



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



In the matter of:)
)
) ISCR Case No. 20-03068
)
Applicant for Security Clearance)

Appearances

For Government: Aubrey DeAngelis, Esq., Department Counsel
For Applicant: Troy Nussbaum, Esq.

11/09/2022

Remand Decision

Curry, Marc E., Administrative Judge:

Upon reconsidering the facts of this case, per the Appeal Board’s Remand Order, I conclude Applicant has mitigated the financial considerations security concerns. Clearance is granted.

Statement of the Case

On March 16, 2021, the Department of Defense Counterintelligence and Security Agency Consolidated Adjudications Facility (DCSA CAF) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline F, financial considerations, and explaining why it was unable to find it clearly consistent with the national security to grant security clearance eligibility. The DCSA CAF took the action under Executive Order (EO) 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 National Adjudicative Guidelines (AG) effective for any adjudication made on or after June 8, 2017. On April 8, 2021, Applicant answered the SOR denying all of the allegations, except subparagraph 1.a, and requested a hearing. On January 20, 2022, the case was assigned to me. On April 19, 2022, the Defense Office of Hearings and Appeals (DOHA) issued a notice of video teleconference hearing, scheduling the hearing for May 10, 2022.

The hearing was held as scheduled. I received seven Government exhibits, marked and identified as Government Exhibit (GE) 1 through GE 7, and 12 exhibits of Applicant marked and identified as Applicant's Exhibit (AE) A through AE L, and I considered the testimony of Applicant. The transcript (Tr.) was received on May 20, 2022.

After the hearing, I issued a decision on August 15, 2022, denying Applicant's clearance application. Applicant appealed the case. On October 18, 2022, the Appeal Board remanded the case, concluding that subparagraphs 1.c through 1.e had been mitigated, and that my emphasis on the lack of a demonstrated track record of reform was "misplaced," and that I did not explain what Applicant could or should have done differently to resolve the "Chapter 13 bankruptcy dismissal or the business tax debt, or explain why the approach she has taken [was] not 'responsible' in light of the circumstances presented in this case." (Appeal Board Decision and Remand Order, ISCR Case No. 20-03068 at 2) The decision that follows on remand is a reconsideration of the record evidence as part of the process of evaluating Applicant's security clearance eligibility, as ordered by the Appeal Board.

Findings of Fact

Applicant is a 47-year old single woman with seven children, ranging in age from 9 to 27. She was married previously from 2003 to 2020. The marriage ended in divorce. (GE 1 at 25) Applicant's ex-husband has custody of the minor children. (Tr. 18)

After graduating from high school, Applicant earned two associate degrees. (GE 1 at 14) She is a veteran of the U.S. Air Force, serving from 1993 to 2015. She retired honorably. (GE 1 at 21) According to a former Air Force supervisor, Applicant performed all of her tasks "with enthusiasm, dedication, and attention to detail." (AE K at 1) While working for this supervisor, Applicant's stellar performance led to a promotion to a position "commensurate with someone with much more experience." (AE K at 1) She has held a security clearance for 21 years.

Applicant currently works for a contractor, as a production planner. She has been working at this position since August 2021. (Tr. 20)

In November 2015, after Applicant retired from the Air Force, she and her then husband started a commercial cleaning business. (Tr. 23) A significant portion of their business derived from a prime contractor who paid her to provide cleaning services on a local military base. Initially, the business was successful. However, the prime contractor stopped making timely payments a few months after entering into the contract. (Tr. 23) This problem gradually worsened until the contractor stopped making payments altogether. (Tr. 24)

Applicant and her then husband consulted law firms about suing the contractor. (Tr. 25) However, no firm was willing to take the case, explaining that the size of the contractor's company and the contractor's clout in the community would make the case too labor-intensive and expensive to litigate. (Tr. 25)

The failure of the contractor to pay Applicant and her then husband strained their finances, as they had to scramble to pay their employees and their business expenses. (Tr. 26) Gradually, they began falling behind on their payroll taxes and their state employment taxes. Ultimately, they became unable to pay their personal debts. (GE 2 at 6)

In September 2018, Applicant and her then husband filed for Chapter 13 bankruptcy protection, as alleged in SOR subparagraph 1.a. Approximately \$87,000 of debts were included in the plan. (GE 3 at 9) As part of the bankruptcy proceeding, Applicant's home was sold at foreclosure. (GE 2 at 14) Also, as part of the bankruptcy plan, Applicant was required to attend financial counseling. (Tr. 34) Applicant had no financial problems before the business failed.

By late 2019, Applicant and her then husband's financial problems had begun to stress their marriage. (Tr. 33) In February 2020, Applicant filed for divorce. As part of their separation agreement, Applicant and her then husband agreed to split the Chapter 13 bankruptcy payments. The divorce was finalized by December 2020. (Tr. 56) Subsequently, Applicant's husband reneged on the terms of the separation agreement, leading to the dismissal of the bankruptcy plan for failing to make the court-ordered payments. (GE 3 at 2; Tr. 33)

In addition to the bankruptcy filing, the SOR alleges that Applicant has incurred five delinquent debts, as alleged in subparagraphs 1.b through 1.f, and that Applicant owes delinquent business tax debt, as alleged in subparagraph 1.g. Subparagraph 1.b, totaling \$6,640, is a credit card account. Applicant has been making \$75 monthly payments since March 2021. (AE C – AE E) As of the date of the hearing, the outstanding balance was \$5,515. (GE C at 1)

Subparagraphs 1.c through 1.e are owed to the same creditor. Subparagraphs 1.d and 1.e are duplicates. By September 2021, Applicant's responsibility for 1.c and 1.d, as alleged again in subparagraph 1.e, was terminated some time after the issuance of the SOR. (*compare* GE 4 at 4 with GE 6 at 3-5 and GE 7 at 6,8)

The debt alleged in subparagraph 1.f, totaling \$5,379, is a credit card debt. Applicant has contacted representatives of the creditor approximately 20 times to arrange a payment plan, and no one has been able to find a record that she owes it. (Tr. 41; AE F)

The debt alleged in subparagraph 1.g, totaling \$45,000, is delinquent payroll taxes related to the failure of Applicant's business. (Tr. 44) Between 2016 and 2020, the IRS applied approximately \$17,000 of refunds from Applicant's personal income tax returns to her business delinquency. (AE H; Tr. 45)

In 2021, Applicant made two payments towards the satisfaction of her tax debt, totaling \$390. (AE B, AE G) Recently, Applicant contacted the IRS to arrange a payment

plan. Her request was rejected, and the account was placed in non-collectible status because the IRS agent concluded that she did not have enough disposable income to execute a payment plan at this time. (Tr. 48)

Applicant maintains a budget. She has \$243 of monthly disposable income. (AE L)

Policies

The U.S. Supreme Court has recognized the substantial discretion the Executive Branch has in regulating access to information pertaining to national security, emphasizing that “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). 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 are required to 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 overall adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(a), the entire process is a conscientious scrutiny of a number of variables known as the “whole-person concept.” The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 1(d) 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.

Under the whole-person concept, the administrative judge must consider the totality of an applicant’s conduct and all relevant circumstances in light of the nine adjudicative process factors in AG ¶ 2(d). They are as follows:

- (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.

Analysis

Guideline F: Financial Considerations

Under this concern, “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.” (AG ¶ 18)

Applicant’s history of financial problems triggers the application of AG ¶ 19(a), “inability to satisfy debts” and AG ¶ 19(c), “a history of not meeting financial obligations.” Her history of delinquent federal payroll taxes triggers the application of AG ¶ 19(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 following mitigating conditions under AG ¶ 20 are potentially applicable to the remaining SOR allegations:

- (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;
- (c) the individual has received or is receiving financial counseling for the problem from a legitimate and credible source, such as a non-profit credit counseling service, and there are clear indications that the problem is being resolved or is under control;
- (d) the individual initiated and is adhering to 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; 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 inability to pay her debts on time was not caused by foolish or profligate spending. Instead, it stemmed from the failure of her business and her subsequent divorce. In early 2021, a few months after her divorce was finalized, Applicant began attempting to contact creditors, including the holder of the debt alleged in subparagraph 1.b. She organized a payment plan with this creditor, to which she has been adhering since March 2021. Moreover, she has received financial counseling, and she has dutifully been making efforts to initiate the payment of the debt alleged in subparagraph 1.f, but representatives of the creditor, whom she has contacted, have been unable to locate the debt. These efforts are sufficient to mitigate subparagraphs 1.b and 1.f, and to trigger the application of AG ¶¶ 20(b) and 20(d). I resolve subparagraphs 1.b and 1.f in Applicant's favor.

Applicant successfully established that subparagraphs 1.d and 1.e are duplicates. As such, I resolve subparagraph 1.e in her favor. (See, e.g., ISCR Case No. 17-01371 at 3 (App. Bd. Nov. 16, 2018))

Applicant contended that she was not responsible for satisfying the debts alleged in subparagraphs 1.c and 1.d because her ex-husband was legally responsible to pay them, per a separation agreement. In my original decision, I concluded that Applicant's contention was unsubstantiated. On appeal, the Appeal Board noted that two of the credit reports that the Government provided, ostensibly in support of the allegations in subparagraphs 1.c and 1.d, actually confirm Applicant's contention that she is no longer responsible for these debts. Consequently, upon reconsideration, I resolve these allegations in her favor.

Applicant attempted to arrange a payment plan with the IRS to satisfy her delinquent business tax debts, but an agent rejected her request, explaining that at that time, her finances were insufficient to begin initiating a payment plan. Under these circumstances, AG ¶ 20(g) is inapplicable.

Upon weighing the evidence again on remand, I conclude that the circumstances beyond Applicant's control that led to her financial problems, together with her responsible behavior in attempting to address them outweigh any negative implications related to the IRS' rejection of her request to implement a payment plan, and its placement of the debt in non-collectible status. Applicant has mitigated the financial considerations security concerns.

Whole-Person Concept

Any security concerns posed by Applicant's financial problems are outweighed by the circumstances surrounding them and her responsible behavior in addressing them. Under these circumstances, her financial problems do not generate a vulnerability to

coercion or exploitation. Upon considering this case in the context of the whole-person concept, I conclude upon reconsideration that Applicant mitigated the security concerns. Clearance 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

Subparagraph 1.a – 1.g: For Applicant

Conclusion

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

Marc E. Curry
Administrative Judge