



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 14-00359

Appearances

For Government: Julie R. Mendez, Esquire, Department Counsel
For Applicant: *Pro se*

06/17/2014

Decision

Harvey, Mark, Administrative Judge:

Applicant’s statement of reasons (SOR) alleges two delinquent debts, totaling \$86,616. He settled and paid one debt, and he is attempting to resolve the remaining debt for \$3,125. Financial considerations concerns are mitigated. Eligibility for access to classified information is granted.

Statement of the Case

On January 12, 2011, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP) or security clearance application (SF 86) (GE 1). On March 4, 2014, the Department of Defense (DOD) 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). (Hearing Exhibit (HE) 2) The SOR detailed reasons why DOD was unable to find that it is clearly consistent with the national interest to continue a security clearance for

Applicant, and it recommended that his case be submitted to an administrative judge for a determination whether his clearance should be continued or revoked. (HE 2)

On April 8, 2014, Applicant responded to the SOR, and requested a hearing. (HE 3) On May 28, 2014, Department Counsel indicated she was ready to proceed on Applicant's case. On May 29, 2014, the Defense Office of Hearings and Appeals (DOHA) assigned Applicant's case to me. On June 2, 2013, DOHA issued a hearing notice, setting the hearing for June 5, 2014. (HE 1) Applicant's hearing was held as scheduled.

At the hearing, Department Counsel offered three exhibits, and Applicant offered 16 exhibits. (Tr. 19-20; GE 1-3; AE A-P) There were no objections, and I admitted GE 1-3 and AE A-P. (Tr. 19-20) On June 12, 2014, DOHA received the transcript of the hearing.

Findings of Fact¹

In his Answer to the SOR, Applicant admitted both of the SOR allegations. (HE 3) He also provided extenuating and mitigating information. His admissions are accepted as findings of fact.

Applicant is a 51-year-old systems engineer, who has been employed by the same defense contractor for the previous 28 years. (Tr. 7-8, 21-22; GE 1) He graduated from high school in 1981, and he was awarded a bachelor's of science degree in electronic technology in 1985 and a second bachelor's of science degree in electrical engineering in 1992. (Tr. 7-8; GE 1) He never served in the military. (GE 1) In 1987, he married, and in 1991, he was divorced. (Tr. 9; GE 1) In 1995, he married, and in 1997, he was divorced. (Tr. 9; GE 1) In 2000, he was married, and in 2011, he was divorced. (Tr. 9; GE 1) He has one child, who is 13 years old. (Tr. 9; GE 1)

Financial Considerations

From June 2010 to July 2011, Applicant and his spouse, who worked in real estate sales, went through a contested divorce. His spouse's share of the marital debts was discharged under Chapter 7 of the Bankruptcy Code. Applicant was left with a debt of \$39,679 on his first mortgage and \$105,000 on his second mortgage after the foreclosure of his residence in May of 2011. (Tr. 23-24; GE 2) He owed about \$3,000 each on two credit cards and \$4,500 to a relative. He repaid his relative, and the bank creditor released him from responsibility on his first mortgage. (Tr. 36) He received an Internal Revenue Service (IRS) Form 1099C stating that on May 3, 2011, his first mortgage debt of \$39,679 was cancelled. (Tr. 24-25; GE 2) He borrowed \$30,000 from his employer to pay the debt allocation from his divorce, and he is paying \$500 monthly to address this \$30,000 non-SOR debt. (Tr. 40)

¹Some details have been excluded in order to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

In December 2010, Applicant was injured at work. Eventually, he received \$15,335 from workers' compensation. (Tr. 30) He used the funds from the workers' compensation settlement to pay some medical debts. (Tr. 30-32; AE I) On October 31, 2011, Applicant filed for protection under Chapter 13 of the Bankruptcy Code. (Tr. 25; GE 2) Applicant paid the trustee \$16,552. (Tr. 25-26; GE 2) From July 31, 2012, to February 28, 2013, the Chapter 13 trustee paid the creditor in SOR ¶ 1.b \$10,548. (Tr. 29; AE G) Several other creditors received some payments, and one non-SOR debt was paid. (GE 2) He received financial counseling as part of the Chapter 13 bankruptcy process. (AE K) For several years, Applicant has maintained a highly-detailed spreadsheet showing his budget and debts. (GE 2)

Applicant's SOR alleges two delinquent debts, totaling \$86,616 as follows: (1) ¶ 1.a alleges a bank credit card debt for \$3,125; and (2) ¶ 1.b alleges a mortgage debt for \$83,491. He asked his attorney to locate the current collection agent for the debt in SOR ¶ 1.a and negotiate a settlement. (Tr. 35-37) Applicant promised to resolve this debt. (Tr. 44) On February 4, 2013, and March 1, 2013, Applicant paid the creditor for the debt in SOR ¶ 1.b \$15,336 to settle the debt, which totaled \$87,442 after deducting the \$10,548 paid by the bankruptcy trustee. (Tr. 27-28; AE A, F, I)

Applicant's annual salary is about \$115,000; and he has about \$300,000 in his 401(k) retirement account. (Tr. 22) He saves \$1,000 each month, and he has saved \$15,000 to pay the additional federal income taxes that will result from settlement of the debt in SOR ¶ 1.b. (Tr. 22, 32-35, 39)

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.” 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 statement at his hearing.

Applicant’s debts became delinquent in 2010-2011. Applicant’s SOR alleges two delinquent debts, totaling \$86,616. 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; 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 in resolving his debts warrants full application of AG ¶¶ 20(a) to 20(d). AG ¶ 20(e) is not applicable. Applicant did not dispute any of his delinquent SOR debts. Applicant’s divorce caused Applicant to have debts he could not afford to pay. His financial problems were affected by his divorce, a circumstance largely beyond his control. On October 31, 2011, Applicant filed for protection under Chapter 13 of the Bankruptcy Code; and he paid the trustee \$16,552. He received financial counseling as

part of the Chapter 13 bankruptcy process. For several years, Applicant has maintained a highly-detailed spreadsheet showing his budget and debts. Applicant's SOR alleges two delinquent debts, totaling \$86,616. He paid and settled the larger SOR debt in March 2013. He asked his attorney to locate the current collection agent for the \$3,125 debt in SOR ¶ 1.a and negotiate a settlement. Applicant promised to resolve this debt.²

The Appeal Board explained that circumstances beyond one's control can cause unresolved debt, and are not necessarily a bar to having access to classified information stating:

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). Applicant admitted responsibility for and took reasonable and responsible actions to resolve his SOR debts, establishing some good faith.³ He established and maintained contact with his creditors.⁴ He used his financial resources to settle and pay one large SOR debt. His financial problem is being resolved and is under control. Applicant's financial problems

² 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)).

³The 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 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)).

⁴Even 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.

are unlikely to recur; and they do not cast doubt on his current reliability, trustworthiness, or good judgment. His efforts are sufficient to fully mitigate financial considerations security concerns.

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 that guideline, but some warrant additional comment.

Applicant is a 51-year-old systems engineer, who has worked continuously for a defense contractor for 27 years. He is sufficiently mature to understand and comply with his security responsibilities. He deserves substantial credit for supporting the U.S. Government as an employee of a contractor. There is every indication that he is loyal to the United States and his employer. There is no evidence that he abuses alcohol or uses illegal drugs. Medical expenses and divorce contributed to his financial woes. I give Applicant substantial credit for admitting responsibility for his delinquent debts. He has sufficient financial resources to resolve his remaining delinquent SOR debt.

Even though he lacked financial resources because of his divorce, Applicant made his payments under his Chapter 13 bankruptcy plan. He stopped his Chapter 13 payments and resolved his largest delinquent debt. He promised to continue to make payments to his creditors and to resolve his remaining SOR debt. The Appeal Board has addressed a key element in the whole-person analysis in financial cases stating:

In evaluating Guideline 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 and quotation marks omitted).

Applicant is an intelligent person, and he understands what he needs to do to establish and maintain his financial responsibility. He established a "meaningful track record" of debt re-payment. I am confident he will maintain his financial responsibility.⁵

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. 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 and 1.b: For Applicant

⁵The 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 the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant's eligibility for a security clearance. Eligibility for a security clearance is granted.

Mark Harvey
Administrative Judge