



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



In the matter of:)	
)	
)	ISCR Case No. 09-00657
)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Candace Le'i, Esq., Department Counsel
For Applicant: Leslie Gordon, Esq.

October 30, 2009

Decision

HEINY, Claude R., Administrative Judge:

Applicant and his wife have a combined annual salary in excess of \$225,000. They are making \$465 monthly payments on five accounts, which had been placed for collection, charged off, or had been past due. He has failed to make any mortgage payments for approximately one year. Applicant has failed to rebut or mitigate the government's security concerns under financial considerations and personal conduct. Clearance is denied.

Statement of the Case

Applicant contests the Defense Department's intent to deny or revoke his eligibility for an industrial security clearance. Acting under the relevant Executive Order and DoD Directive,¹ the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) on April 16, 2009, detailing security concerns under financial considerations and personal conduct.

¹ 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)

On May 6, 2009, Applicant answered the SOR, and requested a hearing. On June 15, 2009, I was assigned the case. On June 26, 2009, DOHA issued a notice of hearing, scheduling the hearing to be held on July 14, 2009. For good cause that hearing was cancelled. On July 29, 2009, DOHA issued a notice of hearing, scheduling the hearing, and it was held on August 25, 2009.

The government offered Exhibits (Ex.) 1 through 4, which were admitted into evidence. Applicant testified on his own behalf and submitted Exhibits A through N, which were admitted into evidence. The record was held open to allow additional information from Applicant. On August 27, 2009, additional material was submitted. Department Counsel had no objection to the material, which was admitted into the record as Ex. O. On September 1, 2009, the transcript (Tr.) was received.

Findings of Fact

In Applicant's Answer to the SOR, he admits the factual allegations, with explanations in ¶ 1.a through ¶ 1.f of the SOR. He denied the allegations, in ¶¶ 1, 2, and 2.a of the SOR. He also provided additional information to support his request for eligibility for a security clearance. Applicant's admissions of the SOR allegations are incorporated herein. After a thorough review of the record, pleadings, exhibits, and testimony, I make the following additional findings of fact:

Applicant is a 35-year-old combat engineer analyst who has worked for a defense contractor since August 2007, and is seeking to obtain a security clearance. From May 1991 until October 2007, Applicant was in the U.S. Army. (Tr. 45, Ex. 1) In 1995, he became an officer. He left the Army as a major (O-4). Applicant's Officer Evaluation Report (OER), with a closeout date of May 31, 2007, recommended Applicant be promoted early to lieutenant colonel and that his duty performance was excellent indicating he was a top 10% officer. (Ex. L) He served both in Iraq and Afghanistan (Ex. M). His awards and decorations include the Bronze Star and two Meritorious Service Medals. (Ex. N, O) Applicant had a clearance the entire time he was in the Army. (Tr. 74)

Applicant's wife is an active duty major in the U.S. Army. They married in June 1998 and have four children. (Tr. 23-24) Applicant's yearly income is \$118,000. (Tr. 86) His wife's income is approximately \$80,000, plus an additional nontaxable pay of \$28,000, which includes allowances for housing and subsistence. Together their yearly income is approximately \$226,000. Applicant's and his wife's net monthly income is \$12,713. (Ex. H) Their net monthly income (gross income less monthly expenses) is approximately \$12,700. (Ex. H) His monthly net income includes a mortgage payment of approximately \$4,100, which currently is not being paid. Without making their mortgage payment their net monthly disposable income is approximately \$5,800.

promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

In January 2008, Applicant's wages were garnished for unpaid county property tax. In January 2008, Applicant began paying \$700 per pay period. As of March 2008, \$8,911 was owed. In the summer of 2008, the property tax was paid in full. (Tr. 86)

Applicant's daughter attended private school with \$1,500 per month tuition. (Tr. 84) The \$21,167 debt listed in SOR ¶ 1.a., which originated in 2007, was placed for collection. (Ex. A) In May 2009, when Applicant answered the SOR, he stated he was co-signer on the debt. At that time, he stated he would make a \$1,000 payment, and starting in mid-May 2009, he would pay the creditor \$250 per month. Applicant made \$250 payments in May, June, and July 2009. (Ex. A)

As to the debt listed in SOR ¶ 1.b, Applicant stated he had been in contact with the collection agency for the past year. In April 2009, he set up a monthly installment plan to pay \$80 per month on this debt. The SOR lists the debt as having been charged off in the amount of \$1,216; however, the amount owed as of October 2008 was \$16,112. (Tr. 29, Ex. B) In March 2009, the creditor offered to settle the matter for \$11,604. (Answer to SOR, Enclosure 3) As of August 18, 2009, Applicant had paid \$960 on this debt. (Ex. B) He is currently making \$80 per month payments on this debt.

The \$8,247 credit card debt listed in SOR ¶ 1.c, as having been charged off, is now in the amount of \$12,157. The account became delinquent in 2005. (Tr. 69) The creditor has offered to settle the matter for \$6,000 payable in six \$500 payments. Applicant's first payment was made April 2009. (Answer to SOR, Enclosure 4) The creditor's August 7, 2009, letter states the account was settled in full for \$5,562. (Ex. B)

In 2005, Applicant and his wife were reassigned to the local area. They rented a home. (Tr. 86) In July 2006, Applicant and his wife purchased their current home for \$900,000, with no down payment. (Tr. 73, 74, 88) Applicant obtained a \$720,000 first mortgage and a \$180,000 second mortgage, both with the same company. (Tr. 89) A monthly payment on the first mortgage was approximately \$4,200 and \$1,700 on the second. The two mortgage payments together total approximately \$5,800 per month. (Tr. 89) In 2006, Applicant started to fall behind on his mortgage payments. (Tr. 72)

In late 2008, Applicant stopped making his mortgage payments. (Tr. 91) As of April 2009, he was past due in the amount of \$13,476 on a mortgage of \$789,000. Applicant is unsure how much he is currently past due on his mortgage. (Tr. 70) Applicant was looking to restructure the loan. He made a submission through the Helping Homeowners Program. (Tr. 32) The fair market value of their home is approximately \$700,000. (Tr. 101)

Applicant was past due in the amount of \$150 on a student loan. He asserts he paid the past due amount. Applicant made monthly payments in September, October, and November 2008. Since March 2009, he has made six monthly payments on this debt. (Ex. E)

Applicant owed the Defense Financial Accounting Service \$3,194. At some point while in the military he was overpaid, and this is a recoupment action. (Tr. 36) He arranged to repay the debt by making \$62 monthly payments. (Answer to SOR, Enclosure 7) As of July 2009, the amount owed had been reduced to \$1,709. (Ex. F)

In March 2008, Applicant completed an Electronic Questionnaires for Investigations Processing (e-QIP). He answered "no" to question 28.a, which asked if during the prior seven years he had ever been more than 180 days delinquent on any debt. He also answered "no" to question 28.b, which asked if he was currently more than 90 days delinquent on any debt. He asserts his answers were not deliberately false. At the time he completed his SF 86, he was in discussions with some of his creditors and did not believe he was delinquent on his debts. (Tr. 48) Applicant's wife handles the family's finances and he was unaware of some of the delinquencies until after the clearance process started.

When completing his e-QIP in March 2008, he knew he had fallen behind on his mortgage payments in 2006. (Tr. 75) Applicant stated the mortgage company changed and he believed he was only 30 days delinquent on his mortgage. (Tr. 75)

At various times, Applicant and his wife have provided financial assistance to his sister, her sister, her brother, and her mother. (Tr. 44, 107) Applicant's mother-in-law was unemployed following a back injury. Applicant helped his parents-in-law avoid foreclosure on their home. How the injury lead to the possible foreclosure of the parents-in-law's home, a home they had lived in for 25 years, was not explained. (Tr. 107) They still support his sister-in-law. (Tr. 80) Applicant has instituted an accelerated monthly payment plan and hopes to have his debts paid in full within three years. (Tr. 57) Applicant and his wife assert they have consolidated their debt and developed a plan. His wife asserts they have paid \$13,000 in debt. (Tr. 114)

Even with yearly income in excess of a quarter million dollars, Applicant's debt to income ratio is 39%. (Ex. D) The document from the credit union states that at this level the debts seem manageable, but they should be paid before they spiral out of control. (Tr. 60, Ex. D) Applicant and his wife owe the IRS \$10,000 for under withholding of personal income tax. (Tr. 97)

Policies

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

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." The applicant has the ultimate burden of persuasion as to obtaining a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk 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

Revised Adjudicative Guideline (AG) ¶ 18 articulates the security concerns relating to financial problems:

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.

Additionally, an individual who is financially irresponsible may also be irresponsible, unconcerned, negligent, or careless in properly handling and safeguarding classified information. Behaving responsibly or irresponsibly in one aspect of life provides an indication of how a person may behave in other aspects of life.

A person's relationship with his creditors is a private matter until evidence is uncovered demonstrating an inability or unwillingness to repay debts as agreed. Absent substantial evidence of extenuating or mitigating circumstances, an applicant with a history of serious or recurring financial difficulties is in a position of risk that is inconsistent with holding a security clearance. An applicant is not required to be debt free, but is required to manage his finances so as to meet his financial obligations.

The record evidence supports a conclusion Applicant has a history of financial problems. Applicant has not paid his mortgage for almost a year. He hopes there will be some type of program to save his house from foreclosure. His wages were garnished to pay past due property tax on his home. He owes the IRS \$10,000. He owes in excess of \$15,000 for past due tuition for his daughter, which has been reduced from the more than \$21,000 previously owed. Disqualifying Conditions AG ¶ 19(a), "inability or unwillingness to satisfy debts" and AG ¶ 19(c), "a history of not meeting financial obligations," apply.

Five Financial Considerations Mitigating Conditions under AG ¶¶ 20(a) – (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; or

(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 settled the \$12,157 debt (SOR ¶ 1.c) for \$6,062. (Ex. C) AG ¶ 20(d) “the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts” applies to this debt.

AG ¶ 20(a) does not apply to the remaining debts. The debts remain unpaid and cast doubt on his reliability, trustworthiness, or good judgment. Applicant and his wife make more than \$225,000 per year. With this income they are making monthly payments of \$465 on the debts listed in the SOR. They assert they have paid off \$13,000 in debt; however, they are not paying their \$5,800 monthly mortgage. The amount they assert has been paid represents approximately two months of mortgage payment.

AG ¶ 20(b) does not apply to the remaining debts. There was no loss of employment; in fact, Applicant started his current job while he was on terminal leave from the Army. There has been no separation or divorce. Applicant and his wife chose to financially assist their relatives. Applicant’s mother-in-law was unemployed following a back injury. How this led to the possible foreclosure of the parents-in-law’s home, a home they had lived in for 25 years, was not explained.

Applicant and his wife make in excess of \$225,000, yet their debt to income ratio is 39%. Applicant has not acted responsibly under the circumstances. They owe the IRS \$10,000, and \$15,000 for past due private tuition, which had been in excess of \$21,000. They have not paid their mortgage in a year, and are paying less than \$500 per month on their debts. They are hoping for a government program to prevent foreclosure on their home. There are no clear indications that the problem is being resolved or is under control. AG ¶ 20(c) does not apply. AG ¶ 20(e) does not apply because none of the debts are being disputed.

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern pertaining to personal conduct, which is 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.

Deliberate omission, concealment, or falsification of a material fact in any written document or oral statement to the Government when applying for a security clearance is a security concern. The government has an interest in examining all relevant and material adverse information about an applicant before making a clearance decision. The government relies on applicants to truthfully disclose that adverse information in a timely fashion, not when it is perceived to be prudent or convenient. Further, an applicant's willingness to report adverse information about himself provides some indication of his willingness to report inadvertent security violations or other security concerns in the future, something the government relies on to perform damage assessments and limit the compromise of classified information.

In March 2008, when completing his e-QIP, Applicant did not list all of his past due obligations, but did list a garnishment which had started two months earlier. When completing his e-QIP, Applicant asserts he knew he had fallen behind on his mortgage payments in 2006, but believed he was only 30 days delinquent on his mortgage. (Tr. 75) Knowing there had been a problem with late mortgage payments, he should have been especially attuned to the questions about his financial situation. He should have investigated his financial situation further before answering "no" when asked if he had ever been more than 180 delinquent on any debt or was currently more than 90 days delinquent on any debt. His answers were false.

None of the mitigating conditions related to personal conduct apply. Applicant did not make a prompt, good-faith effort to correct the omission, concealment, or falsification before being confronted with the facts (AG ¶ 17(a)). There was no refusal or failure to cooperate. AG ¶ 17(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," does not apply.

The offense is not minor, and the e-QIP was completed less than two years ago. Knowing he had experienced financial problems and not listing them on his questionnaire casts doubt on the individual's reliability, trustworthiness, or good judgment. AG ¶ 17(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" has limited applicability because the conduct was limited to two questions on a single e-QIP.

Applicant has not acknowledged the bad behavior nor obtained counseling. AG ¶ 17(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" does not apply.

AG ¶ 17(e) “the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress” does not apply because there is no showing of positive steps taken by the Applicant as to his conduct. AG ¶ 17(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,” does not apply because association with persons involved in criminal activity is not a factor. AG ¶ 17(f) “the information was unsubstantiated or from a source of questionable reliability” does not apply because Applicant’s financial difficulties have been substantiated.

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.

Applicant and his wife were U.S. Army majors when they decided to purchase a \$900,000 home with no down payment. They knew their monthly mortgage would be approximately \$6,000. They chose to put their daughter in private school and incur a \$1,500 per month tuition. They currently make more than \$225,000 per year. Had they paid their debts as agreed there would have been no security concern. They have not paid their mortgage in almost a year. Since they are not making their monthly mortgage payments their monthly net disposable income is \$5,800, from which they are paying less than \$500 per month on the SOR debts. Knowing he was experiencing financial difficulties, he should have been more forthcoming about his financial problems when he completed his e-QIP.

With their sizable annual income and with monthly payments of less than \$500 per month on the SOR debts, I find Applicant has not acted responsibly under the circumstances. Additionally, there is no clear indication that the problem is being resolved or is under control. Overall, the record evidence leaves me with questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the security concerns arising from his financial considerations and personal conduct.

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, Financial Consideration: **AGAINST APPLICANT**

 Subparagraphs 1.a and 1.b: Against Applicant

 Subparagraph 1.c: For Applicant

 Subparagraphs 1.d through 1.f: Against Applicant

Paragraph 2, Personal Conduct: **AGAINST APPLICANT**

 Subparagraph 2.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 interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

CLAUDE R. HEINY II
Administrative Judge