



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



In the matter of:)
)
) ISCR Case No. 11-03268
)
Applicant for Security Clearance)

Appearances

For Government: Gregg A. Cervi, Esquire, Department Counsel
For Applicant: *Pro se*

2/24/2012

Decision

DUFFY, James F., Administrative Judge:

Applicant failed to mitigate security concerns arising under Guideline F, Financial Considerations. Clearance is denied.

Statement of the Case

On September 15, 2011, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under Guideline F. DOHA acted 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) implemented on 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 Applicant's security clearance. On October 11, 2011, Applicant answered the SOR and elected to have her case decided on the written record in lieu of a hearing.

On November 29, 2011, the Government compiled its File of Relevant Material (FORM) that contained documents identified as Items 1 through 10.

On December 2, 2011, DOHA forwarded to the Applicant a copy of the FORM with instructions to submit any additional information and objections within 30 days of its receipt. Applicant received the FORM on December 9, 2011, and did not submit any objections or additional matters within the allotted time period. The case was assigned to me on February 7, 2012. Items 1 through 10 are entered into the record.

Findings of Fact

Applicant is a 63-year-old executive assistant who works for a defense contractor. She has worked at her current job since August 1999. She graduated from high school in 1966. She married in April 1969 and divorced in November 1974. She listed no children in her security clearance application (SCA). She has apparently held a security clearance since 1999.¹

The SOR alleged that Applicant had a foreclosed mortgage in the amount of \$125,796 (SOR ¶ 1.a), that she had a delinquent Internal Revenue Service (IRS) debt in the amount of \$5,000 (SOR ¶ 1.b), and that she failed to file her 2010 federal income tax return when it was due (SOR ¶ 1.c). In her Answer to the SOR, Applicant admitted each of the allegations. Her admissions are incorporated as findings of fact.²

Applicant submitted a SCA on October 28, 2010. In that application, she checked the box indicating that she “[f]ailed to pay Federal, state, or other taxes, or to file a tax return, when required by law or ordinance” and also stated, “taxes have been prepared but not filed. Awaiting to work ou[t] a payment plan.” She did not indicate the tax year(s) involved, but noted she owed the IRS \$5,000. In responding to other questions in her SCA, she also disclosed that she was currently over 90 days delinquent on a \$125,796 mortgage that was going into foreclosure and that she had been counseled, warned, or disciplined for violating the terms of agreement for an employer-provided travel or credit card.³

During an interview with an Office of Personnel Management (OPM) investigator on November 18, 2010, Applicant indicated that her debts were not the result of events beyond her control, but were due to her procrastination. She noted that she put off her financial obligations until she was too deep in debt. Regarding her tax issues, the summary of her OPM interview indicated:

¹ Item 5.

² Items 1 and 4.

³ Item 5.

[Applicant] explained that she used to file her taxes through an agency. When she started doing her own tax return for the tax year ending in 2007, she had some problems on how to fill out the forms and started to procrastinate. She missed the filing deadline, kept putting it off, finally deciding to wait for the next tax year. The same thing happened, she kept procrastinating. Finally, around 05/2010, she decided to take action and contacted a company she had previously used to prepare her taxes, . . . The company has done all the paperwork for the past three years and given it to [her] to file. She is planning to take it to the federal building in [City X] before the end of this month, 11/2010. She is going in person so she can arrange the method of payment. The amount listed, \$5,000 is the estimated amount she owes on her taxes. [Applicant] has no intention to not file her income tax [returns] on time in the future.⁴

In responding to interrogatories, she acknowledged that the summary of her OPM interview was accurate. In another set of interrogatories dated July 7, 2011, she indicated that she had not filed her federal and state income tax returns for 2010.⁵

In October 2004, Applicant purchased a home with a 30-year mortgage. At that time, her monthly payments were about \$800. In 2009, she decided to refinance to obtain a 20-year mortgage. The new mortgage was initially for \$129,673. Her new monthly mortgage payment was \$1,232. In refinancing her home, she indicated that she failed to take into consideration other expenses such as a local recreation fee, homeowner's association fee, insurance payments, and property taxes. Her mortgage payment along with the other expenses totaled \$1,424 per month. She stated that, in about March 2010, she could no longer make the payments and stopped paying the mortgage.

The creditor contacted her to discuss options about the mortgage. The creditor wanted to extend the length of her mortgage to cover the amount of the delinquency and not make any changes to the amount of her monthly payments. She decided that she could not agree to that option. After the creditor sent her a letter and called her at work, she became demoralized and moved out of the property shortly after submitting her SCA. Neighbors later told her the creditor changed the locks on the doors and placed a foreclosure notice on the property. She later consulted an attorney who is made available to employees at her company. The lawyer advised her to let the creditor file for foreclosure. During the OPM interview, she indicated that she had no further information regarding the status of the property. She noted that she is waiting for the creditor to contact her to see what happens next.⁶

⁴ Item 6.

⁵ Items 6 and 7.

⁶ Items 6 and 10.

Applicant's credit report dated November 6, 2010, indicated that the mortgage's balance was \$125,796, that it was past due \$9,593, and that foreclosure proceedings were initiated. Her credit reports dated May 24, 2011, and September 2, 2011, provided no information about the mortgage's balance, the past-due amount, or the status of the foreclosure proceedings, but stated "contact mbr for status." In her Answer to the SOR, she provided no information about the status of the foreclosure.⁷

In her OPM interview, Applicant indicated that she was issued a corporate credit card for office purposes. At one point, this card became overdue \$200 to \$250. She also noted that she used the card for a \$40 personal purchase because it was the only credit card she had with her at that time of the purchase. Due to these incidents, her manager verbally counseled her in mid-2009 about the proper use of the corporate credit card.⁸

In November 2010, Applicant indicated that her net monthly income was \$2,256, her monthly expenses were \$1,595, and her monthly debt payments were \$326, which left her a net monthly remainder of \$335. Those monthly debt payments did not include payments towards the delinquent debts. She also indicated that she was meeting her current financial obligations and was actively working to resolve her financial issues. Her most recent credit report reflected that she had two unpaid medical debts totaling \$1,916 that have been placed for collection.⁹

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

⁷ Items 4, 8, 9, and 10.

⁸ Item 6.

⁹ Items 6 and 8.

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).

Analysis

Guideline F, Financial Considerations

The security concern for Financial Considerations is set out in AG ¶ 18 as follows:

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.

The guideline notes several conditions that could raise security concerns under AG ¶ 19. Three are potentially applicable in this case:

- (a) inability or unwillingness to satisfy debts;
- (c) a history of not meeting financial obligations;
- (g) failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same.

Applicant did not file her 2010 federal income tax return on time. For tax years 2007 through 2009, she owes the IRS \$5,000 in back taxes. In about March 2010, she stopped making her mortgage payments, and the creditor initiated foreclosure proceedings. The current status of the foreclosure proceedings is unknown. This evidence is sufficient to raise the above disqualifying conditions.

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

Appellant's financial issues are recent, ongoing, and cast doubt on her current reliability, trustworthiness, and good judgment. She provided no proof that she has yet filed her 2010 federal income tax return or that she made any arrangements to resolve her \$5,000 delinquent tax debt. She admitted that her financial problems were not due to events beyond her control, but were the result of her procrastination. She consulted an attorney about her pending foreclosure and was advised to let the creditor file for

foreclosure. In her Answer to the SOR, she provided no information about the status of foreclosure proceeding. No documents were presented to show that her financial obligations arising from the mortgage have changed in any manner. There is insufficient evidence to conclude that she has initiated good-faith efforts to resolve her financial problems, that those problems are under control, or that they are unlikely to recur. She merits partial credit under AG 20(c) for consulting with the attorney. None of the other mitigating conditions apply.

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 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.

I considered the potentially disqualifying and mitigating conditions in light of all relevant facts and circumstances surrounding this case. 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 has worked for her current employer for about 12 years. She provided no work performance evaluations or character reference letters. In 2009, she was counseled for misuse of an employer-provided credit card. She also indicated that she failed to file her 2007 through 2009 federal income tax returns on time. Her financial problems remain a security concern.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. Therefore, I conclude Applicant has not mitigated the security concerns arising under Guideline F.

Formal Findings

Formal findings 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 1.a – 1.c:	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 Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

James F. Duffy
Administrative Judge