



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



In the matter of:)
)
-----) ISCR Case No. 10-03524
)
Applicant for Security Clearance)

Appearances

For Government: William T. O'Neil, Esquire, Department Counsel
For Applicant: *Pro se*

April 7, 2011

Decision

HARVEY, Mark, Administrative Judge:

Applicant's statement of reasons (SOR) lists twenty delinquent debts totaling \$57,194. He did not provide proof of any payments to his SOR creditors. He failed to make sufficient progress in resolving his SOR debts, and financial considerations concerns are not mitigated at this time. Applicant's eligibility for access to classified information is denied.

Statement of the Case

On October 29, 2009, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP) or security clearance application (Item 5). On October 5, 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.

On December 20, 2010, Applicant responded to the SOR allegations and requested a decision without a hearing. (Item 4) A complete copy of the file of relevant material (FORM), dated January 13, 2011, was provided to him on January 22, 2011. 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 March 17, 2011.

Findings of Fact²

In Applicant's response to the SOR, he admitted the debts in SOR ¶¶ 1.a-1.t.³ His admissions are accepted as factual findings.

Applicant is a 48-year-old video teleconference technician employed by a government contractor since early 2004.⁴ He attended a university from 1989 to 1992, and he earned a bachelor's degree. He served in the Army from 1994 to 1999, and he received an Honorable discharge. Applicant is married. His children were born in 2001 and 2003, and his two stepchildren were born in 1989 and 1993.

Financial Considerations

Applicant's SOR lists twenty delinquent debts totaling \$57,194. Of this total, \$10,929 relates to overdue mortgage payments on a \$221,000 mortgage.

Applicant explains that his financial problems were initially caused by a seven-month period of unemployment in 2004.⁵ His spouse's health problems and travel expenses were also factors adversely affecting his financial situation. He traveled to Germany in 2006 for eight days, to Brazil in 2006 for 10 days, to Germany in 2007 for

¹The DOHA transmittal letter is dated January 14, 2011, and Applicant's receipt is dated January 22, 2011. 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 information in this paragraph is from Applicant's SOR response. (Item 4)

⁴Unless stated otherwise, the information in this paragraph is from Applicant's security clearance application. (Item 5)

⁵Unless stated otherwise, the information in this paragraph is from Items 4 and 6.

ten days, and to Germany in 2009 for eight days. (Item 6) His spouse traveled to Germany every year for the last several years. His home went into foreclosure in August 2009.

Applicant's SOR debts resulted from his defaulting on multiple credit cards, a state tax lien, a telecommunications account, a signature loan, disputes with apartment complexes, purchases of furniture, defaulting on his mortgage, and seven medical debts. (Items 4, 6) The seven medical debts total \$4,976. (Item 4)

On November 26, 2010, Applicant's mother passed away, and he believes he will receive an inheritance "six to seven times the amount of [his] debt." (Item 4) On December 7, 2010, he received a beneficiary IRA in the amount of \$212,821. Applicant indicated he planned to pay his debts in January 2011 using his share of the inheritance. He wanted to wait until after January 1, 2011 to start paying his creditors for income tax reasons. As indicated previously, Applicant's receipt for the FORM is dated January 22, 2011. The DOHA transmittal letter informed Applicant that he had 30 days after his receipt to submit information. He did not explain why he did not utilize the proceeds from his inheritance to resolve his SOR debts.

Applicant did not provide proof of any payment plans or payments to the SOR creditors. There is no evidence of financial counseling. There is no evidence of reportable criminal offenses, drug abuse, or alcohol-related misconduct.

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.

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 safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about 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 about 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 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 responses to DOHA interrogatories, and his SOR response. Applicant’s SOR lists 20 debts totaling \$57,194. Some of his debts became delinquent in 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 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 in resolving his debts warrants very limited application of AG ¶¶ 20(b), 20(c), and 20(d).⁶ There is no evidence of financial counseling. He showed

⁶The Appeal Board has previously explained what constitutes a “good faith” effort to repay overdue creditors or otherwise resolve debts:

some good faith when he admitted responsibility for his SOR debts in his SOR response. Applicant's financial situation was damaged by insufficient income, seven now delinquent medical debts totaling about \$4,976, and his unemployment in 2004. However, Applicant's financial circumstances have been relatively stable since 2004, and he has not provided sufficient information about variations in his income over the last six or seven years to fully establish any mitigating conditions. He did not explain why he did not use some of his inheritance to pay his delinquent debts.

Applicant did not establish that he acted responsibly under the circumstances. The file lacks proof that he maintained contact with all of his creditors.⁷ There are no receipts or account statements from creditors, establishing any payments to his SOR creditors. There is insufficient evidence that his financial problem is being resolved and is under control. The file lacks evidence that he has acted responsibly on any of his SOR debts.

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

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)).

⁷“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.

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 Guideline F, 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 access to classified information. Applicant is a 48-year-old video teleconference technician employed by a government contractor since early 2004. He is sufficiently mature to understand and comply with his security responsibilities. He served in the Army from 1994 to 1999, and he received an Honorable discharge. He deserves some credit for volunteering to support the U.S. Government as a Soldier from 1994 to 1999 and as an employee of a Department of Defense 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. Applicant's financial situation was damaged by unemployment in 2004, and insufficient income to address his delinquent debts. I give Applicant substantial credit for admitting responsibility for all 20 of his SOR debts in his SOR response. He has been honest about his failure to address his financial plight. These factors show some responsibility, rehabilitation, and mitigation.

The whole-person factors against reinstatement of Applicant's clearance are more substantial at this time. Applicant's SOR lists 20 delinquent debts, totaling \$57,194. Applicant's employment has been stable since 2004. He did not provide proof that unemployment in 2002, \$4,976 in delinquent SOR medical debts, or other non-SOR medical debts were a substantial cause of his inability to make any payments to his SOR creditors. He did not provide his pay statements or his income tax returns. He did not provide any documentation showing attempts to establish payment plans. He did not pay the two smallest SOR debts in SOR ¶ 1.b for \$87 and in SOR ¶ 1.d for \$120. There is no evidence that any SOR creditors have received any payments. Applicant and his spouse have made multiple overseas trips to Germany and Brazil over the last five years for personal reasons. Applicant has failed to make sufficient progress resolving his delinquent SOR debts to establish his financial responsibility.

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 mitigated. Eligibility for access to classified information is denied.

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.t: 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 access to classified information. Eligibility for a security clearance is denied.

MARK HARVEY
Administrative Judge