



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



In the matter of:

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ISCR Case No. 15-08060

Applicant for Security Clearance

Appearances

For Government: Pamela Benson, Esq., Department Counsel

For Applicant: *Pro se*

08/25/2017

Decision

HARVEY, Mark, Administrative Judge:

Applicant provided insufficient evidence of resolution of his financial issues, and financial considerations security concerns are not mitigated. Eligibility for access to classified information is denied.

Statement of the Case

On June 9, 2015, Applicant completed and signed his Questionnaire for National Security Positions (SF 86) or security clearance application (SCA). (Government Exhibit (GE) 1) On June 13, 2016, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a statement of reasons (SOR) to Applicant under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry*, February 20, 1960; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), January 2, 1992; and the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information*, effective on September 1, 2006 (Sept. 1, 2006 AGs).

The SOR detailed reasons why the DOD CAF did not find under the Directive that it is clearly consistent with the interests of national security to grant or continue a security clearance for him, and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked. Specifically, the SOR set forth security concerns arising under the financial considerations guideline.

On September 22, 2016, Applicant responded to the SOR. (HE 3) On November 14, 2016, Department Counsel was ready to proceed. On March 20, 2017, the case was assigned to me. On April 24, 2017, the Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing, setting the hearing for May 5, 2017. (HE 1) Applicant waived his right to 15 days of notice of the date, time, and location of his hearing. (Tr. 13-15) Applicant's hearing was held as scheduled using video teleconference.

During the hearing, Department Counsel offered five exhibits; Applicant did not present any exhibits; there were no objections; and all proffered exhibits were admitted into evidence. (Tr. 12, 19; GE 1-5) On May 15, 2017, DOHA received a copy of the hearing transcript.

While this case was pending a decision, the Director of National Intelligence (DNI) issued Security Executive Agent Directive 4, establishing in Appendix A the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AGs), which he made applicable to all covered individuals who require initial or continued eligibility for access to classified information or eligibility to hold a sensitive position. The new AGs supersede the Sept. 1, 2006 AGs and are effective "for all covered individuals" on or after June 8, 2017. Accordingly, I have evaluated Applicant's security clearance eligibility under the new AGs.¹

Findings of Fact²

In Applicant's SOR response, he admitted the SOR allegations in ¶ 1.a and 1.c. He also provided extenuating and mitigating information. Applicant's admissions are accepted as findings of fact. Additional findings of fact follow.

Applicant is 56 years old, and he has been employed as a custodian or janitor since February 2015. (Tr. 6, 9, 21; GE 1) In 1979, he graduated from high school. (Tr. 6) In 1989, he received a bachelor's degree in interdisciplinary studies. (Tr. 7) He served in the Army from 1992 to 1994, and he received an honorable discharge. (Tr. 7-8) In 1995, Applicant married, and in 2011, he divorced. (Tr. 8) His children are ages 14, 16, 18, and 20. (Tr. 8) His youngest child is in foster care because he is autistic. (Tr. 26) His oldest child is attending college. (Tr. 26) His former spouse is bipolar. (Tr. 26) His other two children live with his former spouse's parents. (Tr. 8, 26) He does not pay any child support or alimony. (Tr. 27) There is no evidence of illegal drug use, alcohol abuse, or security violations.

¹ Application of the AGs that were in effect as of the issuance of the SOR would not change my decision in this case. The new AGs are available at http://ogc.osd.mil/doha/5220-6_R20170608.pdf.

² Some details were excluded to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

Financial Considerations

From 2006 to 2009, Applicant worked as a certified nursing assistant. (Tr. 23) From September 2011 to January 2015, Applicant was unemployed. (Tr. 23-25) Applicant's current salary is \$10.17 an hour. (Tr. 21) He also receives \$265 monthly from the Department of Veterans Affairs (VA) for a service-connected disability. (Tr. 21)

Applicant paid about \$1,400 to help a 30-year-old woman from Mexico because she said she could obtain gold bars from her father's African estate due to the gold being held in African Customs. (Tr. 30) He expects her to move to the United States with the gold. (Tr. 33) He occasionally gave the woman from Mexico money for food. (Tr. 31) He believes she is coming to the United States to marry him. (Tr. 32) He also paid several hundred dollars for a 30-year-old Russian woman to come to the United States; however, she did not come to the United States. (Tr. 29-33) He was unclear about how much he paid the Russian woman to assist her move to the United States. He has never met either woman in person; however, he acknowledged that the payments to the Mexican and Russian woman might be scams. (Tr. 33)³

Applicant's SOR alleges four delinquent debts totaling about \$47,800, and their status is as follows:

SOR ¶ 1.a alleges delinquent student loans totaling \$47,228. (Tr. 36) His May 1, 2017 credit report shows the delinquent student loan total as \$50,660. (Tr. 42) He accepted responsibility for the debt, and he said for the previous three months, he paid the creditor \$50 weekly. (Tr. 36, 41-42; SOR response) He did not provide proof of any payments.

SOR ¶ 1.b alleged a debt owed to the Defense Finance and Accounting Office for \$349. Applicant denied responsibility for the debt. (Tr. 37) His May 1, 2017 credit report does not list this debt. (GE 4)

³ Applicant's SOR does not include information about: (1) his payments to the Mexican and Russian women; (2) Applicant is three months behind on his \$290 monthly payments on his vehicle debt for \$11,600; and (3) Applicant acknowledged responsibility for a charged-off debt for \$1,097. 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)). These three allegations will not be considered except for the five purposes listed above.

SOR ¶ 1.c alleges a telecommunications debt for \$201. Applicant said he paid the debt in 2016. (Tr. 37-38) His credit report indicates the debt is paid, and I have credited Applicant with mitigating SOR ¶ 1.c. (Tr. 44; GE 4)

SOR ¶ 1.d alleges a debt placed for collection for \$94. (Tr. 33, 38; GE 4) He did not recognize this debt. (Tr. 38) His May 1, 2017 credit report does not list this debt. (GE 4)

Applicant received some financial counseling, and he was willing to receive more financial counseling. (Tr. 38, 48) He made about three payments in 2016 to a debt verification company to dispute debts on his credit report. (Tr. 46-47) Applicant is three months behind on his \$290 monthly payments on his vehicle debt for \$11,600. (Tr. 42-43; GE 4) He acknowledged responsibility for a charged-off debt for \$1,097, and he has not made any payments to address this debt. (Tr. 43-44; GE 4) He acknowledged that he fell behind on his debts because of “these women taking advantage of me.” (Tr. 43)

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.

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, Secretary of Defense, and DNI 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 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 or sensitive information. . . . An individual who is financially overextended is at greater risk of having to engage in illegal or otherwise questionable acts to generate funds. . . .

The Appeal Board explained the scope and rationale for the financial considerations security concern in ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012) (citation omitted) 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.

AG ¶ 19 includes three disqualifying conditions that could raise a security concern and may be disqualifying in this case: "(a) inability to satisfy debts;" "(b) unwillingness to satisfy debts regardless of the ability to do so;" and "(c) a history of not meeting financial obligations." In ISCR Case No. 08-12184 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] ¶ E3.1.14 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). The record establishes the disqualifying conditions in AG ¶¶ 19(a), 19(b), and 19(c) requiring additional inquiry about the possible applicability of mitigating conditions.

Five financial considerations mitigating conditions under AG ¶ 20 are potentially applicable in this case:

(a) the behavior happened so long ago,⁴ 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, a death, divorce or separation, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances;

(c) the individual has received or is receiving financial counseling for the problem from a legitimate and credible source, such as a non-profit credit counseling service, and there are clear indications that the problem is being resolved or is under control;

(d) the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts;⁵ and

⁴ 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)).

⁵ The Appeal Board has previously explained what constitutes a "good faith" effort to repay overdue creditors or otherwise resolve debts:

(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 DOHA 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 provided some mitigating information. He was underemployed or unemployed, which are circumstances beyond his control that harmed his finances. He received some financial counseling, and he said he made three monthly payments to a debt verification company in 2016. He is credited with mitigating the debts in SOR ¶¶ 1.b through 1.d. Applicant said he paid or did not recognize the debts in SOR ¶¶ 1.b through 1.d, and his May 1, 2017 credit report does not list the debts in SOR ¶¶ 1.b through 1.d. (GE 4)

The evidence against mitigating financial considerations security concerns is more substantial. Applicant did not provide enough details with documentary corroboration about what he did to address his delinquent student loan debts. He made some uncorroborated claims of payments and payment plans. He did not provide documentation relating to the SOR debts in ¶ 1.a such as: (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; (3) copies of credible debt disputes sent to

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)).

the creditor and/or credit reporting companies indicating he did not believe he was responsible for the debts and why he held such a belief; (4) 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.

There is insufficient evidence about why Applicant was unable to make greater documented progress resolving the debt in SOR ¶ 1.a, which exceeds \$50,000. There is insufficient assurance that his financial problems are being resolved, are under control, and will not recur in the future. Under all the circumstances, he failed to establish that financial considerations security concerns are mitigated.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an Applicant's eligibility for a security clearance by considering the totality of the Applicant's conduct and all the circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d):

(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), "[t]he ultimate determination" of whether to grant a security clearance "must be an overall commonsense judgment based upon careful consideration of the guidelines" and the whole-person concept. My comments under Guideline F are incorporated in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under that guideline but some warrant additional comment.

Applicant is 56 years old, and he has been employed as a custodian or janitor since February 2015. In 1979, he graduated from high school. In 1989, he received a bachelor's degree in interdisciplinary studies. He served in the Army from 1992 to 1994, and he received an honorable discharge. Unemployment and underemployment were circumstances beyond his control that adversely affected his finances. There is no evidence of use of illegal drugs, abuse of alcohol, or security violations.

The evidence against mitigation of financial considerations is more substantial. Applicant admitted responsibility for his delinquent student loans totaling about \$50,000. He said he paid \$600 in the previous three months; however, he did not provide documentation proving that he made these payments. His vehicle loan is also delinquent. He made minimal documented progress addressing his other SOR debts. His payments to the Russian and Mexican women are problematic especially with his limited resources. His failure to act more aggressively to establish his financial responsibility indicates "poor

self-control, lack of judgment, or unwillingness to abide by rules and regulations” and this conduct “raise[s] questions about [his] reliability, trustworthiness, and ability to protect classified or sensitive information.” See AG ¶ 18.

It is well settled that once a concern arises regarding an Applicant security clearance eligibility, there is a strong presumption against the grant or renewal of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990). Unmitigated financial considerations concerns lead me to conclude that grant of a security clearance to Applicant is not warranted at this time. This decision should not be construed as a determination that Applicant cannot or will not attain the state of reform necessary for award of a security clearance in the future. With a track record of behavior consistent with his obligations, he may well be able to demonstrate persuasive evidence of his security clearance worthiness.

I have carefully applied the law, as set forth in *Egan*, Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. Financial considerations security concerns are not 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:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraphs 1.b, 1.c, and 1.d:	For Applicant

Conclusion

In light of all of the circumstances in this case, it is not clearly consistent with the interests of national security to grant Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Mark Harvey
Administrative Judge