



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



In the matter of:)	
)	
-----)	
SSN: -----)	ISCR Case No. 09-03157
)	
)	
Applicant for Security Clearance)	

Appearances

For Government: James F. Duffy, Esquire, Department Counsel
For Applicant: William E. Cassara, Esquire

April 27, 2010

Decision

MALONE, Matthew E., Administrative Judge:

Based upon a review of the pleadings, exhibits, and transcript, Applicant's request for a security clearance is granted.

On December 29, 2008, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) to obtain a security clearance required for her job with a defense contractor. After reviewing the results of the ensuing background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) issued to Applicant two sets of interrogatories¹ to clarify or augment information about potentially disqualifying information in her background. After reviewing the results of the background investigation and Applicant's responses to the interrogatories, DOHA adjudicators were unable to make a preliminary affirmative finding² that it is clearly

¹ Authorized by DoD Directive 5220.6 (Directive), Section E3.1.2.2.

² Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.

consistent with the national interest to grant Applicant's request for access to classified information. On October 8, 2009, DOHA issued to Applicant a Statement of Reasons (SOR) alleging facts which, if proven, raise security concerns addressed in the adjudicative guidelines (AG)³ for financial considerations (Guideline F) and personal conduct (Guideline E).

Applicant timely responded to the SOR and requested a hearing. The case was assigned to me on December 18, 2009. Pursuant to a Notice of Hearing issued on December 30, 2009, I convened a hearing in this matter on January 20, 2010. The parties appeared as scheduled. The Government presented six exhibits (Gx. 1 - 6), which were admitted without objection. Applicant testified on her own behalf, and proffered eight exhibits, which were admitted without objection as Applicant's Exhibits (Ax.) A - H. DOHA received the transcript of hearing (Tr.) on January 28, 2010.

Findings of Fact

Under Guideline F, the Government alleged that Applicant owes approximately \$35,781 for six delinquent debts (SOR ¶¶ 1.a - 1.f). In response to the SOR, Applicant admitted owing each of the alleged debts but averred that she has resolved four of the debts (SOR ¶¶ 1.a, 1.b, 1.d, and 1.e), that she is making payments on another (SOR ¶ 1.c), and that she was trying to resolve a dispute about the balance due for the remaining debt (SOR ¶ 1.f).

Under Guideline E, the Government alleged that, by listing only the debt alleged at SOR ¶ 1.d in response to e-QIP questions 28.a (*In the last 7 years, have you been over 180 days delinquent on any debt(s)?*), and by answering "no" to question 28.b (*Are you currently over 90 days delinquent on any debt(s)?*), she deliberately made a false statement to the government by omitting the other debts alleged in SOR ¶ 1. In response, Applicant admitted answering both questions incorrectly, but denied intending to make a false statement to or mislead the government about her finances. Having reviewed Applicant's response to the SOR, the transcript, and exhibits, I make the following findings of relevant fact.

Applicant is 53 years old and employed by a defense contractor. She requires a security clearance to perform the duties of her position, which she has held since July 2007. Applicant enlisted in the U.S. Army Reserve in 1981, and she converted to active duty in 1983. She retired as a sergeant first class (paygrade E-7) on October 1, 2004, with 20 years of active duty service and with a 70% medical disability. After initially receiving only retired pay offset by her disability benefits, she now receives \$2,428 each month for both her disability benefits and her full retired pay. Applicant has held either a secret or top secret security clearance without incident since 1983. (Gx. 3; Tr. 22 - 25) In her current position, she is an instructor in satellite communications at a joint services

³ The adjudicative guidelines were implemented by the Department of Defense on September 1, 2006. Pending official revision of the Directive, they take precedence over the guidelines listed in Enclosure 2 to the Directive.

command. She has an excellent reputation in the workplace for reliability, professionalism, and integrity. (Tr. 26 - 29; Ax. H)

Applicant has been married three times. Her first marriage ended in divorce in August 1979 after less than 12 months. She married her second husband in August 1979, but he died in December 1982. She and her current husband have been married since April 1984. They have two grown sons (age 20 and 23), who still live with them. Applicant's husband is a long-distance truck driver, but has been unable to work since May 2008 for medical reasons. (Gx. 1; Tr. 70)

After Applicant retired from the Army, she went to work for defense contractors using her military technical expertise. In May 2006, she and her husband went into business with their sons by purchasing a store that sold a particular type of cards to collectors and as part of board games. They also hosted tournaments for these games and sold refreshments in a café-style area of the store. Applicant and her husband paid about \$10,000 cash for the store, but also relied heavily on personal credit cards because they lacked sufficient capital to meet their start-up expenses. They soon realized, however, that they were in over their heads. For example, the previous owner's license was invalid and there were several fire and health code violations to be resolved. Within about six months, their sons came to them and advised that they all should get out of the business. But Applicant did not close the store until November 2007, because she was still optimistic about making the business work. (Answer to SOR; Gx. 2; Tr. 30 - 38)

Applicant acknowledged that she and her husband did not properly research the business before they bought it, and that she made a lot of mistakes when she started the business. She also attributed part of their business failure to the opening of two other similar stores in the area after they bought the business. The unforeseen competition kept Applicant from raising prices to increase revenue. (Answer to SOR; Gx. 2; Tr. 39)

Applicant and her husband accrued nearly \$60,000 in credit card and retail credit debt through their failed business. Applicant insists that they never stopped paying what they could on their debts, but that they eventually fell so far behind in their payments that the accounts became delinquent. (Tr. 61) Their debts were subsequently charged off as business losses by the creditors or were referred to collection agencies. Appellant settled a Discover Card debt of \$4,261 (SOR ¶ 1.a) in June 2007. (Answer to SOR; Gx. 6; Ax. E) A \$4,223 debt to a Sears account underwritten by CitiBank (SOR ¶ 1.b) was also settled in October 2009. (Answer to SOR; Ax. E) Applicant has been paying \$200 each month on a \$15,000 Bank of America card account that was as high as \$17,000. She estimates the balance due is now about \$14,000. She is negotiating with the creditor, the Portfolio collection agency (SOR ¶ 1.c), in response to an offer to settle this debt for \$9,000. At the very least, she will increase her monthly payment when she has the funds. (Answer to SOR; Ax. E; Tr. 39 - 42) An American Express card account for \$5,579 (SOR ¶ 1.e) was also settled in October 2009. (Answer to SOR; Ax. E)

Before they bought the store, Applicant and her husband had an account with Sam's Club, a wholesale warehouse, where they bought many of their household

groceries and other goods. When they started their small business, they obtained another account to use for the store. Both accounts became delinquent due to the failure of their business. Applicant still owes a \$2,304 debt (SOR ¶ 1.d) on one of the accounts. She claimed she had been paying both accounts, sometimes in person, but that the payments were misdirected. She is still working with this creditor to resolve debt. (Answer to SOR; Gx. 2; Gx. 3; Tr. 43 - 45)

Applicant also incurred a \$4,414 debt (SOR ¶ 1.f) to a small web design firm to start a website for her business. She paid them \$2,000 at the outset, but the web designer went out of business after only partially completing the work. Because the firm lost the materials and information Applicant had given them, she could not even try to run the website herself. After disputing the debt, it was settled in full in November 2009. (Answer to SOR; Tr. 62; Gx. 3; Ax. E)

On March 4, 2009, Applicant was interviewed for her clearance by a government investigator. During that interview, she provided a personal financial statement (PFS) that showed she had about \$2,700 remaining each month after expenses and debt payments. In July 2009, she responded to DOHA interrogatories and submitted another PFS, which reflected both an increase in her debt payments and the loss of her husband's income due to illness. Her current net remainder each month is about \$560. (Answer to SOR; Gx. 2; Gx. 3)

Applicant and her husband live well within their means. They file their taxes on time, and they have owned their house for about 16 years but have not borrowed against their equity. They meet all of the current obligations on time. (Tr. 71 - 73) Aside from the debts incurred through her failed business, their only other recent financial challenge arose when one of their sons was arrested on a charge that was ultimately dropped. Applicant and her husband paid nearly \$7,000 in legal fees for their son. They made most of their debt payments and covered their son's legal fees because of a recent inheritance from the estate of Applicant's mother-in-law. (Gx. 2; Answer to SOR; Tr. 73)

Applicant submitted her e-QIP in December 2008 to begin the periodic reinvestigation of her security clearance eligibility. She knew from past experience that she would be interviewed about her answers to the e-QIP. (Tr. 50) As alleged in SOR 2.a, under Section 28 (*Your Financial Delinquencies*) she answered "yes" to question 28a (debts more than 180 days delinquent) and listed only one of her delinquent debts. She also answered "no" to question 28b (debts currently more than 90 days delinquent). Applicant testified that she had not seen a credit report before filling out the form and that she was unsure what she should list in response to either question. In hindsight, she realizes she should have listed everything, but, as she acknowledged to the government investigator in March 2009, she was lazy and decided not to do so. (Tr. 50 - 53, 63 - 67; Gx. 2)

However, when she completed her e-QIP, Applicant also stated in the "Additional Comments" section of Section 27 (*Your Financial Record*):

During the years of my own business...I occurred (sic) many bills. I maxed out credit cards, and took out two loans. With the closing of the business I have made arrangements to pay the bills with most of my creditors. I would be further long (sic) in paying these bills, but my husband has lost his job due to medical reasons. This year 2008, my son has been falsely accused of a offense. I have paid close to \$6,000 in just bail money, plus paid most of his bills. We have moved him and his family into our home till this has been cleared. All bills will be paid. (Gx. 1)

In the "Additional Comments" section of Section 28, she stated:

Over the past 10 years we were good about keeping bills paid until 2005, when we started the business. My husband and I have unfortunately keep (sic) our credit bills on the high side. My current job is the best paying I have ever had. This last year we paid off two cars, and put a good dent in our debt. (Id.)

Policies

A security clearance decision is intended to resolve whether it is clearly consistent with the national interest⁴ for an applicant to either receive or continue to have access to classified information. Each decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information,⁵ and consideration of the pertinent criteria and adjudication policies in the adjudicative guidelines. Decisions must also reflect consideration of the factors listed in ¶ 2(a) of the new guidelines. Commonly referred to as the "whole-person" concept, those factors are:

(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 presence or absence of a disqualifying or mitigating condition is not, by itself, conclusive. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information. In this case, the pleadings and the information presented by the parties require consideration of the security concerns and adjudicative

⁴ See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

⁵ Directive. 6.3.

factors addressed under AG ¶ 15 (Guideline E - Personal Conduct) and AG ¶ 18 (Guideline F - Financial Considerations).

The Government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for an applicant. Additionally, the Government must be able to prove controverted facts alleged in the SOR. If the Government meets its burden, it then falls to the applicant to refute, extenuate or mitigate the government's case. Because no one has a "right" to a security clearance, an applicant bears a heavy burden of persuasion.⁶ A person who has access to classified information enters into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability, and trustworthiness of one who will protect the national interests as his or her own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access in favor of the Government.⁷

Analysis

Financial Considerations

The security concern about Applicant's finances, as stated in AG ¶ 18, is that:

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 Government presented sufficient information to support the allegations in SOR ¶ 1.a - 2.f; that is, that Applicant accrued and had not yet paid about \$35,781 for six delinquent debts. Applicant's financial problems occurred in the last three years and are still in the process of being resolved. Accordingly, the record requires application of the disqualifying conditions listed at AG ¶ 19(a) (*inability or unwillingness to satisfy debts*) and AG ¶ 19(c) (*a history of not meeting financial obligations*).

In response to the SOR and at hearing, Applicant established that she has paid or otherwise resolved all but one (SOR ¶ 1c) of her debts, and that she is making regular monthly payments on the remaining debt. Additionally, Applicant demonstrated that her current finances are sound and that she has a positive cash flow even after making payments on her debts. She and her husband manage their finances together and demonstrated good judgment by using a recent windfall from his mother's estate to pay down their debts.

⁶ See *Egan*, 484 U.S. at 528, 531.

⁷ See *Egan*; Revised Adjudicative Guidelines, ¶ 2(b).

Applicant also established that her delinquent debts arose primarily from the failure of her small business, and that her ability to resolve her debts was also hindered by unforeseen legal expenses for her son and the loss of her husband's income in 2008. While her son's arrest and her husband's illness were beyond her control, whether the business failure was beyond her control is a mixed question. It does not appear she would have incurred these debts if she had not started the business, but she also acknowledged that she used poor judgment getting into the business. Combined with the fact that she and her husband carried high credit card balances, it is not surprising that they experienced these delinquencies. However, Applicant has learned from her experience and, more importantly, she and her husband responded well in trying to resolve their debts.

All of the available information bearing on Applicant's financial problems and her response thereto requires application of the mitigating conditions at AG ¶ 20(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*); AG ¶ 20(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*); and AG ¶ 20(d) (*the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts*).

The ongoing presence of delinquent debt does not automatically mean Applicant should be disqualified. This amount of debt certainly raises the possibility that Applicant could resort to illegal means to get money to pay her debts. However, the analysis here must also consider, regardless of the amount, Applicant's response to her adverse financial circumstances and her overall approach to money management. On balance, I conclude that the security concerns about her unpaid debt are mitigated.

Personal Conduct

The Government also alleged that Applicant deliberately tried to conceal the true scope of her financial problems by only listing one of her delinquent debts under e-QIP Section 28. Such conduct, if proved, raises a security concern that is expressed at AG ¶ 15 as follows:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

The Applicant denied the allegation in SOR 2.a, thereby placing on the Government the burden of "presenting witnesses and other information to establish facts that have been controverted." (Directive, E3.1.14) To be disqualifying, Applicant's answers must have been made with intent to falsify or mislead. (See AG ¶ 16(a):

deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities.) The Government relied on the e-QIP itself and Applicant's statement during her March 2009 subject interview that she did not list her debts because she was lazy. This admission implies a degree of willfulness, in that Applicant chose not to list more than one debt in response to questions that clearly required her to disclose most of her debts.

However, Applicant knew from having answered similar questions in previous security applications over the previous 25 years that her credit history would be checked and that she would have to answer questions about her finances. With that in mind, she submitted less specific but equally adverse information about her finances in the "Additional Comments" portions of two financial sections. From all of the information bearing on the issue of whether she deliberately tried to mislead the Government about her financial problems, I conclude that she did not intend to do so. It is equally clear that Applicant would not again be so lazy in her approach to such questions in future applications. On balance, I conclude that the information presented is insufficient to show that any of the disqualifying conditions under AG ¶ 16 apply.

Whole-Person Concept

I have evaluated the facts presented and have applied the appropriate adjudicative factors under Guidelines E and F. I have also reviewed the record before me in the context of the whole person factors listed in AG ¶ 2(a). Applicant is 53 years old and presumed to be a mature adult. She honorably served for more than 20 years in the U.S. Army. Since retiring, she has continued to use her technical expertise to support the military. Applicant's current military customer regards her as an excellent asset with outstanding integrity and reliability. Applicant and her husband made a poor decision in 2006 when they decided to start a small business. Their actions resulted in significant unpaid debts. Despite unforeseen events that hindered her ability to pay the debts sooner, she has made significant progress in resolving her financial problems by being proactive and responsible in her approach to those problems. Applicant also demonstrated that, while she should have made more of an effort to disclose details about her debts, she was generally candid and forthcoming to the Government about the fact she has significant financial problems. Overall, the record reflects well on her judgment and reliability. A fair and commonsense assessment⁸ of all available information bearing on Applicant's past and current circumstances shows she has addressed satisfactorily the government's doubts about her ability or willingness to protect the government's interests as her own.

Formal Findings

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

⁸ See footnote 4, *supra*.

Paragraph 1, Guideline F:	FOR APPLICANT
Subparagraphs 1.a - 1.f:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	For Applicant

Conclusion

In light of all of the foregoing, it is clearly consistent with the national interest to continue Applicant's access to classified information. Request for security clearance is granted.

MATTHEW E. MALONE
Administrative Judge