



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



In the matter of:)
)
) ISCR Case No. 15-00675
)
Applicant for Security Clearance)

Appearances

For Government: Meg Foreman, Esq., Department Counsel
For Applicant: *Pro se*

05/04/2016

Decision

HARVEY, Mark, Administrative Judge:

Applicant made sufficient progress resolving the delinquent debts listed on his statement of reasons (SOR). On May 15, 2015, the Internal Revenue Service (IRS) indicated his federal income taxes were current, which was before the SOR was issued. Several non-SOR debts are paid or are in current payment plans. He is communicating with his creditors, and has assured he intends to pay his debts. While additional sustained financial effort is necessary, he has established a track record of debt payment and resolution. Financial considerations security concerns are mitigated. Access to classified information is granted.

History of the Case

On March 14, 2013, Applicant completed and signed a Questionnaire for National Security Positions (SF 86). (Government Exhibit (GE) 1) On September 15, 2015, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued an SOR to Applicant pursuant to Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry*; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive); and the adjudicative guidelines (AG), which became effective on September 1, 2006.

The SOR detailed reasons why the DOD CAF did not find 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. (HE 2) Specifically, the SOR set forth security concerns arising under the financial considerations guideline.

On October 13, 2015, Applicant responded to the SOR, and he requested a hearing. On November 23, 2015, Department Counsel was ready to proceed. On January 4, 2016, the case was assigned to me. On February 8, 2016, the Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing, setting the hearing for February 23, 2016. (HE 1) The hearing was held as scheduled.

During the hearing, Department Counsel moved to amend the SOR by withdrawing SOR ¶ 1.i because the debt was paid. (Tr. 14) Applicant did not object, and I granted the motion. (Tr. 14) Department Counsel also moved to amend SOR ¶¶ 1.j to 1.n to indicate Applicant did not timely file his federal tax returns. (Tr. 67) Applicant did not object, and I granted Department Counsel's motion. (Tr. 67) Department Counsel offered 4 exhibits, and Applicant offered 10 exhibits, which were admitted into evidence without objection. (Transcript (Tr.) 18, 20-23; Government Exhibit (GE) 1-4; Applicant Exhibit (AE) A-J) On March 2, 2016, DOHA received a copy of the transcript of the hearing. On March 11, 2016, Applicant provided four additional exhibits, which were admitted without objection. (AE K-N) The record closed on March 11, 2016. (Tr. 64)

Findings of Fact

In Applicant's SOR response, he admitted the SOR allegations in ¶¶ 1.b through 1.g. He also provided extenuating and mitigating information. Applicant's admissions are accepted as findings of fact.

Applicant is 38 years old, and he has been employed by a defense contractor since 2012. (Tr. 6, 8) In 1995, he graduated from high school. (Tr. 6) In 2002, he received a bachelor's degree in mechanical engineering; in 2011, he received a master's degree in mechanical engineering; and, in 2012, he received a master's degree in engineering management systems. (Tr. 6-7) He has never served in the military. (Tr. 7) He has never married. (Tr. 7) His daughter was born in 2000. (Tr. 7)

Financial Considerations

Applicant attributed his financial problems to a "long, arduous battle for the custody" of his daughter, including legal fees, and the expense of supporting two households. (Tr. 17, 32-35, 40; AE D) The litigation extended from 2008 to 2010, and it resulted in court-ordered joint custody. (Tr. 26; AE D) In 2009 alone, his legal bill was about \$9,000. (Tr. 45) In total, he estimated his legal fees to be about \$100,000. (Tr. 45) By the end of 2011 with some help from his family, he had paid the debt owed to his lawyer. (Tr. 41) Applicant has about \$100,000 in student loans, which are currently in forbearance status. (Tr. 29) Later in 2016, he will begin making monthly payments of about \$850. (Tr. 30) His child support is paid by automatic payment from his salary. (Tr. 43) His child support has never been in arrears. (Tr. 43-44) He conceded he fell behind on several debts in the midst of the child custody litigation. (Tr. 44-46) Applicant pays \$10,000 annually so his daughter can attend a private preparatory school. (Tr. 57-58;

AE E at 8) He gave a higher priority to paying her tuition than he did to paying his own debts. (Tr. 58)

Applicant communicated with the IRS about his taxes, and the IRS advised him that since his tax debt was modest he could arrange a payment plan. (Tr. 38) The IRS did not take any action to file a lien or a levy to collect back taxes. (Tr. 39) There is no evidence Applicant filed for any income tax filing extensions. The IRS tax transcripts for tax years 2006 to 2014 provide the following information (AE C, L):¹

Tax Year	Tax Return Filed	Adjusted Gross Income	Taxes Due	Withheld	Due	Date Paid
2006	June 4, 2007	\$53,926	\$7,926	\$6,399	\$1,527	Dec. 24, 2012
2007	June 2, 2008	\$54,259	\$7,805	\$6,041	\$358	Apr. 15, 2013
2008	June 1, 2009	\$55,373	\$7,950	\$7,261	\$669	Mar. 24, 2014
2009	Jan. 9, 2012	\$59,172	\$8,644	\$3,228	\$5,416	Mar. 16, 2015
2010	Jan. 9, 2012	\$61,853	\$5,391	\$6,858	-\$1,457	Feb. 27, 2012
2011	Oct. 29, 2012	\$81,048	\$14,006	\$15,006	-\$1,000	Feb. 10, 2012
2012	Feb. 14, 2014	\$77,669	\$9,139	\$14,489	-\$5,350	Mar. 24, 2014
2013	Jan. 27, 2015	\$89,426	\$15,785	\$16,766	-\$979	May 5, 2015
2014	Mar. 16, 2015	\$92,702	\$13,244	\$17,226	-\$4,022	Mar. 16, 2015
2015	Feb. 6, 2016				-\$2,861	Feb. 6, 2016

Applicant's SOR alleges, and his SF 86, credit reports, Office of Personnel Management (OPM) personal subject interview (PSI), SOR response, and hearing record establish a history of nine delinquent debts totaling \$11,310. Their status is as follows:

SOR ¶ 1.a for \$4,626 alleges a collection debt for a vehicle. His vehicle was totaled in an accident, and he had gap insurance to cover the depreciation in the vehicle. (Tr. 59) He did not understand why a collection company was seeking payment.

¹Applicant's SOR in ¶¶ 1.j through 1.n alleges he failed to timely file his federal tax returns for tax years 2006 through 2010. He also failed to timely file his federal income tax returns for tax years 2011 through 2013. Applicant's SOR does not allege that he failed to timely file federal income tax returns for tax years 2011 through 2013. In ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006), the Appeal Board listed five circumstances in which conduct not alleged in an SOR may be considered stating:

- (a) to assess an applicant's credibility; (b) to evaluate an applicant's evidence of extenuation, mitigation, or changed circumstances; (c) to consider whether an applicant has demonstrated successful rehabilitation; (d) to decide whether a particular provision of the Adjudicative Guidelines is applicable; or (e) to provide evidence for whole person analysis under Directive Section 6.3.

Id. (citing ISCR Case No. 02-07218 at 3 (App. Bd. Mar. 15, 2004); ISCR Case No. 00-0633 at 3 (App. Bd. Oct. 24, 2003)). See also ISCR Case No. 12-09719 at 3 (App. Bd. April 6, 2016) (citing ISCR Case No. 14-00151 at 3, n. 1 (App. Bd. Sept. 12, 2014); ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006)). Consideration that Applicant failed to timely file his federal income tax returns for tax years 2011 through 2013, will not be considered except for the five purposes listed above.

(Tr. 59) He contacted the collection company and asked for information about the debt; however, the collection company was unable to find any information. (Tr. 47-48) He asked the credit reporting companies to delete the information about the debt from his credit reports. (Tr. 48) The debt does not appear on his March 20, 2013 credit report, May 15, 2014 credit report, or on his July 24, 2015 three bureau credit report. (GE 3; GE 4; AE N)

SOR ¶¶ 1.b for \$1,884; 1.c for \$1,435; and 1.h for \$237 involve the same collection company. He paid the debt in SOR ¶ 1.h. (Tr. 48-49; AE F) On February 21, 2016, he made a \$191 payment to the creditor for one account and \$259 to the creditor for another account, and he intends to make five more payments to resolve the debts. (Tr. 49, 61; AE F at 1) His accounts with this creditor are current. (AE F)

SOR ¶¶ 1.d for \$866 and 1.e for \$636 are charged-off bank debts. Applicant acknowledged responsibility for these debts, and he plans to pay them when able to do so. (Tr. 49-50) He has maintained contact with the creditors. In February 2016, he made a \$33 payment to the creditor in SOR ¶ 1.d, and he is discussing with the creditor a single payment to resolve the debt in SOR ¶ 1.e. (Tr. 50-51, 61)

SOR ¶ 1.f for \$495 is owed to a bank. On February 9, 2016, the creditor offered to settle the debt for \$396. (Tr. 50-51; AE H) Applicant said he would attempt to pay the debt in March 2016. (Tr. 50-51)

SOR ¶ 1.g for \$395 is a debt from a corporation that has been transferred to a collection company. (Tr. 51) He is communicating with the collection company and assures he will pay the debt when able to do so. (Tr. 52)

Character Evidence

Applicant's employer indicated in his evaluations that he meets expectations. (Tr. 68; AE E) He received the Outstanding Achievement Award in the fourth quarter of 2013 for an engineering design he generated. (Tr. 69; AE E at 4) In May 2015, he was honored for his contributions to his employer and DOD. (AE E at 5) He tutors children in academics especially mathematics. (Tr. 70)

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 revised 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. Thus, nothing 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 three disqualifying conditions that could raise a security concern and may be disqualifying in this case: "(a) inability or unwillingness to satisfy debts;" "(c) a history of not meeting financial obligations;" and "(g) failure to file annual Federal, state, or local income tax returns as required" Applicant's history of delinquent debt is documented in his credit reports, SF 86, OPM PSI, SOR response, and hearing record. The record establishes a history of nine delinquent debts totaling \$11,310. Applicant failed to timely file his federal income tax returns for tax years 2006 through 2010. The Government established the disqualifying conditions in AG ¶¶ 19(a), 19(c), and 19(g) 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

²The Appeal Board has previously explained what constitutes a "good faith" effort to repay overdue creditors or otherwise resolve debts:

(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 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).

AG ¶¶ 20(a) through 20(e) apply. Applicant's financial problems resulted from Applicant's efforts to gain custody of his daughter. He was unable to fully pay his federal income taxes and some creditors. His lengthy and expensive legal contest to ensure custody of his daughter ended in 2010, and it is an unusual circumstance that took several years to recover from financially.

Applicant failed to timely file his federal income tax returns for tax years 2006 through 2013. The DOHA Appeal Board had commented:

It is well settled that [f]ailure to file tax returns suggest that an applicant has a problem with complying with well-established government rules and systems. Voluntary compliance with such rules and systems is essential for protecting classified information.

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)).

ISCR Case No. 14-05476 at 5 (App. Bd. Mar. 25, 2016) (citing ISCR Case No. 01-05340 at 3 (App. Bd. Dec. 20, 2002)). The failure to timely file his tax returns showed poor judgment and a failure to timely comply with government rules.

For the previous six years (2010 through 2015), Applicant withheld more funds than necessary to pay his federal income taxes. Those funds were applied to pay his federal income tax debt, which at its zenith in 2010, was about \$8,000. His federal income tax debt was paid in March 2015, six months before he received the SOR. His tax returns were timely filed for tax years 2014 and 2015.

Applicant reasonably disputed the debt in SOR ¶ 1.a, and it does not appear in his 2013, 2014, or 2015 credit reports. He paid one debt; two debts are in payment plans that are satisfactory to the creditor; and five SOR debts totaling \$3,365 remain unresolved. Several non-SOR debts are paid or are in current payment plans. He is communicating with his creditors, and has assured he intends to pay his debts. He has established a track record of debt payment and resolution. I am confident that Applicant will conscientiously endeavor to resolve his SOR debts.

Based on Applicant's credible and sincere promise to timely pay his debts, future new delinquent debt "is unlikely to recur and does not cast doubt on [Applicant's] current reliability, trustworthiness, or good judgment," and "there are clear indications that the problem is being resolved or is under control." His payments of some of his debts showed good faith. He has sufficient income to keep his debts in current status and to continue making progress paying his remaining delinquent debts, although he may have to reduce his payments towards his daughter's tuition to ensure his student loan debt is current. His efforts are sufficient to mitigate financial considerations security concerns. Even if Applicant provided insufficient information to mitigate security concerns under AG ¶ 20, he mitigated security concerns under the whole-person concept, *infra*.

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. 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.

Applicant is a 38-year-old employee of a defense contractor. He earned master's degrees in mechanical engineering and in engineering management systems. Applicant's employer indicated in his evaluations that he meets expectations. He received the Outstanding Achievement Award in the fourth quarter of 2013 for an engineering design he generated. In May 2015, he was honored for his contributions to his employer and DOD.

Applicant's financial problems originated from a "long, arduous battle for the custody" of his daughter, including legal fees, and the expense of supporting two households. In total, he estimated his legal fees in the child support litigation to be about \$100,000. By the end of 2011, he had paid the debt owed to his lawyer. His child support, two SOR debts, and several non-SOR debts are in current payment plans.

Applicant filed his federal income tax returns late for tax years 2006 through 2013, and he failed to pay his taxes in full when he did file for tax years 2006 through 2009. By 2010, he had accumulated a federal income tax debt of about \$8,000; however, the IRS did not file any tax liens or levies, and Applicant maintained communication with the IRS. For tax years 2010 to 2014, he was entitled to federal income tax refunds, and his refunds were applied to pay off his tax debt. On May 16, 2015, the IRS indicated his federal income taxes were current, which was before the SOR was issued on September 15, 2015.

In addition, the SOR alleges nine delinquent debts totaling \$11,310. He paid one debt; he successfully disputed one debt; two debts are in payment plans which are satisfactory to the creditor; and five debts totaling \$3,365 remain unresolved. Several non-SOR debts are paid or are in current payment plans. He is communicating with his creditors, and has assured he intends to pay his debts. He understands that he needs to pay his debts, and the conduct required to retain his security clearance. The Appeal Board has addressed a key element in the whole-person analysis in financial cases stating:

. . . the concept of meaningful track record necessarily includes evidence of actual debt reduction through payment of debts. However, an applicant is not required, as a matter of law, to establish that he has paid off each and every debt listed in the SOR. All that is required is that an applicant demonstrate that he has . . . established a plan to resolve his financial problems and taken significant actions to implement that plan. The Judge can reasonably consider the entirety of an applicant's financial situation and his actions in evaluating the extent to which that applicant's plan for the reduction of his outstanding indebtedness is credible and realistic. See Directive ¶ E2.2(a) (Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination.) There is no requirement that a plan provide for payments

on all outstanding debts simultaneously. Rather, a reasonable plan (and concomitant conduct) may provide for the payment of such debts one at a time. Likewise, there is no requirement that the first debts actually paid in furtherance of a reasonable debt plan be the ones listed in the SOR.

ISCR Case No. 07-06482 at 2-3 (App. Bd. May 21, 2008) (internal citations and quotation marks omitted). Applicant has established a “meaningful track record” of debt re-payment, and I am confident he will maintain his financial responsibility.³

I have carefully applied the law, as set forth in *Egan*, Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person.

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:	FOR APPLICANT
Subparagraphs 1.a through 1.h:	For Applicant
Subparagraph 1.i:	Withdrawn
Subparagraphs 1.j through 1.n:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with national security to grant or continue Applicant’s eligibility for a security clearance. Eligibility for access to classified information is granted.

MARK HARVEY
Administrative Judge

³The Government has the option of following-up with more questions about Applicant’s finances. The Government can re-validate Applicant’s financial status at any time through credit reports, investigation, and interrogatories. Approval of a clearance now does not bar the Government from subsequently revoking it, if warranted. “The Government has the right to reconsider the security significance of past conduct or circumstances in light of more recent conduct having negative security significance.” ISCR Case No. 10-06943 at 4 (App. Bd. Feb. 17, 2012). Violation of a promise made in a security context to pay legitimate debts may also raise judgment concerns under Guideline E, and may support future revocation of a security clearance. An administrative judge does not have “authority to grant an interim, conditional, or probationary clearance.” ISCR Case No. 10-06943 at 4 (App. Bd. Feb. 17, 2012) (citing ISCR Case No. 10-03646 at 2 (App. Bd. Dec. 28, 2011)). See also ISCR Case No. 04-03907 at 2 (App. Bd. Sep. 18, 2006) (stating, “The Board has no authority to grant [a]pplicant a conditional or probationary security clearance to allow [the applicant] the opportunity to have a security clearance while [the applicant] works on [his or] her financial problems.”). This footnote does not imply that this decision to grant Applicant’s security clearance is conditional.