



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



In the matter of:

Applicant for Security Clearance

)
)
) ISCR Case No. 17-01877
)
)

Appearances

For Government: Nicole A. Smith, Esq., Department Counsel
For Applicant: Ernesto Gapasin, Esq.

07/06/2018

Decision

HARVEY, Mark, Administrative Judge:

The creditor cancelled all of the delinquent debts listed on Applicant's statement of reasons (SOR) in 2016. Financial considerations security concerns are mitigated. Eligibility for access to classified information is granted.

Statement of the Case

On June 1, 2016, Applicant completed and signed a Questionnaire for National Security Positions (SF 86) or security clearance application (SCA). (Government Exhibit (GE) 1) On June 7, 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 27, 2017, and July 13, 2017, Applicant responded to the SOR, and he requested a hearing. (HE 3) On October 13, 2017, Department Counsel was ready to proceed. On October 19, 2017, the case was assigned to me. On March 6, 2018, the Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing, setting the hearing for March 14, 2018. (HE 1) Applicant waived his right to 15 days of notice of the

date, time, and location of the hearing. (Tr. 8-9) Applicant's hearing was held as scheduled.

During the hearing, Department Counsel offered two exhibits; Applicant offered six exhibits; there were no objections; and all proffered exhibits were admitted into evidence. (Tr. 16-19; GE 1-2; Applicant Exhibit (AE) A-AE F). On March 23, 2018, DOHA received the hearing transcript. One exhibit was provided after the hearing, and it was admitted without objection. (AE G) The record closed on May 15, 2018. (Tr. 69-72)

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. (AE A) He also provided extenuating and mitigating information. (AE A)

Applicant is a 64-year-old instructor and trainer in maintenance procedures and use of highly technical equipment. (Tr. 33-34) In 1972, he graduated from high school, and in 1977, he graduated from college with a bachelor of science degree in electrical engineering specializing in biomedical instrumentation. (Tr. 57-59) In 1979, he married, and his son is 32 years old. (Tr. 58) He did not serve in the military. (Tr. 58) He frequently travels overseas on behalf of his employer. (Tr. 34-35) He may be overseas for 10 of 12 months in a year. (Tr. 45) He has worked for government contractors for 41 years, and he has held a security clearance for 40 years. (Tr. 35)

Financial Considerations

Applicant's annual income has been about \$140,000 to \$150,000 for the last three years. (Tr. 59-60) He has about \$950,000 in his 401(k) account. (Tr. 61) Applicant paid off his original mortgage. (Tr. 37, 62) His taxes are current. (Tr. 37) His spouse handles the payments of the family debts. (Tr. 38) His only negative financial entries on his credit report are listed on the SOR. (Tr. 38) All of his accounts are current. (Tr. 46; AE D) He estimated his net worth to be close to \$2,000,000. (Tr. 63) The first credit report he ever reviewed was the one provided as part of the security clearance process. (Tr. 39) When he purchased new vehicles in 2016 and 2018, his credit union did not say anything about negative entries on his credit report. (Tr. 54) Aside from the SOR allegations, Applicant

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.

does not have any delinquent debts. (AE C; AE D; AE G) His credit report score is 756, which is excellent. (AE E)

The SOR alleges four charged-off delinquent debts totaling about \$97,000 owed to the same bank for \$30,598, \$26,387, \$20,721, and \$19,498.

From 2003 to 2007, Applicant's son attended an expensive private school and a state college. (Tr. 22-23; AE A) He funded his education with private (not guaranteed by the government) student loans. (Tr. 23, 42) Applicant cosigned on the student loans with his son. (Tr. 24-26, 41; AE A) After his son graduated, Applicant's spouse put money into his son's bank account to enable him to make the student-loan payments for a time because his son was somewhat irresponsible. (Tr. 50-51) His son subsequently took over the student-loan payments. (AE A) His son made payments; however, when the amount of the required monthly payments reached \$800 around 2009, Applicant's son defaulted on the student loans. (Tr. 24, 26; AE A) He did not tell his father about defaulting on the student loans. (Tr. 24; AE A)

The first time Applicant learned about the negative entries on his credit report was during his 2017 Office of Personnel Management personal subject interview (OPM PSI). (Tr. 55-56) Applicant asked his son about the loans, and his son admitted that he defaulted on the loans. (Tr. 24, 56) His son said at Applicant's hearing that he told Applicant the loans were forgiven. (Tr. 24, 27) The creditor told Applicant's son that they were not seeking payment of the loans. (Tr. 27) Applicant's son most recently checked with the creditor in 2015, and a bank employee advised Applicant's son that the creditor could not legally accept payment. (Tr. 27-28) Applicant had no knowledge that the loans were in default until the security clearance process. (Tr. 43-44)

Applicant said he was willing to contact the creditor after the hearing and settle the SOR debts. (Tr. 61) He said if the creditor will permit a payment plan, he will set up a payment plan. (Tr. 66)

After the hearing, the creditor provided some information from archives. In two letters both dated February 25, 2014, the SOR creditor wrote to Applicant's son and stated that two debts were settled for less than the full amount on February 25, 2014. The letters stated the credit bureaus would be informed that the accounts were "Paid in full, was a charge off." (AE G at 6-7)

The SOR creditor provided five letters all dated August 18, 2016, addressed to Applicant's son stating that a review of accounts indicated the statute of limitations may have expired, and the five debts in the amounts of \$19,498, \$26,387, \$30,598, \$35,517, and \$20,721 were cancelled. (AE G at 1-5) The creditor's letter indicated the creditor "decided to make no further attempts to collect" these debts; the balance owed on each debt is now zero; and the creditor may issue an IRS Form 1099 for none, some, or all of the debts. (AE G at 1-5)

Applicant's performance reviews from 2015 to 2017 indicate he is an excellent employee who contributes to mission accomplishment. (Tr. 47-48; AE F)

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).

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)).

ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013).

The SOR alleges four student-loan charged-off debts totaling about \$97,000. Applicant cosigned with his son for the four student loans. Applicant's son told Applicant that he was making payments, and subsequently, that the loans were forgiven. Applicant's spouse handled the family finances while he was overseas, and Applicant was unaware that his son defaulted on the payments. These are circumstances beyond his control that adversely affected his finances.

Applicant's SOR indicates all four delinquent debts are in charged-off status on his credit report. A "charged-off debt" is an accounting entry. A creditor considers a debt owed to the creditor to be an asset. When the value of the asset is in doubt, the creditor is required to change the status of the debt to reflect its current status. When the debt appears to be uncollectible, the creditor should change the status for accounting purposes from being an asset to charged off. Notwithstanding the change to charged-off status, a creditor may still sell the debt to a collection agent, and the debtor may still pay or settle the debt. Eventually, the charged-off debts will be dropped from the debtor's credit report. "[T]hat some debts have dropped off his [or her] credit report is not meaningful evidence of debt resolution." ISCR Case No. 14-05803 at 3 (App. Bd. July 7, 2016) (citing ISCR Case No. 14-03612 at 3 (App. Bd. Aug. 25, 2015)). The Fair Credit Reporting Act requires removal of most negative financial items from a credit report seven years from the first date of delinquency or the debt becoming collection barred because of a state statute of limitations, whichever is longer.⁴ Debts may be dropped from a credit report upon dispute when creditors believe the debt is not going to be paid, a creditor fails to timely respond to a credit reporting company's request for information, or when the debt has been charged off. "Mere evidence that debts no longer appear on credit reports is not reason to believe that they are not legitimate or that they have been satisfactorily resolved." ISCR Case No. 16-02941 at 2 (App. Bd. Dec. 29, 2017) (citing ISCR Case No. 14-03747 at 2-3 (App. Bd. Nov. 13, 2015)).

The SOR creditor provided five letters dated August 18, 2016, addressed to Applicant's son stating that a review of accounts indicated the statute of limitations may have expired, and five debts in the amounts of \$19,498, \$26,387, \$30,598, \$35,517, and \$20,721 were cancelled. The creditor "decided to make no further attempts to collect" these debts; the balance owed on each debt is now zero; and the creditor may issue an IRS Form 1099s. Four of the five debts correspond to debts listed in the SOR.

Applicant showed due diligence after his hearing in contacting the creditor and finding out what happened to the student-loan debts. He was willing to settle the debts; however, the creditor is not accepting payments as the debts were resolved in August 2016. All of Applicant's other accounts are current. He has an excellent credit score. There are clear indications that his financial problem is resolved, and his finances are

⁴Title 15 U.S.C. § 1681c. See Federal Trade Commission website, Summary of Fair Credit Reporting Act Updates at Section 605, <https://www.consumer.ftc.gov/articles/pdf-0111-fair-credit-reporting-act.pdf>.

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 64-year-old instructor and trainer in maintenance procedures and use of highly technical equipment. In 1977, he graduated from college with a bachelor of science degree in electrical engineering specializing in biomedical instrumentation. He has worked for government contractors for 41 years, and he has held a security clearance for 40 years. There is no evidence of criminal conduct, use of illegal drugs, or security violations.

Applicant's SOR alleges four delinquent debts totaling about \$97,000. The creditor wrote Applicant's son, who was primarily responsible for the debts, and advised him the debts were cancelled. The creditor said the balance owed is zero. Applicant's son may owe federal income taxes on the cancelled 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, and it is clearly consistent with the national interest to grant or reinstate Applicant's security clearance eligibility. Financial considerations security 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.d:	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 reinstate Applicant's eligibility for a security clearance. Eligibility for access to classified information is granted.

MARK HARVEY
Administrative Judge