



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 16-01773

Appearances

For Government: Mary Margaret Foreman, Esq., Department Counsel
For Applicant: *Pro se*

10/22/2018

Decision

HARVEY, Mark, Administrative Judge:

Applicant provided insufficient information about his efforts to resolve eight debts alleged on the statement of reasons (SOR). Financial considerations security concerns are not mitigated. Eligibility for access to classified information is denied.

Statement of the Case

On March 5, 2014, Applicant completed and signed a Questionnaire for National Security Position (SF 86) or security clearance application (SCA). (Government Exhibit (GE) 1). On June 10, 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). (Hearing Exhibit (HE) 2)

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 Applicant 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 Guideline F (financial considerations). (HE 2)

On July 16, 2016, Applicant provided a response to the SOR. (HE 3) On December 5, 2016, Department Counsel was ready to proceed. On December 20, 2017, the case was assigned to another administrative judge. On January 19, 2018, a hearing was convened; however, Applicant was not present. On January 29, 2018, the Defense Office of Hearings and Appeals received a transcript (Tr.) of the January 19, 2018 proceeding.

On April 26, 2018, the case was transferred to me. On May 23, 2018, DOHA issued a notice setting Applicant's hearing for June 12, 2018. (HE 1) Applicant's hearing was held as scheduled. Department Counsel provided six exhibits; Applicant provided one exhibit (12 pages); and all exhibits were admitted without objections. (Tr. 18-21; GE 1-6; AE A-F) On June 21, 2018, I received the transcript of the hearing. No post-hearing documents were received.

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), effective June 8, 2017. 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 SOR ¶¶ 1.a through 1.i. (HE 2) He also provided extenuating and mitigating information. His admissions are accepted as findings of fact.

Applicant is 64 years old, and a DOD contractor has employed him since March 2014. (Tr. 5) In 1973, he graduated from high school. (Tr. 5) In 2013, he received an associate's degree in computer electrical engineering technology. (Tr. 6, 22) He was married from 1976 to 1993, from 1993 to 1994, and from 1995 to 2013. (Tr. 6) He has seven children and stepchildren. (Tr. 7) His children and stepchildren were born in 1972, 1976, 1978, 1981, and 2000. (Tr. 7) His triplets were born in 2000. (Tr. 7) He served in the Army from 1976 to 1997. (Tr. 7, 22) He honorably retired as a sergeant first class. (Tr. 8) He served in a combat zone during Desert Shield/Desert Storm, and when he retired, he received a Meritorious Service Medal. (Tr. 8) His military occupational specialty was personnel noncommissioned officer (71H). (Tr. 8) After retiring from the Army, he served for seven years in Kuwait and five years in Qatar. (Tr. 8-9, 22) At the time of his hearing, he was deployed to Qatar. (Tr. 9-10)

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

Applicant was unemployed from December 2011 to March 2014 (27 months). (Tr. 24) He experienced an expensive divorce in 2013. (Tr. 30-31, 39) He paid the required child support for the triplets, and that requirement will end soon. (Tr. 32-34) The end of his \$1,400 monthly child-support responsibility will enable him to pay his delinquent debts. (Tr. 32-35, 36-37, 48)

The SOR alleges nine delinquent debts, and their status is as follows:

SOR ¶¶ 1.a and 1.b allege two charged-off student loans for \$10,486 and \$9,580 owed to the same creditor. SOR ¶¶ 1.d, 1.e, and 1.g allege three student loans placed for collection for \$7,467, \$7,168, and \$2,850 owed to the same creditor, but not the same creditor as the debts alleged in SOR ¶¶ 1.a and 1.b. Payments were due on his student loans about six months after he completed his education in 2013. (Tr. 25) He did not make any payments on his student loans. A December 2015 letter from a student loan creditor indicates he owes \$35,064 to the student loan creditor. (Tr. 44; AE A at 8) He acknowledged that interest continued to accrue on his student loans after December 2015.

SOR ¶ 1.c alleges a charged-off bank debt for \$8,604. On August 17, 2016, the creditor wrote Applicant about establishing a \$180 monthly payment plan with the first payment starting in August 2016. (AE A at 4) On May 20, 2017, Applicant paid the creditor \$500. (Tr. 26-28; AE A at 6)

SOR ¶ 1.f alleges a charged-off bank debt for \$6,529. In 2016, he signed an agreement to pay the creditor \$150 monthly; he made about two payments; and for a reason unknown to Applicant, the creditor stopped receiving the automatic payments from his bank account. (Tr. 26-29; AE A at 11) On May 21, 2017, Applicant paid the creditor \$500. (Tr. 26-28; AE A at 11)

SOR ¶ 1.h alleges a telecommunications debt placed for collection for \$3,431. In January 2016, the creditor offered to settle the debt for \$1,868. (AE A at 9)

SOR ¶ 1.i alleges a truck rental debt placed for collection for \$318. On April 19, 2013, Applicant rented a truck, and he promised to pay \$387 after using the truck. (AE A at 7) Applicant said he paid this debt. (Tr. 26; AE A at 2) The debt does not appear on his May 31, 2018 credit report. (GE 6)

The only proof of any payments to the SOR creditors Applicant provided were two \$500 checks paid in May 2017, one was provided to each of the creditors in SOR ¶¶ 1.c and 1.f. (Tr. 44) Applicant intends to pay his debts. (Tr. 39) In January 2018, he completed a cyber awareness challenge examination. (AE A at 1) During his Army service and over his years of support to the DOD as a contractor, he completed numerous courses. He has contributed to the national defense for more than 30 years. (GE 2)

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information.” *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicant’s eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information. Clearance decisions must be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See Exec. Or. 10865 § 7. Thus, nothing in this decision should be construed to suggest that it is based, in whole or in part, on any express or implied determination about applicant’s allegiance, loyalty, or patriotism. It is merely an indication the applicant has not met the strict guidelines the President, Secretary of Defense, and Director of National Intelligence 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 two disqualifying conditions that could raise a security concern and may be disqualifying in this case: “(a) inability to satisfy debts”; 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) 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,³ was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;

(b) the conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, 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;⁴ 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.

³ A debt that became delinquent several years ago is still considered recent because "an applicant's ongoing, unpaid debts evidence a continuing course of conduct and, therefore, can be viewed as recent for purposes of the Guideline F mitigating conditions." ISCR Case No. 15-06532 at 3 (App. Bd. Feb. 16, 2017) (citing ISCR Case No. 15-01690 at 2 (App. Bd. Sept. 13, 2016)).

⁴ The Appeal Board has previously explained what constitutes a "good faith" effort to repay overdue creditors or otherwise resolve debts:

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

(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).

Applicant said he paid the debt in SOR ¶ 1.i. It does not appear on his May 31, 2018 credit report. SOR ¶ 1.i is mitigated. He paid a total of \$1,000 to the creditors in SOR ¶¶ 1.c and 1.f. His finances were harmed by circumstances largely beyond his control including divorce in 2013 and 27 months of unemployment ending in 2014.⁵

Applicant did not provide sufficient documentation about why he was unable to make greater documented progress resolving the debts in SOR ¶¶ 1.a through 1.h. There is insufficient assurance that his financial problems are being resolved 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(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;

⁵ "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.

(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 64 years old, and a DOD contractor has employed him overseas since 2014 in his current position. In 2013, he received an associate's degree in computer electrical engineering technology. He was married three times, and his most recent divorce was in 2013. He has seven children and stepchildren. He had triplets born in 2000, and he is paying child support for the triplets of \$1,400 monthly. Unemployment and divorce are circumstances beyond his control that adversely affected his finances.

Applicant served the DOD for more than 30 years including service in a combat zone and more than a decade overseas as a government contractor. He has contributed to national security. At the time of his hearing, he was deployed to Qatar.

The evidence against grant of a security clearance is more substantial. Applicant owes several delinquent debts including more than \$35,000 in delinquent student loans. There is no evidence of progress after May 2017 addressing the debts in SOR ¶¶ 1.a through 1.h. His actions raise unmitigated questions about Applicant's reliability, trustworthiness, and ability to protect classified information. See AG ¶ 18.

It is well settled that once a concern arises regarding an applicant's security clearance eligibility, there is a strong presumption against the granting a security clearance. See *Dorfmont*, 913 F. 2d at 1401. Unmitigated financial considerations security concerns lead me to conclude that grant of a security clearance to Applicant is not warranted at this time. 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 consideration security concerns are not mitigated. It is not clearly consistent with the interests of national security to grant Applicant security clearance eligibility at this time.

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.h:

Against Applicant

Subparagraph 1.i:

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 eligibility for a security clearance. Eligibility for access to classified information is denied.

Mark Harvey
Administrative Judge