



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 15-02991

Appearances

For Government: Daniel F. Crowley, Esq., Department Counsel
For Applicant: *Pro se*

10/18/2016

Decision

HARVEY, Mark, Administrative Judge:

Applicant's statement of reasons (SOR) alleges five delinquent debts totaling \$27,719. He established his child support was current, leaving four delinquent debts totaling \$25,719. He did not make sufficient progress resolving his delinquent debts. Financial considerations concerns are not mitigated. Eligibility for access to classified information is denied.

Statement of the Case

On November 13, 2012, Applicant signed and submitted an Electronic Questionnaires for Investigations Processing (e-QIP) version of a security clearance application (SF 86) (SCA). (GE 1) On January 8, 2016, 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 (AG), which became effective on September 1, 2006.

The SOR alleged security concerns under Guideline F (financial considerations). (HE 2) 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. (HE 2)

On March 10, 2016, Applicant responded to the SOR allegations and requested a hearing. (HE 3) On August 18, 2016, the Defense Office of Hearings and Appeals (DOHA) issued a hearing notice setting the hearing for September 15, 2016. Applicant's hearing was held as scheduled. Department Counsel offered four exhibits into evidence, and Applicant offered one exhibit into evidence. (Tr. 17-18; Government Exhibits (GE) 1-4; Applicant Exhibit (AE) A) All exhibits were admitted into evidence without objection. (Tr. 17-19) On September 27, 2016, DOHA received the transcript of the hearing. On October 5, 2016, I received seven exhibits. (AE B-AE H) Department Counsel objected to admissibility because several pages were missing from the credit reports Applicant submitted. Department Counsel's objection goes to the weight and not to admissibility, and Applicant's proffered exhibits are admitted. (AE B-AEH) On October 5, 2016, the record closed. (Tr. 37-39)

Findings of Fact¹

In Applicant's SOR response, he denied responsibility for all SOR debts. In his explanation, he indicated the debts became delinquent in 2004. They were transferred between collection agents and eventually they dropped off of his credit report. Applicant's admissions are accepted as findings of fact.

Applicant is a 55-year-old security officer. (Tr. 6, 9) He has worked for the same employer for five years. (Tr. 9) In 1979, he graduated from high school, and he is currently enrolled in college. (Tr. 6-7) He is close to earning his associate's degree. (Tr. 7) He served in the Army from 1979 to 1999, and he honorably retired as a staff sergeant (E-6). (Tr. 7) His military occupational specialty (MOS) was infantry. (Tr. 7) He served in Grenada for three weeks while it was a combat zone. (Tr. 7) His highest military award was a meritorious service medal (MSM). In 1980, he married, and in 1999, he divorced. (Tr. 8) His two children are ages 17 and 34. (Tr. 9)

Financial Considerations

Applicant's history of delinquent debt is documented in his SF 86, credit reports, SOR response, Office of Personnel Management (OPM) personal subject interview (OPM PSI) and hearing transcript. Applicant was divorced in 1999. (Tr. 19) His spouse received 40 percent of his retired pay. (Tr. 23; AE A at 8) He said his spouse did not pay her share of their marital debts. (Tr. 20)² Applicant was underemployed after leaving the Army, and he could not afford to pay all of the marital debts. (Tr. 20) He was also

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

²Applicant's divorce decree shows Applicant and his spouse each had marital debts totaling \$5,321. (AE A at 10) The names of the four creditors listed in the divorce decree do not match the names of the collection companies listed in the SOR. (AE A at 9-10)

unemployed for six months in 2010. (Tr. 22) In 2010, his annual pay was reduced from \$52,000 to about \$30,000. (Tr. 21, 24) His salary subsequently increased to about \$37,000. (Tr. 21, 24) His monthly child support obligation is \$836. (Tr. 24)

Applicant's SOR alleges five delinquent debts totaling \$27,719. SOR ¶¶ 1.a and 1.b are collection accounts for \$12,638 and \$6,439. (Tr. 25) SOR ¶ 1.c is a charged-off bank debt for \$3,637. In his December 6, 2012 OPM PSI, Applicant said he would repay the debt in SOR ¶ 1.c in January or February 2013. (GE 3) Applicant said SOR ¶ 1.d is a collection account for \$3,005. The four accounts in SOR ¶¶ 1.a to 1.d were all related to credit card accounts opened in 2000. (Tr. 30; SOR response) He has not made any payments to address the debts in SOR ¶¶ 1.a to 1.d since 2009, and his intention is to write them off. (Tr. 30-31, 37)

SOR ¶ 1.e alleges a delinquent child support debt for \$2,000. Applicant disclosed the delinquent child support debt on his 2012 SCA. (GE 1) He provided his child support payment schedule, and he is credited with bringing his child support to current status. (AE C)

Applicant used a debt consolidation company from June 2010 to August 2011. (Tr. 29; GE 3) He said he paid \$300 monthly, and only \$100 went to his creditors. (GE 3) He terminated the program because the company was keeping too much of his payment, and not using enough to pay his creditors. (Tr. 29) Some payments might have been made from his debt consolidation plan to the SOR debts during the 2010 to 2011 time frame.

Applicant provided a February 25, 2016 credit report as part of his response to the SOR which indicated he had a collection account in SOR ¶ 1.b for \$6,439. (Tr. 33) He said he would try to set up a payment plan to address that account, and he was given until October 5, 2016 to provide evidence of his actions. (Tr. 34-35) His October 5, 2016, correspondence indicated he contacted the collection agent that he believed was the successor to the collection agent in SOR ¶¶ 1.a, 1.b, and 1.c, and a representative of the collection agent told him "that there was no record of me ow[e]ing them anything." (AE B) He did not indicate he sent copies of his negative credit report entries to the collection agent, and there is no indication he requested the collection agent determine the current holder of his credit card debt.

Applicant provided the following pages from his September 22, 2016 credit reports: pages one and two of his five-page Equifax credit report (AE D); pages one and two of his four-page TransUnion credit report (AE E); pages one and two of his three-page TransUnion credit report (AE F); pages one, two, and three of his six-page TransUnion credit report (AE G); and pages one and two of his four-page Equifax credit report. (AE F) The credit report information he provided did not show any collection or charged-off accounts. His Equifax credit report had a good score of 713 (AE D)

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 SF 86, credit reports, SOR response, OPM PSI, and hearing transcript. Applicant’s SOR alleges and the record establishes that Applicant has four currently delinquent debts totaling \$25,719. 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;³ 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 mitigating information. Several circumstances beyond his control adversely affected his finances. In 1999, Applicant was divorced, and after his retirement from the Army, he was underemployed. He was required to pay child

³The 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)).

support of \$836 monthly. 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 his income was rising.

Applicant established that his child support was current, and he is credited with mitigating the debt in SOR ¶ 1.e. He is not credited with mitigating the other SOR debts because he did not provide any documentation showing progress paying these debts 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.

Applicant in this case relies upon the absence of delinquent debts from his current credit report to mitigate security concerns. “[T]hat some debts have dropped off his credit report is not meaningful evidence of debt resolution.” ISCR Case No. 14-05803 at 3 (App. Bd. July 7, 2016) (citing ISCR Case No. 14-03612 at 3 (App. Bd. Aug. 25, 2015)). The Fair Credit Reporting Act requires removal of most negative financial items from a credit report seven years from the first date of delinquency or the debt becoming collection barred because of a state statute of limitations, whichever is longer.⁴

All states have statutes of limitations upon collectability of credit card debts, which range from three to six years. State statutes of limitations clearly and unequivocally end an Applicant’s legal responsibility to pay the creditor after the passage of a certain amount of time, as specified in state law. In a series of decisions, the Appeal Board has rejected statutes of limitations for debts generated through contracts, which is the law in all 50 states, as significantly mitigating financial considerations concerns under AG ¶ 20(d). See ISCR Case No. 08-01122 at 4 (App. Bd. Feb. 9, 2009); ISCR Case No. 07-08049 at 5 (App. Bd. Jul. 22, 2008); ADP Case No. 07-13041 at 5 (App. Bd. Sep. 19, 2008); ISCR Case No. 07-11814 at 2 (App. Bd. Dec. 29, 2008) ADP Case No. 06-14616 at 3 (App. Bd. Oct. 18, 2007) (stating, “reliance upon legal defenses such as the statute of limitations does not necessarily demonstrate prudence, honesty, and reliability; therefore, such reliance is of diminished probative value in resolving trustworthiness concerns arising out of financial problems. See, e.g., ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006).”).

Recently, the DOHA Appeal Board reinforced its position on statutes of limitations not mitigating financial considerations concerns stating:

In this case, the Judge noted that Applicant explained that he did not owe any of the alleged debts because they had either been deleted from his credit report or soon would be deleted, and he also relied on a state statute of limitations to absolve himself of debts. The Appeal Board has long recognized that debts remain relevant for security clearance

⁴ Title 15 U.S.C. § 1681c. See Federal Trade Commission website, Summary of Fair Credit Reporting Act Updates at Section 605, <https://www.consumer.ftc.gov/articles/pdf-0111-fair-credit-reporting-act.pdf>.

purposes even if they are no longer enforceable due to the running of the statute of limitations or cannot be legally listed on a credit report due to the passage of time. See e.g., ISCR Case No. 03-04779 at 4 (App. Bd. Jul. 20, 2005) and ISCR Case No. 03-20327 at 6 (App. Bd. Oct 26, 2006).⁵ We also have held that reliance on a state's statute of limitations does not constitute a good-faith effort to resolve financial difficulties and is of limited mitigative value. ADP Case No. 06-18900 at 5 (App. Bd. Jun. 6, 2008) (citing ISCR Case No. 03-04779 at 4 (App. Bd. Jul. 20, 2005) and ISCR Case No. 01-09691 at 2-3 (App. Bd. Mar. 27, 2003)).

ISCR Case No. 15-01208 at 3 (App. Bd. Aug. 26, 2016).

There is insufficient evidence about why he was unable to make greater documented progress resolving the debts in SOR ¶¶ 1.a through 1.d. He did not make a sufficient effort to settle or investigate the status of these four SOR debts. There is not enough 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.

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 55-year-old security officer. He has worked for the same employer for five years. He is currently enrolled in college, and he is close to earning his

⁵ Compare ISCR Case No. 12-04806 (App. Bd. Jul. 3, 2014). In that case, Applicant corroborated efforts to settle debts that were in "charged-off" status. Also, that Applicant had received financial counseling. Ultimately, the Board affirmed the Judge's favorable decision.

associate's degree. He served in the Army from 1979 to 1999, and he honorably retired as a staff sergeant. His MOS was infantry. He served in Grenada for three weeks while it was a combat zone. His highest military award was an MSM.

Several circumstances beyond his control adversely affected his finances. In 1999, he was divorced. He was underemployed after he retired from the Army. In 2010, he was also unemployed for six months. He is also credited with mitigating his child support debt in SOR ¶ 1.e.

The disqualifying evidence is more persuasive. Applicant has a lengthy history of delinquent debt. In his SOR response, Applicant admitted that he previously owed the four delinquent debts in SOR ¶¶ 1.a through 1.d, now totaling \$25,719. Applicant did not provide enough specifics about how circumstances beyond his control adversely affected his finances; 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 changes of his income; he did not provide a current budget; he did not provide documentation showing a reasonable dispute of any SOR debts; he did not provide sufficient 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 the creditors in SOR ¶¶ 1.a through 1.d for the past three years while employed by the same employer. 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 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
Subparagraphs 1.a through 1.d:	Against Applicant
Subparagraph 1.e:	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