



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



In the matter of:)
)
-----) ISCR Case No. 08-07736
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Braden M. Murphy, Esquire, Department Counsel
For Applicant: *Pro Se*

April 24, 2009

Decision

HARVEY, Mark W., Administrative Judge:

Applicant mitigated the financial considerations security concerns. Applicant's statement of reasons (SOR) lists a March 2001 Chapter 7 bankruptcy and four delinquent debts, totaling \$34,761. Applicant settled and paid three of the four delinquent SOR debts and the remaining SOR debt is in a payment plan. Clearance is granted.

Statement of the Case

On February 19, 2008, Applicant submitted an Electronic Questionnaires for Sensitive Positions (e-QIP) (SF 86) (GE 1). On November 28, 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) 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 January 2, 2009, DOHA received Applicant's undated response to the SOR (GE 7). On January 12, 2009, Applicant requested a hearing using email (Hearing Exhibit I; Transcript (Tr.) 12-14). On March 6, 2009, Department Counsel was prepared to proceed. The case was assigned to me on March 9, 2009. On March 20, 2009, DOHA issued a hearing notice. The hearing was held on April 13, 2009. At the hearing, Department Counsel offered four exhibits (GEs 1-4) (Tr. 18), and Applicant offered six exhibits (Tr. 20-22; AE A-F). There were no objections, and I admitted GEs 1-4 (Tr. 22), and AEs A-F (Tr. 21-22). Additionally, I admitted the SOR, response to the SOR and the hearing notice (GEs 5-7). I received the transcript on April 21, 2009. I held the record open until April 23, 2009, to permit Applicant to submit additional evidence (Tr. 47-49, 51-52). On April 23, 2009, I received additional evidence (AEs H-K), and these documents were admitted without objection. I closed the record on April 23, 2009.

Findings of Fact¹

In his SOR response, Applicant admitted his responsibility for the debts listed in the SOR (GE 7; Tr. 14). 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 50 years old (Tr. 4, 23). In 1987, he received his bachelor's degree in computer science (Tr. 4, 23). He has worked for a government contractor for the last 15 months as a software engineer (Tr. 24). He has never held a security clearance and he is currently seeking a Secret clearance (Tr. 24). He is not married and does not have any children (Tr. 25).

Financial considerations

Applicant's statement of reasons (SOR) lists four delinquent debts (SOR ¶¶ 1.a to 1.d), totaling \$34,761. Applicant's financial problems were caused by unemployment (Tr. 28-32). Applicant was unemployed for approximately one year before he declared bankruptcy in 2001 (Tr. 26). Prior to becoming unemployed his salary was about \$55,000 annually (Tr. 27). In March 2001, Applicant filed for bankruptcy because he had about \$20,000 in delinquent debt, and in June 2001, Applicant's debts were discharged under Chapter 7 of the Bankruptcy Code (SOR ¶ 1.e, Tr. 25, 27-28).

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

Applicant was employed from September 2001 until September 2006. He was unemployed from September 2006 until February 2007 (Tr. 28-29, 31). He was employed until August 2007, and then unemployed from August to December 2007 (Tr. 32). He has been employed from January 2007 to the present with his current employer (Tr. 32).

Applicant established through his hearing statement and the documents that he provided that three of his SOR debts were settled and paid or paid in full. One debt is in a payment plan. He waited until shortly before his hearing to resolve his SOR debts because he was nervous about the economy and did not want to commit substantial funds to his delinquent debts until he had amassed more funds, and he wanted to be more confident about retention of his employment (Tr. 46-47). The resolution of his SOR debts is more specifically described as follows:

(1) The debt in SOR ¶ 1.a (\$8,312) is a credit card debt (Tr. 36). On February 20, 2009, it was settled for \$3,400 and paid in a lump sum with a check (Tr. 36-37; AE B, E);

(2) The debt in SOR ¶ 1.b (\$1,798) related to purchase of advertising for Applicant's business (Tr. 40, 42). It was paid in full on March 19, 2009 (Tr. 40; AE J);

(3) The debt in SOR ¶ 1.c (\$9,651) is a credit card debt (Tr. 34). On March 5, 2009, it was settled for \$6,000, which Applicant paid in a lump sum with a check for \$6,000 (Tr. 35-36; AE A, D); and

(4) The debt in SOR ¶ 1.d (\$15,000) is for an installment loan (Tr. 37). The amount of the debt has increased to \$19,300 (Tr. 38; AE F). Applicant has a payment plan with payments for the first year of \$100 monthly beginning April 15, 2009 (Tr. 39; AE K). The payments gradually increase to \$600 monthly in the fifth year (Tr. 39). Applicant does not have to pay interest on the debt (Tr. 39; AE K).

Applicant's current annual salary is \$99,000 (Tr. 43). His net salary is about \$60,000 annually (Tr. 43). He does not have a 401K or retirement plan (Tr. 44). He has about \$5,000 in his checking account, and \$35,204 in his savings account, as of March 17, 2009 (Tr. 44-45; AE I). He has one credit card and he pays off the balance every month (Tr. 45). He is current on his state and federal taxes (Tr. 46).

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 SOR response and at his hearing. In 2001, he fell behind on some of his debts because of unemployment. In June 2001, his debts were discharged under Chapter 7 of the Bankruptcy Code. In 2006 and 2007, four additional debts, totaling \$34,761, became delinquent due to unemployment. 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 delinquent debts. He did not dispute the legitimacy of any of his delinquent SOR 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 under AG ¶ 20(a) because his delinquent debts also "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." He resolved three of four delinquent debts and the remaining debt is in a payment plan.

Applicant receives full credit under AG ¶ 20(b) because his financial problems initially resulted because of unemployment. Unemployment caused his financial problems in 2001, which he used bankruptcy to resolve his debts. In the last two years, he was unemployed from September 2006 to February 2007 and from August to December 2007. He acted responsibly under the circumstances and paid three of his four SOR debts prior to his hearing.² His remaining SOR debt is in a payment plan.

AG ¶ 20(c) fully applies. Applicant paid (or settled and paid) three of four of his delinquent debts, and the remaining debt is in a payment plan. There are "clear 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 mitigation under AG ¶ 20(d) because he showed good faith³ in the resolution of his SOR debts.

²"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.

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

In sum, Applicant should have been more diligent and made greater efforts sooner to resolve his delinquent debts. He should have maintained contact with his creditors, keeping them apprised of his financial progress. Nevertheless, his resolution of three of four SOR debts, and his entry into a payment plan on the remaining debt is adequate 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 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 conduct. In 2001, Applicant's debts became delinquent because of his unemployment. In 2001, he utilized a Chapter 7 bankruptcy to eliminate his delinquent debts. By the end of 2007, he had four delinquent debts, totalling \$34,761. He failed to keep his accounts current and negotiate lesser payments when his income decreased, showing some financial irresponsibility and lack of judgment. When he returned to full employment in December 2007, he did not aggressively seek debt repayment or resolution. 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. His unemployment is the source of all of his financial problems. Ultimately, he paid or

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)).

settled three of four delinquent SOR debts. His remaining SOR debt is in a payment plan. His remaining debts are all current. He has about \$35,000 in his savings account. 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 50 years old. He has earned a bachelor’s degree in computer science. He had worked for a government contractor for the last fifteen months and his annual salary from the contractor is now \$99,000. He made mistakes, and his debts became delinquent. There is, however, simply no reason not to trust him. Moreover, he has established a “meaningful track record” of debt payments by actually paying or settling and paying three of his four delinquent SOR debts, and the remaining debt is in a payment plan. These factors show responsibility, rehabilitation, and mitigation. He has demonstrated his loyalty, patriotism and trustworthiness through his service to the Department of Defense as 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 he has 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 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 W. Harvey
Administrative Judge