



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



In the matter of:)
)
) ISCR Case No. 21-00707
)
Applicant for Security Clearance)

Appearances

For Government: Michelle Tilford, Esq., Department Counsel
For Applicant: George Lobb, Esq.

11/01/2022

Decision

BENSON, Pamela C., Administrative Judge:

Applicant failed to provide sufficient documentation concerning why he was unable to make greater documented progress resolving the SOR debts, especially in light of his employment history and six-figure income. Guideline F (financial considerations) security concerns are not mitigated. Eligibility for access to classified information is denied.

Statement of the Case

On September 16, 2020, Applicant completed and signed his Questionnaires for Investigations Processing or security clearance application (SCA). On April 9, 2021, the Defense Counterintelligence and Security Agency Consolidated Adjudications Facility (DCSA CAF) issued a statement of reasons (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), as amended; 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.

The SOR detailed reasons why the DCSA 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 (financial considerations). On May 17, 2021, Applicant provided a response to the SOR and requested a hearing. Processing of Applicant's case was delayed due to the COVID-19 pandemic. On April 5, 2022, the case was assigned to me. On June 7, 2022, DOHA issued a notice of hearing, setting his hearing for June 21, 2022. His hearing was held as scheduled using the Microsoft Teams teleconference system. During the hearing, Department Counsel made a motion to add an additional SOR allegation (§ 1.p.) under Guideline F. Applicant's counsel objected to the new SOR allegation, and alternatively argued that if the allegation is added to the SOR, Applicant required additional time for a proper response. I granted Department Counsel's motion to add the allegation, which read:

SOR § 1.p Applicant fraudulently filed his 2021 federal income tax return when he identified three children who are neither biological nor adopted as his grandchildren when he claimed he was eligible for the child tax credit.

I granted Applicant's Counsel's request for a continuance to respond to the new SOR allegation. The hearing was adjourned and a new hearing was scheduled for August 10, 2022. At the hearing, Department Counsel offered seven Government exhibits (GE) 1-7; Applicant offered four exhibits (AE) A-D; there were no objections; and all proffered exhibits were admitted into evidence. Applicant's Counsel also noted on the record that his client denied the new allegation. (SOR § 1.p) Applicant, his wife, and a tax expert testified during the hearing. On June 28, 2022, DOHA received a transcript of the initial hearing that was continued, and on August 17, 2022, a transcript (Tr.) of the final hearing was delivered. I held the record open until August 31, 2022, in the event either party wanted to supplement the record. On August 29, 2022, Applicant's Counsel provided two documents, AE E and F, and requested additional time to submit other documentation. I granted an additional two weeks to hold the record open, without objection. On September 16, 2022, Applicant's Counsel again requested additional time to submit documentation due to Applicant's extended illness with COVID. I granted a final extension to hold the record open until October 11, 2022. Counsel submitted two post-hearing documents, AE G and AE H. All post-hearing documents were admitted into evidence without objection.

Evidence Issue

Department Counsel requested, and I granted, administrative notice of the Internal Revenue Service (IRS) Fact Sheet regarding 2021 child tax credit; there was no objection. I labeled this document as GE 7.

Findings of Fact

In Applicant's SOR response, he admitted the SOR allegations in §§ 1.a through 1.o. He denied the added SOR allegation (§ 1.p). His admissions are accepted as findings of fact. Additional findings follow.

Applicant is 58 years old, and he has been employed by a government contractor as a network engineer since August 2021. His monthly net salary is about \$9,700. For approximately the past eight years, he has worked as a federal contractor with a two-month break in employment in 2017. In 2006, he received a bachelor's degree from an on-line university. He married in 1999, and he does not have any children. His wife is medically disabled and unemployed. He currently possesses a DOD security clearance. (GE 1, GE 2; AE F; Tr. 24-25, 30-34, 36-37, 49, 64-66, 93, 107)

Financial Considerations

Applicant stated during his October 2020 background interview that he is able to live within his means and pay his debts. He admitted that he had multiple medical debts that were currently unpaid. The majority of the medical bills resulted from his wife and grandchild's medical issues. The authorized DOD investigator showed Applicant his credit report revealing two delinquent student loans, two vet bills, a consumer cash loan, and several outstanding medical accounts. Applicant was surprised at the total number and combined amount of his delinquent accounts, some of which became delinquent in 2015. He stated that it was his intention to obtain a credit report and contact the creditors to determine if the balances owed were legitimate. If a balance was legitimate, he intended to satisfy the account; if the balance was not substantiated, he intended to dispute the delinquent account. (GE 2)

At the hearing, Applicant's wife testified that she has been hospitalized three times within the past two years. She suffered from cancer, aphasia, cellulitis, and she had a portion of her lung removed. Numerous medical bills accrued that they are unable to pay. She is not qualified for disability income because the government determined that Applicant earns too much money. Applicant also has medical out-of-pocket expenses not covered by insurance that are related to his diabetes and sleep apnea. (Tr. 25-29, 52-55, 60; AE C)

Applicant stated that he earns about \$128,000 annually. His wife's cousin and her three children reside with Applicant and his wife. In July 2011, Applicant and his wife were granted legal custody of the older two children, and the mother was ordered to pay child support to Applicant and his wife. Applicant stated that the youngest child was also legally placed into their care. The children's mother works as a school employee, and earns between \$1,500 - \$2,000 monthly during the school year. She also receives monthly disability payments of about \$2,000 from the Veteran's Administration due to her previous service in the U.S. Army. Applicant accepts financial responsibility for the three children in his custody, and he charges his wife's cousin \$900 a month for living in their house. There is insufficient evidence in the record to show whether the children's mother also pays child support to Applicant. (Tr. 64, 67-69; AE D)

Applicant testified that while he was unemployed for approximately two months in 1987, he received a phone call from his student loan creditor. He explained that he was currently unemployed and the student loan provider gave him a six-month forbearance before he was required to start student loan payments. He was initially on an income-based payment plan, but when the plan lapsed, the loan payments increased to almost

\$2,000 a month. He could not afford to make these payments. In about September 2017, he decided he would allow his student loans to go into default, and then he would rehabilitate them. When he later attempted to communicate with the student loan provider to rehabilitate his defaulted student loans, he was unable to make contact. He tried on multiple occasions to make contact with the student loan provider without success. Over the years, he admitted receiving letters from the student loan creditor, but he denied receiving correspondence within the past two years. Applicant last made a payment on his delinquent student loans in about August 2017. The total amount of his delinquent student loans alleged in the SOR is \$82,787. (Tr. 50-52, 86-92)

Applicant testified that his short-term plan for resolving his student loans is to begin making interest-only payments so that his student loan balance does not continue to increase. His long-term plan is to use his inheritance from his father's estate when his father passes away. In addition, Applicant has an elderly friend who has promised that he would inherit half of his estate. Applicant estimated that the inheritance money should fully cover the outstanding student loan balance. (Tr. 60-61)

In approximately 2005, Applicant participated in the Dave Ramsey financial program. At that time, he and his spouse had recently filed for bankruptcy. After their case was discharged, they successfully handled their financial obligations for several years until Applicant's wife became ill and the medical bills accumulated. They focused on paying off the smallest bills. He estimated that they resolved about \$5,000 of their delinquent debt. Applicant testified that he had joined a consumer credit counseling (CCC) program on the same day as his hearing. He will begin making payments through this CCC service next month. Other than his outstanding student loans, he now believes he only has five accounts in collection. There was no documentation to show what specific accounts were included in the CCC repayment plan. Post-hearing documentation showed that Applicant made his first monthly payment of \$203 in September 2022. (Tr. 57-58, 61-62, 79-81, 99-101; AE G)

SOR ¶¶ 1.a through 1.f allege that Applicant owes a total of \$305 for delinquent medical accounts placed for collection. The May 2022 credit report in the record shows that these accounts have been paid. (GE 5; Tr. 98-99)

SOR ¶¶ 1.g, 1.h, 1.n, and 1.o allege that Applicant owes a total of \$1,795 for delinquent medical accounts placed for collection. There is no evidence that these accounts have been successfully disputed, paid, or that they are being paid through the CCC program. These accounts are unresolved. (GE 3, GE 5; Tr. 99)

SOR ¶¶ 1.i alleges that Applicant owes a total of \$3,933 for a consumer payday loan that has been referred for collection. There is no evidence that the account has been successfully disputed, paid, or that it is being paid through the CCC program. This account is unresolved. (GE 5; Tr. 84-85)

SOR ¶¶ 1.j, and 1.k allege that Applicant owes the U.S. Department of Education \$82,787 for two delinquent student loans referred for collection. Applicant admitted that he has not paid on his student loans since mid-2017, well before the COVID pause relief

was enacted by the government. There is no evidence that his student loans have been successfully rehabilitated, or that Applicant has made any interest-only payments. There is insufficient evidence to determine that these student loans have been resolved through an inheritance, or are being paid through the CCC program. These student loans are unresolved. (GE 5; Tr. 86-92)

SOR ¶¶ 1.l, and 1.m allege that Applicant owes a total of \$856 to a pet hospital since 2017. There is no evidence that these accounts have been successfully disputed, paid, or if they are being paid through the CCC program. These accounts are unresolved. (GE 3; Tr. 85-86, 92)

Applicant provided a financial summary at the hearing. It showed that his monthly net income was \$9,500 and he received \$900 from his wife’s cousin each month. With a monthly net income of \$10,400, he was paying the following monthly expenses:

Mortgage	\$1,200		Electric	\$350
Car payment	\$400		Water	\$200
Car Insurance	\$260		Other Utilities, internet, phones, entertainment	\$900
Gasoline	\$600		pets	\$500
Food	\$2,450		Retirement	\$550
Health insur.	\$240		Visit sick father	\$600
Other medical	\$1,250		Toiletries, clothing, school supplies, personal care	\$1,700
HSA contribut.	\$680		Total expenses	\$11,880

Department Counsel questioned Applicant about his financial report since the monthly expenses totaled \$11,880, which is about \$1,500 over his net monthly income. Applicant stated that he may have been “a little on the pessimistic side” when he listed his monthly expenses. According to the chart above, groceries for a family of six cost \$545 each week; pets (four cats and 1 dog) costs averaged about \$112 each week; toiletries, school supplies, clothing, and personal care items cost about \$380 each week. Applicant resubmitted an amended monthly budget post-hearing. His monthly net income is now \$9,700 and he continues to receive \$900 from his wife’s cousin. After paying his monthly expenses, to include the \$203 CCC monthly payment, he has approximately \$1,086 net remainder at the end of the month. (AE A; AE F; Tr. 69-76, 94-97)

SOR ¶ 1.p alleges Applicant fraudulently filed his 2021 federal income tax return when he identified three children who are neither biological nor adopted as his grandchildren when he claimed he was eligible for the child tax credit. Applicant denied this allegation. He had a tax expert testify and provide a written analysis that indicated that although he mistakenly identified the children under his care as his “grandchildren” instead of “foster children” on his 2021 tax return, Applicant was legally entitled to receive child tax credit as they met the requirements under the tax code. Documentation in the record showed that Applicant and his wife were granted legal custody of two of the three children in 2011, but there was insufficient evidence to show that the youngest child was placed into their custody by Children Services. I find that Applicant testified credibly that they have custody of all three children. This SOR allegation has been refuted. (GE 7, AE B, AE D, AE E; Tr. 103-106)

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 [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

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.

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 three disqualifying conditions that could raise a security concern and may be disqualifying in this case: "(a) inability to satisfy debts"; "(c) a history of not meeting financial obligations"; and "(f) failure to file or fraudulently filing annual Federal, state, or local income tax returns or failure to pay annual Federal, state, or local income tax as required." AG ¶ 19(f) is refuted by documentation submitted by the tax expert. 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.

In ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013), the DOHA Appeal Board 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).

Applicant has a history of not meeting financial obligations. He had a previous bankruptcy and discharge, but his finances once again became delinquent. Circumstances beyond Applicant’s control adversely affected his finances, including unforeseen medical issues and receiving custody of three children. However, “[e]ven 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. 03-13096 at 4 (App. Bd. Nov. 29, 2005); ISCR Case No. 99-0462 at 4 (App. Bd. May 25, 2000); ISCR Case No. 99-0012 at 4 (App. Bd. Dec. 1, 1999)). A component is whether he or she maintained contact with creditors and attempted to negotiate partial payments to keep debts current.

There is sufficient evidence that the medical debts alleged in SOR ¶¶ 1.a through 1.f, totaling about \$305, have been paid. I find that Applicant mitigated these SOR medical accounts.

Applicant’s income is six-figures. His most recent budget showed that he had approximately \$1,100 left over at the end of the month after paying expenses, to include his CCC monthly payment plan. He did not provide sufficient documentation explaining why he was unable to make greater documented progress resolving the debts in SOR ¶¶ 1.g through 1.o, especially considering his consistent employment history and income. He did not provide supporting documentary evidence that he maintained contact with these creditors, had evidence of settlements or written offers to settle with the creditor, or proof that these delinquent accounts were included in his recent CCC repayment plan. Assuming that the debts were included in the CCC repayment plan, post-hearing documentation shows that Applicant made one monthly payment of \$203 in September 2022. There is insufficient evidence to establish a track record of steady payments, or good-faith mitigation of his unresolved delinquent SOR debt.

The SOR alleges that Applicant owes \$82,787 for two delinquent student loans referred to the U.S. Department of Education for collection. He last made a payment on his loans in 2017, and allowed them to go into default. A security clearance represents an obligation to the Federal Government for the protection of national secrets. Accordingly, failure to honor other obligations to the Government has a direct bearing on an Applicant’s reliability, trustworthiness, and ability to protect classified information. ISCR Case No. 14-03358 at 2 (App. Bd. Oct. 9, 2015). While these debts are in a deferment status because of the pandemic, Applicant had already defaulted on them prior to the deferment. When student loans are placed in a deferment status after being in default, Applicant’s past inactions are not excused in the context of security clearance eligibility. None of the above mitigating conditions are established for SOR ¶¶ 1.g through 1.o.

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 that guideline but some warrant additional comment.

The evidence against grant of a security clearance is more substantial at this time. Applicant has a history of not responsibly meeting financial obligations. He did not provide documentation explaining why he was unable to make greater progress resolving the debt in SOR ¶¶ 1.g through 1.o, since he was placed on notice in October 2020 of the government's concern about his financial issues. He has done little to address his debts despite his apparent ability to pay, or to take appropriate action to investigate and resolve delinquent debts. His lack of responsible financial action over the last two years raises unmitigated questions about his reliability, trustworthiness, and ability to protect classified information. 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.

This decision should not be construed as a determination that Applicant cannot or will not attain the state of reform necessary for award of a security clearance in the future. With more effort towards documented resolution of his past-due debt, and a better track record of behavior consistent with his obligation, he may well be able to demonstrate persuasive evidence of his security clearance worthiness. 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 – 1.f:	For Applicant
Subparagraphs 1.g – 1.o:	Against Applicant
Subparagraph 1.p:	For 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 or continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Pamela C. Benson
Administrative Judge