



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



In the matter of:	)	
	)	
[Name Redacted]	)	ISCR Case No. 15-01253
	)	
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Nicole A. Smith, Esquire, Department Counsel  
For Applicant: *Pro se*

02/09/2016

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**Decision**

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HOGAN, Erin C., Administrative Judge:

On August 21, 2015, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline F, Financial Considerations. 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 after September 1, 2006.

On September 14, 2015, Applicant answered the SOR and requested a decision on the record. Department Counsel issued a File of Relevant Material (FORM) on November 19, 2015. On December 3, 2015, Applicant responded to the FORM and provided additional documents. His response to the FORM and attached documents are admitted as Item 7. Department Counsel indicated no objection to Applicant's Response to FORM on December 18, 2015. (Item 8) On December 31, 2015, the FORM was forwarded to the Hearing Office and assigned to me on January 5, 2016. Based upon a review of the pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

## **Rulings on Evidence**

Item 4 of the FORM is a portion of the Report of Investigation (ROI) from the background investigation of Applicant. It is a summary of Applicant's Personal Subject Interview completed by the investigator conducting his background investigation on November 9, 2012. It is unsworn and unauthenticated. DODD 5220.6, Enclosure 3, ¶ E3.1.20 states, "An ROI may be received with an authenticating witness provided it is otherwise admissible under the Federal Rules of Evidence." (see ISCR Case No. 11-13999 (App. Bd., February 3, 2014)).

Although Applicant, who is representing himself, has not raised the issue via an objection, I am raising it *sua sponte* because Item 4 is not properly authenticated. Applicant's failure to mention this issue in a response to the FORM is not a knowing waiver of the rule because he more than likely was unaware of the rule. Waiver means "the voluntary relinquishment or abandonment – express or implied – of a legal right or advantage, the party alleged to have waived a right must have had both knowledge of the existing right and the intention of forgoing it." *Black's Law Dictionary*, 1717 (Bryan A. Garner, editor-in-chief, 9<sup>th</sup> ed., West 2009).

While Department Counsel mentions the authentication requirement of ¶ E3.1.20 of the Directive in Footnote 2 of the FORM without directly citing it, I cannot conclude Applicant expressly waived this rule because he did not mention it in his response to the FORM. In accordance with the Directive, Enclosure 3, ¶ E3.1.20, Item 4 is not admissible and will not be considered in this decision.

## **Findings of Fact**

In his response to the SOR, Applicant admits the SOR allegations. (Item 2)

Applicant is an employee of a DOD contractor seeking to maintain his security clearance. He has worked for his current employer since August 2003. He is a high school graduate. He served on active duty in the U.S. Navy from June 1982 until he was honorably retired in July 2003. He is divorced and has several adult children. (Item 3)

On July 9, 2012, Applicant submitted an Electronic Questionnaire for Investigation Processing (e-QIP). In response to Section 26 – Delinquency Involving Routine Accounts, Applicant listed several delinquent accounts. (Item 3, section 26) A subsequent background investigation revealed the following delinquent accounts which are alleged in the SOR: a \$36,945 account that was charged off in August 2009 (SOR ¶ 1.a: Item 5 at 2; Item 6 at 4-5); a \$31,710 second mortgage that was charged-off in May 2010 (SOR ¶ 1.b: Item 5 at 2; Item 6 at 10, 12); and a \$15,166 credit card account placed for collection in November 2009 (SOR ¶ 1.c: Item 5 at 2; Item 6 at 6).

In his Response to the SOR and the FORM, Applicant explains how his financial problems began. Around 2006, Applicant's then wife received notice that her pay was being reduced. At the same time, Applicant's overtime hours were reduced. The

account alleged in SOR ¶ 1.a was used by his wife to cover their living expenses. Applicant claims he was unaware that this was happening. Between 2008 to 2011, his wife underwent surgery. After the surgery, she had plastic surgery to repair some of the side effects of the surgery. The credit card alleged in SOR ¶ 1.c was used to pay for this surgery. (Item 2; Item 7)

Because of financial difficulties, Applicant and his wife attempted to sell their home. This occurred during the housing market crash. They sold their home at a short sale in May 2010. They were hoping to pay their debts with the proceeds, but ended up taking a \$35,000 loss. The second mortgage remained outstanding. The debt alleged in SOR ¶ 1.b is the amount owed on the second mortgage. (Item 2 at 10 - 38)

After the sale of the home, Applicant and his wife separated. Their divorce was final on March 17, 2011. (Item 2 at 86) Applicant's ex-wife filed for bankruptcy. Applicant was required to pay off his ex-wife's car loan because he was a co-signer on the loan. In April 2012, his wages were garnished in order to pay off the car loan. The amount was \$5,613.82. (Item 2 at 90-98) This debt was not alleged in the SOR, but is discussed because Applicant raised it and it is considered as matters of extenuation and mitigation.

Applicant also paid \$8,000 in back taxes for 2009 and 2010, because of a filing error by a tax preparer. He entered into an installment agreement which began in October 2012. Applicant's income tax refunds were applied to the debt. The debt was paid by March 2013. (Item 2 at 99-123) This debt was not alleged in the SOR, but is discussed because Applicant raised it and it is considered as matters of extenuation and mitigation.

On his 2012 e-QIP application, Applicant mentioned he was paying some of his debts through a debt repayment agreement. (Item 3, section 26) He did not provide a copy of his debt repayment agreement or proof that he was making payments towards the repayment agreement (such as receipts, cancelled checks, etc.) In his answer to the SOR, Applicant states he paid the fees in his debt repayment agreement, but never received any updates when he tried to reach them. The debt repayment firm went bankrupt. After he discovered the debt repayment firm went bankrupt, he attempted to contact the creditors who were collecting the debts. When he finally reached them, he could not afford the payments that the creditors required to settle the debts. (Item 2 at 7)

Applicant decided to file for Chapter 13 bankruptcy because he believed he had no other choice. He retained an attorney to represent him in the bankruptcy proceeding. His first consultation was on August 13, 2015. In December 2015, he paid a retainer fee and the fee for filing for Chapter 13 bankruptcy. (Item 2 at 124-144; Item 7 at 3)

In his Response to the FORM, Applicant stated that he paid his attorney his retainer fee on December 11, 2015. He anticipates the court process will begin soon. He believes he is doing everything in his power to resolve his debts. He attended

consumer debt counseling. He has set up a budget. He intends to pay \$1,800 a month during the five year repayment plan. (Item 7)

Applicant's bankruptcy attorney provided a letter, dated December 1, 2015, verifying that Applicant retained him to file a Chapter 13 bankruptcy. They hope the Court will accept a 100% payment plan. The three debts alleged in the SOR are among the 14 debts included in the plan. (Item 7 at 3) Applicant did not provide a copy of his Chapter 13 bankruptcy filing.

Applicant did not provide any character references, performance evaluations, or awards that could be considered under the whole-person.

### **Policies**

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which must be considered when determining 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 overarching adjudicative goal is a fair, impartial and commonsense 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.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." The applicant has the ultimate burden of persuasion as to obtaining a favorable security decision.

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* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

## **Analysis**

### **Guideline F, Financial Considerations**

The security concern relating to the guideline for Financial Considerations 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.

The guideline notes several disqualifying conditions that could raise security concerns. I find AG ¶19(a) (an inability or unwillingness to satisfy debts) and AG ¶19(c) (a history of not meeting financial obligations) apply to Applicant’s case. Applicant encountered financial problems since about 2006. The SOR alleges approximately \$52,030 in delinquent credit card debt and a \$31,710 charged off second mortgage. The total amount of the debt is \$83,740. These debts became delinquent in late 2009 or 2010 and remain unresolved. Both AG ¶19(a) and AG ¶19(c) apply.

An individual who is financially irresponsible may also be irresponsible, unconcerned, or careless in their obligations to protect classified information. Behaving irresponsibly in one aspect of life provides an indication of how a person may behave in other aspects of life. A person’s relationship with her creditors is a private matter until evidence is uncovered demonstrating an inability or unwillingness to pay debts under agreed terms. Absent evidence of strong extenuating or mitigating circumstances, an applicant with a history of serious or recurring financial difficulties is in a situation of risk inconsistent with the holding of a security clearance. An applicant is not required to be debt free, but is required to manage his finances in such a way as to meet his financial obligations.

The Government's substantial evidence and Applicant's admissions raise security concerns under Guideline F. The burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the security concerns. (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. Sept. 22, 2005))

The guideline also includes examples of conditions that could mitigate security concerns arising from financial difficulties. The following mitigating conditions potentially apply:

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(a) does not apply. Applicant incurred the delinquent accounts alleged in the SOR more than five years ago. The debts were charged off or placed for collection in 2009 and 2010. While Applicant states that he enrolled in a debt repayment program, he did not provide a copy of his debt repayment agreement or any proof of payments made to the debt repayment company. Applicant recently decided to resolve his delinquent debts by filing for bankruptcy under Chapter 13. At the close of the record, he had not filed for bankruptcy. It is too soon to conclude that the Chapter 13 plan will resolve doubts about Applicant's reliability and trustworthiness considering the lengthy amount of time that Applicant has encountered financial problems. It is too soon to conclude that he will meet the terms of the Chapter 13 repayment plan.

AG ¶ 20(b) partially applies in that Applicant's financial problems were caused, in part, by a reduction of his wife's income, the loss of overtime hours, and eventually, Applicant's divorce in 2011. While Applicant claimed he attempted to resolve some of his debts through a debt repayment program, he provided no documentation of his debt repayment agreement or proof of any payments made towards the debt repayment agreement. He recently filed for Chapter 13 bankruptcy. Applicant is given partial credit

in that he is now attempting to deal with his financial situation after neglecting it for several years.

AG ¶ 20(c) partially applies in that Applicant attended financial counseling in conjunction with his Chapter 13 bankruptcy filing. However, it is too soon to conclude that his financial situation is now under control. At the close of the record, Applicant had not filed for bankruptcy and a repayment plan had not been approved by the bankruptcy court. A question remains as to whether Applicant will be able to meet the terms of the five year repayment plan under Chapter 13.

AG ¶ 20(d) partially applies because although not alleged in the SOR, Applicant resolved a tax debt and the balance of his ex-wife's automobile loan. The balance of the automobile loan is given less weight because Applicant's wages were garnished in order to resolve the debt. Applicant is making an effort towards resolving his delinquent debts by filing for bankruptcy. However, at the close of the record, the bankruptcy had not been filed and a payment plan had not been established. It is too soon to conclude that Applicant will be able to follow the terms of the Chapter 13 repayment plan. For this reason AG ¶ 20(d) is given less weight.

### **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) 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.

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 requesting an administrative determination, Applicant chose to rely on the written record. However, he failed to submit sufficient information or evidence to supplement the record with relevant and material facts regarding his circumstances and facts that would mitigate financial considerations security concerns. While Applicant provided evidence that he intends to file for bankruptcy, the bankruptcy had not been filed at the close of the record and no repayment plan was established by the bankruptcy court. It is unknown whether Applicant has sufficient income to meet his

financial obligations including the payments towards the Chapter 13 repayment plan. Applicant did not mitigate the concerns arising from financial considerations.

The determination of an individual's eligibility for a security clearance is not a once in a lifetime occurrence, but is based on applying the factors, both disqualifying and mitigating to the evidence presented. Under Applicant's current circumstances, the granting of a security clearance is not warranted. In the future, if Applicant meets the terms of his Chapter 13 repayment agreement and establishes a track record of resolving his delinquent debts, he may demonstrate persuasive evidence of his security worthiness.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I considered Applicant's employment record. I considered his over 21 years of active duty service with the U.S. Navy. Applicant's decision to file for Chapter 13 bankruptcy was recent. It is too soon to conclude that he will successfully meet the terms of the Chapter 13 repayment plan. In the future, he may be able to demonstrate a track record of resolving his financial obligations. It is too soon to make this conclusion at this point. The security concerns raised under financial considerations are not mitigated.

### **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.c:	Against Applicant

### **Conclusion**

In light of all of the circumstances presented by the record in this case, 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.

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ERIN C. HOGAN  
Administrative Judge