



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



In the matter of:)
)
) ISCR Case No. 10-08560
)
Applicant for Security Clearance)

Appearances

For Government: Julie Mendez, Esq., Department Counsel
For Applicant: Terry L. Elling, Esq.

September 9, 2011

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant has not mitigated financial considerations security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On May 25, 2011, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline F, financial considerations. The action was taken under Executive Order (EO) 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) implemented by the Department of Defense on September 1, 2006.

Applicant answered the SOR on June 16, 2011, and requested a hearing before an administrative judge. The case was assigned to another administrative judge on July 20, 2011. DOHA issued a notice of hearing on July 27, 2011, scheduling the hearing for August 15, 2011. The case was reassigned to me on August 15, 2011. The hearing was

convened as scheduled. The Government offered Exhibits (GE) 1 through 4, which were admitted without objection. The Government also offered a demonstrative exhibit, which I accepted without objection as Hearing Exhibit (HE) I. Applicant testified and submitted Exhibits (AE) A through E, which were admitted without objection. The record was held open until September 2, 2011, for Applicant to submit additional information. Applicant timely submitted documents that were marked AE F through G(4) and admitted without objection. Applicant's counsel's memorandum is marked HE II. Department Counsel's memorandum forwarding Applicant's exhibits is marked HE III. DOHA received the hearing transcript (Tr.) on August 23, 2011.

Findings of Fact

Applicant is a 44-year-old employee of a defense contractor. He has worked for his current employer since August 2010. He has a bachelor's degree. He is married with two children, ages 13 and 9.¹

In the early 2000s, Applicant had a good job, and he earned a large income. Tax returns showed adjusted gross income for Applicant and his wife at \$394,196 in 2002, \$287,551 in 2004, and \$194,397 in 2005. His company reorganized, and he lost his job in December 2005. He obtained a job in January 2006, but at a greatly reduced salary. He changed jobs and was unemployed several times before he was hired by his current employer in August 2010. His income never approached what he earned in the early 2000s. His adjusted gross income was \$137,611 in 2006, \$132,827 in 2007, \$165,359 in 2008, \$154,448 in 2009, and \$106,254 in 2010. Applicant also has a special needs child who required extensive medical treatment, which resulted in medical expenses, trips around the country to see specialists, and expensive home modifications. Applicant was unable to pay all his bills and a number of debts became delinquent.²

In about 2005, Applicant incorporated a side business as a Subchapter S corporation³ to buy and sell real estate. Applicant stated that he had expenses related to the business, such as education and travel to locations to view properties, but the company never actually purchased any properties. He stopped pursuing real estate investments in 2008. Several of Applicant's delinquent debts were business accounts that he personally guaranteed.⁴

¹ Tr. at 20-22, 63; GE 1.

² Tr. at 20-28, 47-51; GE 1, 4; AE D.

³ S corporations are corporations that elect to pass corporate income, losses, deductions and credit through to their shareholders for federal tax purposes. Shareholders of S corporations report the flow-through of income and losses on their personal tax returns and are assessed tax at their individual income tax rates. This allows S corporations to avoid double taxation on the corporate income. S corporations are responsible for tax on certain built-in gains and passive income. See www.irs.gov/businesses/small/article/0,,id=98263,00.html.

⁴ Tr. at 59-61; GE 1-4.

Applicant retained a law firm to assist him in addressing his delinquent debts. He paid the firm more than \$3,000, but they did little to help him. He ended his relationship with the firm after several months without any creditors being paid. Several people advised him to file bankruptcy, but he wanted to pay his responsibilities. He decided to address his debts on his own. Applicant settled at least six delinquent debts that were not alleged in the SOR. A \$12,556 debt was settled for \$5,650 in January 2010. A debt of about \$4,670 was settled in September 2010. A debt of about \$9,574 was settled for \$4,000 in September 2010. A debt of about \$14,080 was settled in November 2010. Applicant also settled debts of about \$16,123 and \$12,547. Applicant was able to modify the first and second mortgages on his home. The holder of his \$750,000 first mortgage agreed to a modified payment of \$2,330 per month. The holder of his \$196,000 second mortgage agreed to adjust the interest rate to 1%, the monthly interest-only payments were modified to \$417, and the unpaid balance was changed to \$165,129.⁵

The SOR alleges two delinquent debts. Applicant admitted owing the \$9,998 debt alleged in SOR ¶ 1.a, but he stated that he was paying the debt through a payment plan. He denied owing the \$16,702 debt alleged in SOR ¶ 1.b, stating the underlying debt was settled in 2010.

Applicant's credit report from March 2010 listed the delinquent debt to a bank, as alleged in SOR ¶ 1.a, with a balance of \$10,548. Applicant listed six delinquent debts and payment plans on his Questionnaire for National Security Positions (SF 86) submitted in March 2010, but he did not list that he had a payment plan for this debt. He told a background investigator from the Office of Personnel Management (OPM) in March 2010 that he had a \$150 per month payment plan with the law firm that was collecting the debt, and that he had made the payments for the last six months. When he responded to DOHA interrogatories in March 2011, Applicant indicated that he had a \$100 per month payment plan with the law firm. The March 2011 credit report listed the balance of the debt at \$9,998. Applicant testified that his payment plan with the law firm was originally \$100 per month, but he had increased it to \$125 per month. He stated that the payment plan had been in effect "for about two years." Applicant submitted letters from the law firm dated April 8, 2011, and May 9, 2011, stating the law firm would deposit Applicant's post-dated checks on April 18, 2011, and May 18, 2011. The amounts of the checks were not indicated. Applicant did not submit evidence of the amounts of the checks, or that the checks were paid by his bank. He stated that the law firm told him about 90 days before the hearing that the payoff on the account "was about \$6,500."⁶

Applicant was told at the hearing, that he would be provided time after the hearing if he wanted to submit evidence of the payments he had made. In his post-hearing submission, Applicant submitted a letter from the law firm dated August 29, 2011. The letter confirms that Applicant has a payment agreement with the law firm to pay \$125 per month. The letter shows a balance of \$9,273, but it does not reflect when

⁵ Tr. at 28-32, 43-45, 64-65; GE 1-4; AE C, G, G(1).

⁶ Tr. at 32-34, 52-53; GE 1-4; AE B.

the payment agreement was entered or how many payments had been received. Applicant did not submit any other documentary evidence establishing payments.⁷

Applicant denied owing the \$16,702 debt alleged in SOR ¶ 1.b. The name of the creditor and the amount of the debt are taken from Applicant's March 2011 credit report. That credit report lists the creditor by seven letters, and it is not obvious who the creditor is, but it appears to be a collection company. The debt is listed as being \$19,878 past due, with a high credit of \$24,165, and a balance of \$16,702. The original creditor is a bank (Bank X) credit card account with Applicant's business that he personally guaranteed. Applicant submitted a December 2008 Bank X statement that showed a balance of \$23,168. The March 2010 credit report lists the Bank X account as \$1,672 past due, with a high credit of \$16,702, and a balance of \$24,165.⁸

Applicant listed his delinquent Bank X (SOR ¶ 1.b) credit card account with a \$22,000 balance on his March 2010 SF 86. He noted that the debt was being collected by the same law firm handling the debt alleged in SOR ¶ 1.a. He noted for the Bank X debt that "Payment Settlement being followed as agreed monthly." One of the settled debts that were not alleged in the SOR was also collected by the same law firm.⁹

Applicant told the OPM investigator in March 2010 that he had been on a \$100 per month payment plan with the law firm since December 2008 to pay the Bank X account. He estimated the balance of the debt at \$20,000. Applicant was contacted again by an OPM investigator in July 2010, and asked about this debt. He stated that he paid the debt, and the balance on the debt was zero.¹⁰

DOHA sent interrogatories to Applicant requesting information about his debts, asking:

Please explain what you have done to resolve your debts appearing on a current credit bureau report. If you have either paid or are making payments on the debts cited below, please provide documentary proof, such as copies of cancelled checks, copies of money orders, recent invoices or statements reflecting a current balance and a recent payment, and/or other correspondence received from either the collection agency or the original creditors. (emphasis in original)¹¹

Applicant responded in March 2011. He wrote that he did not recognize the acronym of the debt alleged in SOR ¶ 1.b. He was also asked about the underlying debt to Bank X. He wrote:

⁷ Tr. at 33-34; AE G, G(2).

⁸ Tr. at 59-60; Applicant's response to SOR; GE 1-4; AE G(3), G(4).

⁹ GE 1-4; AE G(1).

¹⁰ GE 4.

¹¹ *Id.*

I do not have the paperwork for payoff. [Bank X] was purchased by [another bank] after filing bankruptcy. [Another collection company] has taken over and does not have payoff information. They claim I'm not alone.¹²

Applicant testified that he settled the debt to Bank X. He stated the settlement was offered to him in about November 2009, for 25% of the balance, or about \$4,000. He stated that he paid the settlement over six months, ending in March 2010. Applicant stated that he received a settlement letter from the law firm, but "in [his] silly emotion of trying to distance [him]self from all of this, [he] got rid of a bunch of it." He stated he contacted the law firm, but they told him they did not keep any files with Bank X, because Bank X went bankrupt. Applicant submitted a copy of a \$750 check to the law firm he stated had handled the debt. The check was dated February 26, 2010, and it posted on March 1, 2010. There is nothing on the check to indicate it was associated with the debt alleged in SOR ¶ 1.b. The "For" section of the check listed a number that coincides with the file number of one of the settled debts with a separate bank that was not alleged in the SOR, which was also collected by the law firm. Applicant testified that he did not know why he told the investigator in March 2010 that he had been on a \$100 monthly payment plan since December 2008, and the balance of the debt was about \$20,000. He testified that the day of the interview "was a long day."¹³

In his post-hearing declaration, Applicant stated that he "recall[ed] settling the debt [with the law firm] as a result of a series of payments that concluded in early 2010." He contacted the law firm, who advised him they had no information concerning the account and could neither confirm nor deny that it had been settled. He stated that he contacted Bank X directly using the number from an old statement. When calling that number, a recorded message is played from another company that indicates the number has not been programmed. Applicant also stated that he called the contact number on the web site of the company collecting the debt. He stated that the representative advised him that their database indicated he owed about \$16,000 on the account, but the account has been acquired by another entity. She stated that she could not provide him with additional information. He provided her with his phone number, but she never called him back.¹⁴ Applicant further stated:

For these reasons, I have been unable to confirm the settlement of the [Bank X] Credit Card account as I recall, to the best of my knowledge and belief. I have also been unable to obtain any information from any of the organizations associated with the account, i.e., [Bank X] Card, [law firm], or [collection company], that establishes to my satisfaction that I legitimately owe any balance on the account. I also have not received any recent contact from any of these entities concerning the account in over a year.

¹² *Id.*

¹³ Tr. at 34-42, 53-58, 62; AE E, G(1).

¹⁴ AE G, G(4).

Although I believe that I have settled the [Bank X] Credit Card account, if at some point I am presented with information that legitimately establishes that it remains unsettled, I am committed to taking prompt action to resolve the account, as I have with all of my debts.¹⁵

Applicant stated that he and his wife have adjusted their lifestyle to reflect their more modest income, they are currently living within their means, and they are not accumulating additional delinquent debt. His wife is unable to work full-time because of their child, but she has a part-time job.¹⁶

Applicant submitted character letters attesting to his excellent job performance, patriotism, ethics, trustworthiness, reliability, responsibility, and honesty.¹⁷

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are to be used 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, administrative judges apply the guidelines 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.

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 the applicant or proven by Department Counsel." The applicant has the ultimate burden of persuasion to obtain a favorable security decision.

¹⁵ AE G.

¹⁶ Tr. at 42-46, 50-51, 58-59, 61-64; GE 4.

¹⁷ GE 4; AE A, F.

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 safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that adverse 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

Guideline F, Financial Considerations

The security concern for financial considerations is set out in AG ¶ 18:

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 a number of delinquent debts and was unable or unwilling to pay his financial obligations. The evidence is sufficient to raise the above disqualifying conditions.

Conditions that could mitigate financial considerations security concerns are provided under AG ¶ 20. The following 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.

In December 2005, Applicant lost a good job that provided a large income. He found other work, but at a greatly reduced salary. He also has a special needs child, with costly medical and other expenses. Those conditions were outside Applicant's control. To be fully applicable, AG ¶ 20(b) also requires that the individual act responsibly under the circumstances.

Applicant settled at least six delinquent debts that were not alleged in the SOR. He was also able to modify the first and second mortgages on his home. He and his wife have adjusted their lifestyle to reflect their more modest income. Those were all responsible actions.

The SOR alleges two additional delinquent debts. Applicant stated that the payment plan on one debt had been in effect "for about two years," and that the second debt was settled in March 2010. Had Applicant verified those claims through documentation, all financial concerns would be mitigated. However, despite repeated notice that documentation of payments was necessary, he failed to provide appropriate documentation. Because the balance on the debt alleged in SOR ¶ 1.a has declined, it could be deduced that Applicant made payments on the debt. That is not a substitute for documentation of actual payments. Two years worth of regular payment monthly payments is relatively easy to document. The fact that Applicant chose not to submit better evidence of his payment plan causes me concern.

Applicant's statements that he settled the debt alleged in SOR ¶ 1.b is even more troubling. In March 2010, he told an OPM investigator that he had been on a \$100 per month payment plan with the law firm since December 2008, and the balance of the debt was about \$20,000. He testified that he settled the debt for about \$4,000 through a six-month settlement ending in March 2010. He submitted a copy of a \$750 check to a law firm as proof of the settlement. That check appears to be related to a settlement of another account. Applicant stated that he threw away the settlement letter from the law firm, and that the law firm did not keep records of the action. He had no explanation for

providing a contradictory statement to the OPM investigator in March 2010, other than that it “was a long day.”

A security clearance adjudication is not a debt collection procedure. It is a procedure designed to evaluate an applicant’s judgment, reliability, and trustworthiness. See ISCR Case No. 09-02160 (App. Bd. Jun. 21, 2010). An applicant is not required, as a matter of law, to establish resolution of every debt alleged in the SOR. An applicant need only establish a plan to resolve the financial problems and take significant actions to implement the plan. There is no requirement that an applicant make payments on all delinquent debts simultaneously, nor is there a requirement that the debts alleged in the SOR be paid first. See ISCR Case No. 07-06482 at 2-3 (App. Bd. May 21, 2008).

Applicant has left me with significant unanswered questions about his finances. When financial issues are raised, it is incumbent on applicants to make their finances transparent. The status of the two debts alleged in the SOR can only be classified as murky. I find that Applicant’s finances are not yet under control. His financial issues are recent and ongoing. I am unable to determine that they are unlikely to recur. They continue to cast doubt on his current reliability, trustworthiness, and good judgment. AG ¶¶ 20(a) and 20(e) are not applicable. AG ¶¶ 20(b), 20(c), and 20(d) are partially applicable. I find that financial concerns remain despite the presence of some mitigation.

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 eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept.

I 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.

I considered Applicant's favorable character evidence and the steps he has taken to address his financial issues. However, Applicant has left me with significant unanswered questions and unresolved concerns about his finances. Under AG ¶ 2(b), I am required to resolve my doubt in favor of national security.

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. I conclude Applicant has not mitigated financial considerations security concerns.

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.b:	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.

Edward W. Loughran
Administrative Judge