



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



In the matter of:)
)
) ISCR Case No. 09-08242
)
)
Applicant for Security Clearance)

Appearances

For Government: J. Theodore Hammer, Esquire, Department Counsel
For Applicant: Elizabeth Newman, Esquire

May 5, 2011

Decision

ANTHONY, Joan Caton, Administrative Judge:

After a thorough review of the pleadings, exhibits, and testimony, I conclude that Applicant failed to rebut or mitigate the Government's security concerns under Guideline F, Financial Considerations, and the whole-person concept. His eligibility for a security clearance is denied.

Statement of the Case

Applicant completed and signed an Electronic Questionnaire for Investigations Processing (e-QIP) on May 15, 2009. On June 23, 2010, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing the security concerns under Guideline F, Financial Considerations. 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) effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant replied to the SOR on September 9, 2010. However, he did not admit or deny the individual SOR allegations. On December 3, 2010, in response to DOHA's direction, he answered the SOR in writing and specifically addressed five of the six allegations. He asked to have a hearing before an administrative judge. The case was assigned to me on February 8, 2011. On February 14, 2011, a Notice of Hearing was issued, scheduling Applicant's hearing for March 2, 2011. On February 16, 2011, DOHA issued an amended Notice of Hearing, setting Applicant's hearing for March 9, 2011. I convened a hearing, as scheduled, to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.

The Government called no witnesses and introduced six exhibits, which were marked Ex. 1 through 6 and admitted to the record without objection. Applicant testified and called no witnesses. He introduced seven exhibits, which were marked as Ex. A through G. Applicant's exhibits were admitted to the record without objection. At the conclusion of the hearing, I left the record open for one calendar week, until March 16, 2011, so that Applicant could submit additional information. Applicant timely filed three additional documents. I marked the documents as Applicant's Ex. H, Ex. I, and Ex. J, and they were admitted to the record without objection. DOHA received the transcript of the hearing on March 17, 2011.

Procedural Matters

The Government noted that two of the SOR allegations were identified as 1.e. and proposed a technical amendment to designate the second SOR allegation 1.e. as SOR allegation 1.f. The SOR was thus amended without objection.

Findings of Fact

The SOR contains six allegations of disqualifying conduct under AG F, Financial Considerations (SOR ¶¶ 1.a. through 1.f.) In his Answer to the SOR, Applicant admitted the allegation at ¶ 1.d. He denied the allegations at ¶¶ 1.a., 1.b., 1.e., and 1.f. He neither admitted nor denied the allegation at ¶ 1.c. He also provided additional information. Applicant's admission is included as a finding of fact. (SOR; Answer to SOR.)

Applicant is 43 years old. He has a high school education. After high school, he enlisted in the U.S. military and served on active duty from 1985 until 1991, when he received an honorable discharge. He was first awarded a security clearance in 1985. (Ex. 1; Tr. 23-25.)

Applicant is president and chief executive officer of an internet technology (IT) services consulting firm, which he founded in 1994. He owns 79% of the company, which is a corporation. Under the rules controlling the organization of the corporation,

Applicant is an employee. The company currently has about 50 employees. Applicant seeks a security clearance and authorization for a facility clearance. (Ex. 1; Tr. 25-27, 51-53, 129-131, 153-154.)

Applicant is currently married.¹ He has been previously married and divorced twice.² He has a 20-year-old son from his first marriage and an 8-year-old daughter from his second marriage. His older child and his mother live in a European country, and the younger child lives with her mother in the United States. Applicant pays child support to the mother of his younger child. (Ex. 1; Ex. A; Tr. 27-28, 58-64.)

Applicant purchased a four-unit apartment house as an investment property. The property went into foreclosure in 2005, and Applicant owed \$110,000 to a mortgage lender. Several years ago, Applicant contacted the lender to inquire about any liability he might have. The lender did not reply, and Applicant did not pursue the matter further. He assumes he no longer owes a debt on the foreclosed property. (Ex. 5 at 9; Tr. 81-82, 135-137.)

The SOR alleges at ¶ 1.a. that Applicant owes \$13,200 on a delinquent child support account. This debt is listed on Applicant's credit report of May 5, 2010.³ In his December 3, 2010, Answer to the SOR, Applicant denied the allegation and asserted that he had sent his child support payments directly to his second ex-wife. He stated that he did not know he was required to send his child support payments to the state office of child support. He also stated that he had contacted the state office of child support, provided documentation to corroborate his direct payments to his second ex-wife, and had been told that his direct payments would be credited in the state system. At his hearing, Applicant provided documentation from the state child support office stating that he was compliant with his child support court order. Applicant also provided a payment history showing he had made his required child support payments of \$2,200 each month from September 2010 through February 2011. (Ex. A; Ex. 4; Tr. 31-32, 83-91.)

The SOR alleges at ¶ 1.b. that Applicant owed a household alarm business \$271 on a delinquent debt in collection status. This debt is listed on Applicant's credit report of May 2009 and dates to 2007. In his Answer to the SOR, Applicant denied the debt but said he would pay it if he owed it. At his hearing, Applicant claimed that he had

¹ When Applicant completed his e-QIP in May 2009, he listed his marital status as divorced. At his hearing he acknowledged that he divorced his second wife in March 2006 and married his third wife in August 2006. He also stated that he and his third wife separated in 2007, and he no longer lives with her in a marital relationship. He stated that he and his third wife have not divorced, have a friendly relationship, and the third wife owns 10% of his company. (Ex. 1; Tr. 58-61, 144.)

² Applicant was married to his first wife from 1987 to 1997. He married his second wife 1998. The couple separated in about 2003. Divorce negotiations were contentious. (Ex. 1; Tr. 28-29.)

³ Applicant provided a credit report dated October 4, 2010, showing that he was 120 days past due in paying his child support and owed a balance of \$15,400. (Ex. B at 9.)

disputed the debt, and it had been dropped from his credit report. He provided a copy of his credit report to show that the debt was no longer listed. Applicant stated that he had not received a response from the credit bureau company to his dispute letter. However, he concluded that the alleged debt had been dropped in response to his dispute letter. (Ex. 2; Tr. 33-34, 91-93.)

The SOR alleges at ¶ 1.c. that Applicant owed a tax lien to State A for \$55,744, entered against him in August 2007. While Applicant neither admitted nor denied this debt, I construe his non-responsiveness as a denial. (SOR; Answer to SOR.)

In response to allegation 1.c., Applicant provided a letter from a certified public accountant (CPA) he had retained to address the State A tax lien. The CPA reported Applicant was challenging the amount of the tax lien, which assessed Applicant \$25,456 (excluding interest) for tax year 2001, \$2,554 (excluding interest) for tax year 2004, and \$8,690 (excluding interest) for tax year 2005. According to the CPA, Applicant denied owing state income taxes to State A for tax year 2001 and part of 2002 because he claimed he lived in State B during that time.⁴ Since he denied any liability to State A for tax year 2001, Applicant asserted that he owed only \$11,244 to State A for tax years 2004 and 2005. (Ex. C; Tr. 35-38.)

In a post-hearing submission, Applicant submitted unsigned joint Federal and State B tax returns for himself and his second wife for 2001. On both returns Applicant and his wife listed their residence as in State A. Nothing in either return identifies a residence or period of residence in State B. The records provided by Applicant suggest that neither the Federal nor the State B returns were actually signed and filed.⁵ Applicant asserted that he filed his 2004 and 2005 state taxes in 2006. (Ex. I; Tr. 99-105.)

The SOR alleges at ¶ 1.d. that Applicant owes a federal tax debt of \$47,025 to the Internal Revenue Service (IRS). The tax debt covered tax years 2003, 2004, 2005, and 2006. In his Answer to the SOR, Applicant admitted the debt and stated that he had entered into a payment plan with the IRS to resolve the debt. At his hearing, he provided documentation to establish that he had made all required payments under the payment plan. (SOR; Answer to SOR; Ex. D; Tr. 39-41, 106-110.)

The SOR alleges at ¶ 1.e. that Applicant owes a \$1,858 judgment debt, filed against him in 2006 by a homeowners' association, and the debt remains unsatisfied. In his Answer to the SOR, Applicant denied the debt and stated that under the terms of his divorce agreement with his second wife, the debt was her responsibility. At his

⁴ When he filed his e-QIP, Applicant stated that he resided in State B from January 1999 to January 2001. He confirmed these dates during his June 2009 personal subject interview. He also stated that he resided in State A from January 2001 to December 2003. (Ex. 1 at 12; Ex. 5 at 12.)

⁵ A cover letter from another CPA firm, dated July 9, 2010, advised Applicant and his wife to sign and mail their 2001 federal return on or before September 30, 2002, and to sign and mail their 2001 State B return on or before November 1, 2002. (Ex. I at 1.)

hearing, Applicant stated that he and his second wife agreed to divide the judgment debt and each would pay half. At his hearing, he admitted that he had reviewed his credit reports over the last two years and knew about the judgment against him. He provided a document, dated March 7, 2011, memorializing the agreement and signed by Applicant and his second wife on March 8, 2011. The agreement acknowledged that Applicant had paid his half of the debt to his second wife, and she would then pay her half of the debt. (Ex. E; Tr. 42-44, 110-115.)

The SOR alleged at ¶ 1.f. that Applicant owed a \$4,400 judgment debt, filed against him in October 2006, and the judgment debt remained unsatisfied. In his Answer to the SOR, Applicant denied the debt. At his hearing, Applicant admitted that the debt arose when he sold a home in 2005 or 2006 and the equity in the home was not sufficient to satisfy title fees. Applicant stated that he entered into an agreement with the creditor to satisfy the debt with monthly payments from his credit card. He could not remember how much he agreed to pay the creditor each month. However, Applicant stated that he lost his wallet containing the credit card used to pay the debt, and the payments were stopped. At his hearing, he provided a document from the creditor's representative acknowledging full payment of the debt on March 7, 2011. (Ex. F; Tr. 45, 115-118.)

Applicant acknowledged that his financial practices had led to debts which have remained unsatisfied over a long period of time. He attributed his delays in resolving his delinquent debts in part to his second wife, who was not cooperative in resolving their joint financial obligations. He also stated that he was poorly served by a CPA and by certain employees in his company. He replaced the CPA and fired the employees he concluded were carrying out bad financial practices. He stated that he intended to address financial issues in a more timely manner in the future. (Tr. 47-51.)

During his hearing, Applicant often had difficulty remembering financial matters with accuracy. For example, he did not know how long he had been paying his federal income tax lien. He didn't remember whether he had delinquent debts when he was in the military or before he started his own business. He was not sure if he had any current outstanding debts. (Tr. 39-40, 56, 123.)

In a post-hearing submission, Applicant provided information on his yearly income from 2001 to 2010. He compiled this information from his W-2 forms. In 2001, his yearly income was \$289,492; in 2002, \$150,021; in 2003, \$111,476; in 2004, \$81,482; in 2005, \$130,345; in 2006, \$179,863; in 2007, \$173,539; in 2008, \$195,218; in 2009, \$193,537; and in 2010, \$155,969. Applicant also provided proof that he filed his 2008 federal income taxes. (Ex. H; Ex. J.)

At his hearing, Applicant provided a personal financial statement. He reported a net monthly income of \$26,381. His monthly living expenses are as follows: rent, \$4,000; groceries, \$500; clothing, \$1,000; utilities, \$1,500; car expenses, \$400; life and other insurance, \$120; child support, \$2,200; and miscellaneous (entertainment, transportation, etc.), \$2,800. (Ex. G.)

On his personal financial statement, Applicant identified two financial obligations: \$47,000 to the IRS and \$28,882 to State A. He reported he paid \$1,500 each month to the IRS to satisfy his federal tax debt. He reported that he had not yet arrived at a payment plan with State A. Applicant's net monthly remainder is \$10,920. (Ex. G.)

Applicant reported the following assets: a real estate interest valued at \$100,000; bank savings, \$71,000; automobiles and boats, \$40,000, miscellaneous, \$10,000. Applicant has not had financial counseling. (Ex. G; Ex. 5 at 9-10.)

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, and it has emphasized that "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 and modified.

When evaluating an applicant's suitability for a security clearance, an administrative judge must consider the revised adjudicative guidelines (AG). 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, the administrative judge applies these guidelines in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial and common sense decision. According to AG ¶ 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.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate,

or mitigate facts admitted by applicant or proven by Department Counsel. . . .” The applicant has the ultimate burden of persuasion as to 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 the 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 substantial delinquent debt. Despite a substantial income, he did not pay his creditors for several years. This evidence is sufficient to raise potentially disqualifying conditions under Guideline F.

The guideline includes examples of conditions that could mitigate security concerns arising from financial difficulties. Several Guideline F mitigating conditions could apply to the security concerns raised by Applicant’s financial delinquencies. If the

financially delinquent 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,” then AG ¶ 20(a) might apply. If “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,” then AG ¶ 20(b) might apply. If “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,” then AG ¶ 20(c) might apply. If “the individual initiated a good faith effort to repay overdue creditors or otherwise resolve debts,” then AG ¶ 20(d) might apply. Finally, if “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,” then AG ¶ 20(e) might apply.

While Applicant’s second divorce was contentious, his failure to resolve debts that grew out of the marriage cannot be seen as a reasonable response to circumstances that were stressful or beyond his control. He had the resources to pay or otherwise resolve his delinquent debts, but he failed to do so for several years. Applicant’s financial delinquencies involved substantial sums of money, occurred under circumstances that are likely to recur, and cast doubt on his current reliability, trustworthiness, and good judgment.

Applicant provided documentation establishing that he was not in arrears in paying child support and had satisfied a federal tax debt. He disputed one debt and provided supporting documentation. His dispute with State A over his tax lien is ongoing. He paid or settled two debts the day before his hearing. However, despite a monthly net remainder of over \$10,000, it is not clear that he has a plan in place for avoid financial delinquency in the future. While Applicant’s recent actions to satisfy his creditors have some merit, he has failed to demonstrate a track record of financial responsibility. He has not yet demonstrated priorities that emphasize paying his debts and avoiding additional financial delinquencies in the future. Moreover, his inattentiveness to his financial situation raises concerns. While I conclude that AG ¶¶ 20(d) and 20(e) apply in part to the facts of Applicant’s case, I also conclude that AG ¶¶ 20(a), 20(b), and 20(c) do not apply.

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.

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.

I considered the potentially disqualifying and mitigating conditions in light of all the relevant facts and circumstances surrounding this case. Applicant is financially successful and leads a business. He seeks a security clearance. However, he has failed to address his financial responsibilities for many years, even though he had the financial resources to do so. While he presented documentation supporting payment of the majority of the debts alleged on the SOR, he failed to demonstrate that he possessed good judgment in managing his financial obligations.

I have reviewed the record, and I observed Applicant carefully at his hearing. I conclude that his assertions that he did not live in State A in tax year 2001 lack credibility.

Applicant has addressed some of his delinquent debts only recently. His financial problems began when he was a mature adult. He has failed to demonstrate that he understands how to avoid excessive debt in the future. His long-term financial delinquencies raise concerns about his judgment, trustworthiness, and reliability.

Overall, the record evidence leaves me with questions and doubts at the present time as to Applicant's eligibility and suitability for a security clearance. Accordingly, I conclude, after a careful review of the facts of his case, the financial considerations adjudicative guideline, and the whole-person analysis, that Applicant failed to mitigate the security concerns arising from his financial delinquencies.

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. - 1.b.:	For Applicant
Subparagraph 1.c.:	Against Applicant
Subparagraphs 1.d. -1.f.:	For 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.

Joan Caton Anthony
Administrative Judge