



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



In the matter of:)
)
-----) ISCR Case No. 09-02959
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Tovah A. Minster, Esquire, Department Counsel
For Applicant: *Pro Se*

October 27, 2009

Decision

HARVEY, Mark, Administrative Judge:

Applicant's statement of reasons (SOR) listed a bankruptcy in 2006 and six debts totaling \$66,159. She denied one debt for \$276 and admitted responsibility for the other five debts. None of the five SOR debts were paid or otherwise resolved. She failed to mitigate financial considerations security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On December 8, 2008, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) or Security Clearance Application (SF 86) (Item 6). On June 30, 2009, the Defense Office of Hearings and Appeals (DOHA) issued an SOR to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified; 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.

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 Applicant, and recommended referral to an administrative judge to determine whether Applicant's clearance should be granted, continued, denied, or revoked.

On July 29, 2009, Applicant responded to the SOR allegations, and elected to have her case decided on the written record in lieu of a hearing (Item 4). A complete copy of the file of relevant material (FORM), dated August 11, 2009, was provided to her, and she was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation.¹ Applicant did respond to the FORM. The case was assigned to me on October 8, 2009.

Findings of Fact²

In Applicant's response to the SOR, she admitted all of the SOR allegations, except SOR ¶ 1.f (Item 4). She also provided an explanation for her financial problems and promised to resolve her delinquent debts (Item 4). After a complete and thorough review of the evidence of record, I make the following findings of fact.

Applicant is 42-year-old employee of a defense contractor.³ She has been a project manager since November 2008. She worked as a lighting specialist from March to October 2008, and she was unemployed from July 2007 to March 2008. She was self-employed at a take-out food service establishment from October 2005 to July 2007.⁴

Applicant graduated from high school in May 1985, and did not attend college. She married in 1988 and divorced in 1990. She married in 1991 and is currently married. Her three children were born in 1992, 1994, and 1996. She has never served in the U.S. military. She has never been fired from a job or left employment under adverse circumstances. Her file does not contain any adverse information relating to police involvement. For example, she has never been charged with a felony, any firearms or explosives offense(s), and does not have any currently pending charges.

¹The Defense Office of Hearings and Appeals (DOHA) transmittal letter is dated August 12, 2009; and Applicant's receipt is dated August 18, 2009. The DOHA transmittal letter informed Applicant that she had 30 days after her receipt to submit information.

²Some details have not been included to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

³Unless stated otherwise, the facts in this paragraph and the next paragraph are from Applicant's October 24, 2007, security clearance application (Item 6).

⁴ Applicant and her partner started a food service business, which was terminated in July 2007 (Item 5). Applicant and her partner filed suit against each other for money damages in 2007 (Item 5). The case went to mediation in February 2008; however, the record does not indicate the result of the mediation or litigation (Item 5).

She has never been charged with any offense related to alcohol or drugs. She has not been arrested for or charged with any other misdemeanor-level offenses. There is no evidence that she has abused alcohol or drugs.

Financial considerations

Applicant's statement of reasons (SOR) in ¶ 1.a listed a bankruptcy discharge of her debts in September 2006. The SOR also listed six debts totaling \$66,159 as follows: ¶ 1.b (2007 default judgment—\$4,175); ¶ 1.c (IRS tax lien—\$60,605); ¶ 1.d (collection account—\$162); ¶ 1.e (collection account—\$279); ¶ 1.f (delinquent account—\$276); and ¶ 1.g (2007 default judgment—\$662) (Item 1). Her SOR response admitted all debts except she denied the debt in SOR ¶ 1.f (Item 4).

On July 29, 2009, Applicant provided a statement describing her financial problems and plans to resolve her delinquent debts.⁵ She did not subsequently provide any information about her attempts to resolve her financial problems.

In 2005, Applicant and her husband had a business. Their business had difficulty obtaining payments for services and supplies from creditors. She and her husband also had problems with the business due to inexperience (Item 5). In October 2005, Applicant and her husband filed for bankruptcy under Chapter 7 of the Bankruptcy Code. She received financial counseling as part of her bankruptcy process. In September 2006, the bankruptcy court discharged her unsecured debts (Item 7). Her bankruptcy schedules listed \$493,082 in unsecured nonpriority claims, \$46,000 in unsecured priority claims, and \$411,500 in secured claims (Item 7). Applicant used her residence as collateral for a line of credit for their company and lost her house when their business failed.

Applicant disclosed her financial problems on her security clearance application (Item 6), her response to DOHA interrogatories (Item 5), and her SOR response (Item 4). Her largest unresolved debt is an IRS tax lien for \$60,605, which related to unpaid federal payroll taxes incurred from the business Applicant and her husband owned (Items 4, 9). She has an accountant and attorney working on the IRS tax lien as well as two other city tax liens. She promised to resolve her debts. She did not provide any documents showing her communications with her creditors, accountant, or attorney concerning her efforts to dispute, pay, or otherwise resolve her delinquent SOR debts.⁶

Policies

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

⁵Unless stated otherwise, the facts in the remainder of this section are from Applicant's response to the SOR (Item 4).

⁶The FORM at pages 6-7 emphasizes the lack of documentation showing efforts to resolve the SOR debts.

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 overarching adjudicative goal is a fair, impartial, and commonsense 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. 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, I conclude the relevant security concerns are under Guideline F (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.” Applicant’s history of delinquent debt is documented in her credit reports, in her response to DOHA interrogatories, and in her SOR response. Applicant’s SOR listed a bankruptcy in 2006 and six debts totaling \$66,159. Her financial difficulties extended over several years and continue today. The government established the disqualifying conditions in AG ¶¶ 19(a) and 19(c), requiring additional inquiry about the possible applicability of mitigating conditions.

Five Financial Considerations Mitigating Conditions under AG ¶ 20 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.

Applicant's conduct does not warrant full application of any mitigating conditions because she did not act more aggressively and responsibly to resolve her delinquent debts. Her delinquent debts are "a continuing course of conduct" under the Appeal Board's jurisprudence. See ISCR Case No. 07-11814 at 3 (App. Bd. Aug. 29, 2008) (citing ISCR Case No. 01-03695 (App. Bd. Oct. 16, 2002)). Applicant does not receive credit under AG ¶ 20(a) because she did not establish that her financial problems "occurred under such circumstances that [they are] unlikely to recur." There is some residual doubt about whether she is fully committed to resolving her delinquent SOR debts and is making adequate steps to do so. AG ¶ 20(e) does not apply because she did not provide any documentation disputing any of the SOR debts.

AG ¶ 20(b) partially applies. Applicant's financial situation was damaged by creditors' failures to pay Applicant and her husband for their business' supplies and services, Applicant's unemployment, and their inexperience running a business. However, she has not provided sufficient evidence to establish that she acted responsibly under the circumstances with respect to her delinquent SOR debts.⁷

AG ¶ 20(c) partially applies. Applicant received financial counseling as part of her bankruptcy process, and she probably has otherwise learned about financial issues. Applicant has not paid, started payment plans, disputed, or otherwise resolved any of the SOR debts. She did not provide specific descriptions of her timeline for setting up payment arrangements of any SOR debts. These are some initial, positive "indications that the problem is being resolved or is under control." She has admitted her responsibility for the debts and promised to eventually resolve them. She established some mitigation under AG ¶ 20(d) because she showed some good faith⁸ in the

⁷"Even 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 creditors and attempted to negotiate partial payments to keep debts current.

⁸The Appeal Board has previously explained what constitutes a "good faith" effort to repay overdue creditors or otherwise resolve debts:

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

resolution of her SOR debts by admitting responsibility for all of her SOR debts except for one small debt and promising to resolve them.

Applicant consistently denied responsibility for the debt in SOR ¶ 1.f for \$276 (Item 4). I conclude this debt is not established as her responsibility, and find “For Applicant” in the Formal Findings on page 8, *infra*.

In sum, Applicant should have been more diligent and made greater efforts sooner to resolve her delinquent debts. In September 2006, her unsecured debts were discharged under Chapter 7 of the Bankruptcy Code. She said she is working with an attorney and accountant to resolve her \$60,605 IRS lien. She did not show any attempts to resolve her smaller SOR debts. Her steps are simply inadequate to fully mitigate financial considerations security concerns.

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.

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 that guideline, but some warrant additional comment.

Although the rationale for granting or reinstating Applicant’s clearance is insufficient to support a security clearance at this time, there are several factors tending to support approval of her clearance. Applicant deserves substantial credit for

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)).

volunteering to support the Department of Defense as an employee of a defense contractor. There is no evidence that she has a criminal record or has ever violated security. There is every indication that she is loyal to the United States, the Department of Defense, her employer, and that she is an honorable person. She does not abuse alcohol or illegal drugs. She has never been fired from a job or left employment under adverse circumstances. Her file does not contain any adverse information relating to police involvement. She is evidently not sophisticated in the area of finance. She made mistakes, and her debts became delinquent. Expenses from her failed business contributed to her financial woes. She learned some financial information as part of her financial counseling received during her bankruptcy proceeding. These factors show some responsibility, rehabilitation, and mitigation.

The whole person factors against granting or reinstating Applicant's clearance are more substantial. Failure to pay or resolve her just debts is not prudent or responsible. Applicant has a lengthy history of financial problems. She began to have financial difficulties several years ago, when multiple debts became delinquent. In June 2009, she responded to DOHA interrogatories, and on July 29, 2009, she responded to the SOR. She had ample opportunity to contact more of her SOR creditors and to make greater progress in the resolution of her SOR debts. She did not pay, start payments, dispute, or otherwise resolve any SOR debts. She made insufficient progress to resolve her delinquent debts, even though she had steady employment and ample opportunity to contact her creditors and provide documentation. She was on clear notice from her receipt of DOHA interrogatories and even more so after she received the SOR that she needed to show substantial progress in the resolution of her delinquent debts; however, she did not provide documentation showing her efforts to accomplish this security responsibility.

After weighing the disqualifying and mitigating conditions, and all the facts and circumstances, in the context of the whole person, I conclude Applicant has not mitigated the financial considerations security concerns. 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 failed to mitigate or overcome the government's case. For the reasons stated, I conclude she is not 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:	Against Applicant
Subparagraphs 1.a to 1.e:	Against Applicant
Subparagraph 1.f:	For Applicant
Subparagraph 1.g:	Against Applicant

Conclusion

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue Applicant's eligibility for a security clearance. Eligibility for a security clearance is denied.

MARK HARVEY
Administrative Judge