



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



In the matter of:)
)
-----) ISCR Case No. 08-06576
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Emilio Jaksetic, Esquire, Department Counsel
For Applicant: *Pro Se*

March 26, 2009

Decision

HARVEY, Mark W., Administrative Judge:

Applicant failed to mitigate the financial considerations security concerns. His statement of reasons (SOR) listed ten delinquent debts totaling \$13,451. He paid two SOR debts for \$179 and \$274. He is making monthly \$70 payments on one SOR debt and plans to start a \$25 monthly payment on a \$148 debt in April 2009. He has not made adequate efforts to address his delinquent debts. Clearance is denied.

Statement of the Case

On February 8, 2007, Applicant submitted an Electronic Questionnaire for Sensitive Positions (SF 86) with a signed (e-QIP), dated January 3, 2007 (Government Exhibit (GE) 2). On December 17, 2008, the Defense Office of Hearings and Appeals (DOHA) issued an SOR detailing the basis for its preliminary decision to deny Applicant eligibility for access to classified information, citing security concerns under Guideline F (Financial Considerations). The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1990), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); Department of Defense (DoD) Regulation 5200.2-R, *Personnel Security Program*, dated January 1987, as amended (Regulation), and the revised adjudicative guidelines (AG) promulgated by

the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006. 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 him, and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

On February 2, 2009, DOHA received Applicant's SOR response and requested a hearing before an administrative judge. Department Counsel was prepared to proceed on February 19, 2009. The case was assigned to me on February 23, 2009. On February 25, 2009, DOHA issued a hearing notice. The hearing was held on March 17, 2009. At the hearing, Department Counsel offered six exhibits (GEs 1-6) (Transcript (Tr.) 16-19), and Applicant did not offer any exhibits. There were no objections, and I admitted GEs 1-6 (Tr. 19). Additionally, I admitted the SOR, response to the SOR and the hearing notice (GEs 7-9). I received the transcript on March 23, 2009.

Findings of Fact¹

In his SOR response, Applicant admitted his responsibility for the debts listed in the SOR. His admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence of record, I make the following findings of fact.

Applicant is 38 years old (Tr. 6, 21; GE 1). In 1989, he graduated from high school (Tr. 6). He has not attended college (Tr. 6). He served in the U.S. Marines from August 1989 to August 1993 (Tr. 22; GE 1). He served overseas in Operation Desert Shield/Desert Storm (Tr. 22). He earned the National Defense Service Medal, the Southwest Asia Service Medal, and the Sea Service Deployment Ribbon (GE 4 at 22). His foreign service is three months and 21 days (GE 4 at 22). He received an Honorable Discharge from the U.S. Marines (Tr. 22).

A government contractor and its predecessor on the same contract, have employed Applicant since January 2006 (Tr. 23). He has not been unemployed in the last five years (Tr. 49). Applicant is a field security technician, and his duties are to install security equipment, such as card readers and motion detectors (Tr. 7). He does not have any felony or alcohol or drug-related arrests (GE 1). He has held a Top Secret security clearance since 1992 (Tr. 6).

Applicant married in 1990 and divorced in 1998 (GE 1). He married again in 2006 (Tr. 33). His six-year-old son and stepdaughter are living in his home (Tr. 33, 52). His spouse works in a daycare center and so he does not need to pay for childcare (Tr. 52).

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

Financial considerations

Applicant's SOR lists ten delinquent debts, totaling \$13,451. He has never filed for bankruptcy or had a property lien for taxes or debt (GE 1). He admitted responsibility for the ten debts (Tr. 24). His SF 86 disclosed he had a judgment for \$2,700 (GE 1). He also had a 1994 Nissan repossessed (GE 1, GE 3). He disclosed on his SF 86 that he had debts currently over 90 days delinquent and debts over 180 days delinquent in the last seven years (GE 1). He listed the debt in SOR ¶ 1.d (\$274); ¶ 1.h (\$6,811); a non-SOR judgment in October 2006 for \$2,843 toward which he had paid \$2,744; and a non-SOR judgment in March 2006 for \$2,700 (GE 1). He commented that he may have other delinquent debts (GE 1). He has not had any liens or garnishments filed against him (Tr. 38, 40). He did not have any problems paying his rent (Tr. 38-39).

Two of his SOR debts resulted from personal loans, and most of the others were from credit cards (Tr. 44-46). One was from a cell phone account and another was from an automobile insurance company (Tr. 46).

Applicant was unemployed for one month in 2002 and then underemployed in his next job (Tr. 30, 49). He fell behind on his debts (Tr. 30). He has not been unemployed during the last five years (Tr. 49). Applicant had judgments entered against him in 2006 and May 2007 (Tr. 34-37). He paid off the 2006 judgment for \$2,843 (Tr. 37).

Applicant said he was unable to afford payments to address his delinquent SOR debts using a debt consolidation program because it would cost about \$500 monthly (GE 4). He was unable to borrow money to pay his debts (Tr. 43; GE 4). He paid his delinquent child support debt, his telephone bill and a small judgment (GE 4).

Applicant has taken positive action to resolve four SOR debts (¶¶ 1.c, 1.d, 1.f and 1.j). The creditor in SOR debt ¶ 1.c (\$148) agreed to accept \$25 monthly beginning April 3, 2009 (Tr. 25). Applicant paid the debt in SOR ¶ 1.d (\$274) (Ex. 4 at 3, 8, 9). On October 15, 2008, he settled and paid the debt in SOR ¶ 1.f (\$179) (Tr. 27; GE 4 at 18). The 2007 judgment was for \$1,200, and he began paying \$70 monthly on this judgment in May 2008 (Tr. 34-35; GE 4 at 3; SOR ¶ 1.j). He does not have any arrangements to pay any of the other SOR debts (Tr. 26-30).

Applicant contacted the creditor in SOR debt 1.g (\$85) and learned the debt was transferred to a collection agency (Tr. 28). The collection agency contacted Applicant and sent him a letter asking for payment (Tr. 29). Applicant has not responded to the collection agency's letter (Tr. 29).

Applicant provided a personal financial statement (PFS) dated April 4, 2001, showing a gross salary of \$3,278 (GE 3). His monthly expenses totaled \$725, and monthly debt payments of \$905 for five debts totaled \$32,700 (GE 3). His net remainder was \$1,648 (GE 3).

Applicant's PFS, dated in September 2008, is still accurate (Tr. 51; GE 4 at 6). His 2008 PFS shows a gross salary of \$4,966 for himself and \$1,600 for his spouse (GE

6). Their combined net salary is \$3,630 (GE 4 at 6). Their monthly expenses total \$3,365, and include a monthly debt payment of \$70 for one debt, which he listed as totaling \$1,200 (GE 4 at 6; SOR ¶ 1.j). His net remainder is \$195 (GE 4 at 6). He lists a car expense of \$1,400, and his next highest expense is \$1,215 for rent, and his third highest expense is \$727 for child support (Tr. 32; GE 4). Applicant and his spouse are making payments on two vehicles (Tr. 41, 52-53). He has about \$8,000 in a 401K account (Tr. 40). He has not borrowed against his 401K account (Tr. 41). Applicant and his spouse do not currently have any credit cards (Tr. 47). Applicant promised to make a more aggressive effort to pay his debts (Tr. 58).

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 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 concern is under Guideline F (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 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 documented in his credit reports, in his SOR response and at his hearing. As indicated in SOR ¶¶ 1.a to 1.j, he had ten delinquent debts totaling about \$13,451. His financial difficulties began in 2002 and continue today. The government established the disqualifying conditions in AG ¶¶ 19(a) and 19(c).

Five Financial Considerations Mitigating Conditions under AG ¶¶ 20(a)-(e) 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) or 20(e) because he did not act more aggressively and responsibly to resolve his ten 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)). Applicant receives partial credit under AG ¶ 20(a) because his financial problems "occurred under such circumstances that [they are] unlikely to recur;" however, there is some residual doubt about whether he is fully committed to resolving his delinquent SOR debts and is making adequate steps to do so. He realizes the importance of avoiding delinquent debt and promise to make a greater effort to keep his debts current. AG ¶ 20(e) does not apply because he did not dispute any of the SOR debts.

AG ¶ 20(b) partially applies. Applicant's financial situation was damaged due to reduction of income while he was unemployed and subsequently by underemployment, and divorce. He lacked the income to pay some of his debts. About two years ago, he obtained his current employment and thereafter he paid several of his debts. He established that he acted responsibly under the circumstances with respect to the debts he paid.²

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

AG ¶ 20(c) partially applies. Applicant received some financial counseling or advice in connection with discussions with debt consolidation companies. He paid some of his non-SOR delinquent debts and one judgment. Applicant has taken positive action to resolve four SOR debts (¶¶ 1.c, 1.d, 1.f and 1.j). Applicant telephoned the creditor in SOR debt ¶ 1.c (\$148), and the creditor agreed to accept \$25 monthly beginning April 3, 2009. Applicant paid the debts in SOR ¶¶ 1.d (\$274) and 1.f (\$179). The 2007 judgment was for \$1,200, and he began paying \$70 monthly on this judgment in May 2008 (Tr. 34-35; GE 4 at 3; SOR ¶ 1.j). He did not have any arrangements to pay any of the other SOR debts (Tr. 26-30). These are some positive “indications that the problem is being resolved or is under control.” He understands the security implications of delinquent debt and will scrupulously avoid future delinquent debt. He has also established some mitigation under AG ¶ 20(d) because Applicant showed some good faith³ in the resolution of his SOR debts.

In sum, Applicant should have been more diligent and made greater efforts sooner to resolve his delinquent debts. His payment of two small delinquent SOR debts for \$179 and \$274, his plan to start a \$25 monthly payment on a debt for \$148, and his \$70 monthly payments to another SOR creditor are simply inadequate to fully mitigate financial considerations security concerns.

Whole Person Concept

Under the whole person concept, the administrative judge must evaluate an Applicant’s eligibility for a security clearance by considering the totality of the Applicant’s conduct and all the circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

- (1) the nature, extent, and seriousness of the conduct;
- (2) the circumstances surrounding the conduct, to include knowledgeable participation;
- (3) the frequency and recency of the conduct;
- (4) the individual’s age and maturity at the time of the conduct;
- (5) the extent to which participation is voluntary;
- (6) the presence or absence of rehabilitation and other permanent behavioral changes;
- (7) the motivation

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)).

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.

Although the rationale for reinstating Applicant's clearance is insufficient to support a security clearance at this time, there are several factors tending to support approval of his clearance. Applicant deserves substantial credit for volunteering to serve in the U.S. Marines, and serving in Southwest Asia during Operation Desert Shield/Storm. There is every indication that he is loyal to the United States, the Department of Defense, his employer and that he is an honorable person. There were no allegations of security violations. He does not have any felony arrests or any drug or alcohol-related arrests or convictions. Applicant is a security agent. He is a high school graduate, but did not attend college. He is not sophisticated in the area of finance. He made mistakes, and debts became delinquent. Expenses from his divorce and from paying child support, as well as unemployment and underemployment contributed to his financial woes. He received some financial counseling and has learned about how to avoid future delinquent debts. He paid several non-SOR debts including his child support debt, and is current on his car loans. He is well on his way to establishing a meaningful track record of debt repayment. See ISCR Case No. 07-06482 at 2-3 (App. Bd. May 21, 2008). He is motivated to have a successful career as an employee of a Department of Defense Contractor, to pay his delinquent debts and to have his security clearance reinstated. These factors show some responsibility, rehabilitation, and mitigation.

The whole person factors against reinstatement of Applicant's clearance are more substantial at this time. Failure to pay or resolve his just debts is not prudent or responsible. Applicant has a lengthy history of financial problems. He began to have financial difficulties in 2002, when several debts became delinquent. In October 2008, he received DOHA interrogatories and in December 2008, he received the SOR. He had ample opportunity to contact more of his SOR creditors and to make greater progress in the resolution of his SOR debts. He paid one delinquent SOR debt for \$179 in October 2008, and another SOR debt for \$274 prior to October 2008. He began making monthly \$70 payments in May 2008 to address the judgment related to the debt in SOR ¶ 1.j (\$1,168). He plans to begin making \$25 payments on his \$148 debt in SOR ¶ 1.c. He made insufficient progress over the last six months to resolve his delinquent debts, even though he had steady employment and ample opportunity to contact his creditors and provide documentation. For example, in the first three months of calendar year 2009, he described monthly payments of only \$70 made to address his SOR debts. He was on clear notice from his receipt of DOHA interrogatories and even more so after he received the SOR that he needed to show substantial progress in the resolution of his delinquent debts; however, he made insufficient effort to accomplish this security responsibility.

After Applicant's delinquent SOR debts are paid or satisfied, and after a reasonable period of time without additional delinquent debts, (assuming no other disqualifying conditions surface), Applicant's clearance should be reinstated. He needs some time after his SOR debts are paid to reestablish his financial responsibility.

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 the 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 failed to mitigate or overcome the government's case. For the reasons stated, I conclude he is not eligible for access to classified information at this time.

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.b:	Against Applicant
Subparagraphs 1.c and 1.d:	For Applicant
Subparagraph 1.e:	Against Applicant
Subparagraph 1.f:	For Applicant
Subparagraphs 1.g to 1.i:	Against Applicant
Subparagraph 1.j:	For 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. Eligibility for a security clearance is denied.

Mark W. Harvey
Administrative Judge