



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



In the matter of:)
)
-----) ISCR Case No. 08-03526
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Fahryn Hoffman, Esquire, Department Counsel
For Applicant: *Pro Se*

July 29, 2009

Decision

HARVEY, Mark, Administrative Judge:

Applicant's statement of reasons (SOR) listed five debts totaling about \$24,500. He paid three debts, and the other two are in payment plans. He made sufficient progress resolving his SOR debts to mitigate security concerns. Eligibility for access to classified information is granted.

Statement of the Case

On March 5, 2007, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) or security clearance application (SF-86) (Government Exhibit (GE) 1). On February 27, 2009, the Defense Office of Hearings and Appeals (DOHA) issued an SOR to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified. The revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, are effective within the Department of Defense for SORs issued after September 1, 2006.

The SOR alleges security concerns under Guideline F (Financial Considerations). The SOR detailed reasons why DOHA 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.

On May 1, 2009, Applicant responded to the SOR (GE 8). On May 6, 2009, Department Counsel was prepared to proceed. On May 7, 2009, DOHA assigned the case to me. On June 5, 2009, DOHA issued a hearing notice. The hearing was held on July 8, 2009. At the hearing, Department Counsel offered four exhibits (GE 1-4) (Transcript (Tr.) 24-25), and Applicant offered six exhibits (Tr. 37-38, 48-49, 56, 62, 116-118; AE A-F). Applicant objected to the government's credit report, dated February 19, 2009, because he believed his credit report, dated June 23, 2009, should be used because it is more recent (Tr. 25-26; GE 3). There were no other objections, and I admitted GE 1-4 (Tr. 26-27), and AE A-F (Tr. 38, 49, 56, 62, 122). Additionally, I admitted documents addressing jurisdiction, Notice of Hearing, SOR, and response to the SOR (GE 5-8). After the hearing, Applicant provided eight exhibits (AE G-N). Department Counsel did not object and I admitted the eight exhibits (AE G-N). I received the transcript on July 15, 2009. I closed the record on July 23, 2009 (Tr. 115).

Procedural issue

On June 22, 2009, Applicant's hearing was cancelled because Applicant's sponsorship was lost (Tr. 15; GE 5). I rescheduled his hearing after DOHA established a different defense contractor was sponsoring Applicant for a security clearance (Tr. 15-19; GE 5).

Findings of Fact¹

In his SOR response, Applicant admitted responsibility for the SOR debts with explanations (GE 8). His admissions are accepted as findings of fact.

Applicant is a 36-year-old employee of a defense contractor (Tr. 6, 29). He works as a logistics research analyst (Tr. 23, 29). In 1993, he received his graduate equivalency diploma (GED) (Tr. 6, 31). He has completed two years towards his bachelor of arts degree with a major in criminal justice (Tr. 6, 31). He anticipates receiving his bachelor's degree in 2011 (Tr. 31). He served on active duty in the Army for 11 years and left active duty as a sergeant (E-5) (Tr. 7). His military occupational specialty in the Army was logistics (Tr. 7). He has held a Secret security clearance for about 13 years (Tr. 34). He currently holds a Secret security clearance (Tr. 7, 34). He has never had a security incident (Tr. 34).

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

Applicant has been married for 13 years (Tr. 29). He has three children, ages nine, 11 and 14 (Tr. 29). The two youngest children live with Applicant and his spouse (Tr. 30). He pays child support for his eldest child (Tr. 30). He separated from his spouse from 2001 to 2003 (Tr. 22, 69). The Army deployed him to Iraq from March 2003 to August 2003 (Tr. 22). The Army returned him early from Iraq because he had a medical problem (Tr. 22). In 2001 to 2003, creditors repossessed two of the family cars, and some other bills fell behind because Applicant and his spouse were disputing who should pay their debts (Tr. 22, 47). In August 2004, he received a medical retirement from the Army (Tr. 22, 32). He received \$39,000 in medical severance pay (Tr. 119). After leaving active duty, he was unemployed for about two months (Tr. 23, 102). He received unemployment compensation of \$224 a week (Tr. 32, 102).

Applicant's wife was in the Army for ten years (Tr. 120). In 2004, she left active duty as a sergeant (E-5)(Tr. 120). She was handling the family bills and debts. She has been employed with a federal government agency since 2004 (Tr. 119). She has about \$10,000 in her 401K account (Tr. 92; GE 2 at 7). She has about three credit cards (Tr. 95).

Summary of SOR debts

Applicant disclosed his delinquent SOR debts on his March 5, 2007, SF-86 (Tr. 105; GE 1). He obtained a credit report before he completed his SF-86 to ensure he provided accurate information to the government (Tr. 105).

SOR ¶ 1.a (\$6,705)—Payment Plan. In March 2006, Applicant began making payments and in 2007, he increased the amount of his monthly payment to \$350 (Tr. 38-39). On April 2, 2009, the creditor wrote that Applicant owes \$5,373, and the creditor had received \$6,972 in payments (AE A). On July 8, 2009, the creditor said the balance owed is \$4,356, and the creditor had received \$8,021 in payments (AE J). He plans to continue making payments on this debt (Tr. 35-41).

SOR ¶ 1.b (\$485)—Paid. The debt was owed to a landlord for breaking a lease (Tr. 48). On March 23, 2009, the creditor provided a letter indicating Applicant settled this debt (\$1,684) for \$1,348 and paid it (Tr. 49-55; AE B).

SOR ¶ 1.c (\$7,018)—Paid. On May 19, 2009, Applicant paid \$6,157, resolving this debt (Tr. 57-61; AE C). He used his income tax refund from 2008 to pay this debt (Tr. 57).

SOR ¶ 1.d (\$291)—Paid. On May 18, 2009, Applicant settled and paid this credit card debt (Tr. 62-66; AE D).

SOR ¶ 1.e (\$9,987)—Payment Plan. Applicant's wife's car payment was \$554 a month (Tr. 69). It was repossessed in 2002 (Tr. 68). His wife said she made sporadic payments in 2005 and 2006 (Tr. 67-68). Applicant and his spouse currently owe the creditor \$10,608 (AE K). They have a payment arrangement for \$295 a month for three years, starting on July 24, 2009 (AE K).

In addition to the SOR debts, a judgment was obtained for \$1,016 on a dental debt (Tr. 71). He thought his wife's dental insurance was going to pay the debt (Tr. 73). In November 2008, they started making payments (Tr. 74), and in July 2009, Applicant paid the last \$100 on this judgment (Tr. 71-77).

Applicant's monthly gross salary is about \$6,000 (Tr. 77). He changed jobs several times in the last five years (Tr. 98-102). His annual salary has varied from about \$35,000 to about \$72,000 (Tr. 98-102). His current net monthly salary is about \$4,600 (Tr. 78). His spouse's net take home pay is about \$3,500 (Tr. 78). His monthly expenses are: groceries (\$300); clothing (\$100); utilities (\$400); telephone (\$100); car expenses (\$220); car payment (\$630); mortgage (\$2,417); medical expenses (\$50); child support (\$300); jewelry credit card (\$40); and miscellaneous (\$100) (Tr. 78-86, 107; GE 2 at 7). His budget listed monthly payments to the creditor in SOR ¶ 1.a (monthly payment: \$350), the judgment for the dental bill (monthly payment: \$200), and two small charge card debts, totaling about \$2,400 (monthly payment: \$104) (Tr. 87-90; GE 2 at 7). He has about \$3,800 monthly left after paying his expenses (Tr. 90-91). He has about \$1,100 in checking and savings (Tr. 92).

On July 16, 2009, Applicant and his spouse received financial counseling (AE L-M). On July 21, 2009, they completed a detailed budget (AE N). The total of all credit card debt is \$4,656 (AE N). This includes six credit cards, and the minimum total payment for the six accounts is \$156 (AE N). The monthly remainder after paying debts (including payments on two remaining SOR debts) and all expenses is \$863 (AE N).

Applicant's DD Form 214 shows: Army Achievement Medal (2nd Award); Army Superior Unit Award; Global War on Terrorism Expeditionary Medal; Global War on Terrorism Service Medal; Army Good Conduct Medal (3rd Award); National Defense Service Medal (2nd Award); Armed Forces Expeditionary Medal; Armed Forces Service Medal; Noncommissioned Officer's Professional Development Ribbon; Army Service Ribbon; Overseas Service Ribbon (2nd Award); United Nations Medal; and NATO Medal (AE F). His DD Form 214 notes his service in Operations Enduring Freedom and Iraqi Freedom from March 2003 to August 2003 as well as completion of various military courses and training (AE F).

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 Applicants 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 and modified.

Eligibility for a security clearance is predicated upon the Applicant meeting the criteria contained in the revised adjudicative guidelines (AG). 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 over-arching adjudicative goal is a fair, impartial and common sense 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 protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to 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 [A]pplicant concerned." See Exec. Or. 10865 § 7. See also Executive Order 12968 (Aug. 2, 1995), Section 3. 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 as to Applicant's allegiance, loyalty, or patriotism. It is merely an indication the Applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the government must establish, by substantial evidence, conditions in the personal or professional history of the Applicant that may disqualify the Applicant from being eligible for access to classified information. The government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. "Substantial evidence" is "more than a scintilla but less than a preponderance." See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an Applicant's security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the government establishes a disqualifying condition by substantial evidence, the burden shifts to the Applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An Applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Upon consideration of all the facts in evidence and after application of all appropriate legal precepts, factors, and conditions, I conclude the relevant security

concerns are under Guideline F (Financial Considerations). AG ¶ 18 articulates the security concern relating to financial considerations:

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 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." ISCR Case No. 03-20327 at 3 (App. Bd. Oct. 26, 2006) provides, "Applicant's credit report was sufficient to establish the Government's prima facie case that Applicant had . . . delinquent [SOR] debts that are of security concern." Applicant's history of delinquent debt is also documented in his SF-86, his SOR response and his oral statement at his hearing. He failed to ensure his creditors were paid as agreed. The government established the disqualifying conditions in AG ¶¶ 19(a) and 19(c). Further inquiry about the applicability of mitigating conditions is required.

Five conditions under AG ¶ 20 may mitigate security concerns and 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 he did not act more aggressively and responsibly to resolve his delinquent debts. His delinquent debts are "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)). He receives partial credit because his delinquent debts "occurred under such circumstances that [they are] unlikely to recur." I am convinced that he will continue with his two payment plans and resolve all of his SOR debts. His SOR debts do not "cast doubt on his current reliability, trustworthiness, or good judgment."

Applicant receives partial credit under AG ¶ 20(b) because his financial problems initially resulted because of separation from his spouse from 2001 to 2003, some brief unemployment in 2004, and occasional underemployment after leaving active duty.² He does not receive full mitigating credit because he had sufficient information about several delinquent debts and failed to maintain contact with his creditors. He did not establish that he acted with sufficient initiative and resolve to address his delinquent debts after he learned of their existence.

AG ¶ 20(c) fully applies. Applicant received financial counseling. There are "clear indications that the problem is being resolved or is under control." He understands what he must do to maintain financial responsibility. He paid three debts and the other two are in payment plans. He has also established partial mitigation under AG ¶ 20(d) because he showed some, recent good faith³ in the resolution of his SOR debts. Applicant did not contest the validity of any debts. AG ¶ 20(e) does not apply.

²Even 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 the Applicant maintained contact with his or her creditors and attempted to negotiate partial payments to keep debts current.

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 [or statute of limitations]) 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)).

In sum, Applicant should have been more diligent and made greater efforts sooner to resolve his delinquent debts. His SOR lists five debts totaling about \$24,500. He paid three debts, and the other two are in payment plans. He made sufficient progress resolving his SOR debts to mitigate security concerns. I am confident he will continue to comply with his payment plans until all of his SOR debts are resolved⁴ because of his substantial progress on SOR debt resolution.

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.

There is some evidence against mitigating Applicant's financial conduct. When he became separated from his spouse, he should have been more aggressive in his efforts to ensure he and his spouse paid their debts. In February 2009, he received the SOR. He did not actively and aggressively investigate and pay one of the debts listed on his SOR. These factors show some financial irresponsibility and lack of judgment. His history of delinquent debt raises sufficient security concerns to merit further inquiry.

The mitigating evidence under the whole person concept is sufficient to warrant reinstatement of Applicant's security clearance. There is no evidence of any security violation(s). He is a law-abiding citizen. His current financial problems were caused by

⁴ Of course, the government can re-validate Applicant's financial status at any time through credit reports, investigation and/or 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. Completion of a security clearance decision documents and establishes a warning to Applicants about the importance of financial responsibility and retention of documentation about debt resolution. The comments in this footnote do not imply that this clearance is conditional.

some factors partially or fully beyond his control: (1) insufficient income; (2) separation from his spouse; and (3) underemployment. His SOR listed five debts totaling about \$24,500. He paid three SOR debts, and the other two are in payment plans. He paid \$8,021 into one payment plan, and still owes \$4,356. The other payment plan starts in July 2009. He made sufficient progress resolving his SOR debts to mitigate security concerns. His other debts, such as his mortgage, car payment, and six credit cards are current. 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 omitted).

Applicant has achieved some important educational and employment goals, demonstrating his self-discipline, responsibility and dedication. He has completed two years of college. He served on active duty in the Army for 11 years, and received an honorable discharge. He served in Iraq in 2003. His employment history and contributions to a defense contractor speak well for his character. He received financial counseling and understands how to budget and what he needs to do to maintain his financial responsibility. Applicant has demonstrated his loyalty, patriotism, and trustworthiness through his service to the Army in war and peace and as an employee of a defense contractor.

After weighing the disqualifying and mitigating conditions, and all the facts and circumstances in the context of the whole person, I conclude Applicant has 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 Guidelines. Applicant has fully mitigated or overcome the government's case. For the reasons stated, I conclude he is 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: FOR APPLICANT

Subparagraphs 1.a to 1.e: For Applicant

Conclusion

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

MARK HARVEY
Administrative Judge