



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 10-08272

Appearances

For Government: Melvin A. Howry, Esquire, Department Counsel
For Applicant: *Pro se*

May 24, 2011

Decision

GALES, Robert Robinson, Administrative Judge:

Applicant failed to mitigate the security concerns regarding financial considerations. Eligibility for a security clearance and access to classified information is denied.

Statement of the Case

On June 21, 2010, Applicant applied for a security clearance and submitted an Electronic Questionnaire for Investigations Processing (e-QIP) version of a Security Clearance Application (SF 86).¹ On an unspecified date, the Defense Office of Hearings and Appeals (DOHA) issued him a set of interrogatories. He responded to the interrogatories on December 9, 2010.² On January 31, 2011, DOHA issued a Statement of Reasons (SOR) to him, pursuant to Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended and modified; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review*

¹ Item 4 (SF 86), dated June 21, 2010.

² Item 6 (Applicant's Answers to Interrogatories, dated December 9, 2010).

Program (January 2, 1992), as amended and modified (Directive); and the *Adjudicative Guidelines for Determining Eligibility For Access to Classified Information* (December 29, 2005) (AG) applicable to all adjudications and other determinations made under the Directive, effective September 1, 2006. The SOR alleged security concerns under Guideline F (Financial Considerations), and detailed reasons why DOHA could not make a preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The SOR recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

Applicant acknowledged receipt of the SOR on February 8, 2011. In a sworn statement, dated February 8, 2011,³ Applicant responded to the SOR allegations and elected to have his case decided on the written record in lieu of a hearing. A complete copy of the Government's file of relevant material (FORM) was provided to Applicant on March 10, 2011, and he was afforded an opportunity, within a period of 30 days after receipt of the FORM, to file objections and submit material in refutation, extenuation, or mitigation. Applicant received the FORM on March 18, 2011, and submitted an additional statement on March 24, 2011. The case was assigned to me on May 12, 2011.

Findings of Fact

In his Answer to the SOR, Applicant admitted all of the factual allegations pertaining to financial considerations (§§ 1.a. through 1.k.) of the SOR. Those admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact:

Applicant is a 50-year-old employee of a defense contractor, currently serving as an AFCAP monitor,⁴ and he is seeking to obtain a security clearance. He has never had a security clearance.⁵ He has not served in the U.S. military.⁶ He is a May 1991 college graduate with a BA degree in political science.⁷ Applicant worked in a variety of positions with various employers. He was a retention specialist from February 2000 until April 2004;⁸ an exhibitor relations representative from April 2004 until August 2006;⁹ and a customer service representative from August 2006 until January 2010.¹⁰ The

³ Item 3 (Applicant's Answer to the SOR, dated February 8, 2011).

⁴ Item 4, *supra* note 1, at 14.

⁵ *Id.* at 40.

⁶ *Id.* at 22.

⁷ *Id.* at 12; Applicant's Answer to the FORM, dated March 24, 2011).

⁸ Item 4, *supra* note 1, at 19.

⁹ *Id.* at 17.

¹⁰ *Id.* at 16.

company that Applicant worked for laid him off in January 2010, when it filed for bankruptcy under Chapter 11 of the U.S. Bankruptcy Code.¹¹ Applicant was unemployed, receiving unemployment compensation, until April 2010, when he joined his current employer.¹² Applicant was married in March 1995.¹³

Financial Considerations

Applicant first started to experience financial difficulties in November 2008.¹⁴ He had been living beyond his means and his job was not sufficient to enable him to make his monthly payments.¹⁵ Applicant characterized his actions at that time as operating with “reckless abandonment.”¹⁶ He anticipated being able to pay for his lifestyle eventually as he made more money, but his expectations did not meet reality.¹⁷ He was 48 years old at the time. In November 2008, Applicant made his last payments, and accounts started to become delinquent. Some of the accounts were placed for collection with a variety of collection agents, and some of the accounts were charged off. One delinquent account first went to repossession and then to judgment. Applicant has offered no explanation why he was unable to continue making his monthly payments or why he could not seek reduced payments under a repayment plan.

In July 2010, while being interviewed by an investigator from the U.S. Office of Personnel Management (OPM), Applicant commented on a number of his delinquent accounts. He acknowledged receiving letters and telephone calls from his creditors, and contended that in November 2008, he spoke to his creditors and informed them that he did not have sufficient funds to make any further payments or enter into any payment plans.¹⁸ Applicant indicated there was no way he could pay off his old debt, and he was contemplating filing for bankruptcy if he was unable to negotiate lower settlements.¹⁹ Applicant has produced no evidence to indicate that he has contacted his creditors, established repayment plans, commenced making any payments, or taken steps to file for bankruptcy, since his interview.

¹¹ *Id.* at 17.

¹² *Id.* at 13, 15.

¹³ *Id.* at 26.

¹⁴ Item 6 (Personal Subject Interview, dated July 29, 2010), at 1, attached to Applicant's Answers to the Interrogatories.

¹⁵ *Id.*

¹⁶ Applicant's Answer to the FORM, *supra* note 7.

¹⁷ Item 6 (Personal Subject Interview), *supra* note 14, at 1.

¹⁸ *Id.* at 1-2.

¹⁹ *Id.* at 1.

The SOR identified 11 continuing delinquencies as reflected by two different credit reports from 2010,²⁰ totaling approximately \$102,857. Among the delinquencies are credit cards and a repossessed motorcycle. Some accounts have been transferred, reassigned, or sold to other creditors or collection agents, and except where the actual transfers are reflected in the credit reports, it is nearly impossible to follow the trail from one creditor to another. Other accounts are referenced repeatedly in the different credit reports, in many instances duplicating other accounts listed, either under the same creditor name or under a different creditor name. Some accounts are identified by complete account numbers, while others are identified by partial account numbers, in some instances eliminating the last four digits, and in others eliminating other digits. In this regard, it appears that several of the SOR allegations duplicate other SOR allegations, giving the false impression that the total delinquent amount is greater than it actually is.

In June 2007, with financing of \$18,000 from a particular bank, Applicant purchased a motorcycle. He made monthly payments of \$485 for about 18 months, and when he could no longer afford to continue making the payments, he requested a voluntary repossession.²¹ The motorcycle was repossessed, and several months later the same creditor sued Applicant on the unpaid balance.²² The July 2010 credit report reflects the repossession, indicating a balance of \$13,212 (SOR ¶ 1.h.).²³ The December 2010 credit report lists the judgment, in the amount of \$14,673 (SOR ¶ 1.a.).²⁴ Applicant contends they are the same account,²⁵ but the Government discounts his contention, claiming he failed to submit documents to support his contention. I disagree. The Government exhibits and Applicant's statements are sufficient to convince me that the accounts are one and the same. Likewise, there is another account, with the same creditor, reflected in the July credit report with a balance of \$21,587 (with a high credit of \$14,673).²⁶ The December 2010 credit report reflects an account, with the same creditor and partial account number, with a balance of \$22,533 (SOR ¶ 1.c.). This allegation duplicates the other two.

There is a credit card account which had a balance of \$17,752 (SOR ¶ 1.i.), which was charged off (rather than merely placed for collection as alleged in the SOR) and sold to another lender.²⁷ According to the July 2010 credit report, the balance is

²⁰ Item 5 (Combined Experian, TransUnion, and Equifax Credit Report, dated July 8, 2010); Item 7 (Equifax Credit Report, dated December 15, 2010).

²¹ Item 6 (Personal Subject Interview), *supra* note 14, at 1.

²² *Id.*

²³ Item 5, *supra* note 20, at 12.

²⁴ Item 7, *supra* note 20, at 1.

²⁵ Item 6 (Personal Subject Interview), *supra* note 14, at 1.

²⁶ Item 5, *supra* note 20, at 6.

²⁷ *Id.* at 7.

now zero.²⁸ There is another account reflected in the same credit report with a different creditor and a high credit of \$17,752 and a past due balance of \$22,076 (SOR ¶ 1.g.). The government exhibits are sufficient to convince me that the accounts are one and the same. The remaining allegations are unchallenged and remain unpaid.

There is no evidence that Applicant ever received financial counseling covering such topics as debt consolidation, money management, repayment plans, or budgeting. On July 29, 2010, Applicant prepared a personal financial statement,²⁹ indicating a monthly net income of \$1,200; \$875 in monthly living expenses; and no debt payments; with a monthly net remainder of \$325 available for discretionary spending.

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.”³⁰ 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. The President has authorized the Secretary of Defense or his designee to grant an applicant eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.”³¹

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

An administrative judge need not view the guidelines as inflexible, ironclad rules of law. Instead, acknowledging 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. 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 meaningful decision.

²⁸ *Id.*

²⁹ Item 6 (Personal Financial Statement, dated July 29, 2010), attached Applicant’s Answers to the Interrogatories.

³⁰ *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

³¹ Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

In the decision-making process, facts must be established by “substantial evidence.”³² The Government initially has the burden of producing evidence to establish a potentially disqualifying condition under the Directive, and has the burden of establishing controverted facts alleged in the SOR. Once the Government has produced substantial evidence of a disqualifying condition, under Directive ¶ E3.1.15, the applicant has the burden of persuasion to present evidence in refutation, explanation, extenuation or mitigation, sufficient to overcome the doubts raised by the Government’s case. The burden of disproving a mitigating condition never shifts to the Government.³³

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 as well. It is because of this special relationship that the Government must be able to repose a high degree of trust and confidence in those 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 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. Furthermore, “security clearance determinations should err, if they must, on the side of denials.”³⁴

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.”³⁵ 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 as to Applicant’s allegiance, loyalty, or patriotism. It is merely an indication the Applicant has or has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance. 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.

Analysis

Guideline F, Financial Considerations

The security concern relating to the guideline for Financial Considerations is set out in AG ¶ 18:

³² “Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all contrary evidence in the record.” ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). “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).

³³ See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

³⁴ *Egan*, 484 U.S. at 531

³⁵ See Exec. Or. 10865 § 7.

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

The guideline notes several conditions that could raise security concerns. Under AG ¶ 19(a), an "inability or unwillingness to satisfy debts" is potentially disqualifying. Similarly, under AG ¶ 19(c), "a history of not meeting financial obligations" may raise security concerns. Also, "consistent spending beyond one's means, which may be indicated by excessiveness indebtedness, significant negative cash flow, high debt-to-income ratio, and/or other financial analysis," may be potentially disqualifying under AG ¶ 19(e).

As noted above, Applicant first started to experience financial difficulties in November 2008 because he had been living beyond his means and his job was not sufficient to enable him to make his monthly payments. Applicant characterized his actions at that time as operating with "reckless abandonment." At that point, he simply failed to keep up with his monthly payments, and accounts started to become delinquent. Some accounts were placed for collection and some accounts were charged off. One went to judgment. Applicant indicated that he has no current ability to pursue his creditors to resolve the delinquent accounts. The record is silent as to why Applicant's delinquent accounts remained unaddressed by him since November 2008, especially since he has been gainfully employed with the exception of the four month period in early 2010. AG ¶¶ 19(a), 19(c), and 19(e) apply.

The guideline also includes examples of conditions that could mitigate security concerns arising from financial difficulties. Under AG ¶ 20(a), the disqualifying condition may be mitigated where "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." Also, under AG ¶ 20(b), financial security concerns may be mitigated where "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." Evidence that "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" is potentially mitigating under AG ¶ 20(c). Similarly, AG ¶ 20(d) applies where the evidence shows "the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts."³⁶

³⁶ 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

AG ¶¶ 20(a), 20(c), and 20(d) do not apply. Applicant was living beyond his means with “reckless abandonment” when his accounts became delinquent. The financial situation is continuing in nature, and the specific causation is not adequately described. In addition, there is no evidence establishing that Applicant ever received financial counseling. Applicant made his last payments on any of the SOR accounts in November 2008. He has produced no evidence to indicate that he has contacted his creditors, attempted to negotiate settlements, established repayment plans, commenced making any payments, or taken steps to file for bankruptcy. With a monthly net remainder of \$325 available for discretionary spending, it was possible that Applicant could have commenced the payment of some delinquent accounts. Nevertheless, the creditors have not been contacted, and the accounts remain unpaid or unresolved.³⁷ Applicant’s handling of his finances, under the circumstances, casts doubt on his current reliability, trustworthiness, or good judgment.

AG ¶ 20(b) only partially applies because of Applicant’s one four-month period of unemployment in early 2010. That might explain why no efforts were made during that brief period, but the 2010 unemployment was not the causation for the 2008 financial meltdown. Applicant failed to describe which specific factors were beyond his control, other than his general lifestyle, that caused his inability to continue making his monthly payments. Moreover, sufficient time has passed since Applicant generated his bills and he still has not addressed his delinquent accounts. The reasons stated do not establish he acted “responsibly under the circumstances.”

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

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 she or she relied on a legally available option (such as bankruptcy [or statute of limitations]) 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)).

³⁷ “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.

participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. Moreover, I have evaluated the various aspects of this case in light of the totality of the record evidence and have not merely performed a piecemeal analysis.³⁸

There is some evidence in favor of mitigating Applicant's conduct. Applicant spoke with his creditors in November 2008, and advised them that he was unable to continue making his monthly payments. He also went through a four-month period of unemployment in early 2010.

The disqualifying evidence under the whole-person concept is substantial. Applicant has a history of spending beyond his means, leading to financial delinquencies. He simply stopped making his monthly payments in November 2008, and has not resolved any of his delinquent accounts. Applicant has offered no explanation as to why he was unable to continue making his monthly payments or why he could not seek reduced payments under a repayment plan. Even though he has sufficient funds each month to make some small payments in an effort to resolve his accounts and the judgment, he has chosen not to do so. Applicant indicated he was contemplating filing for bankruptcy if he was unable to negotiate lower settlements, yet he has taken no action at all. Applicant's inaction reflects traits which raise concerns about his fitness to hold a security clearance. See AG ¶ 2(a)(1) through AG ¶ 2(a)(9).

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
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	Against Applicant
Subparagraph 1.e:	Against Applicant
Subparagraph 1.f:	Against Applicant
Subparagraph 1.g:	For Applicant

³⁸ See *U.S. v. Bottone*, 365 F.2d 389, 392 (2d Cir. 1966); See also ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006).

Subparagraph 1.h:	For Applicant
Subparagraph 1.i:	Against Applicant
Subparagraph 1.j:	Against Applicant
Subparagraph 1.k:	Against Applicant

Conclusion

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

ROBERT ROBINSON GALES
Administrative Judge