



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



In the matter of:)
)
) ISCR Case No. 15-00186
)
Applicant for Security Clearance)

Appearances

For Government: Tovah Minster, Esq., Department Counsel
For Applicant: *Pro se*

05/09/2016

Decision

TUIDER, Robert J., Administrative Judge:

Applicant failed to mitigate security concerns regarding Guideline F (financial considerations). Clearance is denied.

Statement of the Case

On March 8, 2014, Applicant submitted a Questionnaire for National Security Positions (SF-86). On July 11, 2015, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) to Applicant, under 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. The SOR detailed reasons why DOD CAF was unable to find that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant, and referred his case to

an administrative judge for a determination whether his clearance should be granted or denied.

On August 14, 2015, Applicant answered the SOR and elected to have his case decided on the written record in lieu of a hearing. A complete copy of the file of relevant material (FORM), dated September 17, 2015, was provided to him by letter dated December 16, 2015. Applicant received the FORM on January 7, 2015. He was afforded a period of 30 days to file objections and submit material in refutation, extenuation, or mitigation. Applicant timely submitted additional information within the 30-day period, which was received without objection.¹ On March 7, 2016, the case was assigned to me.

Findings of Fact

Applicant admitted SOR ¶¶ 1.a – 1.d and 1.i – 1.k with explanations, and denied SOR ¶¶ 1.e – 1.h with explanations.

Background Information²

Applicant is a 45-year-old system integration/test engineer employed by a defense contractor since October 2013. He seeks a security clearance in conjunction with his current employment. (Items 2, 3)

Applicant graduated from high school in 1988 and attended a community college from 2005 to 2006. (Items 2, 3) Applicant was previously married two times from 1993 to 1997 and from 2000 to 2004. Both marriages ended by divorce. He remarried in August 2005. (Items 2, 3) Applicant has four children and a stepdaughter. (Items 1, 2) He did not serve in the armed forces. (Item 2)

Financial Considerations

Applicant's SOR lists 11 allegations – a Chapter 13 bankruptcy and 10 delinquent debts totaling \$56,307. The delinquencies are comprised of student loans, child support arrearages, and consumer debt. The Chapter 13 bankruptcy was filed in September 2007 and discharged in May 2011, and listed liabilities totaling \$303,739. Applicant attributes his pre-bankruptcy indebtedness to being laid off due to company downsizing. (SOR ¶¶ 1.a – 1.k; Items 1, 3)

¹ I marked Applicant's FORM response as Item 8. After reviewing Item 8, I identified debts that were not addressed in Applicant's FORM response. On March 29, 2016, I e-mailed the Applicant, copying Department Counsel, identifying specific SOR debts that required additional documentation. I provided him with an opportunity to forward additional documentation with a due date of April 1, 2016. I did not receive a response from Applicant on the due date and on April 5, 2016, I forwarded my March 29, 2016 e-mail to him advising that I had not received a response and further advised him that I had no alternative other than to proceed with the information contained in the case file. I marked those e-mails as Item 9.

² The limited background information regarding Applicant was derived from the FORM and was the most current information available.

Applicant's credit reports from 2014 and 2015 reflect additional debt incurred after his 2011 Chapter 13 bankruptcy discharge. (Items 4, 5, 6) Applicant attributed his current financial difficulties to a nine-month period of unemployment before he began his current employment. He claimed that during this time he "burned through [his] savings" and was required to short sell his home and live in a friend's basement while he looked for a job. He added that his car was repossessed and during this time, he also fell behind on his student loans and child support. (Item 1)

Applicant's FORM response provided documentation mitigating four of the ten debts alleged, but not for the remaining six debts alleged. Most notably Applicant provided documentation that he had paid his charged-off child support arrearage for \$2,278, that he had rehabilitated his student loans that were in collections for \$41,357, and paid off two small collection accounts for \$146 and \$83. (SOR ¶¶ 1.c, 1.i, i.j, 1.k; Item 8) In his FORM response, Applicant stated that with the assistance of a credit rehabilitation company, he should have the debts in SOR ¶¶ 1.b (charged-off account for \$7,659), 1.d (past-due account for \$2,275), 1.e (collection account for \$1,085), 1.f (collection account for \$682), 1.g (collection account for \$371), and 1.h (collection account for \$371) "cleared from negatively impacting [his] credit report." (Item 8)

As noted in *fn* 1, I contacted Applicant on March 29, 2016 by e-mail and informed him of the specific SOR debts that required further documentation and contacted him again by e-mail on April 5, 2016, informing him that I had not received a response from him. Applicant did not respond to either of my e-mails. (Item 9)

There is no record evidence that Applicant made any attempt to contact his creditors or mitigate the debts in SOR ¶¶ 1.b, and 1.d – 1.h. or documentation that he paid or settled any of these debts. There is no record evidence that Applicant sought financial counseling.

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. 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 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 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 financial problems is documented not only in his credit reports, but also in the additional evidence contained in the FORM. The evidence establishes the validity of the allegations and 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; 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.

Applicant's conduct does not warrant full application of AG ¶ 20(a) because there is more than one delinquent debt and his financial problems are not isolated. Therefore, his debt is "a continuing course of conduct" under the Appeal Board's jurisprudence. See ISCR Case No. 07-11814 at 3 (App. Bd. Aug. 29, 2008) (citing ISCR Case No. 01-03695 (App. Bd. Oct. 16, 2002)).

Under AG ¶ 20(b), he receives partial credit because his nine-month period of unemployment before he began working for his current employer in October 2013 was largely beyond his control. However, Applicant is precluded from receiving full credit under this mitigating condition because of the time elapsed since he regained employment and the apparent lack of progress in resolving or attempting to resolve his remaining unmitigated debts, discussed *infra*.³

AG ¶ 20(c) is not applicable because there is no record evidence that Applicant sought financial counseling; however, four of his debts appear to be resolved or are under control. Despite having been provided with an opportunity to do so, Applicant did not provide documentation that his remaining six debts were being resolved or were under control. AG ¶ 20(d) is partially applicable as it pertains to SOR ¶¶ 1.c, 1.j and 1.k. The Chapter 13 bankruptcy was discharged in 2011 and is without significant security significance.⁴ AG ¶ 20(e) is not applicable because Applicant did not dispute the legitimacy of any of his debts.

³"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 maintained contact with his creditors and attempted to negotiate partial payments to keep his debts current.

⁴The 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)).

Considering the record evidence as a whole,⁵ financial considerations security concerns remain. If additional favorable evidence exists pertaining to the six unmitigated debts, Applicant did not provide it. The available information shows that Applicant has taken insufficient documented affirmative action to resolve the financial shortcomings identified in his FORM.

With that said, a security clearance case is not aimed at collecting debts.⁶ Rather the purpose is to evaluate an applicant's judgment, reliability, and trustworthiness consistent with the security guidelines in the Directive. In evaluating Guideline F cases, the Appeal Board has established the following standard:

The Board has previously noted that the concept of a 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. 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 payments 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.⁷

In requesting an administrative determination, Applicant chose to rely on the written record. In so doing, however, he failed to submit sufficient evidence to supplement the record with relevant and material facts regarding his circumstances, articulate his position, and mitigate the financial security concerns. He failed to offer evidence of financial counseling or provide documentation regarding his past efforts to address identified delinquent debt. By failing to provide such information, and in relying on an explanation lacking sufficient detail to fully establish mitigation, financial considerations security concerns remain.

After weighing the relevant disqualifying and mitigating conditions and evaluating the evidence in light of the whole-person concept,⁸ I conclude Applicant did not present

⁵ See ISCR Case No. 03-02374 at 4 (App. Bd. Jan. 26, 2006) (citing ISCR Case No. 02-22173 at 4 (App. Bd. May 26, 2004)). When making a recency analysis for AG ¶ 20(a), all debts are considered as a whole.

⁶ ISCR Case No. 09-02160 (App. Bd. Jun. 21, 2010).

⁷ ISCR Case No. 07-06482 at 3 (App. Bd. May 21, 2008) (citations and quotation marks omitted).

⁸ AG ¶ 2(a) (1)-(9).

sufficient evidence to explain, extenuate, and mitigate the Guideline F security concern. Accordingly, Applicant has not met his ultimate burden of persuasion to show that it is clearly consistent with the national interest to grant his eligibility for access to classified information.

Formal Findings

The formal findings on the SOR are as follows:

Paragraph 1, Guideline F:	AGAINST APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	For Applicant
Subparagraphs 1.d – 1.h:	Against Applicant
Subparagraph 1.i – 1.k:	For Applicant

Conclusion

In light of all of the record as a whole, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Clearance is denied.

ROBERT J. TUIDER
Administrative Judge