



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



In the matter of:

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ISCR Case No. 15-08303

Applicant for Security Clearance

Appearances

For Government: Ross Hyams, Esq., Department Counsel
For Applicant: *Pro se*

08/08/2017

Decision

HARVEY, Mark, Administrative Judge:

Applicant's statement of reasons (SOR) alleges his debts were discharged under Chapter 7 of the Bankruptcy Code in 2008, and he has five delinquent debts totaling \$8,189. Three SOR debts are paid, and he is making payments on two SOR debts. The SOR debt total is now \$2,415. He has established his financial responsibility. Financial considerations security concerns are mitigated. Eligibility for access to classified information is granted.

Statement of the Case

On March 3, 2015, Applicant completed and signed his Questionnaire for National Security Positions (SF 86) or security clearance application (SCA). (Item 4) On March 18, 2016, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued an 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. (Item 1)

Specifically, the SOR set forth security concerns arising under the financial considerations guideline. (Item 1)

On April 15, 2016, Applicant provided a response to the SOR, and he did not request a hearing. (Item 3) On August 2, 2016, Department Counsel completed the File of Relevant Material (FORM). On August 24, 2016, Applicant received the FORM, and on September 20, 2016, the Defense Office of Hearings and Appeals (DOHA) received Applicant's response to the FORM. On May 22, 2017, the case was assigned to me. The case file consists of nine exhibits. (Items 1-8; FORM response) There were no objections to any of the exhibits, and they were admitted into evidence.

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

Applicant's SOR response admitted all of the allegations, and he presented extenuating and mitigating information. (Item 3) Applicant's admissions are accepted as findings of fact. Additional findings of fact follow.

Applicant is a 47-year-old software engineer, and a defense contractor has employed him since August 2012.³ He was employed as a carpenter from August 1997 to August 2012. In 1987, he received a high school diploma, and in 2009, he received an associate's degree. He attended some additional college classes from 2009 to 2013. He served in the Air Force from 1989 to 1991, and he received an honorable discharge. In 1990, he married, and in 1997, he divorced. In 1997, he married. His six children or stepchildren were born in 1992, 1993, 1994, 1995, 1999, and 2010. His finances have improved since he is only providing support for two children instead of six, and his spouse is employed outside of their home. There is no evidence of security violations, alcohol abuse, or use of illegal drugs.

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.

³ The sources for the facts in this paragraph are Applicant's March 3, 2015 Questionnaire for National Security Positions (SF 86) or security clearance application (SCA) and April 27, 2015 Office of Personnel Management personal subject interview (OPM PSI). (Item 4)

Financial Considerations

Applicant's credit reports, SCA, Office of Personnel Management personal subject interview (OPM PSI), SOR response, and FORM response establish that Applicant had five delinquent debts and his nonpriority unsecured debts were discharged under Chapter 7 of the Bankruptcy Code in 2008. The status of his five SOR debts is as follows:

SOR ¶ 1.a alleges Applicant owes a delinquent debt for \$495. On September 9, 2016, the creditor wrote that the account has been satisfied, and Applicant's credit record will be updated accordingly. (FORM response)

SOR ¶ 1.b alleges Applicant owes a delinquent debt for \$1,272. On September 9, 2016, the creditor wrote that \$636 was received from Applicant on April 15, 2016, and the balance due was zero. (FORM response)

SOR ¶ 1.c alleges Applicant owes a delinquent telecommunications debt for \$101. The creditor provided an undated letter indicating Applicant's telecommunications account was paid. (FORM response)

SOR ¶ 1.d alleges Applicant owes a delinquent debt for \$4,730. On September 9, 2016, the creditor sent Applicant a settlement agreement indicating the settlement balance was \$2,365, with \$296 monthly payments due from August 31, 2016, to March 17, 2017. (FORM response) His current balance owed is \$1,774. (FORM response)

SOR ¶ 1.e alleges Applicant owes a delinquent debt for \$1,591. On September 9, 2016, the creditor wrote that \$500 was received towards Applicant's balance, and additional payments were expected on a monthly basis. (FORM response) His current balance owed is \$641. (FORM response)

SOR ¶ 1.f alleges Applicant's nonpriority unsecured debts were discharged under Chapter 7 of the Bankruptcy Code in March 2008. Applicant took out a variable interest rate mortgage loan, and his monthly mortgage payments increased from \$800 to \$1,400. (Item 5) He was unable to afford his mortgage payments. He could not afford his vehicle payments, and his vehicle was repossessed. (Item 5) He was unable to afford payments on several other debts. (Item 5) After his unsecured nonpriority debts were discharged in March 2008, he received a fresh financial start.

Applicant's credit reports indicate numerous accounts are paid as agreed, current, or have a zero balance. (Items 6, 7) For example, his six student loans were merged into one debt, and his student loan account is current. The most recent credit report of record is dated February 8, 2016, and it provides the status of 33 accounts. (Item 7) There is no 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.

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). Applicant's history of delinquent debt is documented in his SCA, credit reports, OPM PSI, SOR response, and FORM response. 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
- (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.

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:

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 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).

AG ¶ 20(d) applies. Applicant's SOR alleges his debts were discharged under Chapter 7 of the Bankruptcy Code in 2008, and he has five delinquent debts totaling \$8,189. The bankruptcy was necessary when he was unable to make his payments on a variable interest rate mortgage and some other debts. He was supporting six children or stepchildren, and his spouse was not employed outside their home. Three SOR debts are paid, and he is making payments on the other two SOR debts. The SOR debt total is now \$2,415. His credit reports indicate numerous accounts are paid as agreed, current, or have a zero balance. His non-SOR six student loans were merged into one debt, and his student loan account is current. There is no evidence of financial counseling.

Based on Applicant's track record of paying or resolving 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(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 a 47-year-old software engineer, and a defense contractor has employed him since August 2012. He was employed as a carpenter from August 1997 to August 2012. In 2009, he received an associate’s degree, and he attended some additional college classes from 2009 to 2013. He served in the Air Force from 1989 to 1991, and he received an honorable discharge. He has six children or stepchildren, and his finances have improved since he is currently only providing support for two children. His spouse is now employed outside their home. There is no evidence of security violations, alcohol abuse, or use of illegal drugs.

Applicant’s SOR debts are either in payment plans or paid. He is making payments on two SOR debts totaling \$2,415. His most recent credit report reflects his non-SOR debts are paid as agreed, are current, or have a zero balance. 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 or resolution as indicated in his credit reports. He understands what he needs to do to establish and maintain his financial responsibility. He took reasonable actions under his particular financial circumstances to address his delinquent debts.

I 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 security concerns are mitigated. It is clearly consistent with the interests of national security to grant Applicant security clearance eligibility.

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
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Subparagraphs 1.a through 1.f:	For Applicant
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Conclusion

In light of all of the circumstances in this case, it is clearly consistent with the interests of national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

MARK HARVEY
Administrative Judge