



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



In the matter of:)
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)
Applicant for Security Clearance)

ISCR Case No. 14-05539

Appearances

For Government: Nicole A. Smith, Esq., Department Counsel
For Applicant: *Pro se*

11/16/2015

Decision

HARVEY, Mark, Administrative Judge:

Applicant's statement of reasons (SOR) alleges seven debts, totaling \$15,268 and discharge of his unsecured nonpriority debts under Chapter 7 of the Bankruptcy Code in June 2010. His SOR debt for \$6,426 is in an established payment plan, and the current balance is \$3,616. His four medical SOR debts were discharged in his 2010 bankruptcy. Two debts totaling \$975 are unresolved. He has an established track record of paying his debts. Financial considerations concerns are mitigated. Access to classified information is granted.

History of the Case

On February 27, 2014, Applicant completed and signed an Electronic Questionnaires for Investigations Processing (e-QIP) (SF 86). (Item 3) On April 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 detailed reasons why the DOD CAF made a preliminary decision to deny or revoke Applicant's eligibility for access to classified information. Specifically, the SOR set forth security concerns arising under the financial considerations guideline.

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On July 1, 2015, Applicant responded to the SOR, and he waived his right to a hearing. (Item 2) On August 17, 2015, Department Counsel completed the File of Relevant Material (FORM). On September 28, 2015, Applicant received the FORM. Applicant provided an undated response to the FORM.¹ On October 27, 2015, Department Counsel stated she had no objection to the Applicant's FORM response. On November 5, 2015, the case was assigned to me. The Government's case consisted of eight exhibits. (Items 1-8)

Findings of Fact²

In Applicant's SOR response, he admitted all of the SOR allegations. He also provided extenuating and mitigating information. Applicant's admissions are accepted as findings of fact.

Applicant is a 36-year-old shipyard employee, who is seeking a security clearance.³ In 1998, he received a high school diploma, and he has not attended college. He served in the Navy from September 1998 to April 2008. When he left active duty, he was a petty officer second class (E-5), and he received an honorable discharge. He worked as a security guard or security officer from July 2011 to September 2011, and from March 2011 to July 2011. He was self-employed from June 2009 to August 2009. In 2006, Applicant married. His children were born in 2007, 2008, and 2009. There is no evidence of any security violations, alcohol abuse, use of illegal drugs, or criminal conduct.

Financial Considerations

Applicant said the cause of his financial problems was unemployment. In August 2009, he left his employment to care for his spouse who was ill. He had three substantial periods of unemployment after leaving the Navy in 2008. Applicant was unemployed from March 2012 to September 2013, from August 2009 to March 2011, and from April 2008 to June 2009.

Applicant's history of delinquent debt is documented in his credit reports, SF-86, SOR response, and FORM response. His SOR alleged seven debts, totaling \$15,268 and discharge of his delinquent debts under Chapter 7 of the Bankruptcy Code in June 2010. The status of the seven SOR debts is as follows:

¹The Defense Office of Hearings and Appeals (DOHA) transmittal letter is dated September 15, 2015, and Applicant's receipt is dated September 28, 2015. The DOHA transmittal letter informed Applicant that he had 30 days after his receipt to submit information.

²Some details have been excluded in order to protect Applicant's right to privacy. Specific information is available in the cited exhibits. Unless stated otherwise, the source for the information in this section is his Office of Personnel Management (OPM) personal subject interview (PSI), SOR response, and his February 27, 2014 Electronic Questionnaires for Investigations Processing (e-QIP) (SF 86). (Items 2-4)

³The source for the information in this paragraph is Applicant's February 27, 2014 SF 86. (Item 3)

SOR ¶ 1.a is an unresolved bank credit card debt for \$488; SOR ¶ 1.b is an unresolved telecommunications debt for \$487; and SOR ¶¶ 1.c to 1.e are three medical debts for \$234, \$115, and \$101. According to Appellant's March 15, 2014 credit report, the three medical debts were discharged in his bankruptcy.

SOR ¶ 1.f is a judgment for \$6,426. In 2012, Applicant purchased a van and financed it with a loan for \$15,084.⁴ Three months later, Applicant returned the van to the seller because he could not afford the payments due to unemployment. The van was sold at auction for \$9,127. In 2014, Applicant paid \$3,539 to the creditor, and starting in December 2014, he made monthly payments of \$200 each month.⁵ As of September 2015, he owed the creditor \$3,714. Progress was reduced because interest continued to accrue at an annual rate of 17%. This debt is in an established payment plan.

SOR ¶ 1.g is a judgment for \$7,417. Applicant's March 2014 credit report shows this judgment was adjudged in November 2010. (Item 6) Applicant's October 2014 credit report shows the debt was medical in origin and was adjudged on November 1, 2010. (Item 7) The identity of the original creditor is not indicated in the credit reports, and when the Office of Personnel Management (OPM) investigator interviewed Applicant, he said he was unaware of this debt. (Item 4) Schedule F of Applicant's June 2010 bankruptcy shows multiple medical debts originating in 2006 and 2007 including some notices to medical creditors without amounts and two debts from the same medical entity for emergency treatment, totaling \$4,900. (Item 5) The totality of the evidence supports a conclusion that the debt in SOR ¶ 1.g existed before June 2010, and accordingly, it was resolved in Applicant's June 2010 bankruptcy. See note 8, *infra*.

The February 27, 2010 summary of schedules for Applicant's bankruptcy indicates: real property of \$0; personal property of \$11,940; creditors holding secured claims of \$29,900; unsecured nonpriority claims of \$87,419; current income of \$450; and current expenditures of \$450.⁶ (Item 5) The only secured properties are Applicant's two vehicles, which he valued at \$21,000. (Item 5) Applicant received financial counseling as part of the bankruptcy process. In June 2010, Applicant's unsecured nonpriority debts were discharged under Chapter 7 of the Bankruptcy Code.

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.*

⁴The information in this paragraph is from an account statement the creditor provided. (FORM response)

⁵In Applicant's SOR response, he said he had an established payment plan addressing the debt in SOR ¶ 1.f. Department Counsel's FORM emphasized the absence of corroborating documentation showing the payment plan and history. Applicant submitted an account history from the creditor.

⁶The file contains all of Applicant's 2010 bankruptcy schedules and documentation. (Item 5)

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. Thus, nothing in this decision should be construed to suggest that it is based, in whole or in part, on any express or implied determination about applicant’s allegiance, loyalty, or patriotism. It is merely an indication the applicant has not met the strict guidelines the President 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 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, bankruptcy schedules, SOR response, and FORM response. Applicant’s SOR alleges, and the evidence establishes seven delinquent debts, totaling \$15,268 and discharge of his delinquent debts under Chapter 7 of the Bankruptcy Code in June 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;⁷ and

⁷The Appeal Board has previously explained what constitutes a “good faith” effort to repay overdue creditors or otherwise resolve debts:

(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).

AG ¶¶ 20(a) through 20(c) apply. Applicant's financial problems were adversely affected when his spouse was ill, and he had to leave his employment to care for her. He had three substantial periods of unemployment. His spouse's medical problems and his unemployment are conditions largely beyond his control. He acted responsibly under the circumstances in June 2010, when all of his delinquent nonpriority unsecured debts were discharged under Chapter 7 of the Bankruptcy Code⁸ and by establishing a payment plan in 2014 for his largest remaining SOR debt before he received the SOR.

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)).

⁸There is some duplication of debts in Applicant's bankruptcy schedules. In a bankruptcy filing, most debtors list potential creditors, even when the debt may have been resold or transferred to a different collection agent or creditor, to ensure notice, and reduce the risk of subsequent dismissal of the bankruptcy. If Applicant failed to list some nonpriority unsecured debts on his bankruptcy schedule, this failure to list such debts does not affect their discharge. Absent fraud, in a no-asset bankruptcy, all unsecured, nonpriority debts are discharged when the bankruptcy court grants a discharge, even when they are not listed on a bankruptcy schedule. See *Judd v. Wolfe*, 78 F.3d 110, 114 (3d Cir. 1996); *Francis v. Nat'l Revenue Service, Inc.*, 426 B.R. 398 (Bankr. S.D. FL 2010), *but see First Circuit Bucks Majority*

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Applicant received financial counseling as part of the bankruptcy process. His negative financial situation “occurred under such circumstances that it is unlikely to recur and does not cast doubt on the [Applicant’s] current reliability, trustworthiness, or good judgment.” The problem is being resolved or is under control. Applicant did not provide documentation showing he disputed any of his SOR debts, and AG ¶ 20(e) does not apply to any of his SOR or bankruptcy-listed debts.

In sum, Applicant has an established payment plan for the debt in SOR ¶ 1.e (\$6,426), and the debts in SOR ¶¶ 1.c (\$234), 1.d (\$115), 1.e (\$101), and 1.g (\$7,417) were discharged in June 2010 through bankruptcy, leaving two debts totaling \$975 that Applicant should address. His resolution of his two largest delinquent debts shows sufficient effort, good judgment, trustworthiness, and reliability to warrant mitigation of financial considerations 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.

The rationale for approving Applicant’s clearance is more substantial than the reasons for denying his clearance. Applicant is a 36-year-old shipyard employee, who is seeking a security clearance. In 1998, he received a high school diploma, and he has not attended college. He served in the Navy from September 1998 to April 2008. When

on Discharge of Unlisted Debt in No-Asset Case, American Bankruptcy Institute, 28-9 ABIJ 58 (Nov. 2009). There is no requirement to re-open the bankruptcy to discharge the debt. *Collier on Bankruptcy*, Matthey Bender & Company, Inc., 2010, Chapter 4-523, ¶ 523(a)(3)(A). Some categories of priority obligations are listed on bankruptcy schedules, but are not discharged by bankruptcy, such as tax debts, student loan debts, and child support obligations.

he left active duty he was a petty officer second class, and he received an honorable discharge. Applicant was unemployed from March 2012 to September 2013, from August 2009 to March 2011, and from April 2008 to June 2009. Applicant is married, and he has three children. There is no evidence of any security violations, alcohol abuse, use of illegal drugs, or criminal conduct.

Applicant acted responsibly under the circumstances in June 2010, when all of his delinquent nonpriority, unsecured debts were discharged under Chapter 7 of the Bankruptcy Code. He has two currently delinquent unresolved debts, totaling \$975. He understands that he needs to pay his debts, and the conduct required to retain his security clearance.

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 remaining debts on his SOR when he is financially able to do so, and he will maintain his financial responsibility.⁹

⁹The Government has the option of following-up with more questions about Applicant's finances. The Government can re-validate Applicant's financial status at any time through credit reports, investigation, and interrogatories. Approval of a clearance now does not bar the Government from subsequently revoking it, if warranted. "The Government has the right to reconsider the security significance of past conduct or circumstances in light of more recent conduct having negative security significance." ISCR Case No. 10-06943 at 4 (App. Bd. Feb. 17, 2012). Violation of a promise made in a security context to pay legitimate debts also raises judgment concerns under Guideline E, and may

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 through 1.h: 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 Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

MARK HARVEY
Administrative Judge

support future revocation of a security clearance. An administrative judge does not have “authority to grant an interim, conditional, or probationary clearance.” ISCR Case No. 10-06943 at 4 (App. Bd. Feb. 17, 2012) (citing ISCR Case No. 10-03646 at 2 (App. Bd. Dec. 28, 2011)). *See also* ISCR Case No. 04-03907 at 2 (App. Bd. Sep. 18, 2006) (stating, “The Board has no authority to grant [a]pplicant a conditional or probationary security clearance to allow her the opportunity to have a security clearance while she works on her financial problems.”). This footnote does not imply that this decision to grant Applicant’s security clearance is conditional.

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