



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



In the matter of:

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ISCR Case No. 15-05050

Applicant for Security Clearance

Appearances

For Government: Caroline E. Heintzelman, Esq., Department Counsel
For Applicant: *Pro se*

02/23/2017

Decision

HARVEY, Mark, Administrative Judge:

Applicant's statement of reasons (SOR) alleges seven delinquent debts totaling \$29,880. All of his SOR debts were paid or resolved through successful disputes. Applicant has a track record of paying his debts. Financial considerations security concerns are mitigated. Eligibility for access to classified information is granted.

Statement of the Case

On June 12, 2014, Applicant signed his Questionnaire for National Security Positions (SF 86) or security clearance application (SCA). (Government Exhibit (GE) 1) On January 14, 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 under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant, 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 February 11, 2016, Applicant responded to the SOR and requested a hearing. On August 8, 2016, Department Counsel was ready to proceed. On September 8, 2016, the case was assigned to me. On November 16, 2016, the Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing, setting the hearing for December 5, 2016. (HE 1) The hearing was held as scheduled.

During the hearing, Department Counsel offered six exhibits; Applicant offered seven exhibits; and all proffered exhibits were admitted without objection. (Tr. 17-24; GE 1-6; Applicant Exhibits (AE) A-G) On December 13, 2016, DOHA received a copy of the transcript of the hearing. After the hearing, Applicant provided one exhibit composed of 116 pages, and it was admitted without objection. (AE H) On February 8, 2017, I received the final document, and the record closed on that same day. (Tr. 55, 58; AE H at 29)

Findings of Fact¹

In Applicant's SOR response, he took responsibility for the debts in SOR ¶¶ 1.a, 1.d, 1.f, and 1.g. He denied the other SOR debts, and he provided extenuating and mitigating information. Applicant's admissions are accepted as findings of fact.

Applicant is a 49-year-old engineer, and he has worked for a DOD contractor for 12 years. (Tr. 6, 8-9; GE 1) In 1985, he graduated from high school. (Tr. 6) In 1994, he received a bachelor's degree in electrical engineering, and in 2015, he received a master's degree in systems engineering. (Tr. 7) From 1985 to 1988, he served on active duty in the Army, and from 1988 to 2001, he served in the National Guard and Army Reserve. (Tr. 7-8) In 1994, he married, and in 2007, he divorced. (Tr. 34) He has a 24-year-old daughter and a 3-year-old son. (Tr. 26) He has held a security clearance since 2006. (Tr. 9) He has never been investigated for a security violation. (Tr. 9)

Financial Considerations

Applicant's annual salary is \$123,000. (Tr. 9, 25) He lives with a woman who has an annual salary of \$35,000. (Tr. 25) They have a three-year-old son. (Tr. 26) He has a monthly remainder of about \$2,500 when all of his bills are paid. (Tr. 26) In 2006, Applicant began purchasing rental properties, and now he owns eight rental properties. (Tr. 27, 29) Five of the properties have a mortgage, and six of them have a tenant. (Tr. 27) His home is paid off. (Tr. 28) The five mortgages total \$450,000. (Tr. 28) After the mortgages are paid, he has a net monthly profit of about \$1,500 on his rental properties. (Tr. 29) He has \$182,000 in his 401(k) account. (Tr. 29) All of his mortgages are current, except for the debts in SOR ¶¶ 1.b and 1.c. (Tr. 52) Applicant has not received credit counseling. (Tr. 30) He does not have a budget. (Tr. 52) All of his federal taxes are

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

current, and he is making payments on his state income taxes to address a \$3,000 tax debt for 2014 and 2015. (Tr. 30-32) He received a \$12,526 refund when he filed his federal income tax return for tax year 2015. (Tr. 31; AE H at 65) He is paying the state \$500 monthly. (Tr. 32) Applicant has a contract to sell one rental property for about \$111,000, and it has a total mortgage debt of \$53,200. (Tr. 33; AE C) At his hearing, he said he would use the profits to pay off his state tax debt. (Tr. 34; AE C) After his hearing, he paid his state tax debt. (AE H at 24, 29)

Applicant's history of delinquent debt is documented in his credit reports, August 15, 2014 Office of Personnel Management (OPM) personal subject interview (PSI), and hearing record. The status of his SOR debts is as follows:

SOR ¶ 1.a alleges a utility debt for \$1,399. It was a debt from one of Applicant's rental properties, and it was paid in early 2016. (Tr. 35; GE 6 at 2; AE H at 1) Applicant's December 1, 2016 Equifax credit report indicates the debt has a zero balance. (GE 6 at 2)

SOR ¶¶ 1.b and 1.c pertain to a rental property damaged by a fire in 2008. (Tr. 35-36) SOR ¶ 1.b alleges a \$63,792 mortgage account past-due in the amount of \$13,356, and SOR ¶ 1.c alleges a charged-off bank second mortgage for \$12,013. (Tr. 41) Both debts are now being handled by the same creditor. Applicant's insurance company disbursed \$30,000 to his mortgage company, and Applicant began to repair the property. (Tr. 38, 42; AE H at 12-20) The mortgage company waited several months to disburse the funds to Applicant; the repairs were taking too long; the city decided the property was structurally unsound and dangerous; and in 2009, the property was demolished by the city. (Tr. 36-38) Applicant said the lien for SOR ¶ 1.c was released. (Tr. 37) The insurance company owes or should have paid an additional \$24,000 to the mortgage company. (Tr. 42) Applicant believed the creditor was negligent in not releasing the insurance funds in a timely manner, which delayed the repairs and resulted in the home being demolished. (Tr. 43-44) On May 21, 2012, Applicant's counsel wrote the creditors disputing his responsibility for the two debts. (Tr. 43-44; SOR response) In July 2016, he asked the creditor in SOR ¶ 1.b to resolve the debt. (Tr. 40) On December 27, 2016, the creditor completed their review and advised Applicant that they would contact the credit reporting companies and have any negative information removed from his credit report. (AE H at 6) The creditor indicated they "consider this matter resolved." (AE H at 7)

SOR ¶ 1.d alleges an ambulance-collection account for \$1,374, and SOR ¶ 1.f alleges a medical-collection account for \$778. In 2012, Applicant was in an accident, and an ambulance took him to the hospital, where he received medical care. (Tr. 44, 46) Applicant's insurance company was supposed to pay these two debts. (Tr. 45) On October 13, 2012, the insurance company wrote the creditor in SOR ¶ 1.d, and advised the creditor of the information necessary to process the claim. (SOR response, Ex. 1.d) The creditor failed to send in necessary information to the insurance company. (Tr. 45) In 2016, Applicant sent the claims to his insurance company. (Tr. 45-47) Applicant's December 1, 2016 Equifax credit report indicates the debt in SOR ¶ 1.d is unresolved, and the debt in SOR ¶ 1.f does not appear on this credit report. (GE 6) On February 7,

2017, Applicant settled and paid \$1,030 to resolve the debt in SOR ¶ 1.d. (AE H at 26-28)

SOR ¶ 1.e alleges a charged-off debt for \$399. Applicant said the debt was from a utility bill for his mother's property. (Tr. 45) Applicant never lived at that address. (Tr. 45) He disputed his responsibility for this debt because he never gave his mother permission to put his name on her utility contract. (Tr. 46) In 2011, his mother passed away. (Tr. 46) Applicant's December 1, 2016 Equifax credit report does not include this debt. (GE 6)

SOR ¶ 1.g alleges a telecommunications collection account for \$561. Applicant disputed the debt because he returned his cable box. (Tr. 48) The debt does not appear on his December 1, 2016 Equifax credit report. (Tr. 47; GE 5 at 17; GE 6)

Applicant's credit reports describe numerous debts that were paid as agreed or favorably resolved. He promised to pay any debts he is unable to resolve through legal means. (Tr. 53) For example, it is possible several debts dropped from his December 1, 2016 Equifax credit report will reappear on subsequent credit reports.² Applicant promised to monitor his credit reports and diligently resolve any future debts that appear on his credit reports. (AE H)

Applicant's employer awarded him an exceptional performance certificate. (AE H at 30) He received two additional certificates of appreciation for his sacrifice, diligence, and dedication to the mission. (AE H at 31, 32)

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.

²The Appeal Board noted in ISCR Case No. 15-02957 at 3 (App. Bd. Feb. 17, 2017):

There is more than one plausible explanation for the absence of debts from a credit report, such as the removal of debts due to the passage of time, and the absence of unsatisfied debts from an applicant's credit report does not extenuate or mitigate an overall history of financial difficulties or constitute evidence of financial reform or rehabilitation. See, e.g., ISCR Case No. 01-04425 at 3-4 (App. Bd. May 17, 2002) and ISCR Case No. 03-05197 at 3 (App. Bd. Oct. 14, 2004).

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.

The Appeal Board explained the scope and rationale for the financial considerations security concern as follows:

This concern is broader than the possibility that an applicant might knowingly compromise classified information in order to raise money in satisfaction of his or her debts. Rather, it requires a Judge to examine the totality of an applicant's financial history and circumstances. The Judge must consider pertinent evidence regarding the applicant's self-control, judgment, and other qualities essential to protecting the national secrets as well as the vulnerabilities inherent in the circumstances. The Directive presumes a nexus between proven conduct under any of the Guidelines and an applicant's security eligibility.

ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012) (citation omitted).

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, OPM PSI, 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,³ 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;

³A debt that became delinquent several years ago is still considered recent because "an applicant's ongoing, unpaid debts evidence a continuing course of conduct and, therefore, can be viewed as recent for purposes of the Guideline F mitigating conditions." ISCR Case No. 15-06532 at 3 (App. Bd. February 16, 2017) (citing ISCR Case No. 15-01690 at 2 (App. Bd. Sep. 13, 2016)).

(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;⁴ 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).

AG ¶¶ 20(a), 20(b), 20(c), 20(d), and 20(e) apply. More than 80 percent of Applicant's delinquent SOR debt resulted when a fire damaged one of his rental properties. Applicant had fire insurance, and it took several years and threats of litigation to resolve the two mortgages relating to the rental property. This fire is a circumstance

⁴The 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)).

beyond his control, and he acted responsibly by attempting to repair and then working with the creditors and insurance company to resolve the two mortgage debts.

Applicant paid two debts, and he disputed the other debts. After his disputes, the debts were removed from his credit reports. 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 49-year-old engineer, and he has worked for a DOD contractor for 12 years. In 1994, he received a bachelor's degree in electrical engineering, and in 2015, he received a master's degree in systems engineering. From 1985 to 2001, he served in the Army. He received three certificates of appreciation from his employer. He has held a security clearance since 2006. He has never been investigated for a security violation.

Applicant's SOR alleges seven delinquent debts totaling \$29,880. More than 80 percent of his SOR debt resulted from a fire that seriously damaged a rental property he owned. All of his SOR debts were paid or resolved through disputes. He has ample income and a \$2,500 monthly remainder to address any debts that arise. He began

resolving his SOR debts before he received the SOR. He assures he intends to pay his debts. 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 payment as indicated in his credit reports. He understands what he needs to do to establish and maintain his financial responsibility. He took reasonable actions under his particular financial circumstances to address his delinquent debts. I am confident he will continue his establishment and maintenance of his financial responsibility.⁵

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.

⁵Of course, the Government may re-validate Applicant's financial status at any time through credit reports, investigation, and interrogatories. Approval of access to sensitive information now does not bar the Government from subsequently revoking it, if warranted. "The Government has the right to reconsider [trustworthiness] significance of past conduct or circumstances in light of more recent conduct having negative [trustworthiness] significance." ISCR Case No. 10-06943 at 4 (App. Bd. Feb. 17, 2012). An administrative judge does not have "authority to grant an interim, conditional, or probationary clearance." ISCR Case No. 10-06943 at 4 (App. Bd. Feb. 17, 2012) (citing ISCR Case No. 10-03646 at 2 (App. Bd. Dec. 28, 2011)). See also ISCR Case No. 04-03907 at 2 (App. Bd. Sep. 18, 2006) (stating, "The Board has no authority to grant [a]pplicant a conditional or probationary [public trust position] to allow her the opportunity to have a [public trust position] while she works on her financial problems."). This footnote does not imply that this Applicant's public trust position is conditional.

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

Subparagraphs 1.a through 1.g: For Applicant

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