



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



In the matter of:)	
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-----)	ISCR Case No. 13-00808
)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Caroline E. Heintzelman, Esquire, Department Counsel
For Applicant: Christopher Graham, Esquire

03/10/2014

Decision

HOWE, Philip S., Administrative Judge:

On March 18, 2013, Applicant submitted her Electronic Questionnaire for Investigations Processing (e-QIP; SF 86). On August 28, 2013, the Department of Defense (DoD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline F (Financial Considerations). The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the Department of Defense on September 1, 2006.

Applicant acknowledged receipt of the SOR on September 18, 2013. She answered the SOR in writing on October 2, 2013, and requested a hearing before an administrative judge. Defense Office of Hearings and Appeals (DOHA) received the request on October 7, 2013. Department Counsel was prepared to proceed on November 5, 2013, and I received the case assignment on November 7, 2013. DOHA issued a Notice of Hearing on November 27, 2013, and I convened the hearing as

scheduled on December 16, 2013. The Government offered Exhibits 1 through 5, which were received without objection. Applicant testified and submitted Exhibits A through H, without objection. DOHA received the transcript of the hearing (Tr.) on December 23, 2013. I granted Applicant's request to keep the record open until January 16, 2014, to submit additional matters. On January 16, 2014, she submitted Exhibits I to W, without objection. Based upon a review of the pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

Procedural and Evidentiary Rulings

Notice

At the hearing, Applicant's attorney stated the Notice of Hearing was sent to his former law firm and he did not receive it in the time allowed by the Directive. (Tr. 7) I advised Applicant of her right under ¶ E3.1.8 of the Directive to 15 days notice before the hearing. After consulting with counsel, Applicant affirmatively waived her right to 15 days' notice. (Tr. 7)

Motion to Amend SOR

Department Counsel moved to amend the SOR by adding ¶ 1.g, alleging Applicant is currently being sued as the guarantor for approximately \$2 million on the business debt owed by the family company, and as of the date of the hearing, December 16, 2013, the lawsuit remains outstanding (Tr. 86-90). Applicant's counsel objected to the motion, arguing that Department Counsel had not shown good cause for failing to raise the allegation sooner and that the lack of notice denied Applicant the opportunity to prepare to respond to the allegation at the hearing. I informed Department Counsel that, if the motion to amend were granted, I would give Applicant until January 17, 2014, to respond to the new matter, as required by ¶ E3.1.17 and ¶ E3.1.4 of the Directive (Tr. 94). Her counsel did submit written argument on the issue. Department Counsel had until January 24, 2014, to make her reply. I did not receive any document containing a counter-argument. The record closed at that time.

Findings of Fact

In her Answer to the SOR Applicant admitted the factual allegations in ¶¶ 1.a, 1.b, 1.c, 1.e, and 1.f of the SOR, with explanations. She denied the factual allegations in ¶ 1.d of the SOR. Applicant made no admission or denial of the amended ¶ 1.g (Tr. 55, 92). However, her testimony, her e-QIP, and answers to DOHA interrogatories indicated and admitted there was a deficiency in the amount owed under the guarantees.. She also provided additional information to support her request for eligibility for a security clearance.

Applicant is 53 years old, married, and has two daughters. She and her husband owned and operated a business for about 28 years making plastic components for the auto and defense industries. They owned 30% of the business, with his other family

members owning the remaining 70%. The business was adversely affected by the economic downturn in 2007 and 2008 to such an extent that their lending bank would not renew their business loans. Applicant was forced to sell the business after closing part of it. At one time they had over 200 employees in four factories around the United States. (Tr. 19-23, 29, 67, 68; Exhibits 1-5)

Applicant owes over \$2 million in business and corporate loans, according to the SOR allegations. She has repaid some of those debts and negotiated legal settlements for the larger loans that originated from the operation of her husband's business and the construction of their former home. (Tr. 21, 24-28, 39-58; Exhibits 1-5, A-H, K-S)

Applicant owes a medical provider \$251 (Subparagraph 1.a). This debt is paid and the matter resolved. (Tr. 24; Exhibit D)

Applicant owes another medical provider \$534 (Subparagraph 1.b). This debt is paid and the matter resolved. (Tr. 24; Exhibit C)

Applicant owes a bank \$1,839 on a judgment dating from November 2011 (Subparagraph 1.c). This debt is part of the debt alleged in Subparagraph 1.e for \$21,000 owed to the same bank. The entire debt was negotiated for a sum of \$25,000. Applicant is repaying this debt at the rate of \$500 monthly on a total judgment of \$25,000. She has paid \$4,000, in addition to the monthly installment payments that now total \$1,500. This debt is being resolved. (Tr. 25, 26, 39-42; Exhibits 1-5, B, H)

Applicant owes the Internal Revenue Service (IRS) \$103,000 on a tax lien (Subparagraph 1.d). This tax lien pertains to the tax years of 2006 to 2008, and 2010. Applicant filed her tax forms but did not have sufficient income or financial resources to pay the tax at the time. She has paid \$58,000 through direct payments, tax refunds seizures, and tax loss carry forward allowances under the IRS Code. She now owes \$32,000. She negotiated an installment payment agreement with the IRS in October 2012. She is paying this debt at the rate of \$750 monthly by automatic debit from her checking account. This debt is being resolved. (Tr. 25, 26, 28, 43-48; Exhibits 1-5, A)

Applicant owes a debt collector \$896 for a debt originating with a resort hotel (Subparagraph 1.f). She paid this debt on September 23, 2013, by check. This debt is resolved. (Tr. 27; Exhibits 1-5, E)

Applicant is currently being sued as the guarantor for approximately \$2 million on a business debt owed by their family owned company, and as of the date of the hearing, December 16, 2013, the lawsuit remains outstanding (Subparagraph 1.g). Applicant and her husband signed a guarantee, as did his brother and wife, and another member of the family. These documents were signed in March 2007. All of them were sued by the bank in August 2013. The legal issues are being discussed by the respective attorneys, including the defense raised by Applicant that the bank asked for their cooperation in selling the foam fabricating business in return for not suing for any deficiency or on the

guarantees. The entire matter is in litigation. It is not resolved and will not be for some time. (Tr. 23, 34-37, 75-83; Exhibits 1-5, I-T)

Applicant is also being sued as the guarantor on a loan for \$600,000 on a real estate transaction in 2007. Her husband testified that they took out a mortgage in that amount to build a home on property they bought and paid for over a ten year period. The mortgage eventually grew to \$1.2 million with interest. The bank eventually foreclosed on the property when Applicant ceased making payments because of the lack of income from her husband's company in 2009. The bank accepted a deed in lieu of foreclosure. The deficiency of \$685,562.64 was settled for \$5,000 with Applicant paying \$1,000 monthly to resolve this debt. The documents pertaining to this arrangement were submitted by Applicant. She asserts that under the Mortgage Debt Relief Act of 2007 there is no tax liability for this debt forgiveness by the lending bank. This debt is not alleged in the SOR but became known during the hearing from testimony. (Tr. 49-60, 71-84; Exhibits 1-5, I-V)

Applicant also owes about \$12,000 in state income taxes for the tax years 2004 to 2007. She is paying this debt on the installment basis at \$250 monthly. This debt is being resolved. This debt was not alleged in the SOR but became known during Applicant's testimony. (Tr. 44-48; Exhibits 1-5)

Applicant and her husband are currently renting a home purchased by their daughter. Their credit rating was not good enough to allow them to purchase a home on their own. (Tr. 69)

Applicant is the president of a financial and accounting company she and her husband founded after the foam fabricating company was sold. Her husband is vice president. Their company is also involved in audit readiness preparation and internal financial control reviews. They have 10 employees in Washington, D.C. and four employees (themselves and their daughters) in the local area. Applicant does not have a security clearance. Her husband recently obtained his clearance. (Tr. 17, 18, 32, 33, 71)

Applicant does not currently have any credit card debt. She is paying her house rent on time and all her utility costs regularly. She and her husband have a Section 401(k) retirement account with about \$50,000 in it that they offer to use to pay any debts they cannot pay out of regular monthly income. They used part of that account previously to make debt payments, leaving them with the current balance. Applicant did not introduce any evidence of financial counseling. She did testify that neither she nor her husband want to file bankruptcy for the business debts because they believe they should pay their debts. They have paid credit card debts during the past five years leaving only the one alleged in the SOR. They paid business creditors as much as they could. Their lending bank did not work with them during the financial crisis of 2007 to 2009 to save their business as their previous business lender, which they used until 2007, did. (Tr. 56, 57, 76, 78, 81-83; Exhibit 3)

Applicant and her husband were credible witnesses. Their exhibits are detailed financial documents which support the assertions they made at the hearing. They explained their business problems and the efforts they make to resolve the financial problems resulting from the termination of their foam fabricating business. All of it was interrelated.

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful 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 (AG ¶ 2(a)). The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), 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 ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of 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. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an "applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance 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 protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to 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 as to 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

The security concern relating to the guideline for Financial Considerations is set out in AG ¶ 18:

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.

The guideline at AG ¶ 19 contains nine disqualifying conditions that could raise security concerns. Two conditions are applicable to the facts found in this case:

- (a) inability or unwillingness to satisfy debts; and
- (c) a history of not meeting financial obligations.

Applicant accumulated over \$2 million in delinquent debt from 2007 to the present time that remains unpaid. Most of the debt resulted from the business Applicant and her husband operated over 28 years being dissolved or sold in the 2007 to 2009 period because of pressure from their lending bank to cut their losses at that time. Applicant has seven delinquent debts listed in the SOR.

The guideline in AG ¶ 20 contains six conditions that could mitigate security concerns arising from financial difficulties. Five conditions may be 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 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; and

(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.

Applicant's financial problems happened five years ago. They occurred under unusual circumstances resulting from the economic condition of the United States at that time. She and her husband lost their long-time business in a severe economic downturn. Applicant acted responsibly to negotiate settlements or enter installment payment agreements with her business creditors. She and her husband gave a deed in lieu of foreclosure and paid a \$5,000 settlement on their house mortgage loan deficiency with that bank. She did not walk away from any of her debts but tried to pay them in a responsible manner. AG ¶ 20 (a) and (b) apply to the totality of her efforts regarding her debts.

Applicant testified to all the efforts made by her and her husband over the past five years to pay business creditors from the foam fabricating business they operated for over 28 years. She also showed by various documents the efforts she made to resolve her tax debts by installment payment agreements and negotiations with tax authorities. These financial matters are under control. The only debt subject to litigation, for which Applicant contends she has a meritorious defense, is the loan guarantees on which the lending bank sued in August 2013. It is too early in the legal process to resolve these guarantees. There are four other family members who are also liable on the guarantees so any final judgment would be joint and several liability according to the terms of the agreement. Based on Applicant's record to date of paying her debts, it is likely there will be a negotiated settlement of this issue to terminate the litigation sometime in the future. Therefore, there are clear indications from the evidence she presented that the financial problems are under control and being resolved. AG ¶ 20 (c) applies.

Applicant paid three debts alleged in the SOR in an orderly manner. They are the debts listed in Subparagraphs 1.a, 1.b, and 1.f. The other debts she is paying on the installment payment basis. One debt that was amended into the SOR at the hearing (1.g) is the subject of a lawsuit over the guarantees she and her husband signed for business loans in 2007. There are also guarantees on a loan to their real estate company for the construction of their former home that might later be the subject of a separate lawsuit. Her relatives also signed separate guarantees and are being sued also. AG ¶ 20 (d) applies.

Applicant also has a reasonable basis to dispute the legitimacy of the guarantee debt, in whole or in part. She contends the bank made representations that with their cooperation in selling or closing the business it would forgive or renegotiate the loan guarantees for the family. Applicant submitted copies of email correspondence with the lending bank or its attorneys about those issues. AG ¶ 20 (e) applies.

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 an 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.

AG ¶ 2(c) requires each case must be judged on its own merits. 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 considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant is a business person who recognized that the 2007 to 2009 economic downturn in the United States was adversely affecting her family business. With her husband, she acted responsibly to resolve her debts as stated in the analysis of the applicable guideline. This entire situation was a one-time occurrence not of Applicant’s making or her fault. She and her husband’s family closed that business. They have now started another one of a different kind so that they can support themselves.

Overall, the record evidence leaves me without questions or doubts as to Applicant’s eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the security concerns arising from her financial considerations.

Formal Findings

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

Paragraph 1, Guideline F:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	For Applicant
Subparagraph 1.e:	For Applicant
Subparagraph 1.f:	For Applicant
Subparagraph 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 national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

PHILIP S. HOWE
Administrative Judge