



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)	
)	
-----)	ISCR Case No. 09-06305
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Eric Borgstrom, Esq., Department Counsel
For Applicant: *Pro se*

April 28, 2010

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guideline F (Financial Considerations). Eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted a security clearance application on May 15, 2009. On October 22, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny her application, citing security concerns under Guideline F. DOHA acted 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) promulgated by the President on December 29, 2005.

Applicant received the SOR on October 26, 2009; answered it on November 12, 2009; and requested a determination on the record without a hearing. DOHA received the request on November 18, 2009. Department Counsel requested a hearing on

December 7, 2009, and was ready to proceed on January 11, 2010. The case was assigned to me on January 19, 2010. DOHA issued a notice of hearing on January 27, 2010, scheduling the hearing for February 17, 2010. I convened the hearing as scheduled. Government Exhibits (GX) 1-3, 5, and 6 were admitted in evidence without objection. GX 4 was not admitted. Department Counsel also submitted Hearing Exhibits (HX) I and II, which are attached to the record. Applicant testified and submitted Applicant's Exhibits (AX) A through C, which were admitted without objection. I kept the record open until March 5, 2010, to enable Applicant to submit additional documentary evidence. She timely submitted AX D through M, which were admitted without objection. Department Counsel's comments regarding AX D through M are attached to the record as HX III. DOHA received the transcript (Tr.) on February 25, 2010.

Findings of Fact

In her answer to the SOR, Applicant admitted the allegations in SOR ¶¶ 1.a-1.i, and she denied the allegation in SOR ¶ 1.j. Her admissions in her answer and at the hearing are incorporated in my findings of fact.

Applicant is a 50-year-old program analyst employed by a federal contractor since March 2009. She worked for another federal contractor as an administrative assistant from February 2006 until she was hired by her current employer. She received a security clearance in April 1991 while she was employed by the Department of the Navy, but it was administratively terminated when she left federal employment in 1998. (Tr. 15; GX 1 at 20-21.)

Applicant married in October 1978 and divorced in April 1993. She has two adult children. She began cohabiting and sharing living expenses with the father of her two sons in 2002. (Tr. 64-65.) They separated in July 2009. (Tr. 65.) An unemployed adult son lived with Applicant until December 2009. (Tr. 41, 66.)

Applicant purchased a home in 1998. Her financial problems began when she was laid off from a well-paying job in June 2001. (GX 1 at 19-20.) She then worked at a series of low-paying temporary jobs. Her cohabitant lost his job in 2007, and he did not find a new job until January 2009. (Tr. 39-40, 64-65.)

Applicant did not make her mortgage payments in February and March 2009. In April 2009, she contacted a prospective lender with a view toward refinancing her loan. The prospective lender was unresponsive, and the mortgage holder obtained a judgment for the entire amount of the loan in August 2009. (GX 5.) Applicant contacted the mortgage holder in November 2009 and negotiated a loan modification (Tr. 49-55.) Her loan modification was completed in February 2010, and the account is now current. (AX A-C.)

The federal tax debt alleged in SOR ¶ 1.b arose when Applicant did not pay tax on rental income received in tax year 2002. A federal tax lien was filed in May 2006. (GX 2 at 1.) Applicant did not make any payments on the tax debt, but her income tax

refunds of about \$1,600 per year were applied to the indebtedness. (Tr. 58, 72.) The seizure of her tax refunds reduced her tax indebtedness from about \$8,187 in June 2003 to \$3,568 in October 2009. (AX G at 1, 3.) She contacted the Internal Revenue Service (IRS) by telephone the day before the hearing to discuss a payment plan, but no plan was in effect as of the hearing date. (Tr. 72-73.) After the hearing, she reached an agreement with the IRS to pay \$200 per month, but she was unable to obtain documentation of her agreement before the record closed. (AX D.) Her projected monthly budget includes monthly payments of \$200 to the IRS beginning in March 2010. (AX L.)

In December 2009, Applicant hired a law firm that specializes in debt resolution. She made one \$896 payment to the firm in December 2009. (Tr. 59-60.) She made a second payment in January 2010, but she stopped payment on the check when she was unable to access the firm's website and the telephone number she was given was disconnected. (Tr. 60; AX I.) She has since been contacted by the firm and intends to resume monthly payments. (Tr. 61.) The firm is handling the debts alleged in SOR ¶ 1.c-1.h and 1.j.

The delinquent student loan alleged in SOR ¶ 1.i was incurred for Applicant's son's education. On February 24, 2010, Applicant began a loan rehabilitation program, providing for payments of \$100 per month beginning in March 25, to be paid by automatic deduction from her checking account. She must make nine consecutive payments before her loan will be rehabilitated. (AX H.)

The table below summarizes the evidence concerning the delinquent debts alleged in the SOR.

SOR	Debt	Amount	Status	Evidence
1.a	Judgment (foreclosure)	\$63,740	Judgment vacated	GX 2 at 1; GX 5; AX K
1.b	Federal income taxes	\$7,332	Balance reduced to \$3,568	GX 2 at 1; GX 6; AX G Tr. 58, 72
1.c	Credit card	\$11,000	Payment plan	GX 2 at 1; GX 3 at 8; AX M at 3
1.d	Home mortgage	\$5,000 (past due)	Same as 1.a; loan modified; payments current	GX 2 at 1; AX A-C; Tr. 54
1.e	Credit card	\$2,790	Payment plan	GX 2 at 1; AX M at 3
1.f	Credit card	\$4,607	Payment plan	GX 2 at 1; AX M at 3
1.g	Credit card	\$2,680	Payment plan	GX 2 at 1-2; AX E, M
1.h	Credit card	\$7,497	Payment plan	GX 2 at 2; AX E, M
1.i	Student loan	\$5,522	Rehabilitation plan	GX 2 at 2; AX H
1.j	Credit card	\$13,000	Payment plan	GX 2 at 2; AX M at 3
1.k	Computer	\$299	Payment plan	GX 2 at 2; AX E; Tr. 79

Applicant's living expenses have declined substantially now that she is living alone. (Tr. 68-69.) Her monthly take-home pay is about \$2,650. (Tr. 44.) At the hearing, she testified that she has a net remainder of about \$200 after paying all her monthly expenses, including her mortgage payments and payments to the law firm. (Tr. 68.) On March 2, 2010, she began a part-time second job that will increase her monthly income by about \$400 per month. (AX J; AX L.)

Policies

"[N]o 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 applicants 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 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 made "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. Thus, a decision to deny a security clearance is not necessarily a determination as to the loyalty of the applicant. 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). "[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

Guideline F, Financial Considerations

The concern under this guideline is set out in AG ¶ 18 as follows:

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.

Several disqualifying conditions under this guideline are relevant. AG ¶ 19(a) is raised by an "inability or unwillingness to satisfy debts." AG ¶ 19(c) is raised by "a history of not meeting financial obligations." AG ¶ 19(g) is raised by "failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same." Applicant's financial history raises AG ¶¶ 19(a) and (c). Her federal tax debt does not raise AG ¶ 19(g), because she timely filed her returns and there is no evidence of fraud.

The debts alleged in SOR ¶¶ 1.a and 1.d are duplicates. When the same conduct is alleged twice in the SOR under the same guideline, one of the duplicative allegations should be resolved in Applicant's favor. See ISCR Case No. 03-04704 (App. Bd. Sep. 21, 2005) at 3 (same debt alleged twice). Accordingly, I will resolve SOR ¶ 1.a in Applicant's favor.

Since the government produced substantial evidence to raise the disqualifying conditions in AG ¶¶ 19(a) and (c), the burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

Security concerns based on financial problems can be mitigated by showing that “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.” AG ¶ 20(a). This mitigating condition is not established because Applicant’s debts are ongoing, numerous, and did not occur under circumstances making them unlikely to recur. She is on a tight budget, and the unexpected expenses or loss of employment could occur before her debts are fully resolved.

Security concerns under this guideline also can be mitigated by showing that “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(b). Both prongs, i.e., conditions beyond the person’s control and responsible conduct, must be established. Applicant’s loss of employment in June 2001, subsequent underemployment, her cohabitant’s loss of employment, and the breakup of her relationship with her cohabitant all were conditions beyond her control. She acted responsibly by seeking and finding other jobs, albeit temporary and low-paying jobs. Although several credit card accounts became delinquent, she kept her mortgage payments current until January 2009. Once she resolved the delinquent mortgage, she turned her attention to the other debts. I conclude AG ¶ 20(b) is established.

Security concerns under this guideline also can be mitigated by showing that “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.” AG ¶ 20(c). This mitigating condition is established because Applicant is working with a law firm specializing in debt resolution, has a realistic plan in place, and has her financial situation under control.

Security concerns under this guideline also can be mitigated by showing that “the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.” AG ¶ 20(d). Good faith means acting in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation. ISCR Case No. 99-0201, 1999 WL 1442346 at *4 (App. Bd. Oct. 12, 1999). Evidence of past irresponsibility is not mitigated by payment of debts only under pressure of qualifying for a security clearance.

An applicant is not required, as a matter of law, to establish resolution of each and every debt alleged in the SOR. See ADP Case No. 06-18900 (App. Bd. Jun. 6, 2008). An applicant need only establish a plan to resolve financial problems and take significant actions to implement the plan. ISCR Case No. 07-06482 at 2-3 (App. Bd. May 21, 2008). There also is no requirement that an applicant make payments on all delinquent debts simultaneously, nor is there a requirement that the debts alleged in the SOR be paid first. *Id.*

I conclude that AG ¶ 20(d) is established. Most of Applicant's actions to resolve the debts occurred after she received the SOR, but she began working on the delinquent mortgage, her largest debt, in April 2009. Until the day before the hearing, Applicant's response to the tax debt was passive, allowing the IRS to seize her tax refunds. She did not begin exploring a payment plan until the day before the hearing, but she and the IRS reached agreement on a payment plan before the record closed.

Security concerns under this guideline also can be mitigated by showing "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." AG ¶ 20(e). Applicant denied the debt for the computer purchase (SOR ¶ 1.k) in her answer to the SOR, but she produced no documentation to substantiate the dispute. I conclude AG ¶ 20(e) is not established for the debt in SOR ¶ 1.k, although AG ¶ 20(d) is established as noted above.

Whole-Person Concept

Under the whole-person concept, an 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. An 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.

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 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.

Applicant is a mature woman with a history of working for the federal government or federal contractors. She held a security clearance for several years, apparently without incident. All the debts alleged in the SOR became delinquent after she lost her job and was underemployed for several years. She has successfully avoided foreclosure on her home. Her debt resolution plan is reasonable and feasible. Although she has not yet established a track record of regular, timely payments on the student loans, her debt resolution plan, or her newly-modified home mortgage, she has taken measures such as a second part-time job to ensure that she can resolve her debts.

Based on her record of successful federal service and her candor and sincerity at the hearing, I am confident that she will carry out the agreements she has negotiated.

After weighing the disqualifying and mitigating conditions under Guideline F, evaluating all the evidence in the context of the whole person, and mindful of my obligation to resolve close cases in favor of national security, I conclude Applicant has mitigated the security concerns based on her financial problems. Accordingly, I conclude she has carried her burden of showing that it is clearly consistent with the national interest to grant her eligibility for access to classified information.

Formal Findings

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline F (Financial Considerations): FOR APPLICANT

Subparagraphs 1.a-1.k:

For Applicant

Conclusion

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

LeRoy F. Foreman
Administrative Judge