



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 10-07219

Appearances

For Government: Gina L. Marine, Esq., Department Counsel

For Applicant: *Pro se*

September 29, 2011

Decision

Duffy, James F., Administrative Judge:

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

Statement of the Case

Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP) on May 13, 2010. On March 11, 2011, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under Guideline F (financial considerations). The action was taken under 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*, dated January 2, 1992, as amended (Directive); and the adjudicative guidelines (AG) effective within the Department of Defense for SORs issued after September 1, 2006.

The SOR detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue Applicant's security clearance. On March 29, 2011, Applicant answered the SOR and requested a hearing. The case was assigned to me on August 3, 2011. DOHA issued the Notice of Hearing on August 10, 2011. The hearing was held as scheduled on August 30, 2011. Department Counsel offered exhibits (GE) 1 through 6 that were admitted into evidence without objection. Department Counsel's list of exhibits was marked as hearing exhibit (HE) 1. Applicant testified, called no witnesses, and offered no exhibits. The record was left open until September 6, 2011, for the Applicant to submit additional matters. On September 6, 2011, Applicant requested a seven-day extension of the deadline, which was granted. On September 15, 2011, Applicant submitted post-hearing matters that were marked as AE A through F and admitted into evidence without objection. Department Counsel's memorandum forwarding Applicant's post-hearing submission was marked as HE 2. DOHA received the transcript (Tr.) of the hearing on September 8, 2011.

Findings of Fact

Applicant is a 40-year-old employee of a defense contractor. He has worked for that contractor since September 2008. He earned an associate's degree in 1997. He is separated from his second wife and has a child, age 18, and two step-children, ages 18 and 23. He served on active duty in the U.S. Navy from June 1990 to September 1995 and was honorably discharged. He enlisted in the Navy Reserve in February 2010 and is participating in monthly drills. He held a security clearance in the Navy.¹

The SOR alleged that Applicant had nine delinquent debts totaling \$15,618. In his Answer to the SOR, Applicant admitted two allegations (SOR ¶¶ 1.c and 1.h) and denied the remaining allegations. His admissions are incorporated herein as findings of fact. Credit reports dated May 20, 2010; December 21, 2010; and August 22, 2011 established prima facie evidence of the delinquent debts.²

From at least 2000 to 2007, Applicant was living and working in State A. In September 2007, he was laid off from his job with a telecommunications company as it downsized. His annual salary was \$57,000 before he was laid off. He was unemployed for about one month and received unemployment compensation. From October 2007 to April 2008, he worked as a car salesman. His salaries at the car dealerships were based on sales commissions. Next, he worked at a transmission company for two months and then had a part-time job with a temporary employment agency for three months. His salaries from his jobs after he was laid off were much less than his salary at the telecommunications company. In September 2008, he moved to State B to obtain

¹ Tr. 4-7, 38, 74-76, 85, 107-109; GE 1.

² GE 4, 5, 6; Applicant's Answer to the SOR. In his Answer, Applicant initially wrote "I admit" for SOR ¶ 1.b, but crossed out the word "admit," which I interpret as a denial.

his current job. His wife remained in State A. His new employer paid him \$1,000 for relocation expenses. His current annual salary is about \$44,000.³

Each of the alleged debts is addressed below.

SOR ¶ 1.a – collection account in the amount of \$870. This debt was for a cell phone account. In 2008, Applicant was halfway through his cell phone contract when his cell phone stopped receiving calls. He mailed the cell phone back to the company for a new one. When the company received the cell phone, it had water damage. He claimed that the cell phone had no water damage when he mailed it and that he had insurance for it. He decided to return the new phone. The company received the new phone beyond the deadline for returning it and charged him for the new phone. It returned the new phone back to him. In 2008, he tried to negotiate a settlement of this debt, but was unsuccessful in doing so. He provided no documents substantiating that he has a legitimate basis for disputing this debt.⁴

SOR ¶ 1.b – credit card account 120-days past-due in the amount of \$567 with a balance of \$2,281; SOR ¶ 1.c – credit card account 90-days past-due in the amount of \$383 with a balance of \$3,422; and SOR ¶ 1.g – home mortgage in foreclosure that was past due in the amount of \$12,264 with a balance of \$126,000. These three accounts are related. In 2005, Applicant purchased a home for \$85,000. He had a 30-year fixed mortgage with monthly payments of \$631. In early 2007, he refinanced the home to make home improvements. After the refinancing, his mortgage was about \$100,000, with monthly payments of \$900. As part of the refinancing, he received \$3,000 in cash and obtained two credit cards that were to be used for home improvements. One credit card had a limit of \$1,000 and the other \$2,000. He indicated that he may have used those credit cards once or twice for things other than home improvements.⁵

After he was laid off in September 2007, Applicant lived with his wife in another residence and rented this home under the Housing and Urban Development (HUD) Section 8 program. Under that program, the maximum rent he could charge was \$750. At that time, he was able to pay the difference between the rental income and mortgage payments from either his 401k account or income obtained in subsequent jobs. Because he moved to State B in September 2008, he was managing the property as a long-distance landlord. In about December 2008, the tenant moved out the property and left it damaged. He spent about \$1,500 to make repairs. He attempted to rent the home again but was unable to do so. He became delinquent on his mortgage in about September 2009 and, sometime thereafter, the bank initiated foreclosure proceedings.⁶

³ Tr. 45-51, 71-85; GE 1, 2.

⁴ Tr. 39-45.

⁵ Tr. 45-62, 110-111, 113-114; GE 2, 3, 4, 5, 6.

⁶ *Id.*

In December 2009, Applicant hired a realtor to arrange a short sale of the home. He stated that the home was sold at a short sale for about \$35,000 in February 2011, and all three accounts were resolved. At the hearing, he indicated that he would provide documents pertaining to the short sale of the home. In his post-hearing submission, however, he failed to provide those documents. His latest credit report reflects that the two credit card accounts were charged off and remain delinquent. As for the mortgage, his latest credit report reflects "contact mbr for status." Insufficient evidence has been presented to establish that these debts have been resolved.⁷

SOR ¶ 1.d – credit card account 120-days past-due in the amount of \$254 with a balance of \$825. This was a credit card with a \$500 limit that Applicant maintained as an emergency fund. Before this account became delinquent, it had a balance of about \$300, and he was making monthly payments of \$35. In about May 2010, he made charges to the credit card beyond its credit limit that resulted in a \$60 over-the-limit fee. At that point, he was unable to make the payments needed to avoid further late fees and penalties. This resulted in him falling further behind on this account as late fees and over-the-limit fees accumulated each month. At the hearing, Applicant stated he entered into a settlement agreement with this creditor, began making payments in April 2011, and the remaining balance was about \$300. On August 25, 2011, he made a payment of \$165 on this debt. He indicated that he would submit a document in his post-hearing submission that reflected the remaining balance was \$300, but failed to do so. This debt is unresolved.⁸

SOR ¶ 1.e – credit card account 90 days past-due in the amount of \$166 with a balance of \$825. Applicant used this credit card, which had a \$500 credit limit, for personal purposes. He indicated that he planned to pay off SOR ¶¶ 1.d. and 1.h before addressing this debt. This debt is unresolved.⁹

SOR ¶ 1.f – collection account in the amount of \$855. This debt arose from an apartment that Applicant rented in State A immediately before moving to State B. Before breaking the lease, he spoke to the landlord's agent. He thought he gave adequate notice and paid the amount required to terminate the lease. However, the landlord apparently disagreed. Months later, the landlord notified him that he owed another month's rent and some fees. He attempted to negotiate a settlement, but was unsuccessful in doing so. He is disputing this debt, but provided no documents concerning the dispute.¹⁰

⁷ *Id.*

⁸ Tr. 25-29, 31-35; AE A. In his post-hearing submission, Applicant indicated that he provided a bank statement reflecting a payment of \$165 to this creditor. Although he did not provide that bank statement, he did provide sufficient information for me to find that he made that payment as stated.

⁹ Tr. 62-65.

¹⁰ Tr. 65-70; GE 3.

SOR ¶ 1.h – charged-off account in the amount of \$255. This debt was for a vehicle that Applicant purchased in 2007. His wife used this vehicle and made the monthly payments of \$200. She received a large sum of money and made a lump-sum payment to pay off the loan. However, she miscalculated the final payment and the loan was not paid. At the hearing, Applicant indicated that the creditor claimed he owed about \$615 on this debt. He disputes that amount. He also stated that he made two payments totaling about \$400 since May 2010 and the balance was \$200. He claimed his last payment on this debt was in May 2011. He also indicated that changes in the collection agency handling this debt have delayed his payments. He provided no proof of any payments. This debt is unresolved.¹¹

SOR ¶ 1.i – collection account in the amount of \$54. This debt was for a gas bill in State A. It became delinquent in June 2007. Applicant paid this bill on March 11, 2011. This debt is resolved.¹²

In 2003, Applicant accrued about \$30,000 in child support arrearages. He stated that he was paying \$200 per month in child support after his son was born and, over time, actually had paid more than was required. In 2003, his son's mother moved to another county, and a court action was initiated to increase the amount of the child support. Applicant failed to attend the court proceeding. The court increased his child support payments to \$635 per month. The court also ruled that Applicant owed three years of child support arrearages, resulting in the \$30,000 deficiency. He stated that, when he decided not to attend the court proceeding, he did not know that the court was going to examine potential arrearages. At that time, he thought the court was only addressing the amount of the monthly payment. He was not aware of the court's ruling on the arrearages until his next tax refund was withheld. He claimed he went to court several times to dispute the arrearages, but was told that the time limit for challenging that ruling had expired. Beginning in February 2010, his pay was garnished for the child support payments. He believes that arrearages have been reduced to about \$6,000. He did not provide documentation to show the amount of the current arrearage balance.¹³

Applicant received financial counseling before he bought his house in 2007. This counseling addressed budgeting and credit repair. On November 30, 2010, he submitted a Personal Financial Statement (PFS) that reflected his net monthly income was \$2,100, that his total monthly expenses were \$1,020, and that his total monthly debt payments were \$770, leaving a net monthly remainder of \$210. At the hearing, he testified that he withdrew money from his 401k to make mortgage payments in 2007.

¹¹ Tr. 25-28, 30-31, 35-39; GE 2, 3.

¹² Tr. 70-71; AE A, D, E; GE 2, 3, 4.

¹³ Tr. 85-95; GE 2, 3. Applicant's child support arrearages are not listed as a delinquent debt in the SOR. The arrearages will not be considered in applying the disqualifying conditions, but may be considered in assessing Applicant's overall financial situation and applying the whole-person concept.

Due to those withdrawals, he owed the Internal Revenue Service (IRS) about \$5,000. For that deficiency, he is now paying \$135 per month to the IRS that was not listed on his PFS. The IRS also has withheld his tax refunds for the past two years.¹⁴

While on active duty in the Navy, Applicant was awarded the Good Conduct Medal. In this proceeding, he submitted no character reference letters or performance appraisals.¹⁵

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

¹⁴ Tr. 95-103, 117; GE 3. The IRS deficiency is not listed as a delinquent debt in the SOR. As noted in the previous footnote, this deficiency will not be considered in applying the disqualifying conditions, but may be considered for the other noted purposes.

¹⁵ Tr. 110.

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

The security concern for Financial Considerations is set out in AG ¶ 18 as follows:

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. Two are potentially applicable in this case:

- (a) inability or unwillingness to satisfy debts; and
- (c) a history of not meeting financial obligations.

Applicant accumulated nine delinquent debts totaling over \$15,000 that he has been unable or unwilling to satisfy for a number of years. This evidence is sufficient to raise the above disqualifying conditions.

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 has multiple delinquent debts that are ongoing and significant. He was laid off from his job in September 2007 and was unemployed for about one month. Thereafter, he has had lower-paying jobs, including his current job at which he earns about \$13,000 less per year than before he was laid off. His unemployment and underemployment were conditions beyond his control that contributed to his financial problems. To obtain full credit under AG ¶ 20(b), both prongs of that mitigating condition, *i.e.*, conditions beyond the individual's control and responsible conduct, must be established. Here, however, Applicant failed to establish that he acted responsibly since obtaining his current job in September 2008. He paid one delinquent debt of \$54 and also made a payment of \$165 towards another debt. He provided no proof of other payments or of settlement agreements. He claimed his delinquent mortgage was resolved during a short sale of his home. However, he provided no proof substantiating that claim. Under these circumstances, I cannot find that he acted responsibly in resolving his delinquent debts since obtaining his current job in September 2008. Moreover, I cannot find that his financial problems arose under circumstances that are unlikely to recur or that they do not cast doubt on his current reliability, trustworthiness, or good judgment. AG ¶ 20(a) does not apply. AG ¶ 20(b) and 20(d) partially apply.

AG ¶ 20(c) marginally applies because Applicant obtained financial counseling before purchasing his home in 2007. He disputes, in whole or in part, the debts in SOR ¶¶ 1.a, 1.f, and 1.h but failed to provide documentation to substantiate that he has a legitimate basis for disputing those debts. In the absence of such documentation, AG ¶ 20(e) does 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 a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept.

I have considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my comments under Guideline F in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment. Applicant served on active duty in the Navy for five years and is currently serving in the Navy Reserve. He claims that he resolved some debts and has made payment on others, but he failed to produce documents supporting most of those claims. In essence, he has not established that he has taken meaningful steps to address his financial problems. Overall, the record leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For these reasons, I conclude that Applicant failed to mitigate the security concerns arising under the guideline for financial considerations.

Formal Findings

Formal findings 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 – 1h:	Against Applicant
Subparagraph 1.i:	For 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.

James F. Duffy
Administrative Judge