



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



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| In the matter of: |) | |
| |) | |
| |) | ISCR Case No. 08-07535 |
| SSN: |) | |
| |) | |
| Applicant for Security Clearance |) | |

Appearances

For Government: Emilio Jaksetic, Esquire, Department Counsel
For Applicant: *Pro Se*

June 4, 2009

Decision

HENRY, Mary E., Administrative Judge:

Based upon a review of the case file, pleadings, exhibits, and testimony, I conclude that Applicant's eligibility for access to classified information is granted.

Applicant submitted her Security Clearance Application (SF 86), on March 30, 2007. On December 30, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under Guideline F. 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 January 8, 2009. She answered the SOR in writing on February 2, 2009, and requested a hearing before an

administrative judge. DOHA received the request on January 12, 2009. Department Counsel was prepared to proceed on February 27, 2008, and I received the case assignment on March 3, 2009. DOHA issued a notice of hearing on March 6, 2009, and I convened the hearing as scheduled on April 3, 2009. The government offered eight exhibits (GE) 1 through 8, which were received and admitted into evidence without objection. Applicant testified on her own behalf. She submitted 12 exhibits (AE) A through L, which were received and admitted into evidence without objection. DOHA received the transcript of the hearing (Tr.) on April 10, 2009. I held the record open until April 17, 2009, to allow Applicant to submit additional matters. Applicant timely submitted five exhibits, AE M through AE Q, which are admitted without objection. The record closed on April 17, 2009.

Findings of Fact

In her Answer to the SOR, Applicant admitted the factual allegations in ¶¶ 1.a and 1.c of the SOR. She denied the factual allegations in ¶ 1.b of the SOR.¹

Applicant, who is 52 years old, works as a technical consultant with a contractor for a federal agency. She has worked for her employer for nearly 29 years, including for 20 years as a contractor with the same agency. Her manager for many years recommends her for a clearance, stating that she is an honest person with a strong character and excellent work ethic. A long-time friend describes her as hard-working, trustworthy, and responsible, as well as a woman of high moral character. He also recommends her for a clearance.²

Applicant married her husband 34 years ago. They have three grown children, a daughter, age 33, and two sons, ages 32 and 30. Her daughter and younger son live with Applicant and her husband. Her older son is currently incarcerated in a state corrections facility.³

In 1988, Applicant and her husband filed for Chapter 7 bankruptcy. Prior to this, her husband operated a cleaning business. Financial problems caused by loss of business created significant financial problems, which led to the bankruptcy filing. The court discharged their debts in an Order dated September 28, 1988. Applicant has not

¹When SOR allegations are controverted, the government bears the burden of producing evidence sufficient to prove controverted allegations. Directive, ¶ E3.1.14. That burden has two components. First, the government must establish by substantial evidence that the facts and events alleged in the SOR indeed took place. Second, the government must establish a nexus between the existence of the established facts and events and a legitimate security concern. See ISCR Case No. 07-18525 (App. Bd. Feb. 18, 2009), (concurring and dissenting, in part).

²GE 1 (Applicant's security clearance); AE K; AE L; Tr. 17.

³GE 1, *supra* note 2, at 9-14; Tr. 17, 32, 34.

filed another bankruptcy petition. Rather, she managed her finances and bills until recently.⁴

Applicant's husband started a hauling business after the close of his cleaning business. In 1996, Applicant's mother died, leaving her and her two brothers two properties, which included two houses. She and her husband resolved all financial problems concerning these properties within 18 months of her mother's death. Subsequent to her mother's death, her brother, who lived in another state, moved home and started living in their mother's house. To help him with resettling, Applicant and the other brother offered to pay the expenses on their mother's home. An aunt and uncle live in the second, smaller house, which they have lived in for many years prior to her mother's death.⁵

Applicant's aunt and uncle pay her \$100 to \$200 a month for their housing. For 10 years, her brother has not paid any costs towards the upkeep of property in which he lives. Recently, Applicant told this brother he needed to take financial responsibility for his housing. He recently paid her \$600 and she has requested that he pay at least \$300 a month to her. She plans to transfer the title and the mortgage on the house to this brother in May as she wants her name removed from both documents. She is current on her recurring bills.⁶

In 2006, Applicant's husband, at age 54, began dialysis treatment for renal failure. He continued to work in his business, but less often. Doctors decided that her husband was a candidate for a kidney transplant. While preparing her husband for his kidney transplant, doctors discovered her husband also had heart problems. In May 2008, doctors performed triple by-pass surgery on her husband. He has recovered from this surgery, but is not working.⁷

In the fall of 2008, doctors resumed preparing her husband for his kidney transplant. Testing revealed that her incarcerated son was a perfect match and this son offered to provide his father with a kidney. The state corrections office advised Applicant that she must pay all the costs of transporting her son from prison to the hospital and back. The state estimated the cost at \$7,800 and requested payment prior to the surgery. Tests also revealed that her husband suffered from cirrhosis of the liver. In February 2009, doctors performed a liver transplant using an organ from a cadaver and intended to the kidney transplant at the same time. The doctors decided against using her son's kidney and to use the cadaver kidney. Problems arose and the doctors postponed the kidney transplant. Applicant's husband continues on dialysis and will

⁴GE 3 (1998 bankruptcy petition); Tr. 22.

⁵Tr. 27-29.

⁶Tr. 27-30, 37-39. Because the transfer would occur several weeks after the hearing and the close of the record, documentation reflecting the transfer could not be provided.

⁷AE F (letter, dated Sept. 24, 2008); Tr. 17-19.

undergo a kidney transplant in the future. Currently, doctors are treating him for hepatitis. He applied for social security disability twice and social security denied his application twice.⁸

Applicant earns approximately \$65,000 a year. In March 2009, she received a one-time \$7,500 bonus. After deductions, her net monthly pay averages approximately \$2,300 a month. Applicant obtained a part-time job in the fall 2008. She usually works Tuesday through Saturday, 4:15 a.m. to 7:00 a.m. for a total of 13.75 hours. Her hours fluctuate each week, which impacts her net pay. This employer recently increased her hourly rate of pay from \$9.50 an hour to \$9.75 an hour. Her net pay in February 2009 totaled \$483 and for two weeks in March 2009 totaled \$156. Her monthly income from her part-time job averages \$375. Her son contributes \$250 a month to household expenses and buys groceries regularly. Her daughter generally pays the telephone bill of approximately \$200 each month and Applicant receives an average of \$150 a month for rent from her aunt and uncle. Her total monthly income averages approximately \$3,300.⁹

Since her husband's illness and loss of income, Applicant has experienced difficulties meeting her monthly expenses. Her monthly mortgage on her home, including escrow fees, totals \$1,600. The mortgage, including escrow fees, on her mother's property amounts to \$947 a month; the loan for her husband's truck is \$318; and a personal loan for husband is \$142. She pays \$330 in utilities and \$700 in other expenses, excluding groceries.¹⁰ Her monthly expenses total approximately \$4,037. Each month she incurs a deficit of approximately \$700 without including the cost of food.¹¹

Because of her husband's illness, Applicant has incurred additional unanticipated expenses. His medical treatment has been performed at a major hospital 135 miles from their home, which necessitates payment of hotel bills and other travel expenses. In November 2008, she borrowed money from her 401K retirement account to pay expenses. She also missed her mortgage payment for several months. Because the corrections department required her to pay the \$7,800 before it would transport her son, she used her mortgage money to pay the bill. During this time, she has worked with her creditors, who have been cooperative. When the doctors decided not to use her

⁸AE D (Letter, dated May 23, 2008); AE E (letter, dated Nov. 13, 2008); AE I (Dec. 22, 2008); Tr. 18, 20-21, 34.

⁹GE 2; AE M (pay sheet from part-time job); AE Q (pay sheet from contractor position); Tr. 29, 32, 58-59.

¹⁰Applicant listed life insurance as a monthly expense on her personal financial statement, but her records indicate this money is deducted from her pay check. GE 2, *supra* note 8, at 5; AE Q.

¹¹GE 2, *supra* note 8, at 5; GE 8 (Credit report, dated April 3, 2009); Tr. 56-64.

incarcerated son's kidney, the state returned the money she paid. She used this money to pay her overdue mortgage payments.¹²

Applicant acknowledged that she is behind in the taxes for the property where her aunt and uncle live and that she has tax issues related to her husband's business and business truck. She is working on these issues with staff at the tax office. She states that she has always juggled her bill payments.¹³

The credit reports of record reflect a \$45,000 and \$22,000 debt with a bank, and otherwise a generally good debt payment history. Department Counsel agreed at the hearing that these debts are the same. Thus, the SOR alleges nonpayment of the \$45,000 debt. Applicant indicated this debt relates to her husband's truck, which has now been sold and his business closed. Applicant paid this debt through a settlement with the bank.¹⁴

Applicant provided copies of her income tax returns for the tax years 2005, 2006 and 2007. In 2007, she had a significant increase in income from capital gains after selling her husband's business property. His actual income for that year was \$5,500. She did not owe taxes in any of these years; rather she received a significant refund each year. Throughout the clearance process, Applicant has provided information about her financial problems.¹⁵

Policies

When evaluating an Applicant's suitability for a security clearance, the administrative judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful in evaluating an Applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's over-arching adjudicative goal is a fair, impartial and common sense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

¹²AE G; AE H; AE J; Tr. 34-35, 54-55.

¹³Tr. 49-54, 65.

¹⁴SOR; GE 5 (Credit report, dated Apr. 6, 2007); AE 6 (Credit report, dated May 30, 2008); GE 7 (Credit report, dated Apr. 25, 2008); GE 8, *supra* note 10; Tr. 24.

¹⁵AE N (2007 tax form); AE O (2006 tax forms); AE P (2005 tax forms).

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that “[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security.” In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, 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 as to obtaining a favorable security decision.¹⁶

¹⁶After any decision, the losing party has a right to appeal the case to the Defense Office of Hearings and Appeals Appeal Board. The Appeal Board’s review authority is limited to determining whether three tests are met:

E3.1.32.1. The Administrative Judge’s findings of fact are supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record. In making this review, the Appeal Board shall give deference to the credibility determinations of the Administrative Judge:

E3.a.32.2. The Administrative Judge adhered to the procedures required by E.O. 10865 (enclosure 1) and this Directive: or

E3.1.32.3. The Administrative Judge’s rulings or conclusions are arbitrary, capricious, or contrary to law.

The Appeal Board does not conduct a “*de novo* determination”, recognizing that its members have no opportunity to observe witnesses and make credibility determinations. The Supreme Court in *United States v. Raddatz*, 447 U.S. 667, 690 (1980) succinctly defined the phrase “*de novo* determination”:

[This legal term] has an accepted meaning in the law. It means an independent determination of a controversy that accords no deference to any prior resolution of the same controversy. Thus, in *Renegotiation Board v. Bannerkraft Clothing Co.*, 415 U.S. 1, 23 [(1974)], the Court had occasion to define “*de novo* proceeding” as a review that was “unfettered by any prejudice from the [prior] agency proceeding and free from any claim that the [agency’s] determination is supported by substantial evidence.” In *United States v. First City National Bank*, 386 U.S. 361,368 [(1967)], this Court observed that “review *de novo*” means “that the court should make an independent determination of the issues” and should not give any special weight to the [prior] determination of the administrative agency.

(Internal footnotes omitted). See ISCR Case No. 07-10396 (App. Bd., Oct. 2, 2008) and ISCR Case No. 07-07144 (App. Bd., Oct. 7, 2008). In ISCR Case No. 05-01820 (App. Bd. Dec 14, 2006), the Appeal Board criticized the administrative judge’s analysis, supporting grant of a clearance for a PRC-related Applicant, and then decided the case itself. Judge White’s dissenting opinion cogently explains why credibility determinations and ultimately the decision whether to grant or deny a clearance should be left to the judge who makes witness credibility determinations. *Id.* at 5-7. See also ISCR Case No. 04-06386 at 10-11 (App. Bd. Aug. 25, 2006)(Harvey, J., dissenting) (discussing limitations on Appeal Board’s authority to reverse hearing-level judicial decisions and recommending remand of cases to resolve material, prejudicial error) and ISCR Case No. 07-03307 (App. Bd. Sept. 29, 2008). Compliance with the Agency’s rules and regulations is required. See

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the Applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline F, Financial Considerations

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

Failure or inability to live within one’s means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual’s reliability, trustworthiness and ability to protect classified information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

The guideline notes several conditions that could raise security concerns. Under AG ¶ 19(a), an “inability or unwillingness to satisfy debts” is potentially disqualifying. Similarly under AG ¶ 19(c), “a history of not meeting financial obligations” may raise security concerns. Applicant accumulated some delinquent debt and was unable to pay some obligations for a period of time after her husband became ill. The evidence is sufficient to raise these potentially disqualifying conditions, requiring a closer examination.

The guideline also includes examples of conditions that could mitigate security concerns arising from financial difficulties. Under AG ¶ 20(a), the disqualifying condition may be mitigated where “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

United States ex. rel. Acardi v. Shaughnessy, 347 U.S. 260, 268 (1954); *Lopez v. FAA*, 318 F.3d 242, 247-248 (D.C. Cir 2003); *Nickelson v. United States*, 284 F. Supp.2d 387, 390 (E.D. Va. 2003)(explaining standard of review).

on the individual's current reliability, trustworthiness, or good judgment." Applicant's financial worries arose after her husband became ill. This mitigating condition is not applicable.

Under AG ¶ 20(b), it may be mitigating where "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." Applicant's husband started dialysis in 2006 and continues with it. Over the last three years, her husband has undergone triple bypass surgery and a liver transplant. He is currently being treated for hepatitis and undergoing dialysis, while he waits for a kidney transplant. His health problems have increased incidental expenses related to his medical care and caused the loss of his income as he is not working. The medical problems of Applicant's husband are a circumstance beyond her control. Despite her significant financial problems, Applicant pays her bills. Although she has not always been timely, she works with her creditors when problems arise. She does not ignore her financial issues. I find this mitigating condition applies.

Evidence 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" is potentially mitigating under AG ¶ 20(c). Similarly, AG ¶ 20(d) applies where the evidence shows "the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts." Although Applicant has not received financial counseling, she has resolved the only debt listed in the SOR through settlement. While she continues to have some financial problems, she pays her bills and has not incurred excessive unpaid debts. Her financial issues are under control. I conclude these mitigating conditions apply.¹⁷

Whole Person Concept

Under the whole person concept, the administrative judge must evaluate an Applicant's eligibility for a security clearance by considering the totality of the Applicant's conduct and all the circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

- (1) the nature, extent, and seriousness of the conduct;
- (2) the circumstances surrounding the conduct, to include knowledgeable participation;
- (3) the frequency and recency of the conduct;
- (4) the individual's age and maturity at the time of the conduct;
- (5) the extent to which participation is voluntary;
- (6) the presence or absence of rehabilitation and other permanent behavioral changes;
- (7) the motivation for the conduct;
- (8) the potential for pressure, coercion, exploitation, or duress; and
- (9) the likelihood of continuation or recurrence.

¹⁷AG ¶¶ 20(e) and (f) are not applicable in this case.

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. The decision to grant or deny a security clearance requires a careful weighing of all relevant factors, both favorable and unfavorable. In so doing, an administrative judge must review all the evidence of record, not a single item in isolation, to determine if a security concern is established and then whether it is mitigated. A determination of an applicant's eligibility for a security clearance should not be made as punishment for specific past conduct, but on a reasonable and careful evaluation of all the evidence of record to decide if a nexus exists between established facts and a legitimate security concern.

In reaching a conclusion, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant and her husband used the bankruptcy process to discharge debts in 1987. More recently, Applicant has experienced difficulties paying her regular bills and at times, does not have enough income to pay her monthly expenses.

Under the whole person concept, the mitigating evidence is more substantial. For nearly 20 years after Applicant and her husband filed bankruptcy, they paid their bills and managed their finances. Financial difficulties arose when her husband developed renal failure in 2006 and needed to undergo dialysis on a regular basis. As his kidneys began to fail, doctors determined he would be a good candidate for a kidney transplant and that his incarcerated son was a match. In order for his son to come to the hospital to donate his kidney, the state required Applicant to pay \$7,800 for the cost of transporting and guarding her son while he was out of prison. In preparation for his transplant, doctors discovered first a heart problem, necessitating triply by-pass surgery, and later cirrhosis of the liver, which lead to a liver transplant and a delay in the kidney transplant. During this time, the financial contribution of Applicant's husband to household expenses ended. Her younger son and daughter are now living at home and do help with some monthly household expenses.

Applicant and her brothers decided to keep their mother's properties after she died in 1996. For more than 10 years, Applicant has paid the cost of these properties, while receiving no financial assistance from her brother who lives in the house and minimal financial assistance from her aunt and uncle who live in the second house on the property. Applicant has finally demanded money from her brother and credibly testified that she will transfer the title and mortgage to her mother's property to the brother who lives in it.¹⁸ With the loss of this expense, Applicant will have sufficient money each month to cover her living expenses.

During the last three years, Applicant has worked diligently to keep her bills paid and her expenses under control. She has not lived excessively. She contacted her creditors about her financial problems and worked with them to resolve payment issues.

¹⁸Future promises are not relevant to a determination of an Applicant's security worthiness. In this case, her track record for managing her debt shows she will follow through on this decision.

Her regular expenses are paid. Her debts cannot be a source of improper pressure or duress. Of course, the issue is not simply whether all her debts are paid—it is whether her financial circumstances raise concerns about her fitness to hold a security clearance. While she still has financial issues, particularly with property taxes, these issues do not raise security concerns, as her track record indicates she will resolve her remaining tax issues. (See AG ¶ 2(a)(1).)

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

Formal Findings

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

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|---------------------------|---------------|
| Paragraph 1, Guideline F: | FOR APPLICANT |
| Subparagraph 1.a: | For Applicant |
| Subparagraph 1.b: | For Applicant |
| Subparagraph 1.c: | For Applicant |

Conclusion

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

MARY E. HENRY
Administrative Judge