



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



In the matter of:)	
)	
XXXXXXXXXXXX, XXXXX)	ISCR Case No. 09-08470
)	
Applicant for Security Clearance)	

Appearances

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

April 1, 2011

Decision

TUIDER, Robert J., Administrative Judge:

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

Statement of the Case

On July 2, 2009, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP). On May 17, 2010, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline F (financial considerations). On July 9, 2010, DOHA issued Applicant an Amendment to the Statement of Reasons adding additional allegations under Guideline E (personal conduct). 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 after September 1, 2006.

Applicant answered the SOR on May 27, 2010 and answered the Amendment to the SOR on July 16, 2010. Department Counsel was prepared to proceed on July 12, 2010. The case was assigned to me on July 16, 2010. DOHA issued a notice of hearing

on July 22, 2010, scheduling the hearing for August 17, 2010, and subsequently issued an amended notice of hearing on August 13, 2010 rescheduling the hearing for August 19, 2010. The hearing was held as scheduled.

The Government offered Government Exhibits (GE) 1 through 7, which were received without objection. The Applicant offered Applicant Exhibits (AE) A through E, which were received without objection, and he testified on his own behalf. At Applicant's request, I held the record open until August 31, 2010, to afford him the opportunity to submit additional evidence. Applicant timely submitted AE F through J, which were received without objection. DOHA received the hearing transcript (Tr.) on August 27, 2010. The record closed on August 31, 2010.

Findings of Fact

Applicant admitted all of the allegations alleged in the SOR as well as the allegations in the Amended SOR. His admissions are incorporated as findings of fact.

Background Information

Applicant is a 51-year-old engineer technician, who has been employed by a defense contractor since November 1984. He has held a secret security clearance since March 2002. Maintaining a security clearance is a condition of his continued employment. (GE 1, Tr. 18-21.)

Applicant graduated from high school in May 1978. He has not completed any education beyond high school. He married in April 1977 and has three adult children – two sons and a daughter. All three adult children live at home. His two sons are unemployed and his daughter works as a pharmacy technician. Applicant's wife has also been employed by the same defense contractor as the Applicant since November 1984. She is a composite technician. Applicant did not serve in the armed forces. (GE 1, Tr. 21-28.)

Financial Considerations

Applicant's SOR alleges 11 debts totalling \$44,204. He was interviewed by an Office of Personnel Management (OPM) investigator on August 6, 2009, regarding his financial situation, among other things. The OPM investigator discussed the accounts identified in the SOR with Applicant. Applicant attributed his indebtedness to his wife's health problems for the preceding five years, her inability to work because of her health problems, and the fact that he had to take unpaid time off from work to care for her. Additionally, Applicant encountered a number of uncovered medically-related expenses. His wife's health problems stemmed from complications following her gastric bypass surgery in August 2004 to lose weight. (GE 2(I-5).) He reiterated these factors during his hearing. (Tr. 28-30.) Applicant's wife returned to work full-time in 2009. (Tr. 31.)

During that August 2009 OPM interview, Applicant stated that he would never file bankruptcy and that he intended to repay all of his creditors. He further stated that he

was going to contact a credit counseling service or debt consolidation company within the next few days to straighten out his finances. (GE 2(I-5).) On February 22, 2010, when responding to DOHA interrogatories, Applicant stated that he had not yet contacted a debt management program and that he was “still trying to find one....” He added that he intended to pay his debts off “thr[ough] some legal debt management.” In short, he had made no progress in resolving or attempting to resolve his indebtedness in the ten months since his OPM interview. After receiving his SOR, he indicated on his SOR Response that, “we are getting [a] credit advisor to help me out.” His SOR Response also indicated that he had partially addressed two of the eleven debts alleged, discussed *infra*. (GE 3(I-12), SOR Response.)

Applicant appeared at his hearing poorly prepared to discuss his debts, and it became clear shortly after the hearing commenced that he had done little if anything to make any headway in addressing his indebtedness. He did discuss the limited progress that he had made on two debts – the two debts he discussed in his SOR Response. The first debt is SOR ¶ 1g -- a past-due account of \$6,708 on his \$131,000 mortgage, which is in foreclosure. Applicant’s July 29, 2010 bank statement indicates that he had reduced the past-due amount on this account to \$3,185.04. This account remains past-due. (AE B, Tr. 32-37, 41-44.)

The second debt is SOR ¶ 1h – a credit card collection account in the amount of \$3,550. This account is being satisfied through involuntary garnishment proceedings that commenced in May 2010 -- \$695.66 will be deducted from Applicant’s bi-weekly paycheck until the debt is satisfied. (AE E, Tr. 48-50.) The remaining nine accounts remain in various states of delinquency – states of delinquency that began in 2004. (Tr. 50.)

When Applicant’s wife became ill in 2004, Applicant took over the responsibility of handling the family finances. However, since his wife recovered and returned to work full-time in 2009, they handle the family finances together. (Tr. 30-32, 75-76.)

Post-hearing, Applicant forwarded an application form dated August 26, 2010, that he submitted to a debt settlement group. His application form listed eight creditors and the total amount of unsecured debt for the eight creditors as \$29,713. There was nothing on his application that reflected the plan had taken effect or that Applicant had established a payment plan through the debt settlement group. Applicant did not annotate the application form correlating the eight debts listed on the form with the SOR debts. At best, what Applicant submitted is the beginning of a plan yet to be executed for a portion of his SOR debts. (AE F.)

Personal Conduct

In April 2009, Applicant was arrested and charged for driving under the influence (DUI). In August 2009, he was convicted pursuant to his guilty plea, and sentenced to ten days in jail and ordered to pay fines and fees. (GE 7.) In July 2009 when he completed his e-QIP, he failed to disclose this arrest when asked whether he had ever been charged with any offense related to alcohol. When completing the same e-QIP, he

failed to disclose that he had ever been over 180 days delinquent on any debts and whether he was currently over 90 days delinquent on any debt.

When Applicant was queried why he did not list his DUI on his e-QIP, he stated, "I made a mistake. I honestly made a mistake." (Tr. 62.) This arrest had occurred three months before he completed the e-QIP and cost him approximately \$5,000 in legal fees. (Tr. 63.)

When Applicant was queried why he did not list any of his adverse financial information, he responded that he "didn't think [he] had any (delinquent debts) over at the time [he] did this." He added that he knew he had debts, but "didn't know they were over 180 days." He further claimed that he "missed that one" when referring to debts over 90 days delinquent. (Tr. 58.) Applicant acknowledged having completed at least three previous security clearance applications during the years he held a security clearance. (Tr. 70.)

Character Evidence

Post-hearing, Applicant submitted his 2010 interim employee evaluation as well as his 2009 employee evaluation. These documents reflect solid work performance. (AE G.)

Policies

The President of the United States has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information. *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988). The President has authorized the Secretary of Defense to grant eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended. The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These AGs are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge's adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable to reach his decision.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the

possible risk that the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information. Clearance decisions must be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See Exec. Or. 10865 § 7. See also Executive Order 12968 (Aug. 2, 1995), Section 3. Thus, a clearance decision is merely an indication that the Applicant has or has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed and an applicant’s security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue [his or her] security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Financial Considerations

Under Guideline F, the concern is that an Applicant’s failure or inability to live within one’s means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual’s reliability, trustworthiness and ability to protect classified information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds. (AG ¶ 18.)

Applicant accumulated 11 debts totaling \$44,204 as alleged in the SOR. He claims to have made progress on two of those debts. The first debt is his mortgage. Although he has made some progress in paying down the arrearage on this account, the account remains past-due. The second debt is a credit card account which is being satisfied by involuntary garnishment proceedings. The remaining nine debts have not been addressed. Applicant’s history of indebtedness is well documented. AG ¶ 19(a):

“inability or unwillingness to satisfy debts” and AG ¶ 19(c): “a history of not meeting financial obligations” apply.

Five financial considerations mitigating conditions under AG ¶¶ 20 are potentially applicable:

(a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual’s current reliability, trustworthiness, or good judgment;

(b) the conditions that resulted in the financial problem were largely beyond the person’s control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation), and the individual acted responsibly under the circumstances;

(c) the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control;

(d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts; and

(e) the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue.

Applicant’s conduct does not warrant full application of AG ¶ 20(a) because there is more than one delinquent debt and his financial problems are not isolated. Therefore, his debt is “a continuing course of conduct” under the Appeal Board’s jurisprudence. See ISCR Case No. 07-11814 at 3 (App. Bd. Aug. 29, 2008) (citing ISCR Case No. 01-03695 (App. Bd. Oct. 16, 2002)).

Under AG ¶ 20(b), Applicant receives partial credit because of his wife’s five-year period of unemployment from 2004 to 2009. She was unemployed for medical reasons. This misfortune no doubt impacted their household directly and indirectly. However, to receive full credit under this mitigating condition, Applicant has to demonstrate that he acted responsibly under the circumstances. There is no evidence that Applicant remained in contact with his creditors or tried to make minimum payments during this time. Nor is there any evidence that Applicant made any meaningful effort to contact his creditors after his wife returned to work in 2009 and their income was restored.¹

¹ “Even if Applicant’s financial difficulties initially arose, in whole or in part, due to circumstances outside his control, the Judge could still consider whether Applicant has since acted in a reasonable manner when dealing with those financial difficulties.” ISCR Case No. 05-11366 at 4 n.9 (App. Bd. Jan. 12, 2007) (citing ISCR Case No. 99-0462 at 4 (App. Bd. May 25, 2000); ISCR Case No. 99-0012 at 4 (App. Bd. Dec. 1, 1999); ISCR Case No. 03-13096 at 4 (App. Bd. Nov. 29, 2005)). A component is whether he

AG ¶ 20(c) is not applicable because Applicant did not seek financial counseling. Likewise, there is not sufficient evidence in the record to establish full mitigation under AG ¶ 20(d).² Despite having their income levels restored, Applicant offered little or no evidence that he had made or is making a good-faith effort to repay his creditors or otherwise resolve his debts. Applicant receives some credit for attempting to pay down the arrearage on his mortgage; however, this account remains past-due. One past-due credit card account is being paid through involuntary garnishment. This is not indicative of a “good-faith” effort. Applicant’s past promises to seek credit counseling ring hollow in light of his subsequent actions. Furthermore, completing an application five days before the record closed with a debt settlement group that does not include all of his debts does not establish “good-faith.” AG ¶ 20(e) is not applicable because Applicant does not dispute the validity of the debts alleged.

Personal Conduct

Under Guideline E, the concern is that conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process. (AG ¶ 15.)

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

- (a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities; and

maintained contact with his creditors and attempted to negotiate partial payments to keep his debts current.

² The Appeal Board has previously explained what constitutes a “good-faith” effort to repay overdue creditors or otherwise resolve debts:

In order to qualify for application of [the “good-faith” mitigating condition], an applicant must present evidence showing either a good-faith effort to repay overdue creditors or some other good-faith action aimed at resolving the applicant’s debts. The Directive does not define the term ‘good-faith.’ However, the Board has indicated that the concept of good-faith ‘requires a showing that a person acts in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation.’ Accordingly, an applicant must do more than merely show that he or she relied on a legally available option in order to claim the benefit of [the “good-faith” mitigating condition].

(internal citation and footnote omitted) ISCR Case No. 02-30304 at 3 (App. Bd. Apr. 20, 2004) (quoting ISCR Case No. 99-9020 at 5-6 (App. Bd. June 4, 2001)).

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing,

The SOR alleges that Applicant was arrested for DUI in April 2009 and deliberately failed to list his DUI arrest or information pertaining to his indebtedness on his July 2009 e-QIP. Having gone through the security clearance application process at least three times, Applicant should have been well versed and familiar with what was required of him. Applicant's explanation that he made a mistake or thought that he did not have qualifying delinquent debts, or that he "missed" the correct answer is simply not credible. He had been arrested and charged with DUI three months before completing his e-QIP. This is not an event one easily forgets or misses three months after the fact.

With regard to Applicant's failure to fully disclose his financial situation, I note that he was responsible for managing the family finances from 2004 to 2009 and beginning in 2009, he and his wife managed the family finances. His explanation that he did not think he had any qualifying debts to list suggests a level of situational awareness that is not plausible. Additionally, Applicant's credibility came into question when he represented on three occasions that he was going to seek professional help to resolve his financial situation and failed to do so. In light of these facts, his explanations are insufficient to overcome his obligation to tell the complete truth during the security clearance vetting process. The Government established through the evidence presented the disqualifying condition in AG ¶¶ 16(a).

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

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the

stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress; and

(f) the information was unsubstantiated or from a source of questionable reliability.

A statement is false when it is made deliberately -- knowingly and willfully. An omission of relevant and material information is not deliberate if the person genuinely forgot about it, inadvertently overlooked it, misunderstood the question, or genuinely thought the information did not need to be reported. Here, Applicant knew of his DUI and his financial problems and chose not to disclose them. Had Applicant's information been relied upon without verification, he may well have successfully vetted for a security clearance. Regardless of the reason Applicant chose not to be forthcoming, the process does not allow for applicants to pick and choose which answers they will answer correctly. When applicants lie on their security clearance applications, they seriously undermine the process as Applicant did in this case. I find that none of the mitigating conditions fully apply.³

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

³ The Appeal Board has cogently explained the process for analyzing falsification cases, stating:

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

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

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).

The comments in the Analysis section of this decision are incorporated in the whole-person concept analysis. Applicant's financial indebtedness is ongoing. His deliberate failure to disclose information on his security clearance application is serious, recent, and not mitigated. As such, I have concerns about his current ability or willingness to comply with laws, rules, and regulations. After weighing the disqualifying and mitigating conditions, and all the facts and circumstances, in the context of the whole-person concept, I conclude he has not mitigated security concerns pertaining to financial considerations and personal conduct.

I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my careful consideration of the whole-person factors and supporting evidence, my application of the pertinent factors under the adjudicative process, and my interpretation of my responsibilities under the adjudicative guidelines. Applicant has not fully mitigated or overcome the Government's case. For the reasons stated, I conclude he is not eligible for access to classified information.

Formal Findings

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

Paragraph 1, Guideline F:	AGAINST APPLICANT
Subparagraphs 1a – 1k:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2a – 2c:	Against Applicant

Decision

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

ROBERT J. TUIDER
Administrative Judge

