



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



In the matter of:)	
)	
XXXXXXXXXXXX, XXXXX)	ISCR Case No. 09-03480
)	
Applicant for Security Clearance)	

Appearances

For Government: Stephanie Hess, Esq., Department Counsel
For Applicant: *Pro se*

April 6, 2011

Decision

TUIDER, Robert J., Administrative Judge:

Applicant failed to mitigate Guideline F (financial considerations) security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On January 23, 2009, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP). On April 26, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under Guideline F (financial considerations) for Applicant. 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 May 6, 2010, and DOHA received his answer on May 10, 2010. Department Counsel was prepared to proceed on July 20, 2010. The case was previously assigned to another administrative judge on July 27, 2010, and was reassigned to me on August 6, 2010, due to caseload considerations. DOHA

issued a notice of hearing on September 7, 2010, scheduling the hearing for September 29, 2010. The hearing was held as scheduled.

The Government offered Government Exhibits (GE) 1 through 5, which were received without objection. The Applicant did not offer any exhibits, and he testified on his own behalf. I held the record open until October 13, 2010, to afford him the opportunity to submit additional evidence. At Applicant's request and for good cause shown, I extended the deadline to submit additional evidence to October 29, 2010, and later to January 14, 2011. The Applicant submitted a number of e-mails, some with attachments, before the record closed. His post-hearing submissions were marked Applicant Exhibits (AE) A through I and received without objection. DOHA received the hearing transcript (Tr.) on October 7, 2010. The record closed on January 14, 2011.

Findings of Fact

Applicant admitted all of the SOR allegations except SOR ¶ 1d. His admissions are incorporated as findings of fact.

Background Information

Applicant is a 54-year-old principal electrical engineer, who has been employed by a defense contractor since January 2009. He claims to have held a security clearance from approximately 1987 to 1991 with a previous employer. Shortly after Applicant was hired by his current employer, he was granted an interim secret clearance, which was revoked as a result of these proceedings. Successfully vetting for a security clearance is a condition of Applicant's continued employment. (GE 1, Tr. 13-15, 28-29.)

Applicant was born, raised, and completed the equivalent of high school in Vietnam before he immigrated to the United States in 1975. He, along with thousands of his countrymen, were evacuated by the U.S. Air Force after the fall of South Vietnam. After arriving in the United States, he attended community college and later transferred to a university. He graduated and was awarded a Bachelor of Science degree in electrical engineering in June 1984. He became a naturalized U.S. citizen in March 1984. (GE 1, Tr. 17-22.) He married in May 1991 in the United States. Applicant's wife was also from Vietnam, and she became a naturalized U.S. citizen in February 1986. They have been informally separated and living apart since August 2003. Applicant has two adult children – a stepdaughter and a son. His stepdaughter is self-supporting and his son is a college student. (Tr. 25-27.)

Financial Considerations

Applicant's SOR alleges six debts totalling \$45,863. The debts include a range of creditors -- two different states, attempting to collect unpaid income taxes; the Internal Revenue Service (IRS), attempting to collect unpaid income taxes; the Department of Education (DOE), attempting to collect unpaid student loans; and two credit cards companies, attempting to collect on unpaid accounts.

When Applicant was interviewed by an Office of Personnel Management (OPM) investigator for his background investigation in March 2009, the investigator discussed Applicant's debts with him. During that interview, Applicant attributed his indebtedness to events beyond his control, particularly his separation from his wife, and lack of consistent employment between 2003 and 2009. At the time of the interview, Applicant had not sought financial counselling. (GE 3.) A summary of Applicant's debts and action taken follows:

SOR ¶ 1a – In December 2008, State A notified Applicant of a tax income deficiency for tax year 2007 in the amount of \$4,242. Applicant indicated in his SOR Answer that he had contacted State A's Department of Revenue to discuss the "discrepancies" and thought the issues resulted from missing information. (SOR Answer.) During his testimony, he added that his issue with State A dealt with his business expense deductions. He claimed to have written a letter to State A in June 2009 and was waiting to hear back from them. Post-hearing, Applicant submitted documentation that his accountant had contacted State A. His accountant advised him to contact State A and set up a payment plan. Applicant's last post-hearing document dated January 9, 2011 indicated that he had submitted a Statement of Financial Condition for Individuals dated November 29, 2010, to State A seeking to make monthly payments of \$100. There was nothing in the record indicating that State A had approved Applicant's request or that he was making payments to State A. This debt remains unresolved. (GE 2(I-3 – I-4), AE - AE I, Tr. 30-36.)

SOR ¶ 1b – Applicant was notified by the IRS in January 2009 that he owed \$6,234 in taxes, penalties and interest for tax year 2007. Applicant indicated in his SOR Answer that the IRS had "reduced the 2009's tax return" and that he did not think he had an issue with the IRS. (SOR Answer.) Post-hearing, Applicant provided documentation that his accountant filed an amended return dated November 3, 2010, for tax year 2007 that reflects tax, penalties and interest of \$6,022. By letter dated December 22, 2010, the IRS accepted Applicant's offer to make \$98 monthly installment payments that are automatically deducted from his checking account. This debt is being satisfactorily resolved. (GE 2(I-6 - I-14), AE B, AE G, AE I, Tr. 36-39.)

SOR ¶ 1c – On April 21, 2009, the DOE initiated a garnishment action to collect \$26,477 in unpaid student loans. Per the garnishment order, \$473.78 is deducted from Applicant's pay check every two weeks. (GE 2(I-15 – I-21.) Applicant indicated in his SOR Answer that this debt was his fault because he did not notify DOE of his current address and that he had an issue with "job stability." (SOR Answer.) He testified that the original amount was "probably less than \$5,000.00/\$6,000.00," but had increased to over \$26,000 due to penalties and interest. This debt originated when Applicant was in college in the 1980s. Applicant mentioned he was "tight for the money"; however, there is no indication that he attempted to contact DOE after he graduated in 1984. This debt is in the process of being resolved. (Tr. 39-41.)

SOR ¶ 1d – In December 2005, State B filed a tax lien against Applicant in the amount of \$1,320 for unpaid state taxes. During his hearing, Applicant claimed he does not owe State B any taxes because he did not work there. Later he claimed to have

returned to State B and worked there for a digital microwave company after his seafood business failed in State C. Post-hearing, Applicant submitted an e-mail he sent to State B's franchise tax board on November 15, 2007 disputing the fact he owed them any money. On November 16, 2010, State B's franchise tax board responded saying that Applicant needed to contact their Collection Account Resolution department at their toll free number. Applicant claims he attempted to contact State B's franchise tax board at their toll free number in October and November 2010, but was unable to reach them. This debt is not resolved. (GE 5(33), AE D, Tr. 41-45.)

SOR ¶¶ 1e and 1f – These are credit card collections accounts for \$7,429 and \$161, respectively. Applicant did not adequately address these accounts in his SOR Answer or at his hearing. He surmised that these accounts originated during his “bad marriage” in the 2001 to 2003 time frame, but was unable to provide any amplifying information about either account. He acknowledged that these debts may have arisen out of joint marital debt and added that he left the state where his wife resides in 2003. He has not contacted either creditor. According to Applicant's credit report, the first account was opened in 2000 and the last payment was received in 2002. With regard to the second account, the last activity reported was in 2003. Applicant indicated in a post-hearing e-mail dated January 9, 2011, that two credit counseling services advised him that he did not need to repay the first creditor because the statute of limitations had been tolled and the amount for the second creditor “is too small.”¹ Neither of these debts is resolved. (GE 4, GE 5, AE I, Tr. 45-48, 56-57.)

Applicant testified that his annual salary is “about \$100,000” and after his deductions and bills are paid, his net monthly remainder is “less than \$200.00.” He claims that the majority of his income is being paid into his 401k account. (Tr. 55-59.) Applicant did not submit a budget. (Tr. 64.)

Character Evidence

Applicant did not submit any character evidence. (Tr. 63.)

Policies

The President of the United States has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information. *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988). The President has authorized the Secretary of Defense to grant eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended. The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that “no

¹ By e-mail dated December 16, 2010 addressed to Applicant with CC to Department Counsel, I advised Applicant that the statute of limitations is not a recognized defense in DOHA hearings to avoid paying past-due debts. (AE I.)

one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These AGs are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge's adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable to reach his decision.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information. Clearance decisions must be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See Exec. Or. 10865 § 7. See also Executive Order 12968 (Aug. 2, 1995), Section 3. Thus, a clearance decision is merely an indication that the Applicant has or has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. "Substantial evidence" is "more than a scintilla but less than a preponderance." See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed and an applicant's security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue [his or her] security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, including those described briefly above, I conclude that a relevant security concern exists under Guideline F (financial considerations). AG ¶ 18 articulates the security concern 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.

AG ¶ 19 provides two financial considerations disqualifying conditions that could raise a security concern and may be disqualifying in this case: "(a) inability or unwillingness to satisfy debts," and "(c) a history of not meeting financial obligations." Applicant's history of delinquent debt is established by his admissions and evidence presented. As indicated in SOR ¶¶ 1a to 1f, he has six delinquent debts totaling \$45,863 that have been in various states of delinquency for several years. The Government established the disqualifying conditions in AG ¶¶ 19(a) and 19(c).

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 partial credit under AG ¶ 20(b) due to his lack of consistent employment between 2003 and 2009 and his separation from his spouse since 2003. His lack of consistent employment and separation may well have contributed to his past financial difficulties, but these factors do not fully explain Applicant's current position today. Applicant cannot rely on a voluntary marital separation since 2003 and inconsistent employment to totally absolve himself from his responsibilities to pay state and federal income taxes, student loans, and valid credit card debts. Furthermore, his failure to remain in contact with his creditors does not show that he acted responsibly under the circumstances.²

AG ¶ 20(c) is partially applicable. Applicant did seek financial counseling post-hearing; however, there is no clear indication that his financial problems are resolved or under control. Applicant is able to receive partial credit under AG ¶ 20(d) as it applies to resolving his debt with the IRS.³ However, his efforts to repay his remaining creditors is unimpressive – he avoided paying his student loans from graduation in 1984 until DOE initiated involuntary garnishment proceedings⁴ against him in 2009, and he not made sufficient effort to resolve his tax liabilities with two different states. Furthermore, he

² 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 is whether Applicant maintained contact with his creditors and attempted to negotiate partial payments to keep his debts current.

³ 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 [the "good-faith" mitigating condition], 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 in order to claim the benefit of [the "good-faith" mitigating condition].

(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)).

⁴ Of course, Applicant loses some mitigating credit because some debt payments were made through garnishment of his salary even though his opportunity to establish a payment plan was limited because of his other financial commitments. Payment of a debt "though garnishment rather than a voluntary effort diminishes its mitigating force." *Compare* ISCR Case No. 08-06058 at 4 (App. Bd. Aug. 26, 2010) *with* ISCR Case No. 04-07360 at 2-3 (App. Bd. Sept. 26, 2006) (payment of two of four debts through garnishment did not bar mitigation of financial considerations concerns).

seems content to rely on the statute of limitations as a defense for not repaying two credit card debts even after being advised such a defense was not recognized by DOHA. Under the Appeal Board's jurisprudence, debts that are beyond the statute of limitations for collections cannot be mitigated solely because they are not collectable.⁵ AG ¶ 20(e) does not apply because Applicant did not provide sufficient documentation to warrant application of this mitigation condition as it pertains to his tax liability with State B.

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 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.

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. AG ¶ 2(c).

The comments in the Analysis section of this decision are incorporated in the whole-person concept analysis. Applicant's financial indebtedness is ongoing. Of particular concern is the manner in which Applicant appears to have disengaged from his ongoing responsibility to remain in contact with his creditors and keep them apprised of his situation.

Applicant was given a reasonable opportunity to mitigate concerns identified under Guideline F. However, even with the additional time and explanations given to him throughout the process, he did not seem to fully grasp the seriousness or urgency of establishing his financial responsibility. 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 concept, I conclude he has not mitigated security concerns pertaining to financial considerations.

⁵ See ISCR Case No. 08-01122 at 4 (App. Bd. Feb. 9, 2009); ADP Case No. 06-14616 at 3 (App. Bd. Oct. 18, 2007); ISCR Case No. 07-08049 at 5 (App. Bd. Jul. 22, 2008); ADP Case No. 07-13041 at 5 (App. Bd. Sep. 19, 2008); ISCR Case No. 07-11814 at 2 (App. Bd. Dec. 29, 2008).

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 adjudicative guidelines. Applicant has not fully mitigated 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:	AGAINST APPLICANT
Subparagraph 1a:	Against Applicant
Subparagraph 1b:	For Applicant
Subparagraphs 1c – 1f:	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 Applicant's eligibility for a security clearance. Eligibility for a security clearance is denied.

Robert J. Tuider
Administrative Judge