



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



In the matter of:)
)
-----) ISCR Case No. 09-01529
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Caroline H. Jeffreys, Esquire, Department Counsel
For Applicant: *Pro Se*

December 29, 2009

Decision

HARVEY, Mark, Administrative Judge:

Applicant's statement of reasons (SOR) listed 15 delinquent debts totaling \$40,318. In July and August 2009, Applicant paid seven debts totaling \$4,533. He disputed one debt for \$33. His remaining SOR debts totaled \$35,752, and all related to education loans. He indicated he could have begun a payment plan on his remaining SOR debts; however, he chose not to do so. He failed to mitigate financial considerations security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On November 21, 2008, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) or Security Clearance Application (SF 86) (Item 5). On July 27, 2009, the Defense Office of Hearings and Appeals (DOHA) issued an SOR to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified; and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005.

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 August 28, 2009, Applicant responded to the SOR allegations, and elected to have his case decided on the written record in lieu of a hearing (Item 4). A complete copy of the file of relevant material (FORM), dated September 29, 2009, was provided to him, and he was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation.¹ On November 30, 2009, Applicant provided a response to the FORM. The case was assigned to me on December 14, 2009.

Findings of Fact²

In Applicant's response to the SOR, he admitted that he previously owed all of the SOR debts, except SOR ¶ 1.e (\$33) (Item 4). He also provided an explanation for his financial problems, and explained that he paid the seven debts in SOR ¶¶ 1.a (\$893), 1.b (\$931), 1.c (\$113), 1.d (\$246), 1.f (\$86), 1.g (\$678), and 1.o (\$1,586) (Item 4). After a complete and thorough review of the evidence of record, I make the following findings of fact.

Applicant is 36-year-old employee of a defense contractor.³ He worked for a defense contractor from December 2001 to 2008, and he has been a contract employee for over one year working at a military installation (Item 6 at 14; FORM response). He has not had access to classified information for the last year; however, he would need access to classified information in the event of exceptional circumstances (Item 6 at 14; FORM response).

Applicant received a bachelor of science degree in June 2005. He married in 1996 and divorced in 2005. He remarried in late 2008 (Item 6 at 13-14). His children were born in 1997, 1999, and 2001. He has never served in the U.S. military. He has never been fired from a job or left employment under adverse circumstances. His file does not contain any adverse information relating to police involvement. For example, he has never been charged with a felony, any firearms or explosives offense(s), and does not have any currently pending charges. He has never been charged with any offense related to alcohol or drugs. He has not been arrested for or charged with any

¹The Defense Office of Hearings and Appeals (DOHA) transmittal letter is dated October 19, 2009; and Applicant's receipt is dated October 27, 2009. The DOHA transmittal letter informed Applicant that he had 30 days after his receipt to submit information.

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

³Unless stated otherwise, the facts in this paragraph and the next paragraph are from Applicant's November 21, 2008, security clearance application (Item 5).

other misdemeanor-level offenses. There is no evidence that he has abused alcohol or drugs. In the financial information section of his 2008 security clearance application, he listed an April 2008 state tax lien related to delinquent state income taxes, and approximately \$27,000 in delinquent student loans. Applicant did not list any periods of unemployment in the last seven years.

Financial considerations

Applicant's statement of reasons (SOR) listed 15 delinquent debts totaling \$40,318 as follows: ¶ 1.a (state tax—\$893); ¶ 1.b (state tax—\$931); ¶ 1.c (collection account—\$113); ¶ 1.d (collection account—\$246); ¶ 1.e (collection account—\$33); ¶ 1.f (collection account—\$86); ¶ 1.g (collection account—\$678); ¶¶ 1.h to 1.n (education debts—\$3,492; \$6,248; \$3,621; \$4,635; \$7,317; \$7,342; \$3,079); and ¶ 1.o (collection account—\$1,586) (Item 1).

Applicant's SOR response admitted responsibility for all debts except the debt in SOR ¶ 1.e (\$33) (Item 4 at 2). He checked his credit report, and this debt did not appear on it (Item 4 at 2).

Applicant has a history of financial problems. In approximately 2006, the federal government garnished Applicant's pay for income taxes owed for the 2004 and 2005 tax years (Item 6 at 11, 12). He completed repayment of his delinquent federal income taxes in October 2006 (Item 6 at 12).

On December 23, 2008, Applicant explained to an Office of Personnel Management (OPM) investigator that his separation in 2003 from his wife and children and divorce in 2005 caused financial problems for him (Item 6 at 11-14). His spouse was unemployed and the family debts became his sole responsibility (Item 6 at 11). Initially, he had to pay monthly child support of \$800 (Item 6 at 11). He also had to pay \$2,700 for their children's medical care (Item 6 at 11). His former spouse moved to a different state and it was expensive for Applicant to travel to visit his children (Item 6 at 11). Applicant told the OPM investigator that he did not receive financial counseling.

In May 2009, Applicant received notice of the SOR debts through DOHA interrogatories (Item 6). He noted that his wife unexpectedly needed a tonsillectomy in the Spring of 2009, and he was unable to immediately address his delinquent debts (Item 6 at 4). Medical costs for the tonsillectomy exceeded his insurance by about \$3,000 (Item 6 at 14). He indicated he planned to pay a medical debt for \$109, and the debt in SOR ¶ 1.f (\$86) in May 2009 (Item 6 at 4).

On July 6, 2009, and August 4, 2009, Applicant paid seven SOR debts totaling \$4,533. On July 6, 2009, he paid the debts in SOR ¶¶ 1.c (\$113), 1.d (\$246), and 1.f (\$86) (Item 4 at 1, 6, 7, 8).

On August 4, 2009, Applicant paid four state tax liens, including the two tax debts in SOR ¶¶ 1.a (\$893) and 1.b (\$931) (Item 4 at 1, 4, 5) and two additional non-SOR tax liens. His state tax payments totaled \$3,203 (Item 4 at 1; SOR ¶¶ 1.a and 1.b). The

state required that he pay all debts with a lump sum (Item 4 at 1). It took him some time to save sufficient funds to pay his state tax debts (Item 4 at 1). On August 4, 2009, he also paid the debts in SOR ¶¶ 1.g (\$678) and 1.o (\$1,586) (Item 4 at 2, 9, 10). The \$1,586 debt resulted from a contract to a dating service (Item 6 at 13).

Applicant made a \$1,870 payment towards his delinquent student loans when the federal government involuntarily garnished his federal tax refund in 2006 or 2007 (Item 6 at 5). He said he planned to start paying his student loans through a payroll deduction of 15% of his after-tax income regardless of whether his clearance was granted or not (Item 4 at 2).⁴ However, he wanted to wait for the decision on his clearance to start this allotment because it would be “silly to have a payment or [two]” deducted from his paycheck and then he would become unemployed (Item 4 at 2). If he became unemployed, he would be unable to make payments to address his delinquent student loans (Item 4 at 2). When he responded to the FORM, he again emphasized that “it would be rather silly to” set up an allotment to pay his student loans before he learned whether his security clearance would be granted.

Applicant and his spouse’s net monthly pay is about \$4,700 (Item 6 at 9). His monthly expenses are about \$3,500, leaving about \$1,200 a month to address his student loans (Item 6 at 9, 14). Applicant did not provide any documents showing his communications with his student loan creditors concerning his efforts to pay, establish payment plans, or otherwise resolve his delinquent student loans.⁵

An information technology specialist, who works with Applicant, described his careful compliance with agency regulations and policies (FORM response). She lauded his work ethic and recommended that he receive a security clearance (FORM response).

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.

⁴On May 12, 2009, Applicant said as soon as his smaller debts were paid, he would contact the holder of his student loans, and authorize a direct payment from his salary of about 15% to address this debt (Item 6 at 5).

⁵The FORM at pages 5-6 notes the lack of documentation showing Applicant’s efforts to resolve his delinquent student loans.

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 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 applicant concerned." See Exec. Or. 10865 § 7. See also Executive Order 12968 (Aug. 2, 1995), Section 3. Thus, nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to applicant's allegiance, loyalty, or patriotism. It is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

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

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

Analysis

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, I conclude the relevant security concerns are under Guideline F (Financial Considerations).

AG ¶ 18 articulates the security concern relating to financial 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 OPM interview, in his response to DOHA interrogatories, and in his SOR response. In 2006, the federal government garnished his pay because he did not pay sufficient federal income taxes in 2004 and 2005. His student loans have been delinquent for several years. His SOR listed 15 delinquent debts totaling \$40,318. Although he paid seven SOR debts as well as his delinquent federal income taxes, his financial difficulties extended over several years and continue today. The government established the disqualifying conditions in AG ¶¶ 19(a) and 19(c), requiring additional inquiry about the possible applicability of mitigating conditions.

Five Financial Considerations 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 any mitigating conditions 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 does not receive credit under AG ¶ 20(a) because he did not establish that his financial problems "occurred under such circumstances that [they are] unlikely to recur." 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.

AG ¶ 20(b) partially applies. Applicant's financial situation was damaged by separation, divorce, and medical problems that were not fully covered by insurance. However, he has not provided sufficient evidence to establish that he acted responsibly under the circumstances with respect to his unresolved SOR debts. He had sufficient financial resources to begin a payment plan to address his student loans, and chose not to do so.⁶

AG ¶ 20(c) partially applies. Applicant did not receive financial counseling; however, he probably has otherwise learned about financial issues. Applicant cannot receive full credit under AG ¶ 20(c) because he has not paid, started payment plans, disputed, or otherwise resolved his delinquent student loans. There are some initial, positive "indications that the problem is being resolved or is under control." He has admitted his responsibility for the SOR debts. He paid seven SOR debts. He promised to eventually resolve his student loans. He also established some mitigation under AG ¶ 20(d) because he showed some good faith⁷ in the resolution of his SOR debts by admitting responsibility for all of his SOR debts except for one small debt, paying seven

⁶"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 he or she maintained contact with creditors and attempted to negotiate partial payments to keep debts current.

⁷The 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)).

SOR debts and his delinquent federal income taxes, and promising to resolve his student loans.

Applicant consistently denied responsibility for the debt in SOR ¶ 1.e (\$33). He checked his credit report, and this debt did not appear on it. I conclude this debt is not established as his responsibility, and find “For Applicant” in the Formal Findings on page 9, *infra*.

In sum, Applicant should have been more diligent and made greater efforts sooner to resolve his delinquent student loans. He resolved seven of his smaller delinquent SOR debts and paid his delinquent federal income taxes; however, he did not start a payment plan to address his delinquent student loans even though he had sufficient financial resources to establish a payment plan. His steps 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 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 support the Department of Defense as an employee of a defense contractor. There is no evidence that he has a criminal record or has ever violated security rules. 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. He does not abuse alcohol or illegal drugs. He has never been fired from a job or left employment under adverse circumstances. His file does not contain any adverse information relating to police involvement. His separation, divorce, and medical problems contributed to his financial

woes. He paid his delinquent federal taxes, seven SOR debts, and other non-SOR debts. 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 several years ago, when multiple debts became delinquent. It was necessary for the federal government to garnish his pay to ensure his federal income taxes were paid, In May 2009, he responded to DOHA interrogatories, and in August 2009, he responded to the SOR. He had ample opportunity to contact his student loan creditors and to make greater progress in the resolution of his student loan debts. He did not pay, start payments, dispute, or otherwise resolve his student loans, which total \$35,752. He had about \$1,200 a month after expenses to address his delinquent student loans. He said he could have begun a payment plan to address his delinquent student loans several months ago; however, he chose not to do so. He emphasized that it would be "silly" for him to begin payments, even though he had the resources to make payments, before he learned whether his security clearance would be granted.

In conclusion, Applicant made insufficient progress to resolve his delinquent student loans, even though he had steady employment and ample opportunity to contact his student loan creditors and provide documentation. 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 student loans; however, he did not provide documentation showing his efforts to accomplish this security responsibility.

After weighing the disqualifying and mitigating conditions, and all the facts and circumstances, in the context of the whole person, I conclude Applicant 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.

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.g:	For Applicant
Subparagraphs 1.h to 1.n:	Against Applicant
Subparagraph 1.o:	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