



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



In the matter of:

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ISCR Case No. 15-02198

Applicant for Security Clearance

Appearances

For Government: Ray T. Blank, Jr., Esq., Department Counsel
For Applicant: David H. Leroy, Esq.

10/25/2016

Decision

HARVEY, Mark, Administrative Judge:

Applicant's statement of reasons (SOR) includes 17 allegations of delinquent debts totaling \$75,927 and dismissal of a Chapter 13 Bankruptcy filing in 2011. While circumstances beyond his control damaged his finances, he did not show enough progress paying his debts to mitigate financial considerations security concerns. He disclosed his bankruptcy; however, he unintentionally failed to disclose his delinquent debts on his August 21, 2014 Electronic Questionnaire for National Security Positions (e-QIP) or security clearance application (SCA). Personal conduct security concerns were not established. Eligibility for access to classified information is denied.

Statement of the Case

On August 21, 2014, Applicant completed and signed his SCA. (Government Exhibit (GE) 1) On October 25, 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*; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive); and the adjudicative guidelines (AG), which became effective on September 1, 2006.

The SOR detailed reasons why the DOD CAF did not find under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for him, and recommended referral to an administrative judge to determine whether a

clearance should be granted, continued, denied, or revoked. (Hearing Exhibit (HE) 2) Specifically, the SOR set forth security concerns arising under Guideline F (financial considerations) and Guideline E (personal conduct).

On December 3, 2015, Applicant responded to the SOR. On July 15, 2016, Department Counsel was ready to proceed. On July 25, 2016, the case was assigned to me. On September 14, 2016, the Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing, setting the hearing for September 20, 2016. (HE 1) The hearing was conducted using video teleconference. Applicant waived his right under the Directive to 15 days of notice of the date, time, and location of his hearing. (Tr. 12-13) His hearing was held as scheduled.

During the hearing, Department Counsel offered five exhibits; Applicant offered eight exhibits; and all proffered exhibits were admitted without objection. (Tr. 20-22; Government Exhibit (GE) 1-5; Applicant Exhibit (AE) 1-8) On September 28, 2016, DOHA received a copy of the transcript of the hearing.

Findings of Fact¹

In Applicant's SOR response, he admitted all of the SOR allegations except for the allegation in SOR ¶ 2(a). He also provided extenuating and mitigating information. Applicant's admissions are accepted as findings of fact.

Applicant is a 57-year-old network operations critical situation manager, where he has worked for his employer since 2010. (Tr. 23, 27-28; GE 1) He does not have access to classified information in his current employment; however, a security clearance is required for employment under the DOD contract. (Tr. 27, 41-42) In 1986, he married, and in 2001, he divorced. (Tr. 81) In 2004, he married. (Tr. 23) His spouse has three children, and Applicant has two adult children from prior relationships. (Tr. 23) He does not have a criminal record; he does not abuse illegal drugs; and there is no evidence of security violations. (Tr. 24; GE 1)

In 1998, Applicant was honorably retired as a staff sergeant (E-5) after 20 years of U.S. Air Force service. (Tr. 24-25) When he was in the Air Force, he held a high-level security clearance. (Tr. 27) From 1998 to 2006, he worked as a personal computer technician for the water company. (Tr. 25) He returned to college from 2006 to 2009, and he received a bachelor's degree in information systems technology. (Tr. 24, 26)

Financial Considerations

Applicant's spouse was employed as a nurse, and from about 2005 to about 2010, her annual salary with per diem when traveling was about \$80,000. (Tr. 29, 59-60) The total annual family income in 2009 was about \$120,000. (Tr. 72) In 2010, she

¹Some details have been excluded to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

injured her ankle at work. (Tr. 30-31, 63) She had eight corrective surgeries that were not able to return her to full mobility. (Tr. 31-32) In February 2012, she was released from her employment, and she began receiving \$1,600 monthly in workers' compensation. (Tr. 33) Applicant's spouse is currently receiving Social Security disability of about \$1,500 monthly. (Tr. 34) Her injury caused their income to be reduced by half, and their medical bills totaled about \$40,000. (Tr. 32) He said he made payments on medical bills, kept his mortgage current, brought his student loans to current status, and paid off the lien on a vehicle. (Tr. 32, 65-66) They have reduced the balance on a credit card from \$10,000 to \$1,100. (Tr. 35) His spouse's workers' compensation claim is pending, and if it is successful, Applicant intends to use the proceeds to pay off his debts. (Tr. 35)

In 2014, Applicant's spouse's daughter had a difficult pregnancy, and she spent about 90 days in a hospital. (Tr. 37) Applicant provided financial support to her. (Tr. 37) She is currently disabled. (Tr. 37) They are also providing financial assistance to his spouse's son, who currently lives with Applicant and his spouse. (Tr. 37)

Applicant's current annual salary is \$46,000. (Tr. 27) He received three pay raises after 2010, and his pay increased from \$11.50 an hour to \$22.50 an hour. (Tr. 57) His former spouse receives 30 percent of his Air Force retired pay, and he receives the other 70 percent. (Tr. 58) He receives \$300 monthly from the Department of Veterans Affairs for his service-connected disability. (Tr. 59) Applicant obtained a September 11, 2016 Equifax credit report which shows that most of the SOR debts no longer appear on his credit report. (Tr. 51; AE 8)

SOR ¶ 1.a alleges in July 2011, Applicant filed a Chapter 7 bankruptcy; in August 2011, he filed a Chapter 13 bankruptcy; and in September 2011, the Chapter 13 bankruptcy was dismissed. Applicant believed he was ineligible for a Chapter 7 bankruptcy, and it was prudent to shift to a Chapter 13 bankruptcy. (Tr. 64) Applicant said the bankruptcy was dismissed because he did not want to use bankruptcy to get out of paying his debts. (Tr. 36, 63-65; AE 2) The Chapter 13 bankruptcy was dismissed before he made any payments. (Tr. 83)

SOR ¶ 1.b alleges a timeshare repossession debt for \$24,448.

SOR ¶ 1.c alleges a department store collection debt for \$11,919.

SOR ¶¶ 1.d to 1.i, 1.l, 1.m, 1.o, 1.p, 1.r allege 11 bank collection debts for \$5,565; \$5,441; \$5,376; \$4,740; \$4,347; \$3,632; \$1,715; \$1,577; \$1,288; \$774; and \$375.

SOR ¶¶ 1.j, 1.k, and 1.n allege three collection debts from unspecified sources for \$1,840; \$866; and \$1,524.

SOR ¶ 1.q alleges a collection debt from a gym membership for \$500.

Applicant did not make any payments to address any of the debts in the statement of reasons. (Tr. 66-68) Some of the SOR debts have been delinquent since 2010. (Tr. 70, 74-76; AE 8 at 3, 5, 8) On several debts, Applicant did not maintain contact with the creditors. (Tr. 67-69) He said he made some attempts to set up payment plans; however, he does not have any payment plans arranged with any of the SOR creditors. (Tr. 66-70)

Personal Conduct

Applicant was under pressure to get his August 21, 2014 SCA completed, and his employer set a deadline for its submission. (Tr. 38-43) He was unable to obtain access to his SCA because of technical difficulties for several days. (Tr. 38-40) He also had to collect information to complete his SCA. (Tr. 42-43) He worked all night to complete his SCA. By the time he began the financial portion of his SCA, he was exhausted, and it was about 4:00 a.m. (Tr. 43) Section 26, Financial Record, of Applicant's SCA asks in the past seven (7) years:

Have you filed a petition under any chapter of the bankruptcy code? Have you had any possessions or property voluntarily or involuntarily repossessed or foreclosed? Have you had any bills or debts turned over to a collection agency? Have you had any account or credit card suspended, charged off, or cancelled for failing to pay as agreed? Have you been over 120 days delinquent on any debt(s)? Are you currently over 120 days delinquent on any debt(s)?

Applicant answered "yes" to the bankruptcy question and disclosed that he filed for bankruptcy protection under Chapter 13 of the Bankruptcy Code in 2011. (Tr. 44, 76-77) More than 18 debts were listed on his Chapter 13 bankruptcy filing. (Tr. 85-86) He answered "no" to the other financial questions, and he failed to disclose any of the 17 delinquent debts listed in the previous section. He was aware that the Government would check his bankruptcy and credit reports and would learn about his financial problems. (Tr. 44-45, 48) He mistakenly marked "no" in his answers about debts in collections, cancelled credit cards, delinquent debts, and repossessed properties. (Tr. 47) He read the questions; he was aware he had debts in collections; and conceded his answers were not accurate. (Tr. 47-48, 79-80) He was tired after working all night on his SCA, and he missed the mistake in the financial section. (Tr. 44-50) His failure to provide accurate and complete financial information was unintentional and not designed to deceive the Government. (Tr. 56)

Character Evidence

Three of Applicant's current managers and a manager where he was previously employed provided character statements. (AE 3-AE 6) The general sense of Applicant's four character statements is that Applicant is honest, responsible, diligent, dedicated, and trustworthy. He shows leadership, has integrity, and possesses an excellent reputation. These four statements support continuation of his security clearance.

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. Thus, nothing in this decision should be construed to suggest that it is based, 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 for 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.” Applicant’s history of delinquent debt is documented in his credit reports, SOR response, and hearing record. 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

(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).

Applicant presented some important mitigating information. Several circumstances beyond his control adversely affected his finances. In 2010, Applicant's spouse was hurt at work, and the family income was reduced by half. They also had medical bills. He provided support for two of his spouse's children. However, he did not provide enough specifics about how these circumstances adversely affected his finances, and he did not show that he acted responsibly to address his delinquent SOR debts during the last three years when he had stable employment, and he should have been acclimated to his spouse's reduction in income.

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)).

Applicant's decision to file for bankruptcy under Chapter 13 of the Bankruptcy Code in 2011 does not establish any disqualifying conditions, and SOR ¶ 1.a is mitigated. He is not credited with mitigating the other SOR debts because he did not provide any documentation showing progress paying the debt or a reasonable dispute of any debts, such as copies of letters to the SOR creditors and credit reporting companies disputing his responsibility for any debts.

There is insufficient evidence about why he was unable to make greater documented progress resolving any of his SOR debts. There is insufficient assurance that his financial problems are being resolved, are under control, and will not recur in the future. Under all the circumstances, he failed to establish that financial considerations security concerns are mitigated.

Personal Conduct

AG ¶ 15 explains why personal conduct is a security concern stating:

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.

AG ¶ 16 describes two conditions that could raise a security concern and may be disqualifying in this case:

- (a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire . . . used to conduct investigations, . . . determine security clearance eligibility or trustworthiness. . . ; and
- (b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative.

Applicant unintentionally failed to disclose his delinquent debts on his August 21, 2014 SCA. He disclosed his 2011 bankruptcy filing on his SCA, and it was obvious that he had serious financial problems. Bankruptcy filings are readily available to the Government through the Pacer system. Applicant was not attempting to conceal his financial problems or deceive the Government. The allegation that he knowingly and intentionally made a false statement on his August 21, 2014 SCA is not substantiated. Personal conduct security concerns are not established.

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 Guidelines F and E 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 57-year-old network operations critical situation manager, where he has worked for his employer since 2010. In 1998, Applicant was honorably retired as a staff sergeant after 20 years of Air Force service. In 2009, he received a bachelor's degree in information systems technology. The general sense of Applicant's four character statements is Applicant is honest, responsible, diligent, dedicated, and trustworthy. He shows leadership, has integrity, and possesses an excellent reputation. These statements support reinstatement of his security clearance. He does not have a criminal record; he does not abuse illegal drugs; and there is no evidence of security violations. Applicant is credited with mitigating the bankruptcy allegation in SOR ¶ 1.a. He is also credited with mitigating the allegation that he intentionally falsified his August 21, 2014 SCA.

The disqualification evidence is more persuasive. Applicant has a lengthy history of delinquent debt. In his SOR response, Applicant admitted responsibility for 17 delinquent debts totaling \$75,927. Applicant did not provide enough specifics about how circumstances beyond his control adversely affected his finances;³ he did not provide copies of his tax returns, which would have documented his changes in income; he did not show that he acted responsibly to address his delinquent debts; he did not show how he reduced his expenses to conform with his reduction in income; he did not provide a current budget; he did not provide documentation showing a reasonable

³ He described his spouse's injury, and said he and his spouse's income declined by 50 percent. He said there were \$40,000 in medical bills. He did not provide corroborating documentation. As an Air Force retiree, he would have had TRICARE coverage to pay most of his whatever medical expenses not covered by his spouse's insurance.

dispute of any SOR debts; he did not provide documented payment histories of non-SOR debts such as his mortgage, student loans, vehicle lien, and credit card accounts; and he admitted he did not make any payments to any of his SOR creditors. His failure to make greater progress resolving his SOR debts shows lack of financial responsibility and judgment and raises unmitigated questions about Applicant's reliability, trustworthiness, and ability to protect classified information. See AG ¶ 18. More documented financial progress is necessary to mitigate financial considerations security concerns.

It is well settled that once a concern arises regarding an applicant's security clearance eligibility, there is a strong presumption against the grant or renewal of a security clearance. See *Dorfmont*, 913 F. 2d at 1401. Unmitigated financial considerations concerns lead me to conclude that grant of a security clearance to Applicant is not warranted at this time. This decision should not be construed as a determination that Applicant cannot or will not attain the state of reform necessary for award of a security clearance in the future. With more effort towards documented resolution of his past-due debts, and a track record of behavior consistent with his obligations, he may well be able to demonstrate persuasive evidence of his security clearance worthiness.

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. I conclude that personal conduct security concerns are mitigated; however, financial considerations security concerns are not mitigated. It is not clearly consistent with the national interest to grant or reinstate Applicant's security clearance eligibility at this time.

Formal Findings

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

Paragraph 1, Guideline F:	AGAINST APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraphs 1.b through 1.r:	Against Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or reinstate Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

MARK HARVEY
Administrative Judge