



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



In the matter of:)
)
) ISCR Case No. 14-02882
)
)
Applicant for Security Clearance)

Appearances

For Government: Tovah Minster, Esq., Department Counsel
For Applicant: Mark S. Zaid, Esq.

08/21/2015

Decision

MASON, Paul J., Administrative Judge:

While Applicant received and retained in her bank account most of the \$40,000 from her former fiancé for eight months in 2013, her purpose in keeping the money was not to conspire to help him avoid federal taxes. In view of Applicant’s persuasive evidence in mitigation, she has overcome the security concerns raised by the personal conduct guideline. Eligibility for access to classified information is granted.

Statement of the Case

Applicant completed and signed her Electronic Questionnaire for Investigations Processing (e-QIP), Government’s Exhibit (GE) 1, on January 16, 2014. She was interviewed by an investigator from the Office of Personnel Management (OPM) on February 27, 2014. (GE 2)

On September 2, 2014, the Department of Defense (DOD) issued a Statement of Reasons (SOR) detailing security concerns under personal conduct (Guideline E). The action was taken pursuant to 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) implemented by the Department of Defense on September 1, 2006.

Applicant submitted her response to the SOR on October 13, 2014. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on April 22, 2015, for a hearing on May 19, 2015. The hearing was held as scheduled. Two of the Government's three exhibits (GE 1, GE 3) were admitted in evidence without objection. Applicant objected to the admissibility of the summary interview (GE 2) because of the lack of an authenticating witness. See, Directive 5220.6, E3.1.20. I overruled the objection to promote the development of a full record. Applicant's 13 exhibits (AE A-AE M) were admitted into evidence without objection. On May 28, 2015, the transcript was received by DOHA, and the record in this case closed.

Findings of Fact

The first allegation of the SOR is that in February 2013, Applicant conspired with her former fiancé to help him avoid paying Federal taxes by accepting \$40,000 from him and depositing the money in her bank account. (SOR 1.a) Because the deposit was in cash and over \$10,000, the bank reported the deposit to the U.S. Department of the Treasury. The second allegation is that on her birthday in October 2013, Applicant accepted \$10,000 from her former fiancé in cash and gifts taken from the \$40,000 she had deposited in February 2013. (GE 3)

Applicant denied both allegations of the SOR. She averred that she did not conspire with her former fiancé to assist him to avoid paying federal taxes by accepting \$40,000 from him and depositing it in her bank. The \$10,000 that she received on her birthday from her former fiancé was a birthday gift. She indicated that she applied most the gift to her son's college tuition. (Answer to SOR)

Applicant is 47 years old. After nine years of marriage, she was granted a divorce in December 2004. She has a 22-year-old adopted son who recently graduated from college. She also has a 19-year-old son who recently enrolled in college. She has a 17-year-old daughter who attends high school. She has been involved in track and field events since she was five years old and Applicant has been providing transportation to these events for long time. Applicant received a bachelor's degree in English in August 1990, and a facility management certificate in December 2009. Since March 2001, she has been employed full time as an employee by a defense contractor. She has also been employed

part time as a sales person at a shoe store since October 2013. She has no criminal record and no drug or alcohol issues. She has held a security clearance since 2001. (GE 1 at 9, 14, 28; GE 2 at 3, 4; Tr. 39, 42, 50, 156-158)

Background of Relationship Leading to Transfer of Money from former fiancé to Applicant in February 2013

Applicant's former fiancé testified about: his serious tax problems that began in 2005; his transfer of \$40,000 in cash to her in February 2013, his gifting of \$10,000 (of the larger transferred amount) in cash to Applicant on her birthday in October 2013; and the termination of the relationship in December 2013.

Applicant's former fiancé traced his tax problems to 2005. Apparently, he was not filing his federal tax returns and paying his taxes. In March 2010, the Internal Revenue Service (IRS) filed a \$43,000 lien against him. A \$75,000 lien was filed against him in April 2011. Over at least the last four years, the former fiancé has been rectifying his federal tax problems by paying off a lien, enrolling in an IRS repayment plan to pay his back taxes, and submitting his tax returns on time. His current federal tax status is that the \$75,000 lien was removed when he paid the full lien amount. In addition, he entered the IRS payment plan (Fresh Start) that began in February 2014. He is paying \$1,000 a month until \$39,000 in back taxes is satisfied. Before he was accepted into the plan, he provided documentation showing that he had been making payments to the IRS since at least 2011. (AE H) Under the plan, he is repaying all back taxes instead of paying a portion of the delinquent amount and compromising (as in an offer of compromise) on the remaining delinquent amount. (AE C, D, E, F, G, H; Tr. 57-58, 62-69, 119)

Applicant's former fiancé met her at work in October 2005. Their dating relationship began in October 2008 and they started living together in February 2009. In October 2012, they were engaged, but called off the engagement in December 2012. They talked about getting engaged again. He transferred \$40,000 to her in February 2013, and gave her \$10,000 of the larger amount for her birthday in October 2013. Applicant and her former fiancé ended the affair altogether in December 2013, when she returned the \$30,000, the engagement ring, and about \$20,000 in jewelry to him.¹ (Tr. 54-57, 99-100, 140, 147-148)

SOR 1.a. On January 22, 2013, the former fiancé was thinking about giving Applicant something for Valentines Day in February 2013. He wrote out a check to himself for \$42,100, and placed the money in an envelope. At a Valentines Day dinner, he gave Applicant \$40,000 in cash because he wanted to entrust her with the money so that he would not spend the money or try to make a profit from the money by loaning it to

¹ The former fiancé paid the \$30,000 to the IRS in late December 2013. (AE H; Tr. 120)

someone. He wanted to be engaged again and ultimately marry, but he did not want to get married knowing Applicant had a security clearance and he was saddled with a federal tax lien. He wanted to provide her with a symbol of his commitment to her and her family's future. (Tr. 76-80, 81, 85-86, 126-127, 132)

Though her former fiancé vacillated several times about whether she could spend the money, he finally stated that he wanted her to hold the money for removal of his tax lien and payment of back taxes. She never touched the money and periodically asked him whether he had been contacted by the IRS. He could have applied the \$40,000 to his back taxes, but did not because he needed money to live and he was enrolled in the IRS Fresh Start program. When he gave Applicant the money, the former fiancé was not trying to conspire with her to avoid paying taxes. (Tr. 76-80, 81, 85-86, 113-114, 118-119, 126-127, 132)

Applicant testified that she had no idea her former fiancé was going to give her \$40,000 on Valentine's Day in February 2013. The former fiancé was known to give lavish gifts, particularly when he gave money. She believes she could have utilized the money for any purpose. She thought about using the money to repair her house instead of moving into her former fiancé's smaller dwelling which she considered inadequate for her family. On the other hand, Applicant and her former fiancé had never made a plan on how they would spend the money, a seminal reason why she did not use the money for any purpose. They never discussed wedding plans and their relationship was uneasy. She did not recommend her former fiancé use the money for his IRS issues because she did not view his tax issues as her own. She did not want to jeopardize her good credit. Applicant never conspired with her former fiancé to accept the \$40,000 to help him avoid paying taxes. She held the money from February until her birthday in October 2013, when the former fiancé gave her \$10,000 of the total. In December 2013, she ultimately returned the remaining \$30,000 to Applicant in six segments over a two-day period. (GE 2 at 3; Tr. 137-143, 149-150, 162-170, 177-178, 181-182)

SOR 1.b. Applicant's former fiancé realized that he and Applicant had experienced a turbulent relationship in 2013 leading up to her birthday on October 27, 2013. He wanted to present Applicant with a memorable gift that would symbolize his unselfishness and love for her. He also realized that her son needed tuition for the next college semester. The former fiancé recalled that they took the entire \$40,000 out her account and put it in his account.² On the evening of her birthday, he gave her \$10,000 in a shoe box. Witness Y was present in the kitchen along with Applicant's children. Applicant appeared to be genuinely surprised and relieved by the gift because it meant that her second son could

² Applicant recalled that they only took out \$10,000. (Tr. 143)

continue with college without her having to take out a loan. (AE K (video); Tr. 90-98, Tr. 146-147, 171)

There was no precipitating event to the parting of ways between Applicant and her former fiancé in December 2013. The five-year relationship was going nowhere because after his proposal in October 2012, her former fiancé did not appear to be moving any closer to marriage. Though she did not believe that his financial issues were a reason for the separation, she had been divorced for 10 years and had become very independent in taking care of herself and her family. She was not ready to dwell in a continuing tumultuous relationship with her former fiancé. Other than the emails from March to October 2014, Applicant had no conversations with her former fiancé about his prospective hearing testimony. The former fiancé recalled that he contacted her two or three times since they ended their relationship in December 2013. (AE M; Tr. 100, 158, 172)

Character Evidence

Applicant's first witness (Witness X) testified that she has been in the intelligence and security field for about 10 years. She has known Applicant professionally for about two and one-half years. She has observed Applicant's work-demeanor on a daily to weekly basis. Witness X discussed the SOR with Applicant, who told her that she did not intend to conspire. According to witness X, the SOR allegations definitely did not fit Applicant's character. She executes her daily duties conscientiously and has always been known to follow the rules. She demonstrates consistent security vigilance. Though witness X discerned a little change in Applicant's overall demeanor after her breakup with her former fiancé, the change never impacted her security responsibilities. Witness X admires Applicant's knack of successfully balancing her family responsibilities with her security responsibilities at work. Witness X believes Applicant warrants a position of trust with the Government. (Tr. 16-28)

Witness Y is a property administrator who has been with Applicant's employer for 11 years. She has known Applicant for 40 years, having grown up with her in the same neighborhood, and having attended college with her. Witness Y and Applicant talk several times a day at work. They talk about private matters that they would not share with other people. Applicant indicated that she did not use any of the \$40,000 that she had received from her former fiancé because he had given her gifts before that she had returned to him during difficult times in the relationship. (Tr. 28-36)

Witness Y was at Applicant's house on her birthday, October 27, 2013. When Applicant received the \$10,000 gift, she was visibly surprised. She used the money to pay for her son's college tuition. Witness Y has seen the SOR and Applicant's answer and does not believe Applicant would engage in that type of conduct. Applicant told her that the allegations were untrue. Further, Applicant is very supportive of her children's sport

activities and she is active in her church functions. She would not do anything to jeopardize her family. (GE 1 at 3; Tr. 36-51)

Applicant's former fiancé testified that she is trustworthy, honest, and a reliable friend. She is very independent and dedicated to her family. (Tr. 104)

In Applicant's performance evaluations for 2012 and 2013, she "achieved expectations." Regarding her 2012 evaluation, the manager noted that she has the "highest levels of human behavior and personal integrity." (AE A)

Applicant submitted two character references. Reference 1, an engineer, has known Applicant since they met at work in 2001. In 2009, reference 1 left Applicant's employer for other employment, and is currently a senior software engineer for another company. He has never known Applicant to act in an unlawful manner. He does not believe Applicant would intentionally commit tax fraud or jeopardize her professional reputation. Based on her decision-making abilities and her trustworthiness, the engineer recommends that she be granted a security clearance. (AE J)

Reference 2, a nurse practitioner, has held a security clearance since 2001. She has known Applicant as a childhood friend. Reference 2 and Applicant lived in an apartment for a year and became close friends. Other than the information Applicant told reference 2 about circumstances leading up to the allegations in the SOR, reference 2 has no independent knowledge of the issues. However, based on 30 years of friendship, this alleged conduct is inconsistent with her character and beliefs. Reference 2 completely trusts Applicant and recommends her for a position of trust. (AE L)

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the AG. Each guideline lists potentially disqualifying conditions and mitigating conditions, which are useful in evaluating an applicant's eligibility for access to classified information.

The disqualifying and mitigating conditions should also be evaluated in the context of nine general factors of the whole-person concept so that all available information, past and present, favorable and unfavorable, is a part of the decision for or against an applicant's security clearance application. Such decisions entail a certain degree of legally permissible extrapolation as to the potential, rather than actual, risk of compromise of classified information.

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 of establishing that it is clearly consistent with the national interest to grant him a security clearance.

Analysis

Personal Conduct

The security concern for personal conduct is set forth in AG ¶ 15:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

The potentially pertinent disqualifying condition under AG ¶ 16 is:

(c) credible adverse information in several adjudicative areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard classified information.

Applicant demonstrated poor judgment when she accepted and held the \$40,000 that she received from her former fiancé in February 2013, instead of applying her security knowledge and refused to accept the money because of the amount, and the fact that it was in cash. However, I find there is insufficient evidence to conclude that by accepting the money, Applicant was conspiring with her former fiancé to help him avoid paying federal taxes. Moreover, while she may have not known the details of her former fiancé's IRS issues, she knew he had tax problems and should have pressed him to transfer the money to the IRS. Sufficient credible adverse information is present in the record to support questionable judgment, untrustworthiness, and an unwillingness to abide by rules and regulations within the ambit of Guideline E. AG ¶ 16(c) is established with regard to SOR 1.a. Concerning SOR 1.b, since I have found that Applicant did not conspire to assist her former boyfriend in hiding his legitimate earnings in February 2013, I find that Applicant's \$10,000 gift is not a violation of the personal conduct guideline.

The mitigating conditions under AG ¶ 17 that are potentially pertinent are:

(c) the offense was so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate stressors, circumstances, or factors that caused untrustworthy, unreliable or other inappropriate behavior, and such behavior is unlikely to recur.

Applicant's poor judgment in accepting \$40,000 in cash from her former fiancé occurred less than three years ago. She exacerbated her poor judgment by keeping most of the money in her bank account from February to December 2013, instead of imploring him to apply the money to his IRS obligations. However, her conduct occurred under unique circumstances that are unlikely to recur, particularly because of the compelling character evidence from her current and former coworkers, and friends. AG ¶ 17(c) has some application.

Having observed Applicant's demeanor and conduct during hearing, I am convinced that she wanted the relationship to succeed. The most effective action she took to stop the accompanying stress of the relationship was to end it in December 2013, and return the cash and other jewelry that her former fiancé had given her. Applicant receives full application under AG ¶ 17(d).

Whole-Person Concept

I have examined the evidence under the disqualifying and mitigating conditions of the personal conduct guideline. I have also weighed this case in the context of nine factors of the whole-person concept. These factors are set forth in 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 the participation was 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.

The ultimate determination of whether to grant eligibility for a security clearance must be a commonsense judgment based on careful consideration of the guidelines and the whole-person concept. See AG ¶ 2(c).

Applicant is 47 years old and has been divorced for 10 years. She received a bachelor's in English in August 1980 and a facility management certificate in December 2009. Her strong family ethic has worked for her oldest son who recently graduated from college, and another son who is in college. Her daughter is running track in high school. She has produced a solid work performance and is known for following the rules as she carries out her security responsibilities.

In February 2013, Applicant exercised a lapse in judgment partially due to her desire to make an unworkable relationship work. As she and witness Y testified, Applicant was aware of the ongoing instability in the relationship. The most beneficial move that she made was to return the \$30,000 and all the other personal items to her former fiancé in December 2013, symbolizing a formal end to the involvement. Considering the entire record in the context of the specific disqualifying and mitigating conditions and the general factors of the whole-person concept, Applicant has mitigated the security concerns related to personal conduct.

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 (Personal Conduct):	FOR APPLICANT
Subparagraphs 1.a, 1.b:	For Applicant

Conclusion

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

Paul J. Mason
Administrative Judge