



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



In the matter of:)
)
-----) ISCR Case No. 08-07540
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Nichole L. Noel, Esquire, Department Counsel
For Applicant: *Pro Se*

October 5, 2009

Decision

HARVEY, Mark, Administrative Judge:

Applicant's statement of reasons (SOR) lists four delinquent debts totaling \$44,971. He paid one debt, and one debt is in an established payment plan. Applicant credibly promised to resolve the last two debts, and his track record of debt resolution provides solid assurance that he will fulfill his promise. Financial considerations security concerns are mitigated. Eligibility for access to classified information is granted.

Statement of the Case

On January 9, 2008, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) or Security Clearance Application (SF-86) (Government Exhibit (GE) 1). On April 9, 2009, the Defense Office of Hearings and Appeals (DOHA) issued an SOR to Applicant (GE 13), 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 April 27, 2009, Applicant responded to the SOR (GE 14). On May 21, 2009, Department Counsel was prepared to proceed. On May 26, 2009, the case was assigned to another administrative judge. On June 3, 2009, Applicant requested a continuance. On June 19, 2009, the administrative judge granted a continuance, and DOHA transferred the case to me (GE 9). On July 8, 2009, DOHA issued a hearing notice setting the hearing for August 11, 2009 (GE 10). The hearing was held as scheduled. Department Counsel offered eight exhibits (Tr. 20; GE 1-8), and Applicant offered four exhibits (Tr. 22-25; AE A-D). Applicant did not object to my consideration of GE 1-8, and I admitted GE 1-8 into evidence (Tr. 20). Department Counsel did not object to my consideration of AE A-D, and I admitted AE A-D into evidence (Tr. 25). Additionally, I admitted the documentation concerning the continuance, Hearing Notices, SOR, and response to the SOR as administrative exhibits (GE 9-14). I held the record open after the hearing for Applicant to submit additional documentary evidence. On August 19, 2009, I received the transcript.

On September 4, 2009, Department Counsel provided AE E-H to me. Department Counsel did not object to admission of AE E-H, and I admitted AE E-H into evidence. On September 5, 2009, I closed the record.

Findings of Fact¹

Applicant is a 59-year-old employee of a government contractor (Tr. 6, 26; GE 1). In 1986, he received a bachelor's degree (Tr. 7). He majored in business administration management (Tr. 7). He has been married for 36 years (Tr. 26). He has two children, ages 31 and 21 (Tr. 26). His daughter and granddaughter live in his home (Tr. 27). He does not currently hold a security clearance (Tr. 8).

Financial Considerations

Applicant has four SOR debts, totaling about \$44,971 as follows: (1) tax debt of \$4,200 (SOR ¶ 1.a); (2) credit card/collection debt of \$35,667 (SOR ¶ 1.b); (3) department store/collection debt of \$4,957 (SOR ¶ 1.c); and (4) electronics store debt of \$147 (SOR ¶ 1.d).

He worked for a large defense contractor from 1981 to 1997 in state F (Tr. 28). In 1997, his salary was \$72,000 (Tr. 31). In 1997, he had about \$300,000 in his 401(K)

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

account and he used that account to fund his move to state U (Tr. 29, 32). He did not have a job in state U and chose to move there because he and his wife were originally from that state. He was unemployed or underemployed in sales at state U for about three years (Tr. 30-31). Then he obtained state-government employment at state U and earned an annual income of about \$15,000 (Tr. 31). In 1997, his wife obtained employment cleaning houses and has subsequently had annual earnings of about \$15,000 (Tr. 32, 34). From 1997 to 2006, he spent the money from his 401(K) on living expenses (Tr. 32). In August 2006, he returned to employment with the defense contractor in state F with a starting salary of \$82,000 (Tr. 33). In January of 2007, he transferred to state C (Tr. 34). His spouse and family stayed in state U, and he currently lives in state C (Tr. 34). His current annual income is about \$118,000 (Tr. 34). Beginning in August 2006, a significant expense has been maintenance of two households in two different states as well as travel between the two households.

SOR ¶ 1.a (\$4,200)—Paid. Applicant failed to pay his federal and state income taxes in 2005 (Tr. 35-36). He had two reasons for not paying his taxes: (1) he had a problem with the tax software he was using, and (2) he did not have the money to pay his 2005 taxes (Tr. 50). He conceded his failure to pay his state and federal taxes in 2005 was improper and wrong (Tr. 35-36). In 2006, he filed his federal and state income taxes for 2005 and 2006 (Tr. 36, 50). He worked out a payment plan with the IRS; however, he accelerated the repayment and fully paid his remaining tax debt on April 13, 2009, when he paid \$1,146.55 (AE C).

SOR ¶ 1.b (\$35,667)—Unresolved. Applicant held a credit card with a particular company for 35 years (Tr. 37). He used the credit card for living expenses and then starting in October 2005 did not make his payments as agreed (Tr. 37-38). The balance owed in 2005 was about \$18,000. He was unable to make payments because of low income and exhaustion of his 401(K) account (Tr. 38). The credit card debt has increased to about \$40,000 (AE D at 5). Based on advice from his debt consolidation company (DCC), he did not contact the creditor for about two years (Tr. 39). On August 1, 2009, the creditor offered to settle the debt for a lump sum payment of \$26,281 (Tr. 52). He did not have the funds saved to make this lump sum payment.

SOR ¶ 1.c (\$4,857)—Unresolved. This is a department store/collection debt. He purchased a variety of items (mostly household goods and tools) at a department store and charged many of the items on a charge card (Tr. 40). He stopped making payments on this card in October 2005 (Tr. 41). He planned to save up enough money to settle the debt (Tr. 41).

SOR ¶ 1.d (\$147)—payment plan. This is an electronics store debt (Tr. 41). The debt was actually about \$2,000 not \$147 as alleged in the SOR (Tr. 41). He has been making payments of about \$100 monthly since 2007 (Tr. 42-43; Ex. D at 9, 10). This debt is in current status.

Applicant's credit report shows pays as agreed or pays satisfactorily on nine revolving accounts, two installment accounts, and one other-category account (AE D at 1). It also shows three delinquent other-category accounts (AE D at 1, 5, 7-8, 9). The

three delinquent accounts are for SOR ¶ 1.b (AE D at 5); SOR ¶ 1.c (AE D at 9); and one non-SOR debt. The non-SOR delinquent account noted in the credit report is resolved as discussed in the next paragraph (AE D at 7-8).

Applicant received financial counseling (AE E). The DCC advised him to save up a lump sum and then offer to settle each debt (Tr. 39-40). He followed the DCC's advice, and planned to follow that advice to pay all of his delinquent debts. For example, he saved up a lump sum and paid a non-SOR credit card creditor \$10,083 on June 3, 2009 (Tr. 40, 47; AE B).

Applicant's federal tax returns show the following adjusted gross income: 2008 (\$116,908); 2007 (\$77,527); 2006 (\$56,221); 2005 (\$74,430); 2004 (\$38,647); 2003 (\$57,500); 2002 (\$57,069); 2001 (\$48,083); 2000 (\$48,218); 1999 (\$13,615); and 1998 (\$48,175).

Applicant and his spouse's monthly income, expenses, and remainder are as follows: gross income (\$11,083); net income (\$5,600); rent for residences in two states (\$3,100); miscellaneous expenses (\$5,400); and remainder (\$200) (Tr. 43-46; AE F).

Character reference²

The Director of Applicant's department at his employment has known him for many years. He described Applicant as "highly professional and very experienced." He is a "tremendous asset." He attested that Applicant "is an individual of the highest integrity and demonstrates [un]impeachable ethics." He is confident Applicant is on the right track in clearing his remaining debts.

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 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

²The source for the facts in this section is a July 20, 2009, letter from the Director of a department of his employer.

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 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 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." 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 response to DOHA interrogatories, his SOR response, his oral statement at his hearing, and the documentation he submitted. 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 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 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)).

Applicant receives some mitigating credit because his delinquent debt “occurred under such circumstances that it is unlikely to recur and does not cast doubt on [his] current reliability, trustworthiness, or good judgment.” He established that he paid one substantial SOR debt and several non-SOR debts. He is making payments under a payment plan for one debt, and he is saving money so that he can settle the other two SOR debts. He promised to pay his last two SOR debts as soon as he has saved enough funds to settle them.³ He has a plan to keep his debts current. He has ample income now to pay his debts, and resolve his last two SOR debts.

Applicant receives full credit under AG ¶ 20(b) because his financial problems initially resulted because of unemployment and underemployment. He has acted responsibly under the circumstances by paying \$11,000 to his creditors in 2009. He has a logical and appropriate plan for resolving his last two SOR debts. He has made sufficient effort to pay off his delinquent SOR debts.⁴

AG ¶ 20(c) fully applies. Applicant received financial counseling from the debt consolidation company, and there are “clear indications that the problem is being resolved or is under control” for the reasons stated in the preceding paragraph. He understands the security implications of delinquent debt and will scrupulously avoid future delinquent debt. He has also established some, but not full mitigation under AG ¶ 20(d) because he showed substantial, recent good faith⁵ in the resolution of his SOR debts. AG ¶ 20(e) does not apply. Applicant did not contest the validity any debts.

³ 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. This footnote does not imply that this clearance is conditional.

⁴“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 the Applicant maintained contact with his or her creditors and attempted to negotiate partial payments to keep debts current.

⁵The 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].

In sum, Applicant should have been more diligent and made greater efforts sooner to resolve his delinquent debts. Nevertheless, he established the full applicability of AG ¶¶ 20(b) and 20(c). Moreover, security concerns are fully mitigated under the “Whole Person Concept,” *infra* at pages 8-9.

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 relevant 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 evidence against mitigating Applicant’s financial conduct. Three SOR debts and one large non-SOR debt became delinquent in 2005. He did not file his 2005 federal and state tax returns until after he filed his 2006 federal and state tax returns. He failed to maintain contact with all of his creditors. He should have ensured better documentation of his remedial efforts. 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 more substantial. There is no evidence of any security violation. Applicant is a law-abiding citizen. He received financial counseling. The DCC advised him to save up a lump sum and then offer to settle the debt. He followed the DCC’s advice. He paid one of four SOR debts. He is making payments on one SOR debt totaling about \$2,000. In 2008, his income increased \$40,000 to \$116,908. In 2009, he applied about \$11,000 and resolved two large delinquent debts. Applicant’s credit report shows pays as agreed or pays satisfactorily on nine revolving accounts, two installment accounts, and one other-category account. He and his spouse now have had sufficient income to pay their debts

(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)).

since they both became fully employed. 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 is 59 years old. He has achieved some important educational and employment goals, demonstrating his self-discipline, responsibility and dedication. His financial problems were caused by his unemployment and underemployment, rather than by his misconduct or irresponsible spending. Before his employment problems, he did not have any delinquent debts. Applicant is an intelligent person and he understands how to budget and what he needs to do to establish his financial responsibility. Clearly, he could have acted more aggressively to resolve his debts, after receiving employment with a government contractor. There is, however, simply no reason not to trust him. Moreover, he has established a “meaningful track record” of debt re-payment. He has promised to pay his valid debts. I found his statement to be candid, forthright and credible.

Applicant has demonstrated his loyalty, patriotism and trustworthiness through his service to the Department of Defense as a contractor. A character witness described Applicant as highly professional, with strong integrity and solid ethics. He is a tremendous asset to his corporation. His many years of service supporting the Department of Defense are particularly important. After weighing the disqualifying and mitigating conditions, and all the facts and circumstances, in the context of the whole person, I conclude he has shown sufficient responsibility and rehabilitation to mitigate 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 mitigated 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.d: 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 access to classified information is granted.

MARK HARVEY
Administrative Judge