



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



In the matter of:)
)
-----) ISCR Case No. 14-02564
)
Applicant for Security Clearance)

Appearances

For Government: Caroline E. Heintzelman, Esq., Department Counsel
For Applicant: *Pro se*

12/09/2014

Decision

HARVEY, Mark, Administrative Judge:

Applicant’s statement of reasons (SOR) alleges five delinquent, collection, or charged-off accounts, bankruptcy discharge of his debts in 1997, and foreclosure of his condominium in 2009. Applicant said that three of the non-foreclosure delinquent debts were the result of identity theft; however, he did not provide any information about attempting to resolve one significant debt. He intentionally omitted financial information from his February 28, 2013 Electronic Questionnaires for Investigations Processing (e-QIP) version of security clearance application (SF 86). Financial considerations and personal conduct concerns are not mitigated. Eligibility for access to classified information is denied.

Statement of the Case

On February 28, 2013, Applicant submitted an SF 86. (Item 4) On July 11, 2014, the Department of Defense (DOD) Consolidated Adjudications Facility (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) as revised by the Under Secretary of Defense for Intelligence on August 30, 2006, which became effective on September 1, 2006.

The SOR alleged security concerns under Guidelines F (financial considerations) and E (personal conduct). (Item 1) The SOR detailed reasons why DOD could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant and recommended referral to an administrative judge to determine whether Applicant's clearance should be granted, continued, denied, or revoked. (Item 1)

On July 31, 2014, Applicant responded to the SOR allegations and waived his right to a hearing. (Item 3) A complete copy of the file of relevant material (FORM), dated September 26, 2014, was provided to him on October 9, 2014.¹ Applicant did not respond to the FORM. The case was assigned to me on December 4, 2014.

Findings of Fact²

In Applicant's SOR response, he admitted responsibility for one bank debt, the second mortgage, foreclosure, and bankruptcy in SOR ¶¶ 1.d to 1.g.³ He denied knowledge of the three delinquent, charged off, or collection debts in SOR ¶¶ 1.a to 1.c. He admitted the allegation in SOR ¶ 2.a. Applicant also provided extenuating and mitigating information. Applicant's admissions are accepted as findings of fact.

Applicant is 60 years old, and he has been a software administrator since August 2004.⁴ From August 2004 to April 2007, he worked as a drug and alcohol counselor. He honorably retired after serving on active duty in the Navy from September 1972 to April 1997. In the Navy, he was an Operations Special Chief (E-7) and held a top secret security clearance. (Item 3) In 1971, he married, and in 1989, he was divorced. In 2003, he married. His children were born in 1974, 1976, and 1978, and his stepchild was born in 1974. He did not list his education on his SF 86. Applicant is active in his church. (SOR response) He volunteers for a variety of programs, and he donates funds to several charities. (SOR response) There is no evidence of security violations.

¹The Defense Office of Hearings and Appeals (DOHA) transmittal letter is dated September 29, 2014, and Applicant's receipt is dated October 9, 2014. The DOHA transmittal letter informed Applicant that he had 30 days after his receipt to submit information.

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

³The sources for the information in this paragraph are Applicant's SOR and SOR response. (Items 1, 3)

⁴Unless stated otherwise, Applicant's February 28, 2013 SF 86 is the source for the facts in this paragraph. (Item 4)

Financial Considerations⁵

Applicant's credit reports and SOR allege five delinquent, collection, or charged-off accounts, foreclosure of his condominium in 2009 (¶ 1.f), and discharge of his nonpriority unsecured debts through bankruptcy in 1997 (¶ 1.g). The SOR described his five delinquent debts as follows: ¶ 1.a (\$10,842) for a bank debt; ¶ 1.b (\$6,402) for a credit account; ¶ 1.c (\$13,782) for a collection account; ¶ 1.d (\$21,430) for a bank debt; and ¶ 1.e (\$59,980) for a second mortgage account.

Applicant said he had no knowledge of the debts described in SOR ¶¶ 1.a to 1.c. He contacted each of the creditors and informed them that he had no knowledge of the account, and he believed the three debts were the result of identity theft. Applicant admitted responsibility for the debt in SOR ¶ 1.d, and said he "defaulted on the loan due to rising interest rates and subsequent rising payments" as well as his spouse's unemployment.

As to the allegations in SOR ¶¶ 1.e and 1.f, Applicant utilized a first and second mortgage to purchase a condominium.⁶ His interest rates increased. In 2008 there was a precipitous decline in the value of his condominium. Applicant unsuccessfully attempted to use a quit claim, short sale, or renegotiated mortgage; however, "the lender demanded full payment. So we had no choice but to walk away." In 2009, the bank foreclosed on his condominium. Applicant's residence is in a non-recourse state. See note 8, *infra*.

On an unspecified date, Applicant's spouse became permanently disabled, and his family income was reduced by 25 percent. After two and a half years, she was awarded Social Security disability.

Applicant's bankruptcy in 1997 is not recent. Applicant did not explain why bankruptcy was necessary, the source of the debts, or how much debt was involved.

Personal Conduct

Applicant's February 28, 2013 SF 86 in Section 26 under the label "**Delinquency Involving Routine Accounts**" asked four relevant questions: (1) "**In the past seven (7) years**, [have] you had any possessions or property voluntarily or involuntarily repossessed or foreclosed?"; (2) "**In the past seven (7) years**, [have] you defaulted on any type of loan?"; (3) "**In the past seven (7) years**, [have you] been over 120 days delinquent on any debt not previously listed?"; and (4) "[Are you] currently over 120 days delinquent on any debt?" (emphasis in original; Item 4) Applicant answered, "No," even though his condominium was returned to his mortgage lender using foreclosure, and he had defaulted on his bank debt in SOR ¶ 1.d (\$21,430). In his SOR response,

⁵ The sources for the information in this section are Applicant's SOR and SOR response. (Items 1, 3)

⁶ The source for the information in this paragraph is Applicant's SOR response. (Item 3)

Applicant said, “The reason I did not disclose the items listed was I was scared that I would lose my job. And with the economy as it was and still is, I like many others walk in fear of losing employment and being able to provide security for my family.” (Item 3)

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 [or 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 report and SOR response. Applicant's SOR alleges five delinquent, collection, or charged-off accounts, a foreclosure in 2009, and a bankruptcy in 1997. 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;⁷ 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 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).

⁷The 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)).

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. He did not provide sufficient information about his finances to establish his inability to make greater progress paying his creditors. His spouse's medical problems and unemployment damaged his family finances and are circumstances largely beyond his control; however, he did not act responsibly under the circumstances in regard to all of his SOR debts. Applicant provided sufficient information to mitigate the foreclosure and failure to pay his second mortgage (SOR ¶¶ 1.e and 1.f). Applicant unsuccessfully attempted to use a quit claim, short sale, or renegotiated mortgage. In 2009, the bank foreclosed on his condominium. Applicant's residence is in a non-recourse state.⁸ The foreclosure and second mortgage debt were resolved through foreclosure.

Applicant denied knowledge of the debts in SOR ¶¶ 1.a to 1.c, and he informed the creditors that he was not responsible for those debts. There is no evidence that the creditors have sought to enforce these three debts by obtaining a judgment or garnishing Applicant's pay. These three alleged debts are mitigated under AG ¶ 20(e).

Applicant did not provide any of the following documentation relating to the debt in SOR ¶ 1.d for \$21,430: (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;⁹ (3) a credible debt dispute; (4) attempts to negotiate payment plans, such as settlement offers or agreements to show that he was

⁸ See California Code of Civil Procedure sections 580b and 580d. The Anti-Deficiency Statute, Cal. Code Civ. Proc. § 580(b), states in relevant part:

No deficiency judgment shall lie in any event after a sale of real property or an estate for years therein for failure of the purchaser to complete his or her contract of sale, or under a deed of trust or mortgage given to the vendor to secure payment of the balance of the purchase price of that real property or estate for years therein, or under a deed of trust or mortgage on a dwelling for not more than four families given to a lender to secure repayment of a loan which was in fact used to pay all or part of the purchase price of that dwelling occupied, entirely or in part, by the purchaser.

Under this section, generally if there is a foreclosure on a dwelling and there is a deficiency, the lender has no recourse regarding "purchase money loans," also called "non-recourse loans," the amounts set forth in both the 1st and the 2nd mortgages used to finance the dwelling purchase. The collateral or dwelling is considered full satisfaction. See, e.g., ISCR Case No. 08-09662 at 9 (A.J. Feb. 26, 2009) (quoting same provision to mitigate substantial mortgage debts—it is noted hearing-level decisions are persuasive but non-precedential); ISCR Case No. 08-03024 at 10-12 (AJ Apr. 28, 2009) (same result—different state).

⁹ "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.

attempting to resolve these SOR debts; (5) evidence of financial counseling; or (6) other evidence of progress or resolution of his SOR debts. In his SOR response, he admitted responsibility for the debt and made no comments about how he was endeavoring to resolve it.

Applicant's bankruptcy in 1997, as alleged in SOR ¶ 1.g, is too remote in time to raise a security concern. Moreover, the file does not contain evidence about the number, amount, or source of the debts discharged during this bankruptcy.

Applicant's failure to prove that he has made any steps to resolve the debt in SOR ¶ 1.d 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 this delinquent debt, 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.

Personal Conduct

AG ¶ 15 expresses the security concern pertaining to personal conduct:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

AG ¶ 16 describes one condition that could raise a security concern and may be disqualifying in this case:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities.

AG ¶ 16(a) applies. The Government produced substantial evidence that Applicant deliberately omitted relevant facts from his February 28, 2013 SF 86 about his finances. He failed to disclose the foreclosure of his condominium in 2009 and his \$21,430 charged-off delinquent debt owed to a bank, as alleged in SOR ¶¶ 1.d and 1.f.

AG ¶ 17 provides seven conditions that could mitigate security concerns in this case:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress;

(f) the information was unsubstantiated or from a source of questionable reliability; and

(g) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

None of the mitigating conditions apply to Applicant's intentional false statement about his finances on his February 28, 2013 SF 86. His false statement is recent, serious, and deliberate. He failed to meet his burden of mitigating this conduct.

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 and E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

There is some evidence supporting approval of Applicant's clearance. Applicant is 60 years old, and he has been a software administrator since August 2004. From August 2004 to April 2007, he worked as a drug and alcohol counselor. He honorably retired after serving on active duty in the Navy from September 1972 to April 1997. In the Navy, he was an Operations Special Chief (E-7) and held a top secret security clearance. He is active in his church, volunteers for a variety of programs, and donates to several charities. There is no evidence of security violations.

The evidence against approval of Applicant's clearance is more substantial at this time. Applicant has acknowledged that he has a \$21,430 charged-off delinquent debt owed to a bank, as alleged in SOR ¶¶ 1.d. He has not provided any evidence of what he has done to resolve this debt. His failure to provide more information on resolution of this debt 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 importantly, Applicant deliberately omitted derogatory financial information from his February 28, 2013 SF 86. Applicant's "failure to provide truthful and candid answers during the security clearance process" weighs heavily against approval or reinstatement of his access to classified information because candid disclosure of negative information provides some assurance that a security clearance holder will disclose any potential compromise of classified information. Such disclosure, even when it reflects negatively on a security clearance holder, is crucial to the protection of classified information.

It is well settled that once a concern arises regarding an applicant's security clearance eligibility, there is a strong presumption against the grant or renewal of a security clearance. See *Dorfmont*, 913 F. 2d at 1401. Unmitigated personal conduct and financial considerations concerns lead me to conclude that grant of a security clearance to Applicant is not warranted at this time. 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. At some future time, he may well be able to demonstrate persuasive evidence of his security clearance worthiness. Based on the facts before me and the adjudicative guidelines that I am required to apply, I conclude that it is not clearly consistent with the national interest to grant or reinstate Applicant security clearance eligibility at this time.

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 and personal conduct 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 to 1.c:	For Applicant
Subparagraph 1.d:	Against Applicant
Subparagraphs 1.e to 1.g:	For Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant

Conclusion

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

Mark Harvey
Administrative Judge