



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



In the matter of:)
)
-----) ISCR Case No. 19-00325
)
Applicant for Security Clearance)

Appearances

For Government: Ed Price, Esq., Department Counsel
For Applicant: Frederick D. Greco, Esq.

10/16/2020

Decision

WESLEY, ROGER C. Administrative Judge

Based upon a review of the case file, pleadings, exhibits, and testimony, Applicant did not mitigate financial concerns. Eligibility for access to classified information or to hold a sensitive position is denied.

Statement of the Case

On April 2, 2019, the Department of Defense (DoD) Consolidated Central Adjudications Facility (CAF) issued a statement of reasons (SOR) to Applicant detailing reasons why under the financial considerations guideline the DoD could not make the preliminary affirmative determination of eligibility for granting a security clearance, and recommended referral to an administrative judge to determine whether a security clearance should be granted, continued, denied, or revoked. The action was taken under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960); *Defense Industrial Personnel Security Clearance Review Program*, DoD Directive 5220.6 (January 2, 1992) (Directive); and Security Executive Agent Directive 4, establishing in Appendix A the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AGs), effective June 8, 2017.

Applicant responded to the SOR on February 25, 2020, and requested a hearing. The case was assigned to me on June 26, 2020. A hearing was scheduled for August 17, 2020, and heard on the scheduled date. At the hearing, the Government's case consisted of eight exhibits (GEs 1-8) (Tr. 29-44). Applicant relied on 14 exhibits (A-N) and one witness (himself). The transcript (Tr.) was received on August 28, 2020.

Procedural Issues

Before the opening of the hearing, Applicant made a motion *in limine* to exclude references to Applicant's March 2012 termination covered in the summary interview of Applicant by an agent of the Office of Personnel Management (OPM). (GE 2) Applicant never waived his right to have the OPM summary of interview excluded from evidentiary consideration. For good cause shown, Applicant's motion was granted in part, and the referenced paragraph covering his prior employment termination was stricken from the marked GE 2 exhibit. (Tr. 33) Applicant accepted the balance of the OPM summary of interview for full evidentiary consideration. Denied was his included motion *in limine* to exclude his similar explanation of his 2012 employment termination in the electronic questionnaires for electronic processing (e-QIP) he completed in July 2017. (GE 1)

Prior to the close of the proceedings, Applicant asked to leave the record open to afford him the opportunity to supplement the record with information documenting the principal amount owing on his student loans. For good cause shown, Applicant was granted 14 days to supplement the record. The Government was afforded three days to supplement the record. Within the time permitted, Applicant provided several pieces of documentation covering the amounts still owing on the student loans referenced in the SOR: (a) a payment summary (SOR ¶¶ 1.a-1.b) of Applicant's U.S.-guaranteed and since consolidated student loan accounts covering his daughter's education loans (AE P); (b) payment summaries of a non-SOR student loan account of his daughter (AEs O and Q) covered by SOR ¶ 1.d); and an email explanation of the submitted student loan payment summaries by Applicant's counsel (AE R). Applicant's post-hearing submissions were admitted as AEs O-R without objections for consideration. Comments of counsel for both parties on the exhibits will also be considered.

Summary of Pleadings

Under Guideline F, Applicant allegedly accumulated three delinquent student loan debts exceeding \$127,000 accumulated and two consumer debts exceeding \$630. Allegedly, Applicant's debts remain unsatisfied and unresolved.

Under amended Guideline E, Applicant allegedly was terminated from his employment with a prior defense contractor in March 2012 after being granted a security clearance. Allegedly, his termination was based on his being caught taking a picture of a sensitive Army base site with a personal camera.

In his response to the SOR, Applicant denied each of the allegations covering his debts and termination from his prior employment with explanations. He claimed he has been paying on his student loan accounts, which represent parent loans for his

daughter, in the amount of \$302.54 monthly, which since 2014 have been involuntarily deducted from his earned Social Security (SS) benefits and tax refunds. Addressing his alleged consumer debts, Applicant claimed he could not identify either reported debt and claimed the credit report listing these debts was inaccurate

In his response to the personal conduct allegations covered in the Government's Guideline E amendment, Applicant denied the allegations in full. He interposed no objection to the amendment and provided no explanations for his denial pertaining to his alleged termination by his employer for cause.

Findings of Fact

Applicant is a 73-year-old call center operator for a defense contractor who seeks a security clearance. Applicant denied each of the allegations in the SOR, and findings of fact follow.

Background

Applicant married in November 1968 and divorced in December 1982. (GE 1) He has one adult child from this marriage. He remarried in January 1983 and divorced in November 2013. He has one adult child from this marriage. Applicant earned community college education credits between September 1971 and June 1973, but did not receive a degree or diploma. (GE 1) He enlisted in the U.S. Army in October 1966 and served two years of active duty. During his active tour of duty, Applicant earned a bronze star and purple heart in recognition of his contribution to his military service. (AE A)

Since August 2016, Applicant has been employed by his current employer. (GE 1) He reported periods of unemployment between August 2015 and March 2016, between July 2013 and September 2013, and between February 2011 and March 2011. In March 2012, Applicant was terminated from his then employer as a switch operator on an Army Base. Cited cause for his termination was his being caught taking pictures of a dial central office with a personal camera after being granted a security clearance in June 2011. (GEs 1 and 6)

Applicant's finances

Between November 2008 and May 2019, Applicant accumulated three delinquent student loan debts he guaranteed as a parent for his daughter's college education. These two loans covered by SOR ¶¶1.a-1.b and 1.d involve three separate accounts with the same Navient/U.S. Government loan guarantee creditor: one for \$42,802; another for \$36,313; and a third for \$39,108. (GEs 2-5) For two years (2012-2013) after the loans became due, Applicant's wife made voluntary payments on the loans on behalf of their working daughter. (Tr. 124) She ceased making these voluntary payments, however, after 2013, and Applicant could not say whether his daughter ever made any payments once she began working. (Tr. 124) Acknowledging that each of the three loans went into default after 2013, he could not confirm whether any of the loans

were ever placed in forbearance before or after the defaults. (Tr. 123) Credit reports do not reflect any prior forbearances granted to Applicant on any or all of the three student loans covered in the SOR. (GEs 3-5)

In his hearing testimony, Applicant expressed certainty that his three parent-guaranteed student loans were consolidated into one loan. (Tr. 122) He provided no documentation of consolidation of any or all of the three loans, however, and only the two loans covered by SOR ¶¶1.a-1.b are treated by the U.S. Department of Education (DoE) and the Department of the Treasury (DoT) as consolidated into one account for collection purposes. (GEs A-N and P) Without corroborated evidence of consolidation of the student loan covered by SOR ¶1.d with the loans covered by SOR ¶¶ 1.a-1.b, the SOR 1.d loan must be considered a separate delinquent loan that was apparently not included in any DoT garnishment initiatives covering the SOR 1.a-1.b loans. And, from the evidence produced, none of the three delinquent student loans covered by the SOR have been voluntarily addressed by Applicant or his wife and daughter since 2013.

Beginning in March 2018, and ending in February 2020, the DoT placed the since consolidated two parent-guaranteed loans (totaling \$78,115) in collection status and began intercepting Applicant's SS benefits and involuntarily applied over \$300 a month of Applicant's earmarked SS benefits to his delinquent student loan debts (AEs B-N P-R) SS payments intercepted by DoT were involuntarily withheld and rechanneled for payment of Applicant's consolidated student loan debts. (Tr. 54) The DoT's intercepted dollar amounts from Applicant's monthly \$2,200 SS benefits ranged from \$336 to \$311, to \$315, to \$338 a month and reduced. (AEs B-L; Tr. 53-54) Altogether, DoT intercepted monthly amounts in excess of \$3,300 from Applicant's SS benefits between May 2018 and February 2020. (AEs B-L)

After February 2020, the DoT ceased intercepting portions of Applicant's SS benefits, likely attributable to the Covid-19 pandemic. (Tr. 28) Absent any voluntary payments on the student loan debts from Applicant (none reported), the DoT can be expected to resume its intercepting of Applicant's SS benefits once the Covid 19 pandemic fades or is otherwise favorably resolved.

Because the DoT's intercepted funds from Applicant's SS benefits were applied exclusively to interest and fees owing on the student loan debts, Applicant was not credited with any principal reductions from the SS benefits intercepted by the DoT. (AEs N and P) Applicant's post-hearing submissions confirm only that the DoT's intercepted SS funds were applied exclusively to accrued interest and fees and did not touch loan principle. (AE P)

Additional delinquent debts attributable to Applicant in the SOR are two small delinquent medical debts totaling \$633. (GEs 2-5) These debts are listed in Applicant's credit reports without any information by which to identify the creditors by name. Asked about these debts listed as delinquent in Applicant's credit reports, Applicant could not identify them as debts belonging to him. (GE 2; Tr. 40-41) The listed medical debts are small and cannot be further corroborated.

Currently, Applicant has an annual salary of \$40,000. (Tr. 52) He has earned annual social security benefits of \$25,000 and two pensions from prior employers that pay him \$441 and \$350 a month, respectively, for a combined annual return of \$9,480. (Tr. 93-94) He maintains an average monthly checking balance of \$1,600 and an average monthly savings balance in the \$600 range. (Tr. 94). His monthly debt liabilities include a \$279,000 mortgage on a home valued at \$420,000. (Tr. 95) Based on his monthly income and identified debts, his current financial condition should enable him to make payments on his daughter's delinquent student loans for which he bears repayment responsibility. Since 2013, though, he has made no voluntary payments on the loans that are in any way documented.

Applicant's 2012 separation

According to JPAS incident reports from the Army Base in which he was assigned in March 2012, Applicant was discovered by base police taking pictures with his personal camera phone of a base-dial central office directly outside of the Base communications office at the Army Base where he was assigned. (GE 6) He acknowledged his awareness that having any camera on Base property is strictly forbidden. (Tr. 101)

It is unclear from Joint Personnel Adjudicative System (JPAS) reports of the incident as to why Applicant took such a picture of a major portion of the Base's dial-central office. Applicant admitted only to taking a picture of a tree with his personal camera for curiosity reasons and denied taking a picture of the dial central office or any communications center on the Base as charged. (Tr. 101-102) In his July 2017 e-QIP, he attributed his ensuing 2012 employment termination to a report of the contracting customer of the Base (based on purported accounts from two unidentified Base security officers and his own supervisor on site at the time of the reported incident) to the contracting customer of the Base being uncomfortable with Applicant's reporting the matter to his supervisor. (GE 1; Tr. 105-109 11)

Two weeks after the reported Base camera incident, Applicant was fired for cause by his own supervisor. (GE 1; Tr. 107-109) It is Applicant's stated belief that his ensuing firing was prompted by the contracting customer's perceived retaliation to Applicant's reporting his observations of the customer's heated encounter with his wife (armed with a gun in his possession), to his supervisor. (Tr. 107-109) Corroboration of Applicant's claimed observations is lacking in the record.

With conflicting versions of what Applicant was targeting with his camera in the March 2012 incident, little evidence in place to corroborate either version of the camera incident, and the lengthy time lapse (over eight years) in which to locate witnesses with clear recollections of the camera incident, inferences of what Applicant was targeting with his personal camera in the reported March 2012 Base incident cannot be reasonably and reliably drawn without considerable reaching and speculation. All that is clear and accepted is that Applicant took a picture with his personal camera of some object on the Base in March 2012 that he knew at the time was forbidden by Base regulations and guidelines.

Since his March 2012 Base camera incident, Applicant has not had any reported adverse incidents involving security violations. His employment record with his current employer has no known adverse marks or blemishes.

Policies

By virtue of the jurisprudential principles recognized by the U.S. Supreme Court in *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988), “no one has a ‘right’ to a security clearance.” 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. Eligibility for access to classified information may only be granted “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 AGs list guidelines to be considered by judges in the decision-making process covering DOHA cases. These guidelines take into account factors that could create a potential conflict of interest for the individual applicant, as well as considerations that could affect the individual’s reliability, trustworthiness, and ability to protect classified information. These guidelines include conditions that could raise a security concern and may be disqualifying (disqualifying conditions), if any, and all of the conditions that could mitigate security concerns, if any.

These guidelines must be considered before deciding whether or not a security clearance should be granted, continued, or denied. Although, the guidelines do not require judges to place exclusive reliance on the enumerated disqualifying and mitigating conditions in the guidelines in arriving at a decision.

In addition to the relevant AGs, judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in ¶ 2(a) of the AGs, which are intended to assist the judges in reaching a fair and impartial, commonsense decision based on a careful consideration of the pertinent guidelines within the context of the whole person. The adjudicative process is designed to examine a sufficient period of an applicant’s life to enable predictive judgments to be made about whether the applicant is an acceptable security risk.

When evaluating an applicant’s conduct, the relevant guidelines are to be considered together with the following ¶ 2(d) factors: (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 of the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Viewing the issues raised and evidence as a whole, the following individual guidelines are pertinent herein:

Financial Considerations

The Concern: 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 or regulations, all of which can raise questions about an individual's reliability, trustworthiness and ability to protect classified or sensitive 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 acts or otherwise questionable acts to generate funds. . . . AG ¶ 18.

Personal Conduct

The Concern: Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes. . . . AG ¶ 15.

Burdens of Proof

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* Exec. Or. 12968 (Aug. 2, 1995), § 3.1.

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

Security concerns are raised over Applicant’s accumulation of delinquent debts (mostly related to parent-guaranteed student loans). Additional security concerns are raised over his March 2012 termination attributable to his reported violating Base regulations and guidelines banning the taking of pictures of Base property by taking a picture of a Base facility with his personal camera.

Financial concerns

Applicant’s accumulation of delinquent debts (both student loans and consumer accounts) warrant the application of two of the disqualifying conditions (DC) of the financial consideration guidelines: DC ¶¶ 19(a), “inability to satisfy debts”: and 19(c), “a history of not meeting financial obligations.” Each of these DCs apply to Applicant’s situation.

Applicant’s admitted debt delinquencies negate the need for any independent proof. See Directive 5220.6 at E3. 1.1.14; McCormick on Evidence, § 262 (6th ed. 2006) His admitted debts and tax filing lapses are fully documented and create some judgment issues. See ISCR Case No. 03-01059 at 3 (App. Bd. Sept. 24, 2004).

Financial stability in a person cleared to protect classified information is required precisely to inspire trust and confidence in the holder of a security clearance that entitles the person to access classified information. While the principal concern of a security clearance holder’s demonstrated difficulties is vulnerability to coercion and influence, judgment, and trust concerns are implicit in cases involving debt delinquencies and tax return filing lapses.

Historically, the timing of addressing and resolving debt delinquencies are critical to an assessment of an applicant's trustworthiness, reliability, and good judgment in following rules and guidelines necessary for those seeking access to classified information or to holding a sensitive position. See ISCR Case No. 14-06808 at 3 (App. Bd. Nov. 23, 2016); ISCR Case No. 14-01894 at 5 (App. Bd. Aug. 18, 2015). Applicant's history of financial difficulties associated with his long-delinquent parent-guaranteed student loans for his daughter over a period of years that he has failed to resolve (either voluntarily, or even involuntarily through intercepted earmarked SS benefits) preclude his taking advantage of any of the potentially available extenuating benefits.

Because Applicant has failed to provide any documented evidence of initiated efforts to resolve his admitted student loan debts, mitigating credit cannot be extended under any of the potentially available mitigating conditions. More time is required for Applicant to demonstrate that he is taking responsible steps to address and resolve his delinquent student loan debts.

In evaluating Guideline F cases, the Appeal Board has stressed the importance of a "meaningful track record" that includes evidence of actual debt reduction through the voluntary payment of accrued debts. ISCR case No. 07-06482 at 2-3 (App. Bd. May 21, 2008) In Applicant's case, he has failed to take any documented steps to address his accumulated delinquent student loan debts and provide persuasive proof of his addressing his delinquent debts in issue.

Two of the delinquent debts covered in the SOR (§§ 1.c and 1.e) are reported small consumer debts that Applicant cannot identify as debts belonging to him. These medical debts are small and disputed by Applicant. Considering all of the circumstances, Applicant's explanations are reasonable and enable him to take partial advantage of MC § 20(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." While these debts are not fully explained with documented accounts of any earlier actions taken to resolve them, the listed debts are not sufficiently explained in the credit reports to enable Applicant to reasonably identify and resolve them with information available to him.

Personal conduct concerns

Security concerns are raised as well over Applicant's termination from his employment with a previous defense contractor in March 2012 (after being granted a security clearance and access to classified information in June 2011) after he was reportedly observed by two Base security officers taking a picture with his personal camera of a Base dial central office in violation of Base regulations and guidelines. Applicant acknowledged his awareness of the Base prohibitions against taking pictures on Base of Base facilities, his taking a picture with his personal camera while on Base, and his ensuing termination by his own supervisor. He disputed, however, his taking a picture of the Base's dial central office and claimed the picture he took in March 2012 was of a nearby tree.

Corroborative evidence of the tree incident reported to JPAS in March 2012 is lacking in the record, and there are plausible motivational reasons for the Base facility manager's making the allegations reported in JPAS based on Applicant's account of what he previously encountered with the facility manager on the Base. Moreover, this is an isolated and aged incident (over eight years ago) in Applicant's employment history and does not represent any pattern of dishonesty or rule violations.

So, while Applicant's knowing use of a personal camera to take a picture of Base property (whether a building structure or a tree that was possibly in the line of sight of the camera) while on the Base, in violation of Base regulations and guidelines, the incident itself is isolated and does not reflect any pattern dishonesty or rule violations by Applicant. Considering all of the circumstances surrounding the reported March 12 incident, the conduct is mitigated.

Whole-person assessment

Whole-person assessment of Applicant's clearance eligibility requires consideration of whether his finances are fully compatible with minimum standards for holding a clearance. While Applicant is entitled to credit for his civilian contributions to the defense industry, his efforts are not enough at this time to overcome his failures to resolve his accumulated student loan debt delinquencies. His past and present failures to address and resolve his accumulated student debt delinquencies reflect adversely on his ability to maintain his finances in a sufficiently stable manner to meet the minimum requirements for holding a security clearance. At this time, it is too soon to make safe predictions that Applicant will be able to voluntarily, or even involuntarily, resolve his accrued student debts within the foreseeable future.

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 financial considerations security 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:

Guideline F (FINANCIAL CONSIDERATIONS): AGAINST APPLICANT

Subparagraphs 1.a-1.b and 1.d:	Against Applicant
Subparagraphs 1.c and 1.e:	For Applicant

Guideline E (PERSONAL CONDUCT): FOR APPLICANT

Subparagraph 2.a:	FOR APPLICANT
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Conclusion

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

Roger C. Wesley
Administrative Judge