



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



In the matter of:)	
)	
-----)	ISCR Case No. 09-04646
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Gina L. Marine, Esquire, Department Counsel
For Applicant: *Pro se*

November 18, 2010

Decision

GALES, Robert Robinson, Administrative Judge:

Applicant mitigated the security concerns regarding financial considerations. Eligibility for a security clearance or access to classified information is granted.

Statement of the Case

On March 26, 2009, Applicant applied for a security clearance and submitted an Electronic Questionnaire for Investigations Processing (e-QIP) version of a Security Clearance Application (SF 86).¹ On January 2, 2010, the Defense Office of Hearings and Appeals (DOHA) issued him a set of interrogatories pertaining to his financial situation. He responded to the interrogatories on February 26, 2010, and March 18, 2010.² On May 6, 2010, DOHA issued a Statement of Reasons (SOR) to him, pursuant to 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

¹ Item 4 (SF 86), dated March 26, 2009.

² Item 5 (Applicant's Answers to Interrogatories, dated February 26, 2010, and March 18, 2010).

amended and modified (Directive); and the *Adjudicative Guidelines for Determining Eligibility For Access to Classified Information* (December 29, 2005) (AG) for all adjudications and other determinations made under the Directive. The SOR alleged security concerns under Guideline F (Financial Considerations), and detailed reasons why DOHA could not make a preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant, and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

Applicant acknowledged receipt of the SOR on May 19, 2010. In a sworn, written statement, dated May 20, 2010, Applicant responded to the SOR allegations and elected to have his case decided on the written record in lieu of a hearing.³ A complete copy of the file of relevant material (FORM) was provided to Applicant on July 1, 2010,⁴ and he was afforded an opportunity, within a period of 30 days after receipt of the FORM, to file objections and submit material in refutation, extenuation, or mitigation. Applicant received the FORM on July 13, 2010, and submitted a letter with attachments to Department Counsel on an unspecified date before August 16, 2010.⁵ The case was assigned to me on September 1, 2010.

Findings of Fact

In his Answer to the SOR, Applicant admitted two of the factual allegations in ¶¶ 1.d. and 1.e. of the SOR. He denied the remaining factual allegations in ¶¶ 1.a. through 1.c. Applicant's admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact:

Applicant is a 63-year-old employee of a defense contractor, currently serving as a radio communications instructor,⁶ and he is seeking to retain a SECRET security clearance. A May 1965 high school graduate,⁷ he served on active duty with the U.S. Army from November 1966 until June 1987.⁸ He was granted a TOP SECRET security clearance in 1983.⁹ He has worked in a variety of positions in a variety of locations in several different states. He was an action officer, a new equipment training manager, a configuration manager, a farmer, and a jailer, before being hired by his current

³ Item 3 (Applicant's Answer to the SOR, dated May 20, 2010).

⁴ While the FORM is dated June 30, 2010, the Memorandum of Assignment from the Director, DOHA, to me indicated the Applicant was provided the FORM on July 1, 2010.

⁵ Applicant's Response to the FORM was forwarded to Department Counsel by a Legal Assistant to the Department Counsel on August 16, 2010.

⁶ Item 4, *supra* note 1, at 3.

⁷ *Id.*

⁸ *Id.* at 6.

⁹ *Id.* at 11.

employer.¹⁰ He also went through a period of unemployment from January 2003 until September 2005.¹¹ He assumed his position with his current employer in March 2009.¹²

Applicant was married in 1978 and divorced in 1987.¹³ He has one son (born in 1977) and two daughters (born in 1968 and 1989, respectively).¹⁴

Financial Considerations

There was nothing unusual about Applicant's finances until about 2004, after he became unemployed. He had previously been able to remain current with all of his financial obligations, but conceded that he had stretched his income and was living beyond his means by purchasing a house and investing in rental property, while paying child support.¹⁵ At some unspecified point, Applicant failed to keep up with his monthly payments, and accounts started to become delinquent. Some of the accounts were placed for collection with a variety of collection agents, and some of the accounts were charged off.¹⁶

Applicant had a number of non-SOR delinquent accounts which were apparently resolved, either by being paid off or successfully disputed, and they are of no further security significance. The SOR identified 5 purportedly continuing delinquencies as reflected by credit reports from 2009¹⁷ and 2010,¹⁸ totaling approximately \$10,658. Some accounts reflected in the credit reports have been transferred, reassigned, or sold to other creditors or collection agents. Other accounts are referenced repeatedly in these as well as other different credit reports, in many instances duplicating other accounts listed, either under the same creditor name or under a different creditor name. Some accounts are identified by complete account numbers, while others are identified by partial account numbers, in some instances eliminating the last four digits and in others eliminating other digits. Some accounts reflect no account number.

¹⁰ *Id.* at 3-6.

¹¹ Personal Subject Interview, dated April 16, 2009, at 1, attached to Item 5, *supra* note 2; *Id.* at 5.

¹² *Id.* Item 4, at 3. Applicant was deployed to Iraq for an unspecified period when the preliminary DOHA discovery was conducted, and it was difficult for him to gather the documents necessary for him to present to DOHA. See Item 5, *supra* note 2, at 20.

¹³ *Id.* Item 4, at 7.

¹⁴ *Id.* at 8.

¹⁵ Personal Subject Interview, *supra* note 11, at 1.

¹⁶ Item 8 (Combined Experian, TransUnion, and Equifax Credit Report, dated April 1, 2009).

¹⁷ *Id.*

¹⁸ Item 9 (Equifax Credit Report, dated January 2, 2010); Item 10 (Equifax Credit Report, dated April 10, 2010).

Applicant contends that three of the accounts listed in the SOR (§§ 1.a. through 1.c.), are not his, but rather the result of identity theft.¹⁹ Upon learning of the accounts, he reported his concerns to the police and was issued a case number covering the three accounts.²⁰ He also reported the identity theft “fraud alert” to the credit reporting agencies and noted that his name differed from the ones listed in the credit report entries, and that he had never resided at one of the addresses listed in the credit reports.²¹ Applicant reported his concerns to the relevant creditors or their respective collection agencies, and upon further investigation and review, at least one of the accounts (SOR § 1.c.) was deemed closed and removed from his credit reports.²² It is unclear how the other two creditors or their respective collection agencies reacted, but neither of those accounts (SOR §§ 1.a. and 1.b.) is listed on his most recent credit report.²³

One of the accounts listed in the SOR (§ 1.d.), for a bank credit card in the amount of \$9,618, was charged off and subsequently sold to a delinquent debt buyer.²⁴ Applicant contacted the original creditor but they referred him to the debt purchaser, and he made several attempts to locate the debt purchaser, but was unsuccessful in doing so because they are no longer in business.²⁵

The one remaining account listed in the SOR (§ 1.e.), for telephone service in the amount of \$191, was charged off in October 2008.²⁶ Applicant contends, and the evidence supports his contention, that the credit reports reflect two telephone accounts with the identical account number (one is a nine digit number with a \$191 balance, and the other is three digits of the same number, with a \$130 balance).²⁷ The SOR alleges that the account identified with the three digits was acquired by a particular collection agency, but aside from an identical balance (\$191) there is no evidence tying the collection agency to that particular account.²⁸ In his response to the interrogatories, Applicant claimed he had paid the account in June or July 2009, but he was unable to

¹⁹ Item 3, *supra* note 3, at 2.

²⁰ *Id.*; County Sheriff's Incident Report, dated May 20, 2010, attached to Item 3.

²¹ Combined Experian, TransUnion, and Equifax Credit Report, dated June 1, 2010, at 1, attached to Item 3; Combined Experian, TransUnion, and Equifax Credit Report, dated July 31, 2010, at 1, attached to Applicant's Response to the FORM, undated, at 1; Item 6 (Applicant's credit report comments, dated March 5, 2010).

²² Letter from collection agency, dated May 27, 2010, attached to Applicant's Response to the FORM, *id.*

²³ Combined Experian, TransUnion, and Equifax Credit Report, dated July 31, 2010, *supra* note 21,

²⁴ Item 8, *supra* note 16, at 6.

²⁵ Item 5, *supra* note 2, at 16; Item 3, *supra* note 3, at 3; Express Mail Mailing Label, dated June 1, 2010, attached to Applicant's Response to the FORM (reflecting mail was “unclaimed”); U.S. Postal Service Receipt, Express Mail Mailing Label, and U.S. Postal Service Track & Confirm, various dates, also attached to Item 3, at 16-17 (reflecting mail as “undeliverable”).

²⁶ Item 8, *supra* note 16, at 9.

²⁷ *Id.* at 9; Item 9, *supra* note 18, at 2; Item 10, *supra* note 18, at 2.

²⁸ *Id.* Item 10.

furnish documentary proof because he was, at that time, deployed to Iraq.²⁹ Subsequently, in his Answer to the SOR, he acknowledged there was a misunderstanding on his part. He claimed he had routinely paid his bill but was unaware that the company split the balance into separate bills, with one for local service and another one for long distance service.³⁰ Once the matter was cleared up, on May 12, 2010, he paid the remaining balance.³¹

On February 20, 2010, Applicant prepared a personal financial statement indicating monthly net income of \$9,029.47 (including military retirement), monthly expenses of \$1,030, monthly debt repayments of \$2,830.97, and a net remainder of \$5,168.50 available for discretionary spending.³² He currently has no delinquent accounts.³³

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, “no one has a ‘right’ to a security clearance.”³⁴ As Commander in Chief, the President 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. The President has authorized the Secretary of Defense or his designee to grant an applicant eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.”³⁵

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the AG. In addition to brief introductory explanations for each guideline, the AG list potentially disqualifying conditions and mitigating

²⁹ Item 5, *supra* note 2, at 20.

³⁰ Item 3, *supra* note 3, at 3.

³¹ *Id.* at 20.

³² Personal Financial Statement, dated February 20, 2010, attached to Item 5.

³³ The SOR did not allege that Applicant had more than the five purportedly delinquent accounts. In ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006) the Appeal Board listed five circumstances in which conduct not alleged in an SOR may be considered stating:

(a) to assess an applicant’s credibility; (b) to evaluate an applicant’s evidence of extenuation, mitigation, or changed circumstances; (c) to consider whether an applicant has demonstrated successful rehabilitation; (d) to decide whether a particular provision of the Adjudicative Guidelines is applicable; or (e) to provide evidence for whole person analysis under Directive Section 6.3.

(citing ISCR Case No. 02-07218 at 3 (App. Bd. Mar. 15, 2004); ISCR Case No. 00-0633 at 3 (App. Bd. Oct. 24, 2003)). I have considered the non-SOR derogatory information in this decision solely to assess Applicant’s credibility regarding his efforts to resolve his delinquent debts, including those listed in the SOR.

³⁴ *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

³⁵ Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

conditions, which are used in evaluating an applicant's eligibility for access to classified information.

An administrative judge need not view the guidelines as inflexible, ironclad rules of law. Instead, acknowledging 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. 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 meaningful decision.

In the decision-making process, facts must be established by "substantial evidence."³⁶ The Government initially has the burden of producing evidence to establish a potentially disqualifying condition under the Directive, and has the burden of establishing controverted facts alleged in the SOR. Once the Government has produced substantial evidence of a disqualifying condition, under Directive ¶ E3.1.15, the applicant has the burden of persuasion to present evidence in refutation, explanation, extenuation or mitigation, sufficient to overcome the doubts raised by the Government's case. The burden of disproving a mitigating condition never shifts to the Government.³⁷

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 as well. It is because of this special relationship that the Government must be able to repose a high degree of trust and confidence in those 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 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. Furthermore, "security clearance determinations should err, if they must, on the side of denials."³⁸

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."³⁹ Thus, nothing in this decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant's allegiance, loyalty, or patriotism. It is merely an indication the Applicant has not met the strict guidelines the

³⁶ "Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all contrary evidence in the record." ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). "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).

³⁷ See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

³⁸ *Egan*, 484 U.S. at 531

³⁹ See Exec. Or. 10865 § 7.

President and the Secretary of Defense have established for issuing a clearance. 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.

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. . . .

The guideline notes several conditions that could raise security concerns. Under AG ¶ 19(a), an "inability or unwillingness to satisfy debts" is potentially disqualifying. Similarly, under AG ¶ 19(c), "a history of not meeting financial obligations" may raise security concerns. Also, under AG ¶ 19(e), "consistent spending beyond one's means, which may be indicated by excessive indebtedness, significant negative cash flow, high debt-to-income ratio, and/or other financial analysis," is potentially disqualifying.

As noted above, there was nothing unusual about Applicant's finances until about 2004. At some unspecified point, he failed to keep up with his monthly payments, and accounts started to become delinquent. Some accounts were placed for collection and some accounts were charged off. Applicant attributed his financial situation to having stretched his income and living beyond his means by purchasing a house and investing in rental property, while paying child support. In addition, he was unemployed from January 2003 until September 2005. AG ¶¶ 19(a), 19(c), and 19(e) apply.

The guideline also includes examples of conditions that could mitigate security concerns arising from financial difficulties. Under AG ¶ 20(a), the disqualifying condition may be mitigated where "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." Also, under AG ¶ 20(b), financial security concerns may be mitigated where "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." Evidence that "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" is potentially mitigating under AG ¶ 20(c). Similarly, AG ¶ 20(d) applies where the evidence shows

“the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.”⁴⁰ Also, when “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,” AG ¶ 20(e) may apply.

Applicant’s financial problems commenced sometime in 2004, after he had been unemployed, and have now been resolved. Because his financial difficulties commenced six years ago, and continued until 2009, it was initially frequent and continuing in nature. However, Applicant eventually took the situation under control, and successfully resolved most of the delinquent accounts. His initial mishandling of his finances raised significant doubt as to his reliability, trustworthiness, and good judgment, but his eventual handling of his finances, under the circumstances, has eliminated such doubts. AG ¶ 20(a) partially applies.

AG ¶ 20(b) partially applies because Applicant went through a lengthy period of unemployment from January 2003 until September 2005. However, he has furnished little explanation as to why his financial problems continued long after he had obtained employment in 2005, but failed to properly address his delinquent accounts until four years later. In this circumstance, it is difficult to conclude that Applicant had acted responsibly.

AG ¶ 20(c) applies because, while there is no evidence of Applicant ever having received financial counseling, there is clear and abundant evidence that his financial problems are resolved and are under control. He has resolved his financial problems, established a budget, presented a personal financial statement, and now has zero delinquent debts while enjoying a monthly net remainder of \$5,168.50 available for discretionary spending.

AG ¶ 20(d) applies because Applicant addressed his delinquent debts well before the SOR was issued. Once those delinquent accounts were identified to him he immediately took positive action. As a result, the vast majority of his delinquent accounts were paid or resolved. Three debts were the result of identity theft and have been resolved; they are no longer listed on his credit report. The one remaining debt – the one that was charged off and sold to a debt purchaser who is now out of business –

⁴⁰ 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 (such as bankruptcy [or statute of limitations]) 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)).

should not be held against him for he has made every reasonable, though unsuccessful, effort to locate the “creditor” and pay off the debt.

AG ¶ 20(e) applies because Applicant had a reasonable basis to dispute the legitimacy of the three past-due debts which were the result of identity theft. He reported his concerns to the police; reported the identity theft “fraud alert” to the credit reporting agencies; and he reported his concerns to the relevant creditors or their respective collection agencies. Upon investigation and review, at least one of the accounts was deemed closed and removed from his credit reports. Neither of the other two accounts is listed on his most recent credit report.

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.

There is some evidence against mitigating Applicant’s conduct. He lived beyond his means and permitted accounts to become delinquent and placed for collection or charged off. After years of inaction, Applicant finally started to address his delinquent accounts.

The mitigating evidence under the whole-person concept is substantial. Applicant has a history of financial delinquencies. While it is true that he failed to address his delinquent accounts until 2009, he finally did so with a sustained effort that resulted in all but one of his legitimate accounts being resolved. His efforts regarding that one account should not be overlooked. Applicant’s financial situation is now excellent with a substantial monthly net remainder available for discretionary or emergency use. I have evaluated the various aspects of this case in light of the totality of the record evidence and have not merely performed a piecemeal analysis.⁴¹ His substantial good-faith

⁴¹ See *U.S. v. Bottone*, 365 F.2d 389, 392 (2d Cir. 1966); See also ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006).

efforts are sufficient to mitigate continuing security concerns. See AG ¶ 2(a)(1) through AG ¶ 2(a)(9).

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:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	For Applicant
Subparagraph 1.e:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

ROBERT ROBINSON GALES
Administrative Judge