



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 11-07266

Appearances

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

06/25/2013

Decision

Harvey, Mark, Administrative Judge:

Applicant's statement of reasons (SOR) lists 12 delinquent or charged-off debts totaling \$399,524 and failure to file his federal tax returns on time for tax years 2007 and 2008. He mitigated the tax return issue and disputed one debt; however, he did not make sufficient progress resolving his financial problems. Financial considerations concerns are not mitigated. Eligibility for access to classified information is denied.

Statement of the Case

On February 24, 2011, Applicant submitted his Electronic Questionnaires for Investigations Processing (e-QIP) (SF 86). (GE 1) On September 5, 2012, the Department of Defense (DOD) issued an SOR to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended; and the adjudicative guidelines (AG) the President promulgated on December 29, 2005.

The SOR alleged security concerns under Guideline F (financial considerations). (Hearing Exhibit (HE) 2) The SOR detailed reasons why DOD was unable to find that it is clearly consistent with the national interest to grant or 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 granted, continued, denied, or revoked.

On November 1, 2012, Applicant submitted his response to the SOR. (HE 3) On April 4, 2013, Department Counsel indicated he was ready to proceed on Applicant's case. On April 4, 2013, DOHA assigned Applicant's case to me. On May 28, 2013, Applicant's hearing was scheduled for June 10, 2013. Applicant's hearing was held as scheduled using video teleconference. Department Counsel offered five exhibits, and Applicant offered four exhibits. (GE 1-5; AE A-D) (Tr. 22, 24-26) There were no objections,¹ and I admitted GE 1-5 and AE A-D. (Tr. 23, 26-27)² Additionally, I admitted the hearing notice, SOR, and Applicant's response to the SOR. (HE 1-3) On June 21, 2013, I received the transcript.

Findings of Fact³

Applicant's SOR response admitted responsibility for the debts in ¶¶ 1.a-1.j and he denied the allegations in SOR ¶¶ 1.k-1.m. Applicant's admissions are accepted as findings of fact.

Applicant is a 45-year-old employee of a defense contractor, who maintains aircraft for the National Guard. (Tr. 5, 8; GE 1) He has been working continuously for his employer since December 2010. (Tr. 8) He graduated from high school in 1986, and he attended a trade school. (Tr. 6) He does not have an associate's degree. (Tr. 6) He is qualified and certified to pilot several aircraft. (Tr. 6) He married in 1987, and he was divorced in 2006. (Tr. 7) His two children from his first marriage are ages 21 and 22. (Tr. 7) He married his current spouse in 2012. (Tr. 7) He has never served in the military. (Tr. 7) He received a security clearance in 1990, and there are no allegations of security violations. (Tr. 8)

Financial considerations

Applicant's SOR lists 12 delinquent or charged-off debts totaling \$399,524 and failure to file his federal tax returns on time for tax years 2007 and 2008. His SOR debts include a foreclosed house, two repossessed vehicles, unpaid credit card debts, and medical debts. One unpaid SOR debts is less than \$200.

¹Applicant was concerned that something might come up at the hearing from his June 7, 2013 credit report that he would be unprepared to address. (Tr. 13; GE 5) I told him he could have additional time after the hearing to address any new allegations. (Tr. 14) Applicant agreed with this resolution. (Tr. 14) He indicated he wished to proceed with his case without delay. (Tr. 23-24) No new adverse information was presented from the June 7, 2013 credit report. (GE 5)

²I reserved a decision on admission of AE D, pending a showing of relevance. (Tr. 27) Applicant established its relevance to his case, and it is admitted.

³Some details have been excluded in order to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

Applicant received a September 24, 2012 letter from the attorney general in the state where he owned a house. (Tr. 30; AE A) The letter indicated there is a pending class action lawsuit against the bank, which previously held his mortgage account. (Tr. 30; AE A) The letter began, "You may be eligible to receive a payment of at least \$840.00 as part of the National Mortgage Settlement." (AE A) He is eligible for the settlement because he had a foreclosure with the mortgage company between January 1, 2008 and December 31, 2011. (AE A) The letter did not say anything about possible relief from any potential deficiency judgment.

Applicant owned a business that was doing very well until 2006. (Tr. 31-32) He had perfect credit until the business had problems and he was divorced. (Tr. 32)

Applicant accepted responsibility for the telecommunications debt in SOR ¶ 1.a (\$1,289), the credit card debt in SOR ¶ 1.b (\$6,849), the credit card debt in SOR ¶ 1.e (\$36,785), and the medical debts in SOR ¶ 1.d (\$505) and 1.f (\$803); however, he objected to the excessive charges added to the debts by the creditors as well as the creditors' failure to negotiate reasonable settlements with him. (Tr. 32-36, 49) He said he intended to pay the medical debts in SOR ¶¶ 1.d (\$505) and 1.f (\$803) as well as the utility debt in SOR ¶ 1.h (\$178), the debt in SOR ¶ 1.i (\$676), and the debt owed to a city in SOR ¶ 1.j (\$1,870) when he is able to do so. (Tr. 35-36)

Applicant disputed the medical debt in SOR ¶ 1.g (\$1,166). (GE 3) His credit report indicates the consumer disputes the account. (Tr. 31, 59-62; AE D)

Applicant explained that the debt in SOR ¶ 1.c (\$31,403) arose from the repossession of two vehicles. (Tr. 34-35) He owed \$40,000; the creditor sold the vehicles at auction for \$9,000; and now the creditor seeks about \$31,000 from Applicant. (Tr. 51) Applicant said the credit union settled the debt when the two vehicles were repossessed. (Tr. 35)

Applicant owned a home with a \$165,000 mortgage. (Tr. 36-37) He borrowed against his home to finance his business. (Tr. 36-38) He believed he could refinance again; however, the creditor refused to refinance. (Tr. 38) Applicant was left with a variable interest rate loan, and he was unable to make payments when the interest rate went up. (Tr. 39) In 2007, Applicant sent the creditor hardship information. (Tr. 39) The creditor was not responsive, and Applicant told the creditor that he would stop all payments until the mortgage lender was responsive to his concerns. (Tr. 39) In September 2008 or November 2008, the home he lived in for 10 years was sold at auction for \$106,000. (Tr. 40, 47) His difficulties with the mortgage company generated the debts in SOR ¶¶ 1.k (\$195,000) and 1.l (\$123,000). (Tr. 36-39) The creditor's misconduct resulted in the class action lawsuit. (Tr. 40) Applicant did not provide a forwarding address to the creditor because "I "didn't want my debt collectors chasing me down. I was putting my past in the past and [I am] trying to move on." (Tr. 48) He has never received any correspondence from the creditor. (Tr. 48) Applicant was unaware of the state's anti-deficiency laws for mortgages. (Tr. 53)

In February 2011, Applicant filed his federal income tax returns for 2007 and 2008. (Tr. 40, 45; GE 4 at 23-26) He did not owe any delinquent taxes. (GE 4 at 23-26) He was unable to file the tax returns in a timely fashion because his bookkeeper from his business did not provide him with the necessary documentation to support filing his tax returns. (Tr. 41, 45)

Applicant's employer paid him about \$60,000 per year for 2010 and 2011. (Tr. 44, 54) He went on disability leave from his current employer in November 2012 because of a vision problem. (Tr. 41-42) He is receiving \$2,700 in monthly payments from a disability insurance policy. (Tr. 43-44)

Applicant has not made any payments to any of the SOR creditors. (Tr. 45-46) Applicant settled one non-SOR credit card debt of \$11,500 for about \$5,600. (Tr. 50) Applicant has been saving his money since May 2011 because he was worried about his future employment. (Tr. 55) He had about \$10,000 in his savings account. (Tr. 62) If he receives his clearance, has job security, and his vision is corrected through surgery, then he will begin payments to his SOR creditors. (Tr. 43-44, 55-56)

On March 22, 2013, Applicant paid a medical creditor \$25, and on April 22, 2013, he paid the medical creditor \$49, resolving the debt. (Tr. 57-59; AE D) Applicant is in the process of purchasing property. (Tr. 63) He does not have any vehicle loans or credit cards. (Tr. 63) He intends to live within his means and maintain his financial responsibility. (Tr. 68) He does not use illegal drugs or abuse alcohol. (Tr. 68) He has no criminal offenses reported on his SF 86. (Tr. 68; GE 1)

On April 8, 2011, Applicant told an Office of Personnel Management (OPM) investigator that a bankruptcy attorney he consulted advised him not to contact his creditors or pay his debts. (GE 4 at 140-143) Applicant described his work history in a very positive manner. (Tr. 29-30) He is a responsible, reliable, and competent professional. (Tr. 30) He also provided his resume. (AE B)

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 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 three disqualifying conditions that could raise a security concern and may be disqualifying in this case: "(a) inability or unwillingness to satisfy debts;" "(c) a history of not meeting financial obligations;" and "(g) failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same." 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 SOR response, and his hearing record. His SOR lists 12 delinquent or charged-off debts totaling \$399,524 and failure to timely file his federal tax returns for tax years 2007 and 2008. His SOR debts include a foreclosed house, two repossessed vehicles, and delinquent credit card and medical debts. One SOR debt is less than \$200. The Government established the disqualifying conditions in AG ¶¶ 19(a), 19(c), and 19(g), 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;⁴ 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 delinquent debt does not warrant full application of any mitigating conditions to all of his SOR debts. However, Applicant is credited with mitigating the following SOR allegations: 1.g because he filed a dispute of this medical debt for \$1,166 under AG ¶ 20(e); and 1.m because he filed his federal taxes for 2007 and 2008 in 2011, when he had necessary documentation from his bookkeeper.

Applicant's business failed, and he became divorced. His mortgage company interest rates increased. He recently had medical problems with his vision. These are circumstances beyond his control. He showed some good faith when he admitted responsibility for most of his SOR debts.

Applicant has not provided documentation establishing that he has taken reasonable actions to resolve the debts in SOR ¶¶ 1.a to 1.f and 1.h to 1.i. He did not provide documentation proving that he maintained contact with his SOR creditors, and he did not provide any documentation showing his attempts to negotiate payment plans with these SOR creditors.⁵ He did not make any payments to the 11 SOR creditors in SOR ¶¶ 1.a to 1.f and 1.h to 1.i. There is insufficient evidence to show that his financial

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.

problem is being resolved and is under control. He did not establish his financial responsibility.

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 of 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.

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. Applicant is a 45-year-old aircraft mechanic employed by a defense contractor, who has been working continuously for the same employer since February 2010. He is a high school graduate with some technical training. He has never served in the military. There are no allegations of security violations or evidence that he abused alcohol or illegal drugs or engaged in criminal activity. He went through a difficult divorce, his business failed, his mortgage interest rates increased, and more recently, he has had vision problems. For more than six months he has been living on less than half of his income level for the last two years of \$60,000. These are circumstances beyond his control. I am confident that he has the ability to comply with security requirements. He is an intelligent person who knows what he must do to establish his financial responsibility. I credit Applicant with mitigating security concerns for SOR ¶¶ 1.g and 1.m.

The evidence against approval of Applicant's clearance is more substantial at this time. Applicant's home went into foreclosure in 2008. He did not maintain contact with the creditor, and he does not know the status of two large mortgage debts of \$195,000 and \$123,000. Applicant did not make any payments to 11 SOR creditors, and one debt was for only \$178. He could have made greater progress resolving and documenting resolution of more of his SOR debts. His failure to establish his financial responsibility shows lack of judgment and raises unmitigated questions about Applicant's reliability, trustworthiness and ability to protect classified information. See AG ¶ 15. More financial progress is necessary to fully mitigate security concerns.

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. Financial considerations concerns are not mitigated. For the reasons stated, I conclude he is not eligible for access to classified information.

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.f:	Against Applicant
Subparagraph 1.g:	For Applicant
Subparagraphs 1.h to 1.l:	Against Applicant
Subparagraph 1.m:	For Applicant

Conclusion

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

Mark Harvey
Administrative Judge