



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



In the matter of:)
)
XXXXXXXXXX, XXXXX) ISCR Case No. 12-11315
)
Applicant for Security Clearance)

Appearances

For Government: Candace L. Garcia, Esq., Department Counsel
For Applicant: *Pro se*

11/20/2015

Decision

TUIDER, Robert J., Administrative Judge:

Applicant mitigated security concerns under Guidelines F (financial considerations and E (personal conduct). Clearance is granted.

Statement of the Case

On February 12, 2012, Applicant submitted a Questionnaire for National Security Positions (SF-86). On May 23, 2015, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information within Industry*, dated February 20, 1960, as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended; and the adjudicative guidelines (AG), which became effective on September 1, 2006.

The SOR alleged security concerns under Guidelines F and E. The SOR detailed reasons why DOD was unable to find that it is clearly consistent with the national interest to grant a security clearance for Applicant, and referred his case to an administrative judge for a determination whether his clearance should be granted or denied.

On June 9, 2015, Applicant answered the SOR and elected to have his case decided on the written record in lieu of a hearing. A complete copy of the file of relevant material (FORM), dated August 28, 2015, was provided to him by letter dated September 2, 2015. Applicant received the FORM on September 8, 2015. He was afforded 30 days to file objections and submit material in refutation, extenuation, or mitigation. Applicant timely submitted additional information after receipt of the FORM, which was received without objection from Department Counsel.¹ On October 16, 2015, DOHA assigned the case to me.

Findings of Fact

In his answer to the SOR, Applicant admitted SOR ¶¶ 1.a through 1.e with explanations and denied SOR ¶¶ 1.f and 2.a with explanations. His SOR answers are incorporated in my findings of fact.

Background Information

Applicant is a 37-year-old security officer for a defense contractor, who seeks a security clearance as a requirement for employment reinstatement. He was hired by his employer in May 2012 and was subsequently terminated for failing to secure a security clearance. (Item 3; FORM response)

Applicant was awarded an associate's degree in information technology in June 2000, and was awarded a diploma in cardiovascular technology in May 2009. (Item 3) Applicant was married from May 2004 to June 2006, and that marriage ended by divorce. He has no dependents. (Item 3) Applicant did not serve in the armed forces. (Item 3)

Financial Considerations

Applicant's SOR alleges six separate debt allegations from four different creditors totaling \$43,984. He fell behind with his creditors after completing a two-year non-accredited cardiovascular technology diploma program in 2009 and was unable to find employment in that career field. Applicant was unemployed after completing his program during the following time periods: (1) March 2007 to October 2010; (2) December 2010 to February 2011; and (3) July 2011 to September 2011. (Item 3) He confirmed these periods of unemployment, as well as previous periods of unemployment, during his August 16, 2012 Office of Personnel Management Personal Subject Interview (OPM PSI). (Item 4)

In 2006, Applicant sold his co-operative property to invest in what he thought would be a viable career in cardiovascular technology. He asserts that the school he attended withheld or misrepresented information regarding their lack of accreditation in cardiovascular technology. The non-accreditation issue posed a significant obstacle to Applicant. He discovered that the licensing authority would only allow a graduate of a

¹Applicant's additional information will be referred to as "FORM response."

non-accredited program to sit for a board exam if they worked in cardiovascular technology-related employment for one year. Applicant was unable to find qualifying employment after searching for two years and was therefore unable to sit for his board exam. Frustrated and unable to go forward, he was forced to abandon his career plans in the cardiovascular technology field, but not before incurring substantial debt. (Item 2; FORM response)

The following summarizes the status of Applicant's six SOR debts:

SOR ¶¶ 1.a and 1.b - Charged-off student loans for \$18,243 and \$13,328, respectively. Applicant consolidated these loans with the creditor and has been making \$151 monthly payments by direct debit since June 2015. He has provided documentation of same. **DEBT BEING RESOLVED.** (Item 2; FORM response)

SOR ¶¶ 1.c and 1.d – Delinquent student loans for \$11,371 and \$8,127, respectively. Applicant consolidated and rehabilitated these loans with the creditor and has been making \$26 monthly payments by direct debit since June 2015. He provided documentation of same. **DEBT BEING RESOLVED.** (Item 2; FORM response)

SOR ¶ 1.e – Cell phone collection account for \$315. Applicant settled this account for the lesser amount of \$188.76. He provided documentation that payment was debited from his checking account on September 29, 2015. **DEBT RESOLVED** (Item 2, FORM response)

SOR ¶ 1.f - Cable company collection account in the amount of \$53. Applicant stated that he canceled service, moved, and was not informed of an outstanding balance. **DEBT BEING RESOLVED.** (Item 2)

Applicant asserts that before he encountered financial problems following his negative experience with the non-accredited cardiovascular technology diploma program, he had an “outstanding” credit report. (FORM response) Applicant has not received financial counseling. (Item 4)

Personal Conduct

When Applicant completed his May 2012 SF-86, he did not list any of his student loan debts alleged in ¶¶ 1.a through 1.d. In his FORM response, he stated, “I did not falsify financial information on my May 2012 e-QIP. I knew that I owed money to the [student loan creditors] and I started making payments with them the time that I did my e-QIP (SF-86) so to my knowledge my account was not delinquent.” (FORM response) Applicant thoroughly discussed his student loans and other debts during his August 2012 OPM PSI. During that interview, he stated that he was not financially stable and intended to repay the loans when he regained full time employment. (Item 4)

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. See also Executive Order 12968 (Aug. 2, 1995), § 3.1. Thus, nothing in this Decision should be construed to suggest that I have based this decision, 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 and the Secretary of Defense 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 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 relating to financial problems:

Failure or inability to live within one’s means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual’s reliability, trustworthiness, and ability to protect classified information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

AG ¶ 19 provides two disqualifying conditions that could raise a security concern and may be disqualifying in this case: “(a) inability or unwillingness to satisfy debts;” and “(c) a history of not meeting financial obligations.” The evidence establishes the disqualifying conditions in AG ¶¶ 19(a) and 19(c), requiring additional inquiry about the possible applicability of mitigating conditions.

Five mitigating conditions under AG ¶ 20 are potentially applicable:

(a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual’s current reliability, trustworthiness, or good judgment;

(b) the conditions that resulted in the financial problem were largely beyond the person’s control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation), and the individual acted responsibly under the circumstances;

(c) the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control;

(d) the individual initiated 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.

Applicant's conduct does not warrant full application of AG ¶ 20(a) because there is more than one delinquent debt and his financial problems are not isolated. His debt is a "continuing course of conduct" under the Appeal Board's jurisprudence. See ISCR Case No. 07-11814 at 3 (App. Bd. Aug. 29, 2008) (citing ISCR Case No. 01-03695 (App. Bd. Oct. 16, 2002)). Nevertheless, he receives partial credit under AG ¶ 20(a) because the debts occurred under circumstances that are unlikely to recur and his behavior does not cast doubt on his current reliability, trustworthiness, or good judgement.

Full application of AG ¶ 20(b) is warranted. Applicant sustained significant periods of unemployment following his inability to pursue a viable career in cardiovascular technology. His explanation for attending and continuing with a non-accredited school is plausible. It is doubtful Applicant would ever again consider attending a non-accredited school, given the financial fallout and personal hardship he has since sustained.

AG ¶¶ 20(c) is partially applicable and 20(d) is fully applicable. Although Applicant did not receive formal financial counseling, his debts are being resolved and there are clear indications that his financial problems are resolved or under control. As noted above, Applicant has made a concerted effort to repay his creditors through a series of actions to include rehabilitating and repaying his student loans and settling an outstanding account. Given Applicant's resources, he is approaching his debts in a responsible and measured way.² Applicant disputes the validity of the debt in SOR ¶ 1.f triggering application of AG ¶ 20(e); however, further action is required by Applicant challenging this debt so it does not appear on his credit report.

Personal Conduct

Posing potential security concerns are Applicant's documented omissions of his delinquent student loans from his May 2012 SF-86. His omissions are, however, attributable to his mistaken belief that at the time he completed his SF-86 he had started making payments and to his "knowledge," his accounts were not delinquent. However, a closer reading of the questions under **Section 26 – Financial Record – Delinquency Involving Routine Accounts** would have required him to list his delinquent student loans accounts. He was forthright with the OPM investigator about these accounts and

²"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 maintained contact with his creditors and attempted to negotiate partial payments to keep his debts current.

his other debts several months later during his August OPM PSI. While Applicant could reasonably have been expected to be more diligent about checking on the status of his debts, his judgment lapses are not enough to impute knowing and willful falsification under Guideline E.

Applicant's explanations of his omissions are persuasive enough to avert inferences of knowing and willful omission. There being no misconduct substantiated, there is no need to discuss extenuation or mitigating conditions. Cf. ISCR Case No. 02-13568 (App. Bd. Feb. 13, 2004). While Applicant failed to exercise due diligence in inquiring into the state of his debts, his mistaken reliance on the unknown status of his debts enable him to refute allegations of falsification of his SF-86 covered in subparagraph 2.a under Guideline E.

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(a):

- (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.

The ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. AG ¶ 2(c). The discussion in the Analysis section under Guidelines F and E is incorporated in this whole-person section. However, further comments are warranted.

Both the mitigating conditions under Guidelines F and E and the whole-person analysis support a favorable decision. Applicant's employment with a defense contractor weighs heavily in his favor. He is a law-abiding citizen and a productive member of society. He is current on his day-to-day expenses, lives within his means, and his SOR debts are resolved or are being resolved. The Appeal Board has addressed a key element in the whole-person analysis in financial cases stating:

In evaluating F cases, the Board has previously noted that the concept of "meaningful track record" necessarily includes evidence of actual debt reduction through payment of debts." However, an applicant is not required, as a matter of law, to establish that he has paid off each and every debt listed in the SOR. All that is required is that an applicant

demonstrate that he has “. . . established a plan to resolve his financial problems and taken significant actions to implement that plan.” The Judge can reasonably consider the entirety of an applicant’s financial situation and his actions in evaluating the extent to which that applicant’s plan for the reduction of his outstanding indebtedness is credible and realistic. See Directive ¶ E2.2(a) (“Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination.”) There is no requirement that a plan provide for payments on all outstanding debts simultaneously. Rather, a reasonable plan (and concomitant conduct) may provide for the payment of such debts one at a time. Likewise, there is no requirement that the first debts actually paid in furtherance of a reasonable debt plan be the ones listed in the SOR. ISCR Case No. 07-06482 at 2-3 (App. Bd. May 21, 2008) (internal citations omitted).

ISCR Case No. 07-06482 at 2-3 (App. Bd. May 21, 2008) (internal citations and quotation marks omitted).

Applicant understands what he needs to do to establish and maintain his financial responsibility. His efforts at debt resolution have established a “meaningful track record” of debt re-payment. I am confident he will resolve the remaining debts on his SOR and maintain his financial responsibility.³

I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my careful consideration of the whole-person factors and supporting evidence, my application of the pertinent factors under the adjudicative process, and my interpretation of my responsibilities under the adjudicative guidelines.

³Of course, the Government can re-validate Applicant’s financial status at any time through credit reports, investigation, and additional interrogatories. Approval of a clearance now does not bar the Government from subsequently revoking it, if warranted. “The Government has the right to reconsider the security significance of past conduct or circumstances in light of more recent conduct having negative security significance.” ISCR Case No. 10-06943 at 4 (App. Bd. Feb. 17, 2012). Violation of a promise made in a security context to pay legitimate debts also raises judgment concerns under Guideline E, and may support future revocation of a security clearance. An administrative judge does not have “authority to grant an interim, conditional, or probationary clearance.” ISCR Case No. 10-06943 at 4 (App. Bd. Feb. 17, 2012) (citing ISCR Case No. 10-03646 at 2 (App. Bd. Dec. 28, 2011)). See also ISCR Case No. 04-03907 at 2 (App. Bd. Sep. 18, 2006) (stating, “The Board has no authority to grant [a]pplicant a conditional or probationary security clearance to allow her the opportunity to have a security clearance while she works on her financial problems.”). This footnote does not imply that this Applicant’s security clearance is conditional.

Formal Findings

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline F: FOR APPLICANT

Subparagraphs 1.a to 1.f: FOR APPLICANT

Paragraph 2, Guideline E: FOR APPLICANT

Subparagraph 2.a: FOR APPLICANT

Conclusion

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

Robert J. Tuidor
Administrative Judge