



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



In the matter of:

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ISCR Case No. 15-06820

Applicant for Security Clearance

Appearances

For Government: Jeff A. Nagel, Esq., Department Counsel
For Applicant: *Pro se*

03/20/2017

Decision

HARVEY, Mark, Administrative Judge:

Applicant's statement of reasons (SOR) alleges seven delinquent debts totaling \$19,922. Six of his SOR debts were paid, and one medical debt for \$789 was otherwise resolved. 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 October 2, 2014, Applicant signed his Questionnaire for National Security Positions (SF 86) or security clearance application (SCA). (Item 2) On April 21, 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. (Item 1) Specifically, the SOR set forth security concerns arising under Guideline F (financial considerations).

On May 18, 2016, Applicant provided a response to the SOR, and he requested a decision without a hearing. (Item 1) On June 14, 2016, Department Counsel completed the File of Relevant Material (FORM). On June 24, 2016, Applicant received the FORM. On October 18, 2016, Applicant responded to the FORM. On March 6, 2017, the case was assigned to me. The case file consisted of six exhibits. (Items 1-6 and Applicant's FORM response) There were no objections to any exhibits.

Findings of Fact¹

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

Applicant is a 49-year-old service delivery executive, and he has worked for a DOD contractor since 2008.² In 1991, he received a bachelor's degree, and in 1994, he received a master's degree. He has never served in the U.S. Armed Forces. In 1995, he married. His children were born in 2003 and 2010. There is no evidence that he violated security rules, committed any crimes as an adult, or used illegal drugs. There is no evidence of employer performance evaluations.

Financial Considerations

Applicant's history of delinquent debt is documented in his credit reports, SCA, Office of Personnel Management (OPM) personal subject interview (PSI), SOR response, and FORM response. The status of his seven delinquent SOR debts is as follows.

SOR ¶ 1.a alleges a charged-off bank debt for \$2,277. On October 7, 2016, Applicant paid the creditor \$2,277, and the debt was resolved. (FORM response)

SOR ¶ 1.b alleges a bank debt placed for collection for \$1,090. On May 6, 2016, the creditor wrote that the Applicant paid \$654, and the balance owed was zero. (Item 2)

SOR ¶ 1.c alleges a bank debt placed for collection for \$4,125. On May 6, 2016, the creditor wrote that the Applicant paid \$50; the balance owed was \$4,074; and Applicant had a \$50 monthly payment plan. (Item 2) On October 13, 2016, Applicant paid the creditor \$3,875, and the debt was resolved. (FORM response)

SOR ¶ 1.d alleges a bank debt placed for collection for \$7,751. On October 3, 2016, Applicant paid the creditor \$7,751, and the debt was resolved. (FORM response)

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

² Unless stated otherwise, the source of the information in this paragraph is Applicant's October 2, 2014 Electronic Questionnaire for National Security Positions (e-QIP) (SF 86) or security clearance application (SCA). (Item 2)

SOR ¶ 1.e alleges a bank debt placed for collection for \$3,376. On May 13, 2016, the creditor wrote the debt was paid in full. (FORM response)

SOR ¶ 1.f alleges a medical debt placed for collection for \$789. Applicant contacted the creditor. The creditor advised him that the account was closed, and the debt was resolved.

SOR ¶ 1.g alleges a bank debt placed for collection for \$514. On May 6, 2016, the creditor wrote that the Applicant paid \$309, and the balance owed was zero. (Item 2)

During a company merger, Applicant and his spouse had a substantial pay cut, and several accounts became delinquent. (Items 2, 3) On October 2, 2016, Applicant withdrew \$114,677 from his retirement account. (FORM response) He paid \$45,935 for federal income taxes and \$4,594 for state income taxes. (FORM response) He used some of the remaining funds from his retirement account to pay the debts in SOR ¶¶ 1.a, 1.c, and 1.d. Applicant promised to pay his debts.

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 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, SOR response, and FORM response. 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;

(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

³ A 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)).

⁴ The 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].

(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), and 20(d) apply. Applicant's delinquent SOR debt resulted when his employer reduced his pay and his spouse's pay. This reduction in pay is a circumstance beyond his control, and he acted responsibly by paying his debts.

Applicant's SOR alleges seven delinquent debts totaling \$19,922. Six of his SOR debts were paid, and one was otherwise resolved when the medical creditor closed the account and dropped the request for payment. 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):

(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)).

(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 service delivery executive, and he has worked for a DOD contractor since 2008. In 1991, he received a bachelor's degree, and in 1994, he received a master's degree. There is no evidence that he violated security rules, committed any crimes as an adult, or used illegal drugs.

Applicant's SOR alleges seven delinquent debts totaling \$19,922. Six of his SOR debts were paid, and one medical debt for \$789 was otherwise resolved when the creditor closed the account. 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, SOR response, and FORM response. 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 to maintain 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.

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

⁵ Of course, the Government may re-validate Applicant's financial status at any time through credit reports, investigation, and interrogatories. Approval of access to classified information now does not bar the Government from subsequently revoking it, if warranted. "The Government has the right to reconsider the security significance of past conduct or circumstances in light of more recent conduct having negative security 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 *a/so* 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 security clearance to allow her the opportunity to have access to classified information while she works on her financial problems."). This footnote does not imply that this Applicant's security clearance is conditional.