



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



In the matter of:)
)
-----) ISCR Case No. 12-03137
)
Applicant for Security Clearance)

Appearances

For Government: Alison O’Connell, Esquire, Department Counsel
For Applicant: *Pro se*

11/04/2014

Decision

HARVEY, Mark, Administrative Judge:

Applicant’s statement of reasons (SOR) alleges 10 delinquent, collection, or charged-off accounts totaling \$18,233. He filed his federal and state income tax returns from 2008 to 2012 in 2012 and 2013, and his taxes are current. He made sufficient progress resolving his financial problems, and financial considerations concerns are mitigated. He disclosed his financial problems on his January 4, 2012 Electronic Questionnaires for Investigations Processing (e-QIP) version of a security clearance application (SF 86), and personal conduct concerns are mitigated. Eligibility for access to classified information is granted.

Statement of the Case

On January 4, 2012, Applicant submitted an SF 86. (GE 1) On April 29, 2014, 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) as revised by the Under Secretary of Defense for Intelligence on August 30, 2006, which became effective on September 1, 2006.

The SOR alleged security concerns under Guidelines F (financial considerations) and E (personal conduct). (HE 2) 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. (HE 2)

On May 23, 2014, Applicant responded to the SOR allegations and requested a hearing. (HE 3) Department Counsel was ready to proceed on August 12, 2014. On August 25, 2014, the case was assigned to me. On September 9, 2014, the Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing, and on September 17, 2014, issued an amended notice of hearing, both setting the hearing for October 2, 2014. The hearing was held as scheduled. Applicant affirmatively waived his right to 15 days of notice of date, time, and location of the hearing. (Tr. 15) Department Counsel offered six exhibits, which were admitted without objection. (Tr. 23; GE 1-6) The transcript was received on October 10, 2014. Applicant provided eight exhibits to Department Counsel on October 20, 2014, which were in turn, provided to me on October 24, 2014, and admitted without objection on October 24, 2014. (AE A-H)

Findings of Fact¹

In Applicant's SOR response, he admitted in full or in part the allegations in SOR ¶¶ 1.c, 1.k, 1.l, 2.a, and 2.b. He denied the other SOR allegations, and he provided some extenuating and mitigating information. Applicant's admissions are accepted as findings of fact.

Applicant is a 49-year-old information technology professional, who has worked for a defense contractor for the previous three years. (Tr. 31) In 1983, he graduated from high school. (Tr. 7) In 2004, he was awarded a bachelor's of science degree in computer networking. (Tr. 8) He served on active duty in the Marine Corps for one year and for five years in the reserves as a wireman. (Tr. 8-9) He left the Marine Corps as a corporal (E-4), and he received an honorable discharge. (Tr. 8)

Applicant married in 1994, and he was divorced in 2008. (Tr. 68) His children are ages 14, 15, and 17. (Tr. 69) There is no evidence of security violations, criminal conduct, use of illegal drugs, or alcohol abuse.

Financial Considerations

Applicant's credit reports and SOR allege ten delinquent, collection, or charged-off accounts totaling \$18,233 as follows: (1) and (2) ¶¶ 1.a (\$1,387) and 1.b (\$878) are telecommunications collection accounts owed to the same creditor; (3) ¶ 1.c (\$7,217) is a charged-off bank debt; (4) ¶ 1.d (\$1,599) is a charged-off bank debt; (5) ¶ 1.e (\$3,023) is a charged-off bank debt; (6) and (7) ¶¶ 1.f (\$701) and 1.g (\$1,083) are bank collection

¹Some details have not been included in order to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

debts owed to the same creditor; (8) ¶ 1.h (\$76) is a laundry-related collection bank debt; (9) ¶ 1.i (\$285) is a medical-collection debt; and (10) 1.j (\$1,944) is a medical-collection debt. (HE 2)

Applicant was unemployed from September 2008 to March 2009. (Tr. 32, 34) He was previously unemployed in 2003. (Tr. 33) He had financial problems, and some debts became delinquent while he was unemployed. (Tr. 33) In 2009, he moved to a different state, and many of his bills were not forwarded to his new address. His current annual pay is about \$75,000. (Tr. 32)

Applicant said he disputed the telecommunications debts in SOR ¶¶ 1.a (\$1,387) and 1.b (\$878), and that they do not appear on his December 2013 and April 2014 credit reports. (Tr. 36-40; AE D, H) Applicant said he contacted the creditor for the credit card debt in SOR ¶ 1.c in 2012 and 2013, and the creditor advised they were unable to find a record of the account. (Tr. 40-41)

In December 2013, Applicant paid \$825 to the creditor holding the debt in SOR ¶ 1.d (\$1,599), and the debt was resolved. (Tr. 41-43; AE F, H) For the debt in SOR ¶ 1.e (\$3,023), he said he had been paying the creditor \$180 monthly for more than two years, and he had reduced the debt from \$6,000 to \$743. (Tr. 44-45; AE E, H)

Applicant did not do anything to resolve the debts in SOR ¶¶ 1.f (\$701) and 1.g (\$1,083) which were owed to the same creditor; however, Applicant noted the two debts did not appear on his credit report. (Tr. 48-49) On February 2, 2012, he paid the debt in SOR ¶ 1.h (\$76), and his current credit report indicates the debt is paid. (Tr. 50-51; AE B) He said he paid the debt in SOR ¶ 1.i (\$285). (Tr. 52) He believed the debt in SOR ¶ 1.j (\$1,944) was paid using a garnishment from his salary in 2008. (Tr. 53) His October 7, 2014 credit report shows four medical debts were paid, including a medical judgment for \$2,206 that was satisfied in 2008. (AE G)

At one point Applicant's student loans were delinquent and his pay was being garnished \$180 monthly; however, after six months the garnishment was lifted, and the monthly payment was reduced to \$90. (Tr. 57-59) He is current on his student loans and child support payments. (Tr. 61; AE C, H)

Applicant filed his federal and state income tax returns for 2008 to 2012 in 2012 and 2013. (Tr. 55-56; GE 3) He believed he did not have to file a tax return if he did not owe any taxes. (GE 2) He owed \$28 for federal income taxes for tax year 2011, which he paid when he filed his tax return. (Tr. 55; GE 3) Most of those years, he was due to receive a refund. His federal and state taxes are current. (Tr. 56-57)

Applicant's October 7, 2014 credit report shows one negative account and one collection account as "potentially negative information." (AE G) It shows 12 accounts as "pays as agreed." (AE G) A utility account with a zero balance shows a \$69 charge off, and it indicates the debt was paid in January 2014. (AE G) Although he did not indicate he had financial counseling, he generated a personal financial statement or budget. He promised to maintain his finances and ensure he does not have future delinquent debt.

Personal Conduct

When Applicant completed his January 4, 2012 SF 86, he disclosed his delinquent student loans and child support debts. (Tr. 65; GE 1) He also disclosed that he had not timely filed his tax returns for 2008 to 2011. He explained that he had been living in a different state from when his delinquent debts occurred, and he was not aware of any delinquent debts, except for his student loans and child support debt. (Tr. 65) On January 25, 2012, an Office of Personnel Management (OPM) investigator interviewed Applicant, and he learned that several debts were listed as delinquent on his credit report. (Tr. 66)

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 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.” 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 interview, and SOR response. His SOR alleges 10 delinquent,

collection, or charged-off accounts totaling \$18,233. He filed his federal and state income tax returns from 2008 to 2012 in 2012 and 2013. The Government established the disqualifying conditions in AG ¶¶ 19(a), 19(c), and 19(g), and additional inquiry about the possible applicability of mitigating conditions is required.

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;² 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

²The 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 debts warrants full application of AG ¶¶ 20(a) to 20(c). His financial problems were affected by circumstances largely beyond his control. Applicant has a lengthy history of unemployment. He had insufficient income to pay his debts; however, after he became employed, he brought his student loans and child support to current status, and paid numerous medical debts. He filed his state and federal income tax returns for 2008 to 2012 in early 2012 and 2013, and he had withheld sufficient funds so that he only owed \$28. All of his taxes are current. He promised to maintain his financial responsibility.³

Applicant’s delinquent debts “occurred under such circumstances that [are] unlikely to recur and [do] not cast doubt on [his] current reliability, trustworthiness, or good judgment.” He became unemployed and lacked the income to pay his debts. This is an unusual circumstance that caused his delinquent debt. He acted responsibly under the circumstances by maintaining contact with some of his creditors,⁴ making payments and bringing his student loans, taxes, and child support to current status, as well as paying his other delinquent debts. Although he did not receive financial counseling, there are clear indications that the problem is being resolved or is under control.

AG ¶ 20(d) is partially applicable. Applicant admitted responsibility for and took reasonable and responsible actions to resolve his SOR debts, establishing some good faith. AG ¶ 20(e) is applicable to the debts he successfully disputed, which were then removed from his credit report.

³ The Appeal Board has indicated that promises to pay off delinquent debts in the future are not a substitute for a track record of paying debts in a timely manner and otherwise acting in a financially responsible manner. ISCR Case No. 07-13041 at 4 (App. Bd. Sept. 19, 2008) (citing ISCR Case No. 99-0012 at 3 (App. Bd. Dec. 1, 1999)).

⁴ “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.

In sum, Applicant fell behind on his debts because of unemployment. He has done all that is reasonably possible for him to do to establish his financial responsibility. His efforts are sufficient to fully mitigate financial considerations security concerns.

Personal Conduct

AG ¶ 15 expresses the security concern pertaining to personal conduct:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

One personal conduct disqualifying condition under AG ¶ 16 is potentially applicable. AG ¶ 16(a) provide, "(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire . . . used to . . . determine security clearance eligibility or trustworthiness"⁵

SOR ¶¶ 2.a and 2.b allege Applicant deliberately omitted several delinquent debts from his January 4, 2012 SF 86. However, AG ¶ 16(a) does not apply because his omission of financial information was not intentional. He disclosed adverse financial information about not timely filing his tax returns, his history of delinquent student loans and delinquent child support debts. Some of the negative information in his credit report was incorrect. Moreover, he moved to a different state, and he was unaware of some delinquent debt. Applicant did not intend to deceive security officials.

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):

⁵The Appeal Board has cogently explained the process for analyzing falsification cases, stating:

(a) when a falsification allegation is controverted, Department Counsel has the burden of proving falsification; (b) proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred; and (c) a Judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning the applicant's intent or state of mind at the time the omission occurred. [Moreover], it was legally permissible for the Judge to conclude Department Counsel had established a prima facie case under Guideline E and the burden of persuasion had shifted to the applicant to present evidence to explain the omission.

ISCR Case No. 03-10380 at 5 (App. Bd. Jan. 6, 2006) (citing ISCR Case No. 02-23133 (App. Bd. June 9, 2004)).

(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 Guidelines E and F in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Applicant is a 49-year-old information technology professional, who has worked for a defense contractor for the previous three years. In 2004, he was awarded a bachelor's of science degree in computer networking. He served on active duty in the Marine Corps for one year and for five years in the reserves as a wireman; he left the Marine Corps as a corporal (E-4); and he received an honorable discharge. 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 in the Marine Corps. There is every indication that he is loyal to the United States and his employer. His unemployment caused his financial woes. I give Applicant some credit for maintaining contact with some of his creditors and bringing his student loans and child support debts to current status. As a result of his unemployment, he fell behind on his child support, student loans, and some other debts. He failed to file his income tax returns, as is required when one's income exceeds certain levels. Even though he did not owe the Government, his failure to file tax returns was irresponsible and violated federal law. However, once he learned that he was required to file his tax returns notwithstanding that he did not owe taxes, he did so.

The Appeal Board has addressed a key element in the whole-person analysis in financial cases stating:

. . . the concept of meaningful track record necessarily includes evidence of actual debt reduction through payment of debts. However, an applicant is not required, as a matter of law, to establish that he has paid off each and every debt listed in the SOR. All that is required is that an applicant demonstrate that he has . . . established a plan to resolve his financial problems and taken significant actions to implement that plan. The Judge can reasonably consider the entirety of an applicant's financial situation and his actions in evaluating the extent to which that applicant's plan for the reduction of his outstanding indebtedness is credible and realistic. See Directive ¶ E2.2(a) (Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching

a determination.) There is no requirement that a plan provide for payments on all outstanding debts simultaneously. Rather, a reasonable plan (and concomitant conduct) may provide for the payment of such debts one at a time. Likewise, there is no requirement that the first debts actually paid in furtherance of a reasonable debt plan be the ones listed in the SOR.

ISCR Case No. 07-06482 at 2-3 (App. Bd. May 21, 2008) (internal citations and quotation marks omitted). Applicant's October 7, 2014 credit report corroborates his statements about not having any delinquent debts. He understands what he needs to do to establish and maintain his financial responsibility. His efforts at debt resolution have established a "meaningful track record" of debt re-payment. I am confident he will keep his promise to maintain his financial responsibility.⁶

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 and personal conduct concerns are mitigated, and eligibility for access to classified information is granted.

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:	FOR APPLICANT
Subparagraphs 1.a-1.l:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraphs 2.a and 2.b:	For Applicant

⁶Of course, the Government can re-validate Applicant's financial status at any time through credit reports, investigation, and additional interrogatories. Approval of a clearance now does not bar the Government from subsequently revoking it, if warranted. "The Government has the right to reconsider the security significance of past conduct or circumstances in light of more recent conduct having negative security significance." ISCR Case No. 10-06943 at 4 (App. Bd. Feb. 17, 2012). Violation of a promise made in a security context to pay legitimate debts also raises judgment concerns under Guideline E, and may support future revocation of a security clearance. An administrative judge does not have "authority to grant an interim, conditional, or probationary clearance." ISCR Case No. 10-06943 at 4 (App. Bd. Feb. 17, 2012) (citing ISCR Case No. 10-03646 at 2 (App. Bd. Dec. 28, 2011)). See also ISCR Case No. 04-03907 at 2 (App. Bd. Sep. 18, 2006) (stating, "The Board has no authority to grant [a]pplicant a conditional or probationary security clearance to allow her the opportunity to have a security clearance while she works on her financial problems."). This footnote does not imply that this Applicant's security clearance is conditional.

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

Mark Harvey
Administrative Judge