



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



In the matter of:

Applicant for Security Clearance

)
)
)
)
)

ISCR Case No. 12-10073

Appearances

For Government: Candace Garcia, Esq., Department Counsel
For Applicant: *Pro se*

09/11/2015

Decision

HARVEY, Mark, Administrative Judge:

Applicant’s statement of reasons (SOR), as amended, allege a \$74,750 charged-off debt, discharge of her debts through Chapter 7 of the Bankruptcy Code in December 2014, a federal income tax debt of \$28,000, and a state income tax debt of \$3,138. She currently owes a total of about \$15,000 in state and federal tax debts, and both debts are in creditor-approved payment plans. She provided sufficient evidence of her progress in resolving her financial problems. Financial considerations concerns are mitigated. Eligibility for access to classified information is granted.

Statement of the Case

On March 7, 2012, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP) version of a security clearance application (SF 86). (GE 1) On February 4, 2015, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued an SOR to Applicant, pursuant to Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended; and the adjudicative guidelines (AG), which became effective on September 1, 2006.

The SOR alleged security concerns under Guideline F (financial considerations). (HE 2) The SOR detailed reasons why the DOD CAF was unable to find that it is clearly consistent with national interest to grant or continue Applicant's access to classified information and recommended referral to an administrative judge to determine whether Applicant's clearance should be granted or denied. (HE 2)

On February 25, 2015, Applicant responded to the SOR allegations and requested a hearing. (HE 3) On July 15, 2015, the Defense Office of Hearings and Appeals (DOHA) issued an amendment to the SOR, adding two allegations under the Financial Considerations Guideline. On July 21, 2015, Applicant responded to the allegations in the amended SOR. Department Counsel was prepared to proceed on July 21, 2015, and the case was assigned to me on July 30, 2015. The hearing notice was dated August 5, 2015. On August 21, 2015, Applicant's hearing was held. Applicant received actual notice of the date, time and place of her hearing, and in any event, she waived her right to 15 days of notice of the date, time, and place of the hearing. (Tr. 16-17) Department Counsel offered nine exhibits into evidence, and Applicant offered three exhibits into evidence. (Tr. 22-24; GE 1-9; AE A-C) All exhibits were admitted into evidence without objection. (Tr. 22, 24-25) On August 31, 2015, DOHA received the transcript of the hearing.

Findings of Fact¹

In Applicant's SOR response, she admitted one SOR debt, bankruptcy in 2014, and tax debts owed to the state and federal governments, as alleged in SOR ¶¶ 1.a through 1.d.² She disputed the amount of the tax debt owed to the IRS, and she provided documentation that she owed the IRS \$12,069. She did not provide extenuating and mitigating information as part of her SOR response. Applicant's admissions are accepted as findings of fact.

Applicant is a 61-year-old warehouse manager, who also makes deliveries.³ (Tr. 6, 54) She has worked for the same employer for 17 years. (Tr. 54) In 1972, she graduated from high school. (Tr. 6) She attended one semester of college. (Tr. 6) She served in the Army from 1977 to 1997. (Tr. 6; GE 1) She honorably retired from the Army as a staff sergeant, and she is receiving 60 percent disability from the Department of Veterans Affairs (VA). (Tr. 7) Her military occupational specialty (MOS) was logistics. (Tr. 7) She did not serve in any combat zones. (Tr. 7) Her highest award was an Army Commendation Medal (ARCOM). (Tr. 8)

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

²The source for the information in this paragraph is Applicant's SOR response. (HE 3)

³Unless stated otherwise, Applicant's March 7, 2012 Electronic Questionnaires for Investigations Processing (e-QIP) version of security clearance application (SF 86) is the source for the facts in this paragraph and the next paragraph. (GE 1)

In 1982, she married, and in 1986, she divorced. (Tr. 8) In 1995, she married her current spouse. (Tr. 8-9) Her children are 31 and 32, and they live with Applicant. (Tr. 9) Her son is mentally disabled, and her daughter “has no place else to go.” (Tr. 9, 52) Her daughter is currently unemployed. (Tr. 52) Her husband served in the Army for 10 years at a truck driver, and he is receiving 30 percent disability from the VA. (Tr. 53, 58) He is currently a WG-7 truck driver and a security clearance holder. (Tr. 54, 59, 61)

Financial Considerations

Applicant’s history of delinquent debt is documented in her SF 86, credit reports, bankruptcy records, SOR response, Office of Personnel Management personal subject interview (OPM PSI) and hearing record. (GE 1-9) In 2001, Applicant had financial problems because she and her husband were underemployed. (Tr. 47) In 2001, Applicant’s nonpriority unsecured debts were discharged under Chapter 7 of the Bankruptcy Code. (Tr. 46-47)

In 2005, Applicant and her husband purchased a residence for \$450,000. (Tr. 26) They financed \$422,000 to purchase the residence. (GE 3 at 11-12) The monthly payment on her adjustable rate mortgage (ARM) went from \$3,200 to almost \$4,000. (Tr. 26) In 2009, Applicant obtained a second mortgage for about \$74,000. (Tr. 32; GE 3 at 11) In March 2010, her husband became sick, was admitted to a hospital, and received an operation. (Tr. 27) His hours as a truck driver decreased by 75 percent for six months, and his income was greatly reduced. (Tr. 28, 58) They received a mortgage modification, which reduced their payments on their first mortgage for six months. (Tr. 29-30; GE 3 at 11) When the monthly mortgage payment increased again to about \$4,000, Applicant attempted to resolve her mortgage debts using a short sale or reduce their payment through another mortgage modification. (Tr. 30) The second mortgage creditor would not agree to the terms of the short sale and the first mortgage holder would not reduce their payments. (Tr. 30) In August 2010, Applicant’s home was foreclosed. (Tr. 31) In August 2014, Applicant filed for bankruptcy under Chapter 7 of the Bankruptcy Code. (Tr. 33) The \$74,750 charged-off debt alleged in SOR ¶ 1.a was discharged through Chapter 7 of the Bankruptcy Code in December 2014. (Tr. 19, 35; GE 4 at 8) It was the primary debt resolved through the bankruptcy. (Tr. 51, 55)

Applicant’s August 2014 personal financial statement (PFS) indicates Applicant and her husband have net monthly income of \$6,258, expenses of \$3,825, monthly payments of \$3,434, assets of \$83,000 in retirement accounts, and a net remainder of \$390. (GE 3 at 13) Her PFS should show a negative net remainder of -1,001. (GE 3 at 13) It appears she may have overestimated some of her expenses.

Applicant disclosed on her Bankruptcy Schedule E, Creditors Holding Unsecured Priority Claims, that she owed taxes to the IRS for tax years 2007 to 2012 of \$26,377. (GE 4 at 12) She listed on her Bankruptcy Schedule F, Creditors Holding Unsecured Nonpriority Claims, a total of \$110,713 in delinquent debts. (GE 4 at 16)

In 2011, Applicant withdrew funds from her 401(k) account on two occasions, and she borrowed from an employer retirement account to pay her mortgage and other

debts. (Tr. 37-38; GE 4 at 2) This early withdrawal resulted in additional taxes due. In 2011, her and her husband's wages, salaries, and tips totaled \$104,362; their adjusted gross income was \$121,120 (includes loan from 401(k) account); their federal income taxes were \$16,856; they withheld \$10,524 for taxes; and they owed the IRS \$7,256. (GE 4 at 2-3) For the next three years, she and her husband failed to withhold sufficient funds from their monthly checks for their federal income taxes, and the IRS reported as of July 15, 2015, Applicant and her husband owed \$12,069 to the IRS for the following tax years: 2011-\$7,119; 2012-\$860; 2013-\$1,618; and 2014-\$2,471. (SOR response) Any overdue taxes for years prior to 2011 were paid prior to July 15, 2015. (July 15, 2015 IRS letter, SOR response)

Applicant has been paying the IRS \$200 monthly since May 2014, except for August 2014 to April 2015. (Tr. 40) Her lawyer told her to stop the IRS payments while her bankruptcy was being processed. (Tr. 41) She voluntarily resumed the IRS payments early before she learned her debts were discharged, which was several months after her debts were actually discharged in December 2014. (Tr. 41-42)

Applicant owes \$3,138 in state income taxes. (GE 4 at 7) Applicant paid the state \$137 in February and July 2014, and in May 2014, she paid \$411. (Tr. 44) In August 2015, she paid the new payment amount of \$131. (Tr. 44; AE B) She stopped making the state tax payments because of the processing of her bankruptcy. (Tr. 44) Part of the delay in the resumption of the payments was confusion about restarting the automatic payments from her account. (Tr. 45) She currently owes the state tax authority \$2,753. (AE A)

Applicant's Bankruptcy Schedule D, Creditors Holding Secured Claims, shows three vehicle loans with balances of \$3,806, \$15,600, and \$3,800. (GE 4 at 10) Applicant did not believe she would have financial problems in the future because her husband has Government employment as a truck driver. (Tr. 47) She currently has three debts including her vehicle loans. (Tr. 48; GE 3 at 13) She and her husband have a remainder of about \$500 at the end of the month after making all payments. (Tr. 49) She received financial counseling through her bankruptcy process, and Applicant and her husband are attentive to their expenses. (Tr. 49; GE 3 at 27) They have increased the withholding from their pay to ensure their taxes are paid. (Tr. 61-63)

Policies

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

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

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information. Clearance decisions must be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See Exec. Or. 10865 § 7. Thus, nothing in this Decision should be construed to suggest that I have based this decision, 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 [or her] security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Financial Considerations

AG ¶ 18 articulates the security concern relating to financial problems:

Failure or inability to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness, and ability to protect classified information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

AG ¶ 19 provides two disqualifying conditions that could raise a security concern and may be disqualifying in this case: "(a) inability or unwillingness to satisfy debts"; and "(c) a history of not meeting financial obligations." 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.

(internal citation omitted). Applicant's history of delinquent debt is documented in her SF 86, credit reports, bankruptcy records, SOR response, OPM PSI, and hearing record. Applicant's SOR and amended SOR allege a \$74,750 charged-off debt, discharge of her debts through Chapter 7 of the Bankruptcy Code in December 2014, and two tax debts. She currently owes a total of about \$15,000 in state and federal tax debt. 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;⁴ and

⁴The 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).

Applicant's conduct in resolving her debts warrants application of AG ¶¶ 20(a) through 20(c). Her delinquent debts "occurred under such circumstances that [are] unlikely to recur and [do] not cast doubt on [her] current reliability, trustworthiness, or good judgment." Applicant and her husband purchased a residence and financed it with an ARM. The payments increased, and her husband's income was reduced. Applicant and her husband attempted to pay their mortgage using funds from Applicant's 401(k), resulting in federal and state tax bills. She is financially unsophisticated, and she did not understand the implications of utilizing an ARM and taking early withdrawals from her 401(k).

Applicant utilized bankruptcy to resolve her unsecured nonpriority debts. She received financial counseling and generated a PFS. She established payment plans that are acceptable to the IRS and state taxing authority. She has no delinquent debts. She acted responsibly under the circumstances by paying, establishing payment plans, or otherwise resolving her delinquent debts. There are clear indications that the problem is

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)).

being resolved or is under control. Applicant admitted responsibility for and took reasonable and responsible actions to resolve her SOR debt. Her efforts are sufficient to mitigate financial considerations security 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.

Applicant is a 61-year-old warehouse manager, who also makes deliveries. She has worked for the same employer for 17 years. She served in the Army from 1977 to 1997. She honorably retired from the Army as a staff sergeant, and she is receiving 60 percent disability from the VA. Her MOS was logistics. Her highest award was an ARCOM. In 1995, she married her current spouse. Her children are 31 and 32, and they live with Applicant. Her son is mentally disabled, and her daughter is currently unemployed. Expenses from her support of her adult children adversely affected her finances. Her husband served in the Army for 10 years as a truck driver, and he is receiving 30 percent disability from the VA. He is currently a WG-7 truck driver and a security clearance holder. There is no evidence of disciplinary problems with her employer, illegal drug use, criminal offenses, or alcohol abuse.

In 2001, Applicant had financial problems because she and her husband were underemployed, and she used Chapter 7 of the Bankruptcy Code to obtain a discharge of her nonpriority unsecured debts. In 2011-2012, her husband was underemployed, had medical problems, and her monthly house payments increased to \$4,000 because she and her husband utilized an ARM to purchase their home. She borrowed from her 401(k) account, resulting in substantial state and federal tax debts. Her house was foreclosed. In December 2014, their nonpriority unsecured debts were again discharged under Chapter 7 of the Bankruptcy Code. She maintained contact with the IRS and state tax authority, and she established payment plans to address her tax debts. Her

current tax debts total about \$15,000. Applicant and her husband have stable employment, received financial counseling, are careful about expenses, and have a monthly \$500 remainder after expenses. There are clear indications that her financial problem will not recur, are being resolved, and are under control.

The Appeal Board has addressed a key element in the whole-person analysis in financial cases stating:

. . . the concept of meaningful track record necessarily includes evidence of actual debt reduction through payment of debts. However, an applicant is not required, as a matter of law, to establish that he has paid off each and every debt listed in the SOR. All that is required is that an applicant demonstrate that he has . . . established a plan to resolve his financial problems and taken significant actions to implement that plan. The Judge can reasonably consider the entirety of an applicant's financial situation and his actions in evaluating the extent to which that applicant's plan for the reduction of his outstanding indebtedness is credible and realistic. See Directive ¶ E2.2(a) (Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination.) There is no requirement that a plan provide for payments on all outstanding debts simultaneously. Rather, a reasonable plan (and concomitant conduct) may provide for the payment of such debts one at a time. Likewise, there is no requirement that the first debts actually paid in furtherance of a reasonable debt plan be the ones listed in the SOR.

ISCR Case No. 07-06482 at 2-3 (App. Bd. May 21, 2008) (internal citations and quotation marks omitted).

Applicant understands what she needs to do to establish and maintain her financial responsibility. All of her debts are in payment plans. Her efforts at debt resolution have established a "meaningful track record" of debt re-payment. I am confident she will maintain her financial responsibility.⁵

⁵The 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 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.

I have carefully applied the law, as set forth in *Egan*, Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. Financial considerations concerns are mitigated, and eligibility for access to classified information is granted.

Formal Findings

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline F: FOR APPLICANT

Subparagraphs 1.a through 1.d: 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