



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



In the matter of:

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ISCR Case No. 15-08034

Applicant for Security Clearance

Appearances

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

01/23/2017

Decision

HARVEY, Mark, Administrative Judge:

Applicant's statement of reasons (SOR) alleges 18 delinquent debts totaling \$73,402. He recently made five payments under a Chapter 13 bankruptcy wage earner's plan; however, he has not established a sufficient track record of debt payments. Financial considerations security concerns are not mitigated. Access to classified information is denied.

History of the Case

On April 22, 2015, Applicant completed and signed a Questionnaire for National Security Positions (SF 86) or security clearance application (SCA). (Government Exhibit (GE) 1) On February 6, 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*, 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* (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 him, 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 the financial considerations guideline.

On May 12, 2016, Applicant responded to the SOR and waived his right to a hearing. On June 30, 2016, Applicant requested a hearing. (Tr. 17) On July 20, 2016, Department Counsel indicated she was ready to proceed. On August 30, 2016, the case was assigned to me. On October 4, 2016, the Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing, setting the hearing for October 30, 2016. (HE 1) Applicant waived his right to 15 days of notice of the date, time, and location of his hearing. (Tr. 17-19) Applicant's hearing was held as scheduled.

Department Counsel offered nine exhibits; Applicant offered one exhibit; and all proffered exhibits were admitted without objection. (Tr. 20-25; GE 1-9; Applicant Exhibit (AE) A) On November 6, 2016, Department Counsel provided nine post-hearing exhibits, which were admitted without objection. (GE 10-18) On November 7, 2016, DOHA received the transcript of the hearing. On November 10, 2016, Applicant provided one exhibit consisting of 17 pages, which was admitted without objection. (AE B) The record closed on November 21, 2016. (Tr. 52)

Findings of Fact¹

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

Applicant is a 54-year-old technician who has been employed by a government contractor for 13 years. (Tr. 5, 8) He attended college for about one year. (Tr. 6) In 1989, he married, and in 2004, he divorced. (GE 1) In 2006, he married his current spouse. (GE 1) His two children from his first marriage are ages 22 and 26, and his two children from his current marriage are ages 2 and 3. (Tr. 7-8) He has never served in the U.S. Armed Forces. (Tr. 6) A security clearance is required for his current employment. (Tr. 8-9) There is no evidence of security violations.

Financial Considerations

Applicant said his financial problems were caused by his divorce in 2004, which ended his first marriage. (Tr. 26-29) He was required to pay monthly child support of about \$1,000, and he was allocated responsibility for paying several marital debts. (Tr. 26-27) He accrued additional debts after the divorce. (Tr. 33) He has had several delinquent debts for at least five years. (GE 2; GE 3) In 2004, he was making about \$25 an hour, and he currently makes \$35 an hour. (Tr. 31-32) Applicant's monthly income is \$5,080, and his spouse's monthly income is \$1,814. (GE 8 at 23) Their monthly remainder is \$891. (GE 8 at 25)

¹Some details have been excluded in order 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, bankruptcy schedules, Office of Personnel Management (OPM) personal subject interviews (PSI) in 2010 and 2015, and hearing record. The status of the SOR allegations is as follows:

SOR ¶ 1.a alleges and the record establishes that Applicant filed for bankruptcy protection under Chapter 13 of the Bankruptcy Code in May 2015, and in October 2015, this bankruptcy was dismissed because Applicant failed to provide documentation to the trustee. (SOR response; GE 18)

In December 2015, Applicant filed for bankruptcy protection under Chapter 13 of the Bankruptcy Code, and in May 2016, the bankruptcy was dismissed because Applicant failed to provide necessary documentation to the trustee. (GE 17)² His April 8, 2016 bankruptcy schedules listed: ownership of two motorcycles and two cars (GE 8 at 3); \$31,500 owed on one vehicle purchased in 2014 (GE 8 at 11); \$31,500 owed on one motorcycle purchased in 2014 (GE 8 at 12); \$50,000 in a 401(k) account (GE 8 at 6, 18); \$100 owed on his state income tax (GE 8 at 13); and \$4,700 owed on his federal income tax. (GE 8 at 14; AE B at 2) The motorcycle purchased in 2014 was surrendered to the creditor. (AE B at 2)

The October 1, 2016 trustee's report of distributions for Applicant's Chapter 13 bankruptcy shows \$890 received in June 2016, August 2016, and September 2016 for a total received of \$2,670. (AE B at 2) Applicant provided receipts showing payments of \$1,137 to the trustee on January 26, 2016, and \$1,780 on May 27, 2016. (AE B at 16-17) The disposition of the payments made in January and May 2016 is not indicated in the record evidence. On September 2, 2016, he paid the trustee \$894, and on October 2, 2016, he paid the trustee \$894. (AE B at 15) At his hearing, he said he is working on getting a new payment plan for his bankruptcy. (Tr. 45) His current monthly payment is \$955. (Tr. 46) He said he has made about five payments to the trustee. (Tr. 46-49) Applicant is credited with making five payments to the trustee from June through October 2016.

²Applicant's SOR does not allege: his second Chapter 13 bankruptcy was dismissed in May 2016; a delinquent corporate credit card debt for \$3,430 has been delinquent for several years; and his April 22, 2015 SCA described a delinquent personal loan for \$15,700. 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)). His second Chapter 13 bankruptcy dismissal in May 2016, his delinquent corporate credit card debt for \$3,430, and his delinquent personal loan for \$15,700 will not be considered except for the five purposes listed above.

SOR ¶¶ 1.b through 1.s allege 18 delinquent debts totaling \$73,402. The only payments to any of the SOR creditor were through his Chapter 13 plan, and those payments were made to the creditor in SOR ¶ 1.b. (Tr. 52; AE B) The SOR included the following delinquent debts: a delinquent vehicle loan for \$27,828 (SOR 1.b); state income taxes for \$100 (SOR ¶ 1.d); federal income taxes for \$2,500 (SOR ¶ 1.e); repossession of a motorcycle for \$28,023 (SOR ¶ 1.c); and two municipal debts for \$420 and \$147 (SOR ¶¶ 1.q and 1.r). The SOR did not include a corporate credit card debt for \$3,430, which became delinquent in October 2014, and a delinquent personal loan for \$15,700. (GE 1; GE 3)

In 2014, Applicant purchased a motorcycle and car. (Tr. 36) When he made these purchases, he already owned a truck and another motorcycle. (Tr. 37-38) He owes about \$3,000 to \$5,000 for his state income taxes for 2014. (Tr. 43-44) He may owe about \$4,700 on his federal income taxes; however, he was unsure about his federal income tax debt. (Tr. 44) He received financial counseling as part of the bankruptcy process.

On June 6, 2016, the Internal Revenue Service (IRS) billed Applicant \$511 for federal income taxes for tax year 2015. (AE B at 13) On June 17, 2016, he paid the \$511 debt owed to the IRS. (AE B at 14)

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 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 his or 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

AG ¶ 18 articulates the security concern relating to 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).

Applicant's history of delinquent debt is documented in his credit reports, SOR response, OPM PSIs, and hearing record. 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." The record 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

(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

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 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)).

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's stated efforts to resolve his delinquent debt do not warrant full application of any mitigating conditions to any of his SOR debts. Applicant said his financial problems were caused by his divorce in 2004, which ended his first marriage. He was required to pay monthly child support of about \$1,000, and he was allocated responsibility for paying several marital debts. He accrued additional debts after the divorce. In 2004, he was making about \$25 an hour, and he currently makes \$35 an hour. Applicant did not provide enough details about what he did to address his SOR debts after his divorce, which was 12 years ago. He received financial counseling.

Applicant did not provide sufficient documentation relating to his SOR debts: (1) proof of payments, such as checking account statements, photocopies of checks, or a letter from creditors proving that he paid or made payments to the creditors; (2) correspondence to or from any creditors to establish maintenance of contact with creditors;⁴ (3) credible debt disputes indicating he did not believe he was responsible for the debts and why he held such a belief; (4) attempts to negotiate payment plans, such as settlement offers or agreements to show that he was attempting to resolve debts; or (5) other evidence of progress or resolution of his debts. Applicant failed to establish mitigation under AG ¶ 20(e) for any other SOR debts 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 before starting his current Chapter 13 payment plan in

⁴"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.

June 2016. He has not provided sufficient payments under his Chapter 13 payment plan to provide confidence that he will continue making payments and complete the Chapter 13 payment plan. 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 mitigation of 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):

- (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 54-year-old technician who has been employed by a government contractor for 13 years. He attended college for about one year. A security clearance is required for his current employment. There is no evidence of security violations.

Applicant has a history of financial problems. Applicant's SOR alleges 18 delinquent debts totaling \$73,402. In May 2015, Applicant filed for bankruptcy protection under Chapter 13 of the Bankruptcy Code, and in October 2015, the bankruptcy was dismissed. In December 2015, Applicant filed for bankruptcy protection under Chapter 13 of the Bankruptcy Code, and in May 2016, the bankruptcy was dismissed. Both bankruptcies were dismissed because Applicant failed to provide necessary documentation to the trustee. In May or June 2016, the third Chapter 13 bankruptcy was filed, and from June 2016 through October 2016, Applicant made five monthly payments to the trustee.

Applicant did not provide documentation showing his attempts to resolve any of his SOR debts in good faith prior to May 2015. In 2014, he financed the purchase of a vehicle and a motorcycle, and shortly thereafter, he stopped making payments on the motorcycle loan. He may owe delinquent federal and state income taxes. His actions show lack of financial responsibility and judgment and raise unmitigated questions about

Applicant's reliability, trustworthiness, and ability to protect classified information. See AG ¶ 18. More information about inability to pay debts, financial history, and documented financial progress is necessary to mitigate security concerns. A longer track record of consistent payments to the Chapter 13 trustee is necessary to establish mitigation.

It is well settled that once a concern arises regarding an applicant's security clearance eligibility, there is a strong presumption against the grant or renewal of a security clearance. See *Dorfmont*, 913 F. 2d at 1401. 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 more effort towards documented resolution of his past-due debts, and 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. I conclude that financial consideration concerns are not mitigated, and it is not clearly consistent with the national interest to grant Applicant security clearance eligibility at this time. Financial considerations 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
Subparagraphs 1.a through 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 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