



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



In the matter of:)
)
-----) ISCR Case No. 09-07689
)
)
Applicant for Security Clearance)

Appearances

For Government: Paul M. Delaney, Esquire, Department Counsel
For Applicant: *Pro se*

February 28, 2011

Decision

GALES, Robert Robinson, Administrative Judge:

Applicant failed to mitigate the security concerns regarding financial considerations or criminal conduct. Eligibility for a security clearance or access to classified information is denied.

Statement of the Case

On July 27, 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 an unspecified date, the Defense Office of Hearings and Appeals (DOHA) issued him a set of interrogatories pertaining to his subject interview. He responded to the interrogatories on February 4, 2010.² On another unspecified date, DOHA issued him another set of interrogatories pertaining to his financial situation. He responded to the interrogatories on February 4, 2010.³ On June

¹ Item 5 (SF 86), dated July 27, 2009.

² Item 6 (Applicant's Answers to Interrogatories, dated February 4, 2010).

29, 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 and modified; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended and modified (Directive); and the *Adjudicative Guidelines for Determining Eligibility For Access to Classified Information* (December 29, 2005) (AG) applicable to all adjudications and other determinations made under the Directive, effective September 1, 2006. The SOR alleged security concerns under Guideline F (Financial Considerations) and Guideline J (Criminal Conduct), 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 August 3, 2010. In a sworn statement, dated August 16, 2010, Applicant responded to the SOR allegations and elected to have his case decided on the written record in lieu of a hearing. A complete copy of the Government's file of relevant material (FORM) was provided to Applicant on September 14, 2010, 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 September 22, 2010, and elected not to make any additional submissions. The case was assigned to me on November 19, 2010.

Findings of Fact

In his Answer to the SOR, Applicant admitted nearly all of the factual allegations pertaining to financial considerations in ¶¶ 1.a. through 1.p. of the SOR, as well as the factual allegation pertaining to criminal conduct in ¶ 2.a. of the SOR. Those admissions are incorporated herein as findings of fact. He did not answer ¶ 1.q.

Applicant is a 33-year-old employee of a defense contractor, currently serving as a "contractor" with a nationwide trucking company based at home.⁴ He has never married.⁵ He has not served in the U.S. military.⁶ From January 2000 until June 2003, Applicant was employed by a construction company as a commercial roofer,⁷ and from June 2003 until December 2006, he was employed by another construction company in a similar position.⁸ In December 2006, he was laid off, initially due to the weather, and

³ Item 7 (Applicant's Answers to Interrogatories, dated February 4, 2010).

⁴ Item 5, *supra* note 1, at 16.

⁵ *Id.* at 27.

⁶ *Id.* at 24.

⁷ *Id.* at 20-21.

⁸ *Id.* at 19-20.

remained unemployed until February 2008.⁹ He held positions with different nationwide trucking companies from February 2008 until April 2009, when he assumed his position with his current employer. During that same period, Applicant also was unemployed or underemployed from September 2008 until December 2008.¹⁰

Financial Considerations

There was nothing unusual about Applicant's finances until about 2003-2004. On July 30, 2004, Applicant filed a voluntary petition for bankruptcy under the provisions of Chapter 7 of the U.S. Bankruptcy Code.¹¹ He cited \$5,960 in assets and \$33,486.48 in liabilities.¹² Among his assets were two secured loans for vehicles identified as a 1977 Mercury Cougar and a 1993 Ford Ranger.¹³ Among his liabilities were resort fees and two repossessed vehicles, described as a 1990 Geo Metro and a 2001 Dodge Neon.¹⁴ Under the bankruptcy, he agreed to surrender the 1993 Ford Ranger.¹⁵ Applicant's liabilities were discharged on November 24, 2004.¹⁶ Applicant eventually attributed his financial problems during that period to his youthful financial irresponsibility and fiscal mismanagement.¹⁷

At some unspecified point in 2006, accounts started to again become delinquent.¹⁸ His financial difficulties were exacerbated when he was laid off in December 2006. As a result, because of a slow-down in the roofing business, his decreased income, and his inability to make monthly payments, some of the accounts were placed for collection with a variety of collection agents, and some of the accounts were charged off. One delinquent account went to judgment.

The SOR identified 15 continuing delinquencies as reflected by credit reports from 2009¹⁹ and 2010,²⁰ totaling approximately \$21,484 (not including the entire

⁹ *Id.* at 19.

¹⁰ *Id.* at 17.

¹¹ Item 11 (Bankruptcy Petition, dated July 30, 2004), at 2, and (Case Summary, dated September 8, 2010).

¹² *Id.* at 3.

¹³ *Id.* at 7-9.

¹⁴ *Id.* at 11-12. Applicant subsequently corrected his descriptions of the two vehicles as a 1990 Ford Mustang and a 2001 Plymouth Neon. See Personal Subject Interview, dated August 20, 2009), at 1, attached to Item 6, *supra* note 2.

¹⁵ Item 11, *supra* note 11, at 26.

¹⁶ Discharge of Debtor in a Chapter 7 Case, dated November 24, 2004, at 1, attached to Item 11, *supra* note 11.

¹⁷ Personal Subject Interview, *supra* note 14, at 1.

¹⁸ *Id.*

¹⁹ Item 10 (Combined Experian, Trans Union, and Equifax Credit Report, dated July 31, 2009).

\$71,200 balance of a mortgage loan which is in a foreclosure status). Among the delinquencies are accounts pertaining to medical providers, a home mortgage loan, utility service, credit cards, and truck driving school. Some accounts have been transferred, reassigned, or sold to other creditors or collection agents. Other accounts are referenced repeatedly in 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.

In August 2009, while being interviewed by an investigator from the U.S. Office of Personnel Management (OPM), Applicant indicated he had made only one limited attempt to enter into negotiations with one of his SOR creditors in an effort to resolve his delinquent accounts.²¹ That one effort was an account with a truck driving school, and Applicant contacted the creditor and arranged a repayment plan under which he made only one \$150 payment in May 2009.²² No additional payments were made through August 2009,²³ although Applicant contends he is making current payments.²⁴ In August 2009, he stated that he would establish payment plans with his creditors “when money is available.”²⁵ In February 2010, Applicant stated he would obtain the services of a debt consolidator and start addressing his delinquent accounts during February 2010 through April 2010.²⁶ To date, Applicant has produced no evidence to indicate that he has contacted his remaining creditors, established repayment plans, or commenced making any other payments.

There is no evidence that Applicant ever received financial counseling covering such topics as debt consolidation, money management, repayment plans, or budgeting.

Applicant did not submit a personal financial statement, indicating a monthly net income, monthly living expenses, or a monthly net remainder, if any, available for discretionary spending.

²⁰ Item 9 (Equifax Credit Report, dated March 11, 2010); Item 8 (Equifax Credit Report, dated May 24, 2010).

²¹ Personal Subject Interview, *supra* note 14, at 3.

²² *Id.*

²³ *Id.*

²⁴ Item 4 (Applicant's Answer to the SOR, dated August 16, 2010) at 2.

²⁵ Personal Subject Interview, *supra* note 14, at 1-4.

²⁶ Item 7, *supra* note 3, at 2-5.

Criminal Conduct

At some point during his lengthy period of unemployment (December 2006 – February 2008), Applicant sought to reduce his expenses and moved into his parents' residence where he was welcomed without reservation. In September 2007, at the age of 30, Applicant wrote checks totaling \$500 - \$600 on his father's checking account, without the knowledge or permission of his father.²⁷ They subsequently had a dispute and Applicant moved out of the house. Applicant's father filed felony theft charges against Applicant and warrants were issued for Applicant's arrest.²⁸ When Applicant and his father repaired their relationship in March 2008, his father told him about the criminal complaint. Applicant was not aware that warrants had been issued, and in August 2008, during a traffic stop, he was arrested on the outstanding warrants.²⁹ Because of the nature of the charge, Applicant's employer terminated his employment.³⁰

When Applicant appeared in court, his father told the judge he did not wish to continue the charge against his son. Consequently, the charge was reduced to a misdemeanor charge of attempted forgery.³¹ Applicant was convicted of the reduced charge and sentenced to 50 hours of community service, two years probation, and a fine and court costs.³² Applicant satisfied his court-ordered obligations. He acknowledged his actions were "a very stupid mistake."³³ Applicant and his father resumed a close relationship and Applicant moved back into his parents' home.

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

²⁷ Personal Subject Interview, *supra* note 14, at 4.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

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.

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 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

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

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 or has not met the strict guidelines the 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.

As noted above, there was nothing unusual about Applicant’s finances until about 2003 – 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 during that period to youthful financial irresponsibility and fiscal mismanagement. In 2004, his debts were discharged under Chapter 7 of the U.S. Bankruptcy Code. Two years later, financial problems reoccurred, this time associated with lengthy periods of unemployment (December 2006 – February 2008) and underemployment (September 2008 – December 2008). Once again, 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 during that period to insufficient money arising from his unemployment. Nevertheless, the record is silent as to why Applicant’s delinquent accounts remained unaddressed by him after he secured his current employment in

³⁹ See Exec. Or. 10865 § 7.

April 2009, and he did not start paying off his delinquent debts. AG ¶¶ 19(a) and 19(c) 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

Applicant’s financial problems commenced in 2003 – 2004, disappeared in 2004 when his debts were discharged in bankruptcy, reappeared in 2006, and still have not been resolved. While he attributed his continuing financial difficulties initially to youthful financial irresponsibility and fiscal mismanagement, and subsequently to unemployment and underemployment, he never explained why he failed to resolve or even address nearly all of his delinquent accounts after he became employed in April 2009. Because the financial situation is frequent and continuing in nature, and the continuing causation is not adequately described, AG ¶ 20(a) does not apply. Applicant’s handling of his finances, under the circumstances, casts doubt on his current reliability, trustworthiness, or good judgment.

AG ¶ 20(b) partially applies because his relatively lengthy periods of unemployment and underemployment. Applicant had no debts following his 2004 bankruptcy, yet he still managed to incur additional debt which became delinquent. Moreover, sufficient time has passed since he generated his latest bills and obtained employment, and he still has not addressed his delinquent accounts. The reasons stated do not establish he acted “responsibly under the circumstances.”

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)).

AG ¶ 20(c) does not apply because there is no evidence that Applicant received financial counseling.

Applicant receives very limited application of AG ¶ 20(d) because, with one exception, he failed to address his delinquent accounts. The vast majority of them remain unpaid or unresolved, and while there are some indications that he intends to repay those delinquent debts eventually, as well as some indications that some debts may have been paid, partially or otherwise, he has offered no documentation to indicate the terms of his repayment agreements, or any indication from the various collection agencies that they have agreed to his proposed terms, or to confirm that such agreements exist. In the absence of such documentation, most of the evidence consists of promises to pay or unsupported contentions that some creditors may have been paid.

Guideline J, Criminal Conduct

The security concern relating to the guideline for Criminal Conduct is set out in AG ¶ 30:

Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations.

The guideline notes several conditions that could raise security concerns. Under AG ¶ 31(a), "a single serious crime or multiple lesser offenses" is potentially disqualifying. Similarly, under AG ¶ 31(c), an "allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted," may raise security concerns. As noted above, Applicant was charged with felony theft because of his actions in September 2007 in forging his father's signature to \$500 - \$600 worth of checks. A warrant for his arrest was issued, but he was not arrested until August 2008, during a traffic stop. While his father subsequently intervened on his behalf, and persuaded the court to reduce the charge to misdemeanor attempted forgery, the underlying criminal conduct remains unchallenged. Accordingly, AG ¶¶ 31(a) and 31(c) have been established.

The guideline also includes examples of conditions that could mitigate security concerns arising from criminal conduct. Under AG ¶ 32(a), the disqualifying condition may be mitigated where "so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment." Similarly, AG ¶ 32(d) may apply where "there is evidence of successful rehabilitation: including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement."

Applicant receives partial application of AG ¶¶ 32(a) and 32(d) because nearly three and one-half years have elapsed since the criminal conduct occurred in

September 2007. It is difficult to conclude that such criminal conduct happened under “such unusual circumstances” that it is unlikely to recur and does not cast doubt on [Applicant’s] reliability, trustworthiness, or good judgment.” While the economic realities may have caused Applicant financial difficulties, many individuals have been similarly impacted without resorting to criminal conduct. Applicant chose to handle his financial difficulties in a less-than-honorable manner by disrupting his familial relationship and stealing from his father. Applicant’s criminal acts, accomplished when he was 30 years old, clearly cast substantial doubt on his reliability, trustworthiness, and good judgment. Likewise, while there is no evidence of recurrence of criminal conduct since September 2007, other than the passage of time, employment as a government contractor, and the completion of the court-imposed sentence, the record is silent as to other possible evidence of rehabilitation. Applicant has offered minimal evidence of remorse or restitution, a good employment record (such as an evaluation of his performance), or constructive community involvement.

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 in favor of mitigating Applicant’s conduct. He was directly impacted by a sustained period of national economic recession resulting in a lack of need for his services. As a result, he was unemployed and underemployed for extensive periods of time. Nevertheless, after obtaining new employment, the resolution of the vast majority of his accounts remain goals without specified details or specific milestones.

The disqualifying evidence under the whole-person concept is substantial. Applicant has a history of financial delinquencies. He failed to address his current financial responsibilities, and simply referred to his unemployment and underemployment to explain his financial difficulties. As noted above, the record is silent as to why Applicant’s delinquent accounts remained unaddressed by him after he secured his current employment in April 2009, or why he did not start paying off his

delinquent debts. Moreover, he was welcomed into his parents' home during his period of financial stress, and he stole from his father. Applicant's check-forging escapade and the period of inaction reflect traits which raise concerns about his fitness to hold a security clearance. 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 limited good-faith efforts are insufficient 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:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	Against Applicant
Subparagraph 1.e:	Against Applicant
Subparagraph 1.f:	Against Applicant
Subparagraph 1.g:	Against Applicant
Subparagraph 1.h:	Against Applicant
Subparagraph 1.i:	Against Applicant
Subparagraph 1.j:	Against Applicant
Subparagraph 1.k:	Against Applicant
Subparagraph 1.l:	Against Applicant
Subparagraph 1.m:	Against Applicant
Subparagraph 1.n:	Against Applicant
Subparagraph 1.o:	Against Applicant
Subparagraph 1.p:	Against Applicant
Subparagraph 1.q:	Against Applicant
Paragraph 2, Guideline J:	AGAINST APPLICANT
Subparagraph 2.a:	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.

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).

ROBERT ROBINSON GALES
Administrative Judge