



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 14-03515

Appearances

For Government: Pamela Benson, Esq., Department Counsel
For Applicant: *Pro se*

04/14/2015

Decision

HARVEY, Mark, Administrative Judge:

Applicant's statement of reasons (SOR) alleges three debts totaling \$105,345 and a Chapter 13 bankruptcy dismissed in December 2011. He brought his mortgage to current status, and paid his vehicle loan. After his Chapter 13 bankruptcy was dismissed, Applicant did not make sufficient progress bringing his Chapter 13 debts to current status. Financial considerations security concerns are not mitigated. Eligibility for access to classified information is denied.

Statement of the Case

On March 12, 2013, Applicant signed and submitted an Electronic Questionnaires for Investigations Processing (e-QIP) (SF 86). (GE 1) On November 7, 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). (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 November 20, 2014, Applicant responded to the SOR. (HE 3) On February 10, 2015, Department Counsel was prepared to proceed. On February 24, 2015, DOHA assigned the case to me. On March 18, 2015, DOHA issued a notice of the hearing, setting the hearing for March 24, 2015. (HE 1) The hearing was held as scheduled using video teleconference. Applicant waived his right to 15 days of notice of the date, time, and place of the hearing. (Tr. 16-17) Department Counsel offered five exhibits into evidence, and Applicant offered seven exhibits into evidence. (Tr. 21-26; GE 1-5; AE A-G) There were no objections, and I admitted all proffered exhibits into evidence. (Tr. 23-22, 26; GE 1-5; AE A-G) On April 1, 2015, I received the transcript of the hearing.

Findings of Fact¹

In Applicant's SOR response, he admitted the allegations in SOR ¶¶ 1.a to 1.d. He also provided extenuating and mitigating information. His admissions are accepted as findings of fact.

Applicant is 61 years old, and he has been working part time as a research consultant since January 2013. (Tr. 6, 30-31; GE 1) In 1971, he graduated from high school. (Tr. 7) In 1982, he received a bachelor's of science degree in business, and in 1994, he received a master's degree in aerospace and aeronautical science. (Tr. 7-8)

Applicant served in the Air Force from 1971 to 1979. (Tr. 8) He attended college, and then he resumed his Air Force career, serving on active duty from 1982 until 1995, retiring as a captain. (Tr. 8-9) For most of his Air Force career, he held a security clearance. (Tr. 28) There is no evidence of security violations. (Tr. 28) In 1971, Applicant married his current spouse, and his five children are ages 21, 38, 40, 43, and 45. (Tr. 9-10) His 21-year-old daughter lives at home with Applicant and his spouse. (Tr. 10)

Financial Considerations

In 2005, Applicant purchased a condominium for \$66,000. (Tr. 34) He was transferred, and he purchased another property. (Tr. 37-38) In 2007, Applicant was in a vehicle accident, and he went on sick leave because of an injury to his back. (Tr. 34, 63-64) He had a reduction of income because he worked less hours and could not work overtime. (Tr. 35) Before 2007, all of his debts were current. (Tr. 36, 40)

¹Some details have not been included in order to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

In 2007, Applicant filed for bankruptcy under Chapter 13 of the Bankruptcy Code. (Tr. 20; 36; SOR response) His payments began in March 2008. (GE 2 at 43) In April 2011, the trustee modified the payments; in August 2011, the trustee "filed action to remedy default;" and his bankruptcy was dismissed in December 2011. (GE 2 at 21) The bankruptcy trustee filed his report on the distribution of payments in April 2012. (GE 2 at 25) Applicant estimated that his debts were about \$250,000; however, his two mortgage accounts alone totaled about \$400,000. (Tr. 39-40; GE 2 at 44-45) He owed real estate taxes to two states and income taxes to one state. (Tr. 41-43; GE 2 at 44-45) Applicant filed his tax returns late for 2009 and 2010. (Tr. 44) He said he is now current on his state and federal taxes. (Tr. 44-45)

Applicant worked for the same large company from 1999 to May 2009, when he was laid off from his employment. (Tr. 20, 33) As a severance package, he received four months of pay and six months of health and life insurance. (Tr. 32) He was unemployed from May 2009 to January 2013. (Tr. 31) He received unemployment compensation and military retirement pay. (Tr. 32) Applicant estimated he was receiving about \$7,000 a month after May 2009. (Tr. 33)

From 2008 to 2011, Applicant paid the bankruptcy trustee a total of \$171,709. (Tr. 45; GE 2 at 44) Applicant said there was confusion about mortgage payments, condominium association fees, and insurance payments, and the trustee moved to dismiss the bankruptcy for material default. (Tr. 47; GE 2 at 43) Applicant told a DOD investigator that he intended to refile his bankruptcy in April or May 2013. (Tr. 48, 58)

Applicant's SOR alleges three debts totaling \$105,345: SOR ¶ 1.a is a personal loan for about \$12,000, which has been reduced through payments to about \$11,000; SOR ¶ 1.c is a delinquent mortgage account with a past-due amount of \$69,455; and SOR ¶ 1.d is a charged-off account for a vehicle for \$23,880. He has not made any payments to the creditor in SOR ¶ 1.a since 2011. Applicant had a mortgage in the amount of about \$320,000. (GE 2 at 45) The mortgage account was refinanced a year ago, and it is now current. (Tr. 51-52, 80) He said the vehicle debt in SOR ¶ 1.d was paid off in 2008, and his 2012 bankruptcy trustee report shows the scheduled claim is \$33,254; the claim asserted is \$8,312; the claim allowed is \$8,312; the principal paid is \$8,312; and the interest paid is \$1,274. (Tr. 56; GE 2 at 46)

Applicant's current monthly income is about \$3,700. (Tr. 57) This includes his seventy percent disability from the Department of Veterans Affairs (about \$1,700 a month) (VA) and his retired pay as a captain (about \$2,500 a month). (Tr. 73-75) His monthly mortgage is \$1,600; his monthly utilities are \$300; and his other monthly expenses are about \$850. (Tr. 67-69) He preferred paying his debts versus utilization of bankruptcy. (Tr. 57) Applicant's only employment is his part-time employment, which provided less than \$1,000 last year. (Tr. 57)

Applicant is currently being contacted by about 20 of his creditors, who are seeking about \$75,000 from him. (Tr. 59-60, 71) He believed his total non-mortgage debt was about \$75,000. (Tr. 71) He pays a debt for a credit card issued by the post exchange. (Tr. 75) He maintains two credit cards in current status; however, he does

not believe he has the income to pay any of his other creditors. (Tr. 60, 69-70) If he receives a substantial pay increase, he intends to pay his creditors. (Tr. 62) He received financial counseling as part of his bankruptcy. (Tr. 70)

Applicant's Chapter 13 bankruptcy shows about 40 unsecured scheduled claims, totaling more than \$100,000. (GE 2 at 1-16, 26-40, 44-46) Some of the larger unsecured debts are for credit card debts owed to various creditors for \$5,500; \$6,000; \$20,000; and \$6,200. (Tr. 76-80) He has not made any payments to these four creditors since 2011. (Tr. 76-80)

Character Evidence

Applicant provided statements from his son, daughters, friends, and neighbors.² The letters laud his patriotism, professionalism, organization skills, competence, conscientiousness, intelligence, knowledge, diligence, dependability, dedication, and trustworthiness. Their statements support reinstatement of his security clearance.

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

²The statements in AE B-G are the sources for the facts in this paragraph.

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.” 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). Applicant's history of delinquent debt is documented in his credit reports, SOR response, bankruptcy, and hearing record. Applicant's bankruptcy shows about 40 debts totaling about \$500,000, including about \$400,000 in secured debts, and \$100,000 in unsecured nonpriority debts. 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

(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.

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)).

The 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 apply to all of his SOR allegations. Nevertheless, there is some mitigating financial information. Applicant's delinquent debt initially resulted from a reduction of income when he was unable to work overtime in 2007 due to a vehicle accident. In 2009, he lost his employment that he had held for ten years. These are circumstances beyond his control under AG ¶ 20(b). Since 2009, he has been living on his military retired pay, his VA disability, and unemployment. For several years his income was about \$7,000 per month. In 2007, he filed for protection under Chapter 13 of the Bankruptcy Code, and he began making payments in 2008. He allowed his bankruptcy to be dismissed in December 2011. Other than the SOR debts, he maintained most of his other debts in current status.

After his bankruptcy was dismissed, Applicant refinanced his mortgage; he said he has been making payments; and he did not provide documentary proof of any post-bankruptcy mortgage payments; however, his verbal statement of bringing his mortgage to current status is accepted as credible, and the mortgage debt in SOR ¶ 1.c is mitigated. The Chapter 13 trustee paid off the vehicle-related debt in SOR ¶ 1.d, and SOR ¶ 1.d is mitigated. AG ¶ 20(e) does not apply to any of his debts because he did not provide "documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue."

Applicant's bankruptcy trustee's 2012 report shows a list of about 40 unsecured debts totaling about \$100,000. He said he is making payments on two credit cards and a post exchange issued credit card debt. He did not show how much he had paid these three creditors. He did not provide a detailed budget. He did not provide a clear explanation for the dismissal of his Chapter 13 bankruptcy, as opposed to a restructuring, assuming a restructuring was necessary. Applicant did not take reasonable and responsible actions to resolve his SOR debts. There are not clear indications the problem is being resolved and is under control. He received financial counseling; however, he did not establish that he was unable to make more payments to more of his bankruptcy creditors. His efforts are insufficient to fully 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.

Under AG ¶ 2(c), 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. 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.

There is some evidence supporting Applicant's continued access to classified information; however, this evidence is not sufficient to mitigate security concerns. Applicant is a 61-year-old part-time research consultant. In 1982, he received a bachelor's of science degree in business, and in 1994, he received a master's degree in aerospace and aeronautical science. He served in the Air Force from 1971 to 1979, and from 1982 until 1995, retiring as a captain. For most of his Air Force career, he held a security clearance, and there is no evidence of security violations. Statements from his daughters, son, friends, and neighbors laud his patriotism, professionalism, organization skills, competence, conscientiousness, intelligence, knowledge, diligence, dependability, dedication, and trustworthiness. A vehicle accident in 2007 and unemployment and underemployment from 2009 to the present are circumstances beyond his control that contributed to his financial problems.

The factors weighing towards reinstatement of Applicant's security clearance are less substantial than the factors weighing against its reinstatement. Applicant filed for bankruptcy protection under Chapter 13 of the Bankruptcy Code in 2007, and he began making payments into the bankruptcy plan in March 2008. In December 2011, his bankruptcy petition was dismissed. Applicant's explanation for the dismissal (problems relating to his condo) does not establish that dismissal of his bankruptcy was necessary. He did not show sufficient progress since 2012 on the debts listed in his bankruptcy trustee's report to establish there are clear indications the problem is being resolved and his finances are under control. He did not provide a detailed budget or provide a credible plan for resolution of his debts. He did not act responsibly under the circumstances, and his financial problems are likely to continue. He did not provide documentation showing he disputed any of his SOR debts. The record does not show

enough evidence of inability to pay debts, documented financial progress, financial effort, good judgment, trustworthiness, and reliability to warrant mitigation of financial considerations security concerns.

It is well settled that once a concern arises regarding an applicant's eligibility for a security clearance, there is a strong presumption against the grant or renewal of a security clearance. Unmitigated financial considerations concerns lead me to conclude that reinstatement 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 to justify the award of a security clearance in the future. With more effort towards resolving 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 worthiness for a security clearance.

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 Applicant has not carried his burden and financial considerations concerns are not mitigated. Eligibility for access to classified information is denied.

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 and 1.b:	Against Applicant
Subparagraphs 1.c and 1.d:	For Applicant

Conclusion

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

Mark Harvey
Administrative Judge