



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



In the matter of:)
)
-----) ISCR Case No. 11-03539
)
Applicant for Security Clearance)

Appearances

For Government: Braden Murphy, Esq., Department Counsel
For Applicant: *Pro se*

09/18/2012

Decision

HARVEY, Mark, Administrative Judge:

Applicant’s statement of reasons (SOR) alleges 17 delinquent debts, totaling \$57,796. Divorce and other circumstances beyond his control caused him to have delinquent debts. He had insufficient financial resources to address more than one SOR delinquent debt. On September 10, 2012, he filed for bankruptcy under Chapter 7 of the Bankruptcy Code. Financial considerations are mitigated. Eligibility for access to classified information is granted.

Statement of the Case

On October 13, 2010, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP) or security clearance application (SF 86) (GE 1). On March 16, 2012, 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). (Hearing Exhibit (HE) 2) The SOR detailed reasons why DOHA was unable to find that it

is clearly consistent with the national interest to continue a security clearance for Applicant, and it recommended that his case be submitted to an administrative judge for a determination whether his clearance should be continued or revoked. (HE 2)

On April 12, 2012, DOHA received Applicant's response to the SOR, and he requested a hearing. (HE 3) On July 11, 2012, Department Counsel was ready to proceed on Applicant's case. On July 12, 2012, DOHA assigned Applicant's case to me. On July 20, 2012, DOHA issued a hearing notice, setting the hearing for August 16, 2012. (HE 1) Applicant's hearing was held as scheduled. At the hearing, Department Counsel offered five exhibits, and Applicant offered one exhibit. (Tr. 24, 26, 28; GE 1-5; AE A) There were no objections, and I admitted GE 1-5 and AE A. (Tr. 24-26, 28-29) On August 23, 2012, I received the transcript of the hearing. I held the record open until September 12, 2012, to permit Applicant to provide additional documentation. (Tr. 69, 73-74) Applicant provided five post-hearing exhibits, which were admitted without objection. (AE B-F).

Findings of Fact¹

In his Answer to the SOR, Applicant accepted responsibility for the sixteen debts listed in the SOR, and he admitted partial responsibility for one debt. (HE 3) His admissions are accepted as findings of fact.

Applicant is a 54-year-old dispatcher for a truck company. (Tr. 6, 30; GE 1) He has part-time employment mowing yards. (Tr. 30) He graduated from high school in 1976. (Tr. 6) He completed two years of college. (Tr. 6) He needs three credit hours to complete his Associate's degree in agricultural business. (Tr. 7) He married in 1989 and was divorced in 1997. (SF 86, GE 1) He married in 1980 and was divorced in 1982. (SF 86, GE 1) He has three children, and he pays \$540 per month in child support via allotment to support his 19-year-old son, who is in college. (Tr. 33; AE A, C) His gross annual salary is \$36,000. (Tr. 30, AE A) His net annual salary is about \$20,000 per year. (Tr. 37; AE A) He has worked for the same employer since March 2010. (Tr. 30) He has never served in the military. (SF 86, GE 1)

Financial Considerations

Applicant's history of delinquent debt is documented in detail in his SF 86, credit reports, his Office of Personnel Management (OPM) personal subject interview (PSI), his SOR response, and his statement at his hearing. His SOR alleges 17 delinquent debts, totaling \$57,796. Applicant paid \$160 monthly through a court-ordered garnishment to the creditor in SOR ¶ 1.a (\$1,615), and the balance is now about \$600. (Tr. 33-34, 45; AE A; SOR response) He is not making any other payments to his SOR creditors. (Tr. 34, 45)

¹Some details have been excluded in order to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

Applicant attributed his financial problems to his divorce in 1997. (Tr. 36) His spouse was making significantly more money than Applicant. (Tr. 36) Applicant also made poor investment decisions when he invested in the stock market. (Tr. 35-36)

Applicant received financial counseling, and the counselor advised him to file for bankruptcy. (Tr. 27) He had insufficient income for any credible payment plan. (Tr. 37) Applicant agreed that bankruptcy was his best option; however, he delayed doing so because he was worried that it would adversely affect his security clearance. (Tr. 14) He also received financial counseling before he filed for bankruptcy. (AE C)

Applicant's home does not have a mortgage; however, Applicant is still responsible for maintenance and utilities. (Tr. 39) His monthly car payment is \$350 for a 2001 Ford Taurus. (Tr. 39) He owes the creditor on his car loan \$6,563, which is the sole secured debt listed in his bankruptcy. (AE C) He invests \$108 each month in a retirement plan. (Tr. 41; AE C) Applicant lives month-to-month on his income and has not accumulated any savings. He is unable to generate sufficient funds to settle his debts. (Tr. 41-42) His federal taxes are current; however, he owes about \$700 in state taxes. (Tr. 43)

On September 10, 2012, Applicant filed for bankruptcy under Chapter 7 of the Bankruptcy Code. (AE B) He paid his bankruptcy attorney \$1,800. (AE C) The summary of bankruptcy schedules indicates: total debt owed to creditors holding secured claims is \$6,563 (Schedule D); total debt owed to creditors holding unsecured priority claims is \$700 (Schedule E); total debt owed to creditors holding unsecured, nonpriority claims is \$72,420 (Schedule F); and his current monthly income is \$1,732. (AE C) Monthly income is derived after deducting child support (\$540), taxes and Social Security withholding (\$618), and a 401K deduction (\$108). (AE C)

Character Evidence

Three character references lauded Applicant's hard work, dedication, professionalism, reliability, dependability, and trustworthiness. (AE D-F) He is exceptionally helpful to others and has a very positive attitude toward life and work. (AE D-F)

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 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 [or her] 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 concern is 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 SF 86, his credit reports, his OPM interview, his SOR response, and his statement at his hearing. His debts became delinquent in the late 1990s when he was divorced from his spouse, who earned more than Applicant. He also made poor stock investments. His SOR alleges 17 delinquent debts, totaling \$57,796. Total debt owed to creditors holding unsecured, nonpriority claims under schedule F of his bankruptcy filing is \$72,420. 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 partial application of AG ¶ 20(b) and full application of ¶ 20(c). Applicant's divorce and a stock market downturn had a negative effect on his financial circumstances and caused numerous debts to become delinquent. He was making payments to one SOR creditor of \$160 per month; however, the mitigating effect of such payments is limited because it was being paid through a garnishment.² He paid his bankruptcy attorney to file his bankruptcy, even though he had very limited financial resources available. I do not believe he will have delinquent debt after his debts are discharged under Chapter 7 of the Bankruptcy Code, and he brings his state tax debt to current status.³ He acted responsibly when he filed for bankruptcy, as opposed to waiting for his debts to become unenforceable through the statute of limitations.

Two recent Appeal Board decisions illustrate the analysis for applying AG ¶¶ 20(a) and 20(b). In ISCR Case No. 09-08533, the Applicant had \$41,000 in delinquent credit card debt and defaulted on a home loan generating a \$162,000 delinquent debt. *Id.* at 2. She filed for bankruptcy the same month the Administrative Judge issued his decision. *Id.* at 1-2. The Applicant in ISCR Case No. 09-08533 was recently divorced, had been unemployed for 10 months, and had childcare responsibilities. Her former husband was inconsistent in her payment of child support. The Appeal Board determined that AG ¶ 20(a) was "clearly applicable (debt occurred under such circumstances that it is unlikely to recur and [the debt] does not cast doubt on the individual's current reliability, trustworthiness, or good judgment)" even though that Applicant's debts were unresolved at the time the Administrative Judge's decision was issued. The Appeal Board also decided that the record evidence raised the applicability of AG ¶ 20(b) because of the absence of evidence⁴ of irresponsible behavior, poor judgment, unreliability, or lack of trustworthiness. *Id.* at 4.

²See ISCR Case No. 08-06059 at 6 (App. Bd. Sept. 21, 2009) (indicating involuntary payment of debts through garnishment is not necessarily mitigating).

³The Appeal Board has indicated that promises to pay off delinquent debts in the future are not a substitute for a track record of paying debts in a timely manner and otherwise acting in a financially responsible manner. ISCR Case No. 07-13041 at 4 (App. Bd. Sept. 19, 2008) (citing ISCR Case No. 99-0012 at 3 (App. Bd. Dec. 1, 1999)).

⁴Applicant has the burden of proving the applicability of any mitigating conditions, and the burden to disprove a mitigating condition never shifts to the Government.

Similarly, in ISCR Case No. 08-06567 at 3 (App. Bd. Oct. 29, 2009) the Appeal Board addressed a situation where an Applicant, who had been sporadically unemployed and lacked the ability to pay his creditors, noting that “it will be a long time at best before he has paid” all of his creditors. The Applicant was living on unemployment compensation at the time of her hearing. The Appeal Board explained that such a circumstance was not necessarily a bar to having access to classified information stating:

However, the Board has previously noted that an applicant is not required to be debt-free nor to develop a plan for paying off all debts immediately or simultaneously. All that is required is that an applicant act responsibly given his [or her] circumstances and develop a reasonable plan for repayment, accompanied by “concomitant conduct,” that is, actions which evidence a serious intent to effectuate the plan. See ISCR Case No. 07-06482 at 3 (App. Bd. May 21, 2008).

ISCR Case No. 08-06567 at 3 (App. Bd. Oct. 29, 2009). The Applicant in ISCR Case No. 08-06567 used his limited resources to (1) resolve some of his debts; (2) had a repayment plan for the remaining debts; and (3) took “reasonable actions to effectuate that plan.” *Id.* The Appeal Board remanded the Administrative Judge’s decision because he did not “articulate a satisfactory explanation for his conclusions,” emphasizing the Administrative Judge did “not explain[] what he believes that Applicant could or should have done under the circumstances that he has not already done to rectify his poor financial condition, or why the approach taken by Applicant was not ‘responsible’ in light of his limited circumstances.” *Id.*

Application of AG ¶ 20(c) is warranted. Applicant completed financial counseling. He also generated a personal financial statement (PFS) or budget as part of his bankruptcy. Applicant’s financial situation was damaged by insufficient income, divorce, and a stock market downturn. Applicant established that he acted responsibly under the circumstances by filing for bankruptcy. Although there is limited evidence of record that he established and maintained contact with his creditors,⁵ his financial problem is being resolved or is under control. He is seeking discharge of his delinquent debts under Chapter 7 of the Bankruptcy Code.⁶

⁵“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 of the analysis is whether he or she maintained contact with creditors and attempted to negotiate partial payments to keep debts current.

⁶There is some duplication of debts in Applicant’s bankruptcy schedules. In a bankruptcy filing, most debtors list potential creditors, even when the debt may have been resold or transferred to a different collection agent or creditor, to ensure notice, and to reduce the risk of subsequent dismissal of the bankruptcy. If Applicant failed to list some debts on his bankruptcy schedule, this failure to list some debts does not affect their discharge. Absent fraud, in a no-asset bankruptcy, all unsecured, nonpriority debts are discharged when the bankruptcy court grants a discharge, even when they are not listed on a

AG ¶ 20(d) is partially applicable. Applicant admitted responsibility for and is taking reasonable actions to resolve his SOR debts (through bankruptcy), showing limited good faith.⁷ AG ¶ 20(e) is not applicable. Applicant did not dispute any of his delinquent SOR debts.

In sum, bankruptcy will resolve all of his delinquent debts, except for a \$700 state tax debt which he has the ability to pay after his bankruptcy is completed and his vehicle payment, which is current. His monthly payment of \$160 to one SOR creditor, who is garnishing his pay, will end, and he can apply these funds to his state tax debt. He is employed, has received financial counseling, and understands what he must do to maintain financial responsibility. It is unlikely that such problems will recur. His efforts are sufficient to fully mitigate financial considerations security concerns. Assuming, financial considerations concerns are not mitigated under AG ¶ 20, security concerns are mitigated under the whole-person concept, *infra*.

bankruptcy schedule. See *Judd v. Wolfe*, 78 F.3d 110, 114 (3d Cir. 1996); *Francis v. Nat'l Revenue Service, Inc.*, 426 B.R. 398 (Bankr. S.D. FL 2010), *but see First Circuit Bucks Majority on Discharge of Unlisted Debt in No-Asset Case*, American Bankruptcy Institute, 28-9 ABIJ 58 (Nov. 2009). There is no requirement to re-open the bankruptcy to discharge the debt. *Collier on Bankruptcy*, Matthew Bender & Company, Inc., 2010, Chapter 4-523, ¶ 523(a)(3)(A). Not all debts are discharged through bankruptcy. Priority debts, such as tax debts, student loan debts, and child support obligations, are generally not discharged through bankruptcy. Secured debts such as home mortgages and car liens are not discharged unless the security (home or car) is foreclosed or repossessed.

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) 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)).

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 Guideline F, but some warrant additional comment.

Applicant is a 54-year-old dispatcher for a trucking company. 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 defense contractor. Three character witnesses provided evidence supporting approval of his access to classified information. There is every indication that he is loyal to the United States and his employer. His divorce and poor investments in the stock market and the necessity to support his son in college contributed to his financial woes. I give Applicant substantial credit for admitting responsibility for his delinquent debts in his SF 86, OPM PSI, responses to DOHA interrogatories, SOR response, and at his hearing.

Even though Applicant lacked financial resources, Applicant paid his federal income taxes, his child support obligations, vehicle loan payments, utilities, and some other debts. He also paid his bankruptcy attorney in 2012. His decision to file for bankruptcy is appropriate and reasonable. The discharge of his debts through bankruptcy will give him a fresh financial start, and this result is consistent with the goals of the Bankruptcy Statute and congressional intent.

Applicant is an intelligent person, and he understands how to budget and what he needs to do to establish and maintain his financial responsibility. There is simply no reason not to trust him. I am confident he will maintain his financial responsibility.⁸

⁸Of course, the Government can re-validate Applicant's financial status at any time through credit reports, investigation, and additional interrogatories. Approval of a clearance now does not bar the Government from subsequently revoking it, if warranted. Violation of a promise made in a security context to pay legitimate debts also raises judgment concerns under Guideline E, and may support future

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 mitigated, and eligibility for access to classified information is granted.

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: FOR APPLICANT

Subparagraphs 1.a to 1.q: For Applicant

Conclusion

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant's eligibility for a security clearance. Eligibility for a security clearance is granted.

MARK HARVEY
Administrative Judge

revocation of a security clearance. An administrative judge does not have authority to grant a conditional clearance. ISCR Case No. 99-0901, 2000 WL 288429 at *3 (App. Bd. Mar. 1, 2000). See *also* ISCR Case No. 04-03907 at 2 (stating, "The Board has no authority to grant [a]pplicant a conditional or probationary security clearance to allow [him] the opportunity to have a security clearance while [he] works on [his] financial problems." and citing ISCR Case No. 03-07418 at 3 (App. Bd. Oct. 13, 2004)). This decision does not imply that this Applicant's clearance is conditional.