



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



In the matter of:)
)
-----) ISCR Case No. 11-01052
)
Applicant for Security Clearance)

Appearances

For Government: Braden M. Murphy, Esquire, Department Counsel
For Applicant: *Pro se*

03/20/2012

Decision

HARVEY, Mark, Administrative Judge:

Applicant’s statement of reasons (SOR) alleges one delinquent mortgage account for \$48,000. Shortly before her hearing, Applicant borrowed the necessary funds and settled this debt. Applicant’s financial problems were caused by unemployment, underemployment, and the decline in Florida real estate values. Before 2006, her debts were paid, and she showed she was financially responsible. Once Applicant and her spouse secured employment in a different state in 2008, she showed excellent self-discipline and good judgment when she made substantial payments to her creditors. Financial considerations are mitigated. Eligibility for access to classified information is granted.

Statement of the Case

On May 12, 2010, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP) or security clearance application (SF 86) (GE 1). On November 9, 2011, 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 November 28, 2011, Applicant responded to the SOR and requested a hearing. (HE 3) On January 13, 2012, Department Counsel was ready to proceed on Applicant's case. On January 24, 2012, DOHA assigned Applicant's case to me. On February 7, 2012, Department Counsel, Applicant, and I agreed on a date for the hearing. (Tr. 16) On February 23, 2012, DOHA issued a hearing notice, and on March 6, 2012, Applicant's hearing was held using video teleconference. (HE 1) Applicant waived her right to 15 days of notice of the time and place of her hearing. (Tr. 17) At the hearing, Department Counsel offered five exhibits (GE 1-5), and Applicant offered four exhibits. (Tr. 20-24; AE A-D) There were no objections, and I admitted GE 1-5 and AE A-D. (Tr. 21, 24-25) On March 15, 2012, I received the transcript of the hearing.

Findings of Fact¹

In her Answer to the SOR, Applicant admitted responsibility for the single \$48,000 debt listed in the SOR. Her admission is accepted as a finding of fact.

Applicant is a 51-year-old field technician, who works on circuits for the Government. (Tr. 7, 25-26) She graduated from high school in 1978, and she has not attended college. (Tr. 7) She married in 1984, and her two children are ages 25 and 27. (Tr. 7-8) She currently holds a security clearance. (Tr. 8)

In 2003, Applicant and her husband moved to Florida, and her husband obtained employment in the home construction industry. (Tr. 28) In 2004, they purchased a residence in Florida for \$205,000. (Tr. 31) In 2004, their home was damaged in a hurricane, and they took out a second mortgage to make repairs. (Tr. 31-32) In 2006, the home construction industry crashed in Florida, and her husband became unemployed. (Tr. 35) He had brief periods of low-paying employment from 2006 to 2008. (Tr. 67) They could not afford their mortgage payments, and numerous other accounts became delinquent. (Tr. 36-37; GE 1) They attempted to sell their home and to refinance their mortgages; however, they were unsuccessful. (Tr. 38-39) In January 2008, they left Florida and moved to a state with lower unemployment. (Tr. 40) They turned their home over to the lender. (Tr. 41) The lender purchased the property for \$100 at an auction, extinguishing Applicant and her husband's interest in the property. (Tr. 44) The lender sent an Internal Revenue Service (IRS) Form 1099 to Applicant, indicating the fair market value of the property was \$85,000. (Tr. 45, 64-65)

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

Applicant has worked for the same employer for three years. (Tr. 27) Her current annual salary is \$49,000. (Tr. 27) Applicant and her husband failed to withhold sufficient funds for their taxes in 2008, 2009, and 2010. (Tr. 50-53) Applicant began making \$1,000 monthly payments by bank allotment to the IRS in October 2011. (Tr. 49-51) Their federal tax bill will be paid in three months. (Tr. 50)

In 2008, Applicant and her spouse's adjusted gross taxable income on their federal income tax form was \$24,487. (AE A) In 2009, Applicant and her spouse's adjusted gross taxable income on their federal income tax form was \$56,780. (AE A) In 2010, Applicant and her spouse's adjusted gross taxable income on their federal income tax form was \$70,350. (AE A)

Applicant's personal financial statement (PFS) showed net monthly income of \$4,726, expenses of \$2,744, debt payments of \$1,424, and net remainder of \$981. (Tr. 58-60; GE 3) Her debt payments include her monthly IRS payment of \$1,000. (GE 3) All of their accounts and payments are current. (Tr. 58-61)

Applicant's SOR listed one debt owed to a mortgage company for \$48,000; the actual debt was \$45,709. (AE B) On February 14, 2012, the collection agent for the debt offered to settle it for \$4,571. (AE B) Applicant had previously paid off the lien on her 2005 vehicle. On March 5, 2012, she borrowed \$6,000, secured by her 2005 vehicle, and used \$4,571 to pay off her mortgage debt. (Tr. 46-48, 68, 72; AE D) The interest rate on her loan is 6.84%, her monthly payment is \$187, and the payment term is 36 months. (AE D) The monthly payments will be made automatically from her bank account. (Tr. 54) Their other delinquent accounts were paid over the 2008-2012 period.

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 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 concerns are 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 SOR response, and her statement at her hearing.

Applicant’s debts became delinquent in 2006. When she and her husband obtained employment in 2008, they gradually reduced their delinquent debt. They are currently paying a non-SOR, federal delinquent tax debt. Until recently, her Florida mortgage of about \$48,000 was also delinquent. The Government established 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(a) and 20(b). Unemployment, underemployment, and the precipitous decline in Florida's real estate values had a negative effect on Applicant's financial circumstances and caused several debts to become delinquent. She and her husband moved to a state with less unemployment in 2008, and their finances improved. Under their IRS agreement, their delinquent tax debt will be paid in three months. They paid their delinquent mortgage account.² Circumstances largely beyond her control caused her financial problems. There is no evidence that she acted irresponsibly.

Two recent Appeal Board decisions illustrate the analysis for applying AG ¶¶ 20(a) and 20(b). In ISCR Case No. 09-08533, the applicant had \$41,000 in delinquent credit card debt and defaulted on a home loan generating a \$162,000 delinquent debt. *Id.* at 2. That applicant filed for bankruptcy the same month the administrative judge issued her decision. *Id.* at 1-2. The applicant in that case was recently divorced, had been unemployed for ten months, and had childcare responsibilities. Her former husband was inconsistent in his payment of child support. The Appeal Board determined that AG ¶ 20(a) was "clearly applicable (debt occurred under such circumstances that it is unlikely to recur and [the debt] does not cast doubt on the individual's current reliability, trustworthiness, or good judgment)" even though that applicant's debts were unresolved at the time the administrative judge's decision was issued. The Appeal Board also decided that the record evidence raised the applicability of AG ¶ 20(b) because of the absence of evidence³ of irresponsible behavior, poor judgment, unreliability, or lack of trustworthiness. *Id.* at 4.

Similarly, in ISCR Case No. 08-06567 at 3 (App. Bd. Oct. 29, 2009) the Appeal Board addressed a situation where an applicant who had been sporadically unemployed lacked the ability to pay his creditors noting that "it will be a long time at best before he has paid" all of his creditors. That applicant was living on unemployment compensation at the time of his hearing. The Appeal Board explained that such a circumstance was not necessarily a bar to having access to classified information stating:

However, the Board has previously noted that an applicant is not required to be debt-free nor to develop a plan for paying off all debts immediately or simultaneously. All that is required is that an applicant act responsibly given his circumstances and develop a reasonable plan for repayment, accompanied by "concomitant conduct," that is, actions which evidence a serious intent to effectuate the plan. See ISCR Case No. 07-06482 at 3 (App. Bd. May 21, 2008).

²Applicant loses some mitigating credit because she underpaid her federal income taxes from 2008 to 2010, and she did not resolve her second mortgage debt in a more timely manner.

³Applicant has the burden of proving the applicability of any mitigating conditions, and the burden to disprove a mitigating condition never shifts to the Government.

ISCR Case No. 08-06567 at 3 (App. Bd. Oct. 29, 2009). The applicant in ISCR Case No. 08-06567 used his limited resources to (1) resolve some of his debts; (2) had a repayment plan for the remaining debts; and (3) took “reasonable actions to effectuate that plan.” *Id.* The Appeal Board remanded the administrative judge’s decision denying a security clearance to the applicant because it did not “articulate a satisfactory explanation for his conclusions,” emphasizing the administrative judge did “not explain[] what he believes that applicant could or should have done under the circumstances that he has not already done to rectify his poor financial condition, or why the approach taken by applicant was not ‘responsible’ in light of his limited circumstances.” *Id.*

Partial application of AG ¶¶ 20(c) and 20(d)⁴ is warranted. Although Applicant did not receive formal financial counseling, she did generate a budget or personal financial statement. She understands how to establish her financial responsibility and eliminate delinquent debt. Applicant established that she acted responsibly under the circumstances. She maintained contact with her creditors.⁵ She attempted to sell her Florida residence and refinance it. Due to unemployment and lack of income, and the decline in Florida real estate values, she voluntarily returned the property to the lender. She has an established payment plan, which will resolve her delinquent tax debt in three months, and her sole delinquent SOR debt is settled and paid. Her financial problem is being resolved or is under control. She admitted responsibility for and is taking reasonable and responsible actions to resolve her debts, showing her good faith. AG ¶ 20(e) is not applicable.

In sum, Applicant fell behind on her debts because of unemployment, underemployment, and the decline in Florida real estate values. After she and her husband became consistently employed, they paid their delinquent debts. In three

⁴The 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)).

⁵“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 or she maintained contact with creditors and attempted to negotiate partial payments to keep debts current.

months, her federal income tax debt will be paid, and she will have an additional \$1,000 per month available as a financial margin of safety. It is unlikely that financial problems will recur. All of her debts and accounts are current. Her efforts are sufficient to fully mitigate financial considerations security concerns. Assuming, financial considerations concerns are not mitigated under AGs ¶ 20, security concerns are mitigated under the whole-person concept, *infra*.

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 Guideline F, but some warrant additional comment.

Applicant is 51 years old. 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. Her security clearance application does not list any reportable incidents involving illegal drugs, alcohol, the police, or courts. There is no evidence that she abuses alcohol or uses illegal drugs. Her spouse's unemployment, underemployment, and the decline in Florida real estate values contributed to her financial woes. I give Applicant substantial credit for admitting responsibility for her SOR debt and delinquent taxes.

Applicant's accounts and debts are all current. I am confident she will keep her promise to continue resolving her tax debt and avoid future delinquent debt. The Appeal Board has addressed a key element in the whole-person analysis in financial cases stating:

In evaluating Guideline F cases, the Board has previously noted that the concept of meaningful track record necessarily includes evidence of actual debt reduction through payment of debts. However, an applicant is not

required, as a matter of law, to establish that he has paid off each and every debt listed in the SOR. All that is required is that an applicant demonstrate that he has . . . established a plan to resolve his financial problems and taken significant actions to implement that plan. The Judge can reasonably consider the entirety of an applicant's financial situation and his actions in evaluating the extent to which that applicant's plan for the reduction of his outstanding indebtedness is credible and realistic. See Directive ¶ E2.2(a) (Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination.) There is no requirement that a plan provide for payments on all outstanding debts simultaneously. Rather, a reasonable plan (and concomitant conduct) may provide for the payment of such debts one at a time. Likewise, there is no requirement that the first debts actually paid in furtherance of a reasonable debt plan be the ones listed in the SOR.

ISCR Case No. 07-06482 at 2-3 (App. Bd. May 21, 2008) (internal quotation marks and citations omitted). Applicant is an intelligent person. She understands how to budget, and what she needs to do to establish and maintain her financial responsibility. There is simply no reason not to trust her. Moreover, she has established a "meaningful track record" of debt re-payment.

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, and 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

Subparagraph 1.a: 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 grant or continue Applicant's eligibility for a security clearance. Eligibility for a security clearance is granted.

MARK HARVEY
Administrative Judge