



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



In the matter of:)
)
) ISCR Case No. 11-03181
)
Applicant for Security Clearance)

Appearances

For Government: Gregg A. Cervi, Esquire, Department Counsel
For Applicant: Dana D. Jacobson, Esquire

04/17/2012

Decision

HENRY, Mary E., Administrative Judge:

Based upon a review of the pleadings, exhibits, and testimony, Applicant's eligibility for access to classified information is granted.

Statement of the Case

Applicant signed an Electronic Questionnaire for Investigations Processing (e-QIP) on August 15, 2008. The Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) on October 26, 2011, detailing security concerns under Guideline F, financial considerations, after Applicant notified her facility security officer of her financial problems. 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 *Adjudicative Guidelines For Determining Eligibility for Access to Classified Information* (AG) implemented on September 1, 2006.

Applicant received the SOR on November 4, 2011, which she answered on November 30, 2011. Applicant retained counsel and requested a hearing before an administrative judge. DOHA received the request, and Department Counsel was prepared to proceed on February 6, 2012. I received the case assignment on February 9, 2012. DOHA issued a Notice of Hearing on February 22, 2012, and I convened the hearing as scheduled on March 6, 2012. The Government offered exhibits marked as GE 1 through GE 5, which were received and admitted into evidence without objection. Applicant testified. She submitted exhibits marked as AE A through AE D, which were received and admitted into evidence without objection. I held the record open until March 13, 2012, for Applicant to submit additional matters. Applicant timely submitted AE E through AE G, which were received and admitted without objection. The record closed on March 13, 2012. DOHA received the hearing transcript (Tr.) on March 21, 2012.

Procedural Ruling

Notice

Applicant received the hearing notice less than 15 days before the hearing. (Tr. 8.) I advised Applicant of her right under ¶ E3.1.8 of the Directive to receive the notice 15 days before the hearing. After consulting with counsel, Applicant affirmatively waived her right to the 15-day notice. (*Id.*)

Findings of Fact

In her Answer to the SOR, Applicant admitted the factual allegations in ¶¶ 1.a - 1.c of the SOR. Her admissions are incorporated herein as findings of fact. She denied the factual allegations in ¶ 1.d of the SOR.¹ She also provided additional information to support her request for eligibility for a security clearance. After a complete and thorough review of the evidence of record, I make the following additional findings of fact.

Applicant, who is 55 years old, works as a software developer for a Department of Defense contractor. She began her current employment in November 2007. She has worked as a software developer for more than 14 years.²

¹When SOR allegations are controverted, the Government bears the burden of producing evidence sufficient to prove controverted allegations. Directive, ¶ E3.1.14. "That burden has two components. First, the Government must establish by substantial evidence that the facts and events alleged in the SOR indeed took place. Second, the Government must establish a nexus between the existence of the established facts and events and a legitimate security concern." See ISCR Case No. 07-18525 at 4 (App. Bd. Feb. 18, 2009), (concurring and dissenting, in part) (citations omitted). 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. 08-06605 at 3 (App. Bd. Feb. 4, 2010); ISCR Case No. 08-07290 at 2 (App. Bd. Nov. 17, 2009).

²GE 1; Tr. 17-18, 22-23.

Applicant and her husband married in June 1983. Their daughter is 24 years old and lives with them while she attends school and works. Their son died in May 2011 at the age of 17. At the time of his death, he suffered from a degenerative muscle disease and was totally disabled. Her husband was his primary care giver for many years and has not returned to work since their son's death.³

In late 1993 or early 1994, the employer of Applicant's husband laid him off from his manager job. Applicant had concerns about the stability of her job. At the same time, she was pregnant with her son. She and her husband also owned two houses at this time, one of which they rented. In 1994, the rental income stopped, and they could not sell the rental house. Their ability to pay their bills declined. They decided to file bankruptcy, which they did in August 1994. The bankruptcy court discharged their debts in November 1994.⁴

Following the Chapter 7 discharge, Applicant and her husband managed their finances and paid their bills. In late August 2007, Applicant's employer laid her off. She found another job in another state, which required Applicant and her family to move more than 1,000 miles. In the spring of 2007, Applicant's home had been appraised at \$420,000. When they prepared to move, they learned that they would encounter difficulty selling their home for \$250,000, well below their mortgage debt. They decided to rent their home, which they did for a year. The tenant paid rent for 11 months, not 12 months. The tenants left the property in need of repair and cleaning, which resulted in additional expenses. Her husband did much of the work on the property. They rented the property beginning in January 2009, but this tenant remained for only three months. As of April 2009, Applicant was current on her rental property mortgage and her bills. With the loss of rental income, she began to experience financial difficulties with two mortgages to pay. She used her credit cards to pay some expenses.⁵

In April 2009, Applicant decided to sell the rental property. She retained the services of a real estate agent, who listed the house for \$255,000. At the same time, Applicant contacted the mortgage company, requesting to modify the terms of her mortgage. The mortgage company denied her request in May 2009 and September 2009. In November 2009, Applicant receive a \$166,000 cash offer on this property. She provided this information to the mortgage company. The primary mortgage lender approved the sale, but the secondary mortgage company requested \$75,000 from her before it would agree to the sale. She did not have this money, and the sale failed. By early 2010, the mortgage company had initiated foreclosure proceedings.⁶

³GE 1; Tr. 17, 23, 36.

⁴GE 5; Tr. 38-39.

⁵GE 1; Tr. 26-28.

⁶GE 2; Tr. 30-31.

In April 2009, Applicant contacted the credit card companies and requested assistance. Several companies agreed to reduce the interest rate on her credit cards. In August 2009, she contacted a credit counseling organization, which worked with her and obtained additional interest rate reductions. The company developed a payment plan, but she did not proceed with the plan.⁷

Applicant met with an attorney to discuss her legal options. She decided to file for bankruptcy. On May 26, 2010, she and her husband filed a Chapter 13 petition for bankruptcy. Her bankruptcy filing stopped the foreclosure proceeding on her out-of-state rental property. Applicant and the mortgage companies reached an agreement, which resulted in the sale of this property and a cancellation of her remaining debt. The bank issued 1099-A (abandonment of property) and 1099-C (cancellation of debt) forms. Applicant included the 1099-C information in her 2010 federal tax return. Her mortgage debt on the rental property is resolved. She is current on her residential mortgage.⁸

The bankruptcy trustee approved Applicant's repayment plan in June 2010, which will last for five years. She made her first payment in July 2010 and has continually made her monthly payment of \$1,272 under her Chapter 13 bankruptcy payment plan. Her bankruptcy plan includes the \$6,729 bank debt listed in SOR ¶ 1.c. She also took the credit counseling course required by the bankruptcy court.⁹

Applicant currently earns \$7,916 a month in gross income and receives approximately \$6,391 a month in net income. Her monthly expenses total \$5,302 a month, leaving approximately \$1,089 in disposable income. Her monthly expenses include her Chapter 13 monthly payment. She has sufficient income to pay her monthly bills and does. Since filing for bankruptcy, she does not use credit cards.¹⁰

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶

⁷GE 2; Tr. 29-30.

⁸GE 2; GE 5; AE A; AE B; AE F; Tr. 2-22, 31.

⁹GE 2; AE C; AE G; Tr. 31-35, 45-46.

¹⁰GE 2; Tr.42,

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.” In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record.

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

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk an applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline F, Financial Considerations

The security concern relating to the guideline for Financial Considerations is set out in AG ¶ 18:

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 describes the disqualifying conditions that could raise security concerns. I have considered all the conditions, and the following are potentially applicable:

- (a) inability or unwillingness to satisfy debts; and
- (c) a history of not meeting financial obligations.

Appellant developed significant financial problems after losing her job in 2007 and moving to another state for employment. Loss of rental property income created additional financial pressures which resulted in her filing a bankruptcy petition. These two disqualifying conditions apply.

The Financial Considerations guideline also includes examples of conditions that can mitigate security concerns. I have considered mitigating factors AG ¶ 20(a) through 20(f), and the following 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.

In assessing whether an Applicant has established mitigation under Guideline F, the Appeal Board provided the following guidance in ISCR Case No. 07-06482 at 3 (App. Bd. May 21, 2008):

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." See, e.g., ISCR Case No. 05-01920 at 5 (App. Bd. Mar. 1, 2007). 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. See, e.g., ISCR Case No. 02-25499 at 2 (App. Bd. Jun. 5, 2006). 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." See, e.g.,

ISCR Case No. 04-09684 at 2 (App. Bd. Jul. 6, 2006). 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. See, e.g., ISCR Case No. 06-25584 at 4 (App. Bd. Apr. 4, 2008). 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.

Applicant's financial problems arose when several major events occurred at the same time. Her employer laid her off in August 2007, during the economic downturn. She was the only wage earner in the household because her husband provided full-time care for their disabled son. She found other employment many miles from their residence. Since the market value of her house had declined about \$150,000, she decided to rent the house because she could not sell the house at a price which would pay her debt. She successfully rented the house for 14 months, which enabled her to continue paying the mortgage and meet her living expenses in her new location. Her decision to rent the property in 2007 was reasonable under the circumstances. AG ¶ 20(b) applies.

With the loss of rental income in 2009, Applicant's finances became problematic. She made a good faith effort to resolve her mortgage and credit problems when she sought assistance from the mortgage lender to modify her mortgage. The mortgage lender twice rejected her request. She tried to sell the house through a short-sale, but the secondary mortgage holder would not cooperate with the sale. She obtained the services of a creditor counseling organization, which helped her reduce some of her credit card interest rates, which she also did on her own. Ultimately, she filed a Chapter 13 petition in May 2010. Because of her bankruptcy, she has fully resolved her mortgage debt on the rental property. The bankruptcy trustee approved her payment plan, which she began paying in July 2010 and continues to do so each month. She has established a track record for resolving her past-due debts with the bankruptcy court and for paying her current expenses. Her debts listed in the SOR are resolved. She has done everything that she can to resolve her financial problems for the last three years. Her financial problems do not reflect on her reliability, trustworthiness, and dependability. Her past financial problems are resolved and under control. She lives within her current income and pays her bills. She has mitigated the Government's security concerns under AG ¶¶ 20(a), 20(c), and 20(d).

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 an applicant's conduct and all relevant 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.

Under AG ¶ 2(c), 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. The decision to grant or deny a security clearance requires a careful weighing of all relevant factors, both favorable and unfavorable. In so doing, an administrative judge must review all the evidence of record, not a single item in isolation, to determine if a security concern is established and then whether it is mitigated. A determination of an applicant's eligibility for a security clearance should not be made as punishment for specific past conduct, but on a reasonable and careful evaluation of all the evidence of record to decide if a nexus exists between established facts and a legitimate security concern.

The evidence in support of granting a security clearance to Applicant under the whole-person concept is more substantial than the evidence in support of denial. In reaching a conclusion, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. In 1994, Applicant's husband lost his job, and her job appeared in jeopardy. Their rental income from one rental property had ended, and she was pregnant. These factors created financial problems beyond her control, which she resolved by filing for Chapter 7 bankruptcy. Following the discharge of her debts in 1994, Applicant managed her income and debts for the next 15 years. Since she is the only wage earner in the family, her job loss in 2007 during the economic decline eventually created significant financial problems for her. Although she found employment within two months of her layoff, she needed to move many miles from her home to work. Initially, she rented her home when she moved. For more than a year, she managed her bills. When the rental income stopped after the abrupt departure of the second tenant, she immediately took steps to resolve her mounting financial difficulties. She was able to reduce the interest rate on her credit cards, but could not modify her mortgage loan on the rental house because the bank would not work with her. Her efforts to sell the house through a short-sale failed because the second mortgage holder would not cooperate. The source of her financial problems was again largely beyond her control. (See AG ¶ 2(a)(2).) Applicant

never sat back when her financial problems developed. She took numerous steps in 2009 to resolve her problems and manage her expenses. She ultimately filed for Chapter 13 bankruptcy protection and is compliant with her payment plan. She has learned to manage her finances. Most significantly, she has taken affirmative action to pay or resolve most of the delinquent debts raising security concerns. (See AG ¶ 2(a)(6).) Thus, her debts cannot be a source of improper pressure or duress. Of course, the issue is not simply whether all her debts are paid: it is whether her financial circumstances raise concerns about her fitness to hold a security clearance. It does not.

Overall, the record evidence leaves me without questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the security concerns arising from her finances under Guideline F.

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
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	For Applicant

Conclusion

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

MARY E. HENRY
Administrative Judge