



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



In the matter of:)
)
) ISCR Case No. 18-02048
)
Applicant for Security Clearance)

Appearances

For Government: David F. Hayes, Esq., Department Counsel
For Applicant: *Pro se*

03/04/2019

Decision

HEINY, Claude, Administrative Judge:

Applicant’s statement of reasons (SOR)¹ alleged unpaid federal taxes for tax year 2009, a past-due mortgage, and 35 additional delinquent medical obligations. She failed to mitigate the security concerns under Guideline F, financial considerations. Applicant’s eligibility for access to classified information is denied.

Statement of the Case

Acting under the relevant Executive Order and DoD Directive,² on August 17, 2018, the DoD issued a Statement of Reasons (SOR) detailing security concerns under Guideline F, financial considerations. On September 7, 2018, Applicant answered the SOR and elected to have the matter decided without a hearing. On September 19, 2018,

¹ The record fails to contain the final page of the SOR. It is clear from the record that no additional SOR allegations were alleged.

² Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines effective within the DoD on June 8, 2017.

Defense Office of Hearings and Appeals (DOHA) Department Counsel (DC) submitted the Government's case in a File of Relevant Material (FORM). The FORM contained five attachments (Items). Applicant's response to the FORM was due on December 14, 2018. No response to the FORM has been received by DOHA. On February 8, 2019, I was assigned the case.

Evidentiary Ruling

Department Counsel submitted as Item 3 a summary of a subject interview of Applicant conducted on March 27, 2018. The summary was part of the DoD Report of Investigation (ROI) in Applicant's case. Under ¶ E3.1.20 of the Directive, a DoD personnel background report of investigation may be received in evidence and considered with an authenticating witness, provided it is otherwise admissible under the Federal Rules of Evidence. The interview summary did not bear the authentication required for admissibility under ¶ E3.1.20.

In ISCR Case No. 16-03126 decided on January 24, 2018, the Appeal Board held that it was not error for an administrative judge to admit and consider a summary of personal subject interview where the applicant was placed on notice of her opportunity to object to consideration of the summary; the applicant filed no objection to it; and there is no indication that the summary contained inaccurate information. In this case, Applicant was provided a copy of the FORM and advised of her opportunity to submit objections or material that she wanted the administrative judge to consider. The FORM advised Applicant of the following:

Note to Applicant: Exhibit 3 is a summary of your Personal Subject Interview (PSI) and is being provided to the Administrative Judge for consideration as part of the record evidence in this case. In your response to this [FORM], you can comment on whether the PSI summary accurately reflects the information you provided to the authorized OPM investigator(s) and you can make any corrections, additions, deletions, and updates necessary to make the summary clear and accurate. Alternatively, you can object on the ground that the report is unauthenticated by a Government witness. If no objections are raised in your response to the FORM, or if you do not respond to the FORM, the Administrative Judge may determine that you have waived any objections to the admissibility of the summary and may consider the summary as evidence in your case.

Concerning whether Applicant understood the meaning of authentication or the legal consequences of waiver, Applicant's *pro se* status does not confer any due process rights or protections beyond those afforded her if she was represented by legal counsel. She was advised in ¶ E3.1.4 of the Directive that she may request a hearing. In ¶ E3.1.15, she was advised that she is responsible for presenting evidence to rebut, explain, or mitigate facts admitted by her or proven by Department Counsel and that she has the ultimate burden of persuasion as to obtaining a favorable clearance decision. While the Directive does not specifically provide for a waiver of the authentication requirement,

Applicant was placed on sufficient notice of her opportunity to object to the admissibility of the interview summary, to comment on the interview summary, and to make any corrections, deletions, or updates to the information in the report. Applicant is a college graduate, who can reasonably be held to have understood the note, and she did not respond to the FORM. Accordingly, I accepted Item 3 in the record, subject to issues of relevance and materiality in light of the entire record.

Findings of Fact

In Applicant's answer to the SOR, she admitted she owed \$8,000 in Federal income tax for tax year 2009, and admitted to the delinquency on her mortgage payment, but asserted there had been a loan modification. She asserted she had paid four of the delinquent medical obligations and that three of the listed debts were duplications. She admitted owing the additional 28 delinquent medical debts. After a thorough review of the pleadings and exhibits, I make the following additional findings of fact.

Applicant is a 54-year-old electrical engineer, who has worked for her employer since September 2017. (Item 1) She has never married or served in the military. In December 1996, she obtained her bachelor's degree, and in June 2010, obtained her master's degree. (Ex. 2)

On Applicant's September 2017 Electronic Questionnaires for Investigations Processing (e-QIP) she listed a \$20,500 second mortgage taken out for a new roof on her home on which she planned to negotiate a repayment plan whereby she would pay \$200 monthly. (Ex. 1, Ex. 2, Ex. 3) She listed \$100,000 past due on her primary mortgage and planned to pay \$1,000 monthly once a modification of the mortgage loan was reached. (Ex. 2) She listed \$15,000 owed on medical debts and that she was negotiating a settlement estimating her monthly payments would be \$100. She also listed a \$500 telephone bill and \$500 cable bill on her e-QIP. These two debts are not listed as debts of concern on her SOR. (Ex. 2) On her e-QIP, she explained her financial problems were due to loss of income, underemployment, and medical expenses. (Ex. 2) During her March 27, 2018 enhanced subject interview, she was questioned about all of her delinquent financial obligations and specifically about all of the SOR delinquent obligations. (Ex. 3)

In the FORM, Department Counsel stated:

Applicant appears to have been actively engaged in attempting to resolve her debt through payments in full, negotiations with creditors and arranging payment plans. She has a desire to solve her financial issues, but there is no documentation substantiating any efforts. Additional documentation added to this FORM by the Applicant would be beneficial for mitigation and review by the administrative judge.

No response to the FORM was received, which, of course, means there is no documentation of record supporting her assertions of payment, negotiating with her creditors, or repayment plans received.

In Applicant's September 2018 SOR Response, she says she was unemployed from June 2009 through June 2011 and had incurred a Federal tax debt for 2009. (Ex. 1) She admitted the tax debt was unpaid, and stated an intention to "start making payments beginning next year." (Ex. 1) Between May 2014 and September 2017, she was underemployed at minimum wage and not working in her profession as an engineer. (Ex. 1)

In 2010, due to Applicant's unemployment, her home went into foreclosure proceedings. Her monthly mortgage obligation was \$998. She was 36 months behind on her mortgage payments at the time of the foreclosure. (Ex. 3) From June 2011 through June 2013, she was working full time as an electrical engineer. However, the mortgage company would not accept payments from her until the matter of her mortgage delinquency was heard in court. She fails to explain why she was not setting aside her monthly mortgage in a separate account while she was full-time employed so she could apply the money to her mortgage once a court ruling was made. As of July 2017, she owed \$101,374 on the home and was \$64,641 past due on her payments. (Ex. 3)

In September 2017, the mortgage company was ordered to modify Applicant's loan and in July 2018, a modification was made. Applicant asserts she began making payments in August 2018. The scheduled monthly mortgage payments are \$1,106. (Ex. 3) She provided no documentation supporting her assertion of payments.

Applicant incurred an \$8,000 federal tax debt (SOR 1. a) when she withdrew funds from her 401(k) retirement plan in 2009. She used the funds to prevent foreclosure on her home. (Ex. 3) Initially her tax liability was \$15,000, but the amount was reduced to \$8,000 when a tax refund was intercepted and applied to the tax debt. (Ex. 3) She asserted she worked with the Internal Revenue Service (IRS) concerning the debt, and she receives a letter every six months informing her of the balance owed. (Ex. 3)

The SOR alleges 35 delinquent medical debts, totaling \$12,146. The debts include 13 debts of less than \$100 each, 12 debts of between \$100 and \$200 each, 7 debts of more than \$200 each, and 3 debts that are duplication of other debts. In July 2015, Applicant had a knee replacement. Her medical health insurance had a high deductible resulting in her insurance paying a smaller amount of her medical expenses. (Ex. 1) She made her co-payments. In May 2016, she fell and broke her knee cap. Her high deductible again made her insurance reimbursement low. She said she had to negotiate a settlement for her medical expenses incurred in 2015 and 2016.

In September 2017, Applicant returned to full-time employment as an electrical engineer. At the time of her March 2018 enhanced subject interview, she asserted with her current employment she will be able to repay her delinquent financial obligations. (Ex. 3) She expressed an intention to have all of her medical debts paid within two years. (Ex.

3) She asserts since returning to full-time employment, she is paying a bill a month. She asserted when she responded to the SOR she had paid the \$858 medical bill (SOR 1.s, SOR 1.t is a duplicate debt), the \$831 medical debt (SOR 1.u), the \$531 medical bill (SOR 1.v), and the \$150 collection debt (SOR 1.z) in August 2018 (Ex. 1) She provided no documentation supporting her assertions of payment of these debts.

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which must be considered in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(a), the adjudication process is an examination of a sufficient period and a careful weight of a number of variables of an individual's life to make an affirmative determination that the individual is an acceptable security risk. This is known as the whole-person concept.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." The applicant has the ultimate burden of persuasion to obtain a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. 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 of potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 10865 provides that decisions shall be "in terms of the national interest and shall in no sense be a determination of the loyalty of the applicant

concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline F, Financial Considerations

Adjudicative Guideline (AG) ¶ 18 articulates the security concerns relating to financial problems:

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

Additionally, an individual who is financially irresponsible may also be irresponsible, unconcerned, negligent, or careless in properly handling and safeguarding classified information. Behaving responsibly or irresponsibly in one aspect of life provides an indication of how a person may behave in other aspects of life.

A person's relationship with her creditors is a private matter until evidence is uncovered demonstrating an inability or unwillingness to repay debts under agreed upon terms. Absent evidence of strong extenuating or mitigating circumstances, an applicant with a history of serious or recurring financial difficulties is in a position of risk that is inconsistent with holding a security clearance. An applicant is not required to be debt free, but is required to manage her finances to meet her financial obligations.

Applicant owes the IRS \$8,000 for tax year 2009 due to her withdrawing funds from her 401(k) retirement plan. She was also more than \$64,000 past due on her mortgage and owed 32 medical collections accounts totally more than \$12,000. AG ¶ 19 includes four disqualifying conditions that could raise a security concern any may be disqualifying in this case: “(a) inability to satisfy debts;” “(b) unwillingness to satisfy debts regardless of the ability to do so;” “(c) a history of not meeting financial obligations;” and “(f) failure to file or fraudulently filing annual Federal, state, or local income tax returns or failure to pay annual Federal, state, or local income tax as required.”

The Government's evidence and Applicant's own admissions raise security concerns under AG ¶¶ 19(a), 19(b), 19(c), and 19(f). The burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the security concerns. (Directive ¶ E3.1.15) An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. (See ISCR Case No. 02-31154 at 5 (App. Bd. September 22, 2005)). Applicant has the burden of presenting evidence of

explanation, extenuation, or mitigation to overcome the financial considerations security concerns.

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).

The following 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, a death, divorce or separation, clear victimization by predatory lending practices or identity theft), and the individual acted responsibly under the circumstances;

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

(g) the individual has made arrangements with the appropriate tax authority to file or pay the amount owed and is in compliance with those arrangements.

Applicant's delinquent debts are "a continuing course of conduct. She asserts she has paid some of the debts, but provided no documentation of any payments. The FORM put her on notice that providing documentation substantiating her efforts to address her delinquent obligations would be beneficial for mitigation. No documentation was received.

Applicant owes \$8,000 in Federal income tax for tax year 2009. The tax obligation remains unpaid. In her September 2018 SOR response, she said she would start making payments toward her tax delinquency in 2019. She also stated she had been working with

the IRS to address her tax obligation. However, she provided no documentation supporting this assertion. She says her mortgage has been modified, and she has been making her monthly mortgage payments since August 2018. She provided no documentation showing payments on her mortgage. She asserted she paid four delinquent medical obligations, which totaled approximately \$2,400, in August 2018. It was her intent to pay one delinquent debt each month, but she provided no documentation showing repayment.

Applicant timely filed her Federal income tax return for tax year 2009, but her tax debt still has security implications. The Appeal Board has held as follows:

Failure to file tax returns suggests that an applicant has a problem with complying with well-established governmental rules and systems. Voluntary compliance with such rules and systems is essential for protecting classified information. ISCR Case No. 01-05340 at 3 (App. Bd. Dec. 20, 2002). As we have noted in the past, a clearance adjudication is not directed at collecting debts. See, e.g., ISCR Case No. 07-08049 at 5 (App. Bd. Jul. 22, 2008). By the same token, neither is it directed toward *inducing an applicant to file tax returns*. Rather, it is a proceeding aimed at evaluating an applicant's judgment and reliability. *Id.* A person who fails repeatedly to fulfill his or her legal obligations does not demonstrate the high degree of good judgment and reliability required of those granted access to classified information. See, e.g., ISCR Case No. 14-01894 at 5 (App. Bd. Aug. 18, 2015). See *Cafeteria & Restaurant Workers Union Local 473 v. McElroy*, 284 F.2d 173, 183 (D.C. Cir. 1960), *aff'd*, 367 U.S. 886 (1961).

The Appeal Board ruled that “even in instances where an “[a]pplicant has purportedly corrected [his or her] federal tax problem, and the fact that [applicant] is now motivated to prevent such problems in the future, does not preclude careful consideration of [a]pplicant’s security worthiness in light of [his or her] longstanding prior behavior evidencing irresponsibility” including a failure to timely file federal income tax returns. See ISCR Case No. 15-01031 at 3 and note 3 (App. Bd. June 15, 2016).

Applicant has not sufficiently satisfied any of the mitigating conditions to overcome the financial considerations security concerns raised by her extensive delinquencies. AG ¶ 20(a) does not apply because the behavior did not happen long ago. The behavior was not infrequent since there were a large number of delinquent debts. She had periods of unemployment, underemployment, and medical expenses, which are factors beyond her control. However, Applicant must demonstrate she has acted responsibly under the circumstances. Even though she asserted she has acted responsibly by repaying some of her debts, she failed to document her actions. AG ¶ 20(b) does not apply.

There is no evidence of Applicant having received financial counseling or that her financial problems are resolved or under control. AG ¶ 20(c) does not apply. She asserts she has paid some of the debts, but without documentation she has failed to establish a good-faith effort to repay her creditors. Even if she paid a few of her debts, those efforts

are insufficient to establish AG ¶ 20(d) given the number of delinquent accounts with no repayment plans established. AG ¶ 20(d) does not apply. In this instance AG ¶ 20(g) does not apply. Even though Applicant has filed her 2009 tax return, she has failed to document her communication with the IRS. Additionally, she has not started repaying the \$8,000 outstanding tax delinquency.

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(d):

- (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(d) were addressed under those guidelines, but some warrant additional comment.

As Department Counsel stated in the FORM, it appeared Applicant had been actively engaged in attempting to resolve her debt through payments in full, negotiations with creditors, arranging payment plans, and has a desire to solve her financial issues. However, she failed to provide documentation substantiating her efforts even after being informed documentation would be beneficial for mitigation.

Although Applicant has made assertions to the contrary, there is no documentary evidence Applicant has contacted her creditors and has paid some of her delinquent obligations. An applicant is not required to be debt-free or to develop a plan for paying off all debts immediately or simultaneously, but she is required to act responsibly given her circumstances and develop a reasonable plan for repayment, accompanied by "concomitant conduct," that is, actions which evidence a serious intent to effectuate the plan. See ISCR Case No. 07-06482 at 3 (App. Bd. May 21, 2008). What constitutes responsible behavior depends on the facts of a given case. Applicant's poor financial condition originated in part from periods of unemployment and medical problems. She must document she has established a plan to resolve financial problems and taken significant action to implement the plan, which is not shown in the record.

In requesting an administrative determination, Applicant chose to rely on the written record. In so doing, however, she failed to submit sufficient information or evidence to supplement the record with relevant and material facts regarding her circumstances, articulate her position, and mitigate the financial security concerns. She failed to offer evidence of financial counseling or provide documentation regarding her past efforts to address her delinquent debt. By failing to provide such information, and in relying solely on her explanation in her SOR Response, financial considerations security concerns remain.

This decision should not be construed as a determination that Applicant cannot or will not attain the state of true reform and rehabilitation necessary to be eligible for a security clearance. The determination of an individual's eligibility and suitability for a security clearance is not a once-in-a-lifetime occurrence, but is based on applying the factors, both disqualifying and mitigating, to the evidence presented. Under Applicant's current circumstances, a clearance is not warranted. In the future, Applicant may well demonstrate persuasive evidence of her security worthiness.

The issue is not simply whether all the delinquent obligations have been paid—it is whether her financial circumstances raise concerns about her fitness to hold a security clearance. (See AG ¶ 2(c)). Overall, the record evidence due to a lack of documentation leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the financial considerations concerns.

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, Financial Considerations: AGAINST APPLICANT

Subparagraphs 1.a – 1.c, 1.e – 1.m,
1.o – 1.s, and 1.u – 1.kk: Against Applicant

Subparagraphs 1.d., 1.n, and 1.t: For Applicant (duplicate debts)

Conclusion

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

CLAUDE R. HEINY II
Administrative Judge