



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



In the matter of:)
)
-----) ISCR Case No. 11-03344
)
Applicant for Security Clearance)

Appearances

For Government: Philip J. Katauskas, Esq., Department Counsel
For Applicant: *Pro se*

08/29/2012

Decision

HARVEY, Mark, Administrative Judge:

Applicant’s statement of reasons (SOR) alleges five delinquent debts, totaling \$31,483. Unemployment and other circumstances beyond her control caused her to have delinquent debts. She had insufficient financial resources to pay more than one large delinquent debt. On August 13, 2012, she filed for bankruptcy under Chapter 7 of the Bankruptcy Code. Financial considerations are mitigated. Eligibility for access to classified information is granted.

Statement of the Case

On August 2, 2010, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP) or security clearance application (SF 86) (GE 1). On March 1, 2012, 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 was unable to find that it

is clearly consistent with the national interest to continue a security clearance for Applicant, and it recommended that her case be submitted to an administrative judge for a determination whether her clearance should be continued or revoked. (HE 2)

On April 18, 2012, DOHA received Applicant's response to the SOR and requested a hearing. (HE 3) On June 12, 2012, Department Counsel was ready to proceed on Applicant's case. On June 14, 2012, DOHA assigned Applicant's case to me. On July 17, 2012, DOHA issued a hearing notice, setting the hearing for August 9, 2012. (HE 1) Applicant's hearing was held as scheduled. At the hearing, Department Counsel offered five exhibits, and Applicant offered 14 exhibits. (Tr. 19-26; GE 1-5; AE A-N) There were no objections, and I admitted GE 1-5 and AE A-N. (Tr. 20, 26) On August 17, 2012, I received the transcript of the hearing. I held the record open until August 23, 2012, to permit Applicant to provide additional documentation. (Tr. 69, 73-74) Applicant provided two post-hearing exhibits, which were admitted without objection. (AE O, P) I closed the record on August 23, 2012.

Findings of Fact¹

In her Answer to the SOR, Applicant accepted responsibility for the five debts listed in the SOR and explained why she was unable to pay them. (HE 3) Her admissions are accepted as findings of fact.

Applicant is a 50-year-old technician and cable installer for a defense contractor. (Tr. 6; GE 1) She attended high school through the 11th grade, did not graduate, does not have a graduate equivalency diploma (GED), and has not attended college. (Tr. 6) She completed 455 hours of telecommunications training, graduated at the top of her information technology class, and received a certificate of completion. (Tr. 7) On June 20, 2012, she earned a certificate of completion for information assurance awareness. (AE J) She has never served in the military. (Tr. 60) She has never held a security clearance. (Tr. 8) Her employment requires her to obtain and retain a security clearance. (Tr. 38-41; AE K)

Financial Considerations

Applicant's August 2, 2010 SF 86, credit reports, SOR, and September 27, 2010 Office of Personnel Management (OPM) personal subject interview (PSI) describe her five delinquent SOR debts, totaling \$31,483. (GE 1, 2, AE P) Applicant explained that her debts went into collection while she was unemployed for 26 months. (Tr. 33; SF 86, GE 1) She was employed from 2003 to 2008 as a communications technician. (Tr. 33-34) She was current on all of her accounts until she became unemployed in 2008. (Tr. 43, 55) She was laid off in March 2008 because of a reduction in her company's business. (Tr. 34) She received unemployment compensation for six months. (Tr. 33) Her current employer hired her in June 2010. (Tr. 32) She did not make any payments

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

on her five SOR debts; however, they will all be discharged in her pending bankruptcy. She provided the following information about her five SOR debts.

1.a is a judgment for \$886. Applicant was unsure of the source of this debt. (Tr. 29-30)

1.b is a charged-off debt for a credit card for \$11,173. Applicant used her credit card to fund expenses for her daughter and grandchildren. (Tr. 31) She also used it for living expenses and to pay her taxes. (Tr. 31, 41-42)

1.c is a charged-off debt for \$3,569. Applicant borrowed funds to pay her daughter's past due rent to stop her daughter's family from being evicted. (Tr. 42-43)

1.d is a credit card debt placed for collection owed to a bank for \$1,831. This debt resulted when she purchased a computer and financed it with a credit card. (Tr. 44)

1.e is a debt placed for collection for \$14,024. Applicant used her credit card to fund expenses for her daughter and grandchildren. (Tr. 31) For example, she used this credit card to bring her daughter's vehicle loan to current status, as her daughter's vehicle was on the verge of being repossessed. (Tr. 44) Her daughter's vehicle was essential to transport Applicant's grandchildren to school and for errands. (Tr. 44)

Applicant's daughter is 32 years old, and she has three children, who are ages 7, 12, and 13. (Tr. 31, 45) Applicant makes substantial contributions to the living expenses of her grandchildren. (Tr. 32) She also provides a small amount of support for her son and his family. (Tr. 36) Her daughter has been unemployed for the last year, except for working for five days in January 2012. (Tr. 46, 50) Applicant's grandson has frequent medical problems, and her daughter often has to leave work to take her son home from school and care for him. (Tr. 47) Her daughter's frequent absences from work result in her employers firing her. (Tr. 47) Over the years, her daughter has frequently been unemployed. Her daughter did not receive any support from the father of her children, and Applicant frequently was her daughter's only source of financial support. (Tr. 51)

Applicant married in 1994, and she and her husband built a home in 1996. (Tr. 53) Her husband is 51 years old. (Tr. 67) Her spouse refused to provide support for Applicant's children or grandchildren. (Tr. 51) Applicant's husband insisted that their home's ownership be in his name alone, as he used an inheritance to pay for part of their home. (Tr. 52) Applicant believes this allocation of ownership is unfair because she contributed to the house payments and repairs. (Tr. 53)

On April 24, 2012, Applicant's husband served her with divorce papers. (Tr. 56) She paid her divorce attorney \$1,500. (Tr. 58) The court ordered her to leave her home. (Tr. 56) Their divorce is in the discovery process. (Tr. 59) She currently lives with her daughter and grandchildren. (Tr. 56-57) Her daughter is receiving food stamps. (Tr. 57)

Applicant went to credit counseling and assessed whether she could afford various payment plans, including resolution of her delinquent debts under Chapter 13 of the Bankruptcy Code. (Tr. 48) Her budget revealed that she had \$240 monthly to address her debts. (AE N) Due to interest charges on her debts, such a small monthly allocation to debt resolution would make negligible progress resolving her debts.

In 2007, Applicant successfully underwent a heart bypass operation. (Tr. 64) She had medical insurance; however, it was necessary for her to pay some deductibles. (Tr. 64) In March 2012, she had a \$1,000 debt from a two-day inpatient hospital stay for a heart-related ailment. (Tr. 65) She paid the majority of her medical bills and included the remainder in her bankruptcy filing. (Tr. 64) On November 10, 2011, Applicant paid a judgment for \$2,641. (Tr. 61; GE 2)

On August 13, 2012, Applicant filed for bankruptcy under Chapter 7 of the Bankruptcy Code. (AE P) She paid her bankruptcy attorney \$1,100. (Tr. 60-61) The summary of bankruptcy schedules indicates: total debt owed to creditors holding secured claims is \$0;² total debt owed to creditors holding unsecured priority claims is \$0; total debt owed to creditors holding unsecured, nonpriority claims is \$53,172; and her current monthly income is \$3,735. (AE P)

Character Evidence

Applicant provided two character references which lauded her hard work, generosity, professionalism, dedication, commitment to excellence, and reliability. (AE B, D) She made contributions to the mission of the Air Force and her employer. (AE B, D, L) She received a certificate of appreciation for her support to an Air Force mission over the period August 2-6, 2010. (AE M)

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 her 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

²Applicant’s 1996 Chevy Astro van is paid off; however, repairs for such an old vehicle continue to be an ongoing substantial expense. (Tr. 50; AE C, O)

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 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

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, I conclude the relevant security concern is 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 SF 86, credit reports, her OPM interview, her SOR response, and her statement at her hearing.

Applicant's debts became delinquent beginning in 2010 and continued to be delinquent to the present. Her SOR alleges five delinquent debts, totaling \$31,483. 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). Applicant's unemployment, pending divorce, medical problems, her daughter's unemployment, and her grandson's medical problems had a negative effect on her financial circumstances and caused the SOR debts to become delinquent. She paid a \$2,641 non-SOR debt in 2011. She paid her divorce attorney \$1,500 and her bankruptcy attorney \$1,100 in 2012. She did not have delinquent debt before her unemployment from 2008 to June 2010, and I do not believe she will have delinquent debt after her debts are discharged under Chapter 7 of the Bankruptcy Code.³ Her financial problems were generated by circumstances largely beyond her control. There is no evidence that she acted irresponsibly.

A recent Appeal Board decision 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. She filed for bankruptcy the same month the Administrative Judge issued her decision. *Id.* at 1-2. The Applicant in ISCR Case No. 09-08533 was recently divorced, had been unemployed for 10 months, and had childcare responsibilities. Her former husband was inconsistent in her 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 evidence⁴ of irresponsible behavior, poor judgment, unreliability, or lack of trustworthiness. *Id.* at 4.

Application of AG ¶ 20(c) is warranted. Applicant completed financial counseling. She also generated a personal financial statement (PFS) or budget as part of her bankruptcy. Applicant's financial situation was damaged by multiple problems beyond her control. She established that she acted responsibly under the circumstances. Although there is limited evidence of record that she established and maintained contact with his creditors,⁵ her financial problem is being resolved or is under control. She paid

³The Appeal Board has indicated that promises to pay off delinquent debts in the future are not a substitute for a track record of paying debts in a timely manner and otherwise acting in a financially responsible manner. ISCR Case No. 07-13041 at 4 (App. Bd. Sept. 19, 2008) (citing ISCR Case No. 99-0012 at 3 (App. Bd. Dec. 1, 1999)).

⁴Applicant has the burden of proving the applicability of any mitigating conditions, and the burden to disprove a mitigating condition never shifts to the Government.

⁵Even 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

a \$2,641 debt in 2011, and she is seeking discharge of her remaining delinquent debts under Chapter 7 of the Bankruptcy Code.⁶

AG ¶ 20(d) is not applicable. Applicant admitted responsibility for and is taking reasonable and responsible actions to resolve her SOR debts (through bankruptcy); however, the Appeal Board has limited the applicability of the “good faith” mitigating condition in bankruptcy situations.⁷ AG ¶ 20(e) is not applicable. Applicant did not dispute any of her delinquent SOR debts.

In sum, Applicant fell behind on her debts primarily because of her own unemployment and her desire to support her unemployed daughter and grandchildren. Her medical and marital problems were additional factors in her financial predicament. Bankruptcy will resolve all of her delinquent debts. She is now employed and divorce will resolve her marital issues. It is unlikely that such problems will recur. Her efforts are sufficient to fully mitigate financial considerations security concerns. Assuming, financial

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.

⁶There is some duplication of debts in Applicant’s bankruptcy schedules. In a bankruptcy filing, most debtors list potential creditors, even when the debt may have been resold or transferred to a different collection agent or creditor, to ensure notice, and reduce the risk of subsequent dismissal of the bankruptcy. If Applicant failed to list some debts on his bankruptcy schedule, this failure to list some debts does not affect their discharge. Absent fraud, in a no-asset bankruptcy, all unsecured, nonpriority debts are discharged when the bankruptcy court grants a discharge, even when they are not listed on a bankruptcy schedule. See *Judd v. Wolfe*, 78 F.3d 110, 114 (3d Cir. 1996); *Francis v. Nat’l Revenue Service, Inc.*, 426 B.R. 398 (Bankr. S.D. FL 2010), but see *First Circuit Bucks Majority on Discharge of Unlisted Debt in No-Asset Case*, American Bankruptcy Institute, 28-9 ABIJ 58 (Nov. 2009). There is no requirement to re-open the bankruptcy to discharge the debt. *Collier on Bankruptcy*, Matthey Bender & Company, Inc., 2010, Chapter 4-523, ¶ 523(a)(3)(A). Not all debts are discharged through bankruptcy. Priority debts, such as tax debts, student loan debts, and child support obligations, are generally not discharged through bankruptcy. Secured debts such as home mortgages and car liens are not discharged unless the security (home or car) is foreclosed or repossessed.

⁷The 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)).

considerations concerns are not mitigated under AG ¶ 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 50 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, and for her support to the Air Force. Two character witnesses provided evidence supporting approval of her access to classified information. There is every indication that she is loyal to the United States and her employer. There is no evidence that she abuses alcohol or uses illegal drugs. Her unemployment, separation and pending divorce, medical problems, and the necessity to support her destitute daughter and three grandchildren contributed to her financial woes. I give Applicant substantial credit for admitting responsibility for her delinquent debts in her SF 86, OPM PSI, responses to DOHA interrogatories, and at her hearing.

Even though she lacked financial resources because of her unemployment and the financial stress engendered from her divorce and her daughter and grandchildren's financial predicaments, Applicant paid a \$2,641 debt in 2011. She also paid her divorce attorney and her bankruptcy attorney in 2012. Her decision to file for bankruptcy is appropriate and reasonable. The discharge of her debts through bankruptcy will give her a fresh financial start, and this result is consistent with the goals of the Bankruptcy Statute and congressional intent.

Applicant is an intelligent person, and 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, her finances were excellent prior to her unemployment. I am confident she will maintain her financial responsibility.⁸

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 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

Subparagraphs 1.a to 1.e: 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 Applicant's eligibility for a security clearance. Eligibility for a security clearance is granted.

MARK HARVEY
Administrative Judge

⁸Of course, the government can re-validate Applicant's financial status at any time through credit reports, investigation, and additional interrogatories. Approval of a clearance now does not bar the government from subsequently revoking it, if warranted. Violation of a promise made in a security context to pay legitimate debts also raises judgment concerns under Guideline E, and may support future revocation of a security clearance. An administrative judge does not have authority to grant a conditional clearance. ISCR Case No. 99-0901, 2000 WL 288429 at *3 (App. Bd. Mar. 1, 2000). See *also* ISCR Case No. 04-03907 at 2 (stating, "The Board has no authority to grant [a]pplicant a conditional or probationary security clearance to allow her the opportunity to have a security clearance while she works on her financial problems." and citing ISCR Case No. 03-07418 at 3 (App. Bd. Oct. 13, 2004)). This footnote does not imply that this Applicant's clearance is conditional.