



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



In the matter of:)
)
) ISCR Case No. 18-01266
)
Applicant for Security Clearance)

Appearances

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

06/26/2019

Decision

HEINY, Claude R., Administrative Judge:

Applicant contests the Department of Defense’s (DoD) intent to deny his eligibility for a security clearance to work in the defense industry. Applicant has two charged-off accounts and one account placed for collection. The three delinquent accounts total \$37,729. The debts remain unpaid and Applicant has stated he does not intend to pay these delinquent obligations. He has not made sufficient progress toward resolving his past-due debts to continue his security clearance eligibility. Applicant’s eligibility for access to classified information is denied.

Statement of the Case

On August 22, 2018, the Department of Defense Consolidated Adjudications Facility (DoD CAF) issued a Statement of Reasons (SOR) to Applicant, detailing the security concerns under Guideline F, financial considerations, and explaining why it was unable to find it clearly consistent with the national interest to grant or continue security clearance eligibility for him.

The DoD CAF took the action under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DoD Directive

5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG) effective within the DoD on June 8, 2017.

On September 14, 2018, Applicant responded to the SOR allegations and requested a decision on the written record by an administrative judge from the Defense Office of Hearings and Appeals (DOHA). On October 10, 2018, the Government submitted a File of Relevant Material (FORM), consisting of five exhibits (Items 1-5). DOHA forwarded a copy of the FORM to Applicant and instructed him to respond within 30 days of receipt. No response has been received. On March 6, 2019, I was assigned the case to determine whether it is clearly consistent with national security to grant or continue a security clearance for Applicant.

Evidentiary Ruling

Department Counsel submitted as Item 4, a Response to DOHA Interrogatory, subscribed and sworn by Applicant on July 11, 2018. Included with the Response was the Adoption of Summary of Personal Subject Interview conducted on October 20, 2017. The summary was part of the DoD Report of Investigation (ROI) in Applicant's case. Under ¶ E3.1.20 of the Directive, a DoD personnel background report of investigation may be received in evidence and considered with an authenticating witness, provided it is otherwise admissible under the Federal Rules of Evidence. The interview summary did not bear the authentication required for admissibility under ¶ E3.1.20.

In ISCR Case No. 16-03126 decided on January 24, 2018, the Appeal Board held that it was not error for an administrative judge to admit and consider a summary of personal subject interview where the applicant was placed on notice of his or her opportunity to object to consideration of the summary; the applicant filed no objection to it; and there is no indication that the summary contained inaccurate information. In this case, Applicant was provided a copy of the FORM and advised of his opportunity to submit objections or material that he wanted the administrative judge to consider

Concerning whether Applicant understood the meaning of authentication or the legal consequences of waiver, Applicant's *pro se* status does not confer any due process rights or protections beyond those afforded him if he was represented by legal counsel. He was advised in ¶ E3.1.4 of the Directive that he may request a hearing. In ¶ E3.1.15, he was advised that he is responsible for presenting evidence to rebut, explain, or mitigate facts admitted by him or proven by Department Counsel and that he has the ultimate burden of persuasion as to obtaining a favorable clearance decision. While the Directive does not specifically provide for a waiver of the authentication requirement, Applicant was placed on sufficient notice of his opportunity to object to the admissibility of the interview summary, to comment on the interview summary, and to make any corrections, deletions, or updates to the information in the report. Applicant did not object to the FORM or indicate that the Personal Subject Interview contained inaccurate information.

Applicant, who holds a master's degree, can reasonably be held to have understood his obligation to object to the PSI or indicate that it contained inaccurate

information. Accordingly, I accepted Item 4 in the record, subject to issues of relevance and materiality in light of the entire record.

Summary of SOR Allegations

The SOR alleges that, as of October 10, 2018, Applicant had three delinquent obligations which together totaled \$37,729. In his answer to the SOR, he admitted, with explanation, the delinquent obligations listed in SOR 1.a (\$12,042), SOR 1.b (\$3,687), and SOR 1.c (\$22,000). He stated he had no intention of paying the first two obligations, but was in litigation over the loan listed in SOR 1.c.

Findings of Fact

After considering the FORM, Applicant's response to the FORM, and his response to the SOR (Item 1), I make the following findings of fact.

Applicant is a 42-year-old senior architect who has worked for a defense contractor since December 2015. (Item 3) He seeks to obtain a security clearance. (Item 3) He is not married. In June 1997, he obtained a master's degree.

In Applicant's October 2017 subject interview, he asserted his current financial situation was favorable and that his credit score was 800. (Item 4) He stated he owned a bar in partnership with two partners. There came a point in the partnership where the other partners locked Applicant out of the business. He believes the other partners want him as a minority business partner because the others could not obtain credit. (Item 4) He was 20 percent owner of the business. (Item 4) He believes the debts were beyond his control since he was locked out of the business. (Item 5)

The personal credit card listed in SOR 1.a was used by Applicant to make business purchases. He believes it went delinquent in August 2009. No efforts to pay this debt have been made and he has no intention of paying the debt. Once he was locked out, he referred all calls and letters from the creditor to the business. (Item 5)

On Applicant's February 1, 2016 Electronic Questionnaires for Investigations Processing (e-QIP), he indicated, as to the personal credit card debt in SOR 1.a, "This was a bill from the small business. When I was kicked out of my business by my partner I lost my business and my income/ability to even personally pay for the debt." (Item 3)

The accounts in SOR 1.a and 1.b were opened in July 2007. (Item 5) The obligation in SOR 1.b was a \$3,500 line of credit opened in his name and used to buy an ice machine for the bar. He has no intention of paying the debt. (Item 4) Regarding the delinquent obligation he stated in his e-QIP:

Much like [the SOR 1.a credit card obligation] this bill was being paid by my small business for a year and then when the conflict occurred with my business partner[s] they kicked me out of the business. I was never

compensated for the hit to my credit. I also did not spend the money for personal use. It was all used on the business which agreed to keep paying off the debt. (Item 3)

Applicant explained on his e-QIP the delinquent obligation (SOR 1.b) had been setup as a business account. After he was physically locked out of the business he continued making payment for a period of time, but stopped when he pursued legal action. (Item 3) He stated that he was responsible for the obligation, but he never thought the line of credit would be used by the business and not paid. (Item 3) In a legal action the court ruled in favor of the bank and against Applicant. (Item 3) The debt remains unsatisfied.

The obligation in SOR 1.c (\$22,000) was a Small Business Administration (SBA) loan. Applicant and one of his partners were the guarantors on the \$50,000 loan. In 2015, the loan went into default. In March 2015, he began receiving calls demanding payment from the credit union holding the note. Applicant hired an attorney to assist him in the matter. (Item 4) Applicant claims, without additional documentation, that he is no longer responsible for the debt. He submitted, with his SOR response, page two of an unidentified document signed by Applicant's attorney and the attorney for his co-guarantor. (Item 2) The page is dated April 14, 2011. The date on the page appears to be "4/14/2011," which would have been before the default. It is possible that the date of the document was actually April 14, 2017. (Item 2) The page states, "6. Defendants agree to indemnify Plaintiff [Applicant] with regard to the Small Business Administration loan executed by Plaintiff;" (Item 2)

In May 2017, Applicant was informed by the IRS that his anticipated \$5,500 federal tax refund had been intercepted and applied to the delinquent loan, and that all of his future federal tax refunds would also be intercepted until the loan was paid in full. (Item 4) In October 2018, he received a letter from the Department of the Treasury requesting payment of the \$22,000 loan balance. (Item 4) In his October 2018 interview, he said he was willing to pay the SBA loans to the degree advised by his attorney. He has provided no documentation showing payment.

Except for the delinquent obligations listed in SOR 1.a and 1.b, the other 23 accounts listed on Applicant's February 2016 credit report are listed as "Pays As Agreed." (Item 5) He attributed his financial problems to being immature at the time he entered into the business partnership. He stated there would not be a recurrence of the event because he will never involve himself with business partners again. (Item 5)

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which must be considered 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 overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(a), the adjudication process is an examination of a sufficient period and a careful weight of a number of variables of an individual's life to make an affirmative determination that the individual is an acceptable security risk. This is known as the whole-person concept.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the 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 to obtain 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 safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of 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 of 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

Adjudicative Guideline (AG) ¶ 18 articulates the security concerns relating to financial problems:

Failure 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 or sensitive information . . . An individual who is financially

overextended is at greater risk of having to engage in illegal or otherwise questionable acts to generate funds.

The concern under financial considerations is broader than the possibility that an applicant might knowingly compromise classified information in order to raise money in satisfaction of his or her debts. An individual who is financially irresponsible may also be irresponsible, unconcerned, negligent, or careless in properly handling and safeguarding classified information. An applicant's financial history and circumstances are relevant in assessing his or her self-control, judgment, and other qualities essential to protecting the national secrets as well as the vulnerabilities inherent in the circumstances. Behaving responsibly or 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 his creditors is a private matter until evidence is uncovered demonstrating an inability or unwillingness to repay debts under agreed-upon terms. Absent evidence of strong extenuating or mitigating circumstances, an applicant with a history of serious or recurring financial difficulties is in a position of risk that is inconsistent with holding a security clearance. An applicant is not required to be debt free, but is required to manage his finances to meet his financial obligations.

Applicant has three delinquent obligations which total \$27,729. He used a personal credit card to buy supplies for his business. He used a line of credit to buy an ice machine for the business and he signed as a guarantor for a SBA loan. AG ¶ 19 includes three disqualifying conditions that could raise a security concern, any may be disqualifying in this case: "(a) inability to satisfy debts;" "(b) unwillingness to satisfy debts regardless of the ability to do so;" and "(c) a history of not meeting financial obligations."

Security concerns having been raised, 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. September 22, 2005)). Applicant has the burden of presenting evidence of explanation, extenuation, or mitigation to overcome the financial considerations security concerns.

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).

The following 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, a death, divorce or separation, clear victimization by predatory lending practices or identity theft), and the individual acted responsibly under the circumstances;

(c) the person has received or is receiving counseling for the problem from a legitimate and credible source, such as a non-profit credit counseling service, and there are clear indications that the problem is being resolved or is under control;

(d) the individual initiated and is adhering to 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 incurred three debts related to a business partnership. Two personal credit card accounts became delinquent in about 2009, and a SBA loan went into default in 2015. Although used for business purposes, each debt was incurred by Applicant personally and not by the business. He is personally liable on each debt. He failed to provide sufficient documentation that he is taking responsible action to resolve these debts after being locked out of the business.

AG ¶ 20(a) has limited applicability. Applicant had three debts which indicates his delinquent obligations were few. He stated he was immature when he entered into the business partnership and does not intend to enter into another partnership. The business obligations are unlikely to recur. But the debts remain unpaid and he has stated he does not intend to pay the delinquent obligations. As such, the delinquent obligations cast doubt on his current reliability, trustworthiness, and good judgment. AG ¶ 20(a) does not apply.

Being locked out of his business is an event beyond Applicant's control, but for AG ¶ 20(b) to apply he must act responsibly under the facts. One reasonable course of action after being locked out would be to bring a civil suit against the other partners. The only documentation provided by him showed a lawsuit was possibly filed, however, the context of the document is not part of the record. The title of the document is unknown. The particular page presented appeared to have the signature of the defendants and that of Applicant's attorney and bears the date of "4/14/2011." The actual date of the document might not be 2011 but 2017. The copy is unclear. There is no indication the court saw or approved the document.

The single page of the document indicates the defendants would indemnify Applicant as to the SBA loan. There is no evidence defendants have done so. The record shows the IRS intercepted his tax refund and intends to continue intercepting his tax refunds until the SBA loan default is paid. The record fails to support Applicant has acted reasonably under the circumstances. AG ¶ 20(b) does not apply.

There is no showing Applicant has received or is receiving counseling for the problem from a legitimate and credible source. During his background interview, he asserted he has a favorable credit score, but he failed to provide a document supporting that assertion. His February 2016 credit report showed two delinquent accounts and the other 23 accounts were showing as being paid as agreed. That credit report shows the status of his credit more than three years ago. No documents were presented showing his current credit report or his current financial picture. AG ¶ 20(c) does not apply. He has made no payments on the delinquent obligations and does not intend to do so. The mitigating factors in AG ¶ 20(d) do not apply.

The DOHA Appeal Board has noted under the financial considerations guideline that an applicant should demonstrate a "meaningful track record" of payments that shows overall debt reduction. Though Applicant is not required to demonstrate he has paid off all debts listed in the SOR, he should show that he has a plan to repay the delinquent debts and has taken consistent steps to implement the plan. See ISCR Case No. 07-06482 at 2-3 (App. Bd. May 21, 2008).

For AG ¶ 20(e) to apply there must be more than simply denying responsibility for the delinquent obligation. The individual must have a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem. Additionally, he must provide documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue. Applicant has provided insufficient documentation. AG ¶ 20(e) does not apply.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an Applicant's eligibility for a public trust position 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(d):

(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 common sense judgment based upon careful consideration of the guidelines and the whole-person concept. I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. My comments under Guideline F are incorporated in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under that guideline but some warrant additional comment.

A security clearance adjudication is an evaluation of an individual's judgment, reliability, and trustworthiness. It is not a debt-collection procedure. Applicant is a 42-year-old senior architect who has worked for a defense contractor since December 2015. He was put on notice of the government's concern about his finances during his October 2017 interview, when the August 2018 SOR was issued, and when he received the October 2018 FORM. No payments have been made on his delinquent obligations.

Applicant elected to have a decision based upon the written record, and then did not respond to the government's file of relevant material. Applicant has provided insufficient persuasive evidence to rebut the financial concerns specified in the SOR. It is reasonable to expect Applicant to present documentation about the resolution or satisfaction of specific debts. Applicant has legal repayment obligations that remain unresolved. The delinquent obligations have not been paid and Applicant does not intend to pay them. It is well settled that once a concern arises regarding an applicant's security clearance eligibility, there is a strong presumption against the grant or renewal of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990).

In requesting an administrative determination, Applicant chose to rely on the written record. In so doing, however, he failed to submit sufficient information or evidence to supplement the record with relevant and material facts regarding his circumstances, articulate his position, and mitigate the financial security concerns. He failed to offer evidence of financial counseling or provide documentation regarding his past efforts to address his delinquent debt. By failing to provide such information, and in relying on his three paragraphs of response to the SOR and page "two" of an untitled document, financial considerations security concerns remain.

I have carefully applied the law, as set forth in *Egan*, Exec. Or. 10865, the Directive, DOD Manual 5200.02, and the AGs, to the facts and circumstances in the context of the

whole person. The issue is not simply whether all the delinquent obligations have been paid—it is whether his financial circumstances raise concerns about his fitness to hold a security clearance. (See AG ¶ 2(c)) Overall, the record evidence leaves me with questions and doubts about Applicant’s eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the financial considerations security concerns.

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, Financial Considerations: 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 a security clearance. Eligibility for access to classified information is denied.

CLAUDE R. HEINY II
Administrative Judge