



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



In the matter of:

)
)
)
)
)

ISCR Case No. 15-04124

Applicant for Security Clearance

Appearances

For Government: Julie R. Mendez, Esq., Department Counsel
For Applicant: *Pro se*

07/19/2016

Decision

HARVEY, Mark, Administrative Judge:

Applicant's statement of reasons (SOR) includes 17 allegations of delinquent debts and dismissal of Applicant's bankruptcy under Chapter 13 of the Bankruptcy Code. While circumstances beyond his control damaged his finances, he did not show enough progress paying his debts to mitigate financial considerations security concerns. Access to classified information is denied.

History of the Case

On May 3, 2013, Applicant completed and signed his Questionnaire for National Security Positions or security clearance application (SCA). (Government Exhibit (GE) 1) On February 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*; 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).

On March 3, 2016, Applicant responded to the SOR. On March 25, 2016, Department Counsel was ready to proceed. On March 26, 2016, Department Counsel filed an amendment to SOR ¶ 1.I changing the creditor to the U.S. Government, and the mechanism of enforcement of the debt was changed to a lien. (HE 2) Applicant did not object to the amendment to SOR ¶ 1.I. (Transcript (Tr.) 14-15) 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 24, 2016. (HE 1) Applicant waived his right under the Directive to 15 days of notice of the date, time, and location of his hearing. (Tr. 13-14) His hearing was held as scheduled.

During the hearing, Department Counsel offered five exhibits, and Applicant offered four exhibits, which were admitted without objection. (Tr. 16-21; Government Exhibit (GE) 1-5; Applicant Exhibit (AE) A-D) On July 5, 2016, DOHA received a copy of the transcript of the hearing. The record was held open for additional evidence until May 2, 2016. (Tr. 74-75, 77) No post-hearing evidence was received.

Findings of Fact¹

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

Applicant is a 43-year-old senior systems administrator, who has worked for his employer since 2007. (Tr. 6, 8; GE 1) In 1991, he graduated from high school. In 1997, he received a bachelor's degree in electrical engineering, and in 1999, he received a master's degree in applied mathematics. (Tr. 7) In 2009, he received a master's degree in business administration. (Tr. 7) He has not served in the military. (Tr. 7) In 2003, he married, and in 2010, he divorced. (Tr. 7) In 2013, he married. (Tr. 7) He has a nine-year-old daughter. (Tr. 8)

Financial Considerations

Prior to Applicant's divorce, he had an ownership interest in five properties. (Tr. 26) In 2009, Applicant and his spouse began the divorce process. (Tr. 22) Applicant's temporary monthly child support requirement was \$1,800. (Tr. 22) In 2009, Applicant took an early withdrawal from his retirement plan, which resulted in a \$26,000 federal income tax debt. (Tr. 24) In 2010, his monthly child support payment was reduced to \$1,428. (Tr. 22) After the divorce, Applicant owned two properties, and he had a one-

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

half interest in the third property with his former spouse. (Tr. 24) The divorce decree required the sale of the shared property. (Tr. 24)

SOR ¶ 1.a alleges a mortgage delinquent in the amount of \$49,451. From August 2012 to March 2015, Applicant did not pay make his monthly mortgage payments, and nonpayment of his mortgage qualified Applicant for a mortgage modification. (Tr. 27-28) Applicant lives in this property. The mortgage balance is \$349,000, and it is current. (Tr. 28-29; AE A at 4-6) The unpaid mortgage payments were rolled into the new modified mortgage. (Tr. 28-29) Some of his \$1,506 monthly payments were late because the Internal Revenue Service (IRS) was garnishing his pay. (Tr. 29) His monthly payment under the new modified mortgage plan is \$1,575. (AE A at 4)

SOR ¶¶ 1.b for \$63,362 and 1.c for \$20,204 are delinquent mortgages for Applicant's rental property (rental property A). (Tr. 32) In November 2011, the tenant in rental property A died, and for six months Applicant did not receive any rental income from this property because his other tenants, who were being evicted, refused to pay their rent. (Tr. 22, 31) It took 12 additional months for Applicant to make the necessary repairs and renovate rental property A. (Tr. 23, 31; AE A at 8) In December 2014, the creditor in SOR ¶ 1.c informed Applicant that the creditor intended to write-off the debt as a loss. (AE A at 6) The SOR ¶ 1.c creditor provided an IRS Form 1099 reflecting the debt was discharged. (Tr. 33) Applicant declared the income on the IRS Form 1099 on his 2015 tax return. (Tr. 46)

The other debts in the SOR are as follows: ¶ 1.d bank debt (\$19,106); ¶ 1.e student loan debt (\$18,601); ¶ 1.f bank debt (\$17,420); ¶ 1.g bank debt (\$6,829); ¶ 1.h bank debt (\$5,694); ¶ 1.i bank debt (\$5,009); ¶ 1.j medical debt (\$130); ¶ 1.k medical debt (\$87); ¶ 1.l federal tax debt (\$26,519); ¶ 1.n bank debt (\$5,282); ¶ 1.o telecommunications debt (\$141); ¶ 1.p medical debt (\$104); ¶ 1.q medical debt (\$88); and ¶ 1.r medical debt (\$75). Applicant used some of the money from the banks to make repairs on his rental properties. (Tr. 34) He did not make any payments to any of these creditors, except he was making payments to address the tax debt in SOR ¶ 1.l, and he said he paid the debt in SOR ¶ 1.o. (Tr. 35-36)

The SOR ¶ 1.l tax debt has increased to \$48,000 because Applicant has delinquent taxes from 2013 in addition to the lien for his 2009 taxes. (Tr. 39) On May 9, 2016, the IRS wrote Applicant that he owed \$36,367 for tax year 2009, and he was credited \$181 for his overpayment for 2015. (AE A at 2) He is currently making monthly payments to the IRS of \$576. (Tr. 40; AE B-D) He made all of his monthly tax payments in 2015. (Tr. 45)

Applicant's Chapter 13 bankruptcy was dismissed in 2013 because Applicant erroneously believed he was excused from attending court on a date when he was out of the country getting married. (Tr. 40-41) He decided not to refile the bankruptcy. (Tr. 41) His current spouse has been unemployed for one year. (Tr. 42) Applicant has about \$300 to \$500 left at the end of each month; however, he is using those funds to make

repairs on his spouse's rental property. (Tr. 42-43) Applicant has about \$21,000 in his retirement fund. (Tr. 43)

Applicant said he intends to pay his creditors. (Tr. 44; AE A at 8) He is considering refiling his bankruptcy. (Tr. 44, 49)

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 three disqualifying conditions that could raise a security concern and may be disqualifying in this case: "(a) inability or unwillingness to satisfy debts;" "(c) a history of not meeting financial obligations;" and "(g) failure to file annual Federal, state, or local income tax returns as required" Applicant's history of delinquent debt is documented in his credit reports, SOR response, and hearing record.

When Applicant filed his 2009 federal income taxes, he failed to pay his taxes in full as required by law. Three mortgage accounts, six bank accounts, one education account, one tax debt, and four medical accounts were or are delinquent. The Government established the disqualifying conditions in AG ¶¶ 19(a), 19(c), and 19(g) 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).

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 presented some important mitigating information. Several circumstances beyond his control adversely affected his finances: Applicant and his spouse divorced; the court imposed heavy child support responsibilities; Applicant had problems with his tenants and his rental properties; and the value of his real estate holdings declined in value when the real estate market suffered a precipitous decline about ten years ago. 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 debts after his divorce became final. He received some financial counseling as part of his Chapter 13 bankruptcy.

Applicant receives credit for making payments in accordance with his IRS payment plan for more than one year. This positive information does not fully mitigate his failure to pay his federal income taxes for tax year 2009 when those taxes were due. Moreover, his 2009 federal income tax debt was not fully paid at the time of his hearing. 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).

The Appeal Board commented that even in instances where an “[a]pplicant has purportedly corrected [the applicant’s] federal tax problem, and the fact that [applicant] is now motivated to prevent such problems in the future, does not preclude careful consideration of [a]pplicant’s security worthiness in light of [applicant’s] longstanding prior behavior evidencing irresponsibility.” See ISCR Case No. 15-01031 at 3 and note 3 (App. Bd. June 15, 2016) (characterizing “no harm, no foul” approach to an Applicant’s course of conduct and employed an “all’s well that ends well” analysis as inadequate to support approval of access to classified information with focus on timing of filing of tax returns after receipt of the SOR).

Applicant is credited with mitigating the debts in SOR ¶¶ 1.a (creditor indicates debt is current), 1.c (creditor released Applicant from liability), and 1.o (paid). He is not credited with mitigating the other SOR debts because he did not provide any documentation showing enough 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 more 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.

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 senior systems administrator, who has worked for his employer since 2007. He has received a bachelor's degree and two master's degrees. In 2003, he married, and in 2010, he divorced. In 2013, he married. He has a nine-year-old daughter. Circumstances beyond his control adversely affected his finances, including divorce, substantial child support responsibilities, problems with his tenants, and his rental properties, and the decline in the real estate market.

Applicant is credited with mitigating the debts in SOR ¶¶ 1.a, 1.c, and 1.o. The dismissal of his Chapter 13 bankruptcy alleged in SOR ¶ 1.m is mitigated because it was due to confusion about whether he had to attend a hearing. He is not credited with mitigating his income tax debt because it relates to his 2009 federal income taxes, and he has not made sufficient progress reducing the magnitude of his federal income tax debt over the past five years.

Applicant has a lengthy history of delinquent debt. His SOR alleges and the record establishes: six delinquent bank debts; four delinquent medical debts; a delinquent student loan debt; and a tax debt not completely paid from tax year 2009. He is not credited with mitigating the SOR debts in ¶¶ 1.b, 1.d through 1.n, and 1.p through 1.r because he did not provide documentation showing enough progress paying these debts or reasonable disputes of these debts.

Applicant did not provide enough specifics about how circumstances beyond his control adversely affected his finances, and he did not show that he acted responsibly to address his delinquent debts. 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 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
Subparagraphs 1.d through 1.l:	Against Applicant
Subparagraph 1.m:	For Applicant
Subparagraph 1.n:	Against Applicant
Subparagraph 1.o:	For Applicant
Subparagraphs 1.p through 1.r:	Against 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