



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 14-05507

Appearances

For Government: Ross Hyams, Esq., Department Counsel
For Applicant: *Pro se*

10/22/2015

Decision

HARVEY, Mark, Administrative Judge:

Applicant’s statement of reasons (SOR) alleges two mortgage debts totaling \$246,290, and both debts were secured by the same residence in state A. Applicant was unable to afford the payments on the property because of a circumstance beyond his control, and the property went into foreclosure. The creditor provided an Internal Revenue Service (IRS) Form 1099-A indicating the first mortgage debt for \$211,308 was resolved. The creditor for the second mortgage debt provided an IRS Form 1099-C discharging or cancelling the remainder owed of \$26,691. Aside from these two debts, Applicant has an excellent track record of paying his debts. He provided sufficient evidence of his financial responsibility. Financial considerations concerns are mitigated. Eligibility for access to classified information is granted.

Statement of the Case

On October 16, 2013, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP) version of a security clearance application (SF 86). (GE 1) On May 20, 2015, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued an SOR to Applicant, pursuant to Executive Order (Exec. Or.) 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 the DOD CAF was unable to find that it is clearly consistent with the national interest to grant or continue Applicant's access to classified information and recommended referral to an administrative judge to determine whether Applicant's clearance should be granted, continued, denied, or revoked. (HE 2)

On June 16, 2015, Applicant responded to the SOR allegations and requested a hearing. (HE 3) On July 27, 2015, Department Counsel was prepared to proceed. On July 30, 2015, the case was assigned to me. On August 7, 2015, the Defense Office of Hearings and Appeals (DOHA) issued a hearing notice setting the hearing for September 15, 2015. The hearing was held as scheduled. Department Counsel offered three exhibits into evidence, and Applicant offered 13 exhibits into evidence. (Tr. 14-20; Government Exhibit (GE) 1-3; Applicant Exhibit (AE) A-M) All exhibits were admitted into evidence without objection. (Tr. 15, 20) On September 23, 2015, DOHA received the transcript of the hearing. On October 14, 2015, three post-hearing documents were received, which were admitted without objection. (AE N-P) On October 14, 2015, the record closed.

Findings of Fact¹

In Applicant's SOR response, he admitted the debts in SOR ¶¶ 1.a and 1.b. He also provided extenuating and mitigating information as part of his SOR response. Applicant's admissions are accepted as findings of fact.

Applicant is a 37-year-old computer engineer, who has worked for the same employer for eight years. (Tr. 6-7; GE 1) In 1997, he graduated from high school. (Tr. 6) In 2002, he received a bachelor of science degree with a major in computer science and engineering. (Tr. 6, 48) He has started classes for a master's degree in computer forensics. (Tr. 7) He has never served in the military (Tr. 6) In 2005, he married, and he has three children, who are ages one, four, and six. (Tr. 52, 57; GE 1) There is no evidence of security violations, disciplinary problems with his employer, illegal drug use, criminal offenses, or alcohol abuse.

Financial Considerations

After graduating from college, he accepted employment from another government agency at an annual salary of \$45,000. (Tr. 48) When Applicant returned from overseas in late 2007, his annual government salary was about \$70,000. (Tr. 56) In late 2007, Applicant obtained employment from a government contractor at an annual salary of \$115,000. (Tr. 56)

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

Applicant's history of delinquent debt is documented in his SF 86, credit reports, SOR response, hearing transcript, and exhibits. The record establishes two mortgage debts totaling \$246,290 from the same residence in state A, which became delinquent in late 2009 or early 2010. (SOR ¶¶ 1.a and 1.b)

In 2004, Applicant purchased a residence in state A, where he intended to establish his residence. (Tr. 50) He did not intend to immediately occupy the residence because he planned to be deployed overseas working for another government department for most of his career. (Tr. 32) He hoped to return to state A in between overseas assignments, or at least after his first overseas assignment. (Tr. 50, 52) In 2004, he made a down payment and provided a deposit for a home to be built. (Tr. 32-33) The home was financed with a 10 percent down payment, a 10 percent second mortgage, and an 80 percent first mortgage. (Tr. 41) He believed the residence in state A was a good investment, and it would be prudent to get into the housing market before prices became even higher. (Tr. 50-52)

Applicant was assigned overseas in January 2005, and he returned to the United States at the end of 2007. (Tr. 53) The house in state A was completed in 2006. (Tr. 33-34, 49) He did not have a precise understanding of the housing market and prices in state A while he was deployed overseas. (Tr. 54-55) In 2006, he listed the property with a real estate agent, and he tried to sell it. (Tr. 35) He had a contract; however, the contract fell through. In 2006, home prices began to fall in state A. (Tr. 35) In 2008, he again listed the home in state A for sale, and in 2009, Applicant listed the home for a short sale. (Tr. 37, 60; AE F) The monthly payment on his home in state A, including both mortgages, taxes, insurance, and home owners' association fees, was about \$3,088. (Tr. 63-64; AE O at 3) The house was vacant and not being rented.

In 2007, Applicant purchased a town house in state B for \$535,000. (Tr. 35; AE O at 3) In 2007, Applicant and his spouse were both employed, and they had sufficient income to pay the mortgages on the properties in states A and B. (Tr. 36) In 2008, home prices in state B began to decline, and Applicant was underwater on both homes. (Tr. 36) In 2008, the fair market value of his town house in state B declined by about \$100,000 below his purchase price. (AE O at 3)

In 2010, Applicant and his spouse learned their infant daughter had medical issues, which required significant care, including physical therapy. (Tr. 37, 61-62; AE D; AE E) Continued daycare was not possible. (Tr. 61-62; AE D; AE E) Applicant's spouse quit her employment in September 2010 so that she could care for their daughter. (Tr. 37) The family income declined from about \$200,000 to about \$115,000. (Tr. 38)

Applicant consulted counsel and an accountant, and he elected to stop making payments on the mortgages on the residence in state A, which became delinquent in early 2010. (Tr. 38, 41, 60; AE O at 2) He continued to hope for a short sale; however, no such sale occurred. The statute of limitations bars a deficiency judgment for the first and second mortgages. (Tr. 39, 41)

The creditor for the first mortgage account in SOR ¶ 1.a provided Applicant an IRS Form 1099-A indicating the debt for \$211,308 was resolved. The lender acquired the property in September 2010 for \$77,200 at a public sale, and the fair market value of the property equaled the amount of the debt. (AE H; AE O at 16) In 2013, the creditor for the second mortgage account in SOR ¶ 1.b provided Applicant an IRS Form 1099-C discharging or cancelling the remainder owed to the creditor of \$26,691. (AE O at 12) When Applicant filed his taxes for 2013, he included \$26,691 as income on line 13 of his IRS Form 1040, and he paid taxes for the “gain” he received from being released from responsibility to repay the second mortgage on his home in state A. (Tr. 41; AE O at 10)

Applicant’s W2 for 2010 showed wages of \$128,000, and Medicare wages of \$144,900. (AE O at 13) Applicant and his spouse’s adjusted gross income for 2010 on the IRS Form 1040 was \$182,628. (AE O at 14) Applicant and his spouse’s monthly expenses in 2010, including principal, interest, taxes, and insurance (PITI) on both houses and two vehicle payments, was \$9,400. (AE O at 7) He did not include his federal and state income taxes or other withholding as expenses, and he did not provide his net income after withholding taxes, medical insurance, etc. (AE O at 7, 15) His 2010 federal income tax return shows federal income taxes paid of \$22,637. Applicant’s spouse stopped working outside their home in September 2010, and the reduction in family income is not fully reflected in their 2010 federal tax return. (AE O at 1) His 2011 and 2012 federal income tax returns were not requested or provided.

Applicant’s wages for 2013 were \$146,000. (AE O at 10) His adjusted gross income, after including the amount from his IRS Form 1099-C and deducting his IRA contribution, was \$169,543. (AE O at 10)

Aside from the two SOR debts, Applicant’s 2014 and 2015 credit reports show he has an excellent track record of paying his debts. (AE 2, AE 3) He has more than \$400,000 in his and his spouse’s retirement accounts. (Tr. 42, 57; AE J-K) He tries to save 15-20 percent of his income each month, which amounts to about \$24,000 annually. (Tr. 42, 57-58) He also invests a total of \$500 monthly in his children’s education accounts. (Tr. 58-59) His current annual income is \$165,000. (Tr. 57) In 2010, his PITI was \$3,800 for his residence in state B. (Tr. 68; AE O at 6) Applicant was able to refinance the loan and obtain a lower interest rate, and his PITI for his residence in state B is currently \$2,900. (Tr. 57)

Character Evidence

A special agent of the Federal Bureau of Investigation (FBI) has been employed at the FBI for 12 years. (Tr. 26) He has known Applicant socially and professionally for about five years. (Tr. 24, 26) He described Applicant as honorable, honest, responsible, trustworthy, and conscientious about following the rules. (Tr. 24-25) Applicant has excellent judgment. (Tr. 25) He would loan money to Applicant or cosign on a loan for Applicant if asked to do so. (Tr. 25)

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.

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 I have based this decision 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 SF 86, credit reports, SOR response, hearing transcript, and exhibits. The record establishes two delinquent mortgage debts totaling \$246,290 secured by the same residence in state A. The residence went into foreclosure in 2010. 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;² 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 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).

Applicant's conduct in resolving his debts warrants application of AG ¶¶ 20(a) through 20(c). Applicant's daughter had medical problems, and it was necessary for his spouse to end her employment outside their home so she could care for their daughter. This is a circumstance largely beyond his control, which harmed his finances.

In 2004-2005, Applicant decided to purchase property in state A. This decision was reasonable. Millions of American purchased property to get an investment in a rapidly rising market, and then lost money when the real estate bubble burst and prices precipitously declined. His equity and down payment were lost, and the property was underwater. In 2010, Applicant's residence in state A was costing Applicant and his

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)).

spouse \$36,000 a year, and the fair market value was substantially less than the two mortgages on it. He unsuccessfully attempted to sell his residence. Applicant and his spouse decided that caring for their daughter was more important than the income she earned, and she should end her employment. This change caused their finances to become precarious and any adverse financial occurrence, such as Applicant or his spouse's illness, would cause a financial crisis and delinquent debt. It was reasonable and prudent for Applicant to "stop the bleeding" and permit an expedited foreclosure process. This enabled the first mortgage holder to quickly foreclose, and in turn, the first mortgage holder released Applicant from liability, as documented on his IRS Form 1099-A by indicating the amount owed equaled the fair market value of the property.

The second mortgage debt in SOR ¶ 1.b for \$26,691 is more problematic. Applicant had the financial resources between 2010 and 2013 to settle or resume payments on the second mortgage. Failure to abide by one's contractual responsibilities and meet financial obligations may indicate poor self-control and lack of judgment. Paying one's lawful debts has priority over putting money into retirement accounts or education accounts. His failure to settle this debt or make payments shows lack of judgment. Notwithstanding, this debt became delinquent more than five years ago. In 2013, the second mortgage creditor released Applicant from liability, and elected not to seek a deficiency. I am confident that if the creditor in SOR ¶ 1.b had actively and timely sought repayment, Applicant would have made payments or settled this debt. Applicant has paid taxes on the savings he accrued by not paying this debt, and once he received an IRS Form 1099-C in 2013, the account was closed, and the debt was resolved.

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." He has learned from his mistakes. He acted responsibly under the circumstances by maintaining contact with all of his creditors,³ except for the creditor in SOR ¶ 1.b. He made required payments on numerous debts, and he maintained all of his debts in a current status from 2013 to the present. There are clear indications that the problem is resolved and his finances are under control. His track record of financial responsibility shows sufficient effort, good judgment, trustworthiness, and reliability to warrant mitigation of financial considerations security concerns. Even if financial considerations are not mitigated under AG ¶¶ 20(a) through 20(c), they are mitigated under the whole-person concept, *infra*.

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

³Even 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.

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.

Applicant is a 37-year-old computer engineer, who has worked for the same employer for eight years. In 2002, he received a bachelor of science degree with a major in computer science and engineering. He has started classes for a master's degree in computer forensics. An FBI special agent described Applicant as honorable, honest, responsible, trustworthy, and conscientious about following the rules, and the FBI special agent would loan money to Applicant or cosign on a loan for Applicant if asked to do so. There is no evidence of security violations, disciplinary problems with his employer, illegal drug use, criminal offenses, or alcohol abuse.

Applicant's history of delinquent debt is documented in his SF 86, credit reports, SOR response, hearing transcript, and exhibits. The record establishes two mortgage debts totaling \$246,290 secured by the same residence in state A became delinquent. In 2010, Applicant was unable to afford the payments on the property due to circumstances beyond his control, and the property was foreclosed in September 2010. In 2010, the creditor in SOR ¶ 1.a provided an IRS Form 1099-A indicating the first mortgage debt for \$211,308 was resolved. In 2013, the creditor in SOR ¶ 1.b provided an IRS Form 1099-C discharging or cancelling the remainder owed of \$26,691. He provided sufficient evidence of his financial responsibility. There are clear indications that his financial problems will not recur, are being resolved, and are under 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 maintain his financial responsibility. All of his debts are paid or being paid. His efforts at debt resolution have established a "meaningful track record" of debt repayment. He should continue to check his credit report and diligently act to resolve any negative entries that arise on his credit report. I am confident 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. 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 and 1.b:	For Applicant

Conclusion

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

Mark Harvey
Administrative Judge