



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 11-11439

Appearances

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

06/14/2013

Decision

HARVEY, Mark, Administrative Judge:

Applicant's statement of reasons (SOR) lists 13 delinquent debts, totaling \$32,863. He failed to make sufficient progress documenting resolution of his delinquent SOR debts. Financial considerations concerns are not mitigated. Eligibility for access to classified information is denied.

Statement of the Case

On March 9, 2011, Applicant submitted his Electronic Questionnaires for Investigations Processing (e-QIP) version of a security clearance application (SF 86). (GE 1) On February 13, 2013, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) 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 March 11, 2013, Applicant responded to the SOR. (HE 3) On May 2, 2013, DOHA assigned Applicant's case to me. On May 9, 2013, Department Counsel informally notified Applicant of the hearing. (Tr. 14) On May 16, 2013, DOHA issued a hearing notice, setting the hearing for May 29, 2012. (HE 1) Applicant's hearing was held as scheduled using video teleconference. Department Counsel offered four exhibits, and Applicant did not offer any exhibits. (GE 1-4) (Tr. 17-19) There were no objections, and I admitted GE 1-4. (Tr. 18-19) Additionally, I admitted the hearing notice, SOR, and Applicant's response to the SOR. (HE 1-3) On June 5, 2013, I received the transcript.

Findings of Fact¹

Applicant's SOR response admitted responsibility for the SOR debts in ¶¶ 1.a, 1.b, 1.d, 1.h, 1.i, 1.k, and 1.l. (HE 3) He denied the other SOR allegations. Applicant's admissions are accepted as findings of fact.

Applicant is a 43-year-old site manager for a defense contractor. (Tr. 6, 8; GE 1) He has been continuously working for his employer since September 2010 (32 months). (Tr. 8, 22) He was unemployed from April 2010 to September 2010. (Tr. 22) Applicant was a foreman from March 2009 to April 2010. (Tr. 23) He was married in 1996 and divorced in 2004. (Tr. 7) Applicant married in April 2013, and he does not have any children. (Tr. 7, 23) His spouse does not work outside their home. (Tr. 40)

Applicant graduated from high school in 1987, and he attended college for two years. (Tr. 7) He has never served in the military. (Tr. 8) Over the years, he earned several training certifications from his employers. (Tr. 8)

Financial considerations

Applicant traces his financial problems to his divorce in 2004 and unemployment from April to September 2010. (Tr. 24) His former spouse opened credit cards and was financially irresponsible. (Tr. 24) He paid off a debt to a jeweler and a debt to a furniture company. (Tr. 24, 41)

The debt in SOR ¶ 1.a for \$5,450 may be a delinquent credit card debt. (Tr. 26-29) Applicant was unsure of the current status of this debt. (Tr. 27-29)

The debt in SOR ¶ 1.b for \$6,560 is Applicant's delinquent student loan debt. (Tr. 28-29) About a month before his hearing, the creditor told Applicant that the creditor would send Applicant a payment plan. (Tr. 27) He has not made any payments for two years. (Tr. 49-50)

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

Applicant disputed his responsibility for the debts in SOR ¶ 1.c (\$659) (Tr. 30), 1.e (\$1,423) (Tr. 32-33), 1.g (\$198) (Tr. 34-35), 1.i (\$2,487) (Tr. 35-36), 1.j (\$310) (Tr. 36-37), and 1.m (\$12,563) (Tr. 38). He did not dispute any of these debts in writing to the creditor or the credit reporting company.

Although Applicant accepted responsibility for the debt in SOR ¶ 1.l (\$1,024) in his SOR response, he was unclear about whether he continued to accept responsibility for this debt because he believes he may have paid it. (Tr. 37) Applicant said he settled the debt in SOR ¶ 1.f (\$1,127) for \$800. (Tr. 33-34)

Applicant admitted his responsibility for the debts in SOR ¶ 1.d (\$151) (Tr. 31), 1.h (\$762) (Tr. 35), and 1.k (\$149) (Tr. 37). He planned to pay or resolve them. He has not had any credit counseling. (Tr. 44)

Non-SOR Allegations²

Applicant admitted that he did not disclose any delinquent debts on his March 9, 2011 SF 86, even though his student loan, for example, became delinquent in 2009. (Tr. 39; GE 1) He had arrests for driving under the influence of alcohol (DUI) in December 2004, April 2005, June 2007, and January 2008. (Tr. 46; SF 86) He had three or possibly four DUI convictions. (Tr. 46-47) As for the January 2008 DUI offense, his blood alcohol content was .20, and he served nine months in jail. (Tr. 47) He continues to consume alcohol. (Tr. 49) He does not drive after consuming alcohol. (Tr. 49) The record does not contain any evidence of a diagnosis of alcohol abuse or alcohol dependence.

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

²Applicant’s SOR does not allege that he lied on his March 9, 2011 SF 86 when he failed to disclose his debts currently delinquent over 90 days or that his four DUI arrests raise a security concern under Guideline G. In ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006), the Appeal Board listed five circumstances in which conduct not alleged in an SOR may be considered stating:

- (a) to assess an applicant’s credibility; (b) to evaluate an applicant’s evidence of extenuation, mitigation, or changed circumstances; (c) to consider whether an applicant has demonstrated successful rehabilitation; (d) to decide whether a particular provision of the Adjudicative Guidelines is applicable; or (e) to provide evidence for whole person analysis under Directive Section 6.3.

Id. (citing ISCR Case No. 02-07218 at 3 (App. Bd. Mar. 15, 2004); ISCR Case No. 00-0633 at 3 (App. Bd. Oct. 24, 2003)). The allegations that he falsified his March 9, 2011 SF 86 and his alcohol consumption raised a security concern will not be considered for any purpose because Applicant has not had adequate notice and a full opportunity to collect and present evidence of mitigation regarding these allegations.

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 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 SOR response, and his hearing record. Applicant's SOR lists 13 delinquent debts, totaling \$32,863. He did not provide any documentation showing any payments to any SOR creditors, ongoing payment plans to SOR creditors, or correspondence to or from SOR creditors. 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;³ 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 does not warrant full application of any mitigating conditions to all SOR debts. Applicant said he settled the debt in SOR ¶ 1.f (\$1,127) for \$800, and he is credited with mitigating it, even though he did not provide documentary proof of payment. Applicant did not receive financial counseling. Applicant was unemployed from April 2010 to September 2010 and divorced in 2004. Unemployment and divorce are circumstances beyond his control. He showed some good faith when he admitted responsibility for most of his SOR debts at his hearing.

Applicant has not taken reasonable actions to resolve most of his SOR debts. He has three SOR debts that are less than \$200, and he had the financial means to pay these three debts and establish payment plans on the others. 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 his SOR creditors.⁴ He asserted he was not responsible for several debts; however, he did not "provide documented proof to substantiate the basis of the dispute" or written

³The 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)).

⁴Even 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.

correspondence to his creditors or credit reporting companies disputing responsibility for the debts on his credit reports. There is insufficient evidence that his financial problem is being resolved, and his finances are 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 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 43-year-old site manager employed by a defense contractor. He has been continuously employed by his current employer for 32 months. He has two years of college and several training certifications from his employers. His financial problems were initially caused by his divorce in 2004 and unemployment from April to September 2010, which are circumstances beyond his control adversely affecting his financial circumstances. I am confident that he has the ability to comply with security requirements. He understands the importance of being honest on his security documents. He is an intelligent person who knows what he must do to establish his financial responsibility. I credit him with mitigating the debt in SOR ¶ 1.f for \$1,127. There is no evidence of security violations, disloyalty, or that he would intentionally violate national security.

The evidence against approval of Applicant's clearance is more substantial at this time. Applicant failed to mitigate 12 SOR delinquent debts, totaling \$31,736. He has been steadily employed for more than two years, and he could have made greater progress resolving and documenting resolution of his SOR debts. Other than the debt in SOR ¶ 1.f, he is not credited with making any payments to any SOR creditors. Three SOR debts are less than \$200 each, and he could have paid them and established

payment plans on his other SOR debts or disputed them. His failure to make greater progress on the resolution of his SOR debts shows lack of judgment and raises unmitigated questions about Applicant's reliability, trustworthiness and ability to protect classified information. See AG ¶ 18.

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