



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



In the matter of:)	
)	
)	ISCR Case No. 08-07716
SSN:)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Ray T. Blank, Jr., Esquire, Department Counsel
For Applicant: Pro Se

January 26, 2009

Decision

HENRY, Mary E., Administrative Judge:

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

Applicant submitted her Security Clearance Application (SF 86), on March 19, 2008. On September 25, 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 received the SOR. She submitted a notarized, written response to the SOR allegations on October 11, 2008, and requested a decision on the written record in lieu of a hearing.

Department Counsel prepared a File of Relevant Material (FORM) and mailed Applicant a complete copy on November 3, 2008. Applicant received the FORM on November 6, 2008. She had 30 days from receipt of the FORM to file objections and submit material in refutation, extenuation, or mitigation. She did not submit a response or additional evidence. DOHA assigned this case to me on January 21, 2008. The government submitted eight exhibits, including Applicant's response to the SOR, which have been marked as Items 1-8 and admitted into the record.

Findings of Fact

In her Answer to the SOR, dated June 25, 2007, Applicant admitted the factual allegations in ¶ 1.a of the SOR, but she denied that her debt was a security concern. She also provided additional information to support her request for eligibility for a security clearance.¹

Applicant, who is 36 years old, works as a planner for a Department of Defense contractor. She began her employment with this company in September 2007. When she accepted her current position, she moved 1500 miles from home.²

Applicant attended college for two years. Since college, she has worked as a production planner or a buyer planner. She is single, but lives with a significant other. When she completed her security clearance application, she listed two debts which were past due: a bank credit card in the amount of \$12,000 and a store credit card in the amount of \$6,000.³

By May 2007, after deciding she needed to resolve these two debts, she retained the services of a credit counseling agency. Under the terms of her agreement with the credit counseling agency, Applicant paid a specific sum each month to the credit counseling agency. The credit counseling agency then placed the funds in an account and made monthly settlement offers to her creditors. She began making monthly payments of an unknown amount to the credit counseling agency in May 2007. In December 2007, she authorized the credit counseling agency to withdraw \$400 a month from her checking account, starting January 31, 2008. She has not provided any documentation which indicates that the \$400 is actually being paid.⁴

¹Item 2 (Applicant's response to the SOR).

²Item 4 (Security Clearance Application (e-QIP)) at 2, 7.

³*Id.* at 6-11, 13, 16, 22-23.

⁴Item 5 (Interrogatories and Applicant's response with attachments) at 3, 5-11; Item 6 (Credit report, dated March 27, 2008).

Applicant's monthly payments to the credit counseling agency resulted in the payment of her store credit card listed on her security clearance application. The credit report dated August 12, 2008 reflects that Applicant resolved the store credit card debt, which had increased to \$8,432.⁵

The bank debt Applicant identified in her security clearance application remains unpaid and is the basis for the SOR. Applicant has provided information which indicates that the credit counseling agency has made regular monthly settlement offers to the bank. The documentation shows different monthly offer amounts to the bank by the credit agency from May 2007 through August 2008 totaling \$7,502. The documents do not show a cumulative offer amount, acceptance of any of the monthly offer amounts by the bank, and how much money Applicant has paid to the credit counseling agency.⁶

The credit reports of record indicate that Applicant timely pays or has paid many debts. The two debts discussed above are the only two outstanding debts listed on these reports.⁷

Applicant's gross salary is \$4,100 a month and her net pay is \$3,081 a month. Her monthly expenses total \$2,542 a month and include the \$400 a month payment to the credit counseling agency.⁸

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.

⁵Item 7 (Credit report, dated August 12, 2008) at 1; Item 8 (Credit report, dated August 12, 2008) at 3. In its brief, the government acknowledges that the store credit card debt was paid through the credit counseling agency as shown on these credit reports. Brief at 3.

⁶Item 1 (SOR)

⁷Item 6, *supra* note 4; Item 7, *supra* note 5; Item 8, *supra* note 5.

⁸Item 5, *supra* note 4, at 5, 7.

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.⁹

⁹After 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:

E# 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)], the 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 recommends remanding cases to resolve material, prejudicial error) and ISCR Case No. 07-03307 (App. Bd. Sept. 29, 2008).

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 two large delinquent debts, one of which is paid. The other debt remains unpaid. 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 on the individual’s current reliability, trustworthiness, or good judgment.” Applicant’s one remaining large debt is recent and unpaid. This potentially mitigating condition does not apply.

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 has not presented any evidence which indicates that her financial problems arose because of conditions beyond her control. This potentially mitigating condition does not apply.

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.” In May 2007, several months before she began her current position, Applicant retained the services of a credit counseling agency to help her resolve her store credit card and bank credit card debts. She began making a monthly payment to this agency in May 2007, which she anticipated would be used to pay each of her debts. In turn, the agency began making monthly settlement offers to each of her creditors, which it characterizes as negotiations. While the negotiation and offer practices of the agency are not clearly explained, the credit counseling agency resolved her store credit card debt through settlement. In December 2007, Applicant authorized the credit counseling agency to withdraw \$400 a month from her checking account, beginning in January 2008, to be used to resolve her debts. Although the record does not contain documented evidence that this money has been withdrawn, Applicant lists the payment as part of her monthly expenses. In addition, because the store credit card debt has been resolved with the assistance of this credit counseling agency, I infer that the \$400 monthly payment is being held by the credit counseling agency until a resolution can be reached with the creditor for the bank credit card debt. I also find that Applicant’s payments to the credit counseling agency constitute a good faith effort to resolve her one remaining debt because she is relying on the credit counseling agency to help her repay this debt through a settlement resolution. Thus, I conclude these potentially mitigating conditions apply.¹⁰

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

¹⁰The mitigating conditions in ¶¶ 20(e) and 20(f) do not apply in this case.

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.

The mitigating evidence under the whole person concept is more substantial. In reaching a conclusion, I considered the potentially disqualifying and mitigating conditions, as well as all the evidence of record, in light of all the facts and circumstances surrounding this case. In early 2007, Applicant recognized that she needed to resolve two large outstanding debts. She retained a credit counseling agency to help her, and by May 2007, she had begun payments to the credit counseling agency. She made this decision months before she started her current position and nearly a year before she completed her security clearance application.

With the help of the credit counseling agency, Applicant reached a settlement agreement with creditor for the store credit card debt of more than \$8,000 and paid the debt. She continues to pay the credit counseling agency, which continues to make settlement offers to the holder of the bank credit card debt. Although this debt is not paid, Applicant is not required to pay her old debts in full to hold a security clearance. She must make an effort to resolve her outstanding debts. In this case, Applicant has worked towards her debt resolution for nearly two years. She continues to work through the credit counseling agency to pay the bank credit card debt. Given that this debt is close to \$15,000, it will take time for her to accumulate sufficient funds to pay the debt. Her decision to pay the credit counseling agency \$400 a month shows her determination to pay this debt.

Applicant pays her other bills in a timely manner and has regularly done so. She lives within her financial means, not above her income level. Significantly, she has taken affirmative action to pay or resolve her two largest, delinquent debts. 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 her bank card debt is unpaid, the unpaid status is insufficient to raise a security concern because she is making a good faith effort to pay this debt through the credit counseling agency. (See AG ¶ 2(a)(1).) Having weighed her efforts and assumption of responsibility for her old debts against the fact that the credit reports do not show the bank credit card debt paid in full, I find that Applicant has mitigated the government's security concerns about her finances.

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:

Paragraph 1, Guideline F: FOR APPLICANT

Subparagraph 1.a: 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