



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 13-01225

Appearances

For Government: Daniel F. Crowley, Esquire, Department Counsel
For Applicant: *Pro se*

03/25/2014

Decision

HARVEY, Mark, Administrative Judge:

Applicant's statement of reasons (SOR) alleges five delinquent or charged off accounts totaling \$45,042. His financial problems were caused by underemployment and unemployment. On February 8, 2014, he filed for bankruptcy under Chapter 7 of the Bankruptcy Code. When his debts are discharged, he will receive a fresh financial start. He made sufficient progress resolving his financial problems to mitigate financial considerations concerns. Eligibility for access to classified information is granted.

Statement of the Case

On April 1, 2013, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP) version of security clearance application (SF 86) (GE 1). On December 9, 2013, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued an 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). (HE 2) The SOR detailed reasons why DOD CAF 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. (HE 2)

On January 8, 2014, DOHA received Applicant's undated response to the SOR allegations. (HE 3) Applicant requested a hearing. (Tr. 19; HE 3) On January 27, 2014, Department Counsel was ready to proceed on Applicant's case. On February 3, 2014, DOHA assigned Applicant's case to me. On February 10, 2014, the Defense Office of Hearings and Appeals (DOHA) issued a hearing notice, setting the hearing for February 27, 2014. (HE 1) On February 26, 2014, Applicant's hearing date was changed to March 6, 2014. (HE 1A) At the hearing, Department Counsel offered eight exhibits, and Applicant offered five exhibits. (Tr. 21-26; GE 1-8; AE A-E) There were no objections, and I admitted GE 1-8 and AE A-E. (Tr. 21-26) On March 14, 2014, DOHA received the transcript of the hearing. I held the record open, at Applicant's request, until March 17, 2014. (Tr. 51-52, 58) On March 17, 2014, I received two exhibits from Applicant, which were admitted without objection. (AE F-G)

Findings of Fact¹

In Applicant's response to the SOR, he admitted the allegations in SOR ¶¶ 1.b and 1.f, and he explained why he denied the allegations in SOR ¶¶ 1.a, and 1.c-1.e. (HE 3) He also provided mitigating information. His admissions are accepted as findings of fact.

Applicant is 40 years old, and he is seeking employment in technical support or as a system administrator for a defense contractor. (Tr. 6, 8) In 1992, he graduated from high school. (Tr. 5) He has an associate's degree in applied arts and needs three more courses to receive his bachelor's degree in political science and history. (Tr. 6) He is not married and has no children. (Tr. 6) He has never served in the military. (Tr. 7)

Financial Considerations

Applicant indicates the primary source of his financial plight was his unemployment and underemployment over the previous seven years. He was unemployed from June 2005 to December 2005. (Tr. 27) From April 2006 to November 2006, he was underemployed at a call center. (Tr. 28) From November 2006 to March 2009, he had stable, adequate employment and made progress reducing the debts he accrued during unemployment and underemployment. (Tr. 28) From March 2009 to 2012, he was either unemployed and receiving unemployment compensation or employed part time in real estate sales. (Tr. 29, 42)

¹Some details have not been included in order to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

In July 2011, he filed for bankruptcy under Chapter 13 of the Bankruptcy Code to stop the repossession of his vehicle. (Tr. 29) He was in the Chapter 13 plan for 21 months, and he paid \$4,122 into the plan. (Tr. 45; GE 6) In August 2011, he moved in with his parents to save rent. (Tr. 30) He was in a car accident, and his 2005 vehicle was damaged. (Tr. 30-31) He voluntarily dismissed the Chapter 13 bankruptcy action. (Tr. 30, 36-37) On February 8, 2014, Applicant paid his attorney \$1,000, and his attorney filed for relief under Chapter 7 of the Bankruptcy Code. (Tr. 30)

From April to December 2012, Applicant was employed at a car dealership in sales, and his income was low. (Tr. 41-42) He also worked in sales from January to April 2013, and during this period, he received about \$1,000 each month. (Tr. 40-41) He was employed from June 2013 to February 2014 at a staffing agency, and he earned gross monthly pay of about \$3,200. (Tr. 38-39) He became unemployed on February 28, 2014, and was unemployed at the time of his hearing. (Tr. 30-31) If the government contractor hires him, he will receive about \$21 an hour and health insurance. (Tr. 43-44)

Applicant owes \$57,500 in student loans, and he owes a college \$3,786. (Tr. 47) His student loans are currently deferred; however, when he secures employment and completes his bachelor's degree, he has agreed to begin making payments on his student loans and to pay \$200 a month for his \$3,786 college loans. (Tr. 44, 47; AE E)

Applicant's history of delinquent debt is documented in his credit reports, SOR response, and hearing record. Applicant's SOR alleges five delinquent or charged off accounts totaling \$45,042. He accepted responsibility for the debts in SOR ¶¶ 1.d, and 1.f. (Tr. 31) The debt in SOR ¶ 1.d (\$15,723) is a lien on his 2005 vehicle. (Tr. 31) The debt in SOR ¶ 1.f (\$8,731) is for a debt consolidation loan for funds borrowed in 2002 or 2003 to bring his other debts to a current status. (Tr. 31, 34)

The debts in SOR ¶¶ 1.b (\$10,288) and 1.e (\$9,377) are duplications of each other, and the correct amount owed to the creditor is \$9,377. (Tr. 32-33) Applicant volunteered that he owed a bank \$3,035, which was not listed on the SOR. (Tr. 33) He returned the creditor's equipment, and the creditor resolved the debt in SOR ¶ 1.c (\$923). (Tr. 33) He received credit counseling. (Tr. 35-36)

Applicant's April 11, 2013 credit report shows: (1) a \$16,302 vehicle lease started in 2008 with a designation of "Paid" and a zero balance; (2) a \$1,057 department store revolving account with a designation of "PAYS AS AGREED" with a zero balance; (3) a \$1,479 department store revolving account with a designation of "Paid" with a zero balance; (4) a \$10,447 credit union account opened in 1999 and closed in 2003 with a designation of "PAYS AS AGREED" with a zero balance; and (5) a \$5,712 bank account opened in 1999 and closed in 2003 with a designation of "PAYS AS AGREED" with a zero balance. (GE 3 at 7-8, 11)

Character Evidence

A coworker, who has known Applicant since June 2013, described him as helpful, honest, professional, competent, and friendly. (AE A) A general manager, who

has known Applicant for one year, depicted him as responsive and professional, and a positive person, who reacts immediately to resolve computer problems. (AE B) Another manager, who has worked with Applicant since June 2013, portrayed him as knowledgeable, honest, diligent, professional, and a valuable asset to the company. (AE C)

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 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, SOR response, and hearing statement. His SOR alleges five delinquent or charged off accounts totaling \$45,042. One debt was a duplication and one debt was not listed on the SOR, reducing the debt total to about \$38,000. 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;² 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.

The Appeal Board concisely explained the 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

²The 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, 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, punctuation, 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)).

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).

Applicant’s conduct in resolving his debts warrants application of AG ¶¶ 20(a) to 20(c).³ Applicant had a good credit history until he began having problems with unemployment and underemployment in 2005. He paid several large debts. He filed for bankruptcy under Chapter 13 of the Bankruptcy Code in 2011 and he made most of the required payments in order to stop repossession of his vehicle. After it was damaged in an accident, he voluntarily ended his Chapter 13 plan.

Applicant’s financial problems were affected by circumstances largely beyond his control. He had financial problems because of unemployment and underemployment. He had insufficient income to pay his debts and chose to file for protection and discharge of his debts under Chapter 7 of the Bankruptcy Code.

Two recent Appeal Board decisions illustrate the analysis for applying AG ¶¶ 20(a) and 20(b). In ISCR Case No. 09-08533, the applicant had \$41,000 in delinquent credit card debt and defaulted on a home loan generating a \$162,000 delinquent debt. *Id.* at 2. That applicant filed for bankruptcy the same month the Administrative Judge issued her decision. *Id.* at 1-2. The applicant in ISCR Case No. 09-08533 was recently divorced, had been unemployed for 10 months, and had childcare responsibilities. Her former husband was inconsistent in his payment of child support to her. The Appeal Board determined that AG ¶ 20(a) was “clearly applicable (debt occurred under such circumstances that it is unlikely to recur and [the debt] does not cast doubt on the individual’s current reliability, trustworthiness, or good judgment)” even though that applicant’s debts were unresolved at the time the Administrative Judge’s decision was issued. The Appeal Board also decided that the record evidence raised the applicability of AG ¶ 20(b) because of the absence of evidence⁴ of irresponsible behavior, poor judgment, unreliability, or lack of trustworthiness. *Id.* at 4.

Similarly, in ISCR Case No. 08-06567 at 3 (App. Bd. Oct. 29, 2009) the Appeal Board addressed a situation where an applicant, who had been sporadically unemployed and lacked the ability to pay her creditors, noting that “it will be a long time at best before he has paid” all of her creditors. The applicant was living on unemployment compensation at the time of her hearing. The Appeal Board explained that such a circumstance was not necessarily a bar to having access to classified information stating:

³ The Appeal Board has indicated that promises to pay off delinquent debts in the future are not a substitute for a track record of paying debts in a timely manner and otherwise acting in a financially responsible manner. ISCR Case No. 07-13041 at 4 (App. Bd. Sept. 19, 2008) (citing ISCR Case No. 99-0012 at 3 (App. Bd. Dec. 1, 1999)).

⁴ Applicant has the burden of proving the applicability of any mitigating conditions, and the burden to disprove a mitigating condition never shifts to the Government.

However, the Board has previously noted that an applicant is not required to be debt-free nor to develop a plan for paying off all debts immediately or simultaneously. All that is required is that an applicant act responsibly given his [or her] circumstances and develop a reasonable plan for repayment, accompanied by “concomitant conduct,” that is, actions which evidence a serious intent to effectuate the plan. See ISCR Case No. 07-06482 at 3 (App. Bd. May 21, 2008).

ISCR Case No. 08-06567 at 3 (App. Bd. Oct. 29, 2009). The applicant in ISCR Case No. 08-06567 used his limited resources to (1) resolve some of his debts; (2) had a repayment plan for the remaining debts; and (3) took “reasonable actions to effectuate that plan.” *Id.* The Appeal Board remanded the Administrative Judge’s decision because it did not “articulate a satisfactory explanation for his conclusions,” emphasizing the Administrative Judge did “not explain[] what he believes that applicant could or should have done under the circumstances that he has not already done to rectify his poor financial condition, or why the approach taken by applicant was not ‘responsible’ in light of his limited circumstances.” *Id.*

Partial application of AG ¶ 20(c) is warranted. Applicant received some financial counseling, and he generated a budget as part of the bankruptcy process. Although there is limited evidence of record that he established and maintained contact with his creditors,⁵ his financial problem is being resolved or is under control.

Applicant admitted responsibility for and took reasonable and responsible actions to resolve his SOR debts, establishing some good faith under AG ¶ 20(d). Applicant did not provide documentation disputing any of his delinquent SOR debts, and AG ¶ 20(e) is not applicable.

In sum, Applicant fell behind on his debts primarily because of unemployment and underemployment. He made over \$4,000 in payments under a Chapter 13 bankruptcy plan despite his limited financial resources. On February 8, 2014, he filed for bankruptcy under Chapter 7 of the Bankruptcy Code.⁶ He has established his financial responsibility. It is unlikely that financial problems will recur. His efforts are sufficient to mitigate financial considerations security concerns. Assuming, financial considerations

⁵“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.

⁶Resolution of Applicant’s debts using bankruptcy in this case would not adversely affect Applicant’s eligibility for access to classified information, so long as he does not generate new delinquent debt after his debts are discharged. Bankruptcy would clearly resolve all of his delinquent SOR debts and give him a fresh financial start. His education loans will survive the bankruptcy, and it is important that he maintain them in current status after he obtains employment and his deferment is lifted.

concerns are not mitigated under AG ¶ 20, security concerns are mitigated under the whole-person concept, *infra*.

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). 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.

Applicant is 40 years old, and he is seeking employment in technical support or as a system administrator for a defense contractor. He needs three more courses to receive his bachelor's degree in political science and history. He is sufficiently mature to understand and comply with his security responsibilities. He deserves some credit for volunteering to support the U.S. Government as an employee of a contractor. He provided three character letters from his colleagues and managers, which emphasized his reliability, diligence, and responsibility.

Applicant's history of paying his debts in 2003 when fully employed and under the Chapter 13 payment plan shows his financial responsibility. The Appeal Board has addressed a key element in the whole-person analysis in financial cases stating:

. . . 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 and quotation marks omitted).

Applicant understands what he needs to do to establish and maintain his financial responsibility. There is simply no reason not to trust him. When he was fully employed, he established a “meaningful track record” of debt re-payment. I am confident he will keep his promise to pay his student loans and avoid future delinquent debt.⁷

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. I conclude financial considerations concerns are mitigated, and eligibility for access to classified information is granted.

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

⁷Of 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. 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 a conditional clearance. ISCR Case No. 99-0901, 2000 WL 288429 at *3 (App. Bd. Mar. 1, 2000). See *also* ISCR Case No. 04-03907 at 2 (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.” and citing ISCR Case No. 03-07418 at 3 (App. Bd. Oct. 13, 2004)). This footnote does not imply that this Applicant’s clearance is conditional.

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

Mark Harvey
Administrative Judge