



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



In the matter of:

Applicant for Security Clearance

)
)
)
)
)

ISCR Case No. 17-01748

Appearances

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

07/09/2018

Decision

HARVEY, Mark, Administrative Judge:

Applicant made sufficient progress resolving the delinquent debts alleged on his statement of reasons (SOR). Financial considerations security concerns are mitigated. Eligibility for access to classified information is granted.

Statement of the Case

On September 22, 2015, Applicant completed and signed a Questionnaire for National Security Positions (SF 86) or security clearance application (SCA). (Government Exhibit (GE) 1) On June 2, 2017, 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 set forth security concerns arising under Guideline F.

On June 21, 2017, Applicant responded to the SOR. (HE 3) On November 9, 2017, Department Counsel was ready to proceed. On January 18, 2018, the case was assigned to another Administrative Judge. On February 12, 2018, the case was transferred to me for administrative reasons. On March 14, 2018, the Defense Office of Hearings and

Appeals (DOHA) issued a notice of hearing, setting the hearing for April 2, 2018. (HE 1) Applicant's hearing was held as scheduled.

During the hearing, Department Counsel offered five exhibits; Applicant offered three exhibits; there were no objections; and all proffered exhibits were admitted into evidence. (Tr. 18-23; GE 1-5; Applicant Exhibit (AE) A-AE C) On April 12, 2018, DOHA received the hearing transcript. Seven exhibits were provided after the hearing, and they were admitted without objection. (AE D-AE J) The record closed on May 2, 2018. (Tr. 45, 47)

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 all of the SOR allegations. He also provided extenuating and mitigating information. His admissions are accepted as findings of fact.

Applicant is a 51-year-old cyber-security engineer and program manager who has worked for a government contractor since 2010. (Tr. 7-8) In 1985, he graduated from high school. (Tr. 7) He attended college; however, he did not receive a bachelor's degree. (Tr. 8) He has not served in the military. (Tr. 8) In 1998, he married, and his children are ages 13 and 18. (Tr. 9)

Financial Considerations

Applicant and his spouse separated in 2014, and Applicant became responsible for funding two households. (Tr. 26, 28) His spouse was unemployed for four months in 2014, for five months in 2016, and for several months in 2017. (Tr. 28) He had insufficient income and some debts became delinquent. (Tr. 26) His net monthly income after withholding for taxes is about \$6,000. (Tr. 36) He provides about \$500 monthly to his spouse for support. (Tr. 37) He also pays child support. The SOR alleges three delinquent debts totaling \$17,139 and their status is as follows:

SOR ¶ 1.a alleges a charged-off debt owed to a bank for \$13,988. The debt originated as a home-equity loan in about 2007. (Tr. 26-27) The debt became delinquent

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.

in 2016. (Tr. 28) On February 16, 2018, the creditor agreed to settle the debt for \$9,000 with a payment of \$4,500 on or before February 23, 2018, and the remainder to be paid on or before August 23, 2018. (AE B) Applicant borrowed from his 401(k) account, and on February 26, 2018, Applicant paid \$4,500. (Tr. 26; AE B) The creditor accepted the payment. Applicant promised to pay the remaining \$4,500 on or before August 23, 2018. (Tr. 24, 42; AE B)

SOR ¶ 1.b alleges a charged-off debt owed to a bank for \$2,640. Applicant borrowed the funds to install windows in his home. (Tr. 29) Payments were stopped in 2013. (Tr. 29) Applicant's spouse handled the debt payments when he was living with her, and he was unaware that she stopped making payments to this creditor in 2013. (Tr. 30) The creditor offered to settle the debt for \$396 over the telephone, and Applicant planned to settle the debt as soon as he receives written verification of the settlement offer. (Tr. 25, 30-31) On April 9, 2018, Applicant paid the creditor \$198. (AE E)

SOR ¶ 1.c alleges a delinquent medical debt for \$511. Appellant is checking his medical insurance concerning responsibility for this debt. (Tr. 25) The creditor recently transferred the debt, and Applicant was unable to validate the debt. (Tr. 32) At his hearing, he promised to pay it as soon as he is able to validate it. (Tr. 32, 42) After his hearing, the creditor agreed to settle the debt for \$105, and on April 10, 2018, Applicant paid the debt. (AE E)

Applicant's \$133,000 mortgage was \$7,000 past due. (Tr. 32; AE C) Applicant filed a quitclaim deed on February 23, 2018. (Tr. 32; AE C) Applicant's spouse is taking full responsibility for the mortgage, and she has entered a state-sponsored mortgage loan rehabilitation program (SSMLRP) that is based on her income. (Tr. 32) The SSMLRP paid \$7,000 to bring the mortgage current, paid the \$1,820 real estate tax, and is paying the mortgage from March 2018 through November 2018. (Tr. 33, 39-40; AE C) Their mortgage is no longer delinquent. (Tr. 33) Applicant paid off a debt for \$2,400 to a home-improvement store. (Tr. 35) He is paying \$100 monthly to address a city tax debt. (Tr. 35)

Five character references lauded Applicant's diligence, reliability, responsibility, and trustworthiness. (AE A; AE G) Their statements support approval or continuation of his security clearance.

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 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; 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.

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).

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)).

Applicant's spouse had several periods of unemployment. Applicant and his spouse are separated. These are circumstances beyond his control that adversely affected his finances.

The SOR alleges three delinquent debts. Applicant and the creditor in SOR ¶ 1.a reached a settlement agreement to resolve the debt for \$9,000. On February 26, 2018, Applicant paid \$4,500, and Applicant promised to pay the remaining \$4,500 on or before August 23, 2018. The creditor in SOR ¶ 1.b agreed to settle the debt for \$396, and on April 9, 2018, Applicant paid the creditor \$198. He promised to pay the remaining \$198. The creditor in SOR ¶ 1.c agreed to settle the debt for \$105, and on April 10, 2018, Applicant paid the debt.

Applicant paid one SOR debt, and the other two debts are in established payment plans. He needs to pay \$4,700 to resolve the last two debts, and he promised to pay the creditors. There are clear indications that his financial problem is resolved, and his finances are under control. Future financial problems are unlikely to occur. AG ¶¶ 20(a), 20(b), and 20(d) are established, and financial considerations security concerns are mitigated.

Whole-Person Concept

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

- (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

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

Applicant is a 51-year-old cyber-security engineer and program manager who has worked for government contractors since 2010. He attended college; however, he did not receive a bachelor's degree. Five character references praised Applicant's diligence, reliability, responsibility, and trustworthiness.

Applicant's SOR alleges three delinquent debts. He paid one SOR debt and the other two SOR debts are in established payment plans. He paid or resolved several non-SOR debts. 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 track record of paying his debts.

Applicant does not have any delinquent debts. His actions show financial responsibility and judgment and favorably resolve questions about Applicant's reliability, trustworthiness, and ability to protect classified information. See AG ¶ 18. Future financial problems are unlikely to occur.

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 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:	FOR APPLICANT
Subparagraphs 1.a through 1.c:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is granted.

MARK HARVEY
Administrative Judge