



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



In the matter of:	)	
	)	
XXXXXXXXXXXX, XXXXX	)	ISCR Case No. 10-00805
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Caroline H. Jeffreys, Esq., Department Counsel  
For Applicant: *Pro se*

08/16/2012

**Decision**

TUIDER, Robert J., Administrative Judge:

Applicant failed to mitigate security concerns pertaining to financial considerations and personal conduct (falsification). Clearance is denied.

**Statement of the Case**

On July 26, 2009, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP). On May 5, 2011, the Defense Office of Hearings and Appeals (DOHA) issued an SOR to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended; and the adjudicative guidelines (AG) promulgated by the President on December 29, 2005.

The SOR alleged security concerns under Guidelines F (financial considerations) and E (personal conduct). The SOR detailed reasons why DOHA was unable to find that it is clearly consistent with the national interest to continue a security clearance for Applicant, and it recommended that his case be submitted to an administrative judge for a determination whether his clearance should be continued or revoked.

Applicant answered the SOR on November 11, 2011. Department Counsel was prepared to proceed on January 3, 2012. The case was originally assigned to another administrative judge on January 10, 2012, and was reassigned to me on March 28, 2012. Delay in scheduling the case was caused by Applicant serving in an overseas location. (See Tr. 9-12 and GE 1-5 for further details.) DOHA issued a notice of hearing on May 3, 2012, scheduling the hearing for May 18, 2012. The hearing was held as scheduled.

At the hearing, the Government offered Government Exhibits (GE) 1 through 11, which were received into evidence without objection. Applicant offered Applicant Exhibits (AE) A through E, which were received into evidence without objection, and he testified on his own behalf. DOHA received the hearing transcript (Tr.) on May 30, 2012.

### **Findings of Fact**

In his Answer to the SOR, Applicant admitted all of the allegations under Guidelines F and E “with extenuating circumstances.” His admissions are accepted as findings of fact.

Applicant is a 57-year-old security specialist, who has been employed by a Government contractor since October 2008. As a security specialist, he has served primarily overseas. He is also an “on and off” part-time minister/traveling evangelist for which he receives offerings. (GE 1, Tr. 20, 32-34.) He seeks a security clearance, which is a requirement of his continued employment. Applicant successfully held a security clearance while serving in the U.S. Marine Corps, discussed further below. (Tr. 20-21.)

Applicant graduated from high school in June 1973, and enlisted in the Marine Corps in November 1973. He served 22 years of active service and retired as a gunnery sergeant (pay grade E-7) in November 1995. Applicant’s primary military occupational specialty was 6026 – aircraft power plants mechanic T-56. He held a secret clearance from 1986 to 1988 while in the Marine Corps. Applicant is “a couple of credits” short of earning a bachelor of science degree in aviation management. (AE A, Tr. 21-25.)

Applicant has been married two times. He was married to his first wife from January 1981 to December 2004. That marriage ended by divorce. Applicant married his second wife in December 2004, separated in August 2008, and divorced in October 2011. Applicant has three children, a 32-year-old son, and two twin sons, ages 28. He stated that all three sons are “pretty much” dependent on him for support. (GE 1, Tr. 26-32.)

### **Financial Considerations**

The SOR listed 27 debts totaling \$170,199. These debts are ongoing and were accumulated during Applicant’s second marriage. The vast majority of the debts alleged are consumer-related and have been in a delinquent status beginning in 2007. Their validity has been established by Applicant’s admissions and evidence produced by the

Government. All 27 debts remain unpaid or unresolved. No attempt has been made to pay these debts. (GE 8 – 11, Tr. 66-67.)

Applicant offered evidence that his second wife was largely responsible for incurring these debts through deceptive practices or unauthorized use of credit cards during their marriage. However, he acknowledged during his October 2009 Office of Personnel Management (OPM) interview and also during cross-examination that several of the debts were generated by him or for his benefit. He further acknowledged that his home went through foreclosure in “approximately, 2006, 2007,” a foreclosure listed on his SOR. (SOR ¶ 1.o., GE 7, AE A, AE C - AE E, Tr. 36-41, 47, 57-66.) Applicant sought financial counseling in October 2011 and was advised by his financial counselor, “[i]n the next three years, these debts will no longer appear on (his) credit report. These debts are time-barred!” His financial counselor further advised him to stop paying his debts as they will drop off his credit report, and to open savings accounts at several banks and then borrowing from those accounts using the savings as collateral to regain a credit worthy status. Applicant ultimately acknowledged that he was legally responsible for the debts. (AE A, AE D, Tr. 41-43, 48.)

Applicant estimated that his 2011 annual income apart from his military retirement was in the range of \$50,000. His military retirement covers his home mortgage and utilities, a home that is in his son’s name. Applicant is current on his day-to-day expenses. He earns about \$4,000 a month. Applicant stated most of his money goes towards helping his family. (Tr. 50-57.)

## **Personal Conduct**

When Applicant completed his July 2009 e-QIP, he was asked under Section 26: Financial Record, whether he had ever defaulted on any type of loan; whether he ever had bills or debts turned over to a collection agency; whether he had ever had any account or credit card suspended, charged off, or cancelled for failing to pay as agreed; whether he had ever been over 180 days delinquent on any debts; and whether he was currently over 90 days delinquent on any debts. He answered “no,” which was clearly not accurate given his extensive debt going back to 2007.

Applicant stated during his October 2009 OPM interview that he did not list the accounts because he had no idea of his financial issues because he had not pulled his credit report. (GE 7.) At his hearing, he testified that “I admitted to them (falsifications), but with extenuating circumstances,” adding “I don’t recall, and I wouldn’t have falsified, if I knew exactly what was asked of me, that I didn’t have any debt.” Applicant had previous experience completing security clearance applications when he was in the Marine Corps, but held firm to his explanation that he misunderstood the question. (Tr. 44-47, 67-71.)

## Character Evidence

Applicant submitted a reference letter from his senior pastor, who provided favorable comments about his good character. (AE D.)

## Policies

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

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

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information. Clearance decisions must be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See Exec. Or. 10865 § 7. See also Executive Order 12968 (Aug. 2, 1995), § 3.1. Thus, nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination about applicant’s allegiance, loyalty, or patriotism. It is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4<sup>th</sup> Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the

criteria listed therein and an applicant's security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

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

## Analysis

### Financial Considerations

AG ¶ 18 articulates the security concern relating to financial problems:

Failure or inability to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness, and ability to protect classified information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

AG ¶ 19 provides two disqualifying conditions that could raise a security concern and may be disqualifying in this case: "(a) inability or unwillingness to satisfy debts;" and "(c) a history of not meeting financial obligations." In ISCR Case No. 08-12184 at 7 (App. Bd. Jan. 7, 2010), the Appeal Board explained:

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

(internal citation omitted). Applicant's history of delinquent debt is documented in his credit reports, his OPM personal interview, and his statement at his hearing. Applicant's SOR lists 27 delinquent debts totaling \$170,199. Applicant's delinquent debt began in 2007 and has been ongoing. The Government established the disqualifying conditions in AG ¶¶ 19(a) and 19(c), requiring additional inquiry about the possible applicability of mitigating conditions.

Five mitigating conditions under AG ¶ 20 are potentially applicable:

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

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

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

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

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

Applicant's conduct in resolving his debts warrants partial application of AG ¶¶ 20(b) and 20(c).<sup>1</sup> Applicant sought the professional services of a financial counselor, who advised him, in part, to let the statute of limitations run on all of his debts. The DOHA Appeal Board has long held that this method is not an acceptable means to resolve one's debts.

Applicant emphasized that his former wife was largely responsible for his debts, but acknowledged that he bore some responsibility for several of the debts and was legally responsible for all of the debts. Applicant's financial situation was no doubt

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<sup>1</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)).

damaged as a result of his divorce and his former spouse's financial irresponsibility. Apart from his SOR debts, Applicant appears to be living within his means.

Applicant did not establish that he acted responsibly under the circumstances. He has received a salary and a portion of his military retirement since the inception of these debts. He did not maintain contact with his creditors.<sup>2</sup> Prior to his hearing, Applicant did not make any payments to his SOR creditors. He has not regained financial responsibility. In sum, Applicant's efforts are insufficient to fully mitigate financial considerations security concerns.

## **Personal Conduct**

AG ¶ 15 expresses the security concern pertaining to personal conduct:

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 ¶ 16 describes one condition that could raise a security concern and may be disqualifying with respect to the alleged falsification of his SF 86 on April 27, 2009, 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.<sup>3</sup>

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

<sup>3</sup>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

Applicant admitted “with extenuating circumstances” in his SOR response that he failed to disclose his debts as alleged on his July 2009 e-QIP. At his hearing he further explained that his failure to list his debts was a misunderstanding as a result of his former wife accumulating all of the debts without his knowledge. On cross-examination it became clear that several of the debts were his, which at a minimum, should have heightened his awareness that his financial situation was problematic. Applicant did acknowledge that he was legally responsible for the debts. He contended that his inaccurate answers were not deliberate and intentional attempts to deceive the Government.

I do not find Applicant’s explanation persuasive given his age, level of intelligence, experience of having held a security clearance as a career Marine, and the number of debts involved, several of which he acknowledged. I find Applicant intentionally falsified his e-QIP in responding to the alleged questions.

### **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.

The ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. AG ¶ 2(c). I have incorporated my comments under Guidelines F and E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Although the rationale for reinstating Applicant’s clearance is insufficient to support a security clearance at this time, there are several factors tending to support

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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)). *See also* ISCR Case No. 08-05637 at 3 (App. Bd. Sept. 9, 2010) (noting an applicant’s level of education and other experiences are part of entirety-of-the-record evaluation as to whether a failure to disclose past-due debts on a security clearance application was deliberate).



approval of his access to classified information. Applicant honorably served 22 years as a career Marine retiring as a senior non-commissioned officer. He is dedicated father to his three children and has served overseas for a defense contractor.

There is every indication that he is loyal to the United States and his employer. There is no evidence that he abuses alcohol or uses illegal drugs. His second divorce and problems with his spouse's handling of their finances contributed to his financial woes. One character witness lauds his diligence, professionalism, and responsibility. I give Applicant substantial credit for acknowledging his shortcomings. These factors show some responsibility, rehabilitation, and mitigation.

The whole-person factors against reinstatement of Applicant's clearance are more substantial at this time. Applicant's SOR lists 27 delinquent debts totaling \$170,199. His strategy of dealing with his debts is to wait until they are time barred and let them fall off his credit report. Applicant's failure to be completely forthright when completing his July 2009 e-QIP is equally troubling. I recognize the difficulties Applicant encountered with his wife during his second marriage, however, those difficulties do not justify his failure to pay just debts nor do they justify his failure to be truthful when completing his e-QIP.

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

### **Formal Findings**

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

Paragraph 1, Guideline F:	AGAINST APPLICANT
Subparagraphs 1.a – 1.aa:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	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. TUIDER  
Administrative Judge