



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



In the matter of:)
)
-----) ISCR Case No. 12-11652
)
Applicant for Security Clearance)

Appearances

For Government: Tovah A. Minster, Esquire, Department Counsel
For Applicant: *Pro se*

06/27/2013

Decision

HARVEY, Mark, Administrative Judge:

Applicant’s statement of reasons (SOR) lists five delinquent or charged-off debts, totaling \$34,664. Over \$33,000 of this total relates to unresolved federal income tax liens. He did not make sufficient progress resolving his financial problems. Financial considerations concerns are not mitigated. Eligibility for access to classified information is denied.

Statement of the Case

On April 2, 2011, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP) version of security clearance application (SF 86) (Item 5). The Department of Defense Consolidated Adjudications Facility (DOD CAF) issued an undated 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) promulgated by the President on December 29, 2005.

The SOR alleged security concerns under Guideline F (financial considerations). (Item 1) The SOR detailed reasons why DOD could not make the preliminary affirmative

finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant, and recommended referral to an administrative judge to determine whether Applicant's clearance should be granted, continued, denied, or revoked. (Item 1)

On January 7, 2013, Applicant responded to the SOR allegations and waived his right to a hearing. (Item 3) A complete copy of the file of relevant material (FORM), dated April 4, 2013, was provided to him on April 19, 2013. He was afforded an opportunity to file objections and to submit material in refutation, extenuation, or mitigation.¹ Applicant did not respond to the FORM. The case was assigned to me on June 24, 2013.

Findings of Fact²

In Applicant's response to the SOR, he admitted the allegations in SOR ¶¶ 1.b-1.e, and he denied the allegation in SOR ¶ 1.a, indicating the debt was paid.³ His admissions are accepted as findings of fact.

Applicant is a 56-year-old systems architect for a defense contractor.⁴ He was awarded a bachelor's degree in 1978 from a nationally known university. He worked for the same defense contractor since 2000. He has never served in the military. In 1980, he married, and in 1988, he was divorced. He married the second time in 1988, and he was divorced in 1996. He married his spouse in 2002. He has one child, who was born in 1982. There is no evidence of arrests or convictions in the last 25 years. There is no evidence of use of illegal drugs or alcohol abuse.

Financial Considerations

In Applicant's April 21, 2011 Office of Personnel Management (OPM) personal subject interview (PSI), Applicant indicated he was unsure of the basis of the tax liens, but suggested that they related to an unpaid child support issue he believed had been resolved. (Item 5 at 10) In September 2012, Applicant responded to DOHA interrogatories and said he contacted the IRS, and the IRS said it would be 30 to 45 days before he would hear from an IRS agent. (Item 6 at 2)

¹The DOHA transmittal letter is dated April 8, 2013, and Applicant's receipt is dated April 19, 2013. The DOHA transmittal letter informed Applicant that he had 30 days after his receipt to submit information.

²Some details have not been included in order to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

³Applicant's SOR response is the basis for the facts in this paragraph. (Item 3)

⁴Applicant's April 2, 2011 SF 86 is the basis for the facts in this paragraph. (Item 4)

Applicant disclosed some financial problems on his April 2, 2011 SF 86; however, he did not disclose a problem with his federal income taxes. (Item 4) His SOR lists five delinquent or charged-off debts, totaling \$34,664. (Item 1) He has four federal tax liens filed as follows: (1) in 1992 for \$24,232; (2) in February 1993 for \$4,642; (3) in June 1993 for \$4,671; and (4) in April 1996 for \$252. (Items 1, 7) In his January 7, 2013 SOR response, Applicant said for each tax debt:

I admit because I cannot categorically deny. I have been in communication with the IRS regarding this debt and they have not given me any information, including the specifics, of this debt. However, while awaiting communication from the IRS, I have increased my contributions to the U.S. Treasury as a good faith effort to resolve this debt if it remains unpaid. (Item 3)

The FORM states, "Applicant claims that he has been in communication with the Internal Revenue Service (IRS) regarding these accounts, but provides no documentation." (FORM at 4) The FORM repeatedly emphasized the absence of documentation and insufficient documentation concerning resolution of his SOR debts.

There is no evidence of financial counseling. There is no documentary evidence of any payments to SOR creditors, correspondence to or from creditors, or debt disputes. There is no evidence of progress resolving his SOR debts.

The April 8, 2013 DOHA letter conveying the FORM to Applicant invited him to "submit any material you wish the Administrative Judge to consider or make any objection you may have as to the information in the file." Applicant did not provide any response to the FORM.

Policies

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

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the revised 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 his security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Financial Considerations

AG ¶ 18 articulates the security concern 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.” In ISCR Case No. 08-12184 at 7 (App. Bd. Jan. 7, 2010), the Appeal Board explained:

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

(internal citation omitted). Applicant’s history of delinquent debt is documented in his credit reports, OPM PSI, and SOR response. The record establishes Applicant has five delinquent or charged-off debts, totaling \$34,664. He did clarify the status of his tax debts. The Government established 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;⁵ and

⁵The Appeal Board has previously explained what constitutes a “good faith” effort to repay overdue creditors or otherwise resolve debts:

In order to qualify for application of [the “good faith” mitigating condition], an applicant must present evidence showing either a good-faith effort to repay overdue creditors or some other good-faith action aimed at resolving the applicant’s debts. The Directive does not define the term “good-faith.” However, the Board has indicated that the concept of good-faith “requires a showing that a person acts in a way that shows reasonableness,

(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 in resolving his delinquent debt does not warrant full application of any mitigating conditions to all of his SOR debts. He admitted responsibility for four of the five SOR debts, totaling approximately \$33,000. He did not provide any documentation, such as a checking account statement, photocopies of checks, or a letter from the creditor proving that he paid the debt in SOR ¶ 1.a. There is no evidence of financial counseling, payments to SOR creditors, correspondence to or from creditors, or debt disputes. There is no evidence of progress resolving his SOR debts.⁶ He did not provide documentation proving that he maintained contact with his SOR creditors, and he did not provide any documentation showing his attempts to negotiate payment plans with his SOR creditors.⁷ There is insufficient evidence that his financial problem is being resolved and is under control. He did not establish his financial responsibility.

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):

prudence, honesty, and adherence to duty or obligation." Accordingly, an applicant must do more than merely show that he or she relied on a legally available option (such as bankruptcy) in order to claim the benefit of [the "good faith" mitigating condition].

(internal citation and footnote omitted) ISCR Case No. 02-30304 at 3 (App. Bd. Apr. 20, 2004) (quoting ISCR Case No. 99-9020 at 5-6 (App. Bd. June 4, 2001)).

⁶ There is no evidence that Applicant went to the court where his IRS liens were filed and obtained the tax liens themselves, which may have included automatic expiration dates for the liens. See Item 7. If the liens did not facially indicate they were expired, he could have taken the liens to the IRS and asked the IRS to file releases at the court. If the liens are valid or if he owes the IRS a substantial debt that he is unable to immediately pay, Applicant could have established a payment plan with the IRS. It is Applicant's burden to take such actions or others, depending on his investigation, to resolve financial considerations concerns. Applicant has the burden of providing documentation showing efforts at resolution and actual resolution of SOR debts to security officials. There is insufficient evidence in this file to establish such efforts or actual resolution of the four tax liens described in the SOR. (Item 1, 7)

⁷"Even if Applicant's financial difficulties initially arose, in whole or in part, due to circumstances outside his [or her] control, the Judge could still consider whether Applicant has since acted in a reasonable manner when dealing with those financial difficulties." ISCR Case No. 05-11366 at 4 n.9 (App. Bd. Jan. 12, 2007) (citing ISCR Case No. 99-0462 at 4 (App. Bd. May 25, 2000); ISCR Case No. 99-0012 at 4 (App. Bd. Dec. 1, 1999); ISCR Case No. 03-13096 at 4 (App. Bd. Nov. 29, 2005)). A component is whether he or she maintained contact with creditors and attempted to negotiate partial payments to keep debts current.

(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), 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. I have incorporated my comments under Guideline F in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under Guideline F, but some warrant additional comment.

There is some evidence supporting approval of Applicant's clearance. Applicant has been employed by the same defense contractor for more than 10 years. There is no evidence of criminal conduct or abuse of alcohol or drugs in 25 years. Applicant is exceptionally intelligent as shown by his educational background and history of employment. He clearly has the capability of understanding and taking reasonable actions to resolve financial consideration concerns. He contributes to his company and the Department of Defense. There is no evidence of disloyalty or that he would intentionally violate national security.

The evidence against approval of Applicant's clearance is more substantial at this time. Applicant has a long history of financial problems. He failed to mitigate five delinquent SOR debts, totaling \$34,664. Four tax liens date from the 1990s. He could have made greater progress resolving and documenting resolution of his five SOR debts. He did not provide documentary proof that he made any payments to any of his SOR creditors. His failure to establish his financial responsibility shows lack of judgment and raises unmitigated questions about Applicant's reliability, trustworthiness and ability to protect classified information. See AG ¶ 15. More documented financial progress is necessary to fully mitigate security concerns.

I have carefully applied the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. Financial considerations concerns are not mitigated. For the reasons stated, I conclude he is not eligible for access to classified information at this time.

