



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



In the matter of:)
)
-----) ISCR Case No. 10-01754
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Daniel F. Crowley, Esquire, Department Counsel
For Applicant: *Pro se*

November 24, 2010

Decision

HARVEY, Mark, Administrative Judge:

Applicant has one allegedly delinquent debt, a Social Security Administration (SSA) overpayment of \$75,919. She disputes her responsibility to repay this debt, and an SSA hearing is scheduled for December 1, 2010. Financial considerations are mitigated. Eligibility for access to classified information is granted.

Statement of the Case

On March 5, 2008, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP) or security clearance application (SF 86) (GE 1). On July 28, 2010, the Defense Office of Hearings and Appeals (DOHA) issued an SOR to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended; and the adjudicative guidelines (AG) promulgated by the President on December 29, 2005.

The SOR alleged security concerns under Guideline F (financial considerations). (Hearing Exhibit (HE) 2) The SOR detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The SOR recommended referral to an administrative judge to determine whether Applicant's clearance should be granted, continued, denied, or revoked (HE 2).

On August 18, 2010, Applicant responded to the SOR and requested a hearing. (HE 3) On September 19, 2010, Department Counsel indicated he was ready to proceed on Applicant's case. On September 23, 2010, DOHA assigned Applicant's case to me. On October 1, 2010, DOHA issued a hearing notice. (HE 1) On November 3, 2010, Applicant's hearing was held. At the hearing, Department Counsel offered seven exhibits (GE 1-7) (Tr. 27), and Applicant offered four exhibits. (AE A-D) (Tr. 16-18; pg. 1-91) There were no objections, and I admitted GE 1-7 and AE A-D. (Tr. 17-18, 27) I also admitted documents relating to SSA disability determinations and the appeal process. (Tr. 29-32; Administrative Notice Exhibits (ANE) I-V) Additionally, I admitted the hearing notice, SOR, Applicant's response to the SOR, and email correspondence between me, Department Counsel and Applicant as hearing exhibits. (HE 1-4) I held the record open until November 10, 2010 for the parties to submit additional evidence. (Tr. 63) After the hearing, Department Counsel provided an updated credit report (GE 8), and Applicant provided six exhibits. (AE E-J) There were no objections to the post-hearing exhibits, and I admitted them into evidence. On November 10, 2010, I received the transcript. I also attached several legal references regarding Social Security overpayments and bankruptcy law to the record. (Appellate Exhibits I-IV)

Findings of Fact¹

Applicant's SOR response admits that she received benefits from the SSA, and that her debts were discharged under Chapter 7 of the Bankruptcy Code on March 18, 2005. (HE 3) Her admissions are accepted as factual findings.

Applicant is a 46-year-old employee of a government contractor. (Tr. 7, 33) She graduated from high school in 1981. (Tr. 7-8, 33) In 2002, she received an associates degree in applied computer technology. (Tr. 8) She has never served in the military. (SF 86) She has never been married and does not have any children. (SF 86) In 2008, she received a Secret clearance. (Tr. 9) The only negative entries on her credit reports are her SSA debt and her 2005 bankruptcy. (Tr. 67; GE 8) She disclosed her bankruptcy on her SF 86.

Financial Considerations

Applicant's SOR lists two allegations. SOR ¶ 1.a alleged the SSA placed an overpayment of \$75,919 for collection. SOR ¶ 1.b states her debts were discharged under Chapter 7 of the Bankruptcy Code on March 18, 2005.

¹Some details have been excluded in order to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

In 1994, Applicant lost her job with the post office and decided to file for disability from the SSA. (Tr. 37) She also filed a grievance against the post office. In January 2006, she was able to return to her post office employment. (Tr. 37, 40)

On February 3, 1995, the SSA determined Applicant was entitled to disability because she is deaf, and she had problems with her back. (Tr. 38-39; AE E at 1) On November 13, 2003, SSA notified Applicant that she was not entitled to payments beginning in October 1999 because her income exceeded the thresholds for payment of benefits. (AE E at 11) Her SSA disability payments did not resume after November 2003. (Tr. 43) On May 24, 2006, SSA sent Applicant a notice informing her that SSA calculated the overpayment to be \$75,919, and the overpayment was not waived because she was at fault. (AE E at 2)

On June 20, 2006, Applicant requested a hearing. (Tr. 44; AE E at 2) On March 4, 2008, Applicant had a hearing, which was held to determine whether Applicant “was without fault in causing the overpayment; and if she was without fault, whether recovery of the overpayment should be waived.” (AE E at 3)

The SSA Judge briefly summarized the legal standards for requiring repayment of an SSA disability overpayment as follows:

A finding of fault will be made if an individual made an incorrect statement which he or she knew or should have known was incorrect, or failed to furnish information which the individual knew or should have known was important, or accepted a payment which he or she knew or could have been expected to know was incorrect. (20 C.F.R. 404.507)

Recovery of an overpayment will be waived if a beneficiary is without fault, and recovery would defeat the purpose of the Social Security Act, or would be against equity and good conscience. (Section 204(b) and 20 C.F.R. 404.506)

Recovery will be found to defeat the purpose of Title II if it results in depriving an individual of income needed to meet current ordinary and necessary expenses, or would reduce assets below statutory levels. (20 C.F.R. 404.508)

Recovery would be against equity and good conscience if a person changed his or her position for the worse, or relinquished a valuable right, having relied on the award of benefits. (20 C.F.R. 404.509)

AE E at 5.² Applicant urged the SSA Judge not to require her to repay the overpayment arguing: (1) She worked as an intern while in school from 1999 to 2002, and then part time until March 1, 2004. (AE E at 6); (2) She informed SSA each and every time she worked (AE 6 at 12); (3) She did not earn the amounts of money that SSA contended she earned; and (4) She disagreed with the amount of the overpayment because she did not receive all of her disability checks. (AE E at 10) The SSA Judge determined that Applicant “has not established that she was without fault in causing and accepting the overpayment” and “recovery of the overpayment cannot be waived.”³ (AE E at 11)

The SSA Judge’s decision does not provide a year-by-year breakdown of the amounts owed or overpaid by the SSA. The SSA Judge’s decision states she earned \$40,800 in 1997, \$30,659 in 1998, \$13,360 in 1999, \$0 in 2000; \$4,636 in 2001, \$2,906 in 2002, \$15,267 in 2003, and \$23,650 in 2004. (AE E at 7) The SSA Judge explained this income represents substantial gainful activity (SGA) and that she could earn \$500 per month until June 1999; \$700 per month until December 2000; \$720 per month in 2000 and 2001; \$800 per month in 2003; and \$820 per month in 2004 before her SSA disability payment would be reduced. (AE E at 7)

Applicant appealed the SSA Judge’s decision, and on July 15, 2010, the SSA Appeals Council noted Applicant reported her income and cited four exhibits. (AE A at 2) As to her knowledge that she was not entitled to the SSA disability payment, Applicant contended that she did not understand the SSA process and cited the SSA’s failure to provide an adequate translator. (AE A at 3) The remand directed the SSA Judge to make findings in several areas, including misinformation received from the SSA, income Applicant received, whether Applicant was at fault in the overpayment, and whether recovery of the overpayment may be waived. (AE A at 3) Applicant’s counsel stated that Applicant’s SSA hearing is now scheduled for December 1, 2010. (AE G)

SSA started a garnishment of Applicant’s pay to recoup the overpayment, and then stopped the garnishment because Applicant filed an appeal. (Tr. 50; GE 7) SSA is currently collecting \$20 per month from Applicant. (Tr. 47-50; AE D) The SSA advised Applicant that her payments would be refunded if she prevailed at her hearing. (Tr. 47) There is no SSA documentation of record indicating her SSA debt is currently delinquent. Even if all of her appeals are denied, the SSA will limit her required repayment to a level she can afford based on her income and expenses. (Tr. 53)

²A copy of Title 42 U.S.C. § 404, including interpretative notes and decisions, is at Appellate Exhibit IV, and 20 C.F.R. §404.408 is at Appellate Exhibit V. Appellate Exhibit IV includes a discussion of the applicability of bankruptcy to discharge a debt generated by an overpayment of social security disability benefits.

³The SSA Judge’s decision specifies that a repayment plan is not within the scope of the decision. (AE E at 9 n. 7)

Chapter 7 bankruptcy on March 18, 2005

On December 9, 2004, Applicant filed for Chapter 7 Bankruptcy protection, and on March 18, 2005, her unsecured debts were discharged. Her student loan of \$16,851 was not discharged by her bankruptcy. (Tr. 58) Her bankruptcy was caused by underemployment. As indicated previously, she had several years with low income and her debts were substantial. (Tr. 36) Excluding her Social Security disability payments from 2000 to 2004, her income totaled \$46,457, and over those five years her non-Social Security income averaged \$9,291 per year. (AE E at 7)

Applicant's student loan and car loan are current. (Tr. 58; GE 8) She paid her taxes. (Tr. 58) Aside from her disputed SSA debt, all debts are current. (Tr. 58; GE 8) She received financial counseling as part of the bankruptcy process, and the file contains a personal financial statement (PFS) or budget.

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, "no 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 applicant's 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.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the revised adjudicative guidelines. 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 safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information. Clearance decisions must be "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. See *also* Executive Order 12968 (Aug. 2, 1995), § 3.1. Thus, nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination about applicant's allegiance, loyalty, or patriotism.

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). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[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

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, I conclude the relevant security concern is under Guideline F (financial considerations).

Financial Considerations

AG ¶ 18 articulates the security concern relating to financial problems:

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.

AG ¶ 19 provides two disqualifying conditions that could raise a security concern and may be disqualifying in this case: “(a) inability or unwillingness to satisfy debts;” and “(c) a history of not meeting financial obligations.” In ISCR Case No. 08-12184 at 7 (App. Bd. Jan. 7, 2010), the Appeal Board explained:

It is well-settled that adverse information from a credit report can normally meet the substantial evidence standard and the government’s obligations

under [Directive] ¶ E3.1.14 for pertinent allegations. At that point, the burden shifts to applicant to establish either that [he or] she is not responsible for the debt or that matters in mitigation apply.

(internal citation omitted). Applicant's history of delinquent debt is documented in her credit reports, her 2005 bankruptcy schedules, her March 17, 2008 SSA decision, and her statement at her hearing. Her 2005 bankruptcy schedules by themselves are sufficient to establish the disqualifying conditions in AG ¶¶ 19(a) and 19(c), requiring additional inquiry about the possible applicability of mitigating conditions.

Five 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;

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

(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.

Applicant's conduct in resolving her debts warrants full application of AG ¶¶ 20(b) and 20(c) to her 2005 bankruptcy. Applicant received financial counseling as part of her bankruptcy. She also generated a personal financial statement or budget as part of her response to DOHA interrogatories. Applicant's financial situation was damaged by insufficient income during periods of unemployment and underemployment. She was disabled and was unable to obtain or retain adequate employment. However, her financial circumstances have been stable from 2005 to the present. Applicant established that she acted responsibly under the circumstances. Aside from her SSA debt, she has maintained contact with her creditors,⁴ and kept all of her debts in current

⁴"Even if Applicant's financial difficulties initially arose, in whole or in part, due to circumstances outside his [or her] control, the Judge could still consider whether Applicant has since acted in a reasonable manner when dealing with those financial difficulties." ISCR Case No. 05-11366 at 4 n.9 (App.

status. Her finances are under control. She admitted responsibility for and pays her debts, showing good faith mitigation under AG ¶ 20(d).⁵

AG ¶ 20(e) is fully applicable to her SSA debt. She actively disputed her responsibility for this debt, and her responsibility to pay this debt is not established at this time.⁶ She provided ample evidence of the basis of her dispute, and she has been making payments that are satisfactory to the SSA while the overpayments are being addressed by the SSA Hearing Judge and SSA Appeals Council. Applicant's case was remanded to a hearing-level SSA Judge, who is required to address several factual and legal issues. Her hearing is now scheduled for December 1, 2010. The SSA Appeals Council would not have remanded the case if there were not a *bona fide*, reasonable basis to dispute repayment of some or all of the SSA overpayments. There is also an issue concerning whether SSA's possible overpayment of benefits was discharged in bankruptcy. See *In re Neavear* (1982, CA7 Ill) 674 F.2d 1201, 9 B.C.D. 132, 6 C.B.C.2d 367, CCH Bankr. L. Rep. P. 68656 (holding SSA overpayments are subject to bankruptcy discharge). See also Research Guide for 42 U.S.C. § 404 (citing *In re Neavear*). (Appellate Exhibit IV) Applicant's bankruptcy schedules did not list her SSA overpayment as a debt. However, Applicant's failure to list the SSA debt on her 2005 bankruptcy does not affect its discharge as part of her bankruptcy.⁷

Bd. Jan. 12, 2007) (citing ISCR Case No. 99-0462 at 4 (App. Bd. May 25, 2000); ISCR Case No. 99-0012 at 4 (App. Bd. Dec. 1, 1999); ISCR Case No. 03-13096 at 4 (App. Bd. Nov. 29, 2005)). A component is whether he or she maintained contact with creditors and attempted to negotiate partial payments to keep debts current.

⁵The Appeal Board has previously explained what constitutes a "good faith" effort to repay overdue creditors or otherwise resolve debts:

In order to qualify for application of [the "good faith" mitigating condition], an applicant must present evidence showing either a good-faith effort to repay overdue creditors or some other good-faith action aimed at resolving the applicant's debts. The Directive does not define the term 'good-faith.' However, the Board has indicated that the concept of good-faith 'requires a showing that a person acts in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation.' Accordingly, an applicant must do more than merely show that he or she relied on a legally available option (such as bankruptcy) in order to claim the benefit of [the "good faith" mitigating condition].

(internal citation and footnote omitted) ISCR Case No. 02-30304 at 3 (App. Bd. Apr. 20, 2004) (quoting ISCR Case No. 99-9020 at 5-6 (App. Bd. June 4, 2001)).

⁶ This decision indicates that Appellant's dispute of her SSA debt is reasonable and made in good faith. This decision does not address the merits of her dispute, as that determination is for the SSA Hearing Judge, the SSA Appeals Council and possibly the Bankruptcy Court.

⁷Absent fraud, in a no-asset bankruptcy, all unsecured, nonpriority debts are discharged when the bankruptcy court grants a discharge under Chapter 7 of the Bankruptcy Code, even when they are not listed on a bankruptcy schedule. See *Judd v. Wolfe*, 78 F.3d 110, 114 (3d Cir. 1996); *Francis v. Nat'l Revenue Service, Inc.*, 426 B.R. 398 (Bankr. S.D. FL 2010), but see *First Circuit Bucks Majority on Discharge of Unlisted Debt in No-Asset Case*, American Bankruptcy Institute, 28-9 ABIJ 58 (Nov. 2009). (Appellate Exhibits I & II) Applicant did not receive her bankruptcy discharge from a bankruptcy court in the First Circuit, and she has not lived in a First Circuit state for the last ten years. (SF 86) There is no

In sum, Applicant fell behind on her debts because of underemployment, her disability, and her unemployment while attending college. She utilized bankruptcy in 2005 to obtain a fresh start. Aside from her SSA debt, her credit report does not disclose any delinquent debt. She provided documentation showing a reasonable basis to dispute her SSA debt. Financial considerations security concerns are fully mitigated.

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 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. AG ¶ 2(c). 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 46-year-old employee of a government contractor. She is sufficiently mature to understand and comply with her security responsibilities. She deserves substantial credit for volunteering to support the U.S. Government as an employee of a contractor. There is every indication that she is loyal to the United States and her employer. There is no evidence that she has violated security or abuses illegal drugs. In 2002, she received an associates degree in applied computer technology. The only negative entries on her credit reports are her SSA debt and her 2005 bankruptcy. Her underemployment, disability, and unemployment contributed to her financial woes. She is also credited with disclosing her bankruptcy on her security clearance application. Her SSA debt is being aggressively and reasonably disputed. She is making payments on her SSA debt at a level that is satisfactory to the SSA while the debt is being addressed by an SSA Judge. If she fails to prevail, and must repay some or all of the SSA overpayment, the SSA will take into account her income and expenses when computing her required payments. Over the last five years, Applicant has established a solid track record of payment of her debts. She has established her financial responsibility, rehabilitation, and mitigation.

requirement to re-open the bankruptcy to discharge the debt. *Collier on Bankruptcy*, Matthey Bender & Company, Inc., 2010, Chapter 4-523, ¶ 523(a)(3)(A) (Appellate Exhibit III).

I have carefully applied the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. I conclude financial considerations concerns are fully mitigated. Eligibility for access to classified information is granted.

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

Subparagraphs 1.a and 1.b: For Applicant

Conclusion

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

MARK HARVEY
Administrative Judge