



DEPARTMENT OF DEFENSE  
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of: )  
 )  
----- ) ISCR Case No. 07-13491  
SSN: ----- )  
 )  
Applicant for Security Clearance )

**Appearances**

For Government: Eric H. Borgstrom, Esquire, Department Counsel  
For Applicant: *Pro se*

March 14, 2008

**Decision**

FOREMAN, LeRoy F., Administrative Judge:

Applicant submitted her Security Clearance Application (SF 86) on May 10, 2005. On September 27, 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 Guidelines F (Financial Considerations) and E (Personal Conduct). 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 October 2, 2007; answered it on November 13, 2007; and requested a decision on the record without a hearing. On December 7, 2007, Department Counsel requested a hearing. Department Counsel was ready to proceed on January 2, 2008, and the case was assigned to me on that date. DOHA issued a notice of hearing on January 8, 2008, and I convened the hearing as scheduled on January 29, 2008. Government Exhibits (GX) 1 through 5 were

admitted in evidence without objection. Applicant testified on her own behalf, and she submitted Applicant's Exhibits (AX) A through E, which were admitted without objection. I granted Applicant's request to keep the record open until February 15, 2008, to enable her to submit additional evidence. Applicant timely submitted AX F through R by facsimile transmission, and they were admitted without objection. Original copies of AX G through R subsequently were received by mail and substituted for the facsimile copies. (AX F was a facsimile cover sheet and was not included in the submission by mail.) Department Counsel's response to AX G through R is attached to the record as Hearing Exhibit (HX) I. DOHA received the transcript of the hearing (Tr.) on February 7, 2008. The record closed on February 15, 2007. Eligibility for access to classified information is denied.

## **Procedural Rulings**

### **Counsel for Applicant**

At the hearing Applicant stated she had an attorney assisting her with her financial problems. She stated her attorney was not able to attend the hearing but was available by telephone for consultation (Tr. 4). Her attorney had not filed a notice of appearance with DOHA regarding the hearing. I explained that the hearing would not go forward over her objection, and I asked her if she desired to proceed without her attorney present. She responded in the affirmative (Tr. 5-6). Based on her affirmative waiver, I conducted the hearing with her attorney absent but available for consultation by telephone. Applicant submitted AX A, a narrative statement prepared by her attorney (Tr. 39). Her attorney prepared and submitted her post-hearing evidence (AX F through R).

### **Amendment of SOR**

On Department Counsel's motion, without objection from Applicant, I permitted amendment of SOR ¶ 2.a by substituting the word and figure "Question 38" in place of "Question 28," and amendment of SOR ¶ 2.b by substituting the word and figure "Question 39" in place of "Question 29" (Tr. 21-22).

### **Post-hearing Submission**

On February 20, 2008, I received a copy of a two-page letter addressed to Department Counsel from Applicant's attorney. I declined to consider this letter, attached to the record as HX II, because it was untimely and not addressed to me.

## **Findings of Fact**

In her answer to the SOR, Applicant admitted the allegations in SOR ¶¶ 1.b, 1.d, 1.g, 1.h, and 1.i. 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 50-year-old administrative assistant employed by a federal contractor. She has worked for her current employer since May 2005. She has never held a clearance.

For the appraisal period ending in August 2006, Applicant was rated as 3.5 on a 5-point scale. This rating placed her midway between a 3-point rating (met all requirements and expectations) and a 4-point rating (frequently exceeded requirements and expectations) (AX D). Her rating for the period ending in July 2007 was a 3.7 on the same scale (AX E).

Applicant was married in April 1983 and divorced in September 1988. She married her current spouse in October 1991. She has a 15-year-old daughter and a 10-year-old son from her current marriage (Tr. 49).

Applicant's spouse was a salesman for a telephone communications company. After the terrorist attacks on September 11, 2001, his company downsized and he lost his job (Tr. 43, 49). Her spouse is in poor health, with heart problems and severe spinal arthritis. He suffered a stroke last year (Tr. 43). He is now employed with a home appraisal company (Tr. 50).

Applicant was employed by an insurance company from December 1987 to November 2003 (GX 1 at 2). She was laid off and unemployed until June 2004, when she began working at a golf club. After seven months, she was laid off from the golf club job and was unemployed for about three and a half months. She began her current job in May 2005 (Tr. 51-52).

As a result of their unemployment, Applicant and her spouse accumulated numerous delinquent debts. The SOR alleges six delinquent debts and three unsatisfied judgments totaling about \$33,147. In the summer of 2003, they consulted an attorney about their financial situation, and they considered filing for bankruptcy (GX 5 at 2; Tr. 52-53, 58). After working with the attorney for about two years, they decided they could not afford to pay the fees involved in a bankruptcy (Tr. 59).

While considering bankruptcy and trying to save enough money to pay the fees, Applicant's spouse contacted several creditors, attempting to resolve their debts. He was unsuccessful, and they hired their current attorney about 18 months ago (Tr. 59). Their current attorney challenged several debts and negotiated settlements of the debts alleged in SOR ¶¶ 1.c and 1.h.

At the hearing, Department Counsel announced that his investigation of the charge account debt alleged in SOR ¶ 1.a revealed that Applicant was an "authorized user" of the account but not legally obligated to pay it. Accordingly, Department Counsel announced that the government would not pursue SOR ¶ 1.a and asked that it be resolved in Applicant's favor (Tr. 23).

Applicant stopped making payments on the credit card accounts alleged in SOR ¶¶ 1.b through 1.f shortly after her spouse lost his job. In July 2007, Applicant's spouse entered into a stipulation of settlement of the debt alleged in SOR ¶ 1.c, providing for monthly payments of \$50 (AX M), and Applicant produced evidence of two payments (AX B; Tr. 64)). They had not made any payments on the other credit card accounts as of the date of the hearing (Tr. 62).

Judgments were entered against Applicant in April 2005 and February 2006 for the debts alleged in SOR ¶¶ 1.g. and 1.i. No payments have been made on these judgments.

A judgment was entered against Applicant in August 2005 for the debt alleged in SOR ¶ 1.h. Applicant entered into a stipulation of settlement for this debt providing for payments of \$100 per month (AX C). She testified she started making payments in September or October 2007, but she produced no documentary evidence of payments (Tr. 70).

Applicant's post-hearing submission reflects lawsuits arising from delinquent debts that were filed against Applicant's spouse for \$3,513 in January 2007 (AX R), \$2,202 in February 2007 (AX P), and \$5,220 in July 2007 (AX Q). These lawsuits are not alleged in the SOR, and the record does not show the disposition of these cases.

The evidence concerning the delinquent debts alleged in the SOR is summarized in the table below.

<b>SOR</b>	<b>Debt</b>	<b>Amount</b>	<b>Status</b>	<b>Evidence</b>
1.a	Credit card	\$2,008	Not Applicant's debt	Tr. 23
1.b	Credit card	\$4,916	Unpaid	GX 2 at 2; GX 4 at 4; Tr. 62
1.c	Credit card	\$2,490	Making payments	GX 4; AX B; AX M; Tr. 64
1.d	Credit card	\$5,375	Unpaid	GX 2 at 2; GX 3 at 2; GX 4 at 5
1.e	Credit card	\$2,255	Unpaid	GX 2 at 2; GX 3 at 2; GX 4 at 5
1.f	Credit card	\$10,122	Unpaid	GX 2 at 2; GX 3 at 1; GX 4 at 4
1.g	Judgment	\$2,218	Unpaid	GX 2 at 2; GX 3 at 1; GX 4 at 3
1.h	Judgment	\$6,886	Making payments	GX 2 at 2; GX 3 at 1; AX C
1.i	Judgment	\$2,877	Unpaid	GX 2 at 2; GX 3 at 1

When Applicant was interviewed by a security investigator in February 2006, she had a net monthly salary of \$2,140, monthly household expenses of \$1,150, and a mortgage payment of \$1,100. She was making no credit card payments, and she had a monthly shortfall of about \$110. Her spouse was unemployed. Her mother provided financial assistance to cover the monthly shortfall (GX 5 at 2).

At the time of the hearing, Applicant's spouse had returned to work and was taking home between \$1,500 and \$2,000 each month. In addition to other household expenses, they were paying about \$200 per month for heating oil, and their mortgage

payment had increased to about \$1,200. They still receive occasional financial assistance from her mother (Tr. 79-80).

When Applicant executed her security clearance application (SF 86) on May 10, 2005, she answered “no” to question 38, asking if she had been more than 180 days delinquent during the past seven years, and “no” to question 39, asking if she was currently more than 90 days delinquent on any debt. She did not disclose the debts alleged in SOR ¶¶ 1.a through 1.f.

In her answer to the SOR and at the hearing, Applicant denied falsifying her SF 86. She testified “I think the built up pressure of trying to keep the family together, starting a new job, sorting all this out, husband ill, my mother was ill at the time, I just think I didn’t read it correctly.” She testified knew she had delinquent debts, and knew she had been working with a lawyer to resolve them (Tr. 73-74). She also testified she thought that old debts were “kind of like just washed” and no longer valid (Tr. 75). She testified she might have omitted the debts because she thought the question applied to debts like mortgage, but not credit card debts and the debts being handled by her lawyer (Tr. 75-76).

Applicant testified she was not worried about not getting a job when she filled out her SF 86 because she already had the job (Tr. 77-78). She did not remember being told she needed a security clearance for the job, and she thought the SF 86 was “just something that had to be done,” like the insurance forms and other paperwork (Tr. 78).

Applicant testified as follows about her desire to have a clearance:

For me, to have a government clearance, for lack of a better word, would be like a dream come true. My father had one. He had a career with [a federal contractor], he was very proud of that. I remember as little girl hearing, my mother said that investigators were in the neighborhood talking to the neighbors to see what kind of family man my father was. So when I got this job . . . I felt he’d be very proud of me.

(Tr. 44-45.)

### **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

### Guideline B, Financial Considerations

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." Applicant's financial history raises AG ¶¶ 19(a), (c), and (e). AG ¶ 19(b) is not raised because there is no evidence of frivolous or irresponsible spending.

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 Applicant's delinquent debts are not yet resolved. The second prong ("so infrequent") is not established

because she has numerous delinquent debts. The third prong (“unlikely to recur”) also is not established because Applicant is still financially overextended and has not resolved many of her delinquent debts. I conclude AG ¶ 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.

Applicant’s unemployment, her spouse’s unemployment, and her spouse’s illness were conditions beyond her control. She and her spouse acted responsibly, contacting creditors and seeking legal advice. They have successfully negotiated payment plans for the debts alleged in SOR ¶¶ 1.c and 1.h. I conclude AG ¶ 20(b) is 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). This mitigating condition also has two prongs that may be either disjunctive or conjunctive. If the person has received counseling, it must also be shown that there are clear indications the problem is being resolved or under control. However, if the person has not received counseling, this mitigating condition may still apply if there are clear indications that the problem is being resolved or under control.

Applicant and her spouse are receiving legal advice and assistance, but many debts are still unresolved and their financial situation is still not under control. I conclude 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). Evidence of past irresponsibility is not mitigated by payment of debts only under pressure of qualifying for a security clearance.

Applicant and her spouse lack the financial resources to resolve all their debts, but they have made good faith efforts to do so. They began their efforts in the summer of 2003, long before Applicant applied for a clearance. I conclude AG ¶ 20(d) is established.



## **Guideline E, Personal Conduct**

The concern under this guideline is set out in AG ¶ 15 as follows:

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 relevant disqualifying condition in this case is "deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities." AG ¶ 16(a).

When a falsification allegation is controverted, as in this case, the government has the burden of proving it. An omission, standing alone, does not prove an applicant's state of mind when the omission occurred. An administrative judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning an applicant's state of mind at the time of the omission. See ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004) (explaining holding in ISCR Case No. 02-23133 at 5 (App. Bd. Jun. 9, 2004)).

Applicant presented herself at the hearing as intelligent and articulate, but she gave conflicting explanations for answering the two financial questions in the negative. She was unable to articulate a plausible explanation for not disclosing her financial situation. The remainder of her SF 86 was meticulously and accurately executed. It was clear from her testimony she regarded a security clearance as a coveted badge of honor. I cannot determine whether she omitted the financial information because of embarrassment, a reluctance to explain a complicated situation, or fear that it would jeopardize her application for a clearance. I believe Applicant did not fully appreciate the gravity of her deliberate omission of relevant and material information on her SF 86. I am satisfied, however, that Applicant understood the questions, was aware of her numerous delinquent debts, and deliberately chose not to disclose them. Accordingly, I conclude the disqualifying condition in AG ¶ 16(a) is raised, shifting the burden to Applicant to explain, extenuate, or mitigate the facts.

Security concerns raised by false or misleading answers on a security clearance application may be mitigated by showing that "the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts." AG ¶ 17(a). There is no evidence Applicant made any effort to correct her answers to questions 38 and 39 until she was interviewed by a security investigator in February 2006 and confronted with the evidence of her delinquent debts. I conclude AG ¶ 17(a) is not established.

Security concerns under this guideline also may be mitigating by showing “the offense is 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.” AG ¶ 17(c). Applicant’s intentional omission of relevant and material information from her SF 86 was a felony, not a minor transgression. It involved her current application for a clearance. It is the only instance of its kind in her record. It does raise doubt, however, about her reliability, trustworthiness, and judgment. I conclude AG ¶ 17(c) is not established. No other enumerated mitigating conditions under this guideline are established.

### **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) 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. Some of the factors in AG ¶ 2(a) were addressed above, but some warrant additional comment.

Applicant has endured financial setbacks and family illness. She and her husband have tried for several years to overcome their burden of delinquent debt. They remain financially overextended and have no viable plan to get out of debt. Further delinquencies are likely to occur. Some of the delinquencies are in the name of Applicant’s spouse, but they affect the entire family, making Applicant vulnerable to pressure, coercion, exploitation, or duress.

The three delinquent debts reflected in AX P, Q, and R are not alleged in the SOR, and they may not be considered as independent grounds to deny a clearance. However, conduct not alleged in the SOR may be considered: (a) to assess an applicant’s credibility; (b) to evaluate an applicant’s evidence of extenuation, mitigation, or changed circumstances; (c) to consider whether an applicant has demonstrated successful rehabilitation; (d) to decide whether a particular provision of the Adjudicative Guidelines is applicable; or (e) to provide evidence for the whole person analysis. ISCR

Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006) (citations omitted). I have considered AX P, Q, and R for the limited purpose of evaluating Applicant's overall financial situation.

After weighing the disqualifying and mitigating conditions under Guidelines F and E, 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 and personal conduct. Accordingly, I conclude she has not carried her burden of showing that it is clearly consistent with the national interest to grant 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:	For 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:	Against Applicant
Subparagraph 1.h:	For Applicant
Subparagraph 1.i:	Against Applicant

Paragraph 2, Guideline E (Personal Conduct): **AGAINST APPLICANT**

Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	Against 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 grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

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LeRoy F. Foreman  
Administrative Judge