



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 15-01199

Appearances

For Government: Douglas Velvel, Esq., Department Counsel
For Applicant: *Pro se*

11/10/2016

Decision

Tuider, Robert J., Administrative Judge:

Applicant's statement of reasons (SOR) alleges 16 delinquent debts totaling \$79,764. His financial problems were caused by underemployment, unemployment, and separation from his spouse. On September 18, 2015, Applicant filed for bankruptcy under Chapter 7 of the Bankruptcy Code, and on January 12, 2016, his nonpriority unsecured debts were discharged. He made sufficient progress resolving his delinquent debts, and financial considerations security concerns are mitigated. Eligibility for access to classified information is granted.

Statement of the Case

On September 7, 2012, Applicant signed and submitted an Electronic Questionnaires for Investigations Processing (SF-86). On August 21, 2015, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued an SOR to Applicant, pursuant to Executive Order (Exec. Or.) 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 for Determining Eligibility for Access to Classified Information* (AG), which became effective on September 1, 2006.

The SOR alleged security concerns under Guideline F (financial considerations). The SOR detailed reasons why the DOD CAF was unable to find that it is clearly consistent with national interest to grant or continue Applicant's access to classified information and recommended referral to an administrative judge to determine whether Applicant's clearance should be granted, continued, denied, or revoked.

On September 21, 2015, Applicant responded to the SOR allegations. On February 3, 2016, Department Counsel was prepared to proceed. On April 15, 2016, the case was assigned to me. On May 19, 2016, the Defense Office of Hearings and Appeals (DOHA) issued a hearing notice setting the hearing for June 9, 2016. Applicant's hearing was held as scheduled. Department Counsel offered Government Exhibits (GE) 1-6 into evidence, and after the hearing, Applicant offered Applicant Exhibits (AE) A-D). All exhibits were admitted into evidence without objection. On June 16, 2016, DOHA received the hearing transcript (Tr.). On July 8, 2016, the record was closed.

Findings of Fact¹

In Applicant's SOR response, he admitted all SOR allegations. The SOR was amended adding an additional allegation under Guideline F that Applicant's debts were discharged under Chapter 7 of the Bankruptcy Code on January 12, 2016. Applicant admitted the additional allegation at his hearing. (Tr. 8) He also provided extenuating and mitigating information. Applicant's admissions are accepted as findings of fact.

Applicant is a 59-year-old maintenance worker. (Tr. 13-14; GE 1) He has worked for the same employer since August 2012. (Tr. 15; GE 1) His employer has six employees. (Tr. 47) In 1975, he graduated from high school. (Tr. 17) In 2000, he received an electrician certification. (Tr. 18) Applicant has not served in the U.S. military. (Tr. 22) He does not hold a security clearance. (Tr. 15-16) In 2012, he received a heavy equipment operator's license. (Tr. 18) In 1979, he married, and his two children are ages 36 and 34. (Tr. 19-21) His spouse has never worked outside their home. (Tr. 22, 33)

Financial Considerations

Applicant's history of delinquent debt is documented in his credit reports, SOR response, Office of Personnel Management (OPM) personal subject interview (PSI), hearing transcript, and hearing exhibits. In November 2010, Applicant's employer substantially reduced his hours and pay, and he was unemployed from November 2011 to August 2012. (Tr. 23-24; GE 1) When he was laid off, he also became separated from his spouse, and he set up a separate household. (Tr. 26-27) Applicant subsequently moved back in with his spouse. (Tr. 30) In 2015, Applicant's gross monthly income was \$3,420, and his net monthly income was \$2,663. (Tr. 31) His

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

monthly house payment is \$1,292. (Tr. 32) His monthly remainder is \$27. (Tr. 35-36) In the event of a financial emergency, his son committed to providing financial assistance. (Tr. 39; AE C) His 2006 car is paid off. (Tr. 32-33; GE 6)

Applicant's SOR alleges 16 delinquent debts totaling \$79,764, and their status is as follows: 11 credit card debts were placed for collection in ¶ 1.a for \$26,720, ¶ 1.b for \$11,324, ¶ 1.c for \$10,996, ¶ 1.f for \$3,999, ¶ 1.g for \$2,592, ¶ 1.h for \$2,034, ¶ 1.j for \$827, ¶ 1.l for \$437, ¶ 1.m for \$2,460, ¶ 1.o for \$958, and ¶ 1.p for \$486; two education loans were placed for collection in ¶ 1.d for \$7,718 and ¶ 1.e for \$4,237; one medical debt was delinquent in ¶ 1.i for \$1,000; and two store debts were placed for collection in ¶ 1.k for \$791 and 1.n for \$3,185.

Applicant attempted to file for bankruptcy; however, the law firm kept his payment and closed their office without filing for bankruptcy on his behalf. (Tr. 40-41) On September 18, 2015, Applicant filed for bankruptcy under Chapter 7 of the Bankruptcy Code, and on January 12, 2016, his nonpriority unsecured debts were discharged. (Tr. 28) His bankruptcy schedules indicate: D—secured claims total \$136,162 (mortgage); E—unsecured priority claims total \$0; and F—unsecured nonpriority claims total \$82,061 (the SOR debts including his student loans were incorrectly listed as nonpriority debts). (GE 6) The two student loans in SOR ¶¶ 1.d and 1.e for \$7,718 and \$4,237 are priority debts and not discharged. (Tr. 29) Applicant is current on his student loans and on his mortgage. (Tr. 29, 32; GE 6) His other SOR debts are discharged. (Tr. 29-30) He received financial counseling as part of the bankruptcy process. (Tr. 31)

Character Evidence

A character witness described Applicant's excellent work performance, utmost competence, and learning ability. (AE A) She recommended favorable consideration of Applicant's application. (AE A) A friend who has known Applicant for 15 years indicated he is honest, professional, and shows initiative in self-improvement and study. (AE D) His manager for four years lauded his dedication and diligence. (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.

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. Thus, nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination about applicant's allegiance, loyalty, or patriotism. It is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. "Substantial evidence" is "more than a scintilla but less than a preponderance." See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his [or her] security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Financial Considerations

AG ¶ 18 articulates the security concern relating to financial problems:

Failure or inability to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise

questions about an individual's reliability, trustworthiness, and ability to protect classified information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

AG ¶ 19 provides two disqualifying conditions that could raise a security concern and may be disqualifying in this case: "(a) inability or unwillingness to satisfy debts"; and "(c) a history of not meeting financial obligations." In ISCR Case No. 08-12184 at 7 (App. Bd. Jan. 7, 2010), the Appeal Board explained:

It is well-settled that adverse information from a credit report can normally meet the substantial evidence standard and the government's obligations under [Directive] ¶ E3.1.14 for pertinent allegations. At that point, the burden shifts to applicant to establish either that [he or] she is not responsible for the debt or that matters in mitigation apply.

(internal citation omitted). Applicant's history of delinquent debt is documented in his credit reports, SOR response, OPM PSI, hearing transcript, and hearing exhibits. 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;² and

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

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

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

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

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

AG ¶¶ 20(a), 20(b), and 20(c) apply. Applicant's statement of reasons (SOR) alleges 16 delinquent debts totaling \$79,764. His financial problems were caused by underemployment, unemployment, and separation from his spouse. On September 18, 2015, Applicant filed for bankruptcy under Chapter 7 of the Bankruptcy Code. Applicant acted responsibly under the circumstances on January 12, 2016, when all of his delinquent nonpriority, unsecured debts were discharged under Chapter 7 of the Bankruptcy Code.³

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)).

³There is some duplication of debts in Applicant's bankruptcy schedules. In a bankruptcy filing, most debtors list potential creditors, even when the debt may have been resold or transferred to a different collection agent or creditor, to ensure notice, and reduce the risk of subsequent dismissal of the bankruptcy. If Applicant failed to list some nonpriority unsecured debts on his bankruptcy schedule, this failure to list such debts does not affect their discharge. Absent fraud, in a no-asset bankruptcy, all unsecured, nonpriority debts are discharged when the bankruptcy court grants a discharge, even when they are not listed on a bankruptcy schedule. See *Judd v. Wolfe*, 78 F.3d 110, 114 (3d Cir. 1996); *Francis v. Nat'l Revenue Service, Inc.*, 426 B.R. 398 (Bankr. S.D. FL 2010), *but see First Circuit Bucks Majority on Discharge of Unlisted Debt in No-Asset Case*, American Bankruptcy Institute, 28-9 ABIJ 58 (Nov. 2009). There is no requirement to re-open the bankruptcy to discharge the debt. *Collier on Bankruptcy*, Matthey Bender & Company, Inc., 2010, Chapter 4-523, ¶ 523(a)(3)(A). Some categories of priority obligations are listed on bankruptcy schedules, but are not discharged by bankruptcy, such as tax debts, student loan debts, and child support obligations.

Applicant received financial counseling and generated a budget as part of the bankruptcy process. His negative financial situation “occurred under such circumstances that it is unlikely to recur and does not cast doubt on the [Applicant’s] current reliability, trustworthiness, or good judgment” under AG ¶ 20(a). He “acted responsibly under the circumstances,” and “the problem is being resolved or is under control” as required under AG ¶¶ 20(b) and 20(c). Applicant did not provide documentation showing he disputed any of his SOR debts, and AG ¶ 20(e) does not apply to any of his SOR debts.

In sum, Applicant has mitigated all of the delinquent debts listed on his SOR. He has not generated any new delinquent debts after January 12, 2016, when his nonpriority unsecured debts were discharged under Chapter 7 of the Bankruptcy Code. His resolution of his delinquent debts through the bankruptcy process shows sufficient effort, good judgment, trustworthiness, and reliability to warrant mitigation of financial considerations concerns.

Based on Applicant’s credible and sincere promise to pay his debts, future new delinquent debt “is unlikely to recur and does not cast doubt on [Applicant’s] current reliability, trustworthiness, or good judgment,” and “there are clear indications that the problem is being resolved or is under control.” His resolution of his delinquent debts and payments on his student loans and mortgage account shows some good faith. He has sufficient income to keep his debts in current status and to continue making progress paying his remaining debts. I am confident that Applicant will conscientiously endeavor to maintain his financial responsibility. His efforts are sufficient to mitigate financial considerations security concerns. Even if financial considerations security concerns are not mitigated under Guideline F, they are mitigated under the whole-person concept, *infra*.

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.

Applicant is a 59-year-old maintenance worker, who has worked for the same employer since August 2012. In 2012, he received a heavy equipment operator's license. His spouse has never worked outside their home. Applicant's former manager and two other character witnesses positively described Applicant's work performance, dedication, diligence, competence, learning ability, honesty, professionalism, and initiative. He is sufficiently mature to conscientiously comply with his security responsibilities.

Applicant's delinquent debts were caused by underemployment, unemployment, and separation from his spouse. His income is limited, and his spouse does not work outside their home. His nonpriority unsecured debts were discharged on January 12, 2016, through bankruptcy. His secured debt (mortgage) and his priority debts (student loans) are current. He is communicating with his creditors and assures he intends to pay his debts. He understands the conduct required to retain his security clearance. 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 has established a "meaningful track record" of debt re-payment, and I am confident he will maintain his financial responsibility.⁴

⁴The Government has the option of following-up with more questions about Applicant's finances. The Government can re-validate Applicant's financial status at any time through credit reports, investigation, and 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). An administrative judge does not have "authority to grant an interim, conditional, or probationary clearance." ISCR Case No. 10-06943 at 4

I have carefully applied the law, as set forth in *Egan*, Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. Financial considerations security concerns are mitigated.

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 through 1.q: For Applicant

Conclusion

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

Robert J. Tuider
Administrative Judge

(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 decision to grant Applicant's security clearance is conditional.