsification; (b) proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred; and (c) a Judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning the applicant's intent or state of mind at the time the omission occurred. [Moreover], it was legally permissible for the Judge to conclude Department Counsel had established a prima facie case under Guideline E and the burden of persuasion had shifted to the applicant to present evidence to explain the omission.

ISCR Case No. 03-10380 at 5 (App. Bd. Jan. 6, 2006) (citing ISCR Case No. 02-23133 (App. Bd. June 9, 2004)).

The comments in the Analysis section of this decision are incorporated in the whole-person concept analysis. Applicant's lack of financial responsibility began in approximately 2000 and has been ongoing. His deliberate falsifications, if relied upon, could have adversely affected or influenced the security clearance adjudication process to the detriment of the Government.

Applicant receives credit for 21 years of service as a Government contract employee. His work while working for a Government contractor is excellent, and aside from the SOR allegations no other disciplinary or security-related problems surfaced. His record of good employment weighs in his favor. There is a dichotomy between how Applicant handled his financial affairs and his past work-related performance.

Applicant's deliberate failure to disclose information on his security clearance application is serious, recent, and not mitigated. As such, I have concerns about his current ability or willingness to comply with laws, rules, and regulations. After weighing the disqualifying and mitigating conditions, and all the facts and circumstances, in the context of the whole-person, I conclude he has not mitigated security concerns pertaining to financial considerations and personal conduct.

I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my "careful consideration of the whole person factors" and supporting evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under the Guidelines. Applicant has failed to mitigate or overcome the Government's case. For the reasons stated, I conclude he is not eligible for access to classified information.

Formal Findings

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline F: Subparagraphs 1.a. – 1.yy.:	AGAINST APPLICANT Against Applicant
Paragraph 2, Guideline E: Subparagraphs 2.a. - 2.b.:	AGAINST APPLICANT Against Applicant

Conclusion

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

ROBERT J. TUIDER
Administrative Judge