



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 18-00964

Appearances

For Government: Mary Margaret Foreman, Esq., Department Counsel
For Applicant: *Pro se*

09/07/2018

Decision

HARVEY, Mark, Administrative Judge:

From 1998 to present, Applicant filed for bankruptcy five times. He did not establish that his actions were reasonable and prudent, and that he adhered to duty or obligation in the resolution of his debts. Financial considerations security concerns are not mitigated. Eligibility for access to classified information is denied.

Statement of the Case

On June 3, 2015, Applicant completed and signed a Questionnaire for National Security Position (SF 86) or security clearance application (SCA). (Government Exhibit (GE) 1) On April 19, 2018, 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), and Security Executive Agent Directive 4, establishing in Appendix A new adjudicative guidelines (AGs), effective June 8, 2017.

The SOR detailed reasons why the DOD CAF did not find under the Directive that it is clearly consistent with the interests of national security to grant or continue a security clearance for Applicant and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

Specifically, the SOR set forth security concerns arising under Guideline F (financial considerations). (Hearing Exhibit (HE) 2)

On May 1, 2018, Applicant provided a response to the SOR. (HE 3) On May 30, 2018, Department Counsel indicated she was ready to proceed in Applicant's case. On June 4, 2018, the case was assigned to me. On June 4, 2018, the Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing, setting the hearing for June 11, 2018. (HE 1) Applicant waived his right to 15 days of notice of the date, time, and location of his hearing. (Transcript (Tr.) 13) Applicant's hearing was held as scheduled.

During the hearing, Department Counsel offered eight substantive exhibits and one demonstrative exhibit; Applicant did not offer any exhibits; there were no objections; and all proffered exhibits were admitted into evidence. (Tr. 12, 15-17; GE 1-8; HE 4) On June 19, 2018, DOHA received the hearing transcript.

Findings of Fact¹

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

Applicant is a 43-year-old senior systems administrator and information technology instructor, and a DOD contractor has employed him since May 2016. (Tr. 5, 19-20; GE 1) In 1993, he graduated from high school. (Tr. 6) In 2006, he received a bachelor's degree, and in 2009, he received a master's degree in teaching and learning technology. (Tr. 6-7) From 1993 to 2004, he served in the Marine Corps, and from 2004 to 2016, he served in the Army. (Tr. 7, 21) He has nine and one half years of active duty service, and the remainder was in the Marine Corps and/or Army National Guard or Reserve. (Tr. 7, 21) He retired from the Army as a sergeant first class (E-7). (Tr. 7, 21) From May 2013 to November 2013, he served in Afghanistan working for a DOD contractor. (Tr. 8; GE 2) In 1996, he married, and in 1997, he divorced. (Tr. 8) In 1999, he married, and his children are ages 6 and 11. (Tr. 9, 18-19)

Financial Considerations

From 2007 to 2012, Applicant served on active duty in the United States. (Tr. 21) Applicant was unemployed from May 2012 to September 2012, from January 2016 to May 2016, and two other periods of unemployment for two months or less. (Tr. 20-26; GE 1; GE 2) Applicant is on temporary duty about half of the year, and his spouse handles payment of debts and filing his income tax returns. (Tr. 30-31, 36) His annual income from a contractor is about \$50,000. (Tr. 35)

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

The status of the debts alleged in the SOR is as follows:

SOR ¶ 1.a alleges a utility debt placed for collection for \$797. Applicant said the week before his hearing he made an arrangement with the creditor to pay \$50 monthly. (Tr. 27-30) He did not provide proof of any payments.

SOR ¶¶ 1.b and 1.c allege student loans past due in the amount of \$564 on a debt of \$17,081 and \$402 on a debt of \$12,159. Applicant's April 13, 2018, credit report indicates his most recent payments on these two student loans were in February 2014. (GE 3) In his SOR response, Applicant said "As of this 1st of May 2018 I was given authorization [by the creditor], to allow me 2 months of Deferment." At hearing, Applicant said his student loans were in forbearance status until August 2018, and then he intends to apply for loan forgiveness, which reduces the monthly payment. (Tr. 32, 34) He estimated he owed about \$42,000 on his student loans. (Tr. 33) He did not provide any documentation from the student loan creditors.

SOR ¶ 1.d alleges a charged-off debt for \$398. Applicant said he was unable to contact the creditor despite calling the creditor's phone number. (Tr. 37)

SOR ¶ 1.e alleges, and Applicant admitted that he filed for bankruptcy under Chapter 7 of the Bankruptcy Code in July 1998, and his nonpriority unsecured debts were discharged in November 1998. (SOR response) Applicant said that his first spouse had some unnecessary expenses, including the purchase of encyclopedias for about \$1,200 without his permission; however, he did not remember why it was necessary to file for bankruptcy. (Tr. 39-41)

SOR ¶ 1.f alleges, and Applicant admitted that he filed for bankruptcy under Chapter 7 of the Bankruptcy Code in October 2005, and his nonpriority unsecured debts were discharged in March 2006. (SOR response) His nonpriority unsecured debts totaled \$31,953. (GE 5 at 5) Applicant explained his income was low due to unemployment or underemployment. (Tr. 41-46; SOR response)

SOR ¶ 1.g alleges, and Applicant admitted that he filed for bankruptcy under Chapter 7 of the Bankruptcy Code in January 2015, and his nonpriority unsecured debts were discharged in March 2016. (SOR response) His nonpriority unsecured debts totaled \$41,510. (GE 6 at 15) Applicant explained that in 2012, his 2007 vehicle was repossessed because he was not making payments, and he was behind on his mortgage, some medical bills, and another car payment. (Tr. 46-51)

SOR ¶ 1.h alleges, and Applicant admitted that he filed for bankruptcy under Chapter 13 of the Bankruptcy Code in July 2015, and his bankruptcy was dismissed in March 2016. (SOR response) The Chapter 13 was filed because Applicant was behind on his mortgage. (Tr. 52) He was successful in obtaining a loan modification, and then the Chapter 13 was dismissed. (Tr. 53)

SOR ¶ 1.i alleges, and Applicant admitted that he filed for bankruptcy under Chapter 13 of the Bankruptcy Code in April 2017, and his bankruptcy was dismissed in

April 2017. (SOR response) In 2017, he fell behind again on his mortgage and used the Chapter 13 process to obtain even lower payments on his mortgage. (Tr. 54-55) He now owes about \$20,000 more for his home than his home's fair market value. (Tr. 56) His monthly mortgage payment is \$1,202 and constitutes about half of his monthly income. (Tr. 56)

In the last five years, Applicant has had three vehicles repossessed. (Tr. 57-58) For two of the vehicles, his arrearage totaled more than \$9,000. (Tr. 59; GE 6 at 9) In his 2015 bankruptcy, he indicated his unsecured portion of his \$155,751 mortgage was \$12,588. (Tr. 58; GE 6 at 9)

Applicant's supervisor for about two years has contact with him about once a month. (Tr. 73) He described Applicant as reliable, responsible, diligent, honest, and a great employee. (Tr. 73-78)

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 Director of National Intelligence 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 or her 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. Sep. 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.

Seven financial considerations mitigating conditions under AG ¶ 20 are potentially applicable in this case:

(a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;

(b) the conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, a death, divorce or separation, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances;

(c) the individual has received or is receiving financial counseling for the problem from a legitimate and credible source, such as a non-profit credit counseling service, and there are clear indications that the problem is being resolved or is under control;

(d) the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts; and

(e) the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue.

The DOHA Appeal Board concisely explained Applicant's responsibility for proving the applicability of mitigating conditions as follows:

Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government

presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in security clearance decisions is that articulated in *Egan, supra*. “Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security.” Directive, Enclosure 2 ¶ 2(b).

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

None of the mitigating conditions fully apply. Applicant said his first three bankruptcies were caused by divorce, underemployment, and/or unemployment. These circumstances were beyond his control and adversely affected his finances. AG ¶ 20(b) does not fully apply because he did not act responsibly under the circumstances.

Applicant received financial counseling as part of the bankruptcy process and generated a budget. However, there are not clear indications that his financial problems are being resolved or that his finances are under control.

Applicant receives partial mitigation under AG ¶ 20(d) by showing some good-faith² in the resolution of his SOR debts by admitting responsibility for them and resolving all of them except for his mortgage and student loan debts through bankruptcy.

Applicant filed for bankruptcy five times. In order to conclude that bankruptcy is necessary, clear and complete information about the impact of divorce, underemployment, and unemployment is necessary. Applicant failed to provide detailed financial information about his income. In addition, he said his student loans were in forbearance. He did not provide documentation showing the forbearance was necessary or approved. There is insufficient assurance that similar financial problems will not recur in the future. Under all the circumstances, he failed to establish mitigation of financial considerations security concerns.

²The 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 43-year-old senior systems administrator and information technology instructor, and a DOD contractor has employed him since May 2016. In 2006, he received a bachelor's degree, and in 2009, he received a master's degree in teaching and learning technology. From 1993 to 2016, he served in the Marine Corps and Army. He honorably retired from the Army as a sergeant first class. From May 2013 to November 2013, he served in Afghanistan working for a DOD contractor. In 1999, he married, and his children are ages 6 and 11.

Applicant was divorced in 1997, and he had several periods of unemployment or underemployment. He filed for bankruptcy five times, and his debts were discharged in November 1998, March 2006, and March 2016. He did not meet his burden of providing that he showed reasonableness and prudence, and adherence to duty or obligation in the resolution of his debts. He did not prove his student loans are in forbearance.

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 of 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. Financial consideration security concerns are not mitigated. It is not clearly consistent with the interests of national security to grant Applicant security clearance eligibility at this time.

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
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Subparagraphs 1.a through 1.i:	Against Applicant
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Conclusion

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

Mark Harvey
Administrative Judge