



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



In the matter of:)	
)	
-----)	ISCR Case No. 09-05662
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Pamela C. Benson, Esquire, Department Counsel
For Applicant: J. Edward Foley, Esquire

October 27, 2010

Decision

HOWE, Philip S., Administrative Judge:

On April 16, 2009, Applicant submitted her electronic security clearance application (e-QIP) (SF 86). On December 10, 2009, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline F (Financial Considerations). 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 (AG) effective within the Department of Defense on September 1, 2006.

Applicant acknowledged receipt of the SOR on December 16, 2009. She answered the SOR in writing through counsel on December 31, 2009, and requested a hearing before an administrative judge. Department Counsel was prepared to proceed on January 7, 2010, and I received the case assignment on January 29, 2010. DOHA issued a Notice of Hearing on January 29, 2010, for a hearing to be conducted on February 23, 2010. On February 22, 2010, Applicant's attorney requested a

continuance because he fell and injured himself. I granted the continuance. DOHA issued a second Notice of Hearing on April 9, 2010, for a hearing on May 5, 2010. I convened the hearing as scheduled on that date. The Government offered Exhibits 1 through 7, which were received without objection. Applicant testified and submitted Exhibits A through H, without objection. DOHA received the transcript of the hearing (Tr.) on May 17, 2010. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

Findings of Fact

In her Answer to the SOR, Applicant admitted the 13 factual allegations in ¶¶ 1.a to 1.g, 1.q to 1.t, 1.v, and 1.w of the SOR, with explanations. She denied the 10 factual allegations in ¶¶ 1.h to 1.p and 1.u of the SOR. She also provided additional information to support her request for eligibility for a security clearance.

Applicant is 60 years old and married to her third husband. Her husband is disabled and cannot work. She has one adult child. She worked 30 years (1967 to 2001) for a major industrial company until she retired during a reduction in force in the company. She receives an \$18,000 pension annually. Her last year's salary was \$75,000. She withdrew \$132,000 from her company Section 401(k) deferred compensation plan in 2001 and put the money in a bank account. She used all of it over the past nine years to pay bills and college tuition. The tax laws treated these withdrawals as taxable events from the Section 401(k) plan because Applicant was younger than 59.5 years old. Applicant did not realize she was incurring state and local income tax when she made the withdrawals. After she retired, Applicant spent money at the same rate as she did when employed. Later she realized that she had to reduce her expenditures. (Tr. 24, 38, 40-47, 51-53, 80, 88-91; Exhibit1)

After her retirement, Applicant worked part-time at a fitness club. In November 2004, she started work with her current employer and has a Section 401(k) plan. Her base pay is about \$35,000. Since 2005, she has held a secret security clearance. Applicant earned \$53,800 in 2008. In 2009 after she changed from the second shift where she could earn more money, her total income, including her pension, dropped to \$47,000. (Tr. 35, 46, 47, 66, 67; Exhibit G)

Applicant earned a college degree in 2005 after starting classes in 1971 and working on them part-time over 34 years. The company from which she retired gave her \$5,000 for tuition. She also took out student loans totaling \$20,755. Those loans were listed in the SOR as Paragraphs 1.q to 1.t. (Tr. 18, 39, 88; Exhibits 6 and B)

Applicant filed a Chapter 7 bankruptcy in 2008. The total liabilities listed in the bankruptcy are \$148,162.11. However, her income at that time exceeded the amount allowed under the U.S. Bankruptcy Act for the filing of a Chapter 7 petition. She converted the bankruptcy to a Chapter 13 with the consent of the U.S. Trustee in Bankruptcy. That action was dismissed when Applicant's income dropped in 2009 and she filed another Chapter 7 bankruptcy petition. Applicant listed all her debts, including

her education loans and tax debts to the state and federal governments, in her bankruptcy petition. The Bankruptcy Court discharged Applicant on January 5, 2010, of liability for the credit card and mortgage deficiency debts, along with some of the tax debts. (Any tax debt older than three years is unenforceable under the Bankruptcy Act.) Those taxes may include the state income taxes from 2002 to 2009, although Applicant's attorney will verify the status of the state tax liability with the state revenue department. The Internal Revenue Service (IRS) released their tax liens for the 2001, 2002, and 2005 income tax years. The release is dated April 21, 2010. Applicant paid the IRS \$400 monthly for 24 months on an offer in compromise until she filed her bankruptcy. Applicant's education loans are not dischargeable in bankruptcy and she paid \$275 monthly on them until May 2009 when the payments were reduced to \$186 monthly. (Tr. 18, 36, 65, 66; Exhibits 2, 6, A, B, C, D)

The SOR alleged 23 delinquent debts. Those debts total \$79,509. The non-education delinquent debts listed in the SOR and their current status is:

Paragraphs 1.a to 1.f are state tax liens from 2002 to 2009 totaling \$7,828. They were resolved through the bankruptcy proceeding. (Tr. 53-56)

Paragraph 1.g. is a federal tax lien for \$14,702. It was resolved by the bankruptcy and the release of the lien by the IRS. (Tr. 57; Exhibits 1-6, D)

Paragraphs 1.h to 1.p, and 1.u are debts on credit cards, her mortgage balance, a judgment, a medical debt, a cell phone debt, and a cash advance loan, all of which debts total \$36,324 were discharged in the Chapter 7 bankruptcy action. The house Applicant purchased in 2002 she deeded back to the lender in August 2006. (Tr. 59-64; Exhibits 1-6, A-E)

Applicant sought financial assistance when her mortgage became delinquent. She went to consumer counseling and hired an attorney. She attended a foreclosure seminar she learned about through her employer's employee assistance program. Applicant has no delinquent debt now and her income taxes are current. She has no credit cards now. Applicant refinanced her house in 2005 in an attempt to reduce her payments. She admitted she was naïve about financial matters and thought the refinancing was a second mortgage or a home equity loan, but it was not. Applicant presented her budget comparison between May 2009 and May 2010. She reduced her monthly expenditures by \$529. This reduction occurred because her rent, car payment, and student loan payments decreased, in addition to smaller decreases in her utility payments. Her boat payment ceased because the bankruptcy took the boat from her. (Tr. 34, 37, 68-70, 85, 103, 104; Exhibits 1-6, A-H)

Applicant received a verbal warning in March 2009 from her employer for a verbal altercation with another employee. Her manager and human resources

representative thought Applicant was under influence of an unknown substance. She is now required to undergo three years of random drug testing. Applicant was on short-term disability at the time of the hearing for an ear infection. Her income was reduced by 20% while on disability. (Tr. 93, 94, 100, 101; Exhibits 6, 7)

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an "applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by an applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision."

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline F, Financial Considerations

The security concern relating to the guideline for Financial Considerations is set out in AG ¶ 18:

Failure or inability to live within one’s means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual’s reliability, trustworthiness and ability to protect classified information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

The guideline at AG ¶ 19 contains nine disqualifying conditions that could raise security concerns. Four conditions are applicable to the facts found in this case:

- (a) inability or unwillingness to satisfy debts;
- (c) a history of not meeting financial obligations;
- (e) consistent spending beyond one’s means, which may be indicated by excessive indebtedness, significant negative cash flow, high debt-to-income ratio, and/or other financial analysis; and
- (g) failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of same.

Applicant accumulated \$148,162.11 in delinquent debt from 2001 to the time that it was included in Applicant’s Chapter 7 bankruptcy petition. Applicant has 23 delinquent debts listed in the SOR. The SOR lists \$79,509 of delinquent debts. AG ¶ 19 (a) and (c) apply.

Applicant admitted that she continued spending money at the level she did in 2001 and beyond after she retired while she earned far less than her previous \$75,000 annual income. She accumulated debt in 2002 consisting of her house mortgage, car, and boat purchase. She earns about \$35,000 annually in her present job in addition to her \$18,000 annual pension. AG ¶ 19 (e) applies to that situation between 2001 and 2010.

Applicant did not file the appropriate federal and state income tax returns showing her Section 401(k) distributions were taxable. She should have rolled the money over from her former employer's pension plan to another Section 401(k) account to avoid tax consequences. AG ¶ 19 (g) applies to that series of events.

The guideline in AG ¶ 20 contains six conditions that could mitigate security concerns arising from financial difficulties. Four conditions may be 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; and
- (d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

Applicant's withdrawal and spending of her Section 401(k) funds occurred eight to nine years ago. The failure to pay taxes on this early distribution of retirement funds will not occur again because Applicant is now over 59.5 years old. Her mortgage debt problem will not recur because Applicant acknowledged her lack of financial sophistication and misunderstanding of the home financing mortgages she signed. She now rents her apartment. She keeps better track of her finances and actively worked in the past year to reduce her expenditures. In view of her revised financial practices, those previous actions do not cast doubt on Applicant's current reliability, trustworthiness, or good judgment. AG ¶ 20(a) applies.

Applicant's financial problems over the past decade were caused by her employer induced early retirement and subsequent substantial decreased income. She realized she could not continue to live at the same level of spending as she had when she was earning \$75,000 annually and started to make adjustments in her financial life. She became responsible for her financial mistakes in 2004 when she got another full-time job, though at half the income she made previously. She sought professional assistance through credit counseling and her employer's assistance program to resolve her financial problems and save her home. AG ¶ 20 (b) applies.

Applicant sought help from the consumer credit counseling agency in her area in 2005 and 2006. She hired an attorney who helped her file bankruptcy and negotiate with her creditors. Applicant admitted her lack of financial knowledge and perspective

caused her problems. She has now resolved all the delinquent debts listed in the SOR and some other debts through the Chapter 7 bankruptcy. AG ¶ 20 (c) applies.

Applicant filed bankruptcy after trying to negotiate her debt problems with her creditors. Bankruptcy is a legal method to resolve debts, provided for under federal law. AG ¶ 20 (d) applies because of Applicant's good-faith efforts, including her bankruptcy, to repay her delinquent debts.

Applicant resolved the SOR allegations and lives on a budget now. She reduced her expenses to match her income. She is now financially stable.

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 an 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.

AG ¶ 2(b) requires each case must be judged on its own merits. Under AG ¶ 2(c), 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.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant incurred delinquent debts when she spent beyond her financial ability to repay the debts from 2001 to 2008. She subsequently sought professional assistance to resolve the debts. She found it and eventually filed Chapter 7 bankruptcy. She reduced her spending by decreasing her monthly expenses by \$529. Since 2009 Applicant has acted maturely and proactively in seeking ways to resolve her delinquent debts. She changed her behavior to extricate herself from the debt problems. Because of her actions over the past two years, there is no likelihood of recurrence of the same types of action, particularly as Applicant approaches retirement in five years. There is no reasonable potential for pressure, coercion, exploitation, or duress because Applicant's debt problems were resolved.

I examined the personnel altercation problem Applicant had with another employee at her current company. I concluded it had no bearing or effect on Applicant's

current trustworthiness, reliability, or good judgment. In nearly 40 years of her employment, this incident is the only one mentioned at the hearing. It appears on the evidence to be more of an interpersonal situation between Applicant and another employee than a determining factor in granting or denying her a security clearance. I gave it no weight in my consideration of the financial considerations or “whole-person” concept conditions.

Applicant is not sophisticated in the area of finance. She made mistakes, and debts became delinquent. There is, however, simply no reason not to trust her. She has a record of trustworthy and responsible employment for four decades. She has paid her debts. Furthermore, she has established a “meaningful track record” of debt payments. These factors show responsibility, rehabilitation, and mitigation.

Overall, the record evidence leaves me without questions or doubts as to Applicant’s eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the security concerns arising from her financial considerations. I conclude the “whole-person” concept for Applicant.

Formal Findings

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

Paragraph 1, Guideline F:	FOR APPLICANT
Subparagraph 1.a to 1.w:	For Applicant

Conclusion

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

PHILIP S. HOWE
Administrative Judge