

DATE: December 6, 2006

In re:

SSN: -----

Applicant for Security Clearance

CR Case No. 05-17152

DECISION OF ADMINISTRATIVE JUDGE

LEROY F. FOREMAN

APPEARANCES

FOR GOVERNMENT

Nichole Noel, Esq., Department Counsel

FOR APPLICANT

Pro se

SYNOPSIS

In February 2003, Applicant and her husband were assessed with uncollected state sales taxes for a golf cart business they sold in 1999. The sales taxes were not collected because purchasers fraudulently represented the intended uses for the carts. Applicant fell behind on her debts when her husband underwent numerous emergency surgeries and was unable to work from December 2004 to February 2006. She has challenged the tax assessment, contacted most of her creditors, and negotiated payment plans for two debts. The security concern based on financial considerations is mitigated. Clearance is granted.

STATEMENT OF THE CASE

On May 18, 2006, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny Applicant a security clearance. This action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified (Directive). The SOR alleged security concerns raised under Guideline F (Financial Considerations) of the Directive. Applicant answered the SOR in writing on June 8, 2006, and elected to have a hearing before an administrative judge. The case was assigned to me on October 26, 2006, and heard on November 16, 2006, as scheduled. DOHA received the hearing transcript (Tr.) on November 29, 2006.

FINDINGS OF FACT

Applicant's admissions in her answer to the SOR and at the hearing are incorporated into my findings of fact. I make the following findings:

Applicant is a 51-year-old senior manufacturing support specialist for a federal contractor. She was married in July 1973 and divorced in September 1978. She married her current husband in December 1978. She has one adult child and two adult stepchildren, one of whom is deceased. She has held a clearance since August 1988 (Government Exhibit (GX) 1

at 5; Tr. 8).

The SOR alleges ten delinquent debts totaling about \$73,000, including a state tax lien for about \$35,858. She admitted all the debts alleged in the SOR.

Applicant's husband is 52 years old. He is self-employed and works as a classic automobile restorer (Tr. 66). He has been medically unable to work full-time since 1988. He had an organ transplant in 1990 (Tr. 37-38). In December 2004, he had emergency hernia surgery (Tr. 33; Applicant's Exhibit (AX) C). The surgery was unsuccessful, and he underwent further surgery in arch 2005 and June 2005 (Tr. 36; AX B). He worked for about three weeks until he relapsed and underwent more surgery in August 2005 (Tr. 36; AX A). He relapsed again in November 2005, had more surgery, and was unable to work until February 2006. He now works 15-20 hours a week (Tr. 34-38).

Until 1999, Applicant and her husband had a golf cart business. They sold the business when her husband's son, who ran the business, was murdered (Tr. 67). They sold golf carts to golf courses and to individuals who equipped them with small truck beds and used them for agricultural purposes (Tr. 47). In 2003, they were assessed about \$35,000 for sales taxes not collected from purchasers who claimed exemption from the sales tax because the golf carts were for agricultural use. Applicant disputed the tax assessment on the ground she had no control over persons who fraudulently represented the intended use of the carts (Tr. 48). She made informal inquiries regarding settlement of the tax lien. In January 2006, she sent a letter to the state attorney general, asserting she does not owe the taxes but expressing willingness to negotiate a settlement (GX 2 at 8). She had not received a response as of the date of the hearing (Tr. 49).

Applicant was the sole provider for the family while her husband was unable to work. At the time, she was earning about \$50,000 per year (Tr. 35). Applicant's current take-home pay is about \$3,000 per month, and her husband's is now between \$1,000 and \$1,500 per month (Tr. 58). Her husband also receives \$958 per month in disability pay (Tr. 69).

Applicant and her husband own a home with an estimated market value of \$185,000, on which they owe about \$85,000. Applicant applied for a home equity loan in 2004, when her husband became disabled, but was unsuccessful because of their debt-to-income ratio (Tr. 64).

The status of the delinquent debts alleged in the SOR is summarized in the table below. The nature of each debt, amount, and date of last activity is based on Applicant's credit reports (GX 3; GX 4).

SOR	Debt	Amount	Date of Last Activity	Status	Record
1.a	State tax lien	\$35,858	Feb. 2003	Sent letter to attorney general, Jan. 2006	Tr. 49-50; GX 2 at 8
1.b	Credit card	\$2,959	Jan. 2004	Unpaid	Tr. 50
1.c	Credit card	\$3,878	Jul. 2004	Unpaid	Tr. 50
1.d	Credit card	\$316	Sep. 2004	Contacted creditor, Oct. 2006	Tr. 51
1.e	Credit card	\$1,737	Nov. 2004	Payment plan negotiated, Nov. 2006	Tr. 52; AX D
1.f	Gasoline charge card	\$995	Oct. 2004	Unpaid	Tr. 52
1.g	Gasoline charge card	\$376	May 2004	Payment plan negotiated, Nov. 2006	Tr. 53
1.h	Computer	\$389	Jan. 2005	Unpaid	Tr. 54
1.i	Debt consolidation loan	\$5,299	Oct. 2005	Creditor offered payment plan	Tr. 55

1.j	Debt consolidation loan	\$21,095	Aug. 2005	Contacted creditor, Nov. 2006	Tr. 55
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Applicant and her husband fell five months behind in their home mortgage payments while he was unable to work. They made payments in March, June, and July 2006, and the mortgage payments are now current (Tr. 56-57; AX E, F, and G). She and her husband focused first on bringing their mortgage payments up to date, and they used an income tax refund and a \$3,500 loan from her father to make the payments (Tr. 57). They are repaying her father at \$50 per month (Tr. 62).

In November 2006, Applicant negotiated a payment plan for one of her credit card accounts and a gasoline credit card account (SOR ¶¶ 1.e and 1.g). Two of the debts (SOR ¶¶ 1.i and 1.j) are for debt consolidation loans. Applicant contacted both lenders and received a payment-plan offer from one but was awaiting a response from the other (Tr. 54-55).

Applicant and her husband have car payments of \$593 per month (Tr. 58). They sold one of their two cars to eliminate a \$500 monthly car payment (Tr. 59; GX 2 at 5). They surrendered an expensive tool set used by her husband to reduce their monthly payments by \$279, and disconnected their telephone, now relying on their cell phones. (Tr. 67; GX 2 at 7).

In April 2006, Applicant submitted a personal financial statement in response to DOHA interrogatories. It reflected a net monthly remainder of about \$3.25. It reflected her husband's disability pay but not his current estimated monthly income of \$1,000 to \$1,500 (GX 2 at 7).

Applicant has not sought debt counseling, because she was under the impression that debt counseling firms were a "rip-off." She has considered contacting her employer's EAP (employee assistance program) for financial counseling but had not done so as of the hearing date (Tr. 56).

POLICIES

"[N]o 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 occupy a position . . . that will give that person access to such information." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants 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 and modified. Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive. 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 Directive sets forth adjudicative guidelines for determining eligibility for access to classified information, and it lists the disqualifying conditions (DC) and mitigating conditions (MC) for each guideline. Each clearance decision must be a fair, impartial, and commonsense decision based on the relevant and material facts and circumstances, the whole person concept, and the factors listed in the Directive ¶¶ 6.3.1 through 6.3.6.

A person granted access to classified information enters into a special relationship with the government. The government must be able to have a high degree of trust and confidence in persons with access to classified information. However, the decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. 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 which disqualify, or may disqualify, the applicant from being eligible for access to classified information. *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). "[T]he Directive presumes there is a nexus or rational connection between proven conduct under any of the Criteria listed therein and an applicant's security suitability." ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996) (quoting DISCR Case No. 92-1106 (App. Bd. Oct. 7, 1993)).

Once the government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. ISCR Case No. 01-20700 at 3; *see* 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). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* Directive ¶ E2.2.2.

CONCLUSIONS

Guideline F (Financial Considerations)

Under this guideline, "[a]n individual who is financially overextended is at risk of having to engage in illegal acts to generate funds." Directive ¶ E2.A6.1.1. A person who fails or refuses to pay long-standing debts or is financially irresponsible may also be irresponsible or careless in his or her duty to protect classified information. Two disqualifying conditions (DC) under Guideline F could raise a security concern and may be disqualifying in this case. DC 1 applies where an applicant has a history of not meeting his or her financial obligations. Directive ¶ E2.A6.1.2.1. DC 3 applies where an applicant has exhibited inability or unwillingness to satisfy debts. Directive ¶ E2.A6.1.2.3. Applicant's financial history raises DC 1 and DC 3.

Since the government produced substantial evidence to establish DC 1 and DC 3, the burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. Applicant has the burden of proving a mitigating condition, and the burden of disproving it is never shifted to the government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

A security concern based on financial problems can be mitigated by showing the delinquent debts were not recent (MC 1) or was an isolated incident (MC 2). Directive ¶¶ E2.A6.1.3.1, E2.A6.1.3.2. Applicant has multiple delinquent debts that are not yet fully resolved. I conclude MC 1 and MC 2 are not established.

Security concerns arising from financial problems can be mitigated by showing they are the result of conditions "largely beyond the person's control" (MC 3). Directive ¶ E2.A6.1.3.3. Even if Applicant's financial difficulties initially arose due to circumstances beyond her control, it is appropriate to consider whether she acted in a reasonable manner when dealing with her financial difficulties. ISCR Case No. 02-02116 at 4 (App. Bd. Sep. 25, 2003).

Applicant has encountered numerous events beyond her control. Her stepson, who ran the golf cart business, was murdered in 1999. As a result, they sold the business and lost the income from it, but they were still able to pay all their bills. The state tax lien was imposed in February 2003, long after they had sold the business. It appears that the tax liability may have been due in large part to fraudulent misrepresentations by purchasers of golf carts. Applicant has challenged the assessment and also indicated willingness to compromise it, but has not received a response from the state. In 2004, her husband became seriously ill, had several unsuccessful surgeries, and was unable to work until February 2006. The dates of last activity on the debts alleged in the SOR were within this time frame. They took numerous steps to reduce expenses, including sale of one car, surrendering an expensive tool set, and terminating their home telephone service. I conclude MC 3 is established.

A mitigating condition (MC 4) applies when an applicant "has received or is receiving counseling for the problem and there are clear indications that the problem is being resolved or is under control." Directive ¶ E2.A6.1.3.4. MC 4 is not established because Applicant has not sought financial counseling.

A security concern arising from financial problems can be mitigated by showing a good-faith effort to resolve debts (MC 6). Directive ¶ E2.A6.1.3.6. 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." ISCR Case No. 99-0201, 1999 WL 1442346 at *4 (App. Bd. Oct. 12, 1999). Evidence of past irresponsibility is not mitigated by payment of debts only under pressure

of qualifying for a security clearance.

Before receiving the SOR, Applicant began bringing her home mortgage payments up to date, challenged the state tax lien, disposed of a car, and surrendered an expensive tool set. Since receiving the SOR, she has successfully brought the home mortgage payments up to date, negotiated payment plans for a credit card account and gasoline charge account, contacted a second credit card creditor, received a payment-plan offer on a debt consolidation loan, and contacted the creditor on a second debt consolidation loan. She has reacted to her financial situation by taking significant steps to reduce her monthly expenses and generate funds to pay past due accounts. She has not yet resolved all her debts, but has diligently made substantial progress. She is not required, as a matter of law, to establish that every debt has been resolved. *See* ISCR Case No. 04-10671 at 3 (App. Bd. May 1, 2006). I conclude MC 6 is established.

Whole Person Analysis

In addition to considering the specific disqualifying and mitigating conditions under each guideline, I have also considered: (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 applicant's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent 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. *See* Directive ¶¶ E2.2.1.1 through E2.2.1.9. Several of these factors are incorporated in the above discussion of Guideline F, but some merit additional comment.

Applicant is a mature, strong, responsible woman who has held a clearance for 18 years without incident. She has steadfastly dealt with her husband's illness beginning in 1988, the murder of her stepson in 1999, the unexpected state tax lien in 2003, her husband's repeated medical setbacks in 2004, and the financial impact of her husband's setbacks. She had no history of financial problems until she was confronted with the tax lien in 2003. She did not fall behind on her installment debts until 2004. She has methodically approached their financial situation. She has responded to her recent problems by reducing her monthly expenses, borrowing from family, and negotiating with creditors. At the hearing, she was candid, open, sincere, and very credible. Now that her husband is again able to work, the likelihood of them working their way out of financial difficulty is excellent.

After weighing the disqualifying and mitigating conditions under Guideline F, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concern based on based on her financial problems. Accordingly, I conclude she has carried her burden of showing that it is clearly consistent with the interests of national interest to continue her a security clearance.

FORMAL FINDINGS

The following are my conclusions as to each allegation in the SOR:

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

Subparagraph 1.h: For Applicant

Subparagraph 1.i: For Applicant

Subparagraph 1.j: For Applicant:

DECISION

In light of all of the circumstances in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is granted.

LeRoy F. Foreman

Administrative Judge