



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



In the matter of:)
)
) ISCR Case No. 10-00292
)
Applicant for Security Clearance)

Appearances

For Government: D. Michael Lyles, Esquire, Department Counsel
For Applicant: *Pro se*

July 25, 2011

Decision

CURRY, Marc E., Administrative Judge:

Applicant failed to mitigate the financial considerations security concerns generated by her delinquent debt. Clearance is denied.

Statement of the Case

On October 14, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant 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 revised adjudicative guidelines (AG) implemented by the Department of Defense on December 1, 2006.

Applicant answered the SOR on December 7, 2010, admitting subparagraphs 1.d, 1.e, 1.j, and 1.k, and denying the remainder. She requested a hearing. The case was originally assigned to another administrative judge on January 13, 2011, who

issued a notice of hearing on February 25, 2011, scheduling the case for April 12, 2011. On March 21, 2011, the case was transferred to me. I held the hearing as scheduled.

The day of the hearing, Applicant moved for a continuance, arguing that an attorney she requested to represent her had backed out at the last minute. (Tr. 6) Department Counsel objected, arguing that he mailed a discovery letter to Applicant advising her of her right to retain an attorney on January 10, 2011, three months before the hearing, and that no attorney since then had filed an entry of appearance on Applicant's behalf. Also, Department Counsel argued that he and Applicant spoke several times before the hearing, and Applicant never mentioned that she planned on retaining an attorney. (Tr. 6) Upon considering the parties' arguments, I concluded there was no good cause to grant a continuance. Therefore, I denied Applicant's motion, but left the record open through April 29, 2011 for Applicant to provide evidence and a written, supplementary closing argument.

I then conducted the hearing, receiving 24 Government exhibits, marked Government Exhibits (GE) 1 through 24, and Applicant's testimony. On April 29, 2011, Applicant submitted a written closing argument that I marked as Applicant's Exhibit (AE) A, and submitted 12 documents that I marked as AE B through M. I admitted them over Department Counsel's objection. DOHA received the transcript (Tr.) on April 25, 2011.

Findings of Fact

Applicant is a 47-year-old single woman with no children. She was married previously from 1993 through 1998 when she and her then husband divorced. She has a bachelor's degree in business management, earned in 1996, and a master's degree in accounting, earned in 2001. (Tr. 30-31) She is not a U.S. Certified Public Accountant. She attended law school from 2004 through 2006, but did not finish.

Currently, Applicant is the director of finance for a U.S. government contractor. (Tr. 33) Her duties include overseeing revenue and billings, and performing financial analyses of government contracts. (Tr. 34) She has been working for this employer for 13 years. (GE 1 at 15) The company initially hired her as a general ledger clerk. (AE A at 3) She has held a security clearance since 1998 and needs to continue to retain one because some of the contracts she reviews contain classified information.

In 2003, Applicant and her significant other started a trucking business that "haul[ed] aggregates . . . for road construction." (Tr. 47). They structured the business as a limited liability partnership. (Tr. 39) The business was initially successful, prompting Applicant and her boyfriend to seek to expand it. (Tr. 48) In 2006, they applied for a U.S. Small Business Administration (SBA) loan. (Tr. 39) The bank through which they applied insisted, as a condition of the loan's approval, that they incorporate the company. (GE 16 at 6) Moreover, the bank "laid out what [their] percentages should be for [their] shares," concluding that Applicant should own 80 percent. (Tr. 49)

Applicant and her boyfriend then incorporated the business, structuring it with Applicant as the 80 percent shareholder, as the bank directed. Also, Applicant was the president and the secretary. (GE 16 at 6)

Applicant and her boyfriend then began purchasing more equipment. In the past, they were able to negotiate capital loans with variable monthly payments that decreased during the winter months when the business was dormant. They were unable to negotiate such a provision into the payment plans for the equipment they purchased in 2006. (Tr. 66) Consequently, in the winter of 2007, they began falling behind on their equipment loan payments. (AE A at 1)

In April 2007, the corporation filed for Chapter 11 bankruptcy. (GE 19) The debts listed in subparagraphs 1.a and 1.c were included in the bankruptcy payment plan. (GE 19 at 18) At or about this time, Applicant reduced her role with the corporation from president to bookkeeper. (AE 16 at 6) The bankruptcy plan was reviewed and approved in October 2008. (AE A at 2)

The business continued to operate while in Chapter 11 bankruptcy status. In June 2008, Applicant purchased a construction vehicle in her name and leased it to the company (subparagraph 1.i). (GE 9 at 17; AE A at 1) Also, at or about this time, an additional purchase of capital equipment was made (subparagraph 1.g). It is unclear from the record whether Applicant or the business purchased it.

In the fall of 2008, gas prices rose sharply, greatly increasing the operating costs of the company. Also, at or about this time, the economy entered into a recession, drastically impeding the business. (AE A at 2) Consequently, the business's struggles increased, and Applicant began falling behind on her payments on subparagraph 1.i.

In December 2008, Applicant filed for Chapter 7 bankruptcy protection in her individual capacity. (Answer) She did so, in part, to prevent the creditor listed in subparagraph 1.i from repossessing the construction vehicle. (AE A at 3)

In May 2009, the court dismissed both the Chapter 11 bankruptcy that Applicant's corporation filed and the Chapter 7 that Applicant filed in her individual capacity. (Answer; AE A at 3) The Chapter 11 bankruptcy was dismissed for failure to comply with the payment plan and the Chapter 7 was dismissed because Applicant's personal income was too high to qualify for Chapter 7 bankruptcy protection. (*Id.*; GE 20) The creditor listed in SOR subparagraph 1.i then repossessed the construction vehicle. (Tr. 54)

In June 2009, Applicant's corporation re-filed a petition for Chapter 11 bankruptcy protection. (GE 16 at 2; Answer at 2) The debt listed in subparagraph 1.g, along with the SOR debts listed in the previous corporate bankruptcy filing were included in the petition. In September 2009, Applicant filed a petition for bankruptcy protection under Chapter 11 in her individual capacity. (GE 14; GE 16 at 2)

In December 2010, Applicant's attorney filed a motion in the Applicant's Chapter 11 case requesting the court to declare multiple debts to be unsecured. (GE 15) Per the factual background section of the motion, four creditors hold mortgages on Applicant's home collectively totalling more than four times the home's fair market value. (*Id.* at 4) None of these mortgages are delinquent. The motion also listed three creditors who hold judgment liens against Applicant's personal property totalling approximately \$83,000. (*Id.* at 5, ¶ 23) Approximately \$75,000 of this balance represents debt owed to creditors not listed in the SOR.

As a consequence of the corporation's financial problems, it stopped paying the state tax withholdings of its employees. In April 2008, Applicant's state of residence filed a \$3,633 tax lien against her. (GE 22 at 1) Between November 2007 and October 2009, the state taxing authority filed three liens against Applicant's corporation for delinquent payroll taxes (subparagraphs 1.f, 1.h, 1.i). (*Id.*) The lien amounts range from \$3,102 to \$8,762. She asserts that her boyfriend was responsible for bill paying, and that her responsibilities were limited to accounts receivables and managing the payroll. (Tr. 57)

In October 2010, Applicant resigned from the company. (AE E) Her boyfriend has accepted responsibility for all of the corporation's debts including the payroll tax delinquencies. (*Id.*) He has been making payments to the state through a payment plan. (AE F) It is unknown from the record how long he has been making these payments. Also, there is no documentary evidence of the payment plan.

The business closed in February 2011. (Tr. 42) Applicant's boyfriend now works for another company.

The Government alleges two debts totalling approximately \$3,200 that Applicant accrued in her personal capacity in the early 2000s (subparagraphs 1.d and 1.e). Applicant admits accruing these debts, but asserts that she satisfied them in 2004. The Government's evidence indicates that these debts were satisfied in October 2004, as Applicant asserts. (GE 7)

Applicant's bankruptcy proceeding is ongoing. Per her attorney's advice, she is not attempting to satisfy any of the delinquent debts that the business accrued. (AE A at 4) She earns a \$110,000 annual salary and has approximately \$1,500 of after-expense monthly income. (Tr. 53) She has \$30,000 in her 401k account. (Tr. 72)

Policies

The adjudicative guidelines list potentially disqualifying conditions and mitigating conditions. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, they are applied together with the factors listed in the adjudicative process. 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.”

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by department counsel . . .”. The applicant has the ultimate burden of persuasion for obtaining a favorable security decision.

Analysis

Guideline F, Financial Considerations

Under this guideline, “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 (AG ¶ 18). Applicant’s financial struggles trigger the application of AG ¶¶ 19(a), “inability or unwillingness to satisfy debts,” and 19(c), “a history of not meeting financial obligations.”

The following 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; and

(d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

Applicant satisfied the debts listed in subparagraphs 1.d and 1.e. I conclude they no longer represent a security concern, and resolve them in her favor.

Applicant’s financial delinquencies stemmed from a failed business, not extravagant spending. Now that Applicant has resigned from the business and it no

longer exists, the problem is unlikely to recur. Applicant has proactively addressed the financial crisis from its inception, retaining an attorney, and aggressively attempting to remedy the problem through the bankruptcy process. She has no delinquencies unrelated to the failed business, earns a lucrative salary, and has approximately \$1,500 of monthly after-expense income.

Conversely, the business-related origins of Applicant's financial problems do not entirely mitigate the security concern, particularly with respect to the accrual of the state payroll tax delinquency. As Applicant testified during cross-examination, the business took money out of employees' checks for tax payments, but did not pay the state. Also, Applicant's assertion that she was unaware that her boyfriend was not paying the company's bills is not credible given her educational background and her role as company president for the first year it was incorporated.

Most important, Applicant's bankruptcy is unresolved, all of the SOR delinquencies related to the business are still outstanding, there are \$75,000 of outstanding judgment liens against Applicant's personal property that are unlisted in the SOR, and multiple outstanding mortgages on her home totalling more than four times her home's fair market value. Under these circumstances, the fact Applicant has no non-business related delinquencies has minimal probative value. I conclude that elements of all of the mitigating conditions are partially applicable, but only AG ¶ 20(d) is totally applicable.

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 business-related circumstances of Applicant's financial difficulties constitute a circumstance beyond her control. However, the nature, extent, and seriousness of the Applicant's financial problem is compounded by her failure to pay the business' payroll taxes. Applicant repeatedly emphasized that her boyfriend was the primary manager of the business. She also testified that he was going to assume responsibility for the tax debt and the other business debt. The only evidence she provided supporting this contention was a letter from her boyfriend, submitted after the hearing, stating that he had entered a payment plan with the state taxing authority. Given the amount of

outstanding delinquent debt and the unresolved status of the bankruptcy proceeding, I conclude Applicant has presented some evidence of rehabilitation, but has failed to carry the burden of proving her troubled finances do not pose a security risk. Applicant has failed to mitigate the financial considerations security concern.

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 - 1.c:	Against Applicant
Subparagraphs 1.d - 1.e:	For Applicant
Subparagraphs 1.f - 1.l:	Against Applicant

Conclusion

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

MARC E. CURRY
Administrative Judge