



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



In the matter of:)
)
-----) ISCR Case No. 12-01003
)
Applicant for Security Clearance)

Appearances

For Government: Eric H. Borgstrom, Esquire, Department Counsel
For Applicant: *Pro se*

11/28/2013

Decision

HARVEY, Mark, Administrative Judge:

In December 2000, Applicant's non-priority, unsecured debts were discharged under Chapter 7 of the Bankruptcy Code. Eleven delinquent, collection, or charged off accounts, totaling \$18,930, were subsequently listed on his statement of reasons (SOR). He made some progress; however, he failed to mitigate nine of his SOR debts, totaling \$18,546. Financial considerations concerns are not mitigated. Eligibility for access to classified information is denied.

Statement of the Case

On August 2, 2011, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP) version of a security clearance application (SF 86). (Item 3) On July 18, 2013, the Department of Defense Consolidated Adjudications Facility (DOD 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) 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 DOD 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. (Item 1)

On July 29, 2013, Applicant responded to the SOR allegations and waived his right to a hearing. (Item 2) A complete copy of the file of relevant material (FORM), dated August 20, 2013, was provided to him on September 20, 2013.¹ Applicant did not respond to the FORM. The case was assigned to me on November 7, 2013.

Findings of Fact²

Applicant admitted the allegations in SOR ¶¶ 1.a to 1.i and 1.l. He denied the allegations in SOR ¶¶ 1.j and 1.k. He also provided an explanation for his delinquent debts and provided mitigating information. Applicant's admissions are accepted as findings of fact.

Applicant is 48 years old, and he has been employed as a readiness maintenance supervisor since March 2007.³ In 1996, he married, and he has two children and three stepchildren. He has been separated from his spouse since February 2012. He graduated from high school in 1983. He served in the military from 1983 to 2003, and he received an honorable discharge. There is no evidence of use of illegal drugs or alcohol abuse.

In 2000, Applicant's non-priority, unsecured debts were discharged under Chapter 7 of the Bankruptcy Code. When he completed his August 2, 2011 SF 86, he disclosed six delinquent or collection accounts. (Item 3)

Applicant's credit reports and SOR list 11 delinquent, collection, or charged off accounts, totaling \$18,930 as follows: (1) a music store debt in ¶ 1.a (\$849); (2) a collection debt in ¶ 1.b (\$2,798); (3) a telecommunications debt in ¶ 1.c (\$629); (4) a medical debt in ¶ 1.d (\$336); (5) a collection debt in ¶ 1.e (\$266); (6) a collection debt in ¶ 1.f (\$6,335); (7) a delinquent debt in ¶ 1.g (\$568); (8) a charged off debt in ¶ 1.h (\$6,102); (9) a collection debt in ¶ 1.i (\$663); (10) a medical debt in ¶ 1.j (\$205); and (11) a county debt in ¶ 1.k (\$179). Applicant attributed his financial problems to separation from his spouse in February 2012 and monthly child support of over \$1,100.

¹The DOHA transmittal letter is dated August 27, 2013, and Applicant's receipt is dated September 20, 2013. 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, Applicant's August 2, 2011 SF 86 is the basis for the facts in this paragraph. (Item 3)

(SOR response; Item 5) He also cited his unemployment for almost 30 days in the spring of 2013. (SOR response)

On September 26, 2011, an Office of Personnel Management (OPM) investigator interviewed Applicant about his finances and discussed numerous delinquent debts with him. (Item 5) Applicant was unemployed for one month in 2007. (OPM personal subject interview (PSI) at 1) In 2010, Applicant received a substantial reduction in pay. (OPM PSI at 3) There is no evidence of financial counseling.

Applicant's personal financial statement (PFS) shows his monthly net salary, including his military retired pay, is \$3,419; and his monthly net remainder after subtracting expenses and child support is \$179.⁴ The only debt payment shown on his PFS is a \$150 car payment and a \$120 payment to the Army and Air Force Exchange System. He indicates he has \$80 in savings and \$34,655 in a 401k account. He did not disclose the balance in his checking account as an asset.

In his SOR response, Applicant said seven SOR debts were in a payment plan or paid as follows: ¶ 1.a (plan to start \$200 monthly payments in January 2014); ¶ 1.b (plan to start \$175 monthly payments in May 2014); ¶ 1.c (plan to start \$175 monthly payments in September 2013); ¶ 1.d (plan to make two \$175 payments in August 2013, resolving this debt); ¶ 1.e (plan to pay in full on July 12, 2013); ¶ 1.f (plan to start \$175 monthly payments in May 2014); and ¶ 1.k (paid on May 14, 2013). (Item 5; SOR response) His payment plan also said one non-SOR collection debt for \$275 would be paid in June 2013.

Applicant denied responsibility for the debt listed in SOR ¶ 1.j (\$205) because it did not appear on his two most recent credit reports (May 2013 and July 2013). He paid the utility debt for \$179 in SOR ¶ 1.k (a page from his credit report shows a zero balance due and "Paid collection.>"). (SOR response; Item 5 at Ex. C, showing payment in May 2013) He paid a debt to a pizza company of \$144; however, I am unable to connect this debt with any SOR allegation. (SOR response)

Applicant provided a May 2013 checking account statement showing a \$32 payment to a non-SOR creditor resolving this debt. (Item 5 at Ex. C) The balance in his checking account is \$10,621. (Item 5 at Ex. C)

The August 27, 2013 DOHA letter conveying the FORM to Applicant invited him to "submit any material you wish the Administrative Judge to consider or to make any objections you may have as to the information in the file." Applicant did not provide any response to the FORM.

⁴Applicant's personal financial statement is the source for the facts in this paragraph. (Item 5)

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.

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

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, OPM PSI, responses to DOHA interrogatories, and SOR response. His non-priority, unsecured debts were discharged in 2000 under Chapter 7 of the Bankruptcy Code; however, Applicant subsequently generated nine delinquent, collection, or charged-off SOR debts, totaling \$18,546. 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;⁵ 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.

The Appeal Board concisely explained Applicant's responsibility for proving the applicability of mitigating conditions as follows:

Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in security clearance decisions is that articulated in *Egan, supra*. "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." Directive, Enclosure 2 ¶ 2(b).

ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013).

⁵The 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)).

Applicant's conduct in resolving his delinquent debt does not warrant full application of any mitigating conditions to all of his SOR debts; however, he provided some mitigating information. Applicant's brief periods of unemployment, low income, separation from his spouse, and child support responsibilities are all financial conditions largely beyond his control; however, he did not act responsibly under the circumstances. He did not describe any substantial changes in his income in the last two years.

Applicant disputed the debt in SOR ¶ 1.j (\$205), and it does not appear on his most recent credit report. He paid the debt in SOR ¶ 1.k (\$179). Applicant's bankruptcy in 2000 shows his history of financial problems; however, it is not recent. I have credited Applicant with mitigating SOR ¶¶ 1.j, 1.k, and 1.l.

Applicant's May 2013 checking account statement shows a balance \$10,621. He only established resolution of one \$179 debt through payment, and he did not provide proof of any payments on his nine remaining SOR debts over the previous two years. His generation of a payment plan is a positive step towards establishing his financial responsibility, but proof of a track record of payments to establish that payment plan is necessary. He failed to establish that over the previous two years he could not have settled and paid more of his SOR debts. There is no documentation showing financial counseling, correspondence to or from nine SOR creditors, proof that he maintained contact with nine SOR creditors,⁶ attempts to negotiate payment plans, or other evidence of efforts or progress resolving nine SOR debts. There is insufficient evidence that his financial problems are being resolved and are under control.

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.

⁶“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.

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 is some evidence supporting approval of Applicant's clearance. Applicant's finances were adversely affected when he became unemployed, he was under employed, he was separated from his spouse, and he had significant child support responsibilities. These were circumstances beyond his control. He paid one \$179 SOR debt, he successfully disputed one \$205 debt, and he generated a payment plan for his remaining SOR debts. He has been employed by the same defense contractor since 2007, and since 2010 his employment has been stable, except for a brief layoff of less than 30 days. There is no evidence of abuse of alcohol or drugs. He served his country in the Armed Forces and honorably retired from the service. He contributes to his company and the Department of Defense. There is no evidence of disloyalty or that he would intentionally violate national security.

The financial evidence against approval of Applicant's clearance is more substantial at this time. Applicant has a history of financial problems. He received a fresh start in May 2000, when his non-priority, unsecured debts were discharged under Chapter 7 of the Bankruptcy Code; however, he subsequently generated 11 additional delinquent debts. He paid one \$179 debt and successfully disputed one \$205 debt. In May 2013, he had \$10,621 in his checking account, and he could have made greater progress resolving and documenting resolution of his delinquent SOR debts. He failed to mitigate nine delinquent SOR debts, totaling \$18,546. He did not provide documentary proof that he made any payments to these nine SOR creditors or that he attempted to settle these nine delinquent 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 ¶ 18. More documented financial progress is necessary to 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 Applicant is not eligible for access to classified information at this time.

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.i:	Against Applicant
Subparagraphs 1.j to 1.l:	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