



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



In the matter of:)
)
-----) ISCR Case No. 08-08433
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: James F. Duffy, Esquire, Department Counsel
For Applicant: Adrienne E. Trent, Esquire

January 30, 2009

Decision

HARVEY, Mark W., Administrative Judge:

Applicant’s statement of reasons (SOR) alleged 14 delinquent debts totaling about \$75,000. Applicant’s husband’s arrest and confinement caused more than an 80% reduction in her family income, and most of their debts became delinquent, including their mortgage. She worked hard, increasing her income, and reducing her expenses. She obtained a divorce and filed for bankruptcy. She acted responsibly. Applicant mitigated financial considerations. Eligibility for access to classified information is granted.

Statement of the Case

On April 11, 2008, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) or Security Clearance Application (SF 86) (Government Exhibit (GE) 1). On October 10, 2008, the Defense Office of Hearings and Appeals (DOHA) issued an SOR to her,¹ pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense*

¹Government Exhibit (GE) 5 (SOR, dated October 10, 2008). GE 5 is the source for the facts in the remainder of this paragraph unless stated otherwise.

Industrial Personnel Security Clearance Review Program (Directive), dated January 2, 1992, as amended, modified and revised. The revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, are effective within the Department of Defense for SORs issued after September 1, 2006. The SOR alleges security concerns under Guideline F (Financial Considerations). The SOR detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for her, and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

On October 24, 2008, Applicant signed her SOR response, and she requested a hearing (GE 6). Department Counsel indicated he was ready to proceed on November 17, 2008, and on November 18, 2008, the case was assigned to me. At the hearing held on December 10, 2008, Department Counsel offered three exhibits (GEs 1-3) (Transcript (Tr.) 13-14), and Applicant offered 12 exhibits (Applicant's Exhibit (AE A-L) (Tr. 15-17). There were no objections, and I admitted GEs 1-3 and AEs A-L (Tr. 14, 17). Additionally, after the hearing Applicant provided four more exhibits, which were admitted without objection (AE M-P). I also admitted the SOR (GE 5), Applicant's SOR response (GE 6), and a Hearing Notice (GE 4). I received the transcript on December 17, 2008. I received post-hearing exhibits AE M-P on January 14, 2009, and closed the record that same day.

Findings of Fact²

Applicant admitted in her SOR response that she and/or her husband were responsible for the 14 SOR debts, as listed in the following table:

SOR ¶	Amount	SOR ¶	Amount	SOR ¶	Amount
1.a	\$1,187	1.f	\$8,998	1.k	\$3,061
1.b	\$211	1.g	\$11,130	1.l	\$25,086
1.c	\$70	1.h	\$420	1.m	\$3,004
1.d	\$1,572	1.i	\$1,422	1.n	\$8,773
1.e	\$1,168	1.j	\$8,984		
Total of SOR debts 1.a to 1.n is \$75,086					

Applicant was making \$35 payments on the \$70 debt in SOR ¶ 1.c. The debt in SOR ¶ 1.l of \$25,086 was owed to her mortgage note holder on her \$214,000 mortgage. She agreed to provide the mortgage holder a deed in lieu of foreclosure; however, her husband, who was in jail pending trial, declined to sign the necessary documents to transfer title. Her admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence of record, I make the following findings of fact.

²Some details have not been included in order to protect Applicant's right to privacy. Specific information is available in the cited exhibits. The facts in the Statement of Facts are from Applicant's SOR response (GE 6), unless stated otherwise.

Applicant received her bachelors degree in 1994 (Tr. 40). Applicant served on active duty in the Air Force for 12 years from 1983 to 1995 (Tr. 19). She left active duty as a technical sergeant (Tr. 19). From 1991 to 1994, her last four years on active duty, she had a top secret clearance (Tr. 20). She left active duty because she had several lengthy TDY duties and her absence was having a negative impact on her family (Tr. 21). Applicant married in 1984 and divorced in 1996 (GE 1). Her first two children were born in 1991 and 1994 (GE 1). Applicant did not receive child support payments from her first husband because her second husband adopted her two children from her first marriage (Tr. 44-45). She married the second time in 1996 (GE 1). Her third and fourth children were born in 1998 and 1999 (GE 1). Prior to her husband's arrest, she home schooled her children, and held part-time employment (Tr. 23).

Applicant's husband was arrested in August 2007 for sexually abusing her daughter. He was held pending trial through the date of Applicant's hearing on December 10, 2008. Prior to his arrest, his income from his employment was approximately \$83,000 per year (AE G, I). At the time of her husband's arrest, Applicant's salary was about \$23,000 per year. As of December 2008, Applicant was able to increase her income to about \$43,400 per year.

Applicant's husband was the primary income earner for their family (Tr. 25). In 2006, her husband's income from his employment was \$86,486 and from his military retirement pay was \$15,910 (Tr. 41; AE G, I). In 2006, Applicant's annual income was \$1,482 (Tr. 41; AE H). In 2007, Applicant's annual income was \$11,780 (Tr. 40; AE F).

In 2007, Applicant found out her husband was sexually abusing her oldest daughter (Tr. 25). She informed the police and her husband was arrested in August 2007 (Tr. 25). In September 2007, an assistant state attorney issued a 39-count information charging Applicant's husband with sexual abuse of his stepdaughter between May and August 2007 (AE J). He has been held in confinement since his arrest (Tr. 26). The prosecutors have told her that they expect to prosecute her husband unless he pleads guilty (Tr. 43-44).

Applicant left the family residence, and she and her four children initially stayed with a friend (Tr. 27). She started renting a home on October 15, 2007 (Tr. 27). Her husband's income from his employment stopped when he was arrested (Tr. 27). She received his military retirement pay from August 2007 to January 2008; however, at that point he changed his allotments (Tr. 28). At that time, she was earning \$1,600 a month from her part-time employment (Tr. 28). Her debts were not delinquent prior to her husband's arrest (Tr. 28). After his arrest, she was able to afford basic necessities such as food, utilities and rent, and counseling for her son; but, not funds for her mortgage, credit cards and family debts (Tr. 29, 30). She received food stamps from January through April 2008 (Tr. 37). A victim's aid fund paid for her daughter's counseling and prescription drugs (Tr. 29). She enrolled her children in public schools in August 2007 (Tr. 29-30). She also receives \$224 monthly from the Veteran's Administration for disability (Tr. 30). After he was arrested, she contacted all of their creditors and asked if she could make minimal payments because of the decrease in family income (Tr. 31).

She made \$35 payments to the SOR creditor in ¶ 1.c, which is the only creditor that would agree to such small payments (Tr. 31). The family owned two time shares and a home (Tr. 31-33). She wanted to sign a quit claim on her property interests in return for a release on the debts; however, her husband declined to cooperate and would not sign documents to resolve these issues (Tr. 32-33). Her residence is vacant, and the mortgage holder is attempting to sell it (Tr. 46). All of the SOR debts predate her husband's arrest (Tr. 45). She lives within her current income (Tr. 45). She does not have any car loans, is not responsible for any student loans, and has no delinquent tax debts (Tr. 51).

Applicant received advice from credit counselors in 2007 (Tr. 33; AE B). She established a budget; but the counselor advised her to file for bankruptcy because of the scope of the family debt and the lack of income to address that debt (Tr. 34; AE B). She had to establish her residence in the state where she lived for several additional months so that she could file for divorce where she currently lived (Tr. 34). Her attorney advised her to resolve her divorce, and then file for bankruptcy (Tr. 34, 42-43). She filed for a divorce on January 7, 2008 (Tr. 35; AE C). She was unable to receive child support until she filed for a contempt citation against her husband in April 2008 (Tr. 36). The court ordered \$657 monthly in child support, which was garnished from his retirement pay starting in September 2008 (Tr. 37). Her divorce hearing was in early December 2008, and her divorce was approved on December 12, 2008, with issues of visitation, alimony and child support to be adjudicated at subsequent proceedings (Tr. 42; AE N). The divorce decree barred Applicant's husband from contacting her or coming within 500 yards of her home, business, or other place where she may be present (AE N).

Applicant filed for bankruptcy on January 9, 2009 (AE O, P). She listed assets of real property valued at \$28,000 and personal property valued at about \$3,500 (AE P). Creditors holding secured claims totaled about \$27,000 and unsecured nonpriority claims totaled about \$485,500 (AE P). She included her husband's property, which had a \$139,000 mortgage, as well as the mortgage on the residence they owned jointly of \$214,000 (AE P). Her bankruptcy filing also listed the two timeshares, which she valued at \$28,000, and on which she owed more than \$25,000 (AE P). Her most significant unencumbered asset is her 1999 Plymouth Voyager, which she valued at about \$900 (AE P).

Applicant has substantially increased her income. In April 2008, a government contractor hired Applicant at a salary of \$42,000 per year (Tr. 38). After five months, the contractor increased her annual salary to \$43,400 and gave her a \$500 bonus (Tr. 38-39; AE E). In July 2008, she enrolled in an on-line masters degree program (Tr. 39). Her employer pays her tuition (Tr. 39). So far all of her grades are As (Tr. 39).

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security

emphasizing, “no 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 Applicant’s 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 [A]pplicant concerned.” See Exec. Or. 10865 § 7. See *also* Executive Order 12968 (Aug. 2, 1995), Section 3. Thus, nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant’s allegiance, loyalty, or patriotism. 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). The burden of disproving a mitigating condition never shifts to the government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[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

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, including those described briefly above, I conclude relevant security concerns are under Guideline F (Financial Considerations).

Financial Considerations

AG ¶ 18 articulates the security concern relating to financial problems:

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.

AG ¶ 19 provides two financial considerations disqualifying conditions that could raise a security concern and may be disqualifying in this case: “(a) inability or unwillingness to satisfy debts,” and “(c) a history of not meeting financial obligations.” ISCR Case No. 03-20327 at 3 (App. Bd. Oct. 26, 2006) provides, “Applicant’s credit report was sufficient to establish the Government’s prima facie case that Applicant had . . . SOR delinquent debts that are of security concern.” Applicant’s history of delinquent debt is documented in her credit report, her SOR response, her statement at her hearing, and her bankruptcy filing. The government established the disqualifying conditions in AG ¶¶ 19(a) and 19(c).

Five Financial Considerations Mitigating Conditions under AG ¶¶ 20(a)-(e) are potentially applicable:

(a) 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;

(b) 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;

(c) 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;

(d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts; and

(e) 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.

The ongoing nature of Applicant's delinquent debt is "a continuing course of conduct" under the Appeal Board's jurisprudence because those delinquent debts have not yet been discharged by the bankruptcy court. See ISCR Case No. 07-11814 at 3 (App. Bd. Aug. 29, 2008) (citing ISCR Case No. 01-03695 (App. Bd. Oct. 16, 2002)).

AG ¶¶ 20(a), 20(b) and 20(c) fully apply. Applicant's delinquent debts resulted from a condition beyond her control, and she acted responsibly under the circumstances.³ Her delinquent debts also "occurred under such circumstances that [they are] unlikely to recur and [do] not cast doubt on [her] current reliability, trustworthiness, or good judgment." Prior to her husband's arrest in August 2007, Applicant and her husband did not have any delinquent debt. After his arrest, confinement, and termination of his employment, the family income was reduced by more than 80%. The family accounts became delinquent. She obtained financial and marital/divorce counseling and advice. She then followed that advice. She significantly reduced her expenses and increased her income. Her income and new expenses are in balance. She obtained a divorce and filed for bankruptcy to end her responsibility for marital debt. She pays any new debts that arise, and as such lives within her means. Her problems are unlikely to recur because she is no longer married and has a court order barring her former spouse from contacting Applicant. She understands the importance of financial responsibility and has demonstrated the required self-discipline to avoid future delinquent debt.

AG ¶ 20(d) fully applies because Applicant established that she showed good faith⁴ in the resolution of her delinquent SOR debts. She and her husband paid their

³Even if Applicant's financial difficulties initially arose, in whole or in part, due to circumstances outside his [or her] control, the Judge could still consider whether Applicant has since acted in a reasonable manner when dealing with those financial difficulties." ISCR Case No. 05-11366 at 4 n.9 (App. Bd. Jan. 12, 2007) (citing ISCR Case No. 99-0462 at 4 (App. Bd. May 25, 2000); ISCR Case No. 99-0012 at 4 (App. Bd. Dec. 1, 1999); ISCR Case No. 03-13096 at 4 (App. Bd. Nov. 29, 2005)). A component is whether he or she maintained contact with his or her creditors and attempted to negotiate partial payments to keep debts current.

⁴The Appeal Board has previously explained what constitutes a "good faith" effort to repay overdue creditors or otherwise resolve debts:

debts before her husband was arrested and confined. After her family lost about 80% of their income, some debts could not be paid. She contacted her creditors and attempted to keep her accounts current, offering small payments in return for keeping her accounts in current status. However, all creditors except for one small account holder declined to accept the small payments and she filed for bankruptcy. Under the circumstances, bankruptcy was a prudent and reasonable response to her financial predicament. As indicated previously, she lives within her means and follows her budget. AG ¶ 20(e) does not apply. She did not dispute any delinquent SOR debts.

In sum, Applicant's overall conduct in regard to her delinquent debt does not cast doubt on her current reliability, trustworthiness, and good judgment. She was confronted with daunting financial problems when her husband was arrested for sexual molestation of her eldest daughter. More than eighty percent of the family income suddenly stopped. She is a single mother and she is responsible for four minor children. She acted prudently and responsibly, and is taking good care of her children. Her admirable qualities of self-discipline and dedication to her family are evident. Based on my evaluation of the record evidence as a whole, I conclude financial considerations are fully mitigated.

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.

In order to qualify for application of [the "good faith" mitigating condition], an applicant must present evidence showing either a good-faith effort to repay overdue creditors or some other good-faith action aimed at resolving the applicant's debts. The Directive does not define the term 'good-faith.' However, the Board has indicated that 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.' Accordingly, an applicant must do more than merely show that he or she relied on a legally available option (such as bankruptcy [or statute of limitations]) in order to claim the benefit of [the "good faith" mitigating condition].

(internal citation and footnote omitted) ISCR Case No. 02-30304 at 3 (App. Bd. Apr. 20, 2004) (quoting ISCR Case No. 99-9020 at 5-6 (App. Bd. June 4, 2001)).

The ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole person concept. AG ¶ 2(c). I have incorporated my comments under Guideline F in my whole person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Applicant's dedication to her work and her country is a very positive indication of her good character and trustworthiness. She is loyal to her country. She honourably served on active duty for 12 years and held a top secret clearance for the last four years of her military service. Her record of good employment and law-abiding character weighs in her favor. There is no evidence of any security violation, or criminal activity. Her financial problems arose from her husband's criminal sexual abuse of Applicant's daughter, and not from any lack of judgment or dereliction by Applicant. She reduced her expenses and increased her income, and she brought her budget into balance. She does not have any new delinquent debt. These factors show solid responsibility, rehabilitation, and mitigation.

After weighing the disqualifying and mitigating conditions, and all the facts and circumstances, in the context of the whole person, I conclude she has mitigated the financial considerations security concern. I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my careful consideration of the whole person factors and supporting evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under the Guidelines. Applicant has mitigated or overcome the government's case. For the reasons stated, I conclude she is eligible for access to classified information.

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
Subparagraphs 1.a to 1.n:	For Applicant

Conclusion

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

Mark W. Harvey
Administrative Judge