



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 14-03320

Appearances

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

06/09/2015

Decision

HARVEY, Mark, Administrative Judge:

Applicant's statement of reasons (SOR) alleges four charged-off or collection accounts totaling \$32,105. His debts were caused by circumstances beyond his control. He paid two debts, one debt is almost paid, and the creditor for the fourth debt agreed with his payment plan. Financial considerations concerns are mitigated. Eligibility for access to classified information is granted.

Statement of the Case

On February 19, 2013, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP) (SF 86). (GE 1) On September 6, 2014, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued an SOR to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended; and the adjudicative guidelines (AG), which became effective on September 1, 2006.

The SOR alleged security concerns under Guideline F (financial considerations). (Hearing Exhibit (HE) 2) The SOR detailed reasons why DOD could not make the affirmative finding under the Directive that it is clearly consistent with national security to

grant or continue a security clearance for Applicant and recommended referral to an administrative judge to determine whether Applicant's clearance should be granted, continued, denied, or revoked. (HE 2)

On September 18, 2014, Applicant responded to the SOR allegations and requested a hearing. (HE 3) On February 9, 2015, Department Counsel was prepared to proceed. On March 2, 2015, the case was assigned to me. On April 10, 2015, the Defense Office of Hearings and Appeals (DOHA) issued a hearing notice, setting the hearing for May 14, 2015. (HE 1) The hearing was held as scheduled. Department Counsel offered four exhibits into evidence, and Applicant offered eight exhibits into evidence. (Tr. 15-21; Government Exhibit (GE) 1-4; Applicant Exhibit (AE) A-H) There were no objections, and all exhibits were admitted into evidence. (Tr. 16-17, 21-22; GE 1-4; AE A-H) On May 22, 2015, the transcript was received.

Findings of Fact¹

In his Answer to the SOR, Applicant admitted responsibility for the SOR debts. (HE 3) He also provided extenuating and mitigating information. (HE 3) His admissions are accepted as findings of fact.

Applicant is a 59-year-old technician, who has worked for a defense contractor since 1989.² (Tr. 6, 41) In 1973, he graduated from high school. (Tr. 6) In 1989, he graduated from college with a bachelor of science degree in electrical engineering. (Tr. 7) He never served in the military. (Tr. 7) In 1991, he married, and his children are ages 16 and 17. (Tr. 7-8; AE H) In 1979, Applicant emigrated from Vietnam to the United States. (Tr. 7; AE H) There is no evidence of disciplinary problems with his employer, illegal drug use, criminal offenses, or alcohol abuse.

Financial Considerations

In 2006, Applicant used the equity on his residence to purchase a duplex. (Tr. 30; AE H) In 2008, he sold the duplex for a profit. (Tr. 30) He purchased a fourplex and a commercial property in another state. (Tr. 30-32; AE H) Both properties declined in value, and they were expensive to maintain. (AE H) In 2008, he sold the fourplex, and in 2013, he sold the commercial property. (Tr. 31-33) He lost \$220,000. (Tr. 31-32; AE H) He does not intend to invest in commercial properties in the future. (Tr. 44) His spouse was medically unable to work outside their home. (Tr. 45; AE H)

Applicant earns \$31.50 an hour, and his tax return reflected income of \$110,465 in 2014. (Tr. 23) In 2013, he borrowed \$25,000 from his 401(k) retirement plan, and in 2014, he borrowed \$7,000 from his 401(k) retirement plan to pay his debts. (Tr. 23-25)

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

²Unless stated otherwise, the source for the information in this paragraph is Applicant's February 19, 2013 Electronic Questionnaires for Investigations Processing (e-QIP) (SF 86). (GE 1)

Applicant filed his federal and state taxes on time; however, in 2012, he owed \$14,900 for federal taxes, and in 2014, he owed \$2,900 for state taxes. He had an \$11,300 refund of his 2013 federal income taxes, which was used to pay down his 2012 federal income tax debt to \$3,600, and he expects to receive a \$14,000 federal income tax refund for 2014, which should pay off his 2012 federal tax debt and his 2014 state income tax debt and leave him about \$7,000 to pay his SOR debts. (Tr. 25-29)

Applicant's SOR alleges four collection or charged-off accounts totaling \$32,105. The status of the four SOR accounts is as follows:

¶ 1.a is a bank credit card collection account for \$12,784. In July 2014, Applicant settled this debt for \$7,000. (Tr. 14, 36)

¶ 1.b is a charged-off bank credit card account for \$5,248. Applicant has been making \$467 monthly payments for two years. As of May 2015, the debt is reduced to about \$930. (Tr. 36-37; GE 4)

¶ 1.c is a charged-off bank credit card account for \$13,564. On January 14, 2015, the creditor offered to settle the debt for \$8,138. (Tr. 18; AE A) The creditor has agreed that Applicant can begin making payments in July 2015, after the debt in SOR ¶ 1.b is paid. (Tr. 37-38)

¶ 1.d is a charged-off bank credit card account for \$509. On September 23, 2014, Applicant paid \$333 and settled the debt. (Tr. 18; AE B; GE 4)

On September 11, 2013, Applicant paid \$7,003 to settle a non-SOR bank debt. (AE C) On July 26, 2014, Applicant paid \$6,000 to settle a non-SOR debt. (AE E)

On November 28, 2012, Applicant reached a settlement agreement to resolve a \$15,216 non-SOR debt for \$7,000 to be paid with \$767 monthly payments. (AE D) Applicant's mortgage and vehicle loan are in good standing. (Tr. 38-39) His bills and expenses are current. (Tr. 39)

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 revised 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. See also Executive Order 12968 (Aug. 2, 1995), § 3.1. Thus, nothing in this Decision should be construed to suggest that I have based this decision, 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 and the Secretary of Defense 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 relating to financial problems:

Failure or inability 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 information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

AG ¶ 19 provides two disqualifying conditions that could raise a security concern and may be disqualifying in this case: "(a) inability or unwillingness to satisfy debts;" and "(c) a history of not meeting financial obligations." Applicant's history of delinquent debt is documented in his credit reports, SF 86, SOR response, and hearing record. His SOR alleges four charged-off or collection accounts totaling \$32,105. The Government established the disqualifying conditions in AG ¶¶ 19(a) and 19(c), requiring additional inquiry about the possible applicability of mitigating conditions.

Five mitigating conditions under AG ¶ 20 are potentially applicable:

(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, or a death, divorce or separation), and the individual acted responsibly under the circumstances;

(c) the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control;

(d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts;³ and

³The 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)).

(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.

Applicant's conduct in resolving his debts warrants full application of AG ¶¶ 20(a) through 20(d). His financial problems were affected by circumstances largely beyond his control. Applicant invested in a fourplex and a commercial property. The real estate market substantially declined. The fair market value of his two properties was substantially less than when he purchased them. He sold the two properties at a loss of \$220,000.

Applicant's delinquent debts "occurred under such circumstances that [are] unlikely to recur and [do] not cast doubt on [his] current reliability, trustworthiness, or good judgment." The 2008-2009 real estate crash was the most precipitous nationwide decline in real estate in decades. It is unlikely to recur. Moreover, Applicant has learned from his experience; there are clear indications that the problem is being resolved; his finances are under control; and he showed good faith.

Applicant admitted responsibility for and took reasonable and responsible actions to resolve his SOR debts. He paid two debts, one debt is almost paid, and he promised to establish a payment plan and pay the fourth debt as soon as the third debt is paid. The creditor of the fourth and only remaining unpaid debt agreed to the delay in the start of his payments until July 2015. He does not have debts that are currently delinquent. His efforts are sufficient to mitigate financial considerations security concerns.

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(a):

(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.

The ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. AG ¶ 2(c). I have incorporated my comments under Guideline F in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under Guideline F, but some warrant additional comment.

Applicant is a 59-year-old technician, who has worked for a defense contractor since 1989. In 1989, he graduated from college with a bachelor of science degree in electrical engineering. There is no evidence of disciplinary problems with his employer, illegal drug use, criminal offenses, or alcohol abuse. He is sufficiently mature to understand and comply with his security responsibilities. There is every indication that he is loyal to the United States and his employer. Real estate investments, the real estate crash of 2008-2010, and his spouse's disability caused his financial woes. I give Applicant substantial credit for maintaining contact with his creditors and either paying, establishing payment plans, resolving or bringing all of his delinquent debts to current status.

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. His efforts at debt resolution have established a "meaningful track record" of debt re-payment. I am confident he will resolve the two remaining debts on his SOR and maintain his financial responsibility.

I have carefully applied the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. I conclude financial considerations concerns are mitigated, and eligibility for access to classified information is granted.

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 to 1.d: For Applicant

Conclusion

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

Mark Harvey
Administrative Judge