



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 11-06695

Appearances

For Government: David F. Hayes, Esquire, Department Counsel
For Applicant: *Pro se*

02/21/2012

Decision

HARVEY, Mark, Administrative Judge:

Applicant's statement of reasons (SOR) lists 13 delinquent debts, totaling \$521,473. He did not provide correspondence to or from SOR creditors or credit reporting companies, disputing any debts, concerning negotiation of any settlements, or showing any payments. He failed to make sufficient progress in documenting the resolution of his SOR debts, and financial considerations concerns are not mitigated at this time. Eligibility for access to classified information is denied.

Statement of the Case

On January 3, 2011, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP) or security clearance application (SF 86) (Item 7). On or about September 27, 2011, the Defense Office of Hearings and Appeals (DOHA) issued an undated 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 October 27, 2011, Applicant responded to the SOR allegations and requested a decision without a hearing. (Item 6) A complete copy of the file of relevant material (FORM), dated December 9, 2011, was provided to him on December 19, 2011. He was afforded an opportunity to file objections and to submit material in refutation, extenuation, or mitigation.¹ Applicant did not provide a response to the FORM. The case was assigned to me on February 10, 2012.

Findings of Fact²

In Applicant's response to the SOR, he admitted all of the debts in the SOR. His admissions are accepted as factual findings.

Applicant is a 42-year-old engineer, who has been employed by a government contractor since April 2008.³ From March 2007 to April 2008, he was employed in consulting as a senior operations specialist. From April 2004 to February 2007, he was employed as a curriculum developer. He served in the military from February 1989 to April 2004, and he received an honorable discharge from the Army. In November 2001, he earned a bachelor's degree, and in December 2004, he earned a master's degree. He has continued to earn college credits after completing his master's degree, and he is pursuing his Ph.D. His first marriage was in 1995, and he was divorced in 1999. He married his second wife in June 2003, and he was divorced in June 2009. The last four months of 2008, he was deployed overseas.⁴ While he was deployed, his spouse spent funds irresponsibly. He divorced his second wife because she abused alcohol and drugs, which adversely affected her employment. *Id.* He married his current spouse in June 2009, and she is currently employed outside their home. *Id.* His two stepdaughters were born in 1992 and 1998.

¹The DOHA transmittal letter is dated December 13, 2011, and Applicant's receipt is dated December 19, 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 SF 86. (Item 7)

⁴Applicant's January 31, 2011, Officer of Personnel Management personal subject interview (OPM PSI). (Item 8)

Applicant admitted numerous delinquent debts on his SF 86. His SOR lists, and he admits responsibility for 13 delinquent debts, totaling \$521,473. He attributes his financial situation to divorce and his daughter's injuries in 2010. Applicant and his spouse separated in late 2008, and they were divorced in June 2009. With the loss of his spouse's income, Applicant was unable to pay his debts. His delinquent debts resulted from various credit cards, foreclosure of his residence (\$319,920), a home equity loan (\$133,791), a debt on his motorcycle (\$7,000), medical debts, a debt on his boat (\$18,000), and various other debts. (Item 8; FORM at 5-7) He paid a credit counseling firm \$1,500; however, the firm did little to help with his financial situation. (Item 6)

On September 9, 2011, Applicant wrote in response to DOHA interrogatories that he was willing to pay his debts; however, he has not paid any of his SOR debts because of costs resulting from his daughter's car accident in February 2010.⁵ She sustained knee and shoulder injuries, which required expensive medical treatments. She had knee surgery in July 2011, and she is receiving physical therapy. He moved in May 2011, and his moving expenses further reduced his ability to address his delinquent SOR debts.

Applicant started a separate account, and he said he planned to make direct deposits into this account, which he plans to use to address his delinquent debts. He has been trying to collect information about his debts and creditors to ensure he has the current account holders' addresses. He plans to pay off the smaller debts first, while continuing to save for the larger bills. He provided an unsigned direct deposit form, dated August 26, 2011; however, the form did not include an amount that would be systematically placed into his debt resolution program. There is no evidence that he has actually started using allotments to fund resolution of his delinquent SOR debts.

The FORM advised Applicant of his right to submit "objections, rebuttal, extenuation, mitigation, or explanation, as appropriate." (FORM at 6) The December 13, 2011 letter from the DOHA Director also encouraged Applicant to submit material on his behalf to DOHA; however, no material in response to the FORM was received.

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.

⁵ Applicant's September 9, 2011 letter in response to interrogatories is the source for the facts in this paragraph. (Item 9)

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 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 PSI, his responses to DOHA interrogatories, and his SOR response. Applicant's SOR lists 13 delinquent debts, totaling \$521,473. Some of his SOR debts 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 very limited application of AG ¶¶ 20(b), 20(c), and 20(d).⁶ He is credited with receiving some financial counseling in connection with his involvement with a credit counseling firm. He showed some good faith when he admitted responsibility for his SOR debts in his SF 86, his OPM PSI, responses to DOHA interrogatories, and in his SOR response. Applicant's financial situation was damaged by insufficient income, his divorce in June 2009, his spouse's alcohol and drug abuse, his spouse's irresponsible spending, and his daughter's medical problems. However, Applicant's financial circumstances have been relatively stable since June 2009 when he was divorced, and he has not provided sufficient information about variations in his income and his expenses over the most recent 30 months to fully establish any mitigating conditions. AG ¶ 20(e) does not apply because he failed to provide documented proof to substantiate the basis of any disputed debts or evidence of actions to resolve disputed debts. Applicant credibly stated that he contacted some creditors, and he has a plan to resolve his debts.

Applicant failed to establish that he acted responsibly under the circumstances. Although he recently began re-contacting his creditors, he did not provide proof that he continuously 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 problems are being resolved and are under control. The file lacks evidence that he has acted responsibly on any of his SOR debts.

⁶The 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)).

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.

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.

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 in the future. Applicant is a 42-year-old engineer, who has been employed by a government contractor since April 2008. He served in the military from February 1989 to April 2004, and he received an honorable discharge from the Army. In December 2004, he earned a master's degree, and he is working towards his Ph.D. During the last four months of 2008, he was deployed overseas, and his spouse spent irresponsibly. He divorced his second wife in June 2009. He married his current spouse in June 2009, and she is currently employed outside their home. 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 contractor and for his 15 years of military service. There is every indication that he is loyal to the United States and his employer. Applicant's financial situation was damaged by insufficient income, divorce, drug and alcohol abuse of his former spouse, and his daughter's injuries. I give Applicant substantial credit for admitting responsibility for SOR debts. He has been honest about his failure to address his delinquent SOR debts. 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 13 delinquent debts, totaling \$521,473. He did not provide proof that he disputed any debts, or proof that he negotiated any settlements. Applicant's employment and marital situation has been stable since June 2009, and there is no documentary evidence of sufficient variations in his income to cause delinquent debt. He did not provide his pay statements or his

income tax returns. He did not show his contributions to address his daughter's medical needs. He did not provide enough information to assess his ability to address his delinquent debts. He did not provide any correspondence to or from creditors showing attempts to establish payment plans. 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.m: 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