



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



In the matter of:)	
)	
-----)	ISCR Case No. 10-00130
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Gina L. Marine, Esquire, Department Counsel
For Applicant: *Pro se*

November 9, 2010

Decision

HARVEY, Mark, Administrative Judge:

Applicant’s SOR listed nine unpaid debts, totaling, \$22,335. He did not provide proof of any payments or other 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 September 22, 2009, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP) version of a security clearance application (SF 86) (Item 4). On July 1, 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; 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 July 19, 2010, Applicant responded to the SOR allegations, and requested a decision on the record (Item 3). A complete copy of the file of relevant material (FORM), dated August 12, 2010, was provided to him on August 18, 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 November 2, 2010.

Findings of Fact²

In Applicant's response to the SOR, he admitted all of the allegations in the SOR. (Item 3) His admissions are accepted as factual findings.

Applicant is a 38-year-old employee of a defense contractor, working as a sheet metal mechanic.³ He graduated from high school in 1991. He married in 1999 and was divorced in January 2004. Applicant has never served in the military. He does not have any children. He did not disclose any illegal drug use or alcohol-related offenses on his September 22, 2009, SF 86. There is no evidence of security violations.

Financial Considerations

Applicant's SOR listed nine unpaid debts, totaling, \$22,335, which are as follows: 1.a judgment (\$17,081); 1.b (\$15); 1.c (\$72); 1.d (\$2,160); 1.e (\$882); 1.f (\$86); 1.g (\$202); 1.h (\$289); and 1.i (\$1,548).

While Applicant and his spouse were pending divorce, they agreed that he would pay off two of his credit cards, and she would relinquish any claim she had on a farm they owned.⁴ He made several payments on the credit cards; however, she did not provide the promised release of her interest in the farm. He did not make sufficient

¹The DOHA transmittal letter is dated August 16, 2010, and Applicant's receipt is dated August 18, 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.

³Unless stated otherwise, the source for the information in this paragraph is Applicant's SF 86. (Item 4)

⁴Unless dated otherwise, the source for the information in this paragraph is the summary of Applicant's interview on November 3, 2009, by an Office of Personnel Management (OPM) investigator. (Item 5)

payments to the mortgage on the farm, and he stopped making payments on the two credit cards. In 2006, the mortgagor foreclosed; however, there is no evidence of any deficiency owed to the mortgagor after the foreclosure. In 2006, Applicant's spouse obtained a judgment against him for \$17,081 based on the credit cards he agreed to pay. Applicant's summarized statement to the OPM investigator indicates, "[he] has no intent of paying the judgment." Applicant is current on all of his recent bills. He provides \$300 per month to his widowed mother. Applicant received financial counseling in connection with his Chapter 13 bankruptcy, which resulted in the discharge of his debts in 1999.⁵

Applicant attributes his delinquent debt to his divorce. (Item 5) He concedes he should have been more proactive with his debts. (Item 5) His personal financial statement (PFS) showed monthly gross salary of \$3,700; monthly net salary of \$3,000; monthly expenses of \$1,890; monthly debt payments of \$555; and monthly net remainder of \$555. (Item 5) His PFS did not list any payments to any of the SOR creditors.

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.

⁵The SOR did not allege that Applicant's debts were discharged through bankruptcy in 1999. In ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006) the Appeal Board listed five circumstances in which conduct not alleged in an SOR may be considered stating:

- (a) to assess an applicant's credibility; (b) to evaluate an applicant's evidence of extenuation, mitigation, or changed circumstances; (c) to consider whether an applicant has demonstrated successful rehabilitation; (d) to decide whether a particular provision of the Adjudicative Guidelines is applicable; or (e) to provide evidence for whole person analysis under Directive Section 6.3.

(citing ISCR Case No. 02-07218 at 3 (App. Bd. Mar. 15, 2004); ISCR Case No. 00-0633 at 3 (App. Bd. Oct. 24, 2003)). I have not considered the non-SOR derogatory information for any purpose in this decision because it is remote in time. However, Applicant is credited with receiving financial counseling.

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.

Applicant's SOR listed nine unpaid debts, totaling \$22,335. Some of his debts have been delinquent since 2006. 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 and his divorce in 2004. However, his financial circumstances have been stable for at least a year. There is insufficient evidence that he maintained contact with his creditors,⁶ and there is a paucity of evidence concerning his overall financial circumstances over the last five years. 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 the 1990s as part of his bankruptcy, he now has nine unpaid SOR debts, totaling \$22,335. 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 some responsibility for the SOR debts, showing some good faith mitigation under AG ¶ 20(d).⁷

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:

AG ¶ 20(e) 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 \$555 left over each month after expenses. He has three SOR debts for \$15, \$72, and \$86. 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 38 years old. He is sufficiently mature to understand and comply with his security responsibilities. He deserves substantial credit

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)).

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 divorce in 2004 contributed to his financial woes. I give Applicant substantial credit for admitting responsibility for his SOR debts. 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. He did not provide proof of any payments of his SOR debts even though he has three debts for \$15, \$72, and \$86. 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 at this time.

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.i: 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