



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



In the matter of:)
)
XXXXXXXXXX, XXXXX) ISCR Case No. 10-11034
)
Applicant for Security Clearance)

Appearances

For Government: Richard Stevens, Esq., Department Counsel
For Applicant: *Pro se*

November 30, 2011

Decision

TUIDER, Robert J., Administrative Judge:

Applicant failed to mitigate security concerns for Guideline F (financial considerations). Clearance is denied.

Statement of the Case

Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) on August 20, 2010. On June 15, 2011, the Defense Office of Hearings and Appeals (DOHA) issued 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*, dated February 20, 1960, as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive); and the adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

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, and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

Applicant answered the SOR on June 24, 2011, and elected to have her case decided on the written record in lieu of a hearing. A complete copy of the file of relevant material (FORM), dated August 8, 2011, was provided to her by cover letter dated August 16, 2011. Applicant received her copy of the FORM on August 25, 2011. She was given 30 days from the date she received the FORM to submit any objections, and information in mitigation or extenuation. She did not submit additional information within the 30-day period. The case was assigned to me on October 27, 2011.

Findings of Fact

As to the SOR's factual allegations, Applicant admitted 14 of the 16 financial delinquencies, involving five unpaid medical bills, utilities, credit card accounts and other consumer debts, all totaling \$43,848. She denied SOR ¶ 1p¹ (insurance company debt for \$78) and failed to admit or deny SOR ¶ 1e² (credit card debt for \$6,423).

Applicant is a 41-year-old assembler, who has been employed by a defense contractor since May 2009.³ The only available information regarding her level of education is that she attended college from August 1994 to June 1995. Applicant married in June 1996 and separated in June 2005. She has two sons, ages 19 and 14.

In her Answer, and in earlier responses to concerns about her financial situation, Applicant acknowledges responsibility for the majority of the debts listed in the SOR. From September 1999 until about September 2009, Applicant was self-employed and operated a local convenience store as a sole proprietor.⁴ As her business began to decline as a result of a downturn in the local economy, Applicant used credit cards to fund several business expenses. Unfortunately, her business eventually failed. As a contributing factor to her current financial predicament, Applicant admits that a portion of her delinquent debt resulted from excessive personal spending at local department

¹ Applicant disputes this debt, claiming she switched insurance carriers and her former car insurance provider is seeking premium payments after she terminated her policy with them (Item 7 at 4.)

² This appears to be an administrative oversight by Applicant in answering the SOR. In her Response to Interrogatories, Applicant provided a copy of a Default Judgment rendered against her for this debt, which now totals \$8,183.53 with costs, fees and pre-judgment interest and acknowledged her liability on this debt. (Item 7 at 8; Item 8 at 5.)

³ Background information is derived from Applicant's e-QIP unless otherwise stated.

⁴ Item 6 at 10-11; Item 7 at 3.

stores.⁵ At some point, Applicant sought debt counseling on one occasion and was advised to pursue liquidation of her business or investment real property as a precursor to bankruptcy, but chose neither option.⁶ In May 2009, with her business failing, Applicant began work as an assembler for a defense contractor where she earns a monthly net of \$1,122, which results in a negative monthly remainder.⁷ Applicant is the custodial parent for her two sons and reports receiving \$400 in monthly child support from her estranged husband.⁸

Policies

The President of the United States 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. *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988). The President has authorized the Secretary of Defense to grant 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. The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These AGs 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 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 to reach his decision.

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 that the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of 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.

⁵ Item 6 at 31-36; Item 7 at 3, 4.

⁶ Item 7 at 3. Applicant and her estranged husband own real property (four unimproved building lots valued at \$2,400); Item 7 at 5.

⁷ Item 6 at 9, 38; Item 7 at 5.

⁸ Item 7 at 5.

Or. 10865 § 7. See also Executive Order 12968 (Aug. 2, 1995), Section 3. Thus, a clearance decision is merely an indication that the Applicant has or 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 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 or her] 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).

Conclusions

Under Guideline F, the security concern is that an Applicant’s 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 ¶ 18.

Applicant acknowledges 14 debts totaling \$43,844, and the evidence establishes that she is responsible for one debt in the amount of \$6,423 (SOR ¶ 1n). She failed to submit any documentation supporting her disputed claim with her former insurance company in the amount of \$78 (SOR ¶ 1p). These debts have been ongoing for several years. AG ¶ 19(a): “inability or unwillingness to satisfy debts” and AG ¶ 19(c): “a history of not meeting financial obligations” apply.

Five financial considerations mitigating conditions under AG ¶¶ 20(a) through (e) 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 does not warrant full application of AG ¶ 20(a) because there is more than one delinquent debt and her financial problems are not isolated. Therefore, her debt is "a continuing course of conduct" under the Appeal Board's jurisprudence. See ISCR Case No. 07-11814 at 3 (App. Bd. Aug. 29, 2008) (citing ISCR Case No. 01-03695 (App. Bd. Oct. 16, 2002)).

Under AG ¶ 20(b), in order for this mitigating condition to apply, Applicant would be required to show that circumstances largely beyond her control caused her debt and that she then acted responsibly. Despite Applicant's acknowledged personal overspending, her serious financial problems appear to have resulted from a general downturn in her local economy, which caused her convenience store business to fail. This triggers partial application of this mitigating condition. Applicant appears to have acted responsibly, to some degree, by pursuing debt counseling, attempting to lease her business property, and obtaining her current employment.⁹

Under AG ¶ 20(c), in order for this mitigating condition to apply, Applicant would be required to show, that in addition to seeking financial counseling, there must be clear indications that her financial problems are under control. Based on her current monthly

⁹ "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. 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 maintained contact with his creditors and attempted to negotiate partial payments to keep his debts current.

income, Applicant appears to be unable to repay or establish any repayment plans with any of her creditors precluding full application of this mitigating condition.

Likewise, there is not sufficient evidence in the record to establish full mitigation under AG ¶ 20(d) because of Applicant's inability to repay any of her creditors.¹⁰ Similarly, AG ¶ 20(e) is not applicable because Applicant has not disputed the validity of the debts alleged, except for one small debt for which she failed to submit documentation supporting her position that she is not liable for this debt.

I have carefully weighed all evidence, and I applied the disqualifying and mitigating conditions as listed under the applicable adjudicative guidelines. I applied the whole-person concept. I specifically considered Applicant's age, education, her valued service as a defense contractor employee, and other limited evidence contained in the record. However, given the facts as they have been presented in this case, I am unable to grant Applicant's security clearance.

I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my careful consideration of the whole-person factors and supporting evidence, my application of the pertinent factors under the adjudicative process, and my interpretation of my responsibilities under the adjudicative guidelines.

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: Subparagraphs 1a – 1p:	AGAINST APPLICANT Against Applicant
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¹⁰ The 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 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)).

Decision

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

ROBERT J. TUIDER
Administrative Judge