



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



In the matter of:

-----

SSN: -----

Applicant for Security Clearance

)  
)  
)  
)  
)  
)

ISCR Case No. 07-03037

**Appearances**

For Government: Eric H. Borgstrom, Esq., Department Counsel

For Applicant: [Redacted], Personal Representative

May 12, 2008

**Decision**

FOREMAN, LeRoy F., Administrative Judge:

Applicant submitted her security clearance application on February 27, 2006. On November 19, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny her application, citing 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 revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant acknowledged receipt of the SOR on November 28, 2007; answered it on December 15, 2007; and requested a hearing before an administrative judge. DOHA received the request on December 20, 2007. Department Counsel was prepared to proceed on January 31, 2008, and the case was assigned to me on February 14, 2008. DOHA issued a notice of hearing on February 20, 2008, scheduling it for February 28, 2008. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 19

were admitted in evidence without objection. Applicant testified on her own behalf, presented the testimony of three witnesses, and submitted Applicant's Exhibits (AX) A through D, which were admitted without objection. I granted Applicant's request to keep the record open until March 14, 2008 to enable her to submit additional evidence. On March 14, 2008 Applicant timely submitted AX E and F, and requested additional time to submit evidence. The request for an extension of time and my response extending the deadline until March 28, 2008, are attached to the record as Hearing Exhibit (HX) I. Applicant timely submitted AX G and H. Her additional evidence was admitted without objection. Department Counsel's response to AX E through H is attached to the record as HX II. Applicant's rebuttal to HX II is attached as HX III. The record closed on March 28, 2008. DOHA received the transcript of the hearing (Tr.) on March 10, 2008, but it was incomplete. A corrected transcript was requested on April 25, 2008, and received on April 30, 2008. Eligibility for access to classified information is denied.

## **Procedural and Evidentiary Rulings**

### **Notice of Hearing**

The written hearing notice was dated February 20, 2008, and the hearing convened on February 28, 2008, giving Applicant less than the 15-day notice to which she is entitled under the Directive ¶ E3.1.8. Before the formal hearing notice was issued, she had discussed the hearing date and exchanged email with Department Counsel, and agreed to schedule the case for February 28, 2008. She waived the 15-day notice requirement, with the understanding she would be given additional time after the hearing to submit documents (Tr. 8-9). As noted above, the record was held open until March 28, 2008, and she timely submitted additional evidence. Her last submission, dated March 27, 2008, affirmatively stated, "We will not be submitting any more documents and eagerly await your decision."

### **Unauthenticated Reports of Investigation**

Department Counsel offered two personal subject interviews (GX 16 and 17 extracted from reports of investigation, without presenting an authenticating witness as required by Directive ¶ 3.1.20. I explained the authentication requirement to Applicant, and she affirmatively waived it (Tr. 51-54).

### **Credit Reports**

Applicant objected to six credit reports (GX 6 through 11), because they were outdated. I overruled the objection but explained to Applicant that she was free to present more recent credit reports or contradict the information in GX 6 through 11.

## **Findings of Fact**

In her answer to the SOR, Applicant admitted the allegation in SOR ¶ 1.a and denied the allegations in SOR ¶¶ 1.b through 1.g. Her admissions in her answer to the

SOR and at the hearing are incorporated in my findings of fact. I make the following findings:

Applicant is a 51-year-old senior electrical designer for a defense contractor. She has worked for her current employer and held a security clearance since July 1997. Her clearance was suspended in June 2007 (GX 3 at 1; Tr. 12). She studied electrical architecture in college for four years but was a few credits short of the requirements for a degree (Tr. 11-12). She was married in November 1984 and has three children.

A coworker who has worked for Applicant's employer for 25 years, holds a security clearance, and has worked with Applicant for five years described her as hard-working, very religious, devoted to her family, very frugal, and having a "heart of gold." The witness testified he was unaware of any security violations during the past five years, but that Applicant is the kind of person who would self-report any security violation (Tr. 30-37).

Another coworker who has worked for Applicant's employer for 26 years, holds a security clearance, and known her for three years described her as a reliable person who "keeps to herself." The witness would not hesitate to recommend Applicant for a security clearance (Tr. 43).

Applicant and her husband moved to the Northeast U.S. in 1988, where they both worked for a defense contractor. They found the cost of living very expensive. Applicant's husband handled the family finances, including filing income tax returns, and he decided to increase their federal income tax exemptions to "99," resulting in no taxes being withheld from their paychecks.

Applicant signed the joint returns but was unaware of her husband's action to avoid tax withholding (Tr. 75). When they filed their returns, she asked her husband why they owed so much money to the Internal Revenue Service, and she accepted his vague explanation about owing a lot of money because they made a lot of money. She does not like to be involved with money (Tr. 107).

Because no taxes were withheld, Applicant and her husband were unable to pay the federal income taxes due when they filed their returns for tax years 1989 and 1992 through 2000, resulting in the debts alleged in SOR ¶¶ 1.d, 1.e, and 1.f. They made periodic payments over the years, reducing the amount due from about \$140,688 (GX 13) to about \$75,662 (AX D). Applicant's husband testified they had been unable to negotiate a payment plan, because the IRS insisted on monthly payments of \$4,000, which they could not afford (Tr. 65, 75). In January 2008 they made an offer in compromise for \$15,000. However, as of the date the record closed, they had not received a response (Tr. 88).

Applicant and her husband did not pay state income taxes for the years 1992 to 1995, resulting in the debt alleged in SOR ¶ 1.c. (GX 14; GX 16 at 2). They moved to

another state in 1997, and a wage garnishment for \$1,679 was filed by this state against Applicant's pay (GX 12). This debt is alleged in SOR ¶ 1.b.

During the years 2000 to 2004, Applicant's husband gambled extensively. Accordingly to casino records, he lost \$8,892 in 2000, lost \$9,883 in 2001, won \$16,065 in 2003, and lost \$8,724 in 2004 (AX H). He testified Applicant tried to stop his gambling "plenty of times," but without success (Tr. 80). Her husband testified he stopped gambling "a couple of years ago," but he did not seek any counseling because he did not believe he needed it (Tr. 83). Around 2003, when Applicant learned about her husband's gambling, she took responsibility for the household accounts, but he remained responsible for filing the tax returns (Tr. 80-81).

Applicant's husband was laid off in September 2003 and was unemployed until November 2003, and then he worked only for about a month because he was hospitalized for emergency heart surgery (AX C; Tr. 64). He was unable to work for five or six months after his surgery (Tr. 85). He worked for a defense contractor from December 2006 to May 2007, when he was laid off. He limited his work hours to 32 hours per week because of his health. He was unemployed in May and June 2007, was hired by a government contractor, and laid off again after three weeks. He has worked for his current employer, a government contractor, since June 2007 (GX 4 at 8).

In early 2004, Applicant and her husband made an offer in compromise, intending to pay their delinquent taxes with a \$30,000 loan from her brother-in-law if the offer was accepted (Tr. 65; GX 5). They received the loan but their offer in compromise was rejected.

In October 2004, Applicant and her husband filed a Chapter 7 bankruptcy petition. They listed total assets of \$35,455 and liabilities of \$327,519. They received a discharge in January 2005 (GX 18 and 19). The tax debts were not discharged. Their bankruptcy petition and discharge are alleged in SOR ¶ 1.a.

The \$30,000 loan from Applicant's brother-in-law was not listed on the bankruptcy petition (GX 18) and apparently was not discharged. Applicant's husband testified there is no fixed payment schedule for this debt, but they have continued to make periodic payments totaling about \$7,000 (Tr. 85).

Applicant and her husband do not maintain a household budget (Tr. 87). Her husband testified they pay their bills as they come in, and they have only \$500 left at the end of the month (Tr. 66, 87). However, the evidence about their financial situation is conflicting. In July 2006, Applicant told a security investigator that they had a net monthly remainder of about \$5,000. She also told the investigator she has about \$15,000 in her 401(k) account and \$4,000 in bank savings (GX 16 at 3). In August 2007, Applicant submitted a personal financial statement reflecting total household income of \$9,666 per month, monthly expenses of \$4,769, debt payments of \$2,361, a net remainder of \$2,536, and savings of only \$300 (GX 4 at 9).

As of the date of the hearing, Applicant and her husband had made a \$600 payment on the state tax garnishment for \$1,679 alleged in SOR ¶ 1.b (AX E and F), satisfied the state tax lien alleged in SOR ¶ 1.c (AX G at 2), and were awaiting a response to their offer in compromise of the federal income tax debts alleged in SOR ¶¶ 1.d, 1.e, and 1.f (AX D). They had disputed the credit card entry showing a delinquent credit card account alleged in SOR ¶ 1.g, and the adverse credit report entry had been corrected (AX G at 3).

## **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 have 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 criteria contained in the revised adjudicative guidelines (AG). 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 over-arching adjudicative goal is a fair, impartial and common sense 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 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.

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, a decision to deny a security clearance is not necessarily a determination as to the loyalty of the applicant. 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 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 AG ¶ 2(b).

### Analysis

The security concern relating to Guideline F is set out in AG ¶ 18 as follows:

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.

Several disqualifying conditions under this guideline could raise a security concern and may be disqualifying in this case. AG ¶ 19(a) is raised where there is an “inability or unwillingness to satisfy debts.” AG ¶ 19(b) is a two-pronged condition that is raised where there is “indebtedness caused by frivolous or irresponsible spending and the absence of any evidence of willingness or intent to pay the debt or establish a realistic plan to pay the debt.” AG ¶ 19(c) is raised when there is “a history of not meeting financial obligations.” AG ¶ 19(e) is raised when there is “consistent spending beyond one’s means, which may be indicated by excessive indebtedness, significant negative cash flow, high debt-to-income ratio, and/or other financial analysis.” AG ¶ 19(g) is raised by “failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same.”

Applicant’s financial history raises AG ¶¶ 19(a), (c), and (e). AG ¶ 19(b) is not raised because, while there is evidence of her husband’s irresponsible gambling, there is no evidence of “frivolous or irresponsible spending” on her part. To the contrary, the evidence shows her to be frugal.

It appears Applicant was not aware of her husband’s fraudulent tax scheme. She signed the joint tax forms without examining them, even after discovering they owed large sums when they filed. Her passive participation in the tax fraud was culpably negligent, but it does not raise AG ¶ 19(g).

Since the government produced substantial evidence to raise the disqualifying conditions in AG ¶¶ 19(a), (c), and (e), the burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

Security concerns based on financial problems can be mitigated by showing that “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.” AG ¶ 20(a). This is a compound mitigating condition, with three disjunctive prongs and one conjunctive prong. It may be established by showing the conduct was “so long ago,” or “so infrequent,” or “occurred under such circumstances that it is unlikely to recur.” If any of the three disjunctive prongs are established, the mitigating condition is not fully established unless the conduct “does not cast doubt on the individual’s current reliability, trustworthiness, or good judgment.”

The first prong (“so long ago”) is not established, because the tax debts are still not resolved. The second prong (“so infrequent”) also is not established because Applicant has a long history of financial problems. The third prong (“unlikely to recur”) is not established because Applicant remains passive about financial matters and continues to trust her husband to handle all tax matters. Her lack of attention to her tax situation even after she suspected something was amiss casts doubt on her good judgment. I conclude ¶ 20(a) is not established.

Security concerns under this guideline also can be mitigated by showing that “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.” AG ¶ 20(b). Both prongs, i.e. conditions beyond the persons’s control and responsible conduct, must be established.

The financial problems caused by Applicant’s husband’s compulsive gambling, periods of unemployment, and serious illness were beyond her control. His tax fraud was not beyond her control, because she chose not to exercise control. The unresolved debts are all related to delinquent taxes, triggered by her husband’s tax fraud and her failure to examine the tax returns before signing them. I conclude AG ¶ 20(b) is not established.

Security concerns under this guideline also can be mitigated by showing that “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.” AG ¶ 20(c). Neither Applicant nor her husband has received counseling of any type, and their tax problems are not yet under control. AG ¶ 20(c) is not established.

Security concerns under this guideline also can be mitigated by showing that “the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.” AG ¶ 20(d). 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).

Applicant and her husband successfully settled the state tax lien alleged in SOR ¶ 1.c. They have made periodic payments on their delinquent federal taxes for several years but have been unable to negotiate a payment plan. Applicant’s husband testified they have a net monthly remainder of only about \$500 and cannot afford the \$4,000 monthly payment demanded by the IRS. However, in July 2006 Applicant told a security investigator they had a monthly remainder of \$5,000. In her personal financial statement in August 2007, she reported a monthly remainder of only \$2,536. This conflicting financial information makes it impossible to determine whether Applicant and her husband could have afforded the payment plan offered by the IRS. They have not received an answer to their offer in compromise. In light of the conflicting evidence regarding their financial situation, I conclude AG ¶ 20(d) is not established.

Security concerns under this guideline also can be mitigated by showing “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.” AG ¶ 20(e). Applicant and her husband successfully disputed the credit report showing a delinquent credit card debt and they provided documented proof that the dispute was resolved in their favor. I conclude AG ¶ 20(e) is established for the credit card debt alleged in SOR ¶ 1.g.

## **Whole Person Concept**

Under the whole person concept, an 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. An 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 common sense judgment based upon careful consideration of the guidelines and the whole person concept.



Applicant presented herself at the hearing as soft-spoken, somewhat shy, and sincere. She dislikes dealing with money. It was clear that her husband is the dominant figure in the management of family finances, and she trusts him in spite of his track record of tax fraud and excessive gambling. She and her husband do not maintain a family budget, and they have no firm plan for resolving their tax situation if the offer in compromise is rejected. Unless their tax situation is resolved, she will remain vulnerable to pressure, coercion, exploitation, or duress. She has entrusted resolution of the tax debts to her husband, whose track record on financial management does not inspire confidence. Given her personality and distaste for financial matters, it appears likely that she will continue her passive, uninvolved approach to their tax situation.

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 not mitigated the security concerns based on financial considerations. Accordingly, I conclude she has not carried her burden of showing that it is clearly consistent with the national interest to continue her eligibility for access to classified information.

### **Formal Findings**

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

Paragraph 1, Guideline F (Financial Considerations): AGAINST APPLICANT

Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	Against Applicant
Subparagraph 1.e:	Against Applicant
Subparagraph 1.f:	Against Applicant
Subparagraph 1.g:	For 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 continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

LeRoy F. Foreman  
Administrative Judge