



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



In the matter of:)
)
-----) ISCR Case No. 10-05657
)
Applicant for Security Clearance)

Appearances

For Government: Melvin A. Howry, Esquire, Department Counsel
For Applicant: *Pro se*

August 24, 2011

Decision

HARVEY, Mark, Administrative Judge:

Applicant's statement of reasons (SOR) lists five delinquent debts totaling \$77,676. 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 March 12, 2010, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP) or security clearance application (Item 4). On February 10, 2011, 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 February 21, 2011, Applicant responded to the SOR allegations and requested a decision without a hearing. (Item 3) A complete copy of the file of relevant material (FORM), dated May 31, 2011, was provided to him on June 13, 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 August 3, 2011.

Findings of Fact²

In Applicant's response to the SOR, he admitted the debts in SOR ¶¶ 1.a-1.e. His admissions are accepted as factual findings.

Applicant is a 38-year-old member of a college adjunct faculty and has held this position since early 2005.³ He has been a senior engineer for a government contractor since 2004. He earned his first Ph.D. in 2004 and his second Ph.D. in 2010 in statistics. He has never served in the military. He married his spouse in 2007. He does not have any children.

Financial Considerations

Applicant's SOR lists five delinquent debts totaling \$77,676: 1.a (\$13,424); 1.b (\$6,718); 1.c (\$18,106); 1.d (\$36,388); and 1.e (\$3,040). (Item 1) On February 21, 2011, he admitted responsibility for these five debts in his SOR response. (Item 3)

On April 9, 2010, an Office of Personnel Management (OPM) investigator interviewed Applicant, and he admitted responsibility for the five SOR debts, although lesser amounts were owed to the creditors at the time of his OPM interview.⁴ Applicant admitted he had not had any recent contact with any of the creditors. He explained that

¹The DOHA transmittal letter is dated June 2, 2011, and Applicant's receipt is dated June 13, 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 security clearance application. (Item 4)

⁴ Unless stated otherwise, the information in this paragraph is from Applicant's summary of OPM interview. (Item 7)

he needed to provide for his mother and his spouse. His spouse had extensive dental procedures and other medical issues. He said his finances were stable, and he intended to pay his debts. Applicant and his spouse have net monthly income of \$6,000. Their monthly expenses are \$5,050, and their total monthly debt payments are \$550. He has a monthly net remainder of approximately \$400.

On August 24, 2010, Applicant responded to DOHA-issued interrogatories.⁵ He admitted the five SOR debts; however, he did not provide any information about his efforts to pay his SOR creditors. His personal financial statement was consistent with the statement he provided to the OPM investigator. He added that he has \$221,000 in student loans that are currently on deferred status. His monthly student loan payments will be over \$1,000 per month, and will exceed his net remainder by about \$500 per month. He did not describe any payments to any medical or dental creditors.

The DOHA transmittal letter informed Applicant that he had 30 days after his receipt to submit information. 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

⁵ Unless stated otherwise, the information in this paragraph is from Applicant’s responses to DOHA interrogatories. (Item 8)

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 five delinquent debts totaling \$77,676. His SOR debts became delinquent at least a year ago. 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, to the OPM investigator, and in response to DOHA interrogatories. Applicant's financial situation was damaged by insufficient income, his wife's medical and dental issues, and the necessity that he provide financial assistance to his mother. However, Applicant's financial circumstances have been relatively stable for more than 12 months, and he has not provided sufficient information about efforts to start paying his SOR creditors to fully establish any mitigating conditions. He did not explain why he has not been using some of his monthly remainder to pay his delinquent debts. He did not describe how he is reducing his monthly expenses, which would allow him to have more money available each month to start paying his SOR creditors.

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

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.

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 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 38-year-old adjunct faculty member of a college, and senior engineer for a government contractor. He earned two Ph.Ds. He is sufficiently mature to understand and comply with his security responsibilities. He deserves some credit for volunteering to support the U.S. Government 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 his spouse's medical and dental problems, and he had insufficient income to address his delinquent debts. I give Applicant substantial credit for admitting responsibility for all of his SOR debts. 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 five delinquent debts totaling \$77,676. Applicant's employment has been stable for several years. He has a monthly remainder of about \$500, and, if he reduced his standard of living and expenses, he could increase his net funds available to address his SOR debts. He did not provide any documentation showing attempts to establish payment plans. When he begins to make payments on his student loans, the financial stress on Applicant will increase, making it less likely that he will have the income to address his SOR debts. There is no evidence that any SOR creditors have received any payments, and no convincing evidence is in the file that he will successfully address his SOR debts in the near future. 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.e: 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