



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 15-06885

Appearances

For Government: Carroll Connelley, Esq., Department Counsel
For Applicant: Alton Wiley, Esq.

03/28/2017

Decision

TUIDER, Robert J., Administrative Judge:

Applicant failed to mitigate security concerns under Guideline F (financial considerations). Clearance is denied.

Statement of the Case

On January 25, 2015, Applicant submitted a Questionnaire for National Security Positions (SF-86). On May 28, 2016, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) to Applicant, pursuant to Exec. Or. 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended; and the adjudicative guidelines (AG), which became effective on September 1, 2006.

The SOR alleged security concerns under Guideline F. The SOR detailed reasons why the DOD CAF was unable to find that it is clearly consistent with the national interest to grant a security clearance for Applicant, and it recommended that his case be submitted to an administrative judge for a determination whether his clearance should be granted, continued, or denied.

On June 16, 2016, Applicant responded to the SOR. On August 8, 2016, Department Counsel was ready to proceed. On August 12, 2016, DOHA assigned Applicant's case to me. On August 15, 2016, the Defense Office of Hearings and Appeals (DOHA) issued a hearing notice, setting the hearing for September 13, 2016. Applicant's hearing was held as scheduled.

At the hearing, Department Counsel offered Government Exhibits (GE) 1 through 5, which were received into evidence without objection. Applicant testified, did not call any witnesses, and offered Applicant Exhibits (AE) A through O, which were received into evidence without objection. On September 21, 2017, DOHA received the hearing transcript (Tr.).

At the conclusion of the hearing, I held the record open until October 28, 2016, to afford Applicant an opportunity to submit additional evidence. Post-hearing, I granted Applicant two additional extensions to submit evidence with due dates of December 30, 2016, and February 15, 2017. The record closed on February 15, 2017. Post-hearing, Applicant offered AE P through ZZZZZ, which were received into evidence without objection.

Withdrawal of SOR Allegations

Department Counsel moved to withdraw SOR ¶¶ 1.a and 1.n. Without objection from Applicant's Counsel, I granted Department Counsel's motion. (Tr. 50; AE B)

Findings of Fact

Applicant admitted SOR ¶¶ 1.b, 1.c, 1.e, 1.f, 1.h, 1.i, 1.j, 1.k, 1.l, 1.m, 1.q, and 1.r; and denied the remaining allegations. After a thorough review of the record, I make the following findings of fact.

Background Information

Applicant is a 60-year-old senior designer employed by a defense contractor since September 2003. He seeks to retain his secret security clearance, which is a requirement of his continued employment. (GE 1; Tr. 12-13)

Applicant graduated from high school in Africa in 1979. He immigrated to the United States in 1993 and became a naturalized U.S. citizen in 1999. He received his U.S. GED in 1995, and was awarded an associate's degree in computerized drafting in 2000, and an associate's degree in architectural building technology in 2007. (GE 1, GE 2; Tr. 13-16)

Applicant was previously married from 1994 to 2009. He remarried in 2010 and as of his hearing date was separated from his second wife pending divorce. Applicant has a ten-year-old daughter from his second marriage, who resides with her mother. Applicant has a total of seven children, one born during his second marriage in the United States, and six born in Africa. One of the children born in Africa is an adult son,

who lives in the United States and the remaining five adult children live in Africa. (GE 1; Tr. 16-21, 64)

Financial Considerations

Applicant's SOR contains 19 allegations of delinquent debt totaling \$90,202, ranging from a \$38 collection account to a \$71,220 student loan collection account. These allegations are documented in Applicant's January 2015 SF-86, his March 2015 Office of Personnel Management Personal Subject Interview (OPM PSI), his February 2015 and April 2016 credit reports, and his record of judgment and lien printout. (SOR ¶¶ 1.a – 1.s; GE 1 – 5)

Applicant traces the beginning of his financial difficulties to "around 2001" when he bought some electronic equipment from a major department store on credit. He claimed that he had problems with the equipment and the store replaced the equipment two times, but refused to replace it a third time. Applicant also described truck payments he was held responsible for following the breakup of his first marriage. He was also frustrated at the little headway he was making on paying down his student loans and ultimately stopped paying these loans prompting garnishment proceedings. (Tr. 21-24)

During Applicant's March 2015 OPM PSI, the investigator discussed in detail delinquent debts on his credit report putting him on notice that his finances raised a security concern. During that interview, Applicant claimed that accounts were not his, that he did not recognize the accounts, or that he did not owe the creditors money. (GE 2) The Government's concerns were again brought to Applicant's attention 14 months later when they sent him his May 2016 SOR.

In his SOR answer, Applicant described the impact his divorce had on his finances. His SOR answer explanations for having financial problems were consistent with what he told the investigator during his OPM PSI adding that he was in the process of setting up repayment plans with certain creditors. (SOR answer)

At his hearing, Applicant did not produce sufficient evidence of any good-faith efforts to pay or resolve his SOR debts. The only payments corroborated by evidence were his student loans and department store collection account, and those were being paid through involuntary garnishment. Again, Applicant's testimony was consistent with explanations provided during his OPM PSI and in his SOR answer, such as he did not recognize a particular debt, the debt was not his, or he was attempting to resolve the debt. (Tr. 25-64; AE A, AE O)

As noted, I left the record open and granted Applicant two extensions providing him with approximately five months post-hearing to submit evidence. He provided further evidence documenting the garnishment or judgment actions taken to force repayment for his student loans and department store debt. Applicant's numerous post-hearing documents included performance evaluations, certificates of completion for several apprentice programs, service on his state grand jury, and reference or character letters. (AE P-AE ZZZZZ)

To address financial concerns, Applicant submitted typed paragraphs that provided explanations similar to those previously provided without corroborating evidence. The only persuasive post-hearing documentation submitted pertained to SOR ¶ 1.g (\$38 collection account) for medical treatment. (AE AAAAAA-AE ZZZZZ) Applicant did not submit evidence of financial counseling.

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. See also Executive Order 12968 (Aug. 2, 1995), § 3.1. Thus, nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination about applicant’s allegiance, loyalty, or patriotism. It is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines

presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue her security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Financial Considerations

The Government met its burden of production in support of the allegations in the SOR. The facts established raise a security concern addressed, in relevant part, at AG ¶ 18 as follows:

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.” In ISCR Case No. 09-12184 at 7 (App. Bd. Jan. 7, 2010), the Appeal Board explained:

It is well-settled that adverse information from a credit report can normally meet the substantial evidence standard and the government’s obligations under [Directive] ¶ E.31.14 for pertinent allegations. At that point, the burden shifts to applicant to establish either that [he or] she is not responsible for the debt or that matters in mitigation apply.

(internal citation omitted). Applicant’s history of delinquent debt is documented in his credit reports, OPM PSI, 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;¹ and

(e) the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides

¹The Appeal Board has previously explained what constitutes a “good faith” effort to repay overdue creditors or otherwise resolve debts:

In order to qualify for application of [the “good faith” mitigating condition], an applicant must present evidence showing either a good-faith effort to repay overdue creditors or some other good-faith action aimed at resolving the applicant’s debts. The Directive does not define the term “good-faith.” However, the Board has indicated that the concept of good-faith “requires a showing that a person acts in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation.” Accordingly, an applicant must do more than merely show that he or she relied on a legally available option (such as bankruptcy) in order to claim the benefit of [the “good faith” mitigating condition].

(internal citation and footnote omitted) ISCR Case No. 02-30304 at 3 (App. Bd. Apr. 20, 2004) (quoting ISCR Case No. 99-9020 at 5-6 (App. Bd. June 4, 2001)).

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).

Apart from partial application of AG ¶ 20(d) to SOR ¶ 1.g, none of the mitigating conditions are fully applicable. Applicant did not provide enough details about what he did to address his SOR debts. Except as indicated, he did not provide sufficient documentation relating to any of his SOR debts: (1) proof of payments, such as checking account statements, photocopies of checks, or a letter from the creditor proving that he paid or made any payments to the creditors; (2) correspondence to or from the creditors to establish maintenance of contact;² (3) credible debt disputes indicating he did not believe he was responsible for the debts and why he held such a belief; (4) more evidence of attempts to negotiate payment plans, such as settlement offers or agreements to show that he was attempting to resolve these debts; or (5) other evidence of progress or resolution. Applicant failed to establish mitigation under AG ¶ 20(e) because he did not provide documented proof to substantiate the existence, basis, or the result of any debt disputes.

There is insufficient evidence about why Applicant was unable to make greater progress resolving 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.

²"Even if Applicant's financial difficulties initially arose, in whole or in part, due to circumstances outside his [or her] control, the Judge could still consider whether Applicant has since acted in a reasonable manner when dealing with those financial difficulties." ISCR Case No. 05-11366 at 4 n.9 (App. Bd. Jan. 12, 2007) (citing ISCR Case No. 99-0462 at 4 (App. Bd. May 25, 2000); ISCR Case No. 99-0012 at 4 (App. Bd. Dec. 1, 1999); ISCR Case No. 03-13096 at 4 (App. Bd. Nov. 29, 2005)). A component is whether he or she maintained contact with creditors and attempted to negotiate partial payments to keep debts current.

In summary, Applicant did not mitigate the security concerns raised by the Government's information. In addition to evaluating the facts and applying the appropriate adjudicative factors under Guideline F, I have reviewed the record before me in the context of the whole-person factors listed in AG ¶ 2(a). Applicant has been gainfully employed for the majority of his adult life, and he is presumed to be a mature, responsible citizen. Nonetheless, without other information suggesting his financial problems are being addressed, doubts remain about his suitability for access to classified information. Protection of the national interest is the principal focus of these adjudications. Accordingly, those doubts must be resolved against the Applicant.

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:	Withdrawn
Subparagraphs 1.b – 1.f:	Against Applicant
Subparagraph 1.g:	For Applicant
Subparagraphs 1.h - 1.m:	Against Applicant
Subparagraph 1.n:	Withdrawn
Subparagraphs 1.o – 1.s:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national security to grant Applicant eligibility for a security clearance. Clearance is denied.

ROBERT J. TUIDER
Administrative Judge