



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



In the matter of:)
)
-----) ISCR Case No. 09-06607
SSN: -----)
)
Applicant for Security Clearance)

Appearances

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

August 18, 2010

Decision

HARVEY, Mark, Administrative Judge:

Applicant's debts were discharged under Chapter 7 of the Bankruptcy Code in September 1998. His statement of reasons (SOR) lists 11 debts totaling \$63,711. He did not provide proof of any payments or of any efforts to resolve any of his SOR debts. Financial considerations concerns are not mitigated. Eligibility for access to classified information is denied.

Statement of the Case

On May 27, 2009, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP) or security clearance application (SF 86) (Item 5). On April 13, 2010, 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 the adjudicative guidelines (AG) promulgated by the President on December 29, 2005.

The SOR alleged security concerns under Guideline F (financial considerations) (Item 1). 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 (Item 1).

On April 24, 2010, Applicant responded to the SOR allegations, and requested a decision on the record (Item 4). A complete copy of the file of relevant material (FORM), dated May 26, 2010, was provided to him on June 4, 2010, and he was afforded an opportunity to file objections and to submit material in refutation, extenuation, or mitigation.¹ Applicant did not respond to the FORM. The case was assigned to me on August 11, 2010.

Findings of Fact²

In Applicant's response to the SOR, he admitted all of the allegations in the SOR. (Item 4) His admissions are accepted as factual findings.

Applicant is a 42-year-old employee of a defense contractor, working in production support. (Item 5 at 6, 13) Most of his employment over the last decade has been as a technician. (Item 5 at 13-15) He received a graduate equivalency diploma (GED) in 1986. (Item 5 at 12) He has not attended college. (Item 5 at 12) Applicant has never served in the military. (Item 5 at 18) He married in 1989 and divorced in 2001. (Item 5 at 23) He remarried in 2005. (Item 5 at 22) His son was born in 1997, and his two daughters were born in 1992 and 2006. (Item 5 at 26, 27) He did not disclose any illegal drug use, alcohol-related offenses, or derogatory involvement with law enforcement on his May 27, 2009, security clearance application. (Item 5)

Financial Considerations

Applicant's unsecured, non-priority debts were discharged under Chapter 7 of the Bankruptcy Code in September 1998. (Item 4) As part of the bankruptcy process, he received financial counseling. He has 11 unpaid SOR debts, totaling, \$63,711, which are as follows: 1.b (\$2,516); 1.c (\$5,718); 1.d (\$12,091); 1.e (\$3,557); 1.f (\$1,883); 1.g (\$8,323); 1.h (\$157); 1.i (\$893); 1.j (\$17,000); 1.k (\$11,317); and 1.l (\$256).

Applicant's mobile home was repossessed (resulting in the debt in SOR ¶ 1.j (\$17,000)). (Item 6 at 4-5) In September 2007, two credit cards became delinquent. *Id.* In March 2008, Applicant's vehicle was repossessed and auctioned off (resulting in the

¹The DOHA transmittal letter is dated May 28, 2010, and Applicant's receipt is dated June 4, 2010 (file). The DOHA transmittal letter informed Applicant that he had 30 days after his receipt to submit information (file).

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

debt in SOR ¶ 1.c (\$5,718)). *Id.* Most of the other delinquent SOR debts resulted from credit cards. *Id.* at 4-5.

In his May 27, 2009 security clearance application, Applicant listed his SOR debts and explained that some debts were due to his former spouse's excessive spending, and at the end of 2006, a change in his employment resulted in a reduction in his income from \$50,000 to \$34,000. (Item 5; Item 6 at 4) He was unemployed from March 2008 to March 2009. (Item 5 at 2-9, 45; Item 6 at 4)

On July 8, 2009, Applicant made a statement to an Office of Personnel Management (OPM) investigator. (Item 6) Applicant told the OPM investigator that he has \$1,000 left over after payment of his expenses. *Id.* at 5. He is using the \$1,000 of discretionary funds to fix up his current house. *Id.* He hopes to sell the house, then purchase a new house. *Id.* at 5, 8. Then he plans to use any leftover funds to make arrangements to pay his delinquent debts. *Id.* Applicant did not give an indication of when he might be able to start repaying his creditors. *Id.*

Applicant did not submit proof of payments on any of his SOR debts. He has not provided copies of any offers to pay his debts, any payment plans, or any documentation showing attempts to resolve his debts. He did not provide any documentation showing he was maintaining contact with his creditors.

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 adjudicative guidelines. 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), § 3.1. 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).

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.” In ISCR Case No. 08-12184 at 7 (App. Bd. Jan. 7, 2010), the Appeal Board explained:

It is well-settled that adverse information from a credit report can normally meet the substantial evidence standard and the government’s obligations under [Directive] ¶ E3.1.14 for pertinent allegations. At that point, the burden shifts to applicant to establish either that [he or] she is not responsible for the debt or that matters in mitigation apply.

(internal citation omitted). Applicant’s history of delinquent debt is documented in his credit reports, his OPM interview, and his SOR response.

In September 1998, Applicant’s debts were discharged under Chapter 7 of the Bankruptcy Code. His SOR lists 11 debts totaling \$63,711. Some of his debts have been delinquent since 2007. 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 Applicant is fully committed to resolving his delinquent SOR debts and is taking adequate steps to do so.

AG ¶ 20(b) has limited applicability. Applicant’s financial situation was damaged by insufficient income, unemployment, and to a limited extent his former spouse’s financial irresponsibility (they were divorced in 2001). However, his financial circumstances have been stable for approximately one year. Applicant was aware of and disclosed several delinquent debts on his May 27, 2009 security clearance application. There is insufficient evidence that he maintained contact with his creditors,³ and there is a paucity of evidence concerning his overall financial circumstances. There is no documentary evidence that he has attempted to pay or settle any of his SOR debts or attempted to establish payment plans with his creditors. His documented actions are insufficient to establish he acted responsibly under the circumstances.

AG ¶ 20(c) does not fully apply. Although he received financial counseling in 1998 as part of his bankruptcy, he now has \$63,711 in delinquent debt. Applicant did not provide a credible plan to resolve his delinquent debts. Applicant cannot receive full credit under AG ¶ 20(c) because he has not paid, established payment plans (by making payments), adequately documented disputes of debts, or otherwise resolved any of his SOR debts. There are some initial, positive “indications that the problem is being resolved or is under control.” He has admitted responsibility for and promised to pay the SOR debts, showing some good faith mitigation under AG ¶ 20(d).⁴ AG ¶ 20(e)

³“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.

⁴The 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) 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)).

is not applicable because Applicant did not provide documentation showing he disputed any of his SOR debts.

In sum, Applicant should have been more diligent and made greater efforts sooner to resolve his delinquent SOR debts. He has had steady employment for the last year. He has \$1,000 left over each month after expenses. However, he did not provide proof of any payments to his SOR creditors, or otherwise show sufficient progress on his SOR debts. His documented efforts 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 those guidelines, 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 is 42 years old. He is sufficiently mature to understand and comply with his security responsibilities. He deserves substantial credit for volunteering to support the U.S. Government, as an employee of a contractor. There is every indication that he is loyal to the United States and his employer. There is no evidence that he abuses alcohol or uses illegal drugs. His unemployment, underemployment, reduction in income from his employment, divorce, and problems with his former spouse's handling of her one or two credit cards contributed to his financial woes. I give Applicant substantial credit for admitting responsibility for 11 SOR debts totaling \$63,711. He is also credited with disclosing his financial problems on his security clearance application. 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 history of financial problems. His unsecured delinquent debts were discharged in 1998 under Chapter 7 of the Bankruptcy Code. His post-bankruptcy delinquent debt dates back to a 2007. He has chosen to spend his excess income to fix up his house, instead of paying any of his SOR creditors. He did not provide proof of any payments of his SOR debts even though one debt is \$157, and another debt is \$256. The issue of financial considerations was further emphasized when he received the SOR, yet he did not make any payments to his creditors. He had ample notice of his delinquent SOR debts, and sufficient opportunity to make greater progress in the resolution of his SOR debts. He did not pay, start payments, document and justify any disputes, or otherwise resolve any SOR debts. He has not made repayment of his creditors a high-enough priority. His promises to pay his delinquent debts at some date in the future is insufficient to mitigate these debts because there is insufficient evidence to explain why he has not done more to address his SOR debts after becoming aware that they raised a security concern.

I have carefully applied the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. I conclude financial considerations concerns are not fully mitigated, and 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.l: Against 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