



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



In the matter of:	)	
	)	
XXXXXXXXXX, XXXXX	)	ISCR Case No. 11-02080
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Robert Kilmartin, Esq., Department Counsel  
For Applicant: *Pro se*

10/23/2012

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**Decision**

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TUIDER, Robert J., Administrative Judge:

Applicant failed to mitigate security concerns under Guidelines F (financial considerations) and E (personal conduct). Clearance is denied.

**Statement of the Case**

On November 3, 2010, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP). On April 4, 2012, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines F (financial considerations) and E (personal conduct). The action was taken under Executive Order 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) effective within the Department of Defense for SORs after September 1, 2006.

Applicant answered the SOR on April 25, 2012, and his answer was received by DOHA on May 2, 2012. Department Counsel was prepared to proceed on June 14, 2012. The case was assigned to me on June 26, 2012. DOHA issued a notice of hearing on July 2, 2012, scheduling the hearing for July 25, 2012. The hearing was held as scheduled.

At the hearing, the Government offered Government Exhibits (GE) 1 through 4, which were received without objection. The Applicant testified and offered Applicant Exhibits (AE) A through H, which were received without objection. DOHA received the hearing transcript (Tr.) on August 2, 2012.

### **Findings of Fact**

Applicant admitted all ten SOR allegations involving delinquent debts. (SOR ¶¶ 1.a. – 1.j.) and denied all seven SOR allegations pertaining to falsifications (SOR ¶¶ 2.a. – 2.g.). (SOR answer, Tr. 13-14.) His admissions are incorporated as findings of fact.

### **Background Information**

Applicant is a 30-year-old personal computer installer, who has been employed by a defense contractor since June 2010. He seeks a secret security clearance which is a condition of his continued employment. (GE 1, Tr. 16-17.)

Applicant graduated from high school in June 2001. He has completed approximately 54 college credit hours towards his associate degree, and has been awarded several technical certificates related to his current job. Applicant has never married, but lives with a woman who is the mother of their one-year-old child. His significant other has an eight-year-old child from a previous relationship who lives with them. (Tr. 16, 19.)

### **Financial Considerations**

Applicant's SOR alleges ten debts totalling \$32,415. Three of those debts are student loans and constitute the majority of his indebtedness. He did not attempt to address any of the alleged debts until recently, approximately three months before his hearing. Applicant recently consolidated his three student loans and made several \$60 monthly payments on those loans, but stopped making payments hoping to secure "a better option for a payment plan." He also began making modest payments on three of his smaller debts shortly before his hearing and disputed the remaining debts. Applicant did not submit evidence of any ongoing good-faith effort to repay his creditors or reach a final resolution of any of his non-student loan smaller debts. In short, it became clear after the hearing commenced that Applicant had done little if anything to make any significant headway in addressing his indebtedness. (Tr. 21-35, GE 1, AE A-F.)

### **Personal Conduct**

When completing his November 2010 e-QIP, Applicant provided incorrect answers in response to seven questions. Those are: (1) he failed to disclose a written warning he received from a previous employer and that he had been terminated by a previous employer when asked about previous employment; (2) he failed to disclose any of his SOR debts when asked whether he had defaulted on any type of loan; (3) he failed to disclose any of his SOR debts when asked whether he had any bills or debts turned over to a collection agency; (4) he failed to disclose any of his SOR debts when

asked whether he had any account or credit card suspended, charged off, or cancelled for failing to pay as agreed; (5) he failed to disclose any of his SOR debts when asked whether he had been over 180 days delinquent on any debts; (6) he failed to disclose any of his SOR debts when asked whether he was currently over 90 days delinquent on any debts; and (7) he failed to disclose any of his SOR debts when asked whether he was currently delinquent on any Federal debt.

Applicant stated his failure to provide accurate information was “not deliberate.” He added, “At that time I had a lot of pressure. I was working. I was out of state in [a U.S. city] working nights. I was in a hurry doing the application a couple of times and the computer would give me problems.” (Tr. 14.) When queried by Department Counsel, Applicant remained consistent with this explanation. It is clear that Applicant provided incorrect information and concluded, “If I would do this application now, I would be more careful in what I said no to or yes.” (Tr. 36-42.)

Also, when queried by Department Counsel about his income taxes, Applicant acknowledged that he did not file 2009 and 2010 federal income tax returns. (Tr. 43-45.)

## **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 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 (4<sup>th</sup> 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**

Under Guideline F, the concern is that an Applicant’s 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.)

Applicant accumulated ten debts totaling \$32,415. Shortly before his hearing, he made a modest effort to address his debts. As noted, none of his SOR debts have been resolved insofar as being paid, settled, or successfully disputed with supporting documentation of same. AG ¶ 19(a): “inability or unwillingness to satisfy debts” and AG ¶ 19(c): “a history of not meeting financial obligations” apply.

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 conduct does not warrant full application of AG ¶ 20(a) because there is more than one delinquent debt and his financial problems are not isolated. Therefore, his debt is "a continuing course of conduct" under the Appeal Board's jurisprudence. See ISCR Case No. 07-11814 at 3 (App. Bd. Aug. 29, 2008) (citing ISCR Case No. 01-03695 (App. Bd. Oct. 16, 2002)).

Under AG ¶ 20(b), Applicant does not receive credit under this mitigating condition. He did not offer evidence of any condition beyond his control that led to his financial problems. Furthermore, to receive full credit under this mitigating condition, Applicant has to demonstrate that he acted responsibly under the circumstances. There is no evidence that Applicant remained in contact with his creditors or tried to make minimum payments until recently.<sup>1</sup>

AG ¶ 20(c) is not applicable because Applicant did not seek financial counseling. Likewise, there is not sufficient evidence in the record to establish full mitigation under AG ¶ 20(d).<sup>2</sup> Applicant offered little or no evidence that he had made or is making a

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<sup>1</sup> "Even if Applicant's financial difficulties initially arose, in whole or in part, due to circumstances outside his 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 maintained contact with his creditors and attempted to negotiate partial payments to keep his debts current.

<sup>2</sup> 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

good-faith effort to repay his creditors or otherwise resolve his debts. Applicant receives some credit for attempting to make modest payments on several of his debts; however, these efforts fall into the category of “too little too late.” His individual and collective efforts are not indicative of a “good-faith” effort to repay his debts. AG ¶ 20(e) is not applicable. Although Applicant claims to have disputed several SOR debts, he did not produce documentation supporting the basis of his disputes or documentation indicating that his disputes were successful.

## **Personal Conduct**

Under Guideline E, the concern is that conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process. (AG ¶ 15.)

AG ¶ 16 describes two conditions that could raise a security concern and may be disqualifying in this case:

- (a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities; and
- (e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing, ....

The SOR alleges that Applicant falsified his November 2010 e-QIP seven times by failing to provide full, complete, or truthful answers. Applicant's explanation that his failure to provide such information was “not deliberate,” that he was under a “lot of pressure,” or that he was “in a hurry,” or that “the computer would give me problems” is simply not credible. His debts and past employment problems were significant enough for him to remember them when completing an e-QIP. His explanations are insufficient to overcome his obligation to tell the complete truth during the security clearance vetting

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some other good-faith 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 he or she relied on a legally available option 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)).

process. The Government established through the evidence presented the disqualifying conditions in AG ¶¶ 16(a) and 16(e).

Six personal conduct mitigation conditions under AG ¶ 17 are potentially applicable:

- (a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;
- (b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;
- (c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;
- (d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;
- (e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress; and
- (f) the information was unsubstantiated or from a source of questionable reliability.

A statement is false when it is made deliberately -- knowingly and willfully. An omission of relevant and material information is not deliberate if the person genuinely forgot about it, inadvertently overlooked it, misunderstood the question, or genuinely thought the information did not need to be reported. Here, Applicant knew of his past employment and financial problems and chose not to disclose them. Had Applicant's information been relied upon without verification, he may well have successfully vetted for a security clearance. Regardless of the reason Applicant chose not to be forthcoming, the process does not allow for applicants to pick and choose which answers they will answer truthfully. When applicants lie on their security clearance applications, they seriously undermine the process, as Applicant did in this case. I find that none of the mitigating conditions fully apply.<sup>3</sup>

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<sup>3</sup> The Appeal Board has cogently explained the process for analyzing falsification cases, stating:

- (a) when a falsification allegation is controverted, Department Counsel has the burden of proving falsification; (b) proof of an omission, standing alone, does not establish or prove

## 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 the guidelines 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 indebtedness is ongoing and his limited efforts to address his indebtedness are insufficient to overcome the security concerns raised. His deliberate failure to disclose information on his security clearance application is serious, recent, and not mitigated. As such, I have concerns about his current ability or willingness to comply with laws, rules, and regulations. After weighing the disqualifying and mitigating conditions, and all the facts and circumstances, in the context of the whole-person concept, I conclude he has not mitigated security concerns pertaining to financial considerations and personal conduct.

I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my careful consideration of the whole-person factors and supporting evidence, my application of the pertinent factors under the adjudicative process, and my interpretation of my responsibilities under the adjudicative guidelines. Applicant has not fully mitigated or overcome the Government's case. For the reasons stated, I conclude he is not eligible for access to classified information.

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an applicant's intent or state of mind when the omission occurred; and (c) a Judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning the applicant's intent or state of mind at the time the omission occurred. [Moreover], it was legally permissible for the Judge to conclude Department Counsel had established a prima facie case under Guideline E and the burden of persuasion had shifted to the applicant to present evidence to explain the omission.

ISCR Case No. 03-10380 at 5 (App. Bd. Jan. 6, 2006) (citing ISCR Case No. 02-23133 (App. Bd. June 9, 2004)).



## 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.j.:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a. – 2.g.:	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. Clearance is denied.

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ROBERT J. TUIDER  
Administrative Judge