



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



In the matter of:)
)
) ISCR Case No. 11-00049
)
Applicant for Security Clearance)

Appearances

For Government: Stephanie C. Hess, Esquire, Department Counsel
For Applicant: *Pro se*

December 29, 2011

Decision

DUFFY, James F., Administrative Judge:

Applicant failed to mitigate security concerns arising under Guidelines F (Financial Considerations). Clearance is denied.

Statement of the Case

Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) on September 1, 2010. On May 19, 2011, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under Guideline F. DOHA acted 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) implemented on 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 July 12, 2011, Applicant answered the

SOR and requested a hearing. The case was assigned to me on October 20, 2011. DOHA issued the Notice of Hearing on November 17, 2011. The hearing was held as scheduled on December 6, 2011. Department Counsel offered exhibits (GE) 1 through 3 that were admitted into evidence without objection. Applicant testified, called one witness on his behalf, and offered exhibit (AE) A that was admitted into evidence without objection. DOHA received the transcript (Tr.) of the hearing on December 20, 2011.

Findings of Fact

Applicant is a 29-year-old employee of a defense contractor. He has worked for this employer since April 2007. He graduated from high school in 2000 and attended college for less than a year in 2008-2009. He separated from his wife in 2007 and thereafter began living with his girlfriend. A few months after their separation, his wife moved back into their house. He currently resides with his girlfriend, his wife, and another adult roommate. He has two children, an 11-year-old daughter with his wife and 20-month-old son with his girlfriend. His girlfriend also has a nine-year-old son. He has held a security clearance for about ten years without any security violations.¹

The SOR alleged that Applicant had five delinquent debts totaling \$21,932. In his Answer to the SOR, he admitted the alleged debts. His admissions are incorporated herein as findings of fact.²

Applicant attributes his financial problems to his marital separation. Before the separation, he and his wife shared expenses and were meeting their financial obligations. After the separation, he became responsible for all of their debts, including his wife's car payments, and fell behind on some of those payments. He used credit cards in an attempt to meet his financial obligations, but also fell behind on some credit card payments.³

In his Answer, Applicant provided a draft Debt Management Plan (DMP) agreement dated July 7, 2011. Under that draft plan, the first monthly payment of \$669 was due on July 28, 2011. Applicant, however, did not execute that plan. At the hearing, he indicated that his business travel from early to late September 2011 interfered with him entering into the plan. In his Answer, he also stated that his wife's car lease was due to expire in November 2011, which would free up some of his funds for paying his delinquent debts.⁴

¹ Tr. 5-6, 25-26, 39, 42, 45; GE 1. Applicant testified that he separated from his wife in 2009. See Tr. 42. However, his e-QIP indicated that they separated in December 2007. Applicant's girlfriend also testified that Applicant and his wife separated in December 2007. See Tr. 26.

² Applicant's Answer to the SOR.

³ Tr. 16-17, 23-24, 34-35; GE 2; Applicant's Answer to the SOR.

⁴ Tr. 37-38; Applicant's Answer to the SOR.

At the hearing, Applicant provided an executed DMP agreement that he signed on November 21, 2011. Four of the alleged debts (SOR ¶¶ 1.a, 1.b, 1.c, and 1.d) are included in that DMP. Under the terms of that plan, Applicant is to make monthly payments of \$550 until February 2016. He testified that he made the first payment under this plan in November 2011, but provided no proof of that payment. He also testified that the payments are automatically withdrawn from his bank account, but provided no proof that the automatic payments have been established. The agreement also provided that the automatic payments may be canceled at any time. Under the plan, the DMP company disburses payments to creditors within eight days of confirmed receipt of Applicant's payment. The alleged debt not included in the plan is a \$42 delinquent telephone bill (SOR ¶ 1.e) that remains unresolved, but he indicated that he would pay it separately.⁵

Applicant indicated that he received financial counseling through the DMP. Specifically, he received advice from a counselor about financial budgeting and spending habits. He indicated that he currently does not have a budget. The DPM agreement reflected that his net monthly income was \$2,396.64; his total monthly expenses were \$1,846.33; and his monthly DMP payment was \$550.00; which would leave him a net monthly remainder of 30 cents. He also testified that his roommates were contributing about \$400 or \$500 to his monthly household bills.⁶

At the hearing, Applicant testified that he has about \$100 or \$200 of discretionary income at the end of the month, but also indicated that he used that money for necessities. He stated that he has missed some of his mortgage payments, which are approximately \$1,100 per month, and was currently two months behind on those payments. He has received a letter from the mortgage company threatening foreclosure. He also testified that he had \$25,000 in a 401(k) retirement account. In the past, he has taken funds from the 401(k) account to make mortgage payments, but fell behind on them again. He also stated that he had no car payments because his father is currently making the payments on his 2009 vehicle at that time. He bought that vehicle in August 2010 when he was having financial problems. His father also resolved two of his credit card debts. His credit report dated April 6, 2011, indicated that he was making payments on four installment accounts with balances totaling \$60,999 and one revolving account with a balance of \$6,997.⁷

⁵ Tr. 24-25, 28-29, 31-34, 38-39, 46-47; AE A. The DMP agreement states, "To authorize direct draft through the ACH [automated clearance house] network, please have the following authentication code available for your next counseling session. The code will be used to authenticate your authorization to direct draft your new monthly payment." No documentation was provided to confirm that Applicant activated those ACH payments. The agreement also provides that Applicant could make DMP payments by certified check, postal money order, or electronic bank payment.

⁶ Tr. 28-30, 36-37, 39-40, 46.

⁷ Tr. 34-37, 41-45; GE 1, 2; AE A. None of the four installment accounts or the revolving account were alleged as delinquent in the SOR. One of the installment accounts for \$2,929 was his wife's car lease that ended in November 2011.

Applicant's girlfriend testified that she contributes to their household expenses. She indicated that she contributes to their child's expenses and also pays the cable and Internet bills. She stated that his wife contributes money to the utilities. Applicant provided no reference letters or work performance appraisals.⁸

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 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

⁸ Tr. 21-30, 36-37.

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

Guideline F, 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 five delinquent debts totaling over \$21,000 that he was unable or unwilling to satisfy for a number of years. This evidence is sufficient to raise the above disqualifying conditions.

Four 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; and

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

Applicant's delinquent debts are ongoing and significant. He has received financial counseling that included advice on budgeting, but he still has not developed a monthly budget. His financial situation remains unstable. For example, he relies on his father to make his car payments. Based on the evidence, I cannot find that his financial problems are under control, that they 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) and 20(c) do not apply.

Applicant attributed his financial problems to his separation from his wife in 2007. Upon their separation, he became responsible for their debts and was unable to meet those financial obligations. His marital separation was a condition beyond his control. To obtain full credit under AG ¶ 20(b), however, both prongs of that mitigating condition, *i.e.*, conditions beyond the individual's control and responsible conduct, must be established. In this case, he has not established that he has acted responsibly under the circumstances. He was continually employed during his financial difficulties. Of note, his wife moved back into their home only a few months after their separation. Yet, he presented no evidence showing that he took any action to resolve the delinquent debts until after issuance of the SOR. AG ¶ 20(b) partially applies, but does not mitigate the security concerns in this case.

In his Answer to the SOR, Applicant provided a draft DMP agreement, dated July 7, 2011. He indicated that he did not execute that agreement because of his business travel in September 2011. Apparently, he also was waiting for a car lease to expire so that he would have additional funds to help pay for that program. At the hearing, he provided an executed DMP agreement. The agreement was executed after issuance of the Notice of Hearing. He testified that he made the first monthly payment of \$550 in November 2011, but provided no proof. Under the agreement, monthly payments could be automatically withdrawn from his account, but he not provided proof that he activated the automatic payments. Most importantly, Applicant has failed to provide proof of a

meaningful track record of making payments on the delinquent debts. Based on the evidence presented, I cannot conclude his financial problems are being resolved. AG ¶ 20(d) partially applies, but does not mitigate the security concern 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 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 disqualifying and mitigating conditions under Guideline F and the whole-person concept. AG ¶ 2(c).

The comments in the Analysis section of this decision are incorporated in the whole-person concept analysis. Applicant's financial problems are ongoing. He has presented no proof of payments on the delinquent debts. He has only recently taken steps to resolve his financial problems through a DMP, but has failed to establish a track record of payments under that plan. After weighing all the evidence in the context of the whole-person concept, I find that Applicant's financial problems remain a security concern.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. Therefore, I conclude Applicant has mitigated 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 1.a – 1.e:	Against 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. Eligibility for access to classified information is denied.

James F. Duffy
Administrative Judge