



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



In the matter of:)	
)	
)	ISCR Case No. 09-06688
SSN:)	
)	
Applicant for Security Clearance)	

Appearances

For Government: D. Michael Lyles, Esquire, Department Counsel
For Applicant: Peter D. Fellows, Esquire

September 30, 2010

Decision

HENRY, Mary E., Administrative Judge:

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

Applicant signed his Electronic Questionnaire for Investigations Processing (e-QIP) on January 30, 2009. The Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline F (Financial Considerations) on February 16, 2010. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented on September 1, 2006.

Applicant acknowledged receipt of the SOR on February 23, 2010. He answered the SOR in writing on March 3, 2010. He requested a hearing before an administrative judge. DOHA received the request on March 8, 2010 and Department Counsel was

prepared to proceed on March 22, 2010. I received the case assignment on March 24, 2010. DOHA issued a notice of hearing on April 5, 2010, which Applicant received on April 9, 2010. On April 26, 2010, Applicant's counsel contacted the undersigned, indicating that he had just been retained by Applicant. Counsel requested a continuance. After a telephone conference with counsel and Department Counsel and consideration of Department Counsel's objection, I continued the hearing scheduled for April 29, 2010 after Applicant's counsel submitted his letter of appearance.

DOHA issued a second notice of hearing on June 3, 2010. I convened the hearing as scheduled on June 23, 2010. The Government offered four exhibits (GE) 1 through 4, which were admitted into evidence without objection. Applicant testified on his own behalf. He submitted one exhibit (AE) A, which was admitted into evidence without objection. DOHA received the transcript of the hearing (Tr.) on June 29, 2010.

After the hearing, I issued an Order on June 24, 2010, directing Applicant to submit specific additional matters and gave him until July 30, 2010 to provide the information. On July 27, 2010, Applicant's counsel filed a motion requesting additional time to submit the requested information, indicating that he had not received the June 24, 2010 order. For good cause shown, the motion was granted and the record held open until August 30, 2010. Applicant timely submitted additional information, which has been admitted as AE B through AE H. The record closed on August 30, 2010.

Procedural Ruling

At the hearing, I advised Applicant of his right under ¶ E3.1.8 of the Directive to 15 days notice before the hearing. After consulting with counsel, Applicant affirmatively waived his right to 15 days notice. (Tr. 9.)

Findings of Fact

In his Answer to the SOR, Applicant admitted the factual allegations in SOR ¶¶ 1.b, 1.c, 1.e, and 1.f. His admissions are incorporated herein as findings of fact. He denied the factual allegations in ¶¶ 1.a and 1.d of the SOR.¹ He also submitted additional information to support his request for eligibility for a security clearance. After a complete and thorough review of the evidence of record, I make the following additional findings of fact.

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

Applicant, who is 45 years old, works as a computer technician for a Department of Defense contractor. He began his current employment in February 2008, after six months of unemployment.²

Applicant is a United States citizen who was born in Haiti. Applicant never married, and currently lives with his 80-year-old mother. He has two adult children, ages 21 and 18, who are not dependent on him for support.³

In December 2006, Applicant purchased a condominium for investment. He paid approximately \$239,000 for the property. He financed his purchase with a first mortgage of \$191,000 (SOR ¶ 1.f) and a second mortgage of \$47,750 (SOR ¶ 1.e) with bank A. He rented his property immediately, and the rent paid his mortgage. Later, he lived in the property with his then girlfriend. He told the security investigator that their joint income enabled him to pay the rent until their relationship ended. At the hearing, he indicated that they lived in the property after it went to foreclosure.⁴

In August 2007, his credit union employer laid him off from his job of 14 years. He defaulted on his mortgage payment in November 2008, several months after he lost his job. Applicant provided confusing information on the use of this property and the payment of the mortgage.⁵

The record evidence shows that bank A, the first holder of the mortgage, transferred the mortgage to bank B, date unknown.⁶ Applicant contacted bank B on two occasions to work out a resolution of his mortgage default. Bank B twice refused to work with him because he did not earn enough income.⁷

Bank A foreclosed on Applicant's property and obtained a foreclosure judgment against Applicant on June 30, 2009 on the \$191,000 mortgage. The Clerk of the Court issued a Notice of Judicial Sale of Applicant's property on November 6, 2009, indicating that the property would be sold on November 25, 2009 to the highest bidder for cash. The results of the sale are unknown. The evidence provided does not show whether the foreclosure judgment is paid in full or a balance remains. Likewise, the evidence of record does not reflect if the second mortgage is paid or resolved.⁸

²GE 1.

³GE 1; Tr. 33, 40.

⁴GE 2; GE 4; Tr. 20, 31-33.

⁵GE 4; Tr. 20, 31-33.

⁶Applicant did not provide evidence showing the connection between Bank A and B. The record shows that both banks owned his mortgage.

⁷Tr. 20-21, 30-32.

⁸GE 3, GE 4; AE H; Tr. 20-21, 30-32.

Applicant met with a security investigator on March 20, 2009. During his personal interview, he denied the debts listed in SOR ¶¶ 1.c (\$557) and 1.d (\$316). He acknowledged the debt in SOR ¶ 1.b (\$6,526), and indicated that the creditor offered to settle his debt for \$2,000. He has not provided evidence that he paid the account in SOR ¶ 1.b, although this account has been deleted by one credit reporting company as of June 22, 2010. At the hearing, he stated that he was waiting to hear from this creditor about his offer to settle.⁹

Believing that he had been the victim of identity theft, Applicant filed an incident report with the police on March 1, 2010, after receiving the SOR. On March 3, 2010, Applicant wrote and mailed a letter to the creditor in SOR ¶ 1.c, advising that the debt was not his and was a fraudulent account, even though he admitted owing this debt in his answer to the SOR. He made an offer to settle the account for \$312, but only if the account was not reported to the credit reporting companies. He enclosed a copy of the police report. Counsel advises that the creditor relieved Applicant of any responsibility for this debt because it was a fraudulent account. Counsel did not provide any documentation which supports this assertion.¹⁰

Applicant wrote a letter about the debt in SOR ¶ 1.a (\$959) on April 15, 2010, asserting identity theft and enclosing a copy of his police report. The letter is not addressed to any specific individual or a company, but does clearly reference this debt. The record contains no evidence showing a response to this letter or the status of this debt.¹¹

Bank B, the second mortgage holder, wrote Applicant a letter on June 23, 2010 and on July 7, 2010, indicating that it had received notice from the credit bureau that Applicant had placed a fraud alert on his credit report. Bank B inquired if the alert was related to its accounts. SOR ¶¶ 1.b, 1.e, and 1.f, totaling almost \$244,000, are debts related to this creditor. The June 22, 2010 credit report shows that these debts have been deleted from Applicant's credit report. Applicant did not explain why these debts were deleted.¹²

Applicant denied owing any money to the creditor in SOR ¶ 1.d. to the investigator and in his answer. While he did not provide evidence that he sent a letter about fraud to this creditor, the June 22, 2010 credit report shows that the debt alleged in SOR ¶ 1.d. has been deleted. I find that this debt has been resolved.¹³

⁹GE 2; GE 3; GE 4; Tr. 28-29.

¹⁰AE B; AE C; AE C-2; Tr. 23, 26,

¹¹AE C-1.

¹²AE A; AE C-3; AE C-4; Tr. 27-28.

¹³GE 2; AE A; Tr. 18-19.

The June 22, 2010 credit report documentation is not a complete copy of the Applicant's credit report, but only a report summary. The report summary contains the information showing deleted accounts, but does say why the accounts have been deleted.¹⁴

Applicant currently earns \$14 an hour. He does not work a full 40-hour week. He worked 118.5 hours, not 160 hours, in May 2010. He worked 96 hours, not 160 hours, in June 2010. His net monthly income in May 2010 totaled \$1,361, and his net monthly income in June 2010 totaled \$1,116. He received a \$238 income supplement from unemployment because he was not working full-time. His monthly expenses total \$1,238. He does not use credit cards nor does he have a car payment. Since he lives with his elderly mother, he pays her \$200 towards house expenses. He obtained a loan through his employer, which is repaid at \$98 a month and is deducted from his pay. He pays his current bills.¹⁵

Applicant submitted his tax returns for 2007 through 2009. His adjusted gross income in 2007 totaled \$25,552 and his taxable income was \$8,117. He received a \$2,000 tax refund for 2007. His adjusted gross income in 2008 totaled \$25,594 and his taxable income was \$7,412. He received a \$3,000 tax refund for 2008. His adjusted gross income in 2009 totaled \$26,609 and his taxable income was \$10,959. He received a \$3,300 tax refund for 2009. He did not provide information which showed that this money paid any of his debts.¹⁶

The credit reports of record reflect that Applicant generally paid his debts until he lost his job in 2007. With the deletion of several negative accounts from his credit report, he has a good credit score.¹⁷

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶

¹⁴AE A.

¹⁵AE D; AE E; Tr. 36, 40-41.

¹⁶AE G.

¹⁷GE 3; GE 4.

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. . . .” An applicant has the ultimate burden of persuasion for obtaining a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk an applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline F, Financial Considerations

The security concern relating to the guideline for Financial Considerations is set out in AG ¶ 18:

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

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. Applicant accumulated some delinquent debt and defaulted on his mortgage. He was unable to pay his obligations. The evidence is sufficient to raise these potentially disqualifying conditions.

The guideline also includes examples of conditions that could mitigate security concerns arising from financial difficulties. Under AG ¶ 20(a), mitigation may occur when “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.” Applicant’s financial worries arose recently. This mitigating condition does not apply.

Under AG ¶ 20(b), it may be mitigating 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.” Applicant’s financial problems began when he lost his job in 2007. Two debts listed in the SOR may be the result of identity theft. He filed a police report and notified the credit reporting companies about the possible identity theft. This mitigating condition partially applies.

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). Applicant has not sought financial counseling nor has he shown that his old debts are resolved. The record contains conflicting evidence on the status of the debts alleged in the SOR. Several debts he acknowledged owing have been removed from one credit report without a clear explanation why. This mitigating condition does not apply.

AG ¶ 20(d) applies where the evidence shows “the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.” Applicant has not provided evidence that shows he paid any of the debts in the SOR after contacting the creditors. This mitigating condition does not apply.

AG ¶ 20(e) can mitigate security concerns 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.” Applicant wrote two letters, one to the creditor in SOR ¶ 1.c and a second letter to an unidentified company or person about the debt in SOR ¶ 1.a, stating that he believed the debts with these creditors were the result of identity theft, as he did not recognize the debts. This mitigating condition is partially applicable.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of an applicant's conduct and all relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

- (1) the nature, extent, and seriousness of the conduct;
- (2) the circumstances surrounding the conduct, to include knowledgeable participation;
- (3) the frequency and recency of the conduct;
- (4) the individual's age and maturity at the time of the conduct;
- (5) the extent to which participation is voluntary;
- (6) the presence or absence of rehabilitation and other permanent behavioral changes;
- (7) the motivation for the conduct;
- (8) the potential for pressure, coercion, exploitation, or duress; and
- (9) the likelihood of continuation or recurrence.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. The decision to grant or deny a security clearance requires a careful weighing of all relevant factors, both favorable and unfavorable. In so doing, an administrative judge must review all the evidence of record, not a single item in isolation, to determine if a security concern is established and then whether it is mitigated. A determination of an applicant's eligibility for a security clearance should not be made as punishment for specific past conduct, but on a reasonable and careful evaluation of all the evidence of record to decide if a nexus exists between established facts and a legitimate security concern.

In reaching a conclusion, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant's financial problems began when he lost his job of 14 years in 2007. He was unable to pay his credit cards and his mortgage. He defaulted on these debts. Bank A, the first mortgagor, obtained a foreclosure judgment on the first mortgage. The court directed that the property be sold, but there is no evidence that the property was sold and that he does not owe Bank A money on his mortgage. The record lacks information explaining why debts he agreed he owed have been removed from his credit report. I am not convinced that Applicant's past financial problems are resolved. He has not mitigated the Government's security concerns.

Overall, the record evidence leaves me with questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the security concerns arising from his finances under Guideline F.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline F:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	For Applicant
Subparagraph 1.e:	Against Applicant
Subparagraph 1.f:	Against Applicant

Conclusion

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

MARY E. HENRY
Administrative Judge