



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



In the matter of:

SSN: -----

Applicant for Security Clearance

)
)
)
)
)
)

ISCR Case No. 08-11445

Appearances

For Government: Emilio Jaksetic, Esquire, Department Counsel

For Applicant: *Pro Se*

June 30, 2009

Decision

HARVEY, Mark, Administrative Judge:

Applicant's statement of reasons (SOR) listed 20 debts totaling \$144,233. He paid two debts totaling about \$12,500. There were several duplications and disputed debts, leaving 10 undisputed, delinquent debts totaling \$118,847 to resolve. Applicant failed to mitigate financial considerations security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On November 3, 2008, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) or Security Clearance Application (SF 86) (Government Exhibit (GE) 1). On April 3, 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 April 23, 2009, Applicant responded to the SOR (GE 7). Department Counsel was prepared to proceed on May 19, 2009. On May 27, 2009, the case was assigned to me. On June 16, 2009, DOHA issued a hearing notice. The hearing was held on June 18, 2009.¹ At the hearing, Department Counsel offered four exhibits (GE 1-4) (Transcript (Tr.) 17-18), and Applicant offered three exhibits (Tr. 20-22; AE A-C). There were no objections, and I admitted GE 1-4 (Tr. 18), and AE A-C (Tr. 22). Additionally, I admitted the Notice of Hearing, SOR, and response to the SOR (GE 5-7). I received the transcript on June 25, 2009.

Findings of Fact²

In his SOR response, Applicant admitted responsibility for the debts in SOR ¶¶ 1.a (\$105), 1.b (\$183), 1.c (\$450), 1.d (\$14,426), 1.e (\$628), 1.h (\$9,468), 1.i (\$18,590), 1.j (\$25,103), 1.k (\$3,922), 1.m (\$29,104), 1.n (\$5,907), 1.p (\$570), 1.q (\$10,775), 1.r (\$984) and 1.t (\$12,280) (GE 7). He denied responsibility for the debts in SOR ¶¶ 1.f (\$106), 1.g (\$183), 1.o (\$980), and 1.s (\$10,095) (because they duplicate the debts in SOR ¶¶ 1.a (\$105), 1.b (\$183), 1.t (\$12,280), and 1.l (\$374) (GE 7). He described how his debts became delinquent (GE 7). His SOR response was consistent with his hearing statement. His admissions are accepted as findings of fact.

Applicant is a 45-year-old employee of a defense contractor (Tr. 6, 24). He has a master's degree in computer science (Tr. 6). He has worked in his current position on the night shift since August 2005 (Tr. 24-25, 59). His monthly net, take home pay is about \$3,000 (Tr. 60). In February 2009, he lost his other government contractor job after 21 years of continuous employment with that contractor because of the delay in the adjudication of his clearance (Tr. 25-27).

Financial Considerations

The debts in SOR ¶¶ 1.o (\$980) and 1.s (\$10,095) are duplications of the debt in SOR ¶ 1.t (\$12,280). The creditor in SOR ¶ 1.t had to file four civil actions to get paid. On October 14, 2008, Applicant completed payment of the debt through garnishment of his pay (Tr. 28-30, 55-57; AE A).

¹On May 29, 2009, Department counsel discussed the hearing date, time and location with Applicant (Tr. 32). Applicant waived his right to 15 days notice to the date, time and location of his hearing and agreed to proceed with his hearing on June 18, 2009 (Tr. 30-32).

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

Applicant intends to dispute SOR debts ¶¶ 1.a (\$105), 1.b (\$183), 1.c (\$450), 1.e (\$628), and 1.g (\$183) (Tr. 63-65). The debts in SOR ¶¶ 1.b and 1.g were for the same amount. He believed the debts in SOR ¶¶ 1.a, 1.b, 1.c, and 1.g were medical debts that his insurance company was supposed to pay (Tr. 65). He intended to dispute two non-SOR debts for \$139, \$450 and \$59 because they should have been covered by medical insurance (Tr. 64-65). He did not dispute the other debts (Tr. 66). The debt in SOR ¶ 1.f is paid (Tr. 77-78).

In 1995, Applicant was divorced (Tr. 36). He was responsible for paying \$315.17 every two weeks for child support for one child born in 1992 (Tr. 36-37; GE 1). In 2003, he missed four payments; however, now he is paid up and current on his child support obligation (Tr. 37). He is obligated to make these payments until his child reaches the age of 18 in January 2010 (Tr. 38).

Applicant fell behind on his debts in 2002 (Tr. 33). His girlfriend/partner contracted leukemia and Applicant helped her with her debts (Tr. 35, 57-58). He co-owns a house with her and when she was ill, he contributed about \$2,000 monthly to her (Tr. 44-45). She had some income from her former husband and from some investments (Tr. 58). The mortgage on the property where she lives is current (Tr. 45). Applicant now lives in an apartment in a different state from the state where the mortgaged property is located (Tr. 45).

Applicant charged his bills on his credit cards, while still believing that he could sell some property and use his profits to pay his debts (Tr. 35). He sold two properties before he really wanted to do so, and used the profits to pay daily living expenses (Tr. 35). In the fall in 2002, Applicant sought assistance from and signed a contract with a debt consolidation company (DCC) (Tr. 39). He worked with the DCC for about six weeks (Tr. 40). He terminated his agreement with DCC because their charges were too high (Tr. 40-41). His employer did not recommend any particular debt counseling or debt consolidation company (Tr. 42). In 2003, he went to another debt consolidation company and they recommended that he declare bankruptcy (Tr. 43-44). He did not want to use bankruptcy to avoid repayment of his creditors (Tr. 43). By 2004, his real estate investment properties were sold (Tr. 51-52). After 2004, he did not receive any other debt counseling or work with any debt consolidation companies (Tr. 41-42, 44).

Applicant's partner lives in the only real estate where Applicant has an ownership interest (Tr. 51). Applicant owns two cars (Tr. 46). The newest one is 14 years old (Tr. 46). There are no liens on his cars (Tr. 46). He does not have a checking account (Tr. 47). His other bank accounts have very limited funds (Tr. 47). He does not have any other non-bank financial-type accounts (Tr. 49). He cashed out his 401K and pension plan in March or April of 2009 and received about \$30,000 (Tr. 49-50). He used the funds for living expenses for the house where his partner lived and for his living expenses in another state (Tr. 50-51). His total assets are about \$2,000 (primarily clothes, laptop computer, and two old cars) (Tr. 74-75).

Applicant informed the credit card account creditors that the accounts should be closed, and he would pay when he was able (Tr. 53-54). He plans to pay his delinquent

debts a little at a time (Tr. 52, 66). He has learned to keep his expenses low, and maintains a lower standard of living than previously when his income was higher. For example, he did not purchase newer cars. His frugal spending habits increased available funds to address his debts (Tr. 52). He recently asked the mortgage holder (mortgage amount: \$205,000) to reduce his payments (Tr. 69; AE C). He was optimistic about the future, noting his plan to reduce his payments to his partner next month, and his payments to support his child would end early in 2010 (Tr. 67, 73). When he has funds accrued, he intends to contact his creditors and negotiate settlements (Tr. 68). Applicant's personal financial statement showed his approximate monthly expenses (\$5,609) substantially exceeded his approximate monthly income from his current employment (\$3,000) mostly because he has two households that he is attempting to support (Tr. 70-73; AE C). Before he lost his primary employment in February 2009, he had sufficient income to pay his expenses.

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 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.” 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 documented in his SF-86, his credit reports (GE 3, 4, AE B), his SOR response and 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 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. 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(b) because his financial problems initially resulted because of the real estate downturn as well as his support for his girlfriend/partner, who has cancer. He receives some mitigating credit because his delinquent debts "occurred under such circumstances that it is unlikely to recur;" however, the problem of about \$118,847 in delinquent debt continues to "cast doubt on [his] current reliability, trustworthiness, or good judgment." He established that he paid the debts in SOR ¶¶ 1.t (\$12,280) and 1.f (\$106) and he is current on his mortgage and his expenses of daily living, such as his rent. He disputes five debts mostly because he believes they are covered by medical insurance and one is a telephone company debt: SOR ¶¶ 1.a (\$105), 1.b (\$183), 1.c (\$450), 1.e (\$628), and 1.l (\$374). Three debts are duplications of other debts: SOR ¶¶ 1.g, 1.o and 1.s. He has promised to pay the remaining debts; however, that promise is unlikely to successfully resolve his debts as indicated by the lack of meaningful progress he has demonstrated over the last four years.

AG ¶ 20(c) partially applies. Applicant received some financial counseling and worked with a debt consolidation program in 2003 for about six weeks. However, there are not “clear indications that the problem is being resolved or is under control” because ten debts totaling about \$118,847 remain unresolved. He has also established some, but not full mitigation under AG ¶ 20(d) because he showed some, recent good faith³ in the resolution of his SOR debts by paying one large debt through garnishment of his pay.

Applicant did not provide documentation contesting the validity of any debts. However, I will apply AG ¶ 20(e) because he credibly disputes five small debts totaling about \$1,500, which is less than two percent of his total delinquent debt. His overall recent conduct; however, does not show that he acted responsibly under the circumstances.⁴

In sum, Applicant should have been more diligent and made greater efforts sooner to resolve his delinquent debts. In the last four years, he has not done anything to address ten delinquent debts, totaling \$118,847, even though up until February 2009 he had sufficient funds from his two jobs to make greater progress.

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):

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)).

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.

(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.

The mitigating evidence under the whole person concept is insufficient 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 some factors partially or fully beyond his control: (1) insufficient income, (2) the real estate downturn, and (3) his girlfriend/partner's cancer. He paid two SOR debts. He pays his current living expenses. He pays his rent, mortgage and utilities. Five SOR debts are disputed. Three SOR debts are duplications. He has a plan to pay his other SOR debts. He does not have any credit cards.

Applicant has achieved some important educational and employment goals, demonstrating his self-discipline, responsibility and dedication. Up to February 2009, he had been employed by the same defense contractor for 21 years. This stable employment and contributions to a defense contractor speaks well for his character. In February 2009, he lost that employment because of his security clearance problem relating to his delinquent debts. He still holds employment on the night shift with another government contractor. He understands how to budget and what he needs to do to establish his financial responsibility. Applicant has demonstrated his loyalty, patriotism and trustworthiness through his 21 years of service to the Department of Defense as a contractor. These factors, especially his past government service, show substantial responsibility. However, all of these positive attributes are insufficient to mitigate security concerns at this time.

The evidence against mitigating Applicant's financial conduct is more substantial. Applicant's debts became delinquent more than four years ago. Through those four years, up to February 2009, he should have made greater progress addressing his delinquent debts. He has admitted a total of ten delinquent debts, totaling \$118,847, and he has not paid anything to these 10 creditors in at least four years. He showed some effort to increase his income by working two jobs, but he did not make enough effort to reduce his expenses until recently. Ultimately, he did not establish that he acted with sufficient effort and self-discipline to resolve his delinquent debts and to better document his remedial efforts. All the factors considered together show too much

financial irresponsibility and lack of judgment. His history of delinquent debt raises unmitigated security concerns.

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 sufficiently 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 not fully mitigated or overcome the government's case. For the reasons stated, I conclude he is not 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: AGAINST APPLICANT

Subparagraphs 1.a to 1.c:	For Applicant
Subparagraph 1.d:	Against Applicant
Subparagraphs 1.e to 1.g:	For Applicant
Subparagraphs 1.h to 1.k:	Against Applicant
Subparagraph 1.l:	For Applicant
Subparagraphs 1.m and 1.n:	Against Applicant
Subparagraph 1.o:	For Applicant
Subparagraphs 1.p to 1.r:	Against Applicant
Subparagraphs 1.s and 1.t:	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 HARVEY
Administrative Judge