



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



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| In the matter of: |) | |
| |) | |
| |) | ISCR Case No. 20-02553 |
| |) | |
| Applicant for Security Clearance |) | |

Appearances

For Government: Alison O’Connell, Esq., Department Counsel
 For Applicant: Timothy W. Barbrow, Esq.
 03/31/2022

Decision

RIVERA, Juan J., Administrative Judge:

Applicant’s evidence is sufficient to demonstrate financial responsibility. Circumstances beyond his control led him to acquiring the delinquent debts alleged in the Statement of Reasons (SOR). He has acquired no delinquencies since 2018. He was candid and forthcoming during the clearance process. He is in control of his finances and has the means to maintain his financial responsibility. The financial considerations security concerns are mitigated. Clearance is granted.

Statement of the Case

Applicant submitted his most recent security clearance application (SCA) on May 8, 2018. He was interviewed by a government investigator on November 13, 2019, and answered a set of the Defense Office of Hearings and Appeals (DOHA) interrogatories on December 21, 2020. After reviewing the information gathered during the background investigation, the Defense Counterintelligence and Security Agency Consolidated Adjudications Facility (DOD CAF) issued him an SOR on March 9, 2021, alleging security concerns under Guideline F (financial considerations). Applicant answered the SOR on May 4, 2021, and requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA).

The case was assigned to me on August 30, 2021. The scheduling of the hearing was delayed because of COVID-19 pandemic health and safety concerns, and the unavailability of a viable video teleconference system (VTC). On February 1, 2022, DOHA issued a notice for a hearing via the Microsoft Teams VTC application setting the hearing for February 2, 2022.

I convened the hearing as scheduled. The Government offered five exhibits (GE 1 through 5). Applicant submitted 19 exhibits (AE), marked AE 1 through 19. AE 19 was submitted post-hearing. It is comprised of five tabs marked A through E. All exhibits were made part of the record and admitted without objection, except for AE 16, which is not substantive evidence. Applicant testified as reflected in a hearing transcript (Tr.) received by DOHA on February 8, 2022.

Procedural Issues

SOR ¶ 1.c mistakenly alleged that Applicant owed \$36,000 on a delinquent account. Applicant clarified in his answer to the DOHA interrogatories and at his hearing that the amount he owed was \$360,000. To conform the SOR allegation with the evidence presented, I *sua sponte* amended SOR ¶ 1.c to read \$360,000.

Findings of Fact

In his answer to the SOR, Applicant denied the financial allegations in ¶¶ 1.a (owing a creditor \$154,615 for a loan in collection), and 1.b (owing a bank \$10,392 for an account in collection). He admitted SOR ¶ 1.c (owing \$360,000 to the Small Business Administration (B) on a delinquent account). His SOR admission and those at his hearing are incorporated herein as findings of fact. After a thorough review of the record evidence, I make the following additional findings of fact:

Applicant is 65 years old. He enlisted in the U.S. Army in 1977 and served over 22 years on active duty until he was honorably retired in January 2000. His service included assignments to the Special Forces for 10 years, followed by assignments to signal and intelligence commands. Since he retired, Applicant has been working for federal contractors providing radio and communications support to several highly sensitive Government agencies. He has held eligibility for a clearance since 1978, sometimes at the top-secret or higher levels. There is no evidence of any other security concerns, except for those alleged in the SOR. He married his wife of 40 years in 1982, and has one adult daughter.

Sometime before 2015, Applicant's late brother (D), asked him for financial assistance to purchase a supermarket franchise (store). D was the general manager for a supermarket in the state where he and Applicant were born and raised. D proposed that he would manage the store's daily business because of his expertise, and Applicant would be a silent investor-partner. Applicant lacked the expertise to manage a store, and he had a full-time job and lived in another state. Applicant agreed.

Applicant and D purchased the store franchise for about \$1 million. They came up with about \$500,000 from their savings and retirement accounts. For the remainder of the price, D and Applicant took out a \$643,00 Small Business Administration loan from the creditor alleged in SOR 1.c (B). Applicant became the majority stake holder in the business with 51 percent ownership, and his brother was the minority stake holder with a 49 percent ownership. They incorporated their business, and the supermarket opened for business around October 2015. (Tr. 47-51)

The store did well for the first two years, making about \$2 million in 2016, and about \$3 million in 2017. Applicant testified the income was reinvested into the store, and used to pay employees and operational expenses. (Tr. 51-52) Applicant reported the business increased earnings to his employer and supervisors to avoid any security issues. He purchased a luxury car and a sports car in 2016-2017. As of January 2022, he owed \$19,293 on the luxury car loan, and \$21,298 on the sports car loan. Both accounts are current and in good standing. (AE 2; See AE 19.a)

In late 2017, D had several strokes and was hospitalized. Thereafter, he was unable to manage the store and an assistant manager was appointed. Applicant believes that the assistant manager did not pay the incoming bills and misappropriated the store's money. He did not file charges or a claim against the assistant store manager.

In about June 2018, Applicant received letters from the store's landlord and a creditor indicating that a loan and the lease were delinquent. Applicant testified he contacted the creditors and explained to them that his brother was in the hospital. He then tried to make things right. He called the store twice a week trying to assess the situation and provided whatever help he could to manage the store.

When the store was failing, Applicant took out two personal loans trying to keep the store functioning. He borrowed \$150,000 from the creditor in SOR ¶ 1.a, and a \$50,000 loan from EFG (a financial group not alleged in the SOR). The money from both loans was supposed to be used to pay employee wages and store expenses; however, according to Applicant the store manager did not pay the bills and \$20,000 of money in reserve disappeared. Applicant closed the store mid-2018. (Tr. 53-55)

While the store was in business, it was repaying both of Applicant's personal loans. About \$30,000 of the \$50,000 loan was paid before the store closed. For the remaining balance, Applicant negotiated a \$500 monthly payment plan with EBF. Between November 2019 and March 2021, Applicant made 17 payments for a total of \$8,500. (AE 13) As of February 2022, Applicant owed only \$5,040. (AE 13, 14) At his hearing, he anticipated paying the remainder of the debt in October 2022. He then intends to apply the payment to other debts.

Applicant believes that the store payments reduced the \$150,000 loan alleged in SOR ¶ 1.a, to about \$90,000 by the time the store closed. He testified that in late-2018 early-2019, he attempted to establish a repayment plan with the creditor alleged in SOR ¶ 1.a, similar to the one he established with EBF, but the creditor refused. (Tr. 54-55) He

did not provide copies of any letters sent to the creditor offering to settle the debt. After the store closed in late 2018, Applicant made no more payments to the creditor alleged in SOR ¶ 1.a. The creditor has not contacted Applicant requesting repayment of the loan since the store closed in late-2018, and it has not filed for collection or obtained a judgment against Applicant. (Tr. 56-57)

Applicant testified that when the store closed, it had paid about \$343,000 of the \$643,000 SBC loan he and his late brother took out from B, and it owed about \$300,000. Applicant believes that the account alleged in SOR ¶ 1.c has been satisfied, because when the store closed, B took possession of all the merchandise and equipment inside of the store to offset the store's debt. After B took the store's merchandise and property, Applicant did not make any further payments on the account, and he said the creditor never sought any additional payments. According to Applicant, the creditor did not attempt any further collection, and it has not filed for collection or obtained a judgment against him. The creditor did not initiate a recovery action against the estate of Applicant's brother. Applicant does not know the status of the account or whether he owes any money. (Tr. 37, 55-56, 59)

The store owed about \$100,000 in rent to the landlord when it closed. Applicant testified that the landlord waived collecting the past-due rent because another company wanted to lease Applicant's store. (Tr. 37) Applicant believes that the other company assumed his lease. (Tr. 55) Applicant consulted with attorneys and has considered filing for bankruptcy, but so far has decided against it. He notified the federal agency he was working for about the possibility of having to file for bankruptcy because the business was failing. (Tr. 37, AE 12)

Applicant opened the credit card account with the creditor alleged in SOR ¶ 1.b to pay for store expenses trying to keep it open. SOR ¶ 1.b alleged one account (ending in 0279) in collection for \$10,392. Applicant's documentary evidence shows that he settled the account for \$4,157 in March 2021, and paid it off in twelve monthly payments of about \$346 between March 2021 and February 2022. SOR ¶ 1.b is resolved in Applicant's favor. (AE 1, 15, and 19.c)

Applicant also opened two lines of credit accounts with the same creditor to pay for store necessities. As of January 2022, both line of credit accounts had a balance of about \$19,000 each. (See AE 5, 6) As of the hearing day, both accounts were current and were not alleged in the SOR. (Tr. 44-46, AE 2) In addition to the accounts previously mentioned, as of January 31, 2022, Applicant was making monthly payments on the following accounts: 1) a mortgage payment of \$1,992, on a \$316,161 mortgage. The home has an estimated value of \$609,800. (AE 3, 4); 2) a credit card owing \$17,292 (See AE 7 and AE 19.b); 3) a charge card owing \$2,759; 4) a charge card owing \$4,873; 5) a charge card owing \$8,106; 6) an unsecured loan owing \$433; and 7) an unsecure loan owing \$3,145. (See AE 2)

As of the time of his hearing, Applicant's annual gross salary was about \$123,000. Additionally, he earned about \$8,400 a year from two part-time jobs; \$26,400 a year from

his military retirement; about \$36,000 a year from his service-related disability retirement; and \$9,600 a year from a company's retirement, for a total annual income of over \$203,400. Applicant believes that he is currently financially stable. His income allows him to pay his living expenses and his debts, except for the two debts alleged in SOR ¶¶ 1.a and 1.c. He intends to retire in 2023. He believes that his retired income will allow him to continue paying his debts. (See AE 17, 18) If the creditors alleged in SOR ¶¶ 1.a and 1.c file collection actions against him, Applicant will try to make payment arrangements with them. If they refuse to make payment arrangements, he believes that he may be forced to file for bankruptcy.

Applicant has not participated in financial counseling recently. However, he noted he has consulted with attorneys about the possibility of filing for bankruptcy. Notwithstanding, his documentary evidence is sufficient to show he is following a budget and paying his debts, except for the accounts alleged in SOR ¶¶ 1.a and 1.c. I note that he has not acquired any additional delinquent debts since 2018.

Applicant submitted three reference letters, including two from direct government supervisors and his federal contractor manager. Applicant has been working with a sensitive federal agency since 2013. He has been entrusted with sensitive and classified information for several programs. He is considered to be a man of high character and integrity. Both supervisors trust him with classified and national security information and would welcome him back to work with the agency. (AE 8)

Applicant's financial problems were caused by his failed business. He has learned a hard lesson as a result of his financial problems and the clearance process. He understands that he has to maintain financial responsibility to be eligible for a clearance and to retain his job. He promised to maintain financial responsibility. He noted that he has increased his credit score to 717. He believes this demonstrates his improved financial responsibility. (AE 19.e) His financial problems were caused by circumstances beyond his control and are unlikely to recur in the future. He believes that his military service, along with his many years working sensitive positions for federal agencies, show that he will not be a security risk.

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 *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AGs), applicable to all adjudicative decisions issued on or after 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, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended. 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 AGs 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 AGs 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 Security Executive Agent Directive (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 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 . . .

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.

Applicant's financial problems are documented in the record. He had two outstanding collection accounts and a delinquent account, totaling over \$500,000. AG ¶ 19 provides 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 these 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, 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

(d) the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts.

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).

AG ¶ 19(a) is partially applicable because Applicant acquired the delinquent debts alleged in the SOR between 2015 and 2018, and he has not acquired any additional delinquent debts after 2018. However, he just settled and paid one account alleged in the SOR, and he still has two unresolved accounts in collection that he failed to pay. Thus, the financial problems are recent.

AG ¶ 19(b) is supported by the facts in this case and it is fully applicable because Applicant's financial problem were caused or aggravated largely by circumstances beyond his control, e.g., his brother's illness and death, a failed business, and the larceny of the store's funds. I have carefully considered whether Applicant was financially responsible and determined that in light of the evidence as a whole, he has been financially responsible.

Applicant and his brother used most of their savings and retirement accounts to purchase the store franchise and start their business. D was a manager in a similar store and he knew the business and how to run the store's daily business. During the first two years the store was profitable, making about \$5 million. After his brother became sick and unable to manage the store, the store started to get into financial trouble likely because of the lack of management and close supervision. Applicant lived far away in another state, had his own full-time employment, and did not have the expertise to manage the store. He tried to prop up the store by taking personal loans to pay the employees and the store bills. After his brother died and the store closed, he was left with debt that he was personally liable for as well as the store and likely part of his late brother's share.

The record shows that Applicant attempted to negotiate with his creditors and established payment plans with those creditors willing to negotiate and receive monthly payments. Some of those accounts were current, and as such, not alleged in the SOR. (See AE 2)

Applicant overextended himself financially in his effort to salvage the store. He also purchased a couple of luxury cars when the store was doing well in 2015-2016. He acquired a lot of debt as indicated in AE 2. However, he is currently paying 15 debts and his financial obligations are current, except for the accounts alleged in SOR ¶¶ 1.a and 1.c (See AE 2, 3, 5 -7, 13 - 15, 17, 19.a - 19.d)

Applicant claimed that the store reduced the debt to the creditor of SOR ¶ 1.a to around \$90,000. He also claimed that the debt to the creditor of SOR ¶ 1.c was reduced through the store's payments between 2015 and 2018. He believes that the creditor of SOR ¶ 1.c was satisfied by taking the store's inventory and property when the store closed. He further believes that both creditors are no longer collecting the debts because they have not contacted him since 2018, and they have not filed a collection action or obtained a judgment against him. He failed to present documentary evidence to support his claims.

AG ¶¶ 19(c) and (d) are applicable. Applicant sought financial advice from an attorney seeking to file for bankruptcy protection, and he initiated and is adhering to a good-faith effort to repay most of his creditors. I note that the credit reports on file show Applicant paid or resolved several accounts, and is current and paying many accounts resulting from the failed business, but not alleged in the SOR.

I considered that Applicant did not address SOR ¶ 1.b until after he received the SOR. However, the evidence shows that he paid other accounts not alleged in the SOR before the SOR was issued. I also considered that Applicant has not had any additional delinquent accounts since 2018, and that he was candid and forthcoming during the clearance process. Considering the record as a whole, I find that Applicant acted responsibly under the circumstances and that he made a good-faith effort to pay his delinquent debts. His past financial behavior does not cast doubt on his current reliability, trustworthiness, and good judgment.

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). 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 that guideline but some warrant additional comment.

Applicant, 65, served in the U.S. Army for 22 years. During ten of those years he served in Special Forces units. Those assignments were followed by assignments to Signal and Intelligence units before he was honorably retired. He has worked for federal contractors since he retired in 2000 until the present. He has held eligibility for a clearance, sometimes at a top-secret level or higher, without any security concerns,

except for those in the SOR. His Government supervisors lauded Applicant's trustworthiness, integrity, and judgement.

Applicant's financial problems were caused by circumstances beyond his control and are unlikely to recur. I believe that his prior behavior shows that he will maintain his financial responsibility in the future. He established viable payment plans with those creditors willing to take partial payments and is complying with his payment agreements. He is making good-faith efforts to resolve his financial problems. Applicant has demonstrated the reliability, trustworthiness, and good judgment required to protect classified information. He is in control of his financial situation. Given the opportunity, Applicant will continue to pay his financial obligations.

The AGs do not require an applicant to immediately resolve or pay each and every debt alleged in the SOR, to be debt free, or to resolve first the debts alleged in the SOR. An applicant needs only to establish a plan to resolve financial problems and take significant actions to implement the plan. Applicant has implemented a plan to resolve his financial problems and he has made substantial progress implementing his plan. After weighing the disqualifying and mitigating conditions under Guideline F, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns raised by his delinquent debts.

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:

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| Paragraph 1, Guideline F: | FOR APPLICANT |
| Subparagraphs 1.a - 1.c: | For Applicant |

Conclusion

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

JUAN J. RIVERA
Administrative Judge