



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



In the matter of:)
)
) ISCR Case No. 18-01357
)
Applicant for Security Clearance)

Appearances

For Government: Moira Modzelewski, Esq., Department Counsel
For Applicant: Phoenix S. Ayotte, Esq.

09/04/2019

Decision

RIVERA, Juan J., Administrative Judge:

Applicant demonstrated that circumstances beyond his control contributed to or aggravated his financial problems. He should have been more diligent addressing his delinquent accounts. Notwithstanding, his financial problems are being resolved and are under control. Clearance granted.

Statement of the Case

Applicant submitted his first security clearance application (SCA) on March 24, 2017, seeking eligibility for a clearance required for his position with a federal contractor. After reviewing the information gathered during the background investigation, the Department of Defense (DOD) issued him a Statement of Reasons (SOR) alleging security concerns under Guideline F (financial considerations) on May 28, 2018. He answered the SOR and requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA) on October 10, 2018.

DOHA assigned the case to me on January 16, 2019. The Notice of Hearing (NOH) was issued on April 16, 2019, setting a hearing for May 14, 2019. At the hearing, the Government offered five exhibits (GE 1 through 5). GE 1 through GE 5 were admitted into evidence without objection. GE 6 was marked for administrative purposes.

Applicant testified, presented his wife's testimony, and submitted six exhibits. (AE A through F), which were admitted without objection. DOHA received the hearing transcript (Tr.) on June 5, 2019.

Procedural Issue

At the hearing, Department Counsel moved to amend the SOR by withdrawing SOR ¶ 1.a. I granted the motion as requested. (Tr. 7)

Findings of Fact

In his answer to the SOR, Applicant denied all of the financial allegations (¶¶ 1.b through 1.e). After a thorough review of the record evidence, I make the following findings of fact:

Applicant is a 42-year-old employee of a federal contractor. He graduated from high school in 1994, completed an associate's degree in 2002, and continued to take college courses until 2016, but has not earned another degree. He married in 2000, and has two stepdaughters, ages 31 and 27, and a son and a daughter, ages 18 and 15.

Applicant's employment record in his SCA shows that he has been, except as address below, continually employed since December 2008. Applicant worked for his current employer and security sponsor between April 2012 and October 2015. He was laid off and unemployed between October 2015 and February 2016. He was rehired and has been working for his current employer since February 2016. (GE 1 and 2) He is an information technology systems engineer and his job requires him to be away from home about six months of the year.

At hearing, Applicant testified that he has been unemployed or underemployed several times: in 2001 for about eight months; in 2008 for about six months; and in 2014 for about six weeks. He could not explain the discrepancies between his 2017 SCA work history and his hearing testimony.

In his 2017 SCA, Applicant disclosed that he had financial problems that included an April 2010 judgment filed against him for \$419; two over-120-day delinquent debts that were in collection for \$19,935 and \$1,206 related to a timeshare that he purchased in 2012 and its related maintenance fees; a 2015 medical debt for \$261 that he recently paid; and a 2015 collection for \$1,212 that he was disputing.

Applicant was interviewed by a background investigator in July 2017. (GE 2) He discussed with the investigator all of the accounts and the judgment alleged in the SOR. He stated that he was disputing all the SOR accounts and the judgment. He believed that his financial problems resulted from circumstances beyond his control. Applicant told the investigator that in 2009 he financially supported his in-laws for a period; was laid off and unemployed between December 2008 and January 2009; and had two vehicles that broke down and required expensive repairs. He explained that he took out

a personal loan in 2008 for \$4,500 from a bank. He defaulted on the loan in 2009 because he was laid off and could not catch up with his bills. As a result, between June 2013 and June 2014, Applicant had one-third of his pay garnished to satisfy the defaulted loan. (GE 2)

Applicant and his wife took an eight-day vacation trip to another country in January 2012. (Tr. 109-110) They were enticed to travel at a discounted fare in exchange for their attendance at a timeshare sales presentation. They fell victims to the timeshare personnel pressure-sales tactics and bought a timeshare. He told the investigator that he attempted to return the timeshare (SOR ¶ 1.c) for a refund during the contractual 90-day refund period, but could not get in contact with the company for six months. By then, it was too late for any reconciliation. (GE 2)

At hearing, Applicant's testimony contradicted his statement to the investigator in 2017. He testified that the timeshare salesperson and the purchase contract stated that he could rescind the contract and receive a refund within one-year of the purchase date. (Tr. 72-74) He claimed that he tried numerous times within the year period to contact the timeshare sales personnel by phone and in writing without success. He averred that around November-December 2012, the timeshare company stopped withdrawing the mortgage payments from his bank account. He believed that indicated the timeshare contract was rescinded and the issue was resolved. He claimed he was not aware that the account was in collection until sometime in 2015 when he reviewed a credit report while refinancing his home.

Applicant presented no documentary evidence to substantiate his claims of having a one-year contract rescission and refund clause, or of his efforts to contact the timeshare personnel or of any correspondence to address the debt since he acquired the timeshare in 2012. Applicant testified he paid a total of \$7,000 during the first year he owned the timeshare, but he presented no evidence of efforts to request a refund of his money after the alleged cancellation of the contract in late 2012.

Concerning the judgment alleged in SOR ¶ 1.b, Applicant provided the investigator with two documents the investigator described as "an investigation summary and resolution summary through TransUnion's Online Dispute Services." These two documents described by the investigator are not part of the Government's or Applicant's evidence. According to the investigator, the documents showed that the account was successfully disputed and removed from Applicants credit report on July 12, 2017, by the Circuit Court of the County where the judgment was filed in August 2010. According to the investigator, the court deleted the account due to multiple inaccuracies of the data and the account being more than seven years old.

Applicant told the investigator that he believed the debt stemmed from his son's former private school tuition fees. He stated that his spouse removed their son from the private school because she decided to homeschool him. Because the child was removed from school before the school year was completed, the school charged them with the tuition fees for the year. Applicant told the investigator that he did not disclose

the judgment in his March 2017 SCA because he was unaware of the debt until his July 2017 interview.

Applicant testified that he first became aware of the judgment alleged in SOR ¶ 1.b when reviewing a credit report while refinancing his home in 2015. He and his wife testified that they pulled their son from the private school because he had special needs the school could not address. He testified that they had a meeting with school administrative personnel, and they agreed not to charge them for his son's remaining tuition fees. Applicant repeatedly averred that he was never given notice of the collection suit filed against him, that he never had the opportunity to go in front of a court to dispute the collection, and that he was never notified that a judgment was filed against him. (Tr. 92-95)

Applicant told the investigator that he did not recognize the account alleged in SOR ¶ 1.d. He believed the account was likely a duplicate of the account alleged in SOR ¶ 1.e, in collection by a different collection agency. I find this explanation plausible. Applicant claimed he found about the account for the first time in 2015, and disputed it in June 2016. His dispute was successful and the account was removed from his credit report. The account is not reflected in Applicant's current credit reports. Applicant testified that he does not feel responsible for the debt because the creditor or the collection agency cannot prove the debt belonged to him or that they have the right to collect it. He claimed he would pay it if they were able to produce evidence that it is his debt. (Tr. 115-116)

Applicant and his wife took an 11-day vacation trip to a foreign country at the cost of about \$3,000 in 2016. (Tr. 112-113) At the time, he was already aware of all the delinquent debts alleged in SOR ¶¶ 1.b through 1.e. Applicant presented no documentary evidence of any payments made, payment agreements established, or communications with any of the creditors for the accounts alleged in SOR ¶¶ 1.b through 1.e.

Applicant's current monthly take-home pay is about \$4,800. He has about \$60,000 in a savings account and \$65,000 in his 401k retirement plan. Applicant testified that he no longer has a financial problem. He and his wife live within their financial means and do not spend what you do not have. They follow the Dave Ramsey's budget theory of having savings for when hard times arise. To resolve their financial problems, they paid their smallest debt first and continued to pay the debts one by one. They do not use credit cards, and currently have no car payments. The credit reports in evidence show that he and his wife paid other accounts not alleged in the SOR. Applicant believes that he is diligent, responsible, and takes his finances and debts seriously. He believes his financial house is currently in order and that with his current income, his financial situation is now stable. He believes that he will be able to maintain his financial responsibility and eligibility for a clearance.

Applicant submitted six reference statements from supervisors, coworkers, and friends. He is considered to be reliable, dedicated, trustworthy, and a good role model.

He displays good judgment and is committed to the United States. His references endorsed his eligibility for a clearance.

Policies

The SOR was issued under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive) (January 2, 1992), as amended; and the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AG), implemented by the DOD on June 8, 2017.

Eligibility for access to classified information may be granted “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, § 2. The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

The AG list disqualifying and mitigating conditions for evaluating a person’s suitability for access to classified information. Any one disqualifying or mitigating condition is not, by itself, conclusive. However, the AG should be followed where a case can be measured against them, as they represent policy guidance governing access to classified information. Each decision must reflect a fair, impartial, and commonsense consideration of the whole person and the factors listed in SEAD 4, App. A ¶¶ 2(d) and 2(f). All available, reliable information about the person, past and present, favorable and unfavorable, must be considered.

Security clearance decisions resolve whether it is clearly consistent with the national interest to grant or continue an applicant’s security clearance. The Government must prove, by substantial evidence, controverted facts alleged in the SOR. If it does, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. The applicant bears the heavy burden of demonstrating that it is clearly consistent with the national interest to grant or continue his or her security clearance.

Persons with access to classified information enter into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability, and trustworthiness of those who must protect national interest as their own. The “clearly consistent with the national interest” standard compels resolution of any reasonable doubt about an applicant’s suitability for access in favor of the Government. “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; SEAD 4, ¶ E(4); SEAD 4, App. A, ¶¶ 1(d) and 2(b). Clearance decisions are not a determination of the loyalty of the applicant concerned. They are merely an indication that the applicant has or has not met the strict guidelines the Government has established for issuing a clearance.

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. Financial distress can also be caused or exacerbated by, and thus can be a possible indicator of, other issues of personnel security concern such as excessive gambling, mental health conditions, substance misuse, or alcohol abuse or dependence. An individual who is financially overextended is at greater risk of having to engage in illegal or otherwise questionable acts to generate funds . . .

Applicant's history of financial problems is documented in the record. AG ¶ 19 provides two disqualifying conditions that could raise a security concern and may be disqualifying in this case: "(a) inability to satisfy debts"; and "(c) a history of not meeting financial obligations." The record established the disqualifying conditions, requiring additional inquiry about the possible applicability of mitigating conditions.

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

(c) the individual has received or is receiving financial 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; 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 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).

All of the above financial considerations mitigating conditions are raised, in part, by the facts in this case and mitigate the security concerns. Applicant developed financial problems, partially, because of circumstances beyond his control in 2009, which included periods of unemployment, providing financial support for his in-laws, expensive vehicle repairs, and he being the sole provider for his family. Applicant's financial problems occurred under circumstances unlikely to recur, and they do not cast doubt on his current reliability, trustworthiness, or judgment.

Concerning the judgment alleged in SOR ¶ 1.b, Applicant documented to the investigator that the account was successfully disputed and removed from Applicants credit report on July 12, 2017. According to the investigator, the court deleted the account due to multiple inaccuracies and the account being more than seven years old. I find this allegation for Applicant.

The account alleged in SOR ¶ 1.d appears to be a duplicate of the account alleged in SOR ¶ 1.e, in collection by a different collection agency. Considering the evidence as a whole, I find this explanation plausible and find SOR ¶ 1.d for Applicant.

I also find for Applicant on the accounts alleged in SOR ¶¶ 1.c and 1.e. Applicant and his wife were enticed to travel to another country at a discounted fare in exchange for their attendance at a timeshare sales presentation. They fell prey to the high-pressure sales tactics and purchased a timeshare beyond their financial means. Subsequently, the timeshare sales personnel became unavailable and he was unable to rescind the purchase contract within the 90-day period allowed.

Applicant's efforts to resolve his debts are somewhat lacking, except for disputing the accounts. Notwithstanding, Applicant's resolution of his past financial problems and his present financial posture show diligence and responsibility in the handling of his financial obligations. He is following a solid source of financial counseling and he has a budget. He has not acquired additional delinquent debt. Considering the evidence as a

whole, Applicant's finances are under control. He credibly promised to maintain his financial responsibility. His earnings should be sufficient to pay for his family's living expenses and current debts.

Whole-Person Concept

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, and under the whole-person concept. SEAD 4, App. A, ¶¶ 2(a) and 2(d). I have incorporated my comments under Guideline F in my whole-person analysis. Some of these factors were addressed under that guideline, but some warrant additional comment.

Applicant is a 42-year-old employee of a federal contractor. This is his first SCA. He has worked for his current employer since 2012. He should have been more diligent addressing his delinquent accounts. Notwithstanding, his financial problems are being resolved and are under control. Because of the security clearance process, he is fully aware of the security concerns that would be raised by his failure to maintain financial responsibility. He promised to maintain his financial responsibility. The financial considerations security concerns are 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:	FOR APPLICANT
Subparagraph 1.a:	WITHDRAWN
Subparagraphs 1.b - 1.e:	For Applicant

Conclusion

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest of the United States to grant eligibility for a security clearance to Applicant. Clearance is granted.

JUAN J. RIVERA
Administrative Judge