



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



In the matter of:)
)
) ISCR Case No. 19-02822
)
Applicant for Security Clearance)

Appearances

For Government: Rhett Petcher, Esq., Department Counsel
For Applicant: *Pro se*

06/22/2020

Decision

HARVEY, Mark, Administrative Judge:

Applicant did not provide sufficient information about his efforts to resolve seven of eight delinquent debts alleged in the statement of reasons (SOR). Eligibility for access to classified information is denied.

Statement of the Case

On April 15, 2019, Applicant completed and signed a Questionnaire for National Security Position (SF 86) or security clearance application (SCA). (Item 3). On November 27, 2019, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued an SOR to Applicant under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry*, February 20, 1960; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), January 2, 1992; 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. (Item 1)

The SOR detailed reasons why the DOD CAF did not find under the Directive that it is clearly consistent with the interests of national security to grant or continue a security clearance for Applicant and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked. Specifically, the SOR set forth security concerns arising under Guideline F. (Item 1)

On January 18, 2020, Applicant provided his response to the SOR, and he requested a decision without a hearing. (Item 2) On February 19, 2020, Department Counsel completed the File of Relevant Material (FORM). On March 2, 2020, Applicant was served with a copy of the FORM. Applicant's response, if any, was due on April 1, 2020. No response was received. On May 26, 2020, the case was assigned to me.

Some details were excluded to protect Applicant's right to privacy. Specific information is available in the cited exhibits and transcript. ISCR and ADP decisions and the Directive are available at <https://ogc.osd.mil/doha/isp.html>.

Findings of Fact

In Applicant's SOR response, he admitted all of the SOR allegations. (Item 2) He did not provide any supporting documentation about the status of delinquent debts in his SOR response. Applicant's admissions are accepted as findings of fact. Additional findings follows.

Applicant is a 44-year-old systems data analyst employed by a DOD contractor since July 2009. (Item 3 at 7, 14) From 1993 to 2009, he served on active duty in the Navy, and he received an honorable discharge. (*Id.* at 17-18) In 1993, he received a high school diploma. (*Id.* at 12) In 2018, he received a bachelor's degree. (*Id.* at 13) In 1996, he married, and he is currently separated from his spouse. (*Id.* at 20-21) His children were born in 1997, 2000, 2009, and 2011. (*Id.* at 25-27) There is no evidence of workplace misconduct or criminal conduct. He did not provide copies of performance evaluations or character references.

Financial Considerations

The SOR alleges eight delinquent debts totaling \$49,961 as follows: 1.a is a charged-off debt for \$5,895; 1.b is a charged-off debt for \$4,295; 1.c is a bank debt placed for collection for \$4,501; 1.d is a bank debt placed for collection for \$16,501; 1.e is a charged-off debt for \$4,180; 1.f is a charged-off debt for \$4,312; 1.g is a charged-off store debt for \$1,896; and 1.h is a charged-off debt for \$8,841.

In his April 15, 2019 SCA, Applicant said the debts in SOR ¶¶ 1.a (\$5,895), 1.b (\$4,285), 1.d (\$16,359), 1.f (\$4,312), 1.g (\$1,896), and 1.h (\$8,841) resulted from his "[i]nability to make payments after sep[a]ration from spouse and solely funding my sustainment and agreements for child and spousal support during sep[a]ration." (Item 2 at 40-46). As for actions taken to resolve these debts, he said "No current action taken. When funds are available, [I] will work to make payments if before 3/2020 at which point 3 year statute of limitations expires on legal action for unsecured credit debt." (*Id.*)

In his April 15, 2019 SCA, Applicant did not mention the debt in SOR ¶ 1.c (\$4,501). (Item 2) For the debt in SOR ¶ 1.e (\$4,180), he said it resulted from "failure to pay unsecured credit card during dispute with separated spouse," and it was being resolved through garnishment of his wages. (*Id.* at 38). The garnishment was 15 percent of his wages, and the final payment was scheduled for May 30, 2019. (*Id.* at 39) Applicant's

September 24, 2019 credit report, the most recent credit report of record, indicates the balance is \$184, and the date of last payment is June 2019. (Item 5) On July 30, 2019, Applicant provided proof to an Office of Personnel Management (OPM) investigator that his garnishment was successfully completed, and the debt in SOR ¶ 1.e was resolved. (Item 3)

In the summary of Applicant's July 29, 2019 OPM personal subject interview (PSI), he said that he separated from his spouse in September 2015. (Item 3 at 2) His spouse did not work outside their home. (*Id.*) Applicant agreed to pay his spouse \$4,000 monthly, and she agreed to pay their mortgage and utilities, and to take care of their children. (*Id.*) Applicant moved to a separate residence. (*Id.*) Applicant and his spouse used credit cards to fund any shortfalls in their income. (*Id.*) In July 2016, Applicant's son had a brain aneurism and stroke. (*Id.*) His son had surgery, and he received extensive rehabilitation. (*Id.*) Applicant had good medical coverage; however, these medical problems resulted in additional financial problems. (*Id.*) For a time, he borrowed from his 401(k) account to maintain his credit cards and pay his support obligation. (*Id.*) In March 2017, he "stopped making regular payments on his credit cards since they were unsecured and would not impact on meeting his and his family's monthly living expenses." (*Id.*)

After March 2017, Applicant tried to make smaller payments to the credit card companies. (Item 3 at 2) He tried to arrange payment plans. (*Id.*) The credit card companies were unwilling to work with him, and he was unable to establish affordable payment plans. (*Id.* at 2-5) He said that after he completed the garnishment, and the statute of limitations ends the risk of a lawsuit to collect the debts, he planned to attempt to establish payment plans to resolve his debts. (*Id.* at 5) He did not provide any documentation showing attempts to make payments or to establish payment plans.

In Applicant's July 29, 2019 OPM PSI, Applicant said his monthly net income, including 40 percent disability from the Department of Veterans Affairs and a contribution from his cohabitant, was \$9,247. (*Id.* at 5) His total monthly expenses included the payment of \$4,000 to his spouse, but did not include his garnishment to pay the debt in SOR ¶ 1.e, and totaled \$7,929. (*Id.* at 5-6) His net monthly remainder was \$1,318. (*Id.* at 6) In June 2019, he completed paying the \$1,200 monthly garnishment to address the debt in SOR ¶ 1.e. (*Id.* at 3, 5-6) While the garnishment was ongoing, he reduced his support payments to his spouse by \$300 monthly, and then after the garnishment, he provided \$4,300 to her monthly until the \$300 deduction was repaid. (*Id.*)

In the FORM, Department Counsel noted the absence of corroborating or supporting documentation of resolution of the SOR debts. Aside from Applicant's uncorroborated statements, there is no documentary evidence that Applicant paid, arranged to pay, settled, compromised, or otherwise resolved any of the SOR debts. The record lacks corroborating or substantiating documentation and detailed explanations of the causes for his financial problems and other mitigating information. The FORM informed Applicant that he had 30 days from the receipt of the FORM "**in which to submit a documentary response setting forth objections, rebuttal, extenuation, mitigation, or explanation, as appropriate.** If you do not file any objections or submit any additional information . . . your case will be assigned to an Administrative Judge for a determination

based solely” on the evidence set forth in this FORM. (FORM at 4 (emphasis added)) He did not respond to the FORM.

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information.” *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicant’s eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information. Clearance decisions must be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See Exec. Or. 10865 § 7. Thus, nothing in this decision should be construed to suggest that it is based, 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, Secretary of Defense, and Director of National Intelligence 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 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 for 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. 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. Affluence that cannot be explained by known sources of income is also a security concern insofar as it may result from criminal activity, including espionage.

The Appeal Board explained the scope and rationale for the financial considerations security concern in ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012) (citation omitted) as follows:

This concern 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. Rather, it requires a Judge to examine the totality of an applicant's financial history and circumstances. The Judge must consider pertinent evidence regarding the applicant's self-control, judgment, and other qualities essential to protecting the national secrets as well as the vulnerabilities inherent in the circumstances. The Directive presumes a nexus between proven conduct under any of the Guidelines and an applicant's security eligibility.

AG ¶ 19 includes 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.” In ISCR Case No. 08-12184 at 7 (App. Bd. Jan. 7, 2010), the Appeal Board explained:

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

(internal citation omitted). The record establishes the disqualifying conditions in AG ¶¶ 19(a) and 19(c) requiring additional inquiry about the possible applicability of mitigating conditions.

Five financial considerations mitigating conditions under AG ¶ 20 are potentially applicable in this case:

(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 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;

(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.

The DOHA 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 SOR alleges eight delinquent debts totaling \$49,961. Applicant’s pay was garnished to pay the debt in SOR ¶ 1.e (\$4,180). Payment of a debt “though garnishment rather than a voluntary effort diminishes its mitigating force.” *Compare* ISCR Case No. 08-06058 at 4 (App. Bd. Aug. 26, 2010) *with* ISCR Case No. 04-07360 at 2-3 (App. Bd. Sept. 26, 2006) (payment of two of four debts through garnishment did not bar mitigation of financial considerations concerns). *See also* ISCR Case No. 09-05700 at 4 (App. Bd. Feb. 24, 2011) (garnished payments towards delinquent tax debts is not mitigating information in light of other factors); ISCR Case No. 08-06058 at 6 (App. Bd. Sept. 21, 2009) (remanding the case to the administrative judge and stating when addressing an IRS garnishment, “On its face, satisfaction of a debt through the involuntary establishment of a creditor’s garnishment is not the same as, or similar to, a good-faith initiation of repayment by the debtor.”). On July 30, 2019, Applicant provided proof to the OPM investigator that his garnishment was successfully completed, and the debt in SOR ¶ 1.e was resolved. I have credited him with mitigating this debt; however, I note the mechanism for resolving this debt showed limited good faith.

Applicant’s finances were harmed by his separation from his spouse, the necessity to establish two households, his payments of \$4,000 on average monthly in support, and his son’s illness. These are circumstances largely beyond his control. He does not receive full mitigating credit under AG 20(b) because he did not establish that he acted responsibly under the circumstances. “Even if Applicant’s financial difficulties initially arose, in whole or in part, due to circumstances outside his [or her] control, the Judge could still consider whether Applicant has since acted in a reasonable manner when dealing with those financial difficulties.” ISCR Case No. 05-11366 at 4 n.9 (App. Bd. Jan. 12, 2007) (citing ISCR Case No. 99-0462 at 4 (App. Bd. May 25, 2000); ISCR Case No. 99-0012 at 4 (App. Bd. Dec. 1, 1999); ISCR Case No. 03-13096 at 4 (App. Bd. Nov. 29, 2005)). A component is whether he or she maintained contact with creditors and attempted to negotiate partial payments to keep debts current. Applicant did not provide documentary evidence that he maintained contact with creditors and attempted to negotiate partial payments to keep debts current.

A debt that became delinquent several years ago is still considered recent because “an applicant’s ongoing, unpaid debts evidence a continuing course of conduct and, therefore, can be viewed as recent for purposes of the Guideline F mitigating conditions.” ISCR Case No. 15-06532 at 3 (App. Bd. Feb. 16, 2017) (citing ISCR Case No. 15-01690 at 2 (App. Bd. Sept. 13, 2016)).

Applicant noted that he was waiting for the statute of limitations to run in March 2020 to address his debts. In ISCR Case No. 17-01473 at 5 (App. Bd. Aug. 10, 2018) (quoting ISCR Case No. 10-03656 at 3 (App. Bd. Jan. 19, 2011) (internal citations omitted)), the Appeal Board stated:

The security significance of long delinquent debts is not diminished merely because the debts have become legally unenforceable owing to the passage of time. Security clearance decisions are not controlled or limited by any statute of limitation, and reliance on the non-collectability of a debt does not constitute a good-faith effort to resolve that debt within the meaning of the Directive. A security clearance adjudication is not a proceeding aimed at collecting an applicant's personal debts. Rather a security clearance adjudication is a proceeding aimed at evaluating an applicant's judgment, reliability, and trustworthiness to make a decision about the applicant's security eligibility. Accordingly, even if a delinquent debt is legally unenforceable . . . , the federal government is entitled to consider the facts and circumstances surrounding an applicant's conduct in incurring and failing to satisfy the debt in a timely manner.

Several of Applicant's delinquent debts have been either charged off or may be dropped from his credit report or both. "[T]hat some debts have dropped off his credit report is not meaningful evidence of debt resolution." ISCR Case No. 14-05803 at 3 (App. Bd. July 7, 2016) (citing ISCR Case No. 14-03612 at 3 (App. Bd. Aug. 25, 2015)). The Fair Credit Reporting Act requires removal of most negative financial items from a credit report seven years from the first date of delinquency or the debt becoming collection barred because of a state statute of limitations, whichever is longer. See Title 15 U.S.C. § 1681c. See Federal Trade Commission website, *Summary of Fair Credit Reporting Act Updates at Section 605*, <https://www.consumer.ftc.gov/articles/pdf-01111-fair-credit-reporting-act.pdf>. Debts may be dropped from a credit report upon dispute when creditors believe the debt is not going to be paid, a creditor fails to timely respond to a credit reporting company's request for information, or when the debt has been charged off.

In ISCR Case No. 06-14521 at 2 (App. Bd. Oct. 15, 2007) (internal citation omitted) (mitigating security concerns despite garnishment to pay debt because of other financial efforts), the Appeal Board explained what constitutes a "good faith" effort to repay overdue creditors or otherwise resolve debts:

In order to qualify for application of [this 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 show that he or she relied on a legally available option (such as bankruptcy [or the statute of limitations]) in order to claim the benefit of [these mitigating conditions].

Before Applicant's \$1,200 monthly garnishment started, and after his garnishment was completed, and according to the income and expenses he described to the OPM investigator, he had about \$1,000 monthly available to address his SOR debts. He had the ability to address at least one of the seven unresolved SOR debts. Applicant did not

provide documentation relating to any of the seven SOR debts such as: (1) proof of payments, for example, checking account statements, photocopies of checks, or a letter from the creditor proving that he paid or made any payments to the creditor; (2) correspondence to or from the creditor to establish maintenance of contact; (3) copies of credible debt disputes sent to the creditor and/or credit reporting companies indicating he did not believe he was responsible for the debt and why he held such a belief; (4) evidence of attempts to negotiate payment plans, for example, settlement offers or agreements to show that he was attempting to resolve a debt; or (5) other evidence of progress or resolution.

Applicant did not provide sufficient documentation about why he was unable to make greater documented progress resolving any of the seven debts in SOR ¶¶ 1.a through 1.d and 1.f through 1.h totaling \$45,781. There is insufficient assurance that his financial problems are being resolved. Under all the circumstances, he failed to establish mitigation of financial considerations security concerns.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an Applicant's eligibility for a security clearance by considering the totality of the Applicant's conduct and all the circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(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), "[t]he ultimate determination" of whether to grant a security clearance "must be an overall commonsense judgment based upon careful consideration of the guidelines" and the whole-person concept. My comments under Guideline F are incorporated in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under those guidelines but some warrant additional comment.

Applicant is a 44-year-old systems data analyst employed by a DOD contractor since July 2009. From 1993 to 2009, he served on active duty in the Navy, and he received an honorable discharge. In 2018, he received a bachelor's degree. He is currently separated from his spouse, and she has custody of their four children. He described circumstances beyond his control that adversely affected his finances. There is no evidence of workplace misconduct or criminal conduct. He did not provide copies of performance evaluations or character references.

The evidence against grant of a security clearance is substantial. Applicant did not provide documentation about why he was unable to make greater documented progress resolving seven delinquent SOR debts totaling \$45,781. There is no evidence of progress (payments or payment plans) in the last three years of these seven delinquent debts. His lack of financial actions raises unmitigated questions about Applicant's reliability, trustworthiness, and ability to protect classified information. See AG ¶ 18.

It is well settled that once a concern arises regarding an applicant's security clearance eligibility, there is a strong presumption against granting a security clearance. See *Dorfmont*, 913 F. 2d at 1401. "[A] favorable clearance decision means that the record discloses no basis for doubt about an applicant's eligibility for access to classified information." ISCR Case No. 18-02085 at 7 (App. Bd. Jan. 3, 2020) (citing ISCR Case No.12-00270 at 3 (App. Bd. Jan. 17, 2014)). I have carefully applied the law, as set forth in *Egan*, Exec. Or. 10865, the Directive, the AGs, and the Appeal Board's jurisprudence to the facts and circumstances in the context of the whole person. Applicant failed to mitigate 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, Guideline F:	AGAINST APPLICANT
Subparagraphs 1.a through 1.d:	Against Applicant
Subparagraph 1.e:	For Applicant
Subparagraphs 1.f through 1.h:	Against Applicant

Conclusion

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

Mark Harvey
Administrative Judge