



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



In the matter of:)
)
) ISCR Case No. 09-02781
)
)
Applicant for Security Clearance)

Appearances

For Government: Fahryn Hoffman, Esq., Department Counsel
For Applicant: *Pro se*

March 31, 2010

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant failed to mitigate the security concerns under Guideline F, Financial Considerations. Applicant's eligibility for a security clearance is denied.

On October 9, 2009, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) detailing the security concerns under Guidelines 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 revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR in writing on November 2, 2009, and requested a hearing before an administrative judge. The case was assigned to another administrative judge on January 15, 2010, and reassigned to me on February 1, 2010. DOHA issued a Notice of Hearing on February 4, 2010. I convened the hearing as

scheduled on February 22, 2010. The Government offered Exhibits (GE) 1 through 5. Applicant did not object and they were admitted. Applicant testified and offered Exhibits (AE) A through D, which were admitted without objection. The record was held open until March 4, 2010, to allow Applicant to submit additional documents, which he did. They were marked as AE E through Q and admitted without objection. DOHA received the hearing transcript (Tr.) on March 2, 2010.

Findings of Fact

Applicant admitted SOR ¶ 1.a and denied ¶ 1.b. After a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is 37 years old. He married in 1998 and divorced in 2005. He has an 11-year-old son from the marriage. He remarried in 2008. He has worked as a design engineer for a federal contractor since March 2008. He has been employed continuously since 1997. He has an associate's degree and is currently attending college. He hopes to complete his bachelor's degree in 2011. He obtained student loans to pay for his tuition.¹

Applicant disputes the debt alleged in SOR ¶ 1.a. In approximately 2006, Applicant consolidated his debts and obtained a loan for approximately \$26,000.² The interest rate was 12%, and he made monthly payments of \$400 until he could not afford the payments. He had been working overtime, but when he obtained joint custody of his son, it was difficult for him to work the extra hours due to his obligations and responsibility for caring for his son. He also was making car payments and could not meet his obligations. He contacted the creditor and advised them he could not make the payments. It is Applicant's position that he was told by the creditor that after six months of delinquent payments the creditor would charge-off the debt. He stated he was informed by the original creditor that he qualified for a program that he could either pay a lump sum of \$15,000 to settle the debt, or he could make six consecutive payments of \$506 and the interest rate on the balance of the debt would be reduced to 2%. Applicant accepted the latter option. He stated he made the six payments and believed his subsequent monthly payments were to be \$485. The debt was sold after it was charged-off and the new creditor sent him a statement that showed a higher interest rate than what was agreed to by the original creditor. Applicant disputed the debt with the original creditor, who refused to acknowledge the agreement. He has disputed the debt with the collection company also. He has sent numerous letters to the collection company. Applicant did not have a written agreement to modify the terms of the loan to prove he had a binding contract with the original creditor. He provided phone logs that

¹ Tr. 108-109, 117.

² Tr. 84-86. Applicant originally testified that he secured the loan in 2003 while married to his first wife, and it became delinquent in 2004, when he and his wife separated. He was shown GE 2, which was his statement to an Office of Personnel Management investigator. In the statement he said he obtained the loan in 2006 and it went delinquent in March 2008 because of his divorce and he had fallen behind in making the payments. In GE 1, Applicant lists that he was divorced in 2005. Applicant corrected his testimony and confirmed the written statement was correct.

appear to be from the original creditor that are cryptic at best.³ It is unclear what exactly was orally proposed and it is also unclear if Applicant complied with all of the requirements of the proposal. It appears Applicant made some payments at the time on the loan. It also appears when Applicant defaulted on the loan he was paying court ordered child support, had other expenses, and was unable to meet the original terms of the loan. He was then attempting to negotiate a payment plan with the original creditor that was to begin when his finances improved. He did not continue to make payments of \$485 a month or any other monthly payments after the loan was sold. He acknowledged he used the \$485 to pay for other debts.⁴

Applicant has sent numerous letters to the collection company attempting to enforce an oral agreement he believed he had with the original creditor. His letter of January 29, 2009, to the collection company stated:

- The Subject account is closed with regard to [original creditor].
- [Original creditor] offered several program options to [Applicant], including 0% and extremely reduced balance if paid in an agreed short-term payment plan.
- [Original creditor] unethically closed the account prior to completion of the mutually agreed program.
- [Collection company] has purchased the subject account from [original creditor].
- [Collection company] buys packages of non-performing debts from major credit card companies, and typically pays only 2.6% of the total amount owed.

Applicant further stated in the letter:

Considering these facts, [collection company] has claimed the total debt owed is \$28,253.51 as identified in [letter from collection company to Applicant dated September 12, 2008]. Again, this amount is under dispute. However, assuming [collection company] purchased the subject account at 2.6%, then [it is] reasonable to assume [collection company] has purchased the subject account for approximately \$734.60.

Considering facts known above, [Applicant] proposes a settlement amount of \$1,470.00. In turn, [collection company] shall agree in writing that upon the complete payment of \$1,470.00, the subject account will be satisfied in its entirety.⁵

³ AE E.

⁴ Tr. 21-38, 64.

⁵ AE A, letter dated January 29, 2009.

Applicant has not received a response to any of his letters or his settlement offer. Applicant admitted he owes the delinquent debt, but he was concerned that if he began making the payments with the new higher interest rate, he would be constructively agreeing to the increased rate. He admitted he came to this conclusion based on his own research and did not seek financial counseling. He has not made any recent payments on this debt. He has not contacted the creditor by telephone because he is concerned about keeping a record and because of the previous problems he has had with the debt. He stated he is attempting to negotiate a settlement with the collection company, but has only done it in writing and the offer was for a small amount in comparison to the total original debt. His last contact with the collection company was in February 2009. He admitted the collection company contacted him at work and he told them not to. He did not provide a home phone number because he did not have one. Applicant believes the account continues to accrue interest. The collection company has not responded to his offer to pay \$1,450 on the current balance of \$28,000. He believes he owes about \$25,000.⁶

Applicant stated he intends to pay this debt. He has not been saving money in anticipation of having to resolve the debt. He recently moved residences, due to a separation from his wife, and has reduced his rent and utilities by approximately \$1,600 a month. He stated he is willing to negotiate a settlement and pay a reasonable amount. His last correspondence with the creditor was in February 2009. He admitted he could offer a more reasonable settlement in the range of \$10,000 over six months, but has not.⁷

After his hearing, Applicant provided his handwritten notes presumably taken while speaking with a consumer credit counseling service. He also provided a typed summary of his notes. The financial advisor recommended he contact the collection company and "make arrangements as soon as possible."⁸ His notes also reflect the following advice: "She recommends negotiating the interest rate, as this carries impact of thousands of dollars and represents my core dispute originating with [original creditor]. However, she recommended arranging payments as soon as possible."⁹ Applicant also presumably took handwritten notes when he met with a financial educator/counselor from a credit union. His notes stated: "She noted that [subject debt] was the only tarnished history on the recent credit report she reviewed. [Counselor] understood disputing the percentage rate, but recommended establishing regular payments as soon as possible."¹⁰ Applicant did not provide any proof he has started to make payments to resolve this debt. He provided handwritten notes that he left phone

⁶ Tr. 38-49, 57-60, 62; GE 2.

⁷ Tr. 37-43, 49-57, 60-70; AE C

⁸ AE I, L.

⁹ *Id.*

¹⁰ AE I, M.

messages with the [collection company] and comments that he will continue to contact the collection company “until an agreement in writing is finalized.”¹¹ He also notes “A payment to [collection company] is anticipated for April 2010.”¹²

Applicant admitted that the debt in SOR ¶ 1.b is very old. The original amount of the loan was for approximately \$18,000 to \$19,000. When he married his first wife she had many debts. Applicant took out a loan to consolidate the debts and admitted he knew he was ultimately responsible for the payment of this debt. He admitted the loan is legally in his name. They paid the debt for a period and the balance is now approximately \$9,100. When he and his wife divorced, he stated they orally agreed that she would pay this loan. She did not. He believes the enforcement of the loan is barred by the statute of limitations. He stopped making payments on the loan sometime in 2004. He has not taken any action on this debt. When questioned further, he admitted that the right thing to do would be to contact the creditor and make arrangements to settle the debt. He did not provide any subsequent information that he has made arrangements to pay the debt. In his written statement, provided after the hearing, he stated the debt would be resolved after he had an agreement with the creditor in SOR ¶ 1.a.¹³

Applicant is making payments on four other debts that are not delinquent. Three are credit cards and one is a loan. He has a 401(k) account that he contributes to and has a balance of approximately \$6,000. He stated he is a reliable responsible person.¹⁴ After his hearing, Applicant enrolled in a workshop to “build a strong credit report.”¹⁵ He also provided confirmation from his employer that his salary increased on March 1, 2010, by \$2,523.¹⁶ In addition, Applicant provided a copy of a budget. It does not include payments for the delinquent debts included in the SOR.¹⁷ I have considered Applicant’s excellent performance appraisals for 2008 and 2009.¹⁸

Policies

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the revised adjudicative guidelines (AG). In addition

¹¹ AE I.

¹² *Id.*

¹³ Tr. 70-82.

¹⁴ Tr. 90.

¹⁵ AE P.

¹⁶ AE Q.

¹⁷ AE G, H, I, J, K.

¹⁸ Tr.114; AE B.

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. 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, 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 and 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 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 for Financial Considerations is set out in AG ¶ 18:

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

The guideline notes several conditions that could raise security concerns. I have considered all of the disqualifying conditions under AG ¶ 19 and especially considered:

- (a) inability or unwillingness to satisfy debts; and
- (c) a history of not meeting financial obligations.

Applicant owes two large debts that are delinquent and have been for a significant period. He has not made any recent payments to resolve the debts. I find there is sufficient evidence to raise the above disqualifying conditions.

The guideline also includes examples of conditions that could mitigate security concerns arising from financial difficulties. I have considered the following mitigating conditions under AG ¶ 20:

- (a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;
- (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 behavior is recent because his delinquent debts are ongoing. He does not have a payment plan with either creditor, nor has he made any payments on either debt for a long period. Although he disputes the interest rate on the debt in SOR ¶ 1.a, he admitted he owed about \$25,000, and has not paid it. The debt in SOR ¶ 1.b is not paid, and Applicant did not provide a plan for resolving it. His position is it is barred by the statute of limitations. He provided a written statement, after his hearing, stating he would address it after he had an agreement with the other creditor. I find mitigating condition (a) does not apply. Applicant has not addressed paying his delinquent debts. Despite his dispute, he is aware he owes the debt and has not made payments on it in years. The second debt remains unpaid. Although he stated his ex-wife was responsible for it, he is aware he is legally obligated to pay the debt, and has taken no action to resolve it. I find his actions cast doubt on his reliability, trustworthiness, and judgment.

I have considered mitigating condition (b) and find that Applicant's finances were impacted by his divorce. For mitigating condition (b) to be fully applicable, he must have acted responsibly under the circumstances. I find he did not. He understands he incurred a legal obligation to pay the debt in SOR ¶ 1.b. The debt is very old and it has not been resolved. He knew he was ultimately responsible for it, and has taken no action on the debt. He also knew he was responsible to pay the debt in SOR ¶ 1.a, and even though he disputed the interest rate, he did not set aside money to pay the debt nor made any payments. He offered to pay \$1,450 on the \$28,000 debt. I do not consider this a reasonable good-faith offer to settle the debt. I find mitigating condition (b) only partially applies. I find mitigating conditions (c) and (d) do not apply. Applicant sought financial counseling after his hearing. The counselors recommended he begin repaying his debts as soon as possible. He promises to do so, but showed no documented proof that he made one payment. Applicant has had years to address resolving both of these debts. I do not find him credible in believing he will pay them in the future. There are not clear indications the problem is being resolved. Although the statute of limitation may bar enforcement of the debt in SOR ¶ 1.b, I do not give full credit under mitigating condition (d) for relying on it as a defense to paying this debt.¹⁹

¹⁹ The Appeal Board has previously explained what constitutes a "good-faith" effort to repay overdue creditors or otherwise resolve debts:

In order to qualify for application of Financial Considerations Mitigating Condition 6, an applicant must present evidence showing either a good-faith effort to repay overdue creditors or some other good-faith action aimed at resolving the applicant's debts. The Directive does not define the term 'good-faith.' However, the Board has indicated that the concept of good-faith 'requires a showing that a person acts in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation.' Accordingly, an applicant must do more than merely show that he or she relied on a legally available option (such as bankruptcy) in order to claim the benefit of Financial Considerations Mitigating Condition 6.

(internal citation and footnote omitted) ISCR Case No. 02-30304 at 3 (App. Bd. Apr. 20, 2004) (quoting ISCR Case No. 99-9020 at 5-6 (App. Bd. June 4, 2001)).

Applicant has provided documentation that he disputes the debt in SOR ¶ 1.a. He does not dispute that he received a loan for \$25,000 and defaulted on the loan. He does not dispute that he believes he owes approximately \$25,000 on the loan. He has not made payments on the loan in a few years. His complaint is that he believed he had an agreement that the interest rate on his defaulted loan would be reduced if he made good-faith payments for six months. He does not have a written agreement with the original creditor. He was negotiating an agreement on a loan that he already had defaulted on and has not paid the debt. There are only cryptic notes that Applicant provided, but it remains unclear as to what was agreed upon, by whom, whether Applicant complied with the oral agreement. This information does not negate that he owes this debt. I do not find he has a reasonable basis to dispute the legitimacy of the debt. He agrees he owes it. He is merely unhappy that he did not receive a lower interest rate on it after he defaulted. He is unhappy that the defaulted loan was sold to a collection company that buys loans at a fraction of the amount of the loan. He has not made any recent payments on the principal of the loan. I find mitigating condition (e) does not apply.

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 has been employed consistently since 1997. He experienced financial problems when he and his wife divorced. He has two debts that he acknowledges he is responsible to pay. He has not made payments on either of the debts. He has ignored the debt in SOR ¶ 1.b because it is old and may be barred by the statute of limitations. The other debt he has delayed paying because he disputes the interest rate. Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security

clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising under the guideline for Financial Considerations.

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
Subparagraphs 1.a-1b:	Against Applicant

Conclusion

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

Carol G. Ricciardello
Administrative Judge