



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



In the matter of:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 09-07218

**Appearances**

For Government: Melvin A. Howry, Esquire, Department Counsel

For Applicant: *Pro se*

December 30, 2010

**Decision**

HARVEY, Mark, Administrative Judge:

Applicant's statement of reasons (SOR) lists ten delinquent debts totaling \$1,471,421. He failed to make sufficient progress resolving his SOR debts, and financial considerations concerns are not mitigated at this time. Eligibility for access to classified information is denied.

**Statement of the Case**

On February 13, 2009, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP) or security clearance application (SF 86) (Item 5). On August 12, 2010, the Defense Office of Hearings and Appeals (DOHA) issued an SOR to Applicant, pursuant to 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* (Directive), dated January 2, 1992, as amended; and the adjudicative guidelines (AG) promulgated by the President on December 29, 2005.

The SOR alleged security concerns under Guideline F (financial considerations). (Item 1) The SOR detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interests to grant or continue a security clearance for Applicant, and recommended referral to an administrative judge to determine whether Applicant's clearance should be granted, continued, denied, or revoked. (Item 1)

On September 1, 2010, Applicant responded to the SOR allegations. (Item 2) He requested a decision without a hearing. (Item 2) A complete copy of the file of relevant material (FORM), dated October 19, 2010, was provided to him on October 28, 2010. He was afforded an opportunity to file objections and to submit material in refutation, extenuation, or mitigation.<sup>1</sup> Applicant did not respond to the FORM. The case was assigned to me on December 27, 2010.

### **Findings of Fact<sup>2</sup>**

In Applicant's September 1, 2010 response to the SOR, he admitted SOR ¶¶ 1.a-1.d, 1.f, 1.h, and 1.j.<sup>3</sup> He said he was "looking into a debt consolidation program" for six of the seven debts. For the mortgage-related debt in SOR ¶ 1.f, he is seeking a loan modification. He denied responsibility for the mortgage debts listed in SOR ¶¶ 1.e and 1.i because the property was sold. His admissions are accepted as factual findings.

Applicant is 41-year-old electrician employed by a government contractor.<sup>4</sup> He attended community college from 1992 to 1994. He has never served in the military. He married in 1995. His children were born in 1996 and 2002.

### **Financial Considerations**

In Applicant's April 20, 2010 response to DOHA interrogatories, Applicant said his financial problems were caused by "death in the family, spouse's unemployment and the recession." (Item 8 at 3, Item 11 at 4) His spouse unsuccessfully attempted to sell real estate after she lost her job as a school teacher. *Id.* In August 2009, she returned to full-time employment as a school teacher. (Item 8) In Applicant's February 1, 2010 response to DOHA interrogatories, he also listed negative cash flow from rentals, including lack of a tenant and cost of renovation as causes of delinquent debt. (Item 9 at 10)

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<sup>1</sup>The DOHA transmittal letter is dated October 21, 2010, and Applicant's receipt is dated October 28, 2010. The DOHA transmittal letter informed Applicant that he had 30 days after his receipt to submit information.

<sup>2</sup>Some details have not been included in order to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

<sup>3</sup> Unless stated otherwise, the information in this paragraph is from Applicant's SOR response. (Item 2)

<sup>4</sup> Unless stated otherwise, the information in this paragraph is from Applicant's SF 86. (Item 5)

Applicant's SOR listed ten debts totaling \$1,471,421. As indicated previously in his SOR response and his February 2010 and April 2010 responses to interrogatories, Applicant admitted the seven debts in SOR ¶¶ 1.a-1.d, 1.f, 1.h, and 1.j. (Items 2, 9, 11) For six of these seven debts (not 1.f), he was investigating a debt consolidation program. On March 24, 2010, Applicant and his spouse signed a debt consolidation agreement that provided for Applicant and his spouse to make an initial payment of \$1,995. (Item 11) However, he did not provide evidence that he made the initial payment. After March 2010, he did not provide details of his investigative process or provide the status of this effort at debt consolidation.

The six SOR debts Applicant said are part of the debt consolidation program are as follows: 1.a (collection credit card—\$10,673); 1.b (collection debt—\$12,974); 1.c (credit card collection debt—\$14,656); 1.d (collection debt—\$7,792); 1.h (collection debt—\$11,327); and 1.j (credit card collection debt—\$9,999). (Items 1, 2)

Applicant's other four debts relate to real estate mortgages. Those four debts are in SOR ¶¶ 1.e, 1.f, 1.g, and 1.i. (Items 1, 2) The status of the four mortgage debts is as follows:

**1.e and 1.i—RESOLVED.** The debt in SOR ¶ 1.e is for a first mortgage account in the amount of \$492,000, and his credit report indicated his account was past due in the amount of \$58,192. The debt in SOR ¶ 1.i is for a second mortgage account in the amount of \$121,000, and his credit report did not indicate the amount this account was past due. The document releasing Applicant's ownership of the property was issued on June 28, 2010. (Item 2) The documentation described the transaction as a short sale and specified that Applicant would not receive any payment from the transaction. (Item 2) The file does not explain why Applicant fell so far behind on the two mortgage accounts;

**1.f—UNRESOLVED.** The debt in SOR ¶ 1.f is for a first mortgage account in the amount of \$410,000, and his credit report indicated his account was past due for 120 days or more. Applicant's SOR response indicates he is in the process of a loan modification agreement; however, he did not provide any correspondence from the creditor. (Item 2); and

**1.g—RESOLVED.** The debt in SOR ¶ 1.g is for a first mortgage account in the amount of \$381,000, and his credit report indicated his account was past due for 120 days or more in the amount of \$18,435. Applicant's SOR response indicates he has a loan modification agreement. He provided an August 3, 2010 letter from the creditor indicating if he made \$2,910 monthly payments starting September 1, 2010 for three months, the creditor would modify the mortgage payments, making them more affordable. (Item 2) He did not provide proof of any payments to the creditor.

Applicant's personal financial statement (PFS) of February 2010 showed monthly net income of \$10,353 (included \$5,000 in rental income); monthly expenses of \$1,225; monthly debt payments of \$6,800 (three mortgages); and a net monthly remainder of \$2,328. (Item 9 at 8) His assets included \$70,000 in stocks and bonds, and savings of

\$2,000. (Item 9) There is no explanation about why some of Applicant's assets were not used to pay his creditors, or why some of the net surplus of \$2,328 was not used to address some of his delinquent debts.

## **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." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). 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." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicant's 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.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These guidelines 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 overarching 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.

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 the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about 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), § 3.1. 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 about applicant's allegiance, loyalty, or patriotism. It is merely an indication the applicant 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 therein 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 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, I conclude the relevant security concerns are under Guideline F (financial considerations).

### **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 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." In ISCR Case No. 08-12184 at 7 (App. Bd. Jan. 7, 2010), the Appeal Board explained:

It is well-settled that adverse information from a credit report can normally meet the substantial evidence standard and the government's obligations under [Directive] ¶ E3.1.14 for pertinent allegations. At that point, the burden shifts to applicant to establish either that [he or] she is not responsible for the debt or that matters in mitigation apply.

(internal citation omitted). Applicant's history of delinquent debt is documented in his credit reports, his Office of Personnel Management (OPM) personal subject interview (PSI), his responses to DOHA interrogatories, and his SOR response. Applicant's SOR lists ten delinquent debts totaling \$1,471,421. Some of his debts have been delinquent for more than a year. The Government established the disqualifying conditions in AG ¶¶

19(a) and 19(c), requiring additional inquiry about the possible applicability of mitigating conditions.

Five 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 in resolving his debts warrants partial application of AG ¶¶ 20(b), 20(c), and 20(d).<sup>5</sup> Although there is only limited evidence of financial counseling, he evidently learned some aspects of budgeting when he generated his PFS. He also learned about real estate financing, foreclosures, expenses, cash flow, and short sales through his involvement with his rental properties. He has a good understanding of the requirements to maintain a budget and pay his debts. He showed some good faith when

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<sup>5</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 (such as bankruptcy) 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)).

he admitted responsibility for his SOR debts. Applicant's financial situation was damaged by insufficient income, his spouse's unemployment, her underemployment in real estate sales, the death of a relative, negative cash flow from rentals, and the recession. However, Applicant's financial circumstances have been stable since August 2009, and his February 2010 PFS indicates he has a net monthly surplus after making mortgage payments and other expenses of \$2,328. His PFS also lists \$70,000 in stocks and bonds as an asset, and there is no explanation about why some of his assets or monthly surplus was not used to pay his SOR creditors.

Applicant did not establish that he acted responsibly under the circumstances. The file lacks proof that he maintained contact with all of his creditors.<sup>6</sup> After April 2010, there is no evidence of any payments to his SOR creditors. There is insufficient evidence that his financial problem is being resolved and is under control.

I have credited Applicant with resolving the allegations in SOR ¶¶ 1.e and 1.i because the mortgage companies have advised Applicant of a short sale resolution of his liability. I have also credited Applicant with resolving the allegation in SOR ¶ 1.g because the creditor has written Applicant and agreed to a payment plan, which will bring the debt to current status. There is no reason to believe Applicant will default on his agreement to bring the debt in SOR ¶ 1.g to current status. He has acted responsibly on these three debts.

Applicant did not provide sufficient evidence to mitigate the other seven SOR debts, which total \$477,421. He did not provide sufficient evidence showing his implementation of the debt consolidation plan for the six debts in SOR ¶¶ 1.a-1.d, 1.h, and 1.j. He did not provide sufficient information about the status and efforts to resolve the mortgage debt in SOR ¶ 1.f.

### **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

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<sup>6</sup>"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 he or she maintained contact with creditors and attempted to negotiate partial payments to keep debts current.

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). I have incorporated my comments under Guideline F in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under Guideline F, but some warrant additional comment.

Although the rationale for reinstating Applicant's clearance is insufficient to support a security clearance at this time, there are several factors tending to support approval of his access to classified information. Applicant is a 41-year-old electrician employed by a government contractor. He attended community college from 1992 to 1994. He married in 1995 and his two children were born in 1996 and 2002. He is sufficiently mature to understand and comply with his security responsibilities. He deserves some credit for volunteering to support the U.S. Government as an employee of a contractor. There is every indication that he is loyal to the United States and his employer. There is no evidence that he abuses alcohol or uses illegal drugs. Applicant's financial situation was damaged by insufficient income, his spouse's unemployment, her underemployment in real estate sales, the death of a relative, negative cash flow from rental properties, and the recession. I give Applicant substantial credit for admitting responsibility for his SOR debts, and being honest about his financial plight. These factors show some responsibility, rehabilitation, and mitigation.

The whole-person factors against reinstatement of Applicant's clearance are more substantial at this time. Applicant's SOR listed lists ten delinquent debts totaling \$1,471,421. He utilized a short sale to avoid payment of two mortgages and reduced his delinquent debt load by \$613,000 ( $\$492,000 + \$121,000 = \$613,000$ ). He may also have reduced his debt loan on a substantial amount of interest charged on the two mortgages. I have also credited him with bringing a mortgage of \$381,000 to current status under the assumption that he will make the three payments of \$2,910. Applicant and his spouse's financial circumstances have been stable since August 2009, and their February 2010 PFS indicate they have a net monthly surplus after making mortgage payments and other expenses of \$2,328. Their PFS also lists \$70,000 in stocks and bonds as an asset, and there is no explanation why some of their assets or monthly surplus was not used to establish the debt consolidation plan in April 2010. There is no evidence that seven SOR creditors, who Applicant owes \$471,421, have received any payments since April 2010. Applicant has failed to make sufficient progress resolving seven of his delinquent SOR debts.

I have carefully applied the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. I conclude financial considerations concerns are not mitigated. Eligibility for access to classified information is denied.



## **Formal Findings**

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

Paragraph 1, Guideline F:	AGAINST APPLICANT
Subparagraphs 1.a to 1.d:	Against Applicant
Subparagraph 1.e:	For Applicant
Subparagraph 1.f:	Against Applicant
Subparagraph 1.g:	For Applicant
Subparagraph 1.h:	Against Applicant
Subparagraph 1.i:	For Applicant
Subparagraph 1.j:	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.

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MARK HARVEY  
Administrative Judge