



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



In the matter of:)	
)	
)	ISCR Case No. 09-01341
SSN:)	
)	
Applicant for Security Clearance)	

Appearances

For Government: D. Michael Lyles, Esquire, Department Counsel
For Applicant: *Pro se*

December 9, 2010

Decision

HENRY, Mary E., Administrative Judge:

Based upon a review of the case file, pleadings, exhibits, and testimony, I deny Applicant's eligibility for access to classified information.

Applicant signed an Electronic Questionnaire for Investigations Processing (e-QIP) version of a security clearance application (SF-86) on August 2, 2008. The Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) on December 21, 2009, detailing security concerns under Guideline F (Financial Considerations) and Guideline E (Personal Conduct) that provided the basis for its preliminary decision to deny him a security clearance. 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) implemented on September 1, 2006.

Applicant acknowledged receipt of the SOR on May 1, 2010. He answered the SOR in writing and requested a hearing before an administrative judge. DOHA received the request and Department Counsel was prepared to proceed on August 2, 2010, and I received the case assignment on August 11, 2010. DOHA issued a notice of hearing on August 30, 2010, and I convened the hearing as scheduled on September 15, 2010. The Government offered exhibits (GE) 1 through 7, which were admitted into evidence without objection. Applicant testified, but he did not submit any exhibits. DOHA received the transcript of the hearing (Tr.) on September 22, 2010. I held the record open until September 30, 2010, for Applicant to submit additional matters. Applicant timely submitted Exhibits (AE) A through D, which were admitted without objection. The record closed on September 30, 2010.

Procedural Ruling

Notice

Applicant received the hearing notice less than 15 days before the hearing. (Tr. 10.) I advised Applicant of his right under ¶ E3.1.8 of the Directive to 15 days notice before the hearing. Applicant affirmatively waived his right to 15 days notice. (*Id.*)

Findings of Fact

In his Answer to the SOR, Applicant admitted the factual allegations in ¶¶ 1.a-1.i of the SOR. His admissions are incorporated as findings of fact. He denied the factual allegations in ¶¶ 2.a-2.c of the SOR¹ After a complete and thorough review of the evidence of record, I make the following additional findings of fact.

Applicant, who is 37 years old, works in security for a Department of Defense contractor. He began his employment with his current employer in October 2005. He is required to work outside the United States ten months of the year.²

Applicant graduated from high school and worked in the trucking industry for many years. He married in 1996. He has three children, ages 16, 13, and 9.³

¹When SOR allegations are controverted, the government bears the burden of producing evidence sufficient to prove controverted allegations. Directive, ¶ E3.1.14. "That burden has two components. First, the government must establish by substantial evidence that the facts and events alleged in the SOR indeed took place. Second, the government must establish a nexus between the existence of the established facts and events and a legitimate security concern." See ISCR Case No. 07-18525 at 4 (App. Bd. Feb. 18, 2009), (concurring and dissenting, in part) (citations omitted). 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. 08-06605 at 3 (App. Bd. Feb. 4, 2010); ISCR Case No. 08-07290 at 2 (App. Bd. Nov. 17, 2009).

²GE 1; Tr. 19, 32.

³GE 1; Tr. 19-20.

Applicant and his wife filed for bankruptcy protection under Chapter 13 of the bankruptcy code in April 2000 because his wife lost her job and they could not pay their bills. The court dismissed their petition in August 2000. Applicant indicated that they could not afford the monthly payments established by the court.⁴

When his wife lost her job in 2000, Applicant could not longer afford the monthly payments on his car, which was repossessed later that year. The creditor filed a court action to recover the money owed and obtained a judgment against Applicant in September 2005. Applicant has not paid this \$20,000 judgment. He advised the Office of Personnel Management (OPM) investigator that he contacted the creditor to resolve the debt, but the creditor rejected his offer, and he could not afford the creditor's suggested payment. He did not mention this offer at the hearing.⁵ (SOR ¶ 1.c)

In 2005, his wife did not make her car payments and her car was repossessed. Because this loan account was a joint debt, the creditor filed suit against Applicant and his wife and obtained a judgment against them in January 2007. The creditor collected the judgment money through a garnishment of his wife's paycheck. This judgment was paid in full as of February 2010.⁶ (SOR ¶ 1.d)

Applicant defaulted on two additional debts listed in the SOR many years ago. The date of last activity for the debt in SOR ¶ 1.e (\$1,757) is December 2001 and for the debt in SOR ¶ 1.h (\$3,561) is March 2002. Under State statute of limitations law, the creditor is barred from collecting these debts. These debts are listed on the August 12, 2008 credit report, but they are not listed on the May 20, 2009 and the October 26, 2009 credit reports. The debts may have been removed from the credit reports because of age as Applicant admitted that these debts are his and that he has not paid these debts.⁷

At the hearing Applicant indicated that he contacted the creditor in SOR ¶ 1.h (\$3,561) to develop a payment plan, but could not reach an agreement. He did not give a date for this contact. He advised the OPM investigator that he had not contacted this creditor to resolve the debt.⁸

The debts in SOR ¶¶ 1.a (\$274), 1.b (\$242), and 1.g (\$435) occurred between January 2005 and December 2006. Under State statute of limitations law, the creditor is barred from collecting these debts. The debts are listed on all the credit reports of

⁴GE 7; Tr. 25.

⁵ Response to SOR; GE 2; Tr. 22.

⁶GE 2; GE 4; AE B; Tr. 23.

⁷Response to SOR; GE 4 - GE 6; Tr. 23, 24-25.

⁸GE 2; Tr. 24-25.

record. Applicant admitted that these debts are his and that he has not paid these debts. Applicant paid the \$83 debt in SOR ¶ 1.f.⁹

The credit reports reflect that Applicant is current on his monthly bills, his car payment, and his mortgage, and that he has been for several years. Applicant acknowledged that he did not contact the creditors listed in the SOR when he was in the United States because it took too much time. During his interview with the OPM investigator in December 2008, he indicated that he was saving approximately \$6,000 a month. The credit reports show that he obtained a mortgage in December 2009.¹⁰

When overseas, Applicant earns \$10,615 a month in gross income and \$8,956 a month in net income. His gross income and net income for the first pay period in September 2010 declined by \$1,700 when he traveled to the United States in late August 2010. His wife earns \$2,713 a month in gross income and \$2,196 a month in net income. His total net household income when he is overseas \$11,152 a month, and when he is in the United States, his net household income totals approximately \$7,700. His monthly expenses average \$5,500 to \$6,000. He has sufficient income each month to resolve his unpaid debts.¹¹

Applicant has not had financial counseling. When asked why he has not resolved his debts, he answered that it was time-consuming to do. He also stated that if he did not do it, it did not get done.¹²

When he completed his e-QIP on August 2, 2008, Applicant answered “no” to the following questions:

Section 27. Your Financial Record

- a. In the last 7 years, have you had your wages garnished or had any property repossessed for any reason?

- d. In the last 7 years, have you had any judgments against you that have not been paid?

Section 28. Your Financial Delinquencies

- a. In the last 7 years, have you been over 180 days delinquent on any debt(s)?

⁹Response to the SOR; GE 4- GE 6; AE A; Tr. 20-22, 24.

¹⁰GE 2; GE 4-GE 6.

¹¹GE 3; AE C; AE D; Tr. 31.

¹²GE 2; Tr. 25, 31.

b. Are you currently over 90 days delinquent on any debt(s)?¹³

Because his car was repossessed in 2000, he thought the question asked for 7 years, and it was 2008, Applicant stated he answered “no” question a in Section 27. He did not list the repossession of his wife’s car because it was paid. He did not know about the judgments until the OPM investigator talked to him about these debts. Concerning his answers to the questions in Section 28, Applicant indicated that he was overseas and did not have access to a credit report. Thus, he answered “no” to these questions.¹⁴

Applicant’s testimony at the hearing and his statements to the OPM investigator reflect that he does not remember dates accurately. He does not have a clear understanding of the actions he took with each creditor, only an understanding that he made contact with one of his creditors.

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.

¹³The SOR stated question b in Section 28 as “In the last 7 years, have you been over 90 days delinquent on any debt(s)?” The security clearance application question asks if an Applicant is currently over 90 days delinquent on any debt(s)? This is the question Applicant answered and the question to be addressed in this decision.

¹⁴Tr. 25-27.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . .” An 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 an 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.

AG ¶ 19 describes the disqualifying conditions that could raise security concerns. I have considered all the conditions, and especially the following:

- (a) inability or unwillingness to satisfy debts; and

- (c) a history of not meeting financial obligations.

Applicant developed significant financial problems about 10 years ago when his wife lost her job. His income was insufficient to pay all the household bills. These two disqualifying conditions apply.

The Financial Considerations guideline also includes examples of conditions that can mitigate security concerns. I have considered mitigating factors AG ¶ 20(a) through 20(f), and especially the following:

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

The largest of Applicant's debt listed in the SOR occurred 8 to 10 years ago when his wife lost her job and his income was insufficient to pay all the household bills. However, her job loss does not explain the reason for the nonpayment of the other debts, which occurred later. He has not received financial counseling. Except for two debts, SOR ¶¶1.d and 1.f, he has not resolved the remaining debts listed in the SOR. AG ¶ 20(c) applies to the judgment debt listed in SOR ¶ 1.d, and to the debt listed in SOR ¶ 1.f as the evidence of record reflects that he paid these debts.

Guideline E, Personal Conduct

AG ¶ 15 expresses 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 conditions that could raise a security concern and in this case, the following condition may be disqualifying:

- (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.

For AG DC ¶ 16(a) to apply, Applicant's omission, concealment or falsification in his answer must be deliberate. The Government established that Applicant omitted material facts from his e-QIP when he answered "no" to Questions b and d in Section 27, which asked if in the last 7 years: ". . . have you had your wages garnished or had any property repossessed for any reason?" and ". . . have you had any judgments against you that have not been paid?" He did not disclose the repossessions of his car in 2000 and his wife's car in 2005. The Government also established that he omitted material facts when he answered "no" to Questions a and b in Section 28, which asked about debts more than 180 days delinquent and current debts 90 days delinquent. This information is material to the evaluation of Applicant's trustworthiness to hold a security clearance and to his honesty. In his response to the SOR and at the hearing, Applicant denied, however, that he had an intent to hide information about his finances from the Government. When a falsification allegation is controverted, the Government has the burden of proving the omission was deliberate. Proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred. An administrative judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning an applicant's intent or state of mind at the time the omission occurred.¹⁵

Applicant completed his e-QIP in August 2008. His car was repossessed in 2000, more than 7 years before he completed the e-QIP. Applicant did not list his wife's repossessed car because the debt had been paid. While he should have listed this repossession, his reasoning that it was paid, and as such, he did not have to list the repossession does not show a deliberate intent to hide the information from the government, but rather a misunderstanding of what is required in his response. Applicant was not aware of either judgment against him when he completed his e-QIP, although he was aware that his wife had paid on her car repossession through garnishment. Thus, the requisite intent is not established.

Since he began his current employment, he has made sufficient income to pay his monthly bills and he has. Thus, his "no" answer to Question b in Section 28 was not an attempt to hide current delinquencies from the Government. Concerning the question on debts more than 180 days overdue, Applicant did not have his credit report to determine if any such debts exist. He had been working overseas for many months and was without ready access to his credit reports. During his lengthy stay overseas, his wife assumed responsibility for payment of household bills and did not advised him of problems. Without his credit report, he could not determine the status of his debts. He did not intentionally deceive the Government about his very old debts. The Government has not established that Applicant intentionally falsified his answers on his e-QIP. Guideline E is found in favor of Applicant.

¹⁵See ISCR Case No. 03-09483 at 4 (App. Bd. Nov.17, 2004)(explaining the holding in ISCR Case No. 02-23133 at 5 (App. Bd. Jun. 9, 2004)).

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 an applicant's conduct and all relevant 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. The decision to grant or deny a security clearance requires a careful weighing of all relevant factors, both favorable and unfavorable. In so doing, an administrative judge must review all the evidence of record, not a single item in isolation, to determine if a security concern is established and then whether it is mitigated. A determination of an applicant's eligibility for a security clearance should not be made as punishment for specific past conduct, but on a reasonable and careful evaluation of all the evidence of record to decide if a nexus exists between established facts and a legitimate security concern.

In assessing whether an Applicant has established mitigation under Guideline F, the Appeal Board provided the following guidance in ISCR Case No. 07-06482 at 3 (App. Bd. May 21, 2008):

In evaluating Guideline F cases, the Board has previously noted that the concept of "meaningful track record" necessarily includes evidence of actual debt reduction through payment of debts." See, e.g., ISCR Case No. 05-01920 at 5 (App. Bd. Mar. 1, 200). However, an applicant is not required, as a matter of law, to establish that he has paid off each and every debt listed in the SOR. See, e.g., ISCR Case No. 02-25499 at 2 (App. Bd. Jun. 5, 2006). All that is required is that an applicant demonstrate that he has ". . . established a plan to resolve his financial problems and taken significant actions to implement that plan." See, e.g., ISCR Case No. 04-09684 at 2 (App. Bd. Jul. 6, 2006). The Judge can reasonably consider the entirety of an applicant's financial situation and his actions in evaluating the extent to which that applicant's plan for the reduction of his outstanding indebtedness is credible and realistic. See Directive ¶ E2.2(a) ("Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching

a determination.”) There is no requirement that a plan provide for payments on all outstanding debts simultaneously. Rather, a reasonable plan (and concomitant conduct) may provide for the payment of such debts one at a time. See, e.g., ISCR Case No. 06-25584 at 4 (App. Bd. Apr. 4, 2008). Likewise, there is no requirement that the first debts actually paid in furtherance of a reasonable debt plan be the ones listed in the SOR.

In reaching a conclusion, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant’s financial problems first began when his wife lost her job in 2000. When he stopped his monthly payments, his car was repossessed. He filed a Chapter 13 bankruptcy in an effort to gain control of his finances, but could not afford the monthly payment required by the court. His finances have improved in recent years, but he has not made an effort to pay three of the four small debts listed in the SOR, even though he acknowledges that these debts are his and he earns more than \$8,000 a month.

Other than the two judgments, the unpaid debts listed in the SOR are barred from collection under state law because the unpaid debts are between four and ten years old. However, the Appeal Board has held that the elimination of a debt under a statute of limitations does not show a good faith resolution of a debt, a holding with which I have always agreed. In the instant case, Applicant’s current monthly finances are timely paid. He has not paid three small debts listed in the SOR, which he can easily afford to pay. Applicant has not taken any action on the \$20,000 judgment, which is still a viable debt. As of the hearing, he had no plans to try and resolve the debt. Because he has not taken any action on this debt or his other unpaid debts, and he has the financial resources to resolve some of these debts, I find that he has not resolved the Government’s security concerns about his finances.

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 mitigated the security concerns arising from his personal conduct under Guideline E, but he has not mitigated the security concerns arising from his finances under Guideline F.

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
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	For Applicant

Subparagraph 1.e:	Against Applicant
Subparagraph 1.f:	For Applicant
Subparagraph 1.g:	Against Applicant
Subparagraph 1.h:	Against Applicant
Subparagraph 1.i:	For Applicant

Paragraph 2, Guideline E:	FOR APPLICANT
---------------------------	---------------

Subparagraph 2.a:	For Applicant
Subparagraph 2.b:	For Applicant
Subparagraph 2.c:	For 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.

MARY E. HENRY
Administrative Judge