



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 17-01915

Appearances

For Government: Brittany Muetzel, Esq., Department Counsel
For Applicant: Tokay T. Hackett, Esq.

09/10/2018

Decision

HARVEY, Mark, Administrative Judge:

Applicant provided insufficient evidence that he was unable to make greater progress addressing his substantial delinquent child-support debt. Financial considerations security concerns are not mitigated. Eligibility for access to classified information is denied.

Statement of the Case

On January 8, 2015, Applicant signed a Questionnaire for National Security Positions (SF 86) or security clearance application (SCA). (Government Exhibit (GE) 1) On June 21, 2017, 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, 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. (Hearing Exhibit (HE) 2)

On August 11, 2017, Applicant provided a response to the SOR, and he requested a hearing. (HE 3) On September 11, 2017, Department Counsel was ready to proceed. On February 16, 2018, the case was assigned to me. 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 4 exhibits; Applicant offered 12 exhibits; there were no objections; and all proffered exhibits were admitted into evidence. (Tr. 10-12; GE 1-4; Applicant Exhibit (AE) A-AE L) On April 13, 2018, DOHA received the hearing transcript. Applicant provided two exhibits after his hearing, which were admitted without objection. (AE M-AE N) The record was scheduled to close on May 2, 2018. (Tr. 81, 86) The record was closed on August 20, 2018. (AE N)

Findings of Fact¹

In Applicant's SOR response, he admitted he incurred the debts in SOR ¶¶ 1.a, 1.b, and 1.g. (HE 3) He also provided mitigating information. (HE 3) His admissions are accepted as findings of fact.

Applicant is a 57-year-old project manager, and a government contractor has employed him since September 2015. (Tr. 41, 54, 56) His expertise is in cyber security. (Tr. 56) In 2008, he received a bachelor's degree, and in 2014, he received a master's degree in business administration. (AE A) His children are ages seven and nine. (Tr. 76)

Applicant served on active duty in the U.S. Marine Corps for seven years and in the Reserve from 1997 to 2010 or 2012. (Tr. 40-41; GE 1; AE A) He served a tour in the Republic of Korea. (Tr. 79) His highest award was the Navy and Marine Corps Achievement Medal. (Tr. 80) He received an honorable discharge. (Tr. 41; GE 1) From 2001 to 2012, he was married, and he has one child from that marriage. (Tr. 41; GE 1)

Financial Considerations

Applicant was unemployed from October 2013 to May 2014. (Tr. 42) His current annual income is \$145,000. (Tr. 50) He said he currently pays \$1,000 monthly for each of his two children in child support. (Tr. 50-51) He does not pay for his children's medical insurance. (Tr. 51) There is no child-support order for his nine-year-old child. (Tr. 58)

The SOR alleges 12 delinquent debts, and the record establishes that he has mitigated all of his SOR debts except for his child-support debt. The status of Applicant's SOR accounts is as follows:

SOR ¶ 1.a alleges a child-support debt placed for collection for \$35,561. Applicant initially had a court-ordered monthly child-support payment of \$342. (Tr. 47) He was unable to make his child-support payments during his unemployment in 2013. (Tr. 48, 58) In May 2015, the court issued a default order increasing his monthly payment to \$1,582 with \$118 going toward an unspecified arrearage. (Tr. 49; AE J) The court indicated his payments were to be made by wage lien. (AE J) In 2015, the court denied his motion to

¹ Some details were excluded to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

reduce his monthly child-support payments. (Tr. 72) He said he paid \$800 monthly in child support for a time, and he has been paying \$1,000 monthly since 2016 or 2017. (Tr. 50-51, 59, 77; SOR response, AE A) His documentation indicates that in the first five months in 2017 he averaged \$600 monthly in child-support payments. (AE J) He said he is negotiating a settlement of his child-support arrearage. (Tr. 59-60) He did not provide proof of any payments after June 2017. (AE J) The current arrearage is about \$42,000. (Tr. 61) The child-support debt relates to his seven-year-old child. (Tr. 77) His child-support debt has increased \$7,000 in the last year. (Tr. 77) Three weeks before his hearing, he hired an attorney to help him resolve the child-support debt. (Tr. 73) He paid the attorney \$1,700. (Tr. 73) He hoped to settle the child-support arrearage for about \$5,000. (Tr. 74)

On March 21, 2018, the woman (Ms. K) who is supposed to receive the child support from Applicant as alleged in SOR ¶ 1.a indicated Applicant is “a reliable person, a responsible parent, and a dependable worker.” (AE D) Ms. K said that he “lost his job and as a result some of his financial obligations were put on hold. He has initiated a good-faith effort to repay overdue creditors and resolve debts.” (AE D)

On May 2, 2018, Applicant provided a requested amendment of his child support that he filed with the family court. (AE M) Applicant and Ms. K signed the agreement. It indicated Applicant did not have to pay child support to the state child support enforcement entity. (AE M) The agreement indicates his child-support arrearage places his security clearance in jeopardy. (AE M) The agreement allows Applicant to pay his child support directly to Ms. K, and it reduces his support obligation to \$800 with \$200 of that to go towards his arrearage. (AE M) It also asks the court “to terminate the current child-support obligation as well as the current arrears.” (AE M) On July 11, 2018, I granted a delay until August 10, 2018, to permit Applicant to submit the family court’s disposition for consideration in his security clearance assessment. (AE N) I held the record open until September 10, 2018, and did not receive any post-hearing documentation from Applicant after May 2, 2018.

SOR ¶ 1.b alleges a charged-off vehicle loan for \$11,452. Applicant’s vehicle was stolen and recovered, and then the insurance company declared the vehicle a total loss. (Tr. 51) The insurance company did not pay the full amount of the lien. (Tr. 52) On August 8, 2017, the creditor offered to settle the debt for \$3,800. (AE E) Applicant said he paid the debt around March 2017. (Tr. 52, 60) His March 29, 2018 Experian credit report indicates the original debt was for \$44,185, and the debt was paid in full for less than the full balance. (AE K at 21)

SOR ¶ 1.c alleges a charged-off debt for \$160. This debt resulted from a utility bill related to a rental property. (Tr. 42) He said he paid the debt. (Tr. 43; AE F) His March 29, 2018 Experian credit report indicates the debt is paid. (AE K at 20)

SOR ¶ 1.d alleges a debt placed for collection \$635. Applicant said his credit card went into default during his period of unemployment, and the debt was paid. (Tr. 43) His March 29, 2018 Experian credit report indicates he has a current account with the same

creditor for \$5,091. (AE K at 5) His March 27, 2018 Equifax credit report indicates he has a paid account with the same creditor with a previous high balance of \$941. (AE L at 19)

SOR ¶¶ 1.e and 1.f allege two student loan debts placed for collection for \$4,575. Department Counsel moved to withdraw SOR ¶ 1.f as a duplicate of SOR ¶ 1.e; there was no objection; and I granted the motion. (Tr. 8) The creditor offered to settle the debt for \$2,287. (SOR response) Applicant said the debt became delinquent when he was unemployed, and on August 11, 2017, he settled the debt. (Tr. 43-44; SOR response)

SOR ¶ 1.g alleges a debt placed for collection for \$2,286. Applicant was unaware of the maintenance fees on a timeshare. (Tr. 45) Once he learned of the debt, he paid it. (Tr. 45-46) He provided a checking account statement showing he paid this debt in August 2017. (Tr. 62; AE G)

SOR ¶ 1.h alleges a telecommunications debt placed for collection for \$379. Applicant said the debt became delinquent during his period of unemployment, and in July 2016, he paid this debt. (Tr. 46; SOR response; AE H)

SOR ¶¶ 1.i, 1.j, 1.k, and 1.l allege four vehicle-related tickets for \$205, \$105, \$55, and \$55. (Tr. 47) In August 2017, he paid these four debts. (AE I)

Applicant's financial case action plan (plan) in January 2015 indicated net monthly income of \$4,740, living expenses of \$6,025, and negative monthly shortfall of \$1,285. (SOR response) His plan indicated his monthly child support was \$342 and his arrearage was \$2,617. (SOR response)

Applicant does not owe any delinquent taxes, except for about \$1,000 in delinquent state income taxes. (Tr. 46, 70-71) He is making payments to address his state tax debt. He has about \$17,000 in his savings accounts and about \$45,000 in his retirement account. (Tr. 64-65) In 2016, he purchased a vehicle for about \$39,000, and his monthly payment is \$868. (Tr. 67) His student loan debt of about \$60,000 is current. (Tr. 67) He indicated he had a monthly remainder after deducting expenses of about \$2,000, which he used to pay past-due debt. (Tr. 67) He received financial counseling and generated a budget. (Tr. 71; SOR response) His financial counselor advised him not to use his retirement fund to pay his child-support arrearage. (Tr. 74) His 2018 credit reports generally indicate he is paying his debts, and his accounts are current. (AE K; AE L)

Three co-workers have worked with Applicant for about two years and in one instance has known him for six years. They described him as very professional, ethical, and trustworthy. (Tr. 17-36) They were all aware of Applicant's financial problems, and they nevertheless, recommended reinstatement of Applicant's security clearance. (Tr. 19, 29, 36) Two statements from character witnesses indicate their friendships extended from 16 to 22 years, including during his military service. (AE B; AE C) They lauded his reliability, responsibility, trustworthiness, judgment, loyalty, and diligence. (AE B; AE C)

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,² 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).

² 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).

Applicant presented some mitigating evidence. He was unemployed from October 2013 to May 2014, which is a circumstance largely beyond his control. He is credited with mitigating all of his SOR debts except for his child-support debt in SOR ¶ 1.a. He does not receive full mitigating credit under AG ¶ 20(b) because he did not act responsibly under the circumstances. He received financial counseling and generated a budget.

Applicant's child-support payments to Ms. K for the first five months of 2017 averaged \$600. He did not provide evidence of any child-support payments after June 2017. He did not explain why he reduced his payments from the \$1,000 monthly level of the previous year to \$600 monthly in 2017. Even if the court approved a new child-support payment plan, I am not convinced he would abide by it.³ In 2015, the court ordered him to make his child-support payments automatically from his salary, and he did not comply with that order. His child-support arrearage has increased in the previous 12 months even though his annual income is \$145,000.

Applicant did not prove that he was unable to make greater progress resolving his child-support arrearage. There is insufficient assurance that this debt is being resolved. Under all the circumstances, he failed to establish that 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

³ The Appeal Board has indicated that promises to pay off delinquent debts in the future are not a substitute for a track record of paying debts in a timely manner and otherwise acting in a financially responsible manner. ISCR Case No. 07-13041 at 4 (App. Bd. Sept. 19, 2008) (citing ISCR Case No. 99-0012 at 3 (App. Bd. Dec. 1, 1999)). A promise to pay debts is given greater weight when there is a track record of paying other debts.

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 57-year-old project manager, and a government contractor has employed him since September 2015. His expertise is in cyber security. In 2008, he received a bachelor's degree, and in 2014, he received a master's degree in business administration.

Applicant served in the Marine Corps from 1997 to 2010 or 2012. His highest award was the Navy and Marine Corps Achievement Medal, and he received an honorable discharge. The general sense of the statements of three co-workers, two friends, and the mother of his youngest child is that Applicant is very professional, ethical, loyal, diligent, and trustworthy.

Applicant presented some mitigating financial evidence. Applicant was unemployed from October 2013 to May 2014, which is a circumstance largely beyond his control. He received financial counseling and generated a budget. He mitigated all of his SOR debts except for his child-support debt in SOR ¶ 1.a. Applicant has a generally good credit report with a solid record of financial responsibility, except for the debt in SOR ¶ 1.a.

Applicant did not establish he had insufficient income to make greater progress resolving his child-support arrearage. His actions show a lack of financial responsibility and judgment and raise unmitigated questions about Applicant's reliability, trustworthiness, and ability to protect classified information. See AG ¶ 18. More information about inability to pay debts, financial history, or documented financial progress addressing his child-support arrearage is necessary to mitigate security concerns.

It is well settled that once a concern arises regarding an applicant's security clearance eligibility, there is a strong presumption against the grant or renewal of a security clearance. See *Dorfmont*, 913 F. 2d at 1401. Unmitigated financial considerations lead me to conclude that grant of a security clearance to Applicant is not warranted at this time. This decision should not be construed as a determination that Applicant cannot or will not attain the state of reform necessary for award of a security clearance in the future. With more effort towards documented resolution of his past-due child-support debt, and a track record of behavior consistent with his obligations, he may well be able to demonstrate persuasive evidence of his security clearance worthiness.

I have carefully applied the law, as set forth in *Egan*, Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. I conclude that financial consideration concerns are not mitigated.

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
Subparagraph 1.a:	Against Applicant
Subparagraphs 1.b through 1.e:	For Applicant
Subparagraph 1.f:	Withdrawn
Subparagraphs 1.g through 1.i:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

MARK HARVEY
Administrative Judge