



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



In the matter of:)
)
-----) ISCR Case No. 11-03755
)
)
Applicant for Security Clearance)

Appearances

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

December 29, 2011

Decision

HARVEY, Mark, Administrative Judge:

Applicant’s statement of reasons (SOR) lists five debts totaling \$128,547. In 2008, his \$103,000 home equity debt was resolved through a short sale. His four remaining SOR debts totaling \$25,547 are not resolved. Financial considerations concerns are not mitigated. Access to classified information is denied.

Statement of the Case

On September 22, 2010, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP) (hereinafter SF-86) (Government Exhibit (GE) 1). On June 7, 2011, the Defense Office of Hearings and Appeals (DOHA) issued an SOR to him, alleging security concerns under Guideline F (financial considerations) (Hearing Exhibit (HE) 2). The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1990), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) promulgated by the President on December 29, 2005. 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 him, and it recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

On August 5, 2011, Applicant responded to the SOR. (HE 3) On October 31, 2011, Department Counsel was prepared to proceed. On November 8, 2011, the case was assigned to me. On November 18, 2011, DOHA issued a hearing notice setting the hearing for December 9, 2011. (Tr. 57-59; HE 2) The hearing was held as scheduled. At the hearing, Department Counsel offered seven exhibits. (Transcript (Tr.) 23-26; GE 1-7) Applicant offered three exhibits. (Tr. 28-30; AE A-C) I admitted GE 1-7 and AE A-C. (Tr. 24-27, 30) Additionally, I admitted the SOR, response to the SOR, and the hearing notice. (HE 1-3) I took administrative notice of the law on deficiency judgments in California as described in Kalin, *Deficiency Judgments and California Law and California Association of Realtors and Bank of America v. Graves*, 51 Cal. App. 4th 607, 59 Cal. Rptr. 2nd 288 (1996). (Tr. 26-27; HE 4, 5) On December 15, 2011, I received the hearing transcript.

Findings of Fact¹

Applicant admitted responsibility for the debts alleged in SOR ¶¶ 1.a, 1.b, 1.d, and 1.e, and he asserted the debt in SOR ¶ 1.c was resolved. (HE 3) His admissions are accepted as findings of fact. After a complete and thorough review of the evidence of record, I make the following additional findings of fact.

Applicant is a 35-year-old employee of a defense contractor, who is seeking a security clearance to enable him to provide assistance with more sensitive data and information technology systems. (Tr. 7; GE 1) He earned a bachelor's degree in physics in a foreign country. (Tr. 7-8) He came to the United States in 2000, and he was naturalized as a U.S. citizen in 2005. (Tr. 31-32) In August 2009, he was awarded an associate's degree in computer and electronics engineering technology. (Tr. 8; SOR response, HE 3) He has been employed by a defense contractor since September 2010. (GE 1; GE 5 at 2) He was unemployed from December 2007 to February 2008. (GE 5 at 2) Prior to his current employment, he was underemployed. In 2008, he was receiving about \$12 per hour, and with overtime he earned \$38,000. (Tr. 37) He provided support for his parents before their return to Europe prior to 2011.

Applicant married in 2001, was separated from his spouse in March 2008.² He and his spouse were divorced in 2011. He has never served in the U.S. military. (Tr. 8)

¹The facts in this decision do not specifically describe employment, names of witnesses or locations to protect Applicant and his family's privacy. The cited sources contain more specific information. Unless stated otherwise, the sources for the facts in this section are Applicant's September 22, 2010 SF-86 (GE 1) or his Office of Personnel Management (OPM) investigative personal subject interview (PSI). (GE 5)

² In Section 17 of his September 22, 2010 SF 86, he said he was married on June 17, 2000, and divorced in February 2008. (GE 1) However, he also indicated in Section 28 of his September 22, 2010 SF 86 that the divorce was filed in September 2008 and it was still "pending." (GE 1)

There is no derogatory information concerning Applicant's police records, such as arrests, illegal drug possession or use, or alcohol-related incidents. (GE 1)

Financial Considerations

The SOR alleges five delinquent debts totaling \$128,547 as follows: 1.a is a collection account generated from a credit card, alleging a delinquent debt for \$7,021; 1.b is a charged off account generated from a credit card, alleging a delinquent debt for \$5,948; 1.c is a home equity account for \$103,000; 1.d is a charged off account generated from a credit card, alleging a delinquent debt for \$3,908; and 1.e is a collection account generated from a credit card, alleging a delinquent debt for \$8,670. (HE 2) He disclosed the debt in SOR ¶ 1.d on his September 22, 2010 SF 86 in response to question 26.g, which asked about debts turned over to collection agencies. (GE 1)

Appellant and his spouse purchased a house in 2004 for \$420,000. (Tr. 32-33) At that time Applicant worked at a gas station, and his spouse was a paralegal. (Tr. 32-33) His spouse had a greater income than Applicant. (Tr. 33) They paid \$10,000 down and financed the remainder. (Tr. 33) In March 2008, she separated from Applicant and stopped contributing to the mortgage payments. (Tr. 35) On November 6, 2008, the creditor collecting on Applicant's home equity loan wrote that the balance owed was \$114,665, and Applicant could settle the debt for \$11,000. (GE 4 at 7; AE C) On November 24, 2008, the mortgage lender for Applicant's residence wrote that the short sale amount of \$280,600 was satisfactory, and the short sale's terms included a payment of \$11,000 to the creditor holding Applicant's home equity loan. (GE 4 at 8; AE C) On December 26, 2008, the creditor for his home equity loan posted the payment of \$11,000 to his account, and on August 2, 2011, the creditor for his home equity loan confirmed that his home equity debt was settled in full. (SOR response, HE 3; AE 3)

On October 13, 2010, an Office of Personnel Management (OPM) investigator interviewed Applicant. (GE 5 at 1-5) He told the OPM investigator that he talked to a divorce lawyer in February 2008, who told him to stop making payments on the debts in SOR ¶¶ 1.a, 1.b, 1.d, and 1.e until his divorce was final. (GE 5 at 3-5) He planned to begin making payments after his divorce was final. *Id.* Applicant's former spouse discharged her debts through bankruptcy. (Tr. 50) Applicant paid his lawyer \$3,500 for assisting Applicant with his divorce. (Tr. 50)

On Applicant's May 18, 2011 response to DOHA interrogatories, he said his divorce was final in March 2011.³ For the debt in SOR ¶ 1.a, he planned to contact the creditor. (Tr. 41-42) For the debt in SOR ¶ 1.b, he called an 800 phone number to attempt to negotiate the debt. The creditor wanted him to make monthly payments of \$300, which were too much. (Tr. 41, 54) For the debt in SOR ¶ 1.d, he called the creditor, and the creditor promised to send Applicant a contract to resolve the debt. The creditor wanted Applicant to make monthly payments of \$220; however, he could not

³The information in this paragraph is from Applicant's May 18, 2011 response to DOHA interrogatories. (GE 4)

afford such a large monthly payment. (Tr. 46, 54) For the debt in SOR ¶ 1.e, he said he was in the process of negotiating. He thought that paying \$50 per month would be a reasonable amount to pay to one of his SOR creditors. (Tr. 47)

Applicant's May 2011 personal financial statement (PFS) described his monthly financial entries as follows: gross income of \$3,556; net income of \$2,988; expenses of \$2,570; debt payments of \$340; and net remainder of \$78. (GE 4 at 6) He had no assets, and none of his debt payments were listed as being paid to the SOR creditors. (GE 4 at 6) His May 2011 PFS showed a child support payment of \$400 per month. At his hearing, he said his child support payment was reduced to \$300 per month. His only debt payment is \$340 to address a student loan debt of \$60,000. (GE 4 at 6) His two largest expenses are \$1,295 for rent and \$400 for food.

Applicant's December 2011 PFS indicated the following monthly financial entries: gross pay of \$3,874; expenses of \$2,529 (which included \$500 for child support, \$200 for food, and \$1,295 for rent); student loan payments of \$300; and net remainder of \$356. (Tr. 52; AE A) No payments were indicated as being made to address his SOR debts.

On August 5, 2011, Applicant responded to the SOR and indicated he was in the process of negotiation with the creditors in SOR ¶¶ 1.a, 1.b, 1.d, and 1.e. At his hearing he reiterated that he was attempting to negotiate and had contacted several creditors. (Tr. 40-42, 46-48) Although he did not provide written evidence of any negotiations such as offers or counter offers to make payments to these four SOR creditors, his statements about the ongoing negotiations are accepted as credible. He has not paid his creditors in SOR ¶¶ 1.a, 1.b, 1.d, and 1.e anything for at least one year. (Tr. 54)

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 that, "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 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 meeting the criteria contained in the adjudicative guidelines (AG). 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. Adverse clearance decisions are made “in terms of the national interest and shall in no sense be a determination as to the loyalty of the [a]pplicant concerned.” See Exec. Or. 10865 § 7. See also Executive Order 12968 (Aug. 2, 1995), Section 3. 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 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

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, his OPM interview, and his SOR response. Applicant’s SOR lists five debts totaling \$128,547. In 2008, his \$103,000 home equity debt was resolved through a short sale. His four remaining SOR debts totaling \$25,547 are not resolved. His four SOR debts listed in ¶¶ 1.a, 1.b, 1.d, and 1.e became delinquent in 2008. 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 limited application of AG ¶¶ 20(b), 20(c), and 20(d).⁴ In 2008, he resolved his \$103,000 home equity debt through a short sale, and that debt is fully mitigated under AG ¶ 20(d). He is credited with some financial counseling through his generation of a budget and receipt of advice from his divorce attorney. He showed some good faith when he admitted responsibility for his SOR debts to the OPM investigator and in his response to DOHA interrogatories. Applicant's financial situation was damaged by insufficient income, a three-month period of unemployment, caring for his parents, and his divorce. However, Applicant's divorce was final in March 2011, and his financial circumstances have been relatively stable for more than eight months. He has not provided sufficient information about efforts to start paying his four SOR creditors listed in ¶¶ 1.a, 1.b, 1.d, and 1.e to fully establish any mitigating conditions. His December 8, 2011 personal financial statement indicates he has \$356 remaining each month for addressing his SOR debts, and 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 remaining four SOR creditors.

Applicant did not establish that he acted responsibly under the circumstances. Although he maintained contact with the SOR creditors listed in ¶¶ 1.a, 1.b, 1.d, and 1.e, and he attempted to negotiate some payment plans,⁵ there are no receipts or account statements from creditors, establishing any payments to the SOR creditors listed ¶¶ 1.a, 1.b, 1.d, and 1.e after 2008. The file lacks sufficient evidence that he has acted responsibly on four of his SOR debts totaling \$25,547 and there is no track record of payments to support a conclusion that he will resolve his delinquent debts in the near future.

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)).

⁵Even 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.

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 relevant 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.

Under AG ¶ 2(c), 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. 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.

There are some facts supporting mitigation of security concerns under the whole-person concept; however, they are insufficient to fully mitigate security concerns. There is no derogatory information concerning Applicant's police records, illegal drug possession or use, or alcohol-related incidents. He is loyal to the United States. Applicant's demeanor, sincerity, and honesty at his hearing are important factors militating towards approval of his access to classified information. Applicant is a 35-year-old employee of a defense contractor, who is sufficiently intelligent and mature to understand and comply with security requirements. He has a bachelor's degree in physics, and in August 2009, he was awarded an associate's degree in computer and electronics engineering technology. He has been employed by a defense contractor since September 2010.

Circumstances beyond Applicant's control caused him to have delinquent debt. He was unemployed from December 2007 to February 2008. He provided some support to his parents before they returned to Europe. Prior to his current employment, he was underemployed, and receiving about \$12 per hour. He married in 2001, was separated from his spouse in March 2008, and was divorced in March 2011. His student loan debt and his child support payments are current. He understands what he must do to establish his financial responsibility.

The financial circumstances tending to support denial of Applicant's clearance are more significant than the factors weighing towards approval of his clearance at this time. Applicant currently has four delinquent SOR debts totaling \$25,547. Those four debts have been delinquent since 2008, when his divorce lawyer told him to stop paying his creditors. Applicant's divorce was final in March 2011, and his financial

circumstances have been relatively stable for more than eight months. His December 8, 2011 personal financial statement indicates he has \$356 remaining each month for addressing his SOR debts. After March 2011, he had an obligation to begin serious negotiations with his creditors and set up at least one payment plan. In May 2011, he advised DOHA that he was in negotiations with his creditors and attempting to establish payment plans. If he reduced his standard of living and expenses, he could increase his net funds available to address his SOR debts. There is no evidence that any SOR creditors have received any payments. Applicant has been receiving more income since he was hired by his current employer in September 2010. Applicant has failed to provide sufficient evidence of progress resolving his four 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 Applicant has not fully mitigated the financial consideration security concerns.

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 and 1.b:	Against Applicant
Subparagraph 1.c:	For Applicant
Subparagraphs 1.d and 1.e:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Mark Harvey
Administrative Judge