



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 15-00911

Appearances

For Government: Ross Hyams, Esq., Department Counsel
For Applicant: *Pro se*

07/21/2016

Decision

TUIDER, Robert J., Administrative Judge:

Applicant failed to mitigate security concerns under Guideline F (financial considerations). Clearance is denied.

Statement of the Case

On October 16, 2012, Applicant submitted a Questionnaire for National Security Positions (SF-86). On August 4, 2015, 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) effective within the Department of Defense for SORs issued after September 1, 2006.

The SOR alleged security concerns under Guideline F. The SOR detailed reasons why the DOD CAF was unable to find that it is clearly consistent with the national interest to continue a security clearance for Applicant, and it recommended that

his case be submitted to an administrative judge for a determination whether his clearance should be continued or revoked.

On August 27, 2015, Applicant responded to the SOR. On October 1, 2015, Department Counsel was ready to proceed. On October 15, 2015, the case was assigned to another administration judge. On October 28, 2015, the Defense Office of Hearings and Appeals (DOHA) issued a hearing notice setting the hearing for November 16, 2015. After the case was scheduled, it was continued at Applicant's request. On March 9, 2016, the case was reassigned to me. On April 1, 2016, DOHA issued a hearing notice setting the hearing for April 19, 2016. Applicant's hearing was held as rescheduled.

At the hearing, Department Counsel offered Government Exhibits (GE) 1 through GE 5 and Hearing Exhibit (HE) I, which were received into evidence without objection. Applicant did not call any witnesses, testified, and offered Applicant Exhibits (AE) A and AE B, which were received into evidence without objection. On April 26, 2016, DOHA received the hearing transcript (Tr.).

Findings of Fact

Applicant admitted all of the SOR allegations except for SOR ¶¶ 1.d, 1.e, 1.f, 1.k, 1.t, 1.w, 1.y, 1.z and 1.aa. After a thorough review of the record, I make the following findings of fact.

Background Information

Applicant is a 40-year-old aviation scheduler employed by a defense contractor since October 2012. Shortly after he began working for his employer, he was granted an interim secret security clearance which was revoked in August 2015 as a result of these proceedings. Applicant is currently filling a company position that does not require a clearance, but is unsure of his future with his company should he lose his clearance. (Tr. 11-13, 17-18; GE 1)

Applicant graduated from high school in May 1994. He was awarded a bachelor of science degree in business marketing in August 1999. (Tr. 18-19; GE 1.) Applicant married in November 2003 and has been separated since April 2013. He is representing himself in his divorce and stated that he has been having difficulty getting his wife to sign off on the final divorce papers. Applicant and his wife have two minor children – a son and a daughter. He is paying \$800 in monthly child support. His wife is not employed outside the home. Applicant did not serve in the armed forces. (Tr. 19-21, 37-38, 48-49; GE 1.)

Financial Considerations

The SOR alleges 43 separate allegations, 42 of those allegations are debts totaling \$32,205, and 1 of those allegations is a Chapter 7 bankruptcy filed in March 2009 and discharged in August 2009. (SOR ¶¶ 1.a – 1. qq) Applicant's 2009 Bankruptcy and debts alleged in his SOR were substantiated in his November 17, 2012 Office of Personnel Management Personal Subject Interview (OPM PSI), his October 23, 2012 and January 12, 2015 credit reports, his SOR answer, and hearing testimony. (Tr. 22-36; GE 2 – GE 5)

Applicant attributed his financial problems to uncovered medical expenses related to his being plagued with kidney stones since he was 15 years old and his daughter being diagnosed with nephrotic syndrome, a severe kidney disorder. Applicant did not have insurance to cover the cost shares associated with his numerous medical bills. Applicant was also laid off from January 2009 to October 2012. (Tr. 9-11, 21-22)

Applicant testified that he is current on his taxes, but noted that he does owe \$1,565 for tax year 2015 and has set up a monthly payment plan to the Internal Revenue Service. (Tr. 35-37) He further testified that his net monthly income is \$3,800 and estimated that he has a net remainder of "\$700 to \$1,000." He uses his remainder to "pay more on credit cards or take care of whatever is needed" As of his hearing date he had "\$200 maybe" in his savings account. (Tr. 38-41)

Applicant has not contacted any of his medical creditors, which make up the majority of his SOR debts, nor did he produce any evidence that he resolved or attempted to resolve any of his non-medical debts. He did testify that he planned to make payments on debts listed in SOR ¶¶ 1.b and 1.c, which are student loans in the respective amounts of \$291 and \$250, and on the debt in SOR ¶ 1.u, which is a dental bill in the amount of \$461. (Tr. 42, 44-46) Applicant has not sought financial counseling. (Tr. 47-48, 52-54)

Applicant further testified that he has worked hard his entire life. He added that his wife was unable to contribute financially to their marriage because of various medical issues. (Tr. 43-44) Applicant's wife and daughter are currently living with her mother, and he and his son are living with his parents. (Tr. 49-50)

Character Evidence

Applicant submitted two reference letters from his former supervisors. The collective sense of these letters is very favorable pertaining to his character, work performance, and accomplishments. (Tr. 50-52; AE A, AE B)

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 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).

The evidence establishes the disqualifying conditions in AG ¶¶ 19(a) and 19(c), requiring additional inquiry about the possible applicability of mitigating conditions.

Five financial considerations 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; and

(e) the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue.

Applicant's conduct does not warrant application of AG ¶ 20(a) because there is more than one delinquent debt and his financial problems are not isolated. His debt is a "continuing course of conduct" under the Appeal Board's jurisprudence. See ISCR Case No. 07-11814 at 3 (App. Bd. Aug. 29, 2008) (citing ISCR Case No. 01-03695 (App. Bd. Oct. 16, 2002)).

Furthermore, the evidence does not warrant full application of AG ¶ 20(b). Applicant experienced some significant family medical issues as well as a loss of income when he was laid off from January 2009 to October 2012. However, there is no evidence that he took any corrective action to mitigate his SOR debts having been put on notice that these debts were a concern to the Government in his November 2012 OPM PSI or after having received his August 2015 SOR. There is no documented evidence that Applicant remained in contact with his creditors or tried to resolve his debts.¹

AG ¶ 20(c) is not applicable because Applicant did not seek or receive financial counseling. Absent documentation and given Applicant's very recent attempts to resolve three small debts listed in SOR ¶¶ 1.b, 1.c, and 1.u,

¹"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 maintained contact with his creditors and attempted to negotiate partial payments to keep his debts current.

he is unable to receive credit under AG ¶ 20(d).² Applicant's overall efforts to resolve his SOR debts are not sufficiently mitigating. I recognize that he was unemployed from January 2009 to October 2012, however, I also note that he has been employed since October 2012. The vast majority of his debts have been lingering and remain unresolved, and his recent attempt to resolve three long overdue smaller debts shortly before his hearing date does not constitute good faith. AG ¶ 20(e) is not relevant.

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). The discussion in the Analysis section under Guideline F is incorporated in this whole-person section. However, further comments are warranted.

Applicant's reference letters and employment with his defense contractor employer weigh in his favor. He is a law-abiding citizen and a productive member of

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)).

society. There is no evidence to suggest that he is not current on his day-to-day expenses.

However, given the amount, number of debts involved, time elapsed since being notified these debts were a concern, and minimal evidence of documented effort to resolve any of the SOR debts, I am unable to find in Applicant's favor. I recognize the challenges Applicant has faced, but I also note that he has been employed for the last four years. It is difficult to accept the notion that Applicant was precluded from taking more corrective action during that time period. Unfortunately, these concerns, taken as a whole, leave me with doubts regarding Applicant's security worthiness. After weighing the disqualifying and mitigating conditions, and all the facts and circumstances in the context of the whole-person, I conclude he has not mitigated the financial considerations security concerns.

I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my careful consideration of the whole-person factors and supporting evidence, my application of the pertinent factors under the adjudicative process, and my interpretation of my responsibilities under the adjudicative guidelines. Applicant has not fully mitigated or overcome the Government's case. For the reasons stated, I conclude he is not eligible for access to classified information.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline F:	AGAINST APPLICANT
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Subparagraphs 1.a – 1.qq:	Against Applicant
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Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national security to grant Applicant eligibility for a security clearance. Clearance is denied.

ROBERT J. TUIDER
Administrative Judge