



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



In the matter of:

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ISCR Case No. 15-03451

Applicant for Security Clearance

Appearances

For Government: Aubrey M. De Angelis, Esq., Department Counsel
For Applicant: *Pro se*

12/16/2016

Decision

HARVEY, Mark, Administrative Judge:

Applicant's statement of reasons (SOR) alleges four delinquent debts. Applicant is credited with paying or resolving all of his SOR debts. He has established a track record of debt payment and resolution. Financial considerations security concerns are mitigated. Access to classified information is granted.

History of the Case

On April 13, 2013, Applicant completed and signed his Questionnaire for National Security Positions (SF 86) or security clearance application (SCA). (Government Exhibit (GE) 1) On February 10, 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*; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive); and the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (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. (HE 2) Specifically, the SOR set forth security concerns arising under the financial considerations guideline.

On April 13, 2016, Applicant responded to the SOR, and he requested a hearing. On July 15, 2016, Department Counsel was ready to proceed. On August 30, 2016, the case was assigned to me. On September 30, 2016, the Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing, setting the hearing for October 26, 2016. (HE 1) The hearing was held as scheduled.

Department Counsel offered five exhibits; Applicant offered three exhibits; and all exhibits were admitted into evidence without objection. (Transcript (Tr.) 13-16; Government Exhibits (GE) 1-5; Applicant's Exhibits (AE) A-C) On November 3, 2016, DOHA received the transcript of the hearing.

Findings of Fact

In Applicant's SOR response, he denied the SOR allegations. He admitted that at one time he owed the debts in the SOR. He also provided extenuating and mitigating information. Applicant's admissions are accepted as findings of fact.

Applicant is a 52-year-old employee of a defense contractor. (Tr. 6) In 1982, he graduated from high school. (Tr. 6) He briefly attended college, and he did not receive a degree. (Tr. 6) He has not served in the military. (Tr. 7) He has been employed as a supervisor in shipping and receiving or in manufacturing support for 23 years. (Tr. 7) He has never been married, and he does not have any children. (Tr. 7) There is no evidence of security violations.

Financial Considerations

The cause of Applicant's delinquent debts was the decline in the fair market value of his residence. (Tr. 17) He borrowed funds to make repairs and upgrade his residence. (Tr. 18) His mortgage payments increased; there was a balloon payment; and his mortgage was higher than the fair market value of his residence. (Tr. 19) Applicant exhausted his 401(k) account in an attempt to retain his residence. (Tr. 19) His 401(k) account is now about \$20,000. (Tr. 25) His current annual income is \$50,000. (Tr. 25) His federal and state taxes are current. (Tr. 26-27)

The status of the four SOR allegations is as follows:

SOR ¶ 1.a alleges a mortgage for \$287,450 past due in the amount of \$12,340. On March 15, 2016, the creditor wrote that the mortgage was loaned on September 28, 2004. (AE A) On July 20, 2012, a short sale resolved the debt. (AE A) The creditor acknowledged an "operational error" caused the creditor not to correctly report the resolution, and the creditor promised corrective action within 30 days. (AE A) When Applicant's home sold, the sale price was about \$20,000 more than he owed on his mortgage. (Tr. 31)

SOR ¶ 1.b alleges a delinquent medical debt for \$211. On March 4, 2016, Applicant paid \$137 out of his health spending account to address a medical debt. (AE

B) Applicant's May 12, 2016 Equifax credit report shows this debt has a zero balance owed. (GE 5 at 1)

SOR ¶ 1.c alleges a judgment filed in 2008 for \$9,846. Applicant believed the debt resulted from funds borrowed to improve his residence. He paid \$6,000 and settled the debt when his home was sold. (Tr. 20-21, 28-30; GE 3) Applicant's May 12, 2016 Equifax credit report, the most recent credit report of record, does not show a judgment against Applicant. (GE 5 at 1)

SOR ¶ 1.d alleges a collection account for \$1,912. On October 15, 2016, the collection company wrote that the debt was settled. (Tr. 22-23; AE C)

In sum, the evidence of record indicates all SOR debts are resolved. The only negative entry in Applicant's May 12, 2016 Equifax credit report is a \$37 medical collection debt. (GE 5) Applicant understands the security concern raised by delinquent debts, and he assures he will continue to maintain his financial responsibility.

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 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." 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;¹ 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).

¹The 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)).

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

AG ¶¶ 20(a), 20(c), and 20(d) apply. Applicant's delinquent debts were caused by the decline in the real estate market and his inability to make the increased mortgage payments on his residence. He acted responsibly by paying several debts subsequently alleged in the SOR before the SOR was issued.

Applicant's SOR alleges four delinquent debts. Applicant is credited with paying or resolving all of his SOR debts. Based on Applicant's credible and sincere promise to pay his debts and his track record of paying 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 payments of his debts showed 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.

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 52-year-old employee of a defense contractor. He has been employed as a supervisor in shipping and receiving or in manufacturing support for 23 years. There is no evidence of security violations.

Appellant's delinquent debts were caused by the decline in the real estate market and the increase in his house payments. His two most significant debts were resolved when his residence was sold. All of Applicant's SOR debts are now paid. His 401(k)

account contains about \$20,000. His current annual income is \$50,000 and he has sufficient income to pay his expenses and debts. His federal and state taxes are current. He assures he intends to pay his debts, and 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.

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
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Subparagraphs 1.a through 1.d:	For Applicant
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Conclusion

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

MARK HARVEY
Administrative Judge