



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



In the matter of:)	
)	
XXXXXXXXXX, XXXXX)	ISCR Case No. 14-02372
)	
Applicant for Security Clearance)	

Appearances

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

12/04/2014

Decision

TUIDER, Robert J., Administrative Judge:

Applicant failed to mitigate financial considerations security concerns. Clearance is denied.

Statement of the Case

On January 14, 2014, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP). On July 31, 2014, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) detailing security concerns under Guideline F (financial considerations). The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG), effective within the Department of Defense for SORs issued after September 1, 2006.

On August 25, 2014, Applicant answered the SOR. On September 23, 2014, Department Counsel was prepared to proceed. On September 29, 2014, DOHA assigned the case to me. On October 16, 2014, DOHA issued a notice of hearing scheduling the hearing for November 4, 2014. The hearing was held as scheduled.

At the hearing, the Government offered Government Exhibits (GE) 1 through 4, which were admitted into evidence without objection. Applicant testified and offered Applicant Exhibits (AE) A through C, which were received into evidence without objection.

I held the record open until November 14, 2014, to afford the Applicant the opportunity to submit additional documents. Applicant timely submitted AE D through K, which were received into evidence without objection. On November 14, 2014, DOHA received the hearing transcript (Tr.).

Findings of Fact

Applicant admitted all of the SOR debts with explanations. After a thorough review of the evidence, I make the following additional findings of fact.

Background Information

Applicant is a 58-year-old senior engineer, who has been working for a defense contractor since March 2014. He seeks a security clearance, which is a condition of his continued employment. (GE 1; Tr. 23-24, 79.)

Applicant graduated from high school in June 1974. He was awarded a bachelor of science degree in civil engineering in May 1983. Applicant also attended several classes in management and finance at a community college. (GE 1; Tr. 24-26.)

Applicant married in May 1981, and has four adult children – a 27-year-old daughter, a 25-year-old son, and two 21-year-old twin sons. Applicant maintains two residences in two different states, one located near his place of employment and the other in an adjacent state where his wife and three adult sons live and are dependent on him for support. Applicant's wife and three sons suffer from severe depression. His wife was employed as a nurse until 2010 and has been unable to work since then because of her medical condition. (GE 1; Tr. 26-29, 35, 81-82.) Applicant did not serve in the armed forces. (GE 1; Tr. 15.)

Financial Considerations

The SOR contains ten separate allegations – a Chapter 13 bankruptcy filed in July 2010 that was dismissed in October 2013 for failure to comply; five state tax liens filed in May 2004 for \$4,008, in August 2007 for \$8,227, in November 2007 for \$5,287, in February 2009 for \$8,785, and in August 2013 for \$2,610; a charged-off student loan for \$47,932; a utility collection account for \$146; and two charged-off student loan accounts with the same lender for \$13,488 and \$30,240. (SOR ¶¶ 1.a – 1.j; GE 4; Tr. 76-77.)

Applicant attributes his financial problems to his wife's "on and off employment because of her mental condition" that began in "about 2003" which interrupted their income stream. Applicant took on additional contract work to make up the income

shortfall following his wife's inability to work. In 2010, Applicant's wife stopped working completely after suffering a nervous breakdown. Applicant estimated from 2003 to 2010, his wife was unable to work 70% of the time. Additionally, Applicant was unemployed from December 2009 to April 2010. (SOR answer; GE 1, GE 2; Tr. 29-33, 35.) His wife's family has a history of mental illness that has adversely affected his wife and three sons, as well as his wife's brother, who is institutionalized. (Tr. 41-47.) Applicant stated that the majority of his financial problems stem from his family's mental health problems. However, he was unable or unwilling to produce any documentation of same. (SOR answer; GE 2; AE D; Tr. 72, 75.)

Following this difficult economic time, Applicant filed Chapter 13 bankruptcy in July 2010 with aggressive monthly payments of \$3,200 in addition to making student loan payments he had co-signed for three of his children. He continued to pay into his wage earner plan until approximately October 2013 and was able to significantly reduce his overall debt. (SOR ¶ 1.a; SOR answer; GE 2; Tr. 33-34, 35-41, 47-51, 74-75.)

Applicant submitted documentation post-hearing that the five state tax liens totalling \$28,917 alleged in his SOR have been paid down to \$7,563 as of October 16, 2014. The same documentation; however, reflected that his state taxing authority was unable to enter into an installment payment plan with Applicant because his tax returns were missing for tax years 2011 and 2012. (AE I.) Applicant's state tax problems stem from his failure to file tax returns for supplemental contract work and did not have tax withheld, discussed *supra*. Applicant attributed this shortcoming to "some extenuating circumstances that came into play . . . we had some emergencies that popped up." (SOR ¶¶ 1.b – 1.f; SOR answer; GE 2, AE A; Tr. 51-58, 64, 72-74.) **He has made progress with his tax problems, but his failure to file tax returns for 2011 and 2012 makes resolution uncertain.**

The utility collection account for \$146 was paid as of October 16, 2014. (SOR ¶ 1.h; AE B.) **Debt resolved.**

Applicant's post-hearing documents indicate that he entered into a payment plan with the lender for his charged-off \$47,932 loan effective November 21, 2014 for \$300 per month. With regard to his remaining charged-off student loan accounts for \$13,488 and \$30,240, the lender advised Applicant that full payment is required for both accounts, due to the length of account inactivity and that a "deferment option is off the table." (SOR ¶¶ 1.g, 1.i, 1.j; SOR answer; Tr. 58-62, 74; AE J.) **One student loan being resolved and two student loans remain unresolved.**

Applicant's annual salary is \$126,000. Factoring in the costs of maintaining two residences, and supporting himself, his wife and three adult sons, Applicant has a net monthly remainder of \$535. It is clear from his budget that Applicant maintains a modest lifestyle and lives within his means. (Tr. 64-69, 74; AE H.) Applicant participated in the mandatory financial counseling when he filed for Chapter 13 bankruptcy in 2010 and found it to be "very helpful." (Tr. 75-76.)

Character Evidence

Applicant submitted two favorable reference letters. The first letter was from his current manager and the second letter was from a co-worker and senior engineering specialist. Both individuals were supportive of Applicant and recommend him for a security clearance. (AE F, AE G.)

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

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 financial considerations 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." Applicant's history of delinquent debt is established by the evidence presented. The Government established disqualifying conditions in AG ¶¶ 19(a) and 19(c).

Five financial considerations 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 does not warrant full application of AG ¶ 20(a) because there is more than one delinquent debt and his financial problems are not isolated. His debt is a "continuing course of conduct" under the Appeal Board's jurisprudence. See ISCR Case No. 07-11814 at 3 (App. Bd. Aug. 29, 2008) (citing ISCR Case No. 01-03695 (App. Bd. Oct. 16, 2002)). Nevertheless, he receives partial credit under AG ¶ 20(a) because the debts occurred under circumstances that are unlikely to recur. Nevertheless, his behavior casts doubt on his current reliability, trustworthiness, or good judgment.

Partial application of AG ¶ 20(b) is warranted. Applicant's brief period of unemployment in 2009 and 2010 and his family's history of mental illness could not have been anticipated. However, I would have been inclined to give greater weight to Applicant's emphasis on his family's history of mental illness as mitigation had he provided documentation of same which would have included dates, levels of debilitation, and to what extent the levels of debilitation contributed to Applicant's financial situation.¹

AG ¶ 20(c) partially is applicable. Applicant benefited from the financial counseling he receiving during the 2010 bankruptcy process. However, that process has not netted him the status of regaining full financial responsibility. When his Chapter 13 was dismissed without discharging his debts, the value of counseling was shown to be somewhat less than optimal.

Applicant produced sufficient documentation to warrant partial mitigation under AG ¶ 20(d).² Applicant paid down a significant amount of debt during the Chapter 13

¹"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 maintained contact with his creditors and attempted to negotiate partial payments to keep his debts current.

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

bankruptcy process, paid off the majority of his back state taxes, began making payments on one student loan, and paid off a modest utility bill. Unfortunately, his remaining state tax liability of \$7,563 is unresolved and two of his three student loans remain unresolved with large balances. Applicant did not set up a payment plan for the remaining two student loans until after the hearing. AG ¶ 20(e) is not relevant.

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). The discussion in the Analysis section under Guideline F is incorporated in this whole-person section. However, further comments are warranted.

Applicant's employment as a Government contractor weighs in his favor. He is a law-abiding citizen and contributes to the national defense. Apart from his SOR debts, there is no evidence to suggest that he is not current on his day-to-day expenses.

A security clearance adjudication is aimed at evaluating an applicant's judgment, reliability, and trustworthiness. It is not a debt-collection procedure. ISCR Case No. 09-02160 (App. Bd. June 21, 2010.) An applicant is not required, as a matter of law, to establish resolution of every debt alleged in the SOR. An applicant need only establish a plan to resolve financial problems and take significant actions to implement the plan. There is no requirement that an applicant make payments on all delinquent debts

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)).

simultaneously, nor is there a requirement that the debts alleged in the SOR be paid first. See ISCR Case No. 07-06482 at 2-3 (App. Bd. May 21, 2008).

However, Applicant's inability to address a significant amount of debt precludes a favorable decision. I am not unmindful of the circumstances that led to his financial difficulties or his past efforts to regain financial responsibility. It would have been helpful for him to have documented and developed his family's history of mental illness, but having done so does not suggest that he would have for certain been able to mitigate security concerns raised. He did not sufficiently address a significant amount of student loans and unpaid delinquent state taxes and the substantial priority debts cannot be ignored. After weighing the disqualifying and mitigating conditions, and all the facts and circumstances, in the context of the whole-person, I conclude he has not mitigated financial considerations security concerns.

I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my careful consideration of the whole-person factors and supporting evidence, my application of the pertinent factors under the adjudicative process, and my interpretation of my responsibilities under the adjudicative guidelines. For the reasons stated, I conclude he is not eligible for access to classified information.

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 to 1.f:	Against Applicant
Subparagraphs 1.g to 1.h:	For Applicant
Subparagraphs 1.i to 1.j:	Against Applicant

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 or continue Applicant's eligibility for a security clearance. Clearance is denied.

Robert J. Tuidier
Administrative Judge