



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 14-03285

Appearances

For Government: Pamela Benson, Esq., Department Counsel
For Applicant: John Ruffolo, Esq.

04/20/2015

Decision

HARVEY, Mark, Administrative Judge:

Applicant's statement of reasons (SOR) alleges seven delinquent or charged-off debts totaling \$1,795,085. Four mortgage debts on three condominiums were owed to the same creditor and accounted for \$1,789,824 of this debt. The creditor-bank foreclosed on the three condominiums. Applicant received IRS Form 1099-As on two of the condominium debts. The creditor obtained a \$500,000 judgment on the third condominium debt, and this debt is unresolved. The other six SOR debts are resolved. Applicant did not make sufficient progress resolving this \$500,000 judgment. Financial considerations security concerns are not mitigated. Eligibility for access to classified information is denied.

Statement of the Case

On May 23, 2013, Applicant signed and submitted an Electronic Questionnaires for Investigations Processing (e-QIP) (SF 86). (GE 1) On August 7, 2014, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued an SOR to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive),

dated January 2, 1992, as amended; and the adjudicative guidelines (AG), which became effective on September 1, 2006.

The SOR alleged security concerns under Guideline F (financial considerations). (HE 2) The SOR detailed reasons why the DOD CAF could not make the affirmative finding under the Directive that it is clearly consistent with national security to grant or continue a security clearance for Applicant and recommended referral to an administrative judge to determine whether Applicant's clearance should be granted, continued, denied, or revoked. (HE 2)

On November 20, 2014, Applicant responded to the SOR. (HE 3) On February 10, 2015, Department Counsel was prepared to proceed. On February 24, 2015, DOHA assigned the case to me. On March 18, 2015, DOHA issued a notice of the hearing, setting the hearing for March 24, 2015. (HE 1) The hearing was held as scheduled using video teleconference. Applicant waived his right to 15 days of notice of the date, time, and place of the hearing. (Tr. 10-11) Department Counsel offered four exhibits into evidence, and Applicant offered two exhibits into evidence. (Tr. 12-13, 16-19; GE 1-4; AE A, B) There were no objections, and I admitted all proffered exhibits into evidence. (Tr. 16-19; GE 1-4; AE A, B) After his hearing, I received a complete copy of his March 19, 2015 credit report, which was admitted without objection. (AE C) On April 1, 2015, I received the transcript of the hearing.

Findings of Fact¹

In Applicant's SOR response, he admitted the allegations in SOR ¶¶ 1.a to 1.d. and 1.f and 1.g. He denied the allegation in SOR ¶ 1.e. He also provided extenuating and mitigating information. His admissions are accepted as findings of fact.

Applicant is 64 years old, and he has been working for a building supply company. (Tr. 30) He owns 90 percent of the building supply company, and his two daughters own the other ten percent. (Tr. 30, 32) He started the building supply company 15 years ago. (Tr. 31) The building supply company works in residential construction. (Tr. 48) He has owned another company for about five years. (Tr. 61) In 2014, Applicant made about \$90,000 from his building supply company. (Tr. 32, 52, 56) He also buys and sells real estate. (Tr. 59) His real estate-related company currently owns one lot, which was purchased for \$50,000 five years ago. (Tr. 62)

Applicant served in the Coast Guard from 1969 to 1973; and he received an honorable discharge. (GE 1) He is a disabled veteran, and his monthly take-home pay is about \$8,000. (Tr. 57) In 1976, he received a bachelor's degree in business. (Tr. 30) He has been married for 42 years, and he has two daughters. (Tr. 34) He seeks a security clearance to enable him to be a consultant on classified DOD contracts. (Tr. 33)

¹Some details have not been included in order to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

Financial Considerations

Applicant's SOR alleges seven debts totaling \$1,795,085 as follows: 1.a is a real estate mortgage debt for \$550,505; 1.b is a real estate mortgage debt for \$451,270 past due in the amount of \$59,911; 1.c is a real estate mortgage debt for \$386,094 past due in the amount of \$64,706; 1.d is a real estate mortgage debt for \$401,955; 1.e is a delinquent bank credit card debt for \$5,148; 1.f is a delinquent debt for \$62; and 1.g is a delinquent debt for \$51.

Applicant purchased three condominiums as investments in 2005, 2006, and 2007, utilizing mortgage financing from the same bank. (Tr. 20-21, 35) The fourth SOR mortgage was a line of credit secured by the condominium. (Tr. 21) The three mortgages each had a balloon payment requirement, and when the payment was due, Applicant asked the creditor to refinance; however, in 2010, the creditor wanted Applicant to pay down the mortgages or refinance with a different bank because the properties were appraised at a lower value than the amount owed on the mortgages or in other words, the mortgages were "underwater." (Tr. 22, 36-38) An oil spill in the area further suppressed economic activity in the area and the value of the condominiums declined. (Tr. 26) He rented the three properties; however, he said he lost about \$10,000 each year on each unit. (Tr. 36)

In 2010, Applicant stopped making payments to the creditor holding the mortgages on the condominiums to facilitate short sales of the properties; however, he continued to collect rent from his tenants. (Tr. 23, 66-67) Applicant presented a short-sale contract to the creditor; however, it was not accepted. (Tr. 24) Applicant had equity lines of credit on all of the condominiums. (Tr. 25)

The bank foreclosed on the three condominiums, and Applicant received two IRS Form 1099-As. (Tr. 27, 41) The 2011 1099-A shows a fair market value of \$67,900 and the lien balance outstanding of \$338,248. (Tr. 42) The 2013 1099-A shows a fair market value of \$440,000 and the balance outstanding of \$398,000. (Tr. 43) His credit report indicated a score of 747. (Tr. 28)

As for the condominium without an IRS Form 1099-A, Applicant initially borrowed \$550,000 (SOR ¶ 1.a), and as the condominium rapidly appreciated, he borrowed an additional \$400,000 on this condominium (SOR ¶ 1.d). (Tr. 39, 64-65) In 2012 or 2013, after the foreclosure, the creditor obtained a judgment against Applicant for \$500,000. (Tr. 40, 68) This judgment was not listed on his credit report. (Tr. 40) He did not make any payment to address the \$500,000 debt. (Tr. 46) He said he was willing to work with the creditor on the \$500,000 debt. (Tr. 54-55)

Applicant said the credit card debt in SOR ¶ 1.e for \$5,148 was owed to a creditor that was no longer in business. (Tr. 26, 47) It was a business debt owed by his building supply and construction company, and Applicant had no personal liability to pay it. (Tr. 51) The debts in SOR ¶¶ 1.f for \$62 and 1.g for \$51 were owed to a telephone company. (Tr. 26, 51) Applicant said he resolved the debts in SOR ¶¶ 1.f and 1.g by paying the debts. (Tr. 27)

Applicant paid off and refinanced his mortgage on his residence, and his car loans are current. (Tr. 28, 53) His monthly mortgage payment is about \$3,000. (Tr. 57) He said all of his debts are current (except for the \$500,000 judgment). (Tr. 52, 63) Applicant's March 19, 2015 TransUnion credit score is 747, and his March 19, 2015 Equifax credit score is 768, which are considered good or excellent scores. (AE A and B)

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, "no 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 applicant's 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.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These guidelines 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 overarching 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.

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 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 "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), § 3.1. Thus, nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination about applicant's allegiance, loyalty, or patriotism. It 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. 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

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 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 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." In ISCR Case No. 08-12184 at 7 (App. Bd. Jan. 7, 2010), the Appeal Board explained:

It is well-settled that adverse information from a credit report can normally meet the substantial evidence standard and the government's obligations under [Directive] ¶ E3.1.14 for pertinent allegations. At that point, the burden shifts to applicant to establish either that [he or] she is not responsible for the debt or that matters in mitigation apply.

(internal citation omitted). Applicant's history of delinquent debt is documented in his credit reports, SOR response, and hearing record. Applicant's SOR alleges seven delinquent or charged-off debts totaling \$1,795,085. He owned three condominiums that went to foreclosure when he stopped making payments on the mortgages. A creditor obtained a \$500,000 judgment against Applicant to address the debt in SOR ¶ 1.d. The Government established the disqualifying conditions in AG ¶¶ 19(a) and 19(c), requiring additional inquiry about the possible applicability of mitigating conditions.

Five 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;² 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.

The Appeal Board concisely explained Applicant's responsibility for proving the applicability of mitigating conditions as follows:

Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in security clearance decisions is that articulated in *Egan, supra*. "Any doubt concerning personnel being considered for

²The 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 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 (such as bankruptcy) 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)).

access to classified information will be resolved in favor of the national security.” Directive, Enclosure 2 ¶ 2(b).

ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013).

None of the mitigating conditions apply to all of his SOR allegations. Nevertheless, there is some mitigating financial information. Applicant’s delinquent debt initially resulted from a reduction of real estate values due to an oil spill and the real estate crash that occurred in 2008 to 2009. After substantial appreciation in value from 2007 to 2008, Applicant’s three condominiums were worth dramatically less in late 2010 than their mortgages. The oil spill and the decline in the real estate market are circumstances beyond his control under AG ¶ 20(b). In 2010, he stopped making payments on the mortgages; however, he continued to collect rent from tenants. Other than the condominium mortgages, he maintained his other debts in current status.

The creditor for the mortgage in SOR ¶ 1.d obtained a judgment in Applicant’s state of residence for \$500,000. There is no evidence that the creditor for the other mortgages is seeking reimbursement for the losses on the other loans. AG ¶ 20(e) does not apply to any of his debts because he did not provide “documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue.”

Applicant did not provide a detailed budget. He did not provide a copy of any offer to settle, proposed payment plan, or a credible explanation for his failure to begin making payments to address the \$500,000 debt. He did not take reasonable and responsible actions to resolve this debt. The record lacked clear indications the problem is being resolved and is under control. He did not receive financial counseling. He did not establish that he was unable to make more progress resolving the \$500,000 debt. His efforts are insufficient to fully mitigate financial considerations security concerns.

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 or reinstate eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. I have incorporated my comments under Guideline F in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under Guideline F, but some warrant additional comment.

There is some evidence supporting Applicant's continued access to classified information; however, this evidence is not sufficient to mitigate security concerns. Applicant is 64 years old, and he owns 90 percent of a residential construction or supply company that he has operated for 15 years. In 2014, Applicant made about \$90,000 from a company. He also buys and sells real estate. He served in the Coast Guard from 1969 to 1973; and he received an honorable discharge. He is a disabled veteran, and his monthly take home pay is about \$8,000. He seeks a security clearance to enable him to be a consultant on classified DOD contracts. In 1976, he received a bachelor's degree in business. Applicant paid off and refinanced his mortgage on his residence, and his car loans are current. His credit report reflects a score of 747, and he said all of his debts are current or resolved (except the \$500,000 judgment on his condominium).

The factors weighing towards reinstatement of Applicant's security clearance are less substantial than the factors weighing against its reinstatement. Applicant purchased three condominiums as investments in 2005, 2006, and 2007, utilizing financing from the same bank. He invested about \$550,000 in one condominium, and as the condominium rapidly appreciated, he borrowed an additional \$455,000 on this condominium. In 2010, Applicant stopped making payments on the three condominiums to facilitate short sales of the properties; however, he continued to collect rent from the tenants. The bank foreclosed on the three condominiums, and Applicant received two IRS Form 1099-As. In 2012 or 2013, the creditor obtained a judgment against Applicant for \$500,000 for a debt arising from the foreclosure of the third condominium. He did not make any payments to address the \$500,000 debt.

Applicant did not show sufficient progress resolving the \$500,000 judgment to establish there are clear indications the problem is being resolved and his finances are under control. He did not provide a detailed budget or provide a credible plan for resolution of this debt. He did not act responsibly under the circumstances, and his financial problems are likely to continue. The record does not show enough evidence of his inability to pay this debt, documented financial progress, financial effort, good judgment, trustworthiness, and reliability to warrant mitigation of financial considerations security concerns at this time.

It is well settled that once a concern arises regarding an applicant's eligibility for a security clearance, there is a strong presumption against the grant or renewal of a security clearance. Unmitigated financial considerations concerns lead me to conclude that reinstatement of a security clearance to Applicant is not warranted at this time. This decision should not be construed as a determination that Applicant cannot or will not attain the state of reform necessary to justify the award of a security clearance in the future. With more effort towards resolving his past-due debt, and a track record of

behavior consistent with his obligations, he may well be able to demonstrate persuasive evidence of his worthiness for a security clearance.

I have carefully applied the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. I conclude Applicant has not carried his burden and financial considerations concerns are not mitigated. Eligibility for access to classified information is denied.

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 to 1.c:	For Applicant
Subparagraph 1.d:	Against Applicant
Subparagraphs 1.e to 1.g:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Mark Harvey
Administrative Judge