



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



In the matter of:)
)
XXXXXXXXXX, XXXXX) ISCR Case No. 14-02283
)
Applicant for Security Clearance)

Appearances

For Government: John Bayard Glendon, Esq., Department Counsel
For Applicant: *Pro se*

06/26/2015

Decision

TUIDER, Robert J., Administrative Judge:

Applicant failed to mitigate security concerns regarding Guideline F (financial considerations). Clearance is denied.

Statement of the Case

On October 22, 2009, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP). On August 8, 2014, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) to Applicant, under 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 Guideline F. The SOR detailed reasons why DOD CAF was unable to find that it is clearly consistent with the national interest to continue a security clearance for Applicant, and referred his case to an

administrative judge for a determination whether his clearance should be granted or denied.

Applicant answered the SOR on September 4, 2014, 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 March 11, 2015, was provided to him by letter dated March 11, 2015. Applicant received the FORM on March 19, 2015. He was afforded a period of 30 days to file objections and submit material in refutation, extenuation, or mitigation. Applicant did not submit any information within the time period of 30 days after receipt of copy of the FORM. On June 1, 2015, the case was assigned to me.

Findings of Fact

In his answer to the SOR, Applicant constructively denied all of the SOR allegations. Applicant's answer is incorporated in my findings of fact.

Background Information

Applicant is a 43-year-old software engineer employed by a defense contractor since August 2008. He seeks a security clearance, which is a requirement of his continued employment. (SOR answer; Item 2)

Applicant was awarded a bachelor's degree in May 2001. His e-QIP states that he served in the Army Reserve beginning in 1991 to present; however, his SOR answer, which is more current, states that he "served in the military for over 20 years." (SOR answer; Item 2)

Applicant was previously married from April 1997 to June 2004. That marriage ended by divorce. Per his e-QIP, he remarried in January 2005 and separated in June 2006. He has three children, ages 18, 15, and 14. (Item 2)

Financial Considerations

Applicant's SOR alleges 11 delinquent, charged-off, or collections accounts and one judgment totaling \$126,344. (Item 1) Summarized, the debts are a student loan collection account for \$24,188, a past-due utilities and fuel account for \$612, a charged-off credit card account for \$680, an August 2007 state judgment for child support arrearages in the amount of \$67,531, a past-due student loan for \$3,132, a past-due student loan for \$4,630, a past-due Veterans Administration account for \$125, a cable company collection account for \$162, a past-due student loan account for \$23,264, a utility company collection account for \$258, and a cell phone collection account for \$1,762. (Item 1)

In Applicant's SOR answer, he stated that his accounts were either paid or being paid providing no documentation to substantiate his claim. (Item 1) A review of his February 26, 2015 credit report, however, indicates that he has four collection accounts and five past-due accounts. (Item 3) A review of this credit report indicates that the

creditors listed in SOR ¶¶ 1.a, 1.b, 1.e, and 1.f are listed and five debts not alleged in the SOR are listed suggesting that Applicant's financial situation remains problematic.

Applicant attributed his financial problems to a failed attempt to start his own business without being prepared, stating that he did so to make a better life for his family. He is working hard to address his debts and clear his name, but provided no details. (Item 1) Furthermore, Applicant did not provide specifics on the nature of his business, how his SOR debts were created as a result of his business failure, and what if anything, he did or is doing to maintain contact with his creditors. There is no record evidence of financial counseling.

Applicant's FORM repeated the admonition about the absence of corroborating documentation and other mitigating information and explained that Applicant had 30 days from the receipt of the FORM "in which to submit a documentary response setting forth objections, rebuttal, extenuation, mitigation, or explanation, as appropriate. If you do not file any objections or submit any additional information . . . your case will be assigned to an Administrative Judge for a determination based solely" on the evidence set forth in this FORM. (FORM at 2) Applicant did not respond to the FORM.

Applicant stated that he served in the military for over 20 years, was awarded a Bronze Star while serving in Afghanistan, led soldiers in battle, and helped them through many life situations. (Item 1)

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 for 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 report and SOR response. 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;¹ and

¹The 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)).

(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 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 *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 delinquent debt does not warrant full application of any mitigating conditions to all of his SOR debts except for those listed in SOR ¶¶ 1.c, 1.d, 1.g, and 1.h through 1.k. Those SOR debts no longer appear on his credit report and it appears they have been resolved as Applicant stated in his SOR answer. Application of AG ¶ 1.d is warranted with regard to those debts.

Applicant did not provide sufficient information about his finances to establish his inability to make greater progress paying his creditors. A failed business may be a circumstance largely beyond his control; however, he did not provide any details regarding his failed business or how he acted responsibly under the circumstances. He claimed in his SOR answer that he had paid or was paying his debts; however, he did not provide any evidence corroborating payments to his creditors.

Applicant did not provide documentation showing his income and expenses, and he did not provide a budget. He did not provide any of the following documentation relating to the SOR creditors: (1) proof of payments, such as checking account statements, photocopies of checks, or a letter from the creditor proving that he paid or made any payments to the creditor; (2) correspondence to or from the creditor to establish maintenance of contact with the creditor;² (3) a credible debt dispute; (4)

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 or she maintained contact with creditors and attempted to negotiate partial payments to keep debts current.

attempts to negotiate payment plans, such as settlement offers or agreements to show that he was attempting to resolve these SOR debts; (5) evidence of financial counseling; or (6) other evidence of progress or resolution of his SOR debts.

Applicant's failure to prove that he has made more substantial steps to resolve his debts shows a lack of judgment and responsibility that weighs against approval of his security clearance. There is insufficient evidence that he was unable to make greater progress resolving his delinquent debts, or that his financial problems are being resolved, are under control, and will not recur in the future. Under all the circumstances, he failed to establish that financial consideration concerns are mitigated.

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.

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 is a software engineer, who worked for a government contractor since 2008. He served in the Army Reserve and deployed to Afghanistan and was awarded a Bronze Star. Applicant stated his business failed, but as noted above, there are few details surrounding that failure.

The financial evidence against approval of Applicant's clearance is more substantial at this time. Applicant has a history of financial problems. His SOR alleges 11 delinquent, charged-off, or collections accounts and one judgment totaling \$126,344. The Government substantiated four of those long standing debts, debts totaling approximately \$32,562. He failed to provide sufficient documentation of progress to resolve his financial problems. His failure to provide corroborating documentation shows lack of financial responsibility and judgment and raises unmitigated questions about Applicant's reliability, trustworthiness, and ability to protect classified information. See

AG ¶ 18. More information about inability to pay debts or documented financial progress is necessary to mitigate security concerns.

In requesting a decision without a hearing, Applicant chose to rely on the written record. In so doing, however, he failed to submit sufficient information or evidence to supplement the record with relevant and material facts regarding his circumstances, articulate his position, and mitigate the financial security concerns. He failed to offer evidence of financial counseling or provide documentation regarding his past efforts to address his delinquent debt. By failing to provide such information, and in relying on a limited explanation without sufficient corroborating evidence, financial considerations security concerns remain. This decision should not be construed as a determination that Applicant cannot or will not attain the state of reform necessary to justify the award of a security clearance in the future. With more effort towards documented resolution of his past-due debts, and a track record of behavior consistent with his obligations, he may well be able to demonstrate persuasive evidence of his security clearance worthiness

One additional comment is worthy of note. Applicant's loyalty and patriotism are not at issue in these proceedings. Section 7 of the Executive Order 10865 specifically provides that industrial security decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." Security clearance decisions cover many characteristics of an applicant other than loyalty and patriotism. Nothing in this decision should be considered to suggest that I have based this decision, in whole or in part, on any express or implied decision as to an applicant's loyalty or patriotism.

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.

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.b:	Against Applicant
Subparagraphs 1.c - 1.d:	For Applicant
Subparagraphs 1.e - 1.f:	Against Applicant
Subparagraphs 1.g – 1.k:	For Applicant

Conclusion

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

Robert J. Tuider
Administrative Judge