



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



In the matter of: )  
 )  
XXXXXXXXXXXX, XXXXX ) ISCR Case No. 09-08529  
 )  
Applicant for Security Clearance )

**Appearances**

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

March 30, 2011

**Decision**

TUIDER, Robert J., Administrative Judge:

Applicant has failed to mitigate security concerns pertaining to Guideline F (financial considerations). Clearance is denied.

**Statement of the Case**

On July 13, 2009, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP). On May 28, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under Guideline F (financial considerations) for Applicant. 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 answered the SOR on June 22, 2010, and DOHA received his answer on June 24, 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 18, 2010. The hearing was held as scheduled.

The Government offered Government Exhibits (GE) 1 through 5, which were received without objection. The Applicant offered Applicant Exhibits (AE) A through C, which were received without objection, and he testified on his own behalf.

I held the record open until August 31, 2010, to afford the Applicant the opportunity to submit additional documents on his behalf. Applicant timely submitted AE D through F, 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 SOR ¶¶ 1a, 1c, and 1e, and denied SOR ¶¶ 1b and 1d. His answers are incorporated as findings of fact. After a thorough review of the evidence, I make the following additional findings of fact.

### **Background Information**

Applicant is a 48-year-old named account manager, who has worked for his defense contractor employer since June 2009. He is a first-time applicant for a security clearance. Successfully vetting for a security clearance is a condition of his continued employment. (GE 1, Tr. 14-15.)

Applicant was awarded a GED “around 1980.” (Tr. 15.) Since being awarded his GED, Applicant has completed “probably 40-plus technical courses in [his] field.” (Tr. 16.) He did not serve in the armed forces. Applicant married in August 1985 and has two adult children – a 26-year-old son and a 22-year-old daughter. His wife does not currently work; however, she previously worked in the real estate industry as a mortgage lending underwriter.<sup>1</sup> (GE 1, Tr. 17-19, 70.)

### **Financial Considerations**

In October 2006, Applicant made a cross-country company-sponsored move. Before he moved, he attempted to sell his home (H1) that he had purchased for \$649,000. However, he was unsuccessful in selling his home before moving. Failing in that attempt, he rented his home to tenants he believed were qualified at a monthly rental rate of \$3,500. The monthly rent he charged his tenants “almost covered [his] expenses.” While enroute to his new location, Applicant’s prospective tenants notified him that they were backing out of their lease on H1. In anticipation of relocating, Applicant put a \$25,000 deposit down on a \$640,000 home (H2) at his new location. After consulting with his realtor, Applicant felt confident that he could find a new tenant for H1. (GE 2(119)(124), Tr. 30-37, 39, 70.)

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<sup>1</sup> Note – Applicant’s wife was integrally involved in the events described in this decision to include the sale and purchase of homes as well as payment of debts.

Applicant found a second set of renters for H1; however, just before the renters were scheduled to move in, two water pipes burst in H1 causing extensive damage. The house was uninhabitable and it took four to six months and \$165,000 to make the necessary repairs. Homeowners insurance covered the cost of repairs, but did not cover the loss in rental income. (Tr. 39-40.) After his house was repaired, Applicant found a third set of renters and they remained in the house from about March 2007 to July 2009. However, with the deteriorating real estate market, Applicant was only able to get \$2,600 monthly rent. Applicant was unsuccessful in selling H1 while it was rented. In July 2009, his renters moved out of H1 after a lay-off. During this time period, the adjustable interest only loan on H1 had increased to \$4,300. Applicant augmented these shortfalls on H1 with credit cards, discussed *infra*. (Tr. 20-23.)

Between 2007 and 2008, Applicant had approached the H1 lender three times seeking a loan modification. All three times, the lender denied his requests. When Applicant was unable to pay the mortgage on H1, the lender foreclosed in late 2008. Ultimately, H1 was sold for \$420,000 on a short sale in November 2009. (Tr. 24-26.) Applicant stated that his real estate agent for H1 committed him to a second mortgage for \$77,000 using a power of attorney without consulting him. Applicant considered legal action against the real estate agent, but because of the distance and money involved, he opted against legal action. Rather, Applicant chose to negotiate with the lender of the second mortgage after this account was placed in collections. He successfully convinced the second mortgage lender to reduce the amount of \$77,000 to \$35,000. Applicant is making \$100 monthly payments on this account and is current. (This debt is not alleged on the SOR.) Applicant's August 2010 credit report indicates the mortgage on H1 is "Paid and Closed." (AE D, (AE E(1)(4-5), Tr. 26-29.)

Applicant's SOR identified five separate debts. They are:

1a – Collection account in the amount of \$1,550 owed to a property management company. Applicant co-signed a lease for his daughter. When his daughter vacated the property, the management company discovered a broken window on the rear of the house. After some discussion regarding liability, Applicant agreed to pay the creditor about \$100 per month until the debt is paid off. Post-hearing, Applicant submitted documentation that he had made his first payment in August 2010. (GE 3, AE E(2), Tr. 40-45, 74-76.)

1b – Past-due credit card account in the amount of \$754 with a balance of \$4,010. Applicant used this credit card to cover costs on H1. Applicant contacted the creditor in December 2009 to restore his account to good standing. The creditor agreed to place Applicant in a "hardship program" in which Applicant would make \$100 monthly payments until further notice. Applicant anticipates it will take four years to pay this account off. Post-hearing, Applicant submitted documentation that he had made a \$144 payment in August 2010. (GE 4, AE A(3), AE B, AE D, AE E(6), Tr. 45-53, 76-77.)

1c – Past-due credit card account in the amount of \$1,300 with a balance of \$12,964. Applicant used this credit card to cover costs on H1. Applicant contacted the creditor in August 2009 to restore his account to good standing. The creditor agreed to place Applicant in a “special repayment program” -- a \$270 monthly payment plan for 60 months. Post-hearing, Applicant submitted documentation that he had been making payments and that this account is current. (AE A(2), AE C(2), AE D, AE E(31-40), Tr. 53-57, 77-78.)

1d – Past-due credit card in the amount of \$1,820. The credit card company assigned this debt to another company. Applicant contacted the creditor assignee in approximately December 2009 and negotiated a \$263.07 monthly payment plan for 10 months. This account is paid. (GE 4, GE 5, AE C(3), AE D, AE E(3-3A),(Tr. 58-61, 78.)

1e – Past-due second mortgage on H2 in the amount of \$13,716 with a balance of \$145,000. Applicant’s August 2010 credit report indicates his first mortgage of \$523,545 is past-due \$45,560 and his last payment of \$3,560 was received in March 2010. The credit report further indicates that his second mortgage of \$145,669 is past-due \$17,457 and his last payment of \$1,246 was received in April 2009. (Applicant’s combined total monthly mortgage payment on H2 is \$4,806.) These accounts are seriously delinquent and remain unpaid. (AE D, AE E(1), Tr. 36-37, 79-80.)

Applicant was laid-off in April 2009 and unemployed until he began his current job in June 2009. Additionally, Applicant’s wife has been unemployed since April 2009. Primarily as a result of unemployment, Applicant fell behind on his mortgage payments on H2. He used savings and stocks to cover H2’s mortgage for April and May 2009. Faced with loss of income, Applicant sought a loan modification from his H2 lender to reduce his monthly payment of \$3,560 to \$2,600. The lender agreed to a reduced amount pending Applicant’s loan modification request. Applicant began paying this reduced amount in August 2009.

However, in late 2009 to early 2010, the lender’s mortgage division was acquired by a new company. The new company denied Applicant’s request for a loan modification and Applicant was unable to make the mortgage payments on H2. The new lender recommended that Applicant submit an application under the Making Home Affordable (MHA) program. Applicant submitted his MHA application and on August 27, 2010, he was informed that his MHA application was approved. His new monthly mortgage payment is \$3,000.27. This amount includes a new principal and interest amount of \$2,047.25 plus escrow funds of \$953.02 for a total of \$3,000.27. However, there is nothing in the record to indicate that this modification is in effect. When the record closed, the first and second mortgages on H2 were in a delinquent status and were unresolved. (GE 1, AE D, AE E(11-15)(18-19B)(20A), AE F, Tr. 19-20, 30-36.)

Applicant has not sought credit counseling. He considered debt consolidation and filing bankruptcy. However, Applicant believes that he and his wife can successfully negotiate with their creditors and resolve their debts on their own. (Tr.

61.) Post-hearing, Applicant submitted a current budget that reflects total net monthly income of \$8,497.24 with a net monthly remainder of \$4,199.26. This budget does not include any housing costs as Applicant has not made a payment on his first mortgage since March 2010 nor has he made a payment on his second mortgage (SOR ¶ 1e) since September 2009. (AE E(1),(7).)

In conclusion, Applicant has paid, settled, or resolved four of the five debts alleged. He submitted a budget with his monthly expenses, which reflects a net remainder of \$4,199.26, which did not take into account for any housing costs. Applicant's post-hearing evidence indicates that the modified monthly amount for his first mortgage on H2 will be \$3,000.27. If Applicant were to pay \$3,000.27 and the previously established payment of \$1,246.00 on his second mortgage, his combined monthly housing payment would be \$4,246.27. If that were Applicant's true monthly housing payment, he would have a negative remainder of \$47.01 using his figure of \$4,199.26 as the net remainder on his current budget. There is no established track record to assess how Applicant will fare when confronted with an unknown total monthly mortgage payment on H2 given his current financial situation. If anything, the documentation submitted by Applicant suggests that he will not be able to make his house payment given his current situation. (AE E(1)(7), AE F.)

### **Character Evidence**

Post-hearing, Applicant submitted his 2010 mid-year performance evaluation. His evaluation reflects overall solid performance with a comment, "[Applicant] is an extremely valuable member of my team, and in a short time has proven himself to be well-versed in industry trends and best practices." (AE E(22-29).) Applicant's direct supervisor also submitted a reference letter indicating that he had no reservations whatsoever in recommending Applicant for a security clearance. He described Applicant as reliable, trustworthy, and dedicated to supporting the men and women of our Armed Forces. (AE E(58).)

### **Policies**

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

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available,

reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that “[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security.” In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, 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**

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, including those described briefly above, I conclude one relevant security concern is under Guideline F (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 financial considerations 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.” Applicant’s history of delinquent debt is established by his admissions and evidence presented. The Government established the disqualifying conditions in AG ¶¶ 19(a) and 19(c).

Five financial considerations mitigating conditions under AG ¶¶ 20(a)-(e) 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) or 20(b) because he did not act more responsibly in his decisions that led to his delinquent debt. Because there is more than one delinquent debt, his financial problems are not isolated. It was not until recently that the majority of debts alleged were addressed in some fashion by the Applicant. The second mortgage on H2 (SOR ¶ 1e) remains unresolved. 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)). He receives partial credit under AG ¶ 20(a) because the debts in part “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.” Under AG ¶ 20(b), he receives partial mitigation because of his brief unemployment from April 2009 to June 2009 as well as for his wife’s unemployment. However, he is unable to receive full credit for purchasing a home before selling his existing home in a volatile housing market after he had accepted a voluntary cross-country company transfer.<sup>2</sup>

AG ¶ 20(c) is not applicable because Applicant did not seek financial counseling. He has produced a budget that does not take into account the totality of his housing costs. As such, his budget reflects that he is not living within his means nor has he regained financial responsibility. There is sufficient information to establish partial mitigation under AG ¶ 20(d).<sup>3</sup> Applicant has paid or has attempted to resolve his debts given his circumstances and ability to pay. He has not, however, been able to resolve all of the debts alleged. AG ¶ 20(e) is not applicable because Applicant has not disputed any of the debts alleged.

### **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>2</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 maintained contact with his creditors and attempted to negotiate partial payments to keep his debts current.

<sup>3</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)).



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).

There is some evidence under the whole-person concept mitigating Applicant's conduct. Until 2006, Applicant lived within his means and maintained a state of financial responsibility. Applicant's record of employment weighs in his favor. He is a law-abiding citizen. Applicant has successfully raised two children. He also made efforts to contact his creditors and resolve his debts throughout this process.

However, his decision to acquire a \$640,000 home before selling his \$649,000 home in a volatile real estate market in conjunction with a voluntary cross-country company sponsored move was not an exercise of good judgment. He chose to use his credit cards to make up shortfalls. Had everything fallen into place as planned, Applicant would have sold H1, made a profit, and would have been able to apply that profit to H2. When that sale of H1 fell through in 2006, he was faced with a difficult dilemma. The results were financially disastrous. He was unable to make house payments. H1 was foreclosed and forced into a short sale. He also stopped making payments on H2 in 2009. The status of H2's mortgages remains unresolved. It is unclear whether Applicant can maintain his current lifestyle on his salary.

In short, Applicant has not fully mitigated concerns under this Guideline and established a "meaningful track record" demonstrating financial responsibility. His current financial situation is in such a fluid state that I am unable to grant him a clearance. This does not mean that at some point in the future that Applicant will not attain a level of financial responsibility required for a security clearance. After weighing the disqualifying and mitigating conditions, and all the facts and circumstances, in the context of the whole-person, I conclude he has not mitigated the financial considerations security concerns.

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:	AGAISNT APPLICANT
Subparagraphs 1a to 1d:	For Applicant
Subparagraph 1e:	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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Robert J. Tuidor  
Administrative Judge