



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



In the matter of:)
)
-----) ISCR Case No. 12-03903
)
Applicant for Security Clearance)

Appearances

For Government: Candace Le'i Garcia, Esquire, Department Counsel
For Applicant: *Pro se*

10/15/2014

Decision

HARVEY, Mark, Administrative Judge:

Applicant's statement of reasons (SOR) alleges ten delinquent, collection, or charged-off accounts totaling \$53,818. He paid two debts, and three large debts are in established payment plans. He disputed his responsibility for several debts, and they are not listed on his April 2014 credit report. He provided sufficient documentation of his progress in resolving his financial problems. Financial considerations concerns are mitigated. Eligibility for access to classified information is granted.

Statement of the Case

On July 17, 2011, Applicant submitted a Questionnaire for National Security Positions version of a security clearance application (SF 86). (Item 3) On March 12, 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) 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 April 16, 2014, 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 7, 2014, was provided to him on August 18, 2014.¹ Applicant responded to the FORM and provided additional mitigating evidence. Department Counsel did not object to my consideration of the additional evidence. The case was assigned to me on October 1, 2014.

Findings of Fact²

In his Answer to the SOR, Applicant admitted responsibility for the debts in SOR ¶¶ 1.a to 1.c, 1.f, and 1.g. (Item 2) He indicated the debts in SOR ¶¶ 1.a to 1.c were in established payment plans and the debts in 1.f and 1.g were paid. (Item 2) He denied responsibility for the remaining SOR debts. (Item 2) His admissions are accepted as findings of fact.

Applicant is a 47-year-old electrical equipment repairman, who has worked for a defense contractor since September 2011.³ He graduated from high school in 1985, and he has completed about some college credits with a focus on electrical engineering. From September 1985 to June 1988, he served on active duty in the Army, and he received an honorable discharge.

From January 2010 to July 2011, he worked as an aircraft electrician; from June 2009 to January 2010, he was unemployed; from April 2008 to June 2009, he worked as an electrician and assistant production line supervisor at a naval base; and from March 2007 to April 2008, he worked as an electrician. From November 2004 to April 2008, he worked as a loan officer for several companies.

From 2002 to 2008, Applicant worked part time as a personal trainer and provided electrical work. In 2003, he was divorced, and there were two children from this marriage.

¹The Defense Office of Hearings and Appeals (DOHA) transmittal letter is dated August 8, 2014, and Applicant's receipt is dated August 18, 2014. The DOHA transmittal letter informed Applicant that he had 30 days after his receipt to submit information.

²Some details have been excluded in order to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

³Unless stated otherwise, the sources for the information in this paragraph and the next paragraph are his July 17, 2011 SF 86, his September 3, 2011 Office of Personnel Management (OPM) personal subject interview (PSI), and his July 18, 2011 Declaration for Federal Employment and resume. (Items 3-5)

Financial Considerations

Applicant's history of delinquent debt is documented in his July 17, 2011 SF 86, his September 3, 2011 Office of Personnel Management (OPM) personal subject interview (PSI), his July 18, 2011 Declaration for Federal Employment, and his 2013 credit report. (Items 3-7) His SOR alleges ten delinquent, collection, or charged-off accounts totaling \$53,818.

Applicant explained in his September 3, 2011 OPM PSI that he did not file his federal and state tax returns from 2002 to 2006, resulting in tax debts totaling \$51,634. (Items 1, 5) From 2002 to 2006, he suffered from a mental illness; he indicated his mental illness caused his financial problems; and he received treatment for his mental illness. (Item 5) In 2009, the Internal Revenue Service (IRS) obtained a lien against him for \$47,938. (Item 2) He established a payment plan that is satisfactory to the IRS, and he provided proof that he has made \$200 monthly payments since July 2011 to the IRS. (Item 2) From July 2012 to present, he made \$200 monthly payments to address his two delinquent state tax debts. (Item 2) The debts in SOR ¶¶ 1.a to 1.c are in established payment plans.

The debts in SOR ¶¶ 1.f (\$277) and 1.g (\$195) pertain to two telecommunications accounts. (Item 1) Applicant said he paid these two debts on January 23, 2014, and he provided an account statement showing a payment of \$355. (FORM response)

Applicant consistently denied knowledge of and responsibility for the debts in SOR ¶¶ 1.d (\$910, a medical account), 1.e (\$513, a city collection account), and 1.f (\$97, a collection account). (Item 1) Those accounts are not listed on Applicant's April 2014 and August 2014 credit reports as delinquent accounts. (SOR response; Item 8)

Applicant said he paid the debts in SOR ¶¶ 1.i (\$120) and 1.j (\$72), which were owed to a municipality. (Item 1) He provided a February 8, 2010 receipt for \$170. (FORM response) His credit report shows "Paid or paying as agreed" for this creditor. (Item 2)

Applicant fell behind on his student loans, child support, and credit cards. See note 3, *supra*. Applicant's April 2014 credit report shows student loans, child support, installment, and credit card accounts in current status or paid as agreed. The only derogatory notations on his August 2014 credit report are two tax liens; however, these entries lack any indication of current status. (Item 8) There is no evidence of credit counseling.

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 revised 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 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;" and "(c) a history of not meeting financial obligations." Applicant's history of delinquent debt is documented in his credit reports, his July 17, 2011 SF 86, his September 3, 2011 OPM PSI, and his July 18, 2011 Declaration for Federal Employment. His SOR alleges ten delinquent, collection, or charged-off accounts totaling \$53,818. During his OPM PSI, he disclosed that he did not file his federal and state tax returns from 2002 to 2006, resulting in tax debts totaling \$51,634. 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;⁴ and

⁴The Appeal Board has previously explained what constitutes a "good faith" effort to repay overdue creditors or otherwise resolve debts:

(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 warrants full application of AG ¶¶ 20(a) to 20(c). His financial problems were affected by circumstances largely beyond his control. Applicant had mental problems, and he did not file his income tax returns for several years. Once he received treatment, he was able to establish payment plans with the IRS and state tax authority. He brought his student loans, child support, and credit cards to current status.⁵

A recent Appeal Board decision illustrates the analysis for applying AG ¶¶ 20(a) and 20(b). In ISCR Case No. 09-08533 (App. Bd. Oct. 6, 2010), the applicant had \$41,000 in delinquent credit card debt and defaulted on a home loan generating a \$162,000 delinquent debt. *Id.* at 2. That applicant filed for bankruptcy the same month the Administrative Judge issued her decision. *Id.* at 1-2. The applicant in ISCR Case No. 09-08533 was recently divorced, had been unemployed for 10 months, and had childcare responsibilities. Her former husband was inconsistent in his payment of child support to her. The Appeal Board determined that AG ¶ 20(a) was "clearly applicable (debt occurred under such circumstances that it is unlikely to recur and [the debt] does not cast doubt on the individual's current reliability, trustworthiness, or good judgment)" even though that applicant's debts were unresolved at the time the Administrative Judge's decision was issued. *Id.* at 3. The Appeal Board also decided that the record evidence raised the applicability of AG ¶ 20(b) because of the absence of evidence⁶ of irresponsible behavior, poor judgment, unreliability, or lack of trustworthiness. *Id.* at 4.

Similarly, in ISCR Case No. 08-06567 at 3 (App. Bd. Oct. 29, 2009) the Appeal Board considered a case where an applicant, who had been sporadically unemployed

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)).

⁵ 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)).

⁶ Applicant has the burden of proving the applicability of any mitigating conditions, and the burden to disprove a mitigating condition never shifts to the Government.

and lacked the ability to pay her creditors, and noted that “it will be a long time at best before she has paid” all of her creditors. The applicant was living on unemployment compensation at the time of her hearing. The Appeal Board explained that such a circumstance was not necessarily a bar to having access to classified information stating:

However, the Board has previously noted that an applicant is not required to be debt-free nor to develop a plan for paying off all debts immediately or simultaneously. All that is required is that an applicant act responsibly given his [or her] circumstances and develop a reasonable plan for repayment, accompanied by “concomitant conduct,” that is, actions which evidence a serious intent to effectuate the plan. See ISCR Case No. 07-06482 at 3 (App. Bd. May 21, 2008).

ISCR Case No. 08-06567 at 3 (App. Bd. Oct. 29, 2009). The applicant in ISCR Case No. 08-06567 used his limited resources to (1) resolve some of his debts; (2) had a repayment plan for the remaining debts; and (3) took “reasonable actions to effectuate that plan.” *Id.* The Appeal Board remanded the Administrative Judge’s decision because it did not “articulate a satisfactory explanation for his conclusions,” emphasizing the Administrative Judge did “not explain[] what he believes that applicant could or should have done under the circumstances that he has not already done to rectify his poor financial condition, or why the approach taken by applicant was not ‘responsible’ in light of his limited circumstances.” *Id.*

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 had mental health problems and made some bad choices about his taxes and other debts. After receiving treatment, he acted responsibly under the circumstances by maintaining contact with his creditors,⁷ making payments, and bringing his debts to current status. 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 not applicable. Although Applicant disputed his responsibility for several relatively minor debts on the SOR, he did not provide documentation showing what he did to document those disputes. His April 2014 and August 2014 credit reports did not include the debts he disputed.

⁷“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 primarily because of mental health issues. He received treatment and has made substantial progress rehabilitating his finances. 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.

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.

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. AG ¶ 2(c). 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.

Applicant is a 47-year-old electrical equipment repairman, who has worked for a defense contractor since September 2011. He graduated from high school in 1985, and he has completed about some college credits with a focus in electrical engineering. From September 1985 to June 1988, he served on active duty in the Army, and he received an honorable discharge. From April 2008 to present, he has worked for multiple employers as an electrician or assistant line supervisor. From November 2004 to April 2008, he worked as a loan officer for several companies. In 2003, he was divorced, and he has two children from this marriage. 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 for his Army service. There is every indication that he is loyal to the United States and his employer. His mental health problems caused his financial woes. I give Applicant substantial credit for maintaining contact with his creditors, establishing payment plans, and either paying or bringing all of his delinquent debts to current status.

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 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 continue to pay his debts and maintain his financial responsibility.⁸

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

⁸Of 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.

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 to 1.j: For Applicant

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