



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 17-02018

Appearances

For Government: Alison O'Connell, Esq., Department Counsel
For Applicant: *Pro se*

07/02/2018

Decision

HARVEY, Mark, Administrative Judge:

Applicant provided insufficient evidence that he was unable to make payments to the creditors on his statement of reasons (SOR). Financial considerations security concerns are not mitigated. Eligibility for access to classified information is denied.

Statement of the Case

On January 4, 2016, Applicant signed a Questionnaire for National Security Positions (SF 86) or security clearance application (SCA). (Government Exhibit (GE) 1) On June 29, 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), 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) (June 8, 2017). The SOR set forth security concerns arising under the financial considerations guideline. (Hearing Exhibit (HE) 2)

On August 17, 2017, Applicant provided a response to the SOR, and he requested a hearing. (HE 3) On September 25, 2017, Department Counsel was ready to proceed. On September 25, 2017, the case was assigned to another administrative judge, and on

January 24, 2018, the case was transferred to me for administrative reasons. On February 22, 2018, the Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing, setting the hearing for February 28, 2018. (HE 1) Applicant waived his right to 15 days of notice of the date, time, and location of his hearing. (Transcript (Tr.) 14) Applicant's hearing was held as scheduled.

During the hearing, Department Counsel offered four exhibits; Applicant did not offer any exhibits; there were no objections; and all proffered exhibits were admitted into evidence. (Tr. 16-17; GE 1-4) On March 7, 2018, DOHA received the hearing transcript.

Findings of Fact¹

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

Applicant is 48 years old. (Tr. 6; GE 1) In 1988, Applicant graduated from high school, and in 1992, he received a bachelor of science degree. (Tr. 7) He completed several post-graduate courses. (GE 1) He served 11 years on active duty as a Marine Corps officer (from 1992 to 1997, from 1999 to 2001, and from 2010 to 2012). (Tr. 7-8) He is currently a major in the Marine Corps Reserve. (Tr. 7-8) He has 26 years of Marine Corps service. (Tr. 7) In 1996, he married, and his children are ages 12, 15, and 17. (Tr. 9)

Financial Considerations

In 2006, Applicant and his family moved to state M, and he purchased a fitness or child-development franchise. (Tr. 18, 25) The economy went into a recession, and in March 2009, the business failed. (Tr. 19-20, 25) He was unemployed for several months in 2009. (Tr. 26) From 2010 to 2012, Applicant mobilized with the Marine Corps, and moved to a state C by himself, leaving his family in state M. (Tr. 21-22) He earned about \$140,000 annually as a major. (Tr. 27) From 2012 to 2015, Applicant was employed in state O, and his annual income was \$90,000. (Tr. 22, 28) From 2015 to 2017, Applicant earned about \$25,000 annually as a consultant. (Tr. 29) He earns \$140,000 annually in his current position. (Tr. 29) His spouse is a part-time school teacher. (Tr. 29)

The SOR alleges three delinquent debts totaling \$218,737, and the record establishes the status of Applicant's accounts as follows:

SOR ¶ 1.a alleges a delinquent home-equity loan for \$83,492 and SOR ¶ 1.b alleges a charged-off bank debt for \$14,245. In 2007, he obtained the home-equity loan to fund his business. (Tr. 31) He used the funds from the two loans to live on and for the business until the business failed in 2009. (Tr. 20)

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

SOR ¶ 1.c alleges a delinquent federal small business loan for \$121,000. In 2006, Applicant borrowed \$163,000 for his business. (Tr. 19, 30) He made payments until 2009, reducing the amount of the debt to \$121,000. (Tr. 19) In 2009, he thought he had a “gentleman’s agreement” from the federal agency to accept a \$10,000 payment to settle the debt; however, the agency placed a lien on Applicant’s home. (Tr. 21, 31-32)

Applicant estimated his home was worth \$450,000, and his home was encumbered with a \$380,000 mortgage, the \$121,000 federal lien, and the home-equity loan for \$83,492 (Tr. 33)

When the business failed, Applicant paid the employees and taxes, and he did not pay his business’ landlord. (Tr. 41) The landlord obtained a \$109,000 judgment against Applicant’s business. (Tr. 41) The landlord failed to insist that Applicant sign the lease in both his business and personal capacity. (Tr. 41) Applicant explained, “They were a first-time landlords and they made a mistake and they basically they had no recourse because it was against the company, not against me personally.” (Tr. 41)

Applicant consulted a bankruptcy attorney, and his counsel recommended that of the three debts, he should pay the federal loan first because of the lien on his residence. (Tr. 23) In 2014 and 2015, several contacts were made with the federal agency or bank holding the federal loan to discuss settlement or payment plans. (Tr. 23) The agency made no contacts with Applicant in the past three years. (Tr. 24) The other two debts are charged off. (Tr. 24) He considered filing bankruptcy, and his bankruptcy attorney said he should just wait until his creditors took action against him. (Tr. 34) He did not actively pursue bankruptcy to resolve his debts. (Tr. 35) In his SOR response, he said he intended to pay the three delinquent debts. He is waiting for the creditors to attempt to negotiate the resolution of the debts. (Tr. 35) Aside from the three SOR debts, Applicant’s finances are in good shape. (Tr. 35)

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

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)).

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).

Applicant presented some mitigating evidence. He was underemployed or unemployed at times from 2009 to present. The recession caused his business failure. These are circumstances beyond his control that adversely affected his finances. He does not receive full mitigating credit under AG ¶ 20(b) because he did not act responsibly under the circumstances.

Applicant has three delinquent debts totaling \$218,737 that resulted from his failed business. He did not provide any evidence of any payments to address these debts from 2009 to present. He is waiting for the creditors to contact him to make settlement offers. In his SOR response, he said he intends to pay his SOR creditors.³

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.

Applicant indicates that two of his debts are charged off. Eventually, the charged-off debts will be dropped from his credit report. “[T]hat some debts have dropped off his 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 revolved.” 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)).

Applicant did not prove that he has been unable to make any payments to the three creditors on his SOR over the past eight years. There is insufficient evidence about why Applicant was unable to make greater progress resolving the debts in SOR ¶¶ 1.a through 1.c. There is insufficient assurance that these SOR debts are 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 incorporated in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under that guideline but some warrant additional comment.

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>.

Applicant is 48 years old. In 1992, he received a bachelor of science degree, and he has taken several post-graduate courses. He served 11 years on active duty as a Marine Corps officer. He is currently a major in the Marine Corps Reserve. He has 26 years of Marine Corps service. In 1996, he married, and his children are ages 12, 15, and 17.

Applicant presented some mitigating evidence in addition to his military service. He was underemployed or unemployed at times from 2009 to present. The recession caused his business failure.

Applicant has three delinquent debts totaling \$218,737 that resulted from his failed business. Applicant did not provide any evidence of any payments to address these three debts from 2009 to present. Applicant provided insufficient corroborating or substantiating documentary evidence of payments and established payment plans for these three debts. He did not establish he had insufficient income to make any payments. 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 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 debts, 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

Subparagraphs 1.a through 1.c:

Against 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 or reinstate Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

MARK HARVEY
Administrative Judge