



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



In the matter of:

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Applicant for Security Clearance

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ISCR Case No. 07-05352

Appearances

For Government: Gina L. Marine, Esquire, Department Counsel
For Applicant: *Pro Se*

April 10, 2008

Decision

HARVEY, Mark W., Administrative Judge:

Applicant failed to mitigate security concerns regarding Guideline F (Financial Considerations). Clearance is denied.

Statement of the Case

On June 3, 2005, Applicant submitted a Security Clearance Application (SF 86).¹ On December 6, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to him,² pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2,

¹Item 4. There is no allegation of falsification of the 2005 SF 86.

²Item 1 (Statement of Reasons (SOR), dated Dec. 6, 2007). Item I is the source for the facts in the remainder of this paragraph unless stated otherwise.

1992, as amended, modified and revised.³ The SOR alleges security concerns under Guideline F (Financial Considerations). 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 him, and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

On December 28, 2007, Applicant responded to the SOR allegations, and elected to have his case decided on the written record in lieu of a hearing (Item 3, notarized January 2, 2008). A complete copy of the file of relevant material (FORM), dated February 14, 2008, was provided to him, and he was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation.⁴ Applicant provided a two-page letter with nine enclosures. Applicant's submission was received at DOHA on April 1, 2008. Department counsel did not object to consideration of the documents Applicant submitted in response to the FORM. The case was assigned to me on April 7, 2008.

Findings of Fact

As to the SOR's factual allegations, Applicant admitted responsibility for some debts and disputed others in his response to the SOR. His admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence of record, I make the following findings of fact.

Applicant is 46 years old.⁵ He married his current spouse in 1981. He served on active duty from 1982 to 2004, retiring in the grade of E-7. He served a tour in Korea in 2000-2001 and a tour in Iraq in 2003-2004 (Item 6 at 3). He held a security clearance since 1982 without security violations. After retirement he was hired by a contractor. His spouse was unemployed from 2001 to 2003 (Item 6 at 3). Her unemployment, family moves to a new home in a different state, making payments on two residences and other retirement expenses caused their financial problems (Item 6 at 3).

Financial Considerations

The SOR lists eight delinquent debts totaling about \$24,000. He disputed a state tax lien for taxes from 1992 because he was on active duty and not a resident of that

³On Aug. 30, 2006, the Under Secretary of Defense (Intelligence) published a memorandum directing application of revised Adjudicative Guideline to all adjudications and other determinations made under the Directive and Department of Defense (DoD) Regulation 5200.2-R, *Personnel Security Program* (Regulation), dated Jan. 1987, as amended, in which the SOR was issued on or after Sep. 1, 2006. The revised Adjudicative Guidelines are applicable to Applicant's case.

⁴Defense Office of Hearings and Appeals (DOHA) transmittal letter, is dated Feb. 15, 2008; and Applicant's receipt is signed and dated Feb. 22, 2008. The DOHA transmittal letter informed Applicant that he had 30 days after Applicant's receipt to submit information.

⁵Item 4 (2005 security clearance application) is the source for the facts in this paragraph, unless stated otherwise.

state. On March 5, 2008, he paid the remaining creditors amounts ranging from \$50 to \$150 for a total of \$600. He made sufficient payments on his debt to the Army and Air Force Exchange System (AAFES) to satisfy AAFES. However, he made insufficient progress resolving six debts totaling about \$16,000. Specific information about each of the eight SOR debts listed in ¶ 1 follows:

a. State tax debt of \$2,250 filed on January 24, 2000, for tax year 1992. Applicant disputed the debt because he was a non-resident of that state on military orders. In his response to the FORM, he said he recently received the form to apply for a non-resident exemption. He did not provide a copy of the completed application for the non-resident exemption. The record establishes he was on active duty from 1992 to 1994 when he served in the state with the tax lien. He was not born in the state with the tax lien, did not attend college or marry in the state with the tax lien, and did not retire in that state. I conclude he was not a resident of the state with the tax lien, and this debt is unsubstantiated.

b. Financial debt of \$1,440 charged off in July 2001. In his response to the FORM, he said he agreed to pay the creditor \$50 monthly. On March 5, 2008, he paid the creditor \$50 (Response to FORM at Encl 2).

c. Financial debt of \$984 charged off or placed for collection in about January 2002. In his response to the FORM, he said he agreed to pay the creditor \$50 monthly. On March 5, 2008, he paid the creditor \$50 (Response to FORM at Encl 2).

d. Financial debt of \$1,082 charged off or placed for collection in about August 2003. In his response to the FORM, he said he agreed to pay the creditor \$150 and then \$50 monthly. On March 5, 2008, he paid the creditor \$100 (Response to FORM at Encl 2).

e. Financial debt of \$2,312 charged off or placed for collection in about December 2003. In his response to the FORM, he said he agreed to pay the creditor \$50 monthly. On March 5, 2008, he paid the creditor \$50 (Response to FORM at Encl 2).

f. Financial debt of \$7,718 charged off or placed for collection in about February 2004.⁶ In his response to the FORM, he said he agreed to pay the creditor \$100 monthly. On March 5, 2008, he paid the creditor \$100 (Response to FORM at Encl 2).

g. Army and Air Force Exchange System (AAFES) financial debt for \$5,022 charged off or placed for collection in about June 2005. From August 2005 to December 2005, he made five payments. In June 2007, he made a \$150 payment. On March 5, 2008, he paid AAFES \$150 (Response to FORM at Encl 2). AAFES has access to

⁶ On March 11, 2002, he wrote the creditor disputing \$800 because parts were missing from a bed his wife received on August 8, 2000 (Item 3 at 13, 16). A letter from the creditor, dated July 9, 2002, indicated the debt amount for furniture was \$3,610, and the debt was filed as disputed (Item 3 at 11). A letter dated November 29, 2002 from the creditor noted the claim that side rails to a water bed were not delivered, and sought further documentation or an estimate to repair the damage (Item 3 at 9).

Applicant's retirement pay, and if dissatisfied with his payments can readily obtain additional funds. I find For Applicant on this debt.

h. Financial debt for \$3,518 charged off or placed for collection in about June 2007, he made a \$100 payment. On March 5, 2008, he paid the creditor \$100 (Response to FORM at Encl 2).

Applicant and his spouse receive about \$6,355 monthly in net pay.⁷ Their expenses such as rent, food, clothing and utilities total about \$4,800 monthly. \$1,500 monthly remains for debt payments. Applicant met with a credit counselor and received counseling about his debts (Item 3 at 2).

Applicant had ample warning about the security concerns of his delinquent debt. On May 16, 2006, an Office of Personnel Management (OPM) investigator interviewed Applicant concerning his delinquent debts (Item 6 at 3). On June 21, 2007, Applicant responded to interrogatories from DOHA concerning his delinquent debts (Item 5). The SOR is dated December 6, 2007. Other than the payments made on March 5, 2008, he has done little to resolve the six nontax, non-AAFES related delinquent debts.

Policies

When evaluating an Applicant's suitability for a security clearance, the Administrative Judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful 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, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The Administrative Judge's over-arching adjudicative goal is a fair, impartial and common sense 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. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

⁷ Item 5 at 6 is the source for the facts in this paragraph.

In the decision-making process, the Government has the initial burden of establishing controverted facts alleged in the SOR by “substantial evidence,”⁸ demonstrating, in accordance with the Directive, that it is not clearly consistent with the national interest to grant or continue an applicant’s access to classified information. Once the Government has produced substantial evidence of a disqualifying condition, the burden shifts to Applicant to produce evidence “to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and [applicant] has the ultimate burden of persuasion as to obtaining a favorable clearance decision.” Directive ¶ E3.1.15. 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).⁹

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

Section 7 of Executive Order 10865 provides that 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* Executive Order 12968 (Aug. 2, 1995), Section 3.

Analysis

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, including those described briefly above, I conclude the relevant security concern is under Guideline F (Financial Considerations). AG ¶ 18 articulates the security concern relating to financial problems:

Failure or inability to live within one’s means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or

⁸ See Directive ¶ E3.1.14. “Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the record.” ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). “This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent [a Judge’s] finding from being supported by substantial evidence.” *Consolo v. Federal Maritime Comm’n*, 383 U.S. 607, 620 (1966). “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).

⁹ “The Administrative Judge [considers] the record evidence as a whole, both favorable and unfavorable, evaluate[s] Applicant’s past and current circumstances in light of pertinent provisions of the Directive, and decide[s] whether Applicant ha[s] met his burden of persuasion under Directive ¶ E3.1.15.” ISCR Case No. 04-10340 at 2 (App. Bd. July 6, 2006).

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 ¶ 19 provides two Financial Considerations Disqualifying Conditions that could raise a security concern and may be disqualifying in this case, "(a) inability or unwillingness to satisfy debts," and "(c) a history of not meeting financial obligations."

Applicant's history of delinquent debt is documented in his credit report, his OPM interview, his DOHA interrogatories, his SOR response and his FORM response. He did not make sufficient progress on six of his eight SOR-listed debts. Those six debts were delinquent for several years. The government established the disqualifying conditions in AG ¶¶ 19(a) and 19(c).

Five Financial Considerations Mitigating Conditions under AG ¶¶ 20(a)-(e) 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 became aware of the security significance of his financial problems on May 16, 2006, when an OPM investigator interviewed him concerning his delinquent debts. The importance of resolving his debts was reinforced when he received the SOR in December 2007. However, his efforts to resolve his debts were insufficient. He received financial counseling, and made \$600 in payments on March 5, 2008. However, he had more than \$600 remaining each month from his family's income that remained

each month that could have been used beginning months before he received the FORM to pay down his delinquent debts.

Applicant agreed he was responsible for the debts listed on the SOR. He currently has significant unresolved debt. His overall conduct with his creditors casts doubt on his current reliability, trustworthiness, and good judgment. There are not clear indications his financial problems are being resolved or are under control. He did not establish that he made a good faith effort to repay or resolve debts totaling about \$16,000, as listed in SOR ¶¶ 1.b, 1.c, 1.d, 1.e, 1.f and 1.h.

Applicant raised three circumstances beyond his control which partially mitigate security concerns: (1) his wife was unemployed from 2001 to 2003; (2) his family needed to move after he retired from the Army; and (3) there were other retirement expenses such as maintenance of two households at the same time. However, he did not show sufficient responsibility under the circumstances to mitigate security concerns. He and his wife have both been employed for more than two years after he retired, and should be able to show a consistent track record of delinquent debt reduction. His financial problems are continuing and likely to recur. He should have been more diligent and made greater efforts to resolve his delinquent debts. He has not carried his burden of proving his financial responsibility. Based on my evaluation of the record evidence as a whole, I conclude no mitigating conditions fully apply.

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 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) 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).

Applicant's record of good employment weighs in his favor. He served 22 years on active duty and honorably retired from the Army. His active service included a combat tour in Iraq. He held a security clearance for 22 years without a security violation. He received financial counseling. These factors show some responsibility, rehabilitation, and mitigation.

The evidence against mitigating Applicant's conduct is more substantial. Applicant became aware of the security significance of his financial problems almost two years ago when an OPM investigator interviewed him concerning his delinquent debts. However, his efforts to resolve his debts were insufficient when compared to available income that he could have used to address his delinquent debt. He did not adequately apply the financial counseling for timely resolution of his debts. Although he made \$600 in payments on March 5, 2008, he had additional money left over that he could have used beginning months before he received the FORM to pay down or make much greater progress on his delinquent debts. In sum, he did not make sufficient efforts to repay or resolve debts totaling about \$16,000, as listed in SOR ¶¶ 1.b, 1.c, 1.d, 1.e, 1.f and 1.h.

After weighing the disqualifying and mitigating conditions, and all the facts and circumstances, in the context of the whole person, I conclude he has not mitigated the security concerns pertaining to financial considerations.

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"¹⁰ and supporting evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under the Guidelines. Applicant has not mitigated or overcome the government's case. For the reasons stated, I conclude he is not eligible for access to classified information.

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
Subparagraph 1.a:	For Applicant
Subparagraphs 1.b to 1.f:	Against Applicant
Subparagraph 1.g:	For Applicant
Subparagraph 1.h:	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 or continue eligibility for a security clearance for Applicant. Clearance is denied.

Mark W. Harvey
Administrative Judge

¹⁰See ISCR Case No. 04-06242 at 2 (App. Bd. June 28, 2006).