DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 12-11252
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Richard Stevens, Esq., Department Counsel
For Applicant: *Pro se*

05/29/2015

Decision

RIVERA, Juan J., Administrative Judge:

Applicant's financial problems could have been aggravated, in part, by circumstances beyond his control. Notwithstanding, he failed to present sufficient evidence to show that he acted responsibly under the circumstances, and that his financial problems are resolved or under control. Clearance is denied.

Statement of the Case

Applicant submitted security clearance applications (SCA) on February 23, 2011, and June 9, 2012. On September 18, 2014, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) alleging security concerns under Guideline F (financial considerations).[1] Applicant answered the SOR on October 7, 2014, and elected to have her case decided on the written record.

[1] DOD acted under Executive Order 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 *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), implemented by the DOD on September 1, 2006.

A copy of the Government's file of relevant material (FORM), dated December 22, 2014, was provided to him by transmittal letter dated December 23, 2014. Apparently, Applicant acknowledged he had received the FORM in his e-mail response to an email from a legal assistant from the Defense Office of Hearings and Appeals (DOHA). The e-mail response, dated April 6, 2015, indicating he had no other information to submit.

Procedural and Evidentiary Issues

The Government withdrew SOR ¶ 1.i, because it is a duplicate allegation of SOR ¶ 1.a. (FORM, pg. 3; *See* letter dated September 25, 2014, from a state's child support enforcement agency.)

In the FORM, the Government offered as evidence a summary of Applicant's interview (PSI) with an Office of Personnel Management (OPM) investigator conducted on August 17, 2012. (Item 6) The Government noted that Item 6 had not been authenticated by Applicant, and acknowledged that the document was subject to an objection to its admissibility on that ground. (Directive, Enclosure 3, ¶ E3.1.20 (An ROI may be received with an authenticating witness provided it is otherwise admissible . . . .)) The Government invited Applicant to correct, revise, or update the information in Item 6, or to object to its admissibility in its entirety. (FORM, Footnote 1, pg. 2)

Applicant acknowledged receipt of the FORM on April 6, 2015, when he responded to an e-mail from a DOHA employee. The e-mail to Applicant states: "Per our conversation . . . could you please confirm that you received your "your eyes only" packet and that you have no rebuttal." Applicant e-mail response is also unclear: "I received the packet from my company. I have no other rebuttal paperwork to send." (Because the file contains no rebuttal beyond his e-mail response, I will presume Applicant meant the email as his response.)

The Government's footnote provided Applicant with sufficient knowledge of his right to object to the admissibility of Item 6. However, there is no evidence to show that Applicant received notice that his failure to correct Item 6 (the equivalent of certifying or authenticating the document), or to object to Item 6, would be considered a waiver of his right to object, and that his waiver would then allow an administrative judge to consider the document on its face.

Conversely, Applicant may have relied upon the Government's inclusion of his PSI (Item 6) in the record, and he may have wanted that evidence considered, and chose not to repeat facts contained in his PSI in his FORM response. (Section VII of the FORM states that if "you do not file any objections, or submit any additional information . . . the case will be assigned to an administrative judge for a determination based solely on the FORM.")

The Supreme Court has explained that "waiver is the 'intentional relinquishment or abandonment of a known right.' *Kontrick v. Ryan*, 540 U.S. 443, 458, n. 13 (2004)

(quoting *United States v. Olano*, 507 U.S. 725, 733 (1993)). I presume Applicant read the FORM and elected not to submit a response or objection. When evidence is submitted in a case, an Applicant is expected to object to the evidence, if there is a reason to do so. As a general statement of the law, failure to object to consideration of evidence results in waiver. There is no requirement that Department Counsel discuss the benefits or merits of making a rights' election.

Applicant's election not to object may have been better "informed" if Department Counsel's advice in the FORM had included comment that if Applicant elects to object to consideration of his PSI, it will not be accepted as evidence in his case; that if he does not object the PSI will be considered as evidence; and that Applicant's failure to respond to the FORM will be considered a waiver. Considering the circumstances in this particular case, the evidence is insufficient for me to conclude that Applicant knowingly waived his right to object. Accordingly, Item 6 was not admitted as evidence and will not be considered.

Findings of Fact

Applicant admitted the factual allegations in the SOR, with explanations, except for SOR ¶ 1.i, which he denied. His admissions are incorporated as findings of fact. After a review of the record evidence, I make the following additional findings of fact:

Applicant is a 33-year-old employee of a government contractor. He received a General Education Development (GED) certificate before he enlisted in the U.S. Army in 2000. While on active duty, he was deployed to Iraq from June 2005 to May 2006. Applicant was discharged in 2006 with a characterization of service of under other than honorable conditions (OTH). Apparently, he was charged with drug-related offenses and elected to be administratively discharged in lieu of a trial by court-martial. Applicant was first granted a secret-level security clearance in 2001, incidental to his service.

Applicant is currently divorced. He married his first spouse in 2002 and divorced in 2006. He married his second spouse in 2006 and divorced in 2009. He has a 13-year daughter, born out of wedlock, who resides with her mother. Applicant claimed that he has a verbal support agreement with the mother and provides $186 monthly in child support. He presented no documentary evidence to support such payments. He also has a seven-year-old son from his second marriage. Applicant has a court order requiring him to pay $250 monthly in child support. As of September 2014, he was $9,474 in arrears.

After his discharge, Applicant was unemployed for a short period, and then worked for a short periods for a temporary work agency and a private company. He worked full time for several defense contractors from September 2007 until January 2012. He was unemployed from January 2012 to May 2012, after he resigned from his overseas job. He started working for his current employer, a government contractor, in June 2012. Pursuant to his employment with several defense contractors, Applicant was deployed to Iraq (from January to September 2008, and November to January 2011)

and to Afghanistan (from January 2011 to January 2012) in support of U.S. interests in those countries. Apparently, he also worked overseas in 2013 – 2014, but the dates of actual service are not in the record.

Applicant disclosed in Section 26 (Financial History) of the 2012 SCA that he had financial problems, which included some of the delinquent debts alleged in the SOR and his delinquent child support. The subsequent background investigation and credit reports disclosed the eight delinquent SOR debts, totaling over $25,000.

Based on the 2011 and 2012 SCAs, and his answer to the SOR, the status of the delinquent debts alleged in the SOR is as follows:

SOR ¶ 1.a – This is a collection from a state agency for $9,474 of child support in arrears. In response to financial questions in his 2011 SCA, Applicant stated that he was up to date with his child support payments. In the 2012 SCA, Applicant stated that he "missed payments by accident, he was overseas," but that he was "paid up and current."

In his answer to the SOR, Applicant claimed the account was in good standing. He submitted a letter from the state's child support division indicating that Applicant was paying $250 monthly, plus an average of $96 extra each month to pay the arrearages. As of September 2014, he was $9,474 in arrears. Applicant presented no additional evidence to show whether he has been making consecutive payments since September 2014 to present.

SOR ¶ 1.b – In his 2012 SCA, Applicant stated that he had paid this debt in full. In his response to the SOR, he indicated that he had entered into a payment agreement with the creditor to pay $240 monthly, starting in October 2014. A letter from the law firm collecting the debt, dated September 30, 2014, confirmed the agreement. However, Applicant provided no documentary evidence to show the he has been complying with the agreement and is current on his payments.

SOR ¶¶ 1.c and 1.d - In his response to the SOR, Applicant admitted both debts and indicated that he had "set up a payment plan" and "requested copy of supporting documentation" for both debts. He claimed that he delayed sending his SOR answer waiting for the documents, but they did not arrive on time. The July 2014 credit report included in the FORM (Item 9) shows both debts as "charged off," and that Applicant disputed them. There is no information to show whether the disputes had a reasonable basis or were resolved favorably for Applicant.

SOR ¶ 1.e – In his response to the SOR, Applicant stated that the account was in collection by a different collector, and that he had "been working to pay this account off" and currently owed $380. A credit card statement submitted by Applicant, dated October 13, 2014, shows that in September 2014, he made a $370 payment. As of October 2014, he owed $380. He provided no documentary evidence showing that he

had made any payments prior to September 2014, or that he has made any additional payments since.

SOR ¶ 1.f – In his 2012 SCA, Applicant stated that he had just found about this account, and that he would be making payment arrangements. In his response to the SOR, Applicant admitted this was his debt, but claimed it was being reported inaccurately. He further claimed that he disputed the debt, and it was removed from his credit report. Applicant provided no documentary information showing when he disputed the debt, the reasons for the dispute, or why the debt was removed from his credit report.

A June 2012 credit report (FORM, Item 8) shows that the original creditor was a cellular service provider. The account has been delinquent and in collection since at least January 2012.

SOR ¶ 1.g – In his 2011 SCA, Applicant stated that he had just found about this account, and that he would be making payment arrangements. In the 2012 SCA, Applicant stated that he could not afford to pay the account and disputed it. In his response to the SOR, Applicant admitted this was his debt, but claimed it was being reported inaccurately and he disputed it. He stated that the debt was removed from his credit report. Applicant provided no information stating the reasons for the dispute, or the reasons for the removal of the debt from his credit report.

SOR ¶ 1.h – In his 2011 SCA, Applicant stated that the debt was cancelled, and that he received an IRS 1099 Form to file with his taxes. In his response to the SOR, Applicant admitted this was his debt, but claimed it was being reported inaccurately. He claimed that he disputed the debt and it was removed from his credit report. Applicant provided no information stating the reasons for the dispute, or the reasons for the removal of the debt from his credit report.

SOR ¶ 1.i – This allegation is a duplicate of SOR ¶ 1.a, and it was withdrawn by the Government.

Applicant provided little information about when he acquired the debts, why they became delinquent, what efforts he took before he was issued the SOR in September 2014 to stay in contact with his creditors, or to pay his delinquent debt. In his 2011 and 2012 SCAs, Applicant alludes to not having sufficient funds to pay some debts, and to missing some payments by accident because he was deployed overseas.

Applicant provided little information about his current earnings and financial position. He did not provide any information about his monthly income, his monthly expenses, and whether his current income is sufficient to pay his current day-to-day living expenses and his debts. There is no information to indicate whether he participated in financial counseling or whether he follows a budget.

Policies

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 AG 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 AG 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 AG ¶ 2(a). 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; AG ¶ 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

Guideline F, Financial Considerations

Under Guideline F, the security concern is that 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 ¶ 18)

Applicant admitted, and the credit reports established, the eight delinquent debts alleged in the SOR. AG ¶ 19(a) "inability or unwillingness to satisfy debts" and AG ¶ 19(c) "a history of not meeting financial obligations," apply.

AG ¶ 20 lists five conditions that could mitigate the financial considerations security concerns:

> (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.

Financial considerations mitigating condition AG ¶ 20(a) does not apply. Applicant's financial problems are ongoing and he did not present sufficient evidence to show that his financial problems occurred under unusual circumstances and are unlikely to recur.

AG ¶ 20(b) partially applies, but does not fully mitigate the financial considerations security concerns. Applicant's financial problems could have been, in part, aggravated or caused by circumstances beyond his control – his period of underemployment between January and May 2012, his divorces, and his deployments. However, Applicant presented no evidence explaining the circumstances of his resignation in January 2012, or how his five-month period of unemployment prevented him from addressing his delinquent debts from May 2012 to present.

Additionally, Applicant failed to present sufficient evidence to show that he acted responsibly under the circumstances, and that he made a good-faith effort to repay

overdue creditors or otherwise resolve his debts. He presented little documentary evidence of payments made, contacts with creditors, or efforts to otherwise resolve any of the delinquent SOR debts prior to his receipt of the SOR.

I considered that Applicant disputed a number of debts. Notwithstanding, Applicant failed to present sufficient evidence to establish that he had a reasonable basis to dispute the legitimacy of the past-due debts. Furthermore, Applicant's contradictory statements (in the 2011 and 2012 SCAs and in his answer to the SOR) create doubts about the accuracy of his statements. The remaining mitigating conditions are not applicable to the facts in this case.

In sum, Applicant provided little information about his current earnings and financial position. He did not provide any information about his monthly income, monthly expenses, and whether his current income is sufficient to pay his current day-to-day living expenses and debts. There is no information to show that he participated in financial counseling or that he follows a budget. The available information is insufficient to establish clear indications that his financial problems are being resolved or are under control. Applicant presented no reasonable plan to address his delinquent debts.

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. AG ¶ 2(c). I have incorporated my comments under Guideline F in my whole-person analysis.

Applicant failed to submit documentary evidence to show that he acted responsibly under the circumstances and that his financial problem is being resolved or is under control. He failed to mitigate the Guideline F 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.h:	Against Applicant
Subparagraph 1.i:	Withdrawn

Conclusion

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

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JUAN J. RIVERA
Administrative Judge