



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



In the matter of:

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ISCR Case No. 15-02474

Applicant for Security Clearance

Appearances

For Government: Benjamin Dorsey, Esq., Department Counsel
For Applicant: *Pro se*

08/17/2016

Decision

HARVEY, Mark, Administrative Judge:

Applicant's statement of reasons (SOR) includes three allegations of delinquent debts, including a \$17,058 debt owed to the Defense Finance and Accounting Service (DFAS). The DFAS debt has been delinquent for more than 10 years, and he decided not to make further attempts to resolve the DFAS debt. He did not show enough progress paying or resolving his DFAS debt to mitigate financial considerations security concerns. Access to classified information is denied.

History of the Case

On December 19, 2012, Applicant completed and signed his Questionnaire for National Security Positions or security clearance application (SCA). (Government Exhibit (GE) 1) On November 2, 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 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) 3) Specifically, the SOR set forth security concerns arising under Guideline F (financial considerations).

On December 2, 2015, Applicant responded to the SOR. On April 8, 2016, Department Counsel was ready to proceed. On May 24, 2016, the case was assigned to me. On June 7, 2016, the Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing, setting the hearing for June 30, 2016. (HE 1) After a brief hearing, Applicant's request for a delay was granted. On June 30, 2016, DOHA issued a notice of hearing, setting the hearing for July 25, 2016. (HE 2) The second hearing started from the beginning without consideration of the prior hearing. (Tr. 11-12) His hearing was held as scheduled on July 25, 2016.

During the hearing, Department Counsel offered four exhibits; Applicant offered two exhibits; and all exhibits were admitted without objection. (Tr. 17-20; Government Exhibit (GE) 1-4; Applicant Exhibit (AE) A-B) On July 11, 2016, and August 2, 2016, DOHA received a copy of the first and second transcript of the hearings.

Findings of Fact¹

In Applicant's SOR response, he admitted the allegations in SOR ¶¶ 1.a and 1.c. He denied the allegation in SOR ¶ 1.b. He also provided extenuating and mitigating information. Applicant's admissions are accepted as findings of fact.

Applicant is a 43-year-old security lieutenant, who has worked for his employer for five years. (Tr. 6, 23; GE 1) He also holds part-time employment as a security officer. (Tr. 23) His total annual income from both jobs is \$95,000. (Tr. 24) In 1991, he graduated from high school. (Tr. 7) He served in the Marine Corps from 1992 to 1996, and from 1998 to 2001. (Tr. 7) He was honorably discharged as a sergeant. (Tr. 7) His final Marine Corps specialty was maintenance administrator. (Tr. 8) In 1995, he married, and in 2002, he divorced. (Tr. 9) His children are ages 16 and 21. (Tr. 10)

Financial Considerations

Applicant's credit reports and the SOR allege three delinquent debts totaling \$19,244. The status of his three SOR debts is as follows:

SOR ¶ 1.a alleges a \$1,479 debt resulting from an on-line education account. (Tr. 26-27) The debt has been owed for more than two years. (Tr. 28) Applicant said he paid \$50 monthly for the three months before his hearing to the creditor. (Tr. 26-27) He believes the debt is reduced to \$1,300. (Tr. 27) He said he did not have any documentation showing his payments. (Tr. 28) He plans to pay the debt by October 2016. (Tr. 30)

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

SOR ¶ 1.b alleged a debt owed to DFAS for \$17,058. Applicant said he did not understand why he owed this debt to DFAS. In November 1999, Applicant, who was on active duty in the Marine Corps, moved from his off-post residence into family quarters on post with his spouse, who was also on active duty. (Tr. 30-31, 47-48) In the summer of 2000, Applicant moved from his spouse's family quarters to the barracks. (Tr. 31, 48) At that time, Applicant was a corporal, and his spouse was a sergeant. (Tr. 32) His spouse had custody of their child. (Tr. 32) Applicant was unsure about when his spouse moved out of family quarters; however, he believed it was in 2001. (Tr. 32, 48) Applicant was discharged from the Marine Corps in November 2001. (Tr. 50) Applicant was fairly sure that he was not receiving a housing allowance while he was living in the barracks. (Tr. 33-34, 49)

When Applicant left the Marine Corps, he received separation pay of \$9,000 after taxes. (Tr. 50) He has known about the DFAS debt for about 10 years. (Tr. 35) Applicant made several telephone calls to try to learn more about this DFAS debt, and he sent a letter to DFAS about five years ago. (Tr. 35-39) His most recent telephone call to DFAS was more than a year ago. (Tr. 40) DFAS advised him he owed \$17,000; however, DFAS did not provide substantiating documentation to establish the debt. (Tr. 38) He has no documentation showing his contacts with DFAS to resolve the debt. (Tr. 36) He believed the debt was in his former spouse's name because she was a sergeant, and he was a corporal. (Tr. 39) She was still in the Marine Corps when Applicant was discharged. (Tr. 39) He contended he was not responsible for the debt. (Tr. 39) Applicant provided a July 11, 2016 letter from Equifax indicating the DFAS debt was deleted from his Equifax Credit Report. (AE A) He said he contacted the credit reporting companies and disputed the debt. (Tr. 41) He did not intend to take any further action to address the DFAS debt, and he considered the matter closed. (Tr. 42)

SOR ¶ 1.c alleges a child support delinquency of \$707. (Tr. 42) Applicant said his child support debt was current. (Tr. 42) He said the debt did not appear on his current credit report. (Tr. 42) He pays \$66 monthly to address the debt. (Tr. 43) He did not provide documentary proof of any payments. (Tr. 43)

Applicant requested an extension to file his 2015 federal income tax return, and he believes he will not need to file his tax return until April 2017. (Tr. 44) He is disputing with his former spouse the deduction for his child on their federal income tax returns. (Tr. 44) He has not filed his 2015 state tax return. (Tr. 45) He has not received credit counseling. (Tr. 45) He does not use a written budget. (Tr. 46) Applicant contributes to his community. He supports a youth basketball team. (Tr. 56)

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. 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 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." Applicant's history of delinquent debt is documented in his credit reports, SOR response, and hearing record. The evidence of record establishes a history of three delinquent debts totaling \$19,244. 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

(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 mitigating information. Applicant said he was making payments on the debts in SOR ¶¶ 1.a and 1.c. I have credited him with mitigating these two debts. This positive information does not fully mitigate his failure to resolve or provide documentation showing a good-faith attempt to resolve his DFAS debt for \$17,058. The DOHA Appeal Board has repeatedly emphasized the importance of timely payment of U.S. Government debts. See ISCR Case No. 14-04437 at 3 (App. Bd. Apr. 15, 2016) (stating "A person who fails repeatedly to fulfill his or her legal obligations does not demonstrate the high degree of good judgment and reliability required of those granted access to classified information") (citations omitted); ISCR Case No. 14-05476 at 5 (App. Bd. Mar. 25, 2016) (citing ISCR Case No. 01-05340 at 3 (App. Bd. Dec. 20, 2002)); ISCR Case No. 14-01894 at 4-5 (App. Bd. Aug. 18, 2015).

Applicant is not credited with mitigating the DFAS debt because he did not provide any documentation showing any progress paying the debt or a reasonable dispute of the debt, such as copies of letters to DFAS disputing his responsibility for the debt. The record does not indicate why DFAS believes Applicant received an overpayment. He may have received an overpayment of housing allowance while he

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)).

was living in the barracks or quarters; he may not have been entitled to separation pay; or there could be some other reason for the overpayment. Applicant admitted that he contacted DFAS, and a DFAS representative told him on the telephone that he owed the debt. If Applicant wanted to contest the debt, it was his responsibility to write DFAS and ask for the basis of the debt, and, if necessary, to ask for an audit of his pay and supporting documentation to ensure the validity of the debt.³ He is not required to pay a debt that is not valid; however, he is required to act responsibly in determining the validity of a debt, and, then he is responsible for paying his valid debts.

There is insufficient evidence about why Applicant was unable to make greater documented progress resolving his DFAS debt. He did not provide “a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem;” he did not provide “documented proof to substantiate the basis of the dispute;” and he did not provide “evidence of actions to resolve the issue” under AG ¶ 20(e). There is insufficient assurance that his DFAS debt is being resolved. Under all the circumstances, he failed to establish that financial considerations security concerns are mitigated.

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 that guideline, but some warrant additional comment.

Applicant is a 43-year-old security lieutenant, who has worked for his employer for five years. He also holds part-time employment as a security officer. His total annual income from both jobs is \$95,000. He served in the Marine Corps from 1992 to 1996,

³See Defense Finance and Accounting Service website, Military Debts, <http://www.dfas.mil/debtandclaims/militarydebts.html>. Additional information and contact numbers are at <http://www.dfas.mil>.

and from 1998 to 2001. He was honorably discharged as a sergeant. There is no evidence of security violations.

Applicant is credited with mitigating the debts in SOR ¶¶ 1.a and 1.c. He said he has established payment plans and is on track to resolve these two debts. He is not credited with mitigating his \$17,058 DFAS debt. The debt has been delinquent for more than 10 years, and in Applicant's most recent communication with DFAS, he learned that DFAS believes the debt is valid. He did not follow-up with a written dispute to DFAS; he did not make a written request for an audit; and he did not make payments to DFAS. His failure to make greater progress resolving his DFAS debt 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 debt, 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 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

Subparagraph 1.b:

Against Applicant

Subparagraph 1.c:

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