DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 22-00056
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Patricia Lynch-Epps, Esq., Department Counsel
For Applicant: Brittany Forrester, Esq.

04/14/2023

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Decision

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BENSON, Pamela C., Administrative Judge:

Applicant provided insufficient evidence to show why she was unable to make more progress with the resolution of her delinquent debts. She did not take responsible action to address her financial responsibilities despite having the financial means at her disposal. Financial considerations security concerns are not mitigated. Eligibility for access to classified information is denied.

Statement of the Case

On February 17, 2021, Applicant signed a security clearance application (SCA). On February 11, 2022, the Defense Counterintelligence and Security Agency (DCSA) Consolidated Adjudications Facility (CAF) issued a SOR to Applicant under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry*, February 20, 1960; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), January 2, 1992, Security Executive Agent Directive 4, establishing in Appendix A the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AGs), effective June 8, 2017.

The SOR detailed reasons why the DOD CAF did not find under the Directive that it is clearly consistent with the interests of national security to grant or continue eligibility

for Applicant's security clearance. Specifically, the SOR set forth security concerns arising under Guideline F (financial considerations).

On April 14, 2022, Applicant provided a response to the SOR with attached documentation and requested a hearing. On January 23, 2023, the case was assigned to me. I emailed Department Counsel and Applicant on February 16, 2023, to schedule the hearing. Both parties agreed to proceed with the hearing on March 8, 2023. On February 24, 2023, the Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing, setting the hearing for March 8, 2023, using the Microsoft Teams video teleconference system. Her hearing was held as scheduled.

During the hearing, Department Counsel offered five Government exhibits (GE) 1-5; Applicant offered four exhibits, which I labeled as Applicant Exhibits (AE) A through D; and all proffered exhibits were admitted into evidence without objection. I held the record open until March 22, 2023, in the event either party wanted to supplement the record with additional documentation. On March 13, 2023, I received a notice of representation from Applicant's newly retained attorney to assist her with the submission of post-hearing documents while the record was still open. Her counsel also requested an additional two-week extension to keep the record open. I granted the request without objection, and the record remained open until April 5, 2023. On March 15, 2023, I received a copy of the hearing transcript. (Tr.) On April 5, 2023, Applicant submitted 11 exhibits, (reentered as AE E through O); which were admitted into evidence without objection. The record closed on April 6, 2023.

Findings of Fact

In Applicant's April 2022 SOR response, she denied both delinquent credit card debts (SOR ¶¶ 1.a and 1.b.) She acknowledged the two debts were under her name with the credit bureaus, but she claimed that she did not initiate the debt nor authorized the account to be taken out in her name. Her husband had a failing business and he made poor financial decisions by financing the business with credit cards. In 2017, she became aware of this debt and soon became the sole provider for the family after her husband moved in with his mother to care for her. She was actively disputing these debts with the credit reporting agencies, and she referenced State A's statute of limitations as additional incentive to remove the accounts from her credit bureau reports. The combined total of both debts is $53,143. (SOR response)

Applicant is 57 years old, and she has been employed by a federal contractor since 2010. She is an executive administrative assistant, and she currently possesses a DOD security clearance. She has been married for 42 years and has four adult children. Her annual salary is approximately $51,600. Her husband has not worked since late 2017, when he became a fulltime caregiver for his disabled mother. He continues to reside with his mother. (Tr. 25-27,53, 57; GE 1; AE G)

Financial Considerations

Applicant testified that beginning in approximately 2006, her husband stopped working as an aircraft electrician and started his own business day trading, which is a form of speculation in securities. He registered his business as a limited liability corporation (LLC). He conducted his business for about ten years, except for about a two-year period when he returned to work as an aircraft electrician. In 2016, Applicant and her husband began to experience financial problems due to borrowing lines of credit from their credit cards to finance his business. (Tr. 28-31, 57-58; AE E)

SOR ¶ 1.a alleges Applicant is indebted to a credit union for a credit card account charged off as a bad debt in the approximate amount of $29,146. She has never made a payment on this delinquent account. This debt is unresolved. (Tr. 61-64; SOR response)

SOR ¶ 1.b alleges Applicant is indebted to a bank for a credit card account charged off as a bad debt in the amount of $23,997. She testified that she had used this credit card over the years. After it became delinquent, she never made a payment on this account. This debt is unresolved. (Tr. 61-64; SOR response)

Both accounts are joint credit card accounts that were opened in 1986. Applicant became aware that the accounts were delinquent in about April 2017. Her husband had been acting extremely stressed. After questioning him about his odd behavior, she learned they were facing a large amount of delinquent debt due to him trying to cover the losses from his unsuccessful day trading. (Tr. 34-37, 44-45; GE 2, GE 3 page 29 and 40; AE E)

Applicant completed her SCA in February 2021, but she did not disclose any adverse financial information under Section 26 – Financial Record. In March 2021, during her background interview with a DOD authorized investigator, she was confronted about several delinquent financial accounts. She admitted that she and her husband had settled one delinquent account with a credit card creditor before appearing in court. The other overdue accounts were related to her husband's failed business, and she had thought the accounts were closed and had "dropped off" the credit reports. She disclosed that she and her husband were currently involved in negotiations with the credit union creditor, as set forth in SOR subparagraph 1.a, above. (GE 1, GE 2; Tr. 39)

In September 2021, Applicant responded to financial interrogatories. She listed that she and her husband were currently working with the credit bureaus to dispute any adverse financial information reported. In accordance with the Fair Credit Reporting Act, the credit bureaus had 30 days to respond after receiving notice of the dispute. She listed that when these delinquent accounts were successfully removed from their credit reports, she would provide an updated statement of her credit standing. (GE 3 page 9; Tr. 37-38)

During the hearing, Applicant admitted writing to the credit bureaus on multiple occasions. She provided a copy of a December 2021 letter she had sent to the credit reporting agencies with a total of 13 "unverified accounts," that she demanded be removed from her credit report. The two SOR debts are listed on this letter, but there is

no explanation for the other 11 disputed accounts that were also listed. They may have been dropped off Applicant's credit bureau report. Applicant stated during the hearing that both SOR accounts should no longer appear on her credit report beginning in August 2023, which marked the end of the seven-year credit reporting period. She did not intend to initiate communication with these creditors because that would restart the seven-year period. She was unaware if a creditor had ever sent them a 1099-C, a cancellation of debt form, but she offered to check with her husband while the record was held open. She did not submit documentation post-hearing as to whether they had received a 1099-C form from any of their delinquent creditors. (Tr. 41-43, 45-47; GE 3; AE H)

Applicant provided a Personal Financial Statement (PFS) dated August 2021. After deducting her monthly expenses and an additional $480 401(k) contribution from her monthly pay, she had a net remainder of approximately $705. The PFS did not reflect any payment to her delinquent accounts. The PFS noted over $210,000 in a bank savings account; money received from the sale of their house. She testified that she had not sought the assistance of a financial counseling program to resolve her indebtedness. After the hearing, Applicant submitted a new PFS that showed her total expenses exceeded her monthly income by $706, which did include monthly payments of $1,560 to the two SOR debts. She also submitted documentation that showed if she paid a total of $1,300 monthly to these creditors through a consumer debt management program, she still would not have enough income to make the payments in full. (GE 3 page 8; Tr. 43, 49-53; AE B, AE F)

During cross examination, Applicant admitted that possibly six other delinquent credit accounts had dropped off their credit bureau report without being paid. She estimated that the amounts of these dropped-off debts were similar to the current debts of concern in this case, possibly a little lower than approximately $30,000 each. The only two charged-off accounts remaining on her credit report were the accounts referenced in the SOR totaling approximately $53,000. She admitted that she had also received documentation from the credit bureaus in response to her letters of dispute. I asked her if she had any evidence to show that she was not legally responsible for the unpaid joint accounts with her spouse. She agreed she would provide a copy of her correspondence from the credit bureau(s) while the record was held open; however, this documentation was not submitted. (Tr. 61-67)

Character Evidence

Applicant submitted several letters of appreciation from her employer, and two character reference letters from her supervisor and the chief executive officer of the company. Both references reported that Applicant is regarded as an exceptional employee, and she is eager to take on any challenge. "She approaches tasks with a positive attitude and has received favorable feedback from her customers, co-workers, and business associates." Both references endorsed Applicant's continued eligibility for a DOD security clearance. (AE A, AE L)

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information." *Id*. at 527. The President has authorized the Secretary of Defense or his designee to grant applicant's eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information. Clearance decisions must be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." *See* Exec. Or. 10865 § 7. 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, Secretary of Defense, and DNI 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. Sept. 22, 2005). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* AG ¶ 2(b).

Analysis

Financial Considerations

AG ¶ 18 articulates the security concern for financial problems:

> Failure 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. . . .

The Appeal Board explained the scope and rationale for the financial considerations security concern in ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012) (citation omitted) as follows:

> This concern is broader than the possibility that an applicant might knowingly compromise classified information in order to raise money in satisfaction of his or her debts. Rather, it requires a Judge to examine the totality of an applicant's financial history and circumstances. The Judge must consider pertinent evidence regarding the applicant's self-control, judgment, and other qualities essential to protecting the national secrets as well as the vulnerabilities inherent in the circumstances. The Directive presumes a nexus between proven conduct under any of the Guidelines and an applicant's security eligibility.

The guideline notes several conditions that could raise security concerns under AG ¶ 19. The following are potentially applicable in this case:

> (a) inability to satisfy debts;
>
> (b) unwillingness to satisfy debts regardless of the ability to do so; and
>
> (c) a history of not meeting financial obligations.

Applicant has a history of delinquent debts, as shown by credit reports in the record. AG ¶¶ 19(a), 19(b), and 19(c) apply.

AG ¶ 20 sets forth conditions that could mitigate security concerns arising from financial difficulties. The following are potentially applicable in this case:

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

In ISCR Case No. 08-12184 at 7 (App. Bd. Jan. 7, 2010), the Appeal Board explained:

> It is well-settled that adverse information from a credit report can normally meet the substantial evidence standard and the government's obligations under [Directive] ¶ E3.1.14 for pertinent allegations. At that point, the burden shifts to applicant to establish either that [he or] she is not responsible for the debt or that matters in mitigation apply.

A debt that became delinquent several years ago is still considered recent because "an applicant's ongoing, unpaid debts evidence a continuing course of conduct and, therefore, can be viewed as recent for purposes of the Guideline F mitigating conditions." ISCR Case No. 15-06532 at 3 (App. Bd. Feb. 16, 2017) (citing ISCR Case No. 15-01690 at 2 (App. Bd. Sept. 13, 2016)).

Applicant noted in her SOR response State A's statute of limitations during her on-going dispute of debts with the credit bureau reporting agencies. In ISCR Case No. 17-01473 at 5 (App. Bd. Aug. 10, 2018) (quoting ISCR Case No. 10-03656 at 3 (App. Bd. Jan. 19, 2011) (internal citations omitted)), the Appeal Board stated:

> The security significance of long delinquent debts is not diminished merely because the debts have become legally unenforceable owing to the passage of time. Security clearance decisions are not controlled or limited by any statute of limitation, and reliance on the non-collectability of a debt does not constitute a good-faith effort to resolve that debt within the

> meaning of the Directive. A security clearance adjudication is not a proceeding aimed at collecting an applicant's personal debts. Rather a security clearance adjudication is a proceeding aimed at evaluating an applicant's judgment, reliability, and trustworthiness to make a decision about the applicant's security eligibility. Accordingly, even if a delinquent debt is legally unenforceable . . . , the federal government is entitled to consider the facts and circumstances surrounding an applicant's conduct in incurring and failing to satisfy the debt in a timely manner.

Several of Applicant's past delinquent debts have been either charged off or may have been dropped from her credit report or both. "[T]hat some debts have dropped off his credit report is not meaningful evidence of debt resolution." ISCR Case No. 14-05803 at 3 (App. Bd. July 7, 2016) (citing ISCR Case No. 14-03612 at 3 (App. Bd. Aug. 25, 2015)). The Fair Credit Reporting Act requires removal of most negative financial items from a credit report seven years from the first date of delinquency or the debt becoming collection barred because of a state statute of limitations, whichever is longer. See Title 15 U.S.C. § 1681c. See Federal Trade Commission website, *Summary of Fair Credit Reporting Act Updates at Section 605*, https://www.consumer.ftc.gov/articles/pdf-0111-fair-credit-reporting-act.pdf. Debts may be dropped from a credit report upon dispute when creditors believe the debt is not going to be paid, a creditor fails to timely respond to a credit reporting company's request for information, or when the debt has been charged off.

Applicant holds her spouse responsible for the debts he created while trying to support his family through his failing business. She does not assert that her spouse fraudulently obtained money from their joint accounts. It is well-settled that both parties are legally responsible for debt repayment on joint accounts, even if only one incurred the debt. She has not made an effort to responsibly repay the outstanding joint accounts she is legally responsible for despite the ample financial resources in her savings account that could easily pay the debts in full. There is insufficient evidence to show that she participated in financial counseling. She has not established that her financial behavior is unlikely to recur or no longer casts doubt on her reliability, trustworthiness, or good judgment. AG ¶¶ 20(a) and 20(c) do not apply.

Applicant's husband's attempt to refinance losses from his failed business is a condition beyond her control and contributed to her financial problems. Thus, the first prong of AG ¶ 20(b) applies. For the full application of AG ¶ 20(b), she must provide evidence that she acted responsibly under the circumstances. Applicant did not provide a reasonable explanation as to why she was unable to make more progress addressing her delinquent accounts when she had the financial resources at her disposal. She has not made an effort to arrange a payment plan with her creditors nor did she initiate contact with the creditors. She is waiting for the charged-off accounts to either be removed from her credit report from the dispute, or to be dropped from her credit report in August 2023, the end of the seven-year period. I find Applicant has not acted responsibly under the circumstances. AG ¶¶ 20(b) and 20(d) do not apply. Under all of these circumstances, Applicant failed to establish that financial considerations security concerns are mitigated.

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), "[t]he ultimate determination" of whether to grant a security clearance "must be an overall commonsense judgment based upon careful consideration of the guidelines" and the whole-person concept. My comments under Guideline F are incorporated in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under that guideline but some warrant additional comment.

Applicant is 57 years old, and she has been employed by a federal contractor since 2010. She is highly regarded as a committed and responsible employee at her place of employment. I observed her demeanor during the hearing. There is no question in my mind that she is an exceptional employee providing outstanding service.

Applicant did not establish why she was unable to make more significant progress in resolving her delinquent creditors, given that her August 2021 PFS documented a balance of over $210,000 in a bank savings account. She did not initiate good-faith payment plans with any of her charged off creditors. Her actions demonstrate a lack of fiscal responsibility and good judgment, and raise unmitigated questions about her reliability, trustworthiness, and ability to protect classified information.

This decision should not be construed as a determination that Applicant cannot or will not attain the state of reform necessary for award of a security clearance in the future. With more effort toward documented resolution of her past-due debt, she may well be able to demonstrate persuasive evidence of her security clearance worthiness.

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. I conclude that financial consideration concerns are not mitigated.

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:	AGAINST APPLICANT
Subparagraphs 1.a and 1.b:	Against Applicant

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 or continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

_____
Pamela C. Benson
Administrative Judge