



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



In the matter of:)
)
XXXXXXXXXX, XXXXX) ISCR Case No. 11-00771
)
Applicant for Security Clearance)

Appearances

For Government: Paul M. DeLaney, Esq., Department Counsel
For Applicant: *Pro se*

January 6, 2012

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 Questionnaires for Investigations Processing (e-QIP) on October 18, 2010. On July 26, 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 August 12, 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 September 15, 2011, was provided to her by cover letter dated September 20, 2011. Applicant received her copy of the FORM on September 29, 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 November 30, 2011.

Findings of Fact

As to the SOR's factual allegations, Applicant denied the allegations under SOR ¶¶ 1a through 1g, admitting only the single allegation in SOR ¶ 1h. It is apparent from her Answer, however, that she does not deny the actual debts alleged in SOR ¶¶ 1a through 1g, but rather contends those debts are paid, current, or being managed under a payment agreement.¹

Applicant is a 62-year-old property management specialist, who has been employed by a defense contractor since about August 2010.² She attended a university from September 1986 to June 1988, and was awarded a bachelor's degree in June 1988. Applicant married in May 2006, and her e-QIP does not list any dependent children.

Applicant has been continuously employed from about August 1997 until she was laid off in about March 2005, and was then employed sporadically in temporary positions until her present employment.³ Her e-QIP lists periods of unemployment from March to July 2005, from July 2006 to January 2007, from January to August 2008, and from September 2008 to July 2009.⁴

¹ See Item 4. Applicant states the debts alleged in SOR ¶¶ 1a and 1b "have been on a monthly payment plan with (bank) for at least 10 months," the debt alleged in SOR ¶ 1c "is current and paid ahead," and the debt alleged in SOR ¶ 1d is "in settlement and will be paid in full on 9/28/11." *Id.* She also states the debt alleged in SOR ¶ 1e "has been settled and is paid in full," and the debt alleged in SOR ¶ 1f "is current and has been current for at least eleven months." *Id.* She contends she is in a "trial modification" for the mortgage debt alleged in SOR ¶ 1g, and that her creditor is working a loan modification for the mortgage debt alleged in SOR ¶ 1h. *Id.*

² Background information is derived from Applicant's e-QIP unless otherwise stated.

³ Item 5.

⁴ *Id.*

As supported by the record evidence, including information she submitted in her e-QIP and information contained in two credit reports,⁵ Applicant has delinquent debts totaling more than \$111,300.⁶ During a November 2010 Office of Personnel Management (OPM) interview, Applicant attributed her financial problems to her job loss and to her mother's death, at which time she "took on some of her debt."⁷ At that time, she acknowledged most of the delinquent accounts listed to her, said her financial situation was "improving," and said she was capable of meeting her financial obligations.⁸ She had not sought or received financial counseling, but planned on seeking the services of a debt consolidation agency "in the near future."⁹ Applicant said that during her periods of unemployment, she was financially supported by her husband's income and by her receipt of state unemployment benefits.¹⁰

Although it appears from statements made during her OPM interview that she largely attributes her financial problems to her periods of unemployment, she has not provided information or detail sufficient to show the full financial impact of those periods of unemployment, or that she managed her finances responsibly through that time period. Notably, she first became unemployed when laid off in March 2005, it was after that time that she married in May 2006, became obligated on an automobile loan of more than \$43,000 that required monthly payments of \$637 in March 2006,¹¹ and her e-QIP lists no less than six different vacation cruises she took from May 2006 to June 2010 at a time when she became severely in debt.¹²

The record contains little explanation or detail showing why or how she became delinquent in an amount totaling more than \$111,300 on her credit accounts. Nor does the record establish that the conditions or circumstances surrounding her financial situation were beyond her control, or that her responses to that situation over time were reasonable prudent, and responsible.

⁵ The Appeal Board has held that an applicant's credit report showing the delinquent debts alleged in an SOR is sufficient to establish the Government's *prima facie* case. See ISCR Case No. 03-20327 at 3 (App. Bd. Oct. 26, 2006).

⁶ Items 1 – 8.

⁷ Item 6 at 5.

⁸ *Id* at 5-7.

⁹ *Id* at 5.

¹⁰ *Id* at 8.

¹¹ Items 7 and 8 show an automobile loan with (creditor) Applicant opened in March 2006 with a high credit amount of \$43,531 and monthly payments of \$637. As alleged in SOR ¶ 1f, Item 7 shows the automobile that secured this loan account was involuntarily repossessed.

¹² See Item 5 at 37-41, which lists vacation cruises. See *a/so*, Items 6 – 8, which discuss Applicant's delinquent accounts.

While it appears that Applicant has positively addressed some of the delinquent debts alleged, she has not provided documentation to fully support her statements regarding the present status of her delinquent accounts. As noted above, she contends she has “been on a monthly payment plan for at least 10 months” for debts alleged in SOR ¶¶ 1a and 1b,¹³ but she has provided no documentation showing she has such a payment agreement in place with her creditor or that she has fully complied with any such agreement.

It does appear from the evidence she has supplied that she has made payments toward the debts alleged in SOR ¶¶ 1c, 1d, and 1f,¹⁴ and that she was as of June 4, 2011 in a trial period under a modification program for the delinquent mortgage account alleged in SOR ¶ 1g.¹⁵ However, she has not provided any documentation showing she has made the required payments under that program, provided any more recent communication showing her loan has actually been modified, or provided any documentation at all showing the debt alleged in SOR ¶ 1h has been entered into a similar modification program.

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

¹³ Item 4 at 3.

¹⁴ Item 4 at 3-9. Items 4 and 5 (a statement dated Aug. 28, 2011) supports Applicant’s contention that she is current on the debt alleged in SOR ¶ 1c and has “paid ahead” on that debt. Item 4 at 6 – 8 support Applicant’s contention that she has settled the debt alleged in SOR ¶ 1d (Item 4 at 6 shows the settlement amount as \$2,163.10) and has made payments toward the settled amount per agreement with her creditor. Item 4 at 9 (a statement for period ending July 15, 2011) supports Applicant’s contention that she has made payments toward the debt alleged in SOR ¶ 1f (showing no past-due amount and a lowered debt balance of \$14,715.51.)

¹⁵ Item 4 at 10 documents Applicant’s approval, as of June 4, 2011, for a trial period for the mortgage loan alleged in SOR ¶ 1g.

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. 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.

The evidence establishes that Applicant owes approximately \$111,300 to various creditors. 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. The record contains little explanation or detail showing why or how she became delinquent in an amount totaling more than \$111,300 on her credit accounts, does not establish that the conditions or circumstances surrounding her financial situation were beyond her control, or that her responses to that situation over time were reasonable, prudent, and responsible. AG ¶ 20(b) is not applicable.¹⁶

¹⁶ “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

AG ¶ 20(c) is not applicable because there is no record evidence that Applicant sought financial counseling and clearly her financial problems are not under control. Likewise, there is not sufficient evidence in the record to establish full mitigation under AG ¶ 20(d) except for debts listed under SOR ¶¶ 1c, 1d, and 1f because of Applicant's inability to repay her creditors or documentation to show that she is repaying her creditors as she claims.¹⁷ However and as noted, Applicant's documentation reflects that she is making payments for debts under SOR ¶¶ 1c, 1d, and 1f and she receives partial credit under this mitigating condition for those debts. AG ¶ 20(e) is not applicable because Applicant has not disputed the validity of the debts alleged.

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 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.

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.

¹⁷ 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)).

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 1a – 1b:	Against Applicant
Subparagraphs 1c – 1d:	For Applicant
Subparagraph 1e:	Against Applicant
Subparagraph 1f:	For Applicant
Subparagraphs 1g – 1h:	Against Applicant

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