



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



In the matter of:)
)
-----) ISCR Case No. 12-01354
)
Applicant for Security Clearance)

Appearances

For Government: Gregg A. Cervi, Esquire, Department Counsel
For Applicant: *Pro se*

01/03/2014

Decision

HARVEY, Mark, Administrative Judge:

Applicant’s delinquent nonpriority unsecured debts were discharged under Chapter 7 of the Bankruptcy Code in October 2003. He subsequently generated 12 delinquent, collection, or charged-off debts, totaling \$35,016, which are listed on his statement of reasons (SOR). He failed to mitigate nine delinquent SOR debts, totaling \$34,301. He did not provide sufficient documentation of progress resolving his financial problems. Financial considerations concerns are not mitigated. Eligibility for access to classified information is denied.

Statement of the Case

On November 9, 2011, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP) version of security clearance application (SF 86). (Item 5) On July 23, 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 August 9, 2013, Applicant responded to the SOR allegations, and on August 14, 2013, Applicant waived his right to a hearing. (Item 4) A complete copy of the file of relevant material (FORM), dated September 24, 2013, was provided to him on November 4, 2013.¹ Applicant responded to the FORM, providing a one-page statement addressing the SOR debts. Department Counsel did not object to consideration of Applicant's FORM response. The case was assigned to me on December 19, 2013.

Findings of Fact²

In Applicant's August 8, 2013 SOR response, Applicant admitted all of the SOR allegations and explained that in regard to SOR ¶¶ 1.a-1.e, 1.g, 1.h, 1.j, and 1.m, he planned to file bankruptcy. (Item 4) He planned to dispute the debts in SOR ¶¶ 1.f, 1.k, and 1.l because he believes his insurance should have paid these debts. He did not provide any corroborating documentation from creditors, disputes, or bankruptcy schedules as part of his SOR response. Applicant's admissions are accepted as findings of fact.

Applicant is 68 years old, and he has worked as an electro-mechanical technician since 1995.³ (Item 5) In 1963, he graduated from high school. In 1964, he married. His two daughters were born in 1975 and 1977. He has never served on active duty. He began his employment with a defense contractor in January 2011. There is no evidence of criminal arrests or convictions or use of illegal drugs or alcohol abuse. He has previously held a security clearance.

When Applicant completed his November 9, 2011 SF 86, he disclosed a delinquent debt of \$2,526 that began in October 2010 and resulted in garnishment of his pay. He also revealed a vehicle repossession debt of \$22,000 that began in October 2010.

¹The DOHA transmittal letter is dated October 28, 2013, and Applicant's receipt is dated November 4, 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.

³Unless stated otherwise, the facts in this paragraph and the next paragraphs are from Applicant's November 8, 2011 SF 86. (Item 5)

Applicant had hernia surgery and has colon cancer, and his spouse has lupus and cancer.⁴ Applicant indicates that absent these medical problems he would not have any delinquent debts. He had medical insurance, which should have paid most or all of his medical bills. More than half of the delinquent SOR debt resulted from the voluntary repossession of Applicant's vehicle in January 2006. Applicant's spouse had medical problems and she could not climb into and out of the vehicle. Applicant contacted the dealership, and they suggested he return the vehicle. Applicant erroneously believed he would not owe anything on the vehicle; however, the vehicle was resold for a low amount, resulting in a large debt. Applicant has not had any recent financial counseling.

Applicant's SOR and credit bureau reports, dated November 19, 2011, and March 1, 2013, describe 12 delinquent, collection, or charged-off debts, totaling \$35,016 as follows: (1) ¶ 1.a is a judgment filed in May 2009 (\$18,436); (2) ¶ 1.b is a judgment filed in July 2008 (\$1,055); (3) ¶ 1.c is a telecommunications collection account (\$612); (4) and (5) ¶ 1.d and ¶ 1.e are two telecommunications accounts, originating with the same creditor and being collected by the same collection company (\$118 and \$461); (6)-(8) ¶¶ 1.f (\$165), 1.k (\$133), and 1.l (\$417) are three delinquent medical debts; (9) ¶ 1.g is a charged off account (\$497); (10) ¶ 1.h is a charged off debt (\$10,488); (11) and (12) ¶¶ 1.j and 1.m are telecommunications collection debts (\$2,086 and \$548).

Applicant's undated personal financial statement (PFS) shows his monthly gross salary is \$5,314; his monthly net salary is \$3,770; and his monthly net remainder after subtracting expenses is \$1,190.⁵ No assets, savings, or investments are listed. He is receiving a civil service retirement of \$2,370. He provided a statement from Social Security indicating he is receiving a monthly benefit of \$828. (Item 6) Applicant's PFS lists four debts, and he states he is making monthly payments totaling \$250 to two of the four creditors. No payments to SOR creditors are indicated on his PFS.

Applicant's bankruptcy records show that his unsecured nonpriority debts were discharged under Chapter 7 of the Bankruptcy Code in October 2010. (SOR ¶ 1.i; Item 9) His debts were previously discharged under Chapter 7 of the Bankruptcy Code in October 1993. (Item 9)⁶

⁴Applicant's December 21, 2011 Office of Personnel Management (OPM) personal subject interview (PSI) is the source for the facts in this paragraph. (Item 6)

⁵Applicant's personal financial statement is the source for the facts in this paragraph. (Item 6)

⁶Applicant's SOR does not allege the 1993 bankruptcy. 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.

Applicant's FORM noted the absence of mitigating information and explained that Applicant had 30 days from the receipt of the FORM "in which to submit a documentary response setting forth objections, rebuttal, extenuation, mitigation, or explanation, as appropriate." (FORM at 9) Applicant's FORM response repeats the information submitted in his SOR response.

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.

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)). Although the 1993 bankruptcy was cited in Applicant's FORM, the 1993 bankruptcy 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 this allegation.

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, SOR response, and FORM response. His delinquent nonpriority unsecured debts were discharged under

Chapter 7 of the Bankruptcy Code in October 2003. He subsequently accrued 12 delinquent, collection, or charged-off accounts, totaling \$35,016. 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;⁷ 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

⁷The 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)).

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).

Applicant’s conduct in resolving his delinquent debt does not warrant full application of any mitigating conditions to all SOR debts; however, he provided some mitigating information. Applicant and his spouse’s illnesses and his mistake about his liability for the delinquency resulting from the voluntary repossession of his vehicle are all financial conditions largely beyond his control; however, he did not act responsibly under the circumstances. He did not provide specific information about any unemployment or changes in his income over the last five years to establish how the illnesses affected his income or debts. On December 21, 2011, the OPM investigator discussed Applicant’s delinquent debts with him; however, there has been no evidence of progress over the next two years. He failed to establish sufficient efforts to pay his creditors or otherwise resolve his delinquent debts and to provide documentation of such efforts to DOHA.

Applicant did not explain why it was necessary to file bankruptcy in October 2003. Applicant received financial counseling in connection with this bankruptcy in October 2003; however, there is no evidence of recent financial counseling.

Applicant disputed his responsibility for the three delinquent, collection, or charged off medical debts in SOR ¶¶ 1.f (\$165), 1.k (\$133), and 1.l (\$417). I have credited Applicant with mitigating these three medical debts as they are likely the responsibility of his private medical insurance, although Applicant may owe some copays on these medical bills. Applicant receives some mitigation from his PFS, which shows a reasonable budget and an ample monthly remainder of \$1,190. He also established some mitigation under AG ¶ 20(d) because he showed some good faith in the resolution of his SOR debts by admitting responsibility for 12 of his SOR debts.

In sum, Applicant did not provide any documentation, such as checking account statements, photocopies of checks, or a letter from the creditor proving that he paid or made any payments to the following nine SOR creditors totaling \$34,301 as follows: ¶ 1.a (\$18,436); ¶ 1.b (\$1,055); ¶ 1.c (\$612); ¶ 1.d (\$118); ¶ 1.e (\$461); ¶ 1.g (\$497); ¶ 1.h (\$10,488); ¶ 1.j (\$2,086); and ¶ 1.m (\$548). There is no financial documentation relating to these nine SOR creditors as follows: financial counseling; maintenance of contact with creditors;⁸ correspondence to or from these creditors; credible debt

⁸“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

disputes in light of his acceptance of responsibility in his SOR response; attempts to negotiate payment plans; or other evidence of progress or resolution of these nine SOR debts. There is insufficient evidence that his financial problems are being resolved, are under control, and will not occur in the future.

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 is some evidence supporting approval of Applicant's clearance. Applicant's finances were adversely affected when he and his spouse suffered illnesses. He was also unaware that voluntary repossession of his vehicle could result in a large delinquent debt. These are two financial conditions largely beyond his control. He is credited with mitigating the three SOR medical debts in ¶¶ 1.f, 1.k, and 1.l. He has a reasonable budget and an ample monthly remainder of \$1,190. He admitted responsibility for 12 of his SOR debts; however, he disputed three medical debts. There is no evidence of criminal conduct or abuse of alcohol or drugs. 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. His delinquent unsecured nonpriority debts were discharged under Chapter 7 of the Bankruptcy Code

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.

in October 2003. Several debts on his SOR became delinquent more than five years ago. His largest delinquent debt resulted from the voluntary repossession of his vehicle in 2006. His PFS showed a remainder of \$1,190, and he did not describe any payments to any SOR creditors, even though three of his SOR debts were less than \$500. SOR ¶ 1.d is \$118; SOR ¶ 1.e is \$461; and SOR ¶ 1.g is \$497. He could have made greater progress resolving and documenting resolution of his delinquent SOR debts. He failed to mitigate nine delinquent SOR debts, totaling \$34,301. Applicant's SOR response and FORM response said he intended to resolve his delinquent debt by obtaining a bankruptcy discharge; however, he did not provide any proof that he had filed for bankruptcy. Not everyone who files for bankruptcy is able to successfully discharge their nonpriority unsecured 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.e:	Against Applicant
Subparagraph 1.f:	For Applicant
Subparagraphs 1.g to 1.j:	Against Applicant
Subparagraphs 1.k and 1.l:	For Applicant
Subparagraph 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