



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



In the matter of:	)	
	)	
[Redacted]	)	ISCR Case No. 11-13552
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Chris Morin, Esq., Department Counsel  
For Applicant: *Pro se*

06/19/2013

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**Decision**

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FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guideline F (Financial Considerations). Eligibility for access to classified information is denied.

**Statement of the Case**

Applicant submitted a security clearance application on August 3, 2011. On January 29, 2013, the Department of Defense (DOD) sent him a Statement of Reasons (SOR) alleging security concerns under Guideline F. DOD acted 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) implemented by DOD on September 1, 2006.

Applicant received the SOR on February 6, 2013; answered it in an undated document; and requested a hearing before an administrative judge. Department Counsel was ready to proceed on March 18, 2013, and the case was assigned to an administrative judge on March 28, 2013. Scheduling of the hearing was delayed by budget constraints and the unavailability of video teleconference equipment at the

location where Applicant lives and works. The case was reassigned to me on May 8, 2013. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on May 15, 2013, scheduling the hearing for June 5, 2013. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 5 were admitted in evidence without objection. Applicant testified, presented the testimony of one witness, and submitted Applicant's Exhibits (AX) A through C, which were admitted without objection. I kept the record open until June 14, 2013, to enable Applicant to submit additional documentary evidence. He timely submitted AX D through K, which were admitted without objection. Department Counsel's comments regarding AX D through K are attached to the record as Hearing Exhibit I. DOHA received the transcript (Tr.) on June 17, 2013.

### **Findings of Fact**

In his answer to the SOR, Applicant admitted all the allegations in the SOR. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 31-year-old design engineer employed by a defense contractor since November 2010. He received an associate's degree from a technical school in October 2000. He has worked for defense contractors since November 2000. He received a security clearance in February 2001, but it expired and was not renewed because he was in a position that did not require a clearance. He is now seeking to renew his clearance. (Tr. 8-9.)

Applicant's financial problems began when his ex-girlfriend, with whom he rented a home and shared expenses, left him in June 2007. He was responsible for payments on the lease until it expired in April 2008. (GX 2 at 18.) He estimated that his monthly living expenses increased by \$800 or \$900 when he became solely responsible for them. (Tr. 52.) He was laid off for about four weeks in late 2009. (Tr. 50.) He was unable to pay the federal income tax of \$912 he owed for 2008, but it has since been collected in full by applying his refund for 2012. (AX E.)

Applicant testified that he stopped making payments on his delinquent debts shortly after he and his ex-girlfriend separated. He did not contact any of his creditors. The attorneys for the creditor alleged in SOR ¶ 1.a contacted him, and they negotiated a payment agreement. (Tr. 55-56.) Between June 2008 and January 2009, Applicant made one \$500 payment and six \$418 payments on the \$5,556 judgment alleged in SOR ¶ 1.a. (AX A.) This debt has been reduced to about \$1,024. (GX 5 at 27.)

Applicant married in February 2010. In December 2011, his wife gave birth to twins. She was unable to work for about two months before the birth of the twins and about three months afterwards. (Tr. 88.) She is now working part time. Applicant and his wife work flexible schedules so that one of them can take care of the children, because they cannot afford child care. (Tr. 46-47.)

Applicant's financial problems were complicated when another individual filed a federal tax return in his name for tax year 2011. The Internal Revenue Service (IRS)

has verified the identity theft, and he was required to return a refund check to the IRS. Separate from the identity theft, he owes \$2,606 for tax year 2011, and he has contacted the IRS to arrange a payment plan. However, he has not yet reached an agreement with the IRS. (Tr. 44-45; AX D; AX K.)

On April 15, 2013, Applicant filed a petition for Chapter 7 bankruptcy. The meeting of creditors was scheduled for May 23, 2013, and the deadline for objections or challenges to the dischargeability of debts is July 22, 2013. Applicant listed assets of \$38,747 and liabilities of \$64,866. (GX 5; AX B.)

At the hearing, Applicant testified that all the debts alleged in the SOR were included in his Chapter 7 bankruptcy petition, except the debts alleged in SOR ¶¶ 1.d, 1.f, and 1.j. (Tr. 54-76.) After the hearing, Applicant submitted a statement that he had consulted with his bankruptcy attorney, who assured him that all delinquent debts, including those alleged in SOR ¶¶ 1.d, 1.f, and 1.j, were included in the bankruptcy.<sup>1</sup> His student loans (which are current) and his federal income tax debt (which is not alleged in the SOR) are not included. (AX K.) Applicant has completed the financial counseling required by the bankruptcy court. (AX F; AX G.)

Schedule J of Applicant's bankruptcy petition reflects that his monthly family income is \$4,395 and his expenses are \$4,867, leaving a monthly shortfall of about \$472. (GX 5 at 37.) He testified that, after filing his petition, he and his wife were able to eliminate the \$600 child care expense, leaving a net monthly remainder of about \$100. (Tr. 77.)

Applicant's supervisor has known him for about six years, the first three as a coworker and the last three as his supervisor. They have daily contact. Applicant's supervisor regards him as truthful, punctual, reliable, and dedicated to his family. (Tr. 32-36.) He has given Applicant top ratings for dependability and overall performance on his last two annual performance reviews. (AX C.)

## Policies

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). 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." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants 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.

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<sup>1</sup> Absent fraud, in a no-asset bankruptcy, all unsecured, nonpriority debts are discharged, even when they are not listed on the bankruptcy schedule. See *Judd v. Wolfe*, 78 F.3d 110, 114 (3d Cir. 1996); *Francis v. Nat'l Revenue Service, Inc.*, 426 B.R. 398 (Bankr. S.D. FL 2010).

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the AG. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines in conjunction with an evaluation of the whole person. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available and reliable information about the person, past and present, favorable and unfavorable.

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 about potential, rather than actual, risk of compromise of classified information.

Clearance decisions must be made "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. Thus, a decision to deny a security clearance is merely an indication the applicant 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 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability. See ISCR Case No. 92-1106 at 3, 1993 WL 545051 at \*3 (App. Bd. Oct. 7, 1993).

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 burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). "[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 SOR alleges ten delinquent debts totaling about \$24,240. The concern under this guideline 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.

This concern is broader than the possibility that an individual might knowingly compromise classified information in order to raise money. It encompasses concerns about an individual's self-control, judgment, and other qualities essential to protecting classified information. An individual who is financially irresponsible may also be irresponsible, unconcerned, or negligent in handling and safeguarding classified information. See ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012).

Applicant's admissions, corroborated by his credit reports and bankruptcy petition, establish two disqualifying conditions under this guideline: AG ¶ 19(a) ("inability or unwillingness to satisfy debts") and AG ¶ 19(c) ("a history of not meeting financial obligations"). The following mitigating conditions are potentially relevant:

AG ¶ 20(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;

AG ¶ 20(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;

AG ¶ 20(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

AG ¶ 20(d): the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

AG ¶ 20(e) (reasonable basis to dispute a debt) and AG ¶ 20 (f) (unexplained affluence) are not relevant. Applicant has not disputed any of the debts, and there are no issues regarding unexplained affluence.

AG ¶ 20(a) is partially established. Applicant's delinquent debts are numerous and ongoing, but the domestic break-up that began his financial problems is unlikely to recur.

AG ¶ 20(b) is not fully established. Applicant's domestic break-up in 2007, a short period of unemployment in 2009, the inability of his wife to work because of complications during her pregnancy, and the delay in resolving his income tax debt because of identity theft were conditions beyond his control. However, he has not acted responsibly. He did not contact any of his creditors when he began to have difficulty in meeting his financial obligations. Even though he made payments on the debt in SOR ¶ 1.a for several months, the payment agreement was initiated by the creditor, not Applicant, and he made no further payments on the debt after January 2009.

AG ¶ 20(c) is established. Applicant has completed the financial counseling required by the bankruptcy court. Absent any unexpected or unusual events, it is likely that his debts will be discharged.

AG ¶ 20(d) is not established. Good faith within the meaning of this mitigating condition means acting in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation. ISCR Case No. 99-0201, 1999 WL 1442346 at \*4 (App. Bd. Oct. 12, 1999). Evidence of past irresponsibility is not mitigated by payment of debts only under pressure of qualifying for a security clearance. While bankruptcy is a legally permissible remedy and probably a prudent course of action in this case, rendering a debt uncollectible does not constitute a good-faith effort to resolve that debt. See ISCR Case No. 07-06841 at 4. (App. Bd. Dec. 19, 2008). An applicant must do more than merely show that he or she relied on a legally available option such as bankruptcy in order to establish this mitigating condition. ISCR Case No. 03-20327 (App. Bd. Oct. 26, 2006). Applicant is relying solely on his bankruptcy petition to resolve the delinquent debts alleged in the SOR.

### **Whole-Person Concept**

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. In applying the whole-person concept, an 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. An 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.

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.

Applicant has held a security clearance and worked for defense contractors for many years. To his credit, he has kept his student loan payments current, and he is working with the IRS to resolve his tax debt. However, he did not take meaningful or responsible steps to resolve any of the delinquent debts alleged in the SOR until he needed a security clearance.

After weighing the disqualifying and mitigating conditions under Guideline F, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns raised by his financial difficulties. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

### **Formal Findings**

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline F (Financial Considerations): AGAINST APPLICANT

Subparagraphs 1.a-1.j:

Against Applicant

### **Conclusion**

I conclude that 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.

LeRoy F. Foreman  
Administrative Judge