



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



In the matter of:

SSN:

Applicant for Security Clearance

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ISCR Case No. 09-04849

Appearances

For Government: Melvin A. Howry, Esquire, Department Counsel
For Applicant: *Pro se*

August 11, 2010

Decision

WESLEY, Roger C., Administrative Judge:

Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

Statement of the Case

On November 3, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing reasons why DOHA could not make the preliminary affirmative determination of eligibility for granting a security clearance, and DOHA recommended referral to an administrative judge to determine whether a security clearance should be granted, continued, denied, or revoked. 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 Adjudicative Guidelines (AGs).

Applicant responded to the SOR on November 17, 2009, and requested a hearing. The case was initially assigned to another judge, and was reassigned to me on March 4, 2010. A hearing was scheduled for March 31, 2010, and was convened on the scheduled date. At the hearing, the Government's case consisted of six exhibits (GE).

All but one of the Government's exhibits (GE 6) were admitted pursuant to stipulation by the parties. Applicant relied on one witness (herself) and five exhibits (AE). The transcript (Tr.) was received on April 21, 2010.

Procedural Issues

Before the close of the hearing, Applicant requested leave to supplement the record with an updated personal financial statement and letters to her creditors. For good cause shown, Applicant was granted 11 days to supplement the record. Department Counsel was afforded two days to respond. Within the time permitted, Applicant furnished copies of her updated personal financial statement and letters to her creditors. Her submissions were admitted as AEs F and G.

Summary of Pleadings

Under Guideline F, Applicant allegedly incurred six delinquent debts exceeding \$22,000. In her November 17, 2009 response to the SOR, Applicant admitted each of the allegations. She provided explanations for the listed debts and the steps she has taken to try and resolve them.

Findings of Fact

Applicant is a 47-year-old security guard for a defense contractor who seeks a security clearance. The allegations covered in the SOR and admitted by Applicant are adopted as relevant and material findings. Additional findings follow.

Applicant married her first spouse in August 1978 and has two children from this marriage. GE 1. She divorced her first husband in June 1989. See GE 1. In September 1994, she married her current husband GE 1. She has two stepchildren from this marriage. Since the fall of 2006, she has attended a local college and is pursuing an Associate of Art degree in general studies. She was awarded an Associate of Applied Science degree in criminal justice this year. Tr. 116. She expects to complete her general studies class work in the fall of 2010. Tr. 115.

Applicant's finances

In June 2004, Applicant injured her shoulder while pulling print cylinders on her job Tr. 44-45. The accident was work-related, and she prepared a contemporaneous accident report describing the circumstances of her accident. Tr. 45. She wrote a contemporaneous accident report complaining of pain in her right shoulder, right upper arm, and neck.

The day after her accident, she consulted with a company physician who indicated her injury was likely soft tissue-related, and not very serious. Tr. 46-47. When the pain did not dissipate, she continued her physical therapy and consulted another doctor, who prescribed surgical repair of her shoulder. Applicant underwent her surgical intervention to correct her shoulder injury in December 2004. Tr. 48-49.

Applicant returned to work in January 2005. Tr. 50. When her safety manager asked her about her condition, she replied that she was having considerable pain in her neck. Told that she had not indicated any pain in her neck in the post-accident complaint she filed, or awarded any relief for neck pain in her workman's compensation hearing, she double-checked her accident report, which confirmed her complaints of shoulder and neck pain in the report she filed with her employer following the accident. Tr. 51-52.

In April 2005, Applicant was "pulled off the press" and told by her supervisor that she was not fit to operate a press with her neck injury. Tr. 51. Her supervisor then told her that the company was docking her wages for the time she could not work on the forklift she was trained to operate. Tr. 52.

When her employer determined in June 2005 that Applicant was then fit to operate a forklift, her supervisor ordered her to take a forklift driver's test. Tr. 52-53. When she could not pass the forklift test in her current condition, her employer's safety manager and human resources manager informed her that she could not return to work until she could do her job and advised her to apply for short-term disability. Tr. 54-55.

Applicant applied for and was awarded short term disability benefits in August 2005. Her benefits provided for bi-weekly payments of \$500 (a \$500 reduction from her employment benefits). By September 2005, Applicant and her husband realized they could not meet their monthly expenses with the reduced benefits and explored refinancing of their home. When she learned she could not obtain refinancing, she turned to a debt consolidation company to try and obtained lower interest rates. Tr. 81-90.

Applicant and her husband signed a debt repayment agreement with the financial services company (FS) in October 2005, and agreed to pay the service firm \$3,237 if they would reduce their overall debts from approximately \$21,586 (inclusive of cost of service) to a much lower debt load of \$11,872 (inclusive of service costs). See GE 2; Tr. 57-58. Applicant and FS entered into an agreement that memorialized their mutual understanding of how FS would consolidate and pay off Applicant's identified delinquent debts. For the ensuing 13 months, FS debited their checking account with bi-weekly deductions from Applicant's joint checking account. Once FS's fees were paid, however, Applicant and her husband stopped receiving payment invoices from FS. See GE 2; Tr. 62-63. Altogether, Applicant paid FS \$3,400 in fees. Tr. 64. With the funds, FS paid off two of her accounts (creditors 1.a and 1.e), but failed to address the three remaining ones.

By November 2005, Applicant no longer received disability checks. Shortly thereafter (in December 2005), her husband was laid off from his job due to plant closure. GE 2; Tr. 59. Thereafter, he began receiving unemployment checks.

In February 2006, Applicant learned that she had won her disability hearing concerning her employer's refusal to accept responsibility for her neck injury. GE 2; Tr. 56-57. She then had to press her appeal for actual back pay, which her employer challenged. Tr. 57. In June 2007, Applicant was granted a 29 per cent disability on her workman's compensation claim. Based on this disability calculation, she was awarded

25 per cent of her claimed lost wages in one lump sum amount and 4 per cent (which translates to about \$890 a year) of her lost wages monthly for the duration of her life, or until she reaches the age of 70. Tr. 65-69. Her employer's insurance company was held responsible for the payments covered by her award. Tr. 68. After her attorney deducted her 33 and 1/3 per cent share of her award to cover her attorneys fees, Applicant was left with \$36,000, scarcely enough to pay her bills. Tr. 59-61, 65-69.

Applicant 's husband returned to work with another employer in March 2006. Tr. 59-61. Three months later (in July 2006), Applicant underwent neck surgery for the fusion of two discs. GE 2. The fusion procedure secured a 29 per cent disability rating for her in April 2007. With the additional income from her husband, she was able to settle two of her delinquent debts.

With the \$36,000 lump sum disability proceeds awarded her In June 2007, Applicant was able to pay off her truck, in addition to other bills, her overdraft protection, and her brother who had advanced her funds to cover her mortgage. GE 2; Tr. 70. In the same month, she also asked FS to move forward with negotiations to settle her remaining delinquent accounts with the remaining money she retained in her checking account. She advised FS that she had escrowed \$8,000 to \$10,000 to cover her creditors holding outstanding balances. Tr. 71-72.

By July 2008, Applicant had heard nothing back from FS about paying off her creditors. After signing another power of attorney July 2008 to extend her power of attorney to FS, she received an e-mail that a new company (H Company) would be assuming responsibility for addressing her debts under the guidance of the same personal negotiator. GE 2; Tr. 72. After receiving e-mails and confirming calls from this negotiator, Applicant received nothing of substance from this personal negotiator for over a year. She continued to remit monthly payments to him, but received no confirmations that any of her identified delinquent debts had been paid or addressed. Tr. 72-73.

After joining her current employer in January 2009, her husband was placed on temporary layoff status due to cut backs imposed by his employer, and began receiving unemployment benefits pending his recall to full time work status. When she made renewed inquiries to her personal negotiator in April 2009, she was reassured in May 2009 that he would soon be returning to working on her accounts. GE 2. Upon learning from a local better business bureau that FS had an F rating, (GE 2), she filed an on-line complaint with the bureau. Tr. 72-73. This prompted a phone call from her personal negotiator in July 2009, and a follow-up e-mail that his H group was still representing her and working on the six identified accounts she provided. See GE 2; Tr. 74-75.

To date, Applicant has received no substantive information from her personal negotiator concerning his progress in addressing her accounts. Tr. 77-79. Through her own contacts with creditors 1.a and 1.e (opened in 2004), she was able to document that these two accounts were paid by the H group. See AE C; Tr. 80-83. However, she has had no success with the other creditors she has contacted to explore payment arrangements on their charged off accounts. See AE D. Tr. 85-89.

Applicant has continued to enlist her remaining creditors to work with her in developing repayment plans, but to no avail. None of her remaining creditors have returned her repeated calls to arrange repayment plans. She documents recent letters to each of her remaining creditors outlining her repayment efforts dating to September 2005. See AEs G through H. In the meantime, she continues to work two jobs to pay her bills. Her husband has received unemployment benefits since March 2010, and has filed for his Social Security benefits. Tr. 77, 98-99.

Based on her most current personal financial statement, Applicant and her husband earn about \$3,526 in net monthly income. GE F. She and her husband estimate about \$1,530 in net monthly expenses, and \$1,375 in debts (inclusive of their mortgage). This leaves them with a net monthly remainder of approximately \$621. Compare GE 3 with AE F and Tr. 100-01.

Endorsements

Applicant is well-regarded by her supervisors and colleagues. She documents numerous credits for her contributions to her team's missions. See AEs A, D and F. Colleagues who have had considerable experience working with her describe her as very conscientious and trustworthy. They credit her with demonstrated courage, leadership, and outstanding performance in the execution of her assigned responsibilities as a team leader. See AEs A and E.

Applicant draws important support from her family as well. Her son has served in the U.S. Navy for the past 14 years and describes Applicant as a strong supporter of sailors and marines who over the years has sent gifts to deployed military personnel. AE A. For over four years, Applicant and her husband have been foster parents for young boys with behavioral issues. Tr. 96. They are compensated by her state's division of child and family services. See AE A; Tr. 107-08.

Policies

The AGs list guidelines to be used by administrative judges in the decision-making process covering DOHA cases. These guidelines take into account factors that could create a potential conflict of interest for the individual applicant, as well as considerations that could affect the individual's reliability, trustworthiness, and ability to protect classified information.

These guidelines include "[c]onditions that could raise a security concern and may be disqualifying" (disqualifying conditions), if any, and many of the "[c]onditions that could mitigate security concerns." They must be considered before deciding whether or not a security clearance should be granted, continued, or denied. The guidelines do not require administrative judges to place exclusive reliance on the enumerated disqualifying and mitigating conditions in the guidelines in arriving at a decision. Each of the guidelines is to be evaluated in the context of the whole person in accordance with AG ¶ 2(c)

In addition to the relevant AGs, administrative judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in AG ¶ 2(a) of the revised AGs, which are intended to assist the judges in reaching a fair and impartial commonsense decision based upon a careful consideration of the pertinent guidelines within the context of the whole person. The adjudicative process is designed to examine a sufficient period of an applicant's life to enable predictive judgments to be made about whether the applicant is an acceptable security risk.

When evaluating an applicant's conduct, the relevant guidelines are to be considered together with the following AG ¶ 2(a) factors: (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.

Viewing the issues raised and evidence as a whole, the following adjudication policy concerns are pertinent herein:

Financial Considerations

The Concern: 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. Compulsive gambling is a concern as it may lead to financial crimes including espionage. Affluence that cannot be explained by known sources of income is also a security concern. It may indicate proceeds from financially profitable criminal acts. AG ¶ 18.

Burden of Proof

Under the Directive, a decision to grant or continue an applicant's request for security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires administrative judges to make a commonsense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a security clearance depends, in large part, on the relevance and materiality of that evidence. As with all adversarial proceedings, the judge may draw only those inferences which have a reasonable and logical basis from the evidence of record.

The Government's initial burden is twofold: (1) It must prove by substantial evidence any controverted facts alleged in the SOR; and (2) it must demonstrate that the facts proven have a material bearing to the applicant's eligibility to obtain or maintain a

security clearance. The required showing of material bearing, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a security clearance. Rather, consideration must take account of cognizable risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the burden of proof shifts to the applicant for the purpose of establishing his or his security worthiness through evidence of refutation, extenuation or mitigation of the Government's case. Because Executive Order 10865 requires that all security clearances be clearly consistent with the national interest, "security-clearance determinations should err, if they must, on the side of denials." See *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

Analysis

Applicant is a respected employee of a defense contractor who accumulated a number of delinquent debts during periods of her own unemployment resulting from a work-related accident and associated shoulder injury, and her husband's layoffs during the same contemporaneous time frame. With proceeds she received from her workman's compensation award, she engaged a debt consolidation firm to work with her creditors and pay them off. Unbeknownst to her, the debt consolidation firm and its successor firm failed to resolve most of her debts, while assuring her they were actively engaged in working with her creditors. As matters now stand, only two of the listed creditors in the SOR (creditors 1.a and 1.e have been paid.

Applicant's accumulated debt delinquencies warrant the application of two of the disqualifying conditions (DC) of the financial consideration guideline: DC ¶ 19(a), "inability or unwillingness to satisfy debts," and DC ¶19(c) "a history of not meeting financial obligations."

Holding a security clearance involves a fiduciary relationship between the Government and the clearance holder. Quite apart from any agreement the clearance holder may have signed with the Government, the nature of the clearance holder's duties and access to classified information necessarily impose important duties of trust and candor on the clearance holder that are considerably higher than those typically imposed on government employees and contractors involved in other lines of government business. See *Snepp v. United States*, 444 U.S. 507, 511 n.6 (1980). Failure of the applicant to make concerted efforts to pay or resolve her debts when able to do so raises security-significant concerns about the sufficiency of the applicant's demonstrated trust and judgment necessary to safeguard classified information.

All of Applicant's listed debts were accumulated during periods when she was out of work and collecting disability benefits for a shoulder injury she suffered in a work-related accident. Based on her evidentiary showing, Applicant's proofs are sufficient to establish significant extenuating circumstances associated with her debt accumulations. As a result, MC ¶ 20(b) of the financial considerations guideline, "the conditions that resulted in the behavior 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),” applies to Applicant’s circumstances.

After succeeding in her workman’s compensation appeal, she used most of the proceeds to address the delinquent debts she incurred in 2004 and 2005 when both she and her husband were out of work for considerable periods. She made good faith attempts to pay her creditors by engaging a debt consolidation firm to work with her creditors. She paid the debt consolidation firm their required monthly fees in the belief the firm was actively working in her behalf. As it turns out, the firm and its related successor accepted Applicant’s money for many months, but for reasons still unexplained, the firm paid off only two of Applicant’s creditors (creditors 1.a and 1.e). Applicant cannot be faulted for working earnestly through a debt consolidation firm, as well as the debtors individually, to resolve her debts, all of which were opened in 2004 and 2005.

By all credible accounts in the record, Applicant’s remaining debts are barred by her state’s four-year statute of limitations for collections of debts on account. See § 11.190 of State A’s revised civil statutes. Applicant’s debts are associated with credit card accounts for the most part and qualify as debts on account.

Statutes of limitation, while considered important policy tools for discouraging plaintiffs from pursuing stale claims and promoting finality in litigation, have never been equated with good-faith efforts to repay overdue creditors. See, e.g., ISCR Case No. 02-30304, at 3 (App. Bd. April 2004)(quoting ISCR Case No. 99-9020, at 5-6 (App. Bd. June 2001). Still, they provide effective collection barriers and, like bankruptcy, serve to insulate the debtor from pressures to raise cash to satisfy his or her creditors.

To be sure, Applicant does not assert relevant statutes of limitation in her defense. With her limited income and good-faith efforts in working with her debt consolidation firm, she fully expected to repay all of her listed debts with the workman’s compensation proceeds she was awarded in 2007. To her surprise, and disappointment, the debt consolidation firm she engaged did not fulfill its contractual responsibilities.

At this time, it is not clear what steps Applicant might consider in the foreseeable future, if any, to resolve her remaining time barred debts. If these covered creditors are not willing, or in a position, to detail the bases of the debts, the consolidation firm is unlikely to have any future interest in pursuing them, their assurances notwithstanding. While she has not sought any new financial counseling or initiated constructive steps (such as petitioning for bankruptcy) to discharge or otherwise resolve her debts, she is currently legally insulated from any collection action by the applicable state statute of limitation, and for all practicable purposes, is no longer at risk to having to raise large sums of money to resolve her debts.

Applicant has a positive remainder every month, and she has shown considerable progress in the payment of her debts since she returned to full time employment in 2009. She is current with all of her debts not listed in the SOR, and is pursuing advanced degrees to improve her skills and opportunities.

Evaluating all of her repayment efforts contextually, and given the difficult family and unemployment issues she has had to manage the past few years, Applicant may be credited with serious, good-faith efforts to resolve her debts and regain control of her finances. She has made considerable progress to date in regaining control of her finances and shows good promise for fulfilling her remaining debt obligations.

Applicant's repayment efforts entitle her to mitigation credit under both MC ¶ 20(d), "the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts," and MC ¶ 20(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." These mitigating conditions have application to Applicant's situation, considering her repayment efforts and credible reasons for disputing her remaining debts.

On balance, Applicant has shown good faith in addressing her debts since she returned to full-time employment with her current employer in 2009. With her improved financial situation (which includes a net monthly remainder), she demonstrates that she is now firmly in control of her finances and can be expected to stay current with her debts.

Based on a whole-person assessment, Applicant surmounts the judgment questions raised by her accumulation of six delinquent debts during extended periods of disability and her husband's layoffs. Her positive endorsements from her supervisors and colleagues merit considerable praise and commendation. On balance, she has shown sufficient tangible effort in addressing her major debts to mitigate her listed delinquent debts and demonstrate restored control over her finances.

Taking into account all of the extenuating facts and circumstances surrounding Applicant's debt accumulations, the limited resources she has had to work with following her work-related accident and ensuing layoffs of her husband, safe predictive judgments can be made about her ability and intentions to maintain control of her finances for the foreseeable future. Favorable conclusions warrant with respect to the allegations covered by subparagraphs 1.a through 1.f.

In reaching my decision, I have considered the evidence as a whole, including each of the factors and conditions enumerated in ¶ 2(a) of the AGs.

Formal Findings

In reviewing the allegations of the SOR in the context of the findings of fact, conclusions, and the factors and conditions listed above, I make the following separate formal findings with respect to Applicant's eligibility for a security clearance.

GUIDELINE F (FINANCIAL CONSIDERATIONS): FOR APPLICANT

Subparas 1.a through 1.f : For Applicant

Conclusions

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 security clearance. Clearance is granted.

Roger C. Wesley
Administrative Judge

