



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



In the matter of:

Applicant for Security Clearance

)
)
) ISCR Case No. 17-02917
)
)

Appearances

For Government: Caroline E. Heintzelman, Esq., Department Counsel
For Applicant: *Pro se*

02/02/2018

Decision

HARVEY, Mark, Administrative Judge:

Applicant provided sufficient evidence of progress resolving the delinquent debts 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 August 5, 2016, Applicant signed a Questionnaire for National Security Positions (SF 86) or security clearance application (SCA). Government Exhibit (GE) 1. On September 6, 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; and 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). The SOR set forth security concerns arising under the financial considerations guideline. Hearing Exhibit (HE) 2.

On October 4, 2017, Applicant provided a response to the SOR, and he requested a hearing. HE 3. On October 23, 2017, Department Counsel was ready to proceed. On October 30, 2017, the case was assigned to me. On November 8, 2017, the Defense

Office of Hearings and Appeals (DOHA) issued a notice of hearing, setting the hearing for November 30, 2017. HE 1. Applicant's hearing was held as scheduled.

During the hearing, Department Counsel offered six exhibits; Applicant offered one exhibit; there were no objections; and all proffered exhibits were admitted into evidence. Tr. 19-21; GE 1-6; Applicant Exhibit (AE) A (43 pages). On December 13, 2017, DOHA received a copy of the hearing transcript. On January 4, 2018, Applicant provided one exhibit, which was admitted without objection. AE B (8 pages).

Findings of Fact¹

In Applicant's SOR response, he admitted the debts in SOR ¶¶ 1.a through 1.l and 1.n. He denied the debt in SOR ¶ 1.m as it is a duplication of the debt in SOR ¶ 1.i. He also provided mitigating information. HE 3.

Applicant is a 52-year-old employee of a government contractor. Tr. 5; GE 1. His current employer has employed him for one year in logistics. Tr. 9. He was an Army civilian employee from 2005 to 2015. GE 1.

In 1983, Applicant graduated from high school. Tr. 5. In 2003, he received a bachelor of science degree in business administration, and in 2005, he received a master's degree in business administration. Tr. 6. He served on active duty in the Navy from 1983 to 2003, and his specialty was explosive ordnance. Tr. 6-7. When he honorably retired from the Navy, he was a petty officer first class (E-6). Tr. 7. He did not serve in any combat zones. Tr. 7. Applicant was married three times: from 1986 to 1990; from 1991 to 1994; and from 1994 to 2008. Tr. 8; GE 1. His children are ages 1, 17, 19, 23, and 27. Tr. 8-9. There is no evidence of any criminal conduct, use of illegal drugs, abuse of alcohol, or security violations.

Financial Considerations

Applicant was unemployed from April 2015 to October 2016. Tr. 9. His current annual salary is \$77,177; his annual Department of Veterans Affairs (VA) disability pay is \$22,800; and his net Navy retirement pay is \$13,000. Tr. 22, 24. He has \$1,500 in savings, and he has \$11,800 in his 401(k) account. Tr. 23. He is current on his monthly child support responsibility of \$300. Tr. 25. His alimony payment is automatically deducted from his Navy retirement. Tr. 26. All of his tax returns were timely filed. Tr. 26, 28. His financial problems resulted from his financial assistance to his mother, sister, and son. Tr. 28. He provided payments to pay for some of his mother's health care costs. Tr. 28. The Department of Veterans Affairs (VA) audited his account and determined that Applicant owed \$18,000. Tr. 35. The VA stopped making disability payments to him until the overpayment was recouped. Tr. 35. He disclosed his delinquent debts on his August 5, 2016 SCA.

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

In December 2014, Applicant was attempting to avoid a dog attack. Tr. 36-38. He fell and injured his leg. Tr. 38. He resigned from his employment because he was unable to drive to work, and he wanted to focus on his physical therapy. Tr. 42-43.

The SOR alleges 14 delinquent debts totaling \$121,735, and the record establishes the status of Applicant's accounts as follows:

SOR ¶ 1.a alleges a federal income tax debt for \$16,963 for tax years 2013 and 2015. Applicant's 2013 federal income tax transcript indicates: adjusted gross income (AGI) of \$86,347; taxable income of \$61,797; tax of \$6,363; withholding of \$11,630; refund issued of \$5,372; additional tax per assessment of \$2,025; and completion of payments on the assessment on May 29, 2017. AE B at 2-3. The balance owed for tax year 2013 is zero. AE B at 3.

Applicant's 2015 federal income tax debt resulted when he withdrew funds from his 401(k) account during his unemployment, and he failed to withhold sufficient federal income taxes. Tr. 27. Applicant's 2015 tax transcript indicates: AGI of \$160,438; taxable income of \$132,254; tax of \$40,029; withholding of \$25,937; and refund from 2016 tax year applied of \$5,882. AE B at 4-5. Applicant made eight \$320 monthly payments from May to December 2017, and the current balance owed to the IRS is \$6,755. Tr. 30-31; AE B at 5. The payments to the IRS are made automatically from his checking account. Tr. 30. He is credited with having a payment plan that is acceptable to the IRS.

SOR ¶ 1.b alleges a debt owed to a state for \$5,000 for tax year 2015. On November 24, 2017, the state wrote Applicant that the debt was satisfied. Tr. 28-30; AE B at 6-7.

SOR ¶¶ 1.c through 1.l and 1.n are charged-off bank credit card debts for the following amounts: \$11,516; \$11,004; \$10,846; \$10,499; \$9,079; \$8,892; \$8,191; \$7,517; \$6,816; \$2,377; and \$3,182. Applicant's credit cards became delinquent when he was unemployed. SOR ¶ 1.m alleges a bank debt placed for collection for \$9,853.

As soon as Applicant became employed, he met with a debt consolidation company (DCC) to work on a payment plan. Tr. 43. In December 2016, Applicant established a debt consolidation plan. Tr. 31-32. Applicant made all 13 of the monthly payments of \$3,361 from December 2016 to December 2017. Tr. 32-33; AE B at 8. The DCC is making payments to all of the SOR creditors and one additional non-SOR creditor ranging from \$65 to \$438 monthly. SOR response.

Character Evidence

Applicant's Navy performance evaluations and awards, contractor performance evaluation and award, training certificates, Army civilian employee evaluations and awards, and certificates for community service show his diligence, dedication, initiative, and responsibility. AE B.

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”; “(c) a history of not meeting financial obligations”; and “(f) failure to file or fraudulently filing annual Federal, state, or local income tax returns or failure to pay annual Federal, state, or local income tax as required.” 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(c), and 19(f) requiring additional inquiry about the possible applicability of mitigating conditions.

AG ¶ 20 lists financial considerations mitigating conditions that 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;

(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;

(f) the affluence resulted from a legal source of income; and

(g) the individual has made arrangements with the appropriate tax authority to file or pay the amount owed and is in compliance with those arrangements.

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

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)).

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).

Medical problems, the needs of his family, and unemployment harmed Applicant’s finances. These are circumstances beyond his control. He acted reasonably under the circumstances by establishing payment plans once he became employed. The SOR alleges 14 delinquent debts totaling \$121,735. Applicant paid one debt (SOR ¶ 1.b), one debt is a duplication (SOR ¶ 1.m), and the other SOR debts are in established payment plans. In December 2016, he initiated a payment plan before the SOR was issued on September 6, 2017. He has paid more than \$58,000 to address his delinquent debts.

Two Appeal Board decisions illustrate the analysis for applying AG ¶¶ 20(a) and 20(b). In ISCR Case No. 09-08533 (App. Bd. Oct. 6, 2010), the applicant had \$41,871 in delinquent credit card debt and defaulted on a home loan generating a \$162,000 delinquent debt. *Id.* at 2. That applicant filed for bankruptcy the same month the Administrative Judge issued her decision. *Id.* at 1-2. The applicant in ISCR Case No. 09-08533 was recently divorced, had been unemployed for 10 months, and had childcare responsibilities. Her former husband was inconsistent in his child support payments to her. The Appeal Board determined that AG ¶ 20(a) was “clearly applicable (debt occurred under such circumstances that it is unlikely to recur and [the debt] does not cast doubt on the individual’s current reliability, trustworthiness, or good judgment)” even though that applicant’s debts were unresolved at the time the Administrative Judge’s decision was issued. *Id.* at 3. The Appeal Board also decided that the record evidence raised the applicability of AG ¶ 20(b) because of the absence of evidence³ of irresponsible behavior, poor judgment, unreliability, or lack of trustworthiness. *Id.* at 4.

Similarly, in ISCR Case No. 08-06567 (App. Bd. Oct. 29, 2009) the Appeal Board addressed a situation where an applicant was sporadically unemployed and lacked the ability to pay his creditors. The Appeal Board noted “it will be a long time at best before he has paid” all of his creditors. *Id.* at 3. The applicant was living on unemployment compensation at the time of his hearing. The Appeal Board explained that such a circumstance was not necessarily a bar to having access to classified information stating:

However, the Board has previously noted that an applicant is not required to be debt-free nor to develop a plan for paying off all debts immediately or simultaneously. All that is required is that an applicant act responsibly given his [or her] circumstances and develop a reasonable plan for repayment,

³ Applicant has the burden of proving the applicability of any mitigating conditions, and the burden to disprove a mitigating condition never shifts to the Government.

accompanied by “concomitant conduct,” that is, actions which evidence a serious intent to effectuate the plan.

ISCR Case No. 08-06567 at 3 (App. Bd. Oct. 29, 2009) (citing ISCR Case No. 07-06482 at 3 (App. Bd. May 21, 2008)). The applicant in ISCR Case No. 08-06567 used his limited resources to (1) resolve some of his debts; (2) had a repayment plan for the remaining debts; and (3) took “reasonable actions to effectuate that plan.” *Id.* The Appeal Board remanded the Administrative Judge’s decision because it did not “articulate a satisfactory explanation for his conclusions,” emphasizing the Administrative Judge did “not explain[] what he believes that applicant could or should have done under the circumstances that he has not already done to rectify his poor financial condition, or why the approach taken by applicant was not ‘responsible’ in light of his limited circumstances.” *Id.*

Application of AG ¶¶ 20(a), 20(b), 20(d), and 20(g) is warranted. Applicant financial situation was damaged by circumstances partially or fully beyond his control. He acted responsibly by paying as many debts as possible and establishing payment plans for the remainder of his delinquent debts. Although there is limited evidence of record that he established and maintained contact with his creditors,⁴ his financial problem is being resolved or is under control.

Applicant took reasonable and responsible actions to resolve his debts, establishing his good faith.⁵ Based on Applicant’s credible and sincere promise to pay his debts and his track record of paying his debts, future new delinquent debt “is unlikely to recur and does not cast doubt on [Applicant’s] current reliability, trustworthiness, or good judgment.” AG ¶ 20(a). Applicant assures he will conscientiously endeavor to maintain his financial responsibility, and he will continue his payment plans until his remaining debts are resolved. His efforts are sufficient to mitigate financial considerations security concerns.

⁴ “Even if Applicant’s financial difficulties initially arose, in whole or in part, due to circumstances outside his [or her] control, the Judge could still consider whether Applicant has since acted in a reasonable manner when dealing with those financial difficulties.” ISCR Case No. 05-11366 at 4 n.9 (App. Bd. Jan. 12, 2007) (citing ISCR Case No. 99-0462 at 4 (App. Bd. May 25, 2000); ISCR Case No. 99-0012 at 4 (App. Bd. Dec. 1, 1999); ISCR Case No. 03-13096 at 4 (App. Bd. Nov. 29, 2005)). A component is whether he or she maintained contact with creditors and attempted to negotiate partial payments to keep debts current.

⁵ The Appeal Board has previously explained what constitutes a “good faith” effort to repay overdue creditors or otherwise resolve debts:

In order to qualify for application of [the “good faith” mitigating condition], an applicant must present evidence showing either a good-faith effort to repay overdue creditors or some other good-faith action aimed at resolving the applicant’s debts. The Directive does not define the term ‘good-faith.’ However, the Board has indicated that the concept of good-faith ‘requires a showing that a person acts in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation.’ Accordingly, an applicant must do more than merely show that he or she relied on a legally available option (such as bankruptcy) in order to claim the benefit of [the “good faith” mitigating condition].

(internal citation and footnote omitted) ISCR Case No. 02-30304 at 3 (App. Bd. Apr. 20, 2004) (quoting ISCR Case No. 99-9020 at 5-6 (App. Bd. June 4, 2001)).

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 52-year-old employee of a government contractor. His current employer has employed him for one year in logistics. He was an Army civilian employee from 2005 to 2015. He has a bachelor of science degree in business administration, and a master's degree in business administration. He served on active duty in the Navy from 1983 to 2003, and his specialty was explosive ordnance. When he honorably retired from the Navy, he was a petty officer first class. There is no evidence of any criminal conduct, use of illegal drugs, abuse of alcohol, or security violations. Applicant's character evidence shows his diligence, dedication, initiative, and responsibility over more than 30 years of employment associated with the DOD.

The SOR alleges 14 delinquent debts totaling \$121,735. Applicant paid one debt and the other SOR debts are in established payment plans. In December 2016, he initiated a payment plan before the SOR was issued. He has paid more than \$58,000 to address his delinquent debts since December 2016. Medical problems, the needs of his family, and unemployment harmed Applicant's finances. These are circumstances beyond his control.

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 understands what he needs to do to establish and maintain his financial responsibility. He took reasonable actions under his particular financial circumstances to address his delinquent debts. Applicant has established a "meaningful track record" of debt re-payment, and he assures he will maintain his financial responsibility.

I have carefully applied the law, as set forth in *Egan*, Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. I conclude that financial considerations security concerns are mitigated. It is clearly consistent with the interests of national security to grant Applicant security clearance eligibility.

Formal Findings

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline F:	FOR APPLICANT
Subparagraphs 1.a through 1.n:	For Applicant

Conclusion

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

Mark Harvey
Administrative Judge