



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



In the matter of:

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ISCR Case No. 15-06649

Applicant for Security Clearance

Appearances

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

01/10/2017

Decision

HARVEY, Mark, Administrative Judge:

Applicant did not make sufficient progress resolving the debts alleged in his statement of reasons (SOR). He knowingly and intentionally denied that he had delinquent debts on his February 12, 2015 Questionnaire for National Security Positions (SF 86) or security clearance application (SCA). Financial considerations and personal conduct security concerns are not mitigated. Eligibility for access to classified information is denied.

Statement of the Case

On February 12, 2015, Applicant completed and signed his SCA. (Government Exhibit (GE) 1) On April 15, 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 Guidelines F (financial considerations) and E (personal conduct).

On June 3, 2016, Applicant responded to the SOR and requested a hearing. On July 20, 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.

During the hearing, Department Counsel offered 4 exhibits; Applicant offered 11 exhibits; and all proffered exhibits were admitted without objection. (Tr. 13-22; Government Exhibits (GE) 1-4; Applicant Exhibits (AE) A-J) On November 2, 2016, DOHA received the transcript of the hearing.

Findings of Fact¹

In Applicant's SOR response, he admitted all of the SOR allegations except for the allegation in SOR ¶ 2.a. He also provided extenuating and mitigating information. Applicant's admissions are accepted as findings of fact.

Applicant is a 33-year-old mechanical technician, who has worked for his employer since January 2015. (Tr. 6-7, 21; GE 1) In 2001, he graduated from high school. (Tr. 6) He has completed three years towards a degree in aerospace engineering. (Tr. 6) He is currently attending an aviation-related school. (Tr. 48) He has not served in the military. (Tr. 7) He has never married, and he does not have any children. (Tr. 7)

Financial Considerations

Applicant fell behind on his finances in November 2010, after his driver's license was suspended, and he was unable to work. (Tr. 24) His credit was excellent before November 2010. (Tr. 24) In 2010, he stopped making payments on the credit card accounts and student loans listed on the SOR. (Tr. 31) He explained that he did not resolve his debts sooner because he was less mature than he is now. (Tr. 26) He is also better organized. (Tr. 26) He said he was not fully aware of the magnitude of his debt until his Office of Personnel Management (OPM) personal subject interview (PSI). His financial situation was unstable until January 2015 when he began working for his current employer. (Tr. 31) His current annual salary is \$75,000. (Tr. 45) He owns a business; however, any profits from his business are reinvested into his business. (Tr. 44-45) His business account has about \$10,000 in it, and his personal bank account has about \$4,000 in it. (Tr. 46) He believes he has sufficient funds available to make payments on his debts. (Tr. 49)

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

Applicant's history of delinquent debt is documented in his credit reports, SOR response, and hearing record. The status of his SOR debts is as follows:

SOR ¶ 1.a alleges a credit card account placed for collection in the amount of \$17,166. Applicant provided a February 17, 2016 settlement offer from a collection agent, indicating the debt could be settled if he made 12 monthly payments of \$590. (AE G) He wrote the creditor asking for validation that the collection agent was representing the creditor. (Tr. 20-21) He assured he was willing to pay the debt even though he is aware that the debt is so old it is not legally collectible. (Tr. 22, 25)

SOR ¶ 1.b alleges a charged-off credit card account in the amount of \$7,485. On October 26, 2016, the creditor offered to settle the debt for \$4,491 to be paid in six monthly installments beginning on October 31, 2016. (AE B) Applicant said he planned to make the six payments described in the creditor's settlement offer. (Tr. 19, 28)

SOR ¶ 1.c alleges a charged-off credit card account in the amount of \$3,137. Applicant made six monthly payments beginning in January 2016. (Tr. 29) On October 26, 2016, the creditor wrote that this debt with a balance of \$1,569 was settled in full on July 27, 2016. (Tr. 18-19; AE A)

SOR ¶ 1.d alleges eight delinquent student loan accounts placed for collection in the amount of \$29,410. In January 2016, Applicant entered into a loan rehabilitation program where he agreed to pay the creditor \$5 monthly for nine months. (Tr. 32-33; AE C; AE D) Applicant said he made the first eight payments. (Tr. 19) On October 26, 2016, the creditor wrote that the loan would soon be rehabilitated. (AE C; AE D) Applicant has two additional student loans for \$8,291 and \$6,229, which are in deferment because Applicant is attending an aviation-related school. (Tr. 27, 33-35; AE E; AE F)

Personal Conduct

Section 26, Financial Record, of Applicant's SCA asks in the past seven (7) years: have "you had any bills or debts turned over to a collection agency?"; have "you had any account or credit card suspended, charged off, or cancelled for failing to pay as agreed?"; have you "been over 120 days delinquent on any debt(s)"; and are "you currently over 120 days delinquent on any debt(s)?" (GE 1)

Applicant answered "no" to these four questions. At his hearing he explained, "I kind of missed it. I should have been more careful. It was like an oversight on my part and I didn't deliberately do that." (Tr. 35-36) He continued, "It was like a long questionnaire. It took me a few days to finish and I would say I should have paid more attention to the financial part, and if I were to do it all over again, I would list everything." (Tr. 37-38)

Applicant's April 16, 2015 OPM PSI states, "Subject confirmed an answer of 'no' to all of the financial record questions. His overall financial situation is stable and fine with no issues." (GE 2 at 11) An OPM investigator subsequently confronted Applicant

with the information on his credit report. (Tr. 36-37; GE 2 at 11-12) Applicant said he thought the accounts were no longer on his record. (Tr. 36-37) He conceded an honest answer to the OPM investigator would have included an acknowledgement that his history included some financial problems. (Tr. 51) He said he did not realize before the OPM interview that his finances were important in the security clearance process. (Tr. 53)

Applicant failed to disclose a September 11, 2010 arrest, for driving under the influence of alcohol (DUI) on his SCA. (Tr. 38-39; GE 1; GE 2 at 9) He said he did not disclose the DUI arrest for four reasons: (1) it was dismissed before he went to court (the SCA specifies that dismissed charges are required to be reported); (2) he did not think it was that important because it was a “stop for suspicion” and not a charge; (3) he was not guilty of DUI; and (4) it was an oversight. (Tr. 38-41; GE 1) When he was stopped for the DUI, he was placed in handcuffs and his vehicle was impounded. (Tr. 40) He had to pay a \$500 fine. (Tr. 40-41) Applicant initially told the OPM investigator that he did not have SCA-reportable arrest information, and then after he was confronted with his record of arrest, he admitted that he was stopped for DUI. (Tr. 41; GE 2 at 9)

Applicant regretted his incorrect answers on his SCA and to the OPM investigator. (Tr. 54, 57) He promised to be more careful in the future. (Tr. 54, 57)

Character Evidence

Applicant’s 2015 performance review and his supervisor positively describe his character and work performance.² The general sense of his performance review and statement indicate his is trustworthy, reliable, responsible, diligent, and professional. These two documents support approval of his access to classified information.

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.

² The sources for the facts in this paragraph are Applicant’s 2015 performance and a statement from his supervisor, who has known Applicant for three years. (AE I; AE J)

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.

AG ¶ 19 provides two disqualifying conditions that could raise a security concern and may be disqualifying in this case: "(a) inability or unwillingness to satisfy debts;" and "(c) a history of not meeting financial obligations." Applicant's history of delinquent debt is documented in his credit reports, SOR response, and hearing record. The 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

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

(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 important mitigating information. Several circumstances beyond his control adversely affected his finances. Applicant had some periods of unemployment or underemployment before obtaining his current employment and his income was limited. 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 his first year of his current employment (January 2015 to January 2016).

Applicant is credited with mitigating the debts in SOR ¶¶ 1.c and 1.d. He settled the debt in SOR ¶ 1.c. He made eight \$5 payments to address his eight delinquent education debts, and he brought his eight student loans to current status. His student loans should be deferred because he is attending school. He is not credited with mitigating the other SOR debts because he did not provide sufficient documentation showing progress paying the debt, a reasonable dispute of any debts, or an inability to start payments on at least one more delinquent debt starting in January 2015.

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)).

There is insufficient evidence about why Applicant was unable to make greater documented progress resolving the debts in SOR ¶¶ 1.a and 1.b. 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.

Personal Conduct

AG ¶ 15 explains why personal conduct is a security concern stating:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

AG ¶ 16 describes one condition that could raise a security concern and may be disqualifying in this case:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire . . . used to conduct investigations, . . . determine security clearance eligibility or trustworthiness. . . .⁴

Applicant falsely answered “no” to four questions in Section 26, Financial Record, of Applicant's February 12, 2015 SCA, which asks in the past seven (7) years: have “you had any bills or debts turned over to a collection agency?”; have “you had any account or credit card suspended, charged off, or cancelled for failing to pay as agreed?”; have you “been over 120 days delinquent on any debt(s)?”; and are “you currently over 120 days delinquent on any debt(s)?” (GE 1) AG ¶ 16(a) is established.

⁴The Appeal Board has cogently explained the process for analyzing falsification cases, stating:

(a) when a falsification allegation is controverted, Department Counsel has the burden of proving falsification; (b) proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred; and (c) a Judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning the applicant's intent or state of mind at the time the omission occurred. [Moreover], it was legally permissible for the Judge to conclude Department Counsel had established a prima facie case under Guideline E and the burden of persuasion had shifted to the applicant to present evidence to explain the omission.

ISCR Case No. 03-10380 at 5 (App. Bd. Jan. 6, 2006) (citing ISCR Case No. 02-23133 (App. Bd. June 9, 2004)).

AG ¶ 17 lists five conditions that could mitigate security concerns including:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress; and

(f) the information was unsubstantiated or from a source of questionable reliability.

None of the mitigating conditions apply. Applicant failed to disclose important financial information on his February 12, 2015 SCA. When an OPM investigator interviewed him, he did not disclose his delinquent debts until he was confronted with his credit report. His failure to disclose his DUI arrest on his SCA and at the beginning of his OPM PSI is an indication that he did not want to disclose derogatory information on his SCA and to the OPM investigator.⁵ Personal conduct security concerns are not mitigated.

⁵Applicant's SOR does not allege that: (1) he initially lied to the OPM investigator when he denied knowing about any SCA-reportable delinquent debts in the previous seven years; (2) he failed to disclose a reportable DUI arrest on his SCA; and (3) he failed to disclose his DUI arrest upon request when his OPM interview began. In ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006), the Appeal Board listed five circumstances in which conduct not alleged in an SOR may be considered stating:

(a) to assess an applicant's credibility; (b) to evaluate an applicant's evidence of extenuation, mitigation, or changed circumstances; (c) to consider whether an applicant has demonstrated successful rehabilitation; (d) to decide whether a particular provision of the Adjudicative Guidelines is applicable; or (e) to provide evidence for whole person analysis under Directive Section 6.3.

Id. (citing ISCR Case No. 02-07218 at 3 (App. Bd. Mar. 15, 2004); ISCR Case No. 00-0633 at 3 (App. Bd. Oct. 24, 2003)). See *also* ISCR Case No. 12-09719 at 3 (App. Bd. April 6, 2016) (citing ISCR Case No. 14-00151 at 3, n. 1 (App. Bd. Sept. 12, 2014); ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006)). Consideration of these three allegations will not be considered except for the five purposes listed above.

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 Guidelines F and E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Applicant is a 33-year-old mechanical technician, who has worked for his employer since January 2015. In 2001, he graduated from high school, and he has completed three years towards a degree in aerospace engineering. He is currently attending an aviation-related school.

Applicant's 2015 performance review and his supervisor positively described his character and performance. The general sense of his performance review and statement is that he is trustworthy, reliable, responsible, diligent, and professional, and this information supports approval of his access to classified information.

Applicant provided some important mitigating financial information. Applicant accrued delinquent debts in 2010, when he became unemployed. He did not establish stable employment until January 2015. He brought his student loans to current or deferment status, and he paid one delinquent SOR debt.

The financial evidence against approval of Applicant's clearance is more substantial at this time. Applicant has a history of financial problems exceeding five years. He has two unresolved delinquent debts totaling about \$24,651. He contacted the creditors and learned he could settle the two debts for about \$11,000. He did not start the payment plans to address either of these two debts. He did not provide enough specifics about how the 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. When he completed his February 12, 2015 SCA, Applicant intentionally and falsely denied that he had any delinquent debts meeting the criteria in the SCA in the previous seven years even though he knew that he had delinquent debts meeting the SCA's criteria. Similarly he failed to disclose those same reportable debts at the start of his OPM PSI before being confronted with his credit report. He failed to disclose his DUI arrest on his February 12, 2015 SCA and at the start of his OPM PSI before being confronted with his arrest record. See note 5 *supra*.

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 consideration and personal conduct 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 and 1.b:	Against Applicant
Subparagraphs 1.c and 1.d:	For Applicant
Paragraph 2, Guideline E:	Against APPLICANT
Subparagraph 2.a:	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