



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



In the matter of: )  
 )  
XXXXXXXXXX, XXXXX ) ISCR Case No. 09-06390  
 )  
Applicant for Security Clearance )

**Appearances**

For Government: Candace Le'i Garcia, Esq., Department Counsel  
For Applicant: *Pro Se*

February 16, 2011

**Decision**

TUIDER, Robert J., Administrative Judge:

Applicant failed to mitigate security concerns regarding Guidelines F (financial considerations) and E (personal conduct). Clearance is denied.

**Statement of the Case**

Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) on May 15, 2009. On March 15, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under Guidelines F (financial considerations) and E (personal conduct). The action was taken under Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive); and the 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.

The SOR detailed reasons why DOHA could not make the 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 answered the SOR on March 25, 2010 and provided a supplemental answer on April 12, 2010. He elected to have his case decided on the written record in lieu of a hearing. A complete copy of the file of relevant material (FORM), dated June 15, 2010, was provided to him by cover letter dated June 16, 2010. Applicant received his copy of the FORM on June 29, 2010. He was given 30 days from the date he received the FORM to submit any objections, and information in mitigation or extenuation. He did not submit additional information within the 30-day period. The case was assigned to me on October 7, 2010.

### **Findings of Fact**

Applicant admitted the allegations in SOR ¶¶ 1a and 1c to 1f, and denied the allegations in SOR ¶¶ 1b and 2a in his response to the SOR. His admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence of record, I make the following findings of fact.

Applicant is a 40-year-old custodian, who has been employed by a defense contractor since June 2008.<sup>1</sup> Information contained in the FORM indicates that he attended high school from September 1974 to June 1970 and was awarded a “high school diploma or equivalent” in June 1988. The FORM does not reflect any further education beyond high school. Applicant married his wife in July 1980 and does not report any dependents. He is a first-time applicant for a security clearance.

Applicant’s SOR lists six debts consisting of one judgment, three collection accounts, one charged-off account, and one past-due account totaling \$11,022. These debts are substantiated, in part, by Applicant’s admissions, *supra*; his May 2009, December 2009, and June 2010 credit reports; and a January 2007 record of judgment and lien filing. Applicant’s history of indebtedness is documented as early as 2005 and has been ongoing. (Items 7-11.) In Applicant’s SOR answer, he stated in response to SOR ¶ 1b, “I disagree. Settled at [Name] Dist Court in my favor.” (SOR Answer.) Applicant has not, however, provided any documentation to corroborate his claim. His failure to provide documentation was discussed in Department Counsel’s June 2010 FORM, yet he failed to address that shortcoming when provided an opportunity to do so.

When Applicant completed his e-QIP in May 2009, he failed to disclose any history of adverse information regarding his financial obligations such as collection

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<sup>1</sup> Background information is derived from Application’s e-QIP unless otherwise stated.

accounts, charged-off accounts, accounts that were delinquent over 180 days, and accounts currently delinquent over 90 days. In short, he failed to disclose any of the SOR debts.

Applicant was interviewed in June 2009 by an Office of Personnel Management (OPM) investigator in conjunction with his background check for security clearance. During that interview, he was confronted with his indebtedness. He indicated that he was unable to repay his creditors due to his limited income. Applicant was also queried about providing false information on his e-QIP. He indicated that he did not list his indebtedness believing it to be a privacy issue and was embarrassed about his financial situation. He added that he was not trying to be arrogant about this matter. (Item 7.)

During his June 2009 OPM interview, Applicant explained that his financial delinquencies arose because of the following circumstances: (1) a period of unemployment from October 2006 to June 2008; (2) uncovered medical bills; (3) costs associated with his son getting married; (4) his spouse lost her job in late 1996; and (5) a reduction in his salary. Specific details about these events were not developed in the FORM. (Item 7.)

Applicant was again made aware of his indebtedness when he received his SOR. Apart from denying SOR ¶ 1b, discussed *supra*, he indicated in his March 2010 answers that he agreed with the remaining five debts alleged and stated that he would pay those debts when he could. Applicant has not offered any documentation that any of his debts have been paid, that he has set up payment plans, nor has he submitted any evidence that he contacted any creditors or sought credit counseling or that his debts are or will be resolved.

### **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 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 (4<sup>th</sup> 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**

### **Financial Considerations**

Under Guideline F, the concern is that an Applicant’s 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 ¶ 18.)

For the last several years, Applicant accumulated six debts totaling \$11,022 as alleged in the SOR. Applicant claims that he settled the debt alleged in SOR ¶ 1b. His mere assertion that this account is settled is insufficient, particularly in light of the fact that his credibility has become an issue. At least five of the six debts alleged remain delinquent. Applicant's history of indebtedness is well documented. AG ¶ 19(a): "inability or unwillingness to satisfy debts" and AG ¶ 19(c): "a history of not meeting financial obligations" apply.

Five financial considerations mitigating conditions under AG ¶¶ 20 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 full application of AG ¶ 20(a) because there is more than one delinquent debt and his financial problems are not isolated. Therefore, his debt is "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)).

Under AG ¶ 20(b), Applicant receives partial credit because the unemployment and underemployment that he experienced were largely beyond his control. However, to receive full credit under this mitigating condition, Applicant has to demonstrate that he acted responsibly under the circumstances. There is no evidence that Applicant

remained in contact with his creditors or tried to make minimum payments during this time.<sup>2</sup>

AG ¶ 20(c) is not applicable because Applicant did not seek financial counseling. Likewise, there is not sufficient evidence in the record to establish full mitigation under AG ¶ 20(d).<sup>3</sup> Despite having being employed full-time since June 2008, there is no evidence that Applicant has made any attempt to repay his overdue creditors. AG ¶ 20(e) is not applicable because Applicant does not dispute the validity of the debts alleged.

## **Personal Conduct**

Under Guideline E, the concern is that 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 ¶ 15.)

AG ¶ 16 describes one condition that could raise a security concern and may be disqualifying in this case:

- (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

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<sup>2</sup> “Even if Applicant’s financial difficulties initially arose, in whole or in part, due to circumstances outside his 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 he maintained contact with his creditors and attempted to negotiate partial payments to keep his debts current.

<sup>3</sup> 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)).

qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities.

The SOR alleges that Applicant deliberately provided false information or omitted required information on his May 2009 e-QIP. Applicant's explanation that information about his financial situation is "private" is insufficient to overcome his obligations to tell the complete truth during the security clearance vetting process. Nor is embarrassment an acceptable explanation for failure to be totally candid when completing his e-QIP. The Government established through the evidence presented the disqualifying condition in AG ¶¶ 16(a).<sup>4</sup>

Six personal conduct mitigation conditions under AG ¶ 17 are potentially applicable:

- (a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;
- (b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;
- (c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;
- (d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;
- (e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress; and
- (f) the information was unsubstantiated or from a source of questionable reliability.

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<sup>4</sup> Deliberate and materially false answers on a security clearance application violate 18 U.S.C. § 1001. The Supreme Court defined "materiality" in *United States v. Gaudin*, 515 U.S. 506, 512 (1995): as a statement having a "natural tendency to influence, or [be] capable of influencing, the decision making body to which it is addressed." See also *United States v. McLaughlin*, 386 F.3d 547, 553 (3d Cir. 2004). Making a false statement under 18 U.S.C. § 1001 is a serious crime, a felony (the maximum potential sentence includes confinement for five years and a \$10,000 fine).

A statement is false when it is made deliberately -- knowingly and willfully. An omission of relevant and material information is not deliberate if the person genuinely forgot about it, inadvertently overlooked it, misunderstood the question, or genuinely thought the information did not need to be reported. Here, Applicant knew of financial problems and chose not to disclose them for personal reasons. Had Applicant's information been relied upon without verification, he may well have successfully vetted for a security clearance. Regardless of the reason Applicant chose not to be forthcoming, the process does not allow for applicants to pick and choose which answers they will answer correctly. When applicants lie on their security clearance applications, they seriously undermine the process as Applicant did in this case. I find that none of the mitigating conditions fully apply.<sup>5</sup>

### **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).

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<sup>5</sup> The Appeal Board has cogently explained the process for analyzing falsification cases, stating:

(a) when a falsification allegation is controverted, Department Counsel has the burden of proving falsification; (b) proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred; and (c) a Judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning the applicant's intent or state of mind at the time the omission occurred. [Moreover], it was legally permissible for the Judge to conclude Department Counsel had established a prima facie case under Guideline E and the burden of persuasion had shifted to the applicant to present evidence to explain the omission.

ISCR Case No. 03-10380 at 5 (App. Bd. Jan. 6, 2006) (citing ISCR Case No. 02-23133 (App. Bd. June 9, 2004)).



The comments in the Analysis section of this decision are incorporated in the whole-person concept analysis. Applicant's financial indebtedness is ongoing. His deliberate failure to disclose information on his security clearance application is serious, recent, and not mitigated. 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 and personal conduct.

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
Subparagraphs 1a – 1f:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2a:	Against Applicant

### **Decision**

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 eligibility for a security clearance for Applicant. Clearance is denied.

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ROBERT J. TUIDER  
Administrative Judge