



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



In the matter of:)	
)	
XXXXXXXXXX, XXXXX)	ISCR Case No. 10-09511
)	
Applicant for Security Clearance)	

Appearances

For Government: Braden M. Murphy, Esq., Department Counsel
For Applicant: *Pro se*

September 21, 2011

Decision

TUIDER, Robert J., Administrative Judge:

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

Statement of the Case

On April 26, 2010, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP). On February 18, 2011, the Defense Office of Hearings and Appeals (DOHA) issued Applicant 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* (Directive), dated January 2, 1992, as amended; 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 a security clearance for Applicant, and recommended referral to an

administrative judge to determine whether a clearance should be granted, continued, denied, or revoked. Applicant answered the SOR on April 14, 2011, and elected to have his case decided on the written record in lieu of a hearing.

A complete copy of the file of relevant material (FORM), dated May 27, 2011, was provided to him by letter dated June 3, 2011. Applicant received the FORM on June 16, 2011. He was afforded a period of 30 days to file objections and submit material in refutation, extenuation, or mitigation. Applicant timely submitted additional material. On July 14, 2011, Department Counsel indicated that he had no objections to the admissibility of materials submitted by the Applicant. The case was assigned to me on July 25, 2011.

Findings of Fact

Applicant admitted all of the allegations except SOR ¶¶ 1l(6), 1l(7), 1l(16), 1l(21), 1l(26), and 1l(33). He denied those six allegations. His admissions are incorporated as findings of fact. After a thorough review of the evidence of record, I make the following additional findings of fact.

Background Information

Applicant is a 49-year-old sensor operator, who has been employed by a defense contractor since April 2010.¹ (Item 7.) The FORM contains limited information regarding Applicant's educational background except that he attended a vocational school from March 2001 to October 2002, where he apparently received his commercial, multi and instrument pilot's ratings.

Applicant was previously married three times and is currently unmarried. He was married to his first wife from August 1984 to February 1986, married to his second wife from May 1987 to July 1989, and married to his third wife from March 1990 to November 1993. Those marriages ended by divorce. Applicant does not have any dependent children. Applicant served on active duty or was in the inactive reserve in the U.S. Army from June 1985 to June 1992, and was honorably discharged.

Financial Considerations

Applicant disclosed numerous adverse areas regarding his financial history in his April 2010 e-QIP. These areas included: (1) that he filed bankruptcy; (2) that he had possessions or property repossessed or foreclosed; (3) that he had failed to pay federal, state, or other taxes; (4) that a lien had been placed against his property for failing to pay taxes or other debts; (5) that he had defaulted on a loan; (6) that he had bills or debts turned over to a collection agency; (7) that he had an account or credit card suspended, charged off, or cancelled for failing to pay as agreed; and (8) that he had

¹ The source for Applicant's biographical information is derived from his April 2010 e-QIP unless otherwise stated.

been over 180 days delinquents on debts. (Item 4.) In July 2010, Applicant was interviewed by an Office of Personnel Management (OPM) investigator. During that interview, the investigator discussed in detail Applicant's financial situation with him. The investigator reviewed Applicant's debts from his credit reports and discussed the circumstances that led to his financial difficulties. (Item 5.)

During his OPM interview, Applicant attributed his financial problems in large part to a failed trucking business that he owned from 2003 to 2009. From 2003 to 2007, his business was successful. However, in late 2007 his two largest customers went out of business and he also began losing customers to larger trucking companies. He used his personal credit cards to keep his business afloat. Applicant also failed to pay income taxes, using the money to make payroll instead. At the time he closed his business down, he estimated that he was approximately \$250,000 in debt. Applicant stated during his July 2010 interview that he intends to pay all of his debts from his salary. He expects to earn \$700 per day with minimal expenses. He estimated that his debt at the time of the July 2010 interview was \$200,000. Applicant predicted that he would be able to pay off all of his debt in two years if employed by his sponsoring employer. (Item 5.)

Applicant's SOR is broken down in two parts. The first part includes SOR ¶¶ 1a through 1k alleging 11 separate delinquent debts totaling approximately \$134,508. The second part includes SOR ¶ 1l(1) through 1l(35) alleging 35 separate delinquent debts that were included in Applicant's Chapter 13 bankruptcy filed in September 2008. The total amount of these additional 35 debts totals approximately \$328,690. Applicant's September 2008 bankruptcy was dismissed in May 2009 for failure to make payments as agreed.

Applicant's numerous debts include four separate delinquent debts owed to the Internal Revenue Service (IRS) (SOR ¶¶ 1a, 1b, 1l(20) and 1l(21)), totaling \$188,741, as well as an additional \$27,334 owed to his state tax authority (SOR ¶¶ 1l(6), 1l(7), and 1l(8)). Applicant explained that his decision to "delay" payment of taxes was the only reasonable choice he had at the time. He added that by delaying payment of his taxes, he was able to meet payroll and keep his business afloat, at least for a while. (Response to FORM.) Applicant's 35 debts alleged in his SOR derived from his Chapter 13 bankruptcy are detailed in the list of Scheduled Creditors in the Final Trustee's Report. (Item 10.) His bankruptcy petition lists \$237,190 in liabilities. (Item 8.)

Applicant's SOR Response and his Response to FORM contain lengthy explanations of the origin of his business-related and personal debts. He states that he will be able to begin or resume payment on these debts once his employment stabilizes. Applicant states that he has been able to pay off five debts, two of which were alleged in the SOR. Applicant did provide documentation in his Response to SOR that he had paid some of his creditors; however, it is difficult to determine with certainty from the documents in the FORM which SOR debts, if any, have been paid or addressed. This venue precludes the administrative judge from going outside the four corners of the documents contained in the FORM.

Applicant participated in the mandatory financial counseling required when he filed for Chapter 13 bankruptcy protection. Applicant submitted several personal references to include long-time friends and business associates. These individuals provided favorable comments about Applicant and stated that he is a trustworthy individual and they support him for a security clearance.

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.” *Egan at 528*.

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 unfavourable, 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 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 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* at 531; see AG ¶ 2(b).

Analysis

Guideline F, Financial Considerations

Under Guideline F, the security concern is that 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 ¶ 18.

The SOR alleges and the evidence establishes that Applicant is deeply in debt and has been for several years. As noted in the SOR, his debts are broken down in two parts – 11 separate debts totaling \$134,508, and 35 separate debts totaling \$328,690 included in a 2008 Chapter 13 bankruptcy that was dismissed in 2009 for failure to make agreed payments. Of particular note, Applicant owes \$188,741 to the IRS and \$27,334 to his state tax authority.

These debts have been ongoing for several years and remain unpaid or unresolved. AG ¶ 19(a) "inability or unwillingness to satisfy debts," and AG ¶ 19(c) "a history of not meeting financial obligations," apply.

AG ¶ 20 lists six conditions that could mitigate the financial considerations security concerns:

(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;

(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; and

(f) the affluence resulted from a legal source of income.

Applicant's favorable evidence fails to fully raise the applicability of any mitigating condition. His financial problems are ongoing, and his evidence fails to show they occurred under such circumstances that they are unlikely to recur and do not cast doubt on Applicant's current reliability, trustworthiness, or good judgment. AG ¶ 20(a) does not apply.

The circumstances described by Applicant that led to his failed business are sufficient to establish circumstances beyond his control. However, I am unable to thoroughly evaluate those circumstances or action taken by Applicant based on the information provided. Notwithstanding, Applicant presented insufficient documentary evidence showing that he acted responsibly in the acquisition of his debts, that he made good-faith efforts to resolve his debts, or that he has a track record of financial responsibility. AG ¶¶ 20(b) and (d) do not apply.

AG ¶ 20(c) does not apply. Although Applicant may have received the mandatory financial counseling associated with filing for Chapter 13 bankruptcy, there are no clear indications that his financial problems are being resolved or are under control. Considering the number of delinquent debts, the date the debts were acquired, the aggregate value of the debts, and the limited evidence of efforts to resolve his financial obligations, Applicant's information is insufficient to establish that his financial problems are unlikely to recur. The remaining mitigating conditions are not reasonably raised by the facts in this case.

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 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.

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). My comments in the Analysis section are incorporated in this whole-person analysis.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant receives credit for the years he was able to maintain financial responsibility. Apart from Applicant's financial difficulties, the record supports the notion that Applicant is a decent and honorable individual. As noted by Department Counsel, this case is not about Applicant's character, nor is it about his suitability for employment. The ultimate issue is whether it is "clearly consistent with the national interest" that Applicant be granted access to classified information. Applicant's significant delinquent debt, no matter the origin, is sufficient to raise a security concern, as he recognizes in his SOR response. Even though the majority of his debts stem from his business that failed due to circumstances beyond his control, he still must show that the problems have been or are being resolved.

The limited mitigating record evidence contained in the FORM fails to convince me of Applicant's suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising from his financial considerations.

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 1a – 1l:	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 eligibility for a security clearance to Applicant. Clearance is denied.

ROBERT J. TUIDER
Administrative Judge