



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



In the matter of:)
)
) ISCR Case No. 16-03479
)
Applicant for Security Clearance)

Appearances

For Government: Pamela Benson, Esq., Department Counsel
For Applicant: *Pro se*

10/20/2017

Decision

HARVEY, Mark, Administrative Judge:

Applicant provided sufficient evidence of progress towards resolution of his financial issues. In the past 12 months, Applicant paid \$24,589 to a law firm to address his delinquent debts. The law firm is making payments to address four debts listed in his statement of reasons (SOR). Financial considerations security concerns are mitigated. Eligibility for access to classified information is granted.

Statement of the Case

On June 2, 2015, Applicant signed his Questionnaire for National Security Positions (SF 86) or security clearance application (SCA). Government Exhibit (GE) 1. On December 30, 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. Hearing Exhibit (HE) 2. The SOR set forth security concerns arising under the financial considerations guideline. HE 2.

On January 12, 2016, Applicant provided a response to the SOR, and he requested a hearing. HE 3. On March 31, 2017, Department Counsel was ready to

proceed. On May 5, 2017, the case was assigned to me. On May 18, 2017, the Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing, setting the hearing for June 5, 2017. HE 1. Applicant's hearing was held as scheduled using video teleconference. Transcript (Tr.) 11.

During the hearing, Department Counsel offered 4 exhibits; Applicant offered 22 exhibits; there were no objections; and all proffered exhibits were admitted into evidence. Tr. 18-19; GE 1-4; Applicant Exhibits (AE) A-V. On June 14, 2017, DOHA received a copy of the hearing transcript.

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 on or after June 8, 2017. The new AGs supersede the previous AGs. 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 SOR ¶¶ 1.a through 1.n. HE 3. He also provided extenuating and mitigating information. HE 3.

Applicant is 46 years old, and he has been employed as an information technology systems administrator for a government contractor for nine years. Tr. 7, 9. In 1987, he received a General Equivalency Diploma (GED), and in 2002, he received an associate's degree in applied science. Tr. 7. He has not served in the military. Tr. 8. He was married from 1991 to 1992. Tr. 8. In 2003, he married, and his children are ages 15, 25, and 28. Tr. 8, 30. There is no evidence of security violations, abuse of alcohol, or use of illegal drugs.

Financial Considerations

Around 2013, Applicant's spouse's employment ended. Tr. 31. She found employment about three weeks later; however, her annual salary was reduced from about \$120,000 to about \$50,000. Tr. 31-32. His spouse used credit cards without Applicant's knowledge to enable their family to maintain their standard of living. Tr. 33. Applicant said his spouse's secretive behavior concerning the family finances and excessive spending damaged their relationship. Tr. 33. Applicant conceded the family spent money excessively, and they were not prudent about their use of credit. Tr. 38. Applicant and his spouse received marital counseling to improve communications, and they are now working together as a team to resolve their delinquent debts. Tr. 33; AE A.

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/SEAD4_20170608.pdf.

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

Applicant's annual salary is about \$106,000. Tr. 26. His most recent period of unemployment was in 2006. Tr. 28. Applicant has \$157,000 in his 401(k) account. Tr. 35; AE S.

In April 2016, Applicant hired a law firm to settle his delinquent debts. Tr. 35-36. Applicant makes \$2,049 monthly payments to the law firm, and at the time of his hearing, he had paid the law firm \$24,589. Tr. 41-42, 44. The law firm paid creditors \$4,775 and reached settlement agreements with four SOR creditors and one non-SOR creditor. Tr. 41-42; AE A at 4. Applicant explained there is a substantial initial fee to the law firm, and then gradually more of the payments go to the creditors and less goes to the law firm. Tr. 40. Applicant's law firm currently keeps about \$1,132 and pays \$917 to Applicant's creditors with \$788 going to four SOR creditors and \$129 to one non-SOR creditor. AE A at 4. If Applicant continues to comply with the payment plan, all of his debts will be paid in the fall of 2019. Tr. 42.

Applicant's SOR alleges 14 delinquent debts totaling \$96,752, and their status is as follows:

SOR ¶¶ 1.a, 1.d through 1.g and 1.i are bank debts placed for collection for the following amounts: \$14,230, \$12,116; \$11,087; \$6,726; \$5,785, and \$3,617. SOR ¶ 1.h is a home improvement store credit-card debt placed for collection for \$4,891. SOR ¶ 1.j is a clothing store debt placed for collection for \$3,617.

SOR ¶¶ 1.b and 1.c are two bank debts owed to the same bank placed for collection for \$13,234 and \$12,917. The creditor has agreed to settle the two debts in SOR ¶¶ 1.b and 1.c for \$6,000 and \$5,200 respectively. AE A at 3. The two debts will be paid by February 2018. AE A at 3. The monthly payments are \$622. AE A at 4.

SOR ¶ 1.k is a bank debt placed for collection for \$2,720. The settlement agreement requires Applicant to pay \$1,225. AE A at 4. The scheduled monthly payment is \$100. AE A at 4. SOR ¶¶ 1.l and 1.m are two bank debts owed to the same bank placed for collection for \$2,167 and \$2,417.

SOR ¶ 1.n is a charged-off department store debt for \$1,365. The actual amount of the debt is actually \$2,347, and the settlement agreement requires Applicant to pay \$1,173. AE A at 3. The scheduled monthly payment is \$66. AE A at 4.

Applicant's personal financial statement indicates: gross monthly pay of \$7,970; net monthly pay of \$6,658; monthly expenses of \$2,894; monthly payments to address debts of \$3,007 (including \$2,049 to a law firm); and a monthly net remainder of \$757. AE B. He owes \$8,587 on his non-SOR student loan debt, and his student loan account is current. AE N. His mortgage is current. AE P. On May 31, 2017, he paid off his truck debt, and he has an additional \$658 monthly to address his delinquent debts. Tr. 44-45; AE Q.

Two character witnesses described Applicant as honest and trustworthy. AE U; AE V. One character evidence emphasized that Applicant is responsible and reliable. AE V.

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 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. Sept. 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,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).

In April 2016, Applicant hired a law firm to settle his delinquent debts. Applicant makes \$2,049 monthly payments to the law firm, and at the time of his hearing, he had paid the law firm \$24,589. The law firm paid creditors \$4,775 and reached settlement agreements with four SOR creditors and one non-SOR creditor. There is a substantial initial fee to the law firm, and then gradually more of the payments go to the creditors. His law firm currently pays \$917 to Applicant's creditors with \$788 going to four SOR creditors and \$129 to one non-SOR creditor. If Applicant continues to comply with the payment plan, all of his debts will be paid in the fall of 2019.

Applicant's SOR alleges 14 delinquent debts totaling \$96,752. The law firm's settlement agreements on four SOR debts have reduced the SOR-debt total to \$80,114, and his payments have reduced the SOR-debt total to about \$75,000. AG ¶ 20(a) and 20(d) apply.

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 to address 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. Applicant assures he 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 46 years old, and he has been employed as an information technology systems administrator for a government contractor for nine years. In 1987, he received a GED, and in 2002, he received an associate's degree in applied science. In 2003, he married, and his children are ages 15, 25, and 28. Two character witnesses described Applicant as honest, trustworthy, responsible, and reliable. There is no evidence of security violations, abuse of alcohol, or use of illegal drugs.

Applicant's SOR alleges 14 delinquent debts totaling \$96,752. The law firm's settlement agreements on four SOR debts have reduced the SOR-debt total to \$80,114, and his payments have reduced the SOR-debt total to about \$75,000. Applicant paid a law firm \$24,589, and the law firm paid his creditors \$4,775. If Applicant continues to comply with the payment plan, all of his SOR debts will be paid in the fall of 2019. He paid off his truck debt, and his mortgage, student loan, and other debts are current.

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). 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. Applicant has established a “meaningful track record” of debt re-payment, and he assures he will maintain his financial responsibility.⁵

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 considerations 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

Subparagraphs 1.a through 1.n: For Applicant

Conclusion

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

Mark Harvey
Administrative Judge

⁵ Failure to comply with payment plans or other delinquent debt will raise a security concern. The Government has the option of following-up with more questions about Applicant’s finances. The Government can re-validate Applicant’s financial status at any time through credit reports, investigation, and interrogatories. Approval of a clearance now does not bar the Government from subsequently revoking it, if warranted. “The Government has the right to reconsider the security significance of past conduct or circumstances in light of more recent conduct having negative security significance.” ISCR Case No. 10-06943 at 4 (App. Bd. Feb. 17, 2012). An administrative judge does not have “authority to grant an interim, conditional, or probationary clearance.” ISCR Case No. 10-06943 at 4 (App. Bd. Feb. 17, 2012) (citing ISCR Case No. 10-03646 at 2 (App. Bd. Dec. 28, 2011)). See *a/so* ISCR Case No. 04-03907 at 2 (App. Bd. Sep. 18, 2006) (stating, “The Board has no authority to grant [a]pplicant a conditional or probationary security clearance to allow her the opportunity to have a security clearance while she works on her financial problems.”). This footnote does not imply that granting Applicant’s security clearance is conditional.