



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
 [Redacted]) ISCR Case No. 11-07191
)
 Applicant for Security Clearance)

Appearances

For Government: Gina L. Marine, Esq., Department Counsel
For Applicant: *Pro se*

05/07/2013

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guideline F (Financial Considerations). Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application on October 28, 2010. On October 15, 2012, the Department of Defense (DOD) sent her a Statement of Reasons (SOR), alleging security concerns under Guideline F. DOD acted 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 (AG) implemented by DOD on September 1, 2006.

Applicant answered the SOR on November 27, 2012 and requested a determination on the record without a hearing. Department Counsel submitted the Government's written case on February 15, 2013. On February 20, 2013, a complete copy of the file of relevant material (FORM) was sent to Applicant, who was given an opportunity to file objections and submit material to refute, extenuate, or mitigate the

Government's evidence. Included with the FORM was an amendment to the SOR, adding two additional allegations (SOR ¶¶ 1.p and 1.q). Applicant received the FORM and amended SOR on March 8, 2013; and she responded on April 4, 2013. The case was assigned to me on April 23, 2013.

Findings of Fact

In her answer to the SOR, Applicant admitted the allegations in SOR ¶¶ 1.a, 1.d, and 1.k. She denied the remaining allegations. Her admissions are incorporated in my findings of fact.

Applicant is a 59-year-old senior software configuration analyst employed by a defense contractor since September 2000. She was laid off from a previous job in June 2000 and was unemployed until she began her current job. Her current job pays about \$20,000 less than her previous job. (Item 3 at 1.) Since October 2004, she also has worked as a part-time, self-employed representative of a private company. She earned a bachelor's degree in 1976. She has held a security clearance since February 2001.

Applicant married in September 1974. She and her husband have two adult sons. In a personal subject interview (PSI) in November 2010, she told an investigator that her husband began having serious health problems in 2000. He became disabled and medically retired in 2004, causing him to lose his "tax business"¹ and his job as a high school teacher and coach. He was diagnosed with a degenerative disease in 2007. His illness caused unexpected bills for medical care and prescription drugs. (Item 5 at 5.) For reasons unrelated to his illness, they failed to file timely federal and state tax returns for 2008, 2009, and 2010. The evidence concerning the debts alleged in the SOR is summarized below.

SOR ¶ 1.a (Chapter 7 bankruptcy). Applicant and her husband filed a joint Chapter 7 bankruptcy petition in July 2005, because their reduced income and increased medical expenses caused them to fall behind on their house payments and other financial obligations. They listed assets of \$257,481 and liabilities of \$374,078. They received a discharge in November 2005. (Item 5 at 4.)

SOR ¶¶ 1.b and 1.f (medical bills for \$275 and \$400). Department Counsel conceded that these two bills are for the same debt. (FORM at 5.) On April 1, 2013, Applicant made a \$25 payment on this debt pursuant to a payment agreement, leaving a balance due of about \$227. (Response to FORM, SOR ¶ 1.b Exhibit.)

SOR ¶ 1.c (collection account for \$405). Applicant paid this debt in full on April 13, 2013. (Response to FORM, SOR ¶ 1.c Exhibit.)

¹ The nature of the "tax business" is not clear. If Applicant's husband was an experienced tax preparer, then it is more likely that Applicant and her husband understood the consequences of failing to timely file their tax returns.

SOR ¶ 1.d (non-medical account for \$690, charged off in January 2010.)

Applicant admitted this debt in her answer to the SOR and stated that she would contact the creditor after her tax liability payments were determined. She has submitted no evidence of a payment agreement, any payments, or any attempts to contact the creditor.

SOR ¶ 1.e (medical collection account for \$1,965). Applicant began making monthly \$84 payments on this debt in May 2011. Her most recent payment was on March 29, 2013, leaving a balance of \$96. (Response to FORM, SOR ¶ 1.e Exhibit.)

SOR ¶ 1.g (medical bill for \$341). Applicant's November 2010 credit report reflected that this debt was paid. (Item 9 at 108.²)

SOR ¶¶ 1.h and 1.n (medical bill for \$725 and collection account for \$1,966). Department Counsel conceded that SOR ¶¶ 1.h and 1.n pertain to the same debt. (FORM at 5.) Applicant asserts that these debts are included in SOR ¶ 1.e, discussed above. (Item 3 at 2; Response to FORM, Table at 2.) The invoice from the creditor alleged in SOR ¶ 1.n reflects that the current creditor is the same creditor as alleged in SOR ¶ 1.e and the debt is within one dollar of the amount alleged in SOR ¶ 1.e. I conclude that SOR ¶¶ 1.h and 1.n are included in SOR ¶ 1.e.

SOR ¶¶ 1.i and 1.j (collection accounts for \$497 and \$808). These debts were included in the Chapter 7 bankruptcy. (Item 7 at 3; Item 9 at 108-09.)

SOR ¶ 1.k (non-medical collection account for \$707). Applicant admitted this debt in her answer to the SOR. She stated that she had contacted the creditor and intended to begin making payments once her tax liability was determined. She has submitted no evidence of a payment agreement or any payments. The debt is unresolved.

SOR ¶ 1.l (medical bill for \$850). Applicant submitted evidence of monthly \$57.22 payments from December 2012 to March 2013. (Response to FORM, SOR ¶ 1.l Exhibit.)

SOR ¶ 1.m (property damage to rental property, \$4,500). After receiving a Chapter 7 bankruptcy discharge, Applicant and her husband attempted to negotiate a loan modification on their home but were unsuccessful. The mortgage on their home was foreclosed in January 2008, and they moved into a rental property. In November 2008, Applicant's husband's doctor failed to timely file his disability certification, causing her husband's disability payments for November and December 2008 to be delayed. They were evicted for non-payment of rent in December 2008, and they moved into another rental property, where they now reside. Their landlord who evicted them claimed that they had caused damage worth \$40,000 to the property. They negotiated a settlement for \$3,735.21, which they paid in monthly \$250 installments. They overpaid the amount of the settlement by about \$515, requested a refund of the overpayment,

² The pagination of Item 9 begins with page 101.

and found that the landlord had filed a petition for bankruptcy and listed them as a creditor for the amount of the overpayment. (Item 5 at 5; FORM Response Exhibits 2 and 3.)

SOR ¶¶ 1.o, 1.p, 1.q (failure to file federal and state income tax returns; federal tax debt of \$25,463; state tax debt of \$4,787). In a personal subject interview (PSI) in November 2010, Applicant told the investigator that she and her husband were unable to timely file their 2008 income tax returns because her husband's computer malfunctioned, causing them to lose their tax data. She stated that they were also unable to timely file their 2009 returns because they still had not retrieved their tax data. She told the investigator that they had filed requests for extension of time to file their returns for 2008 and 2009. (Item 5 at 4.) However, the record contains no documentation of any requests for extensions. Applicant has submitted no explanation for failing to timely file her 2010 return.

In response to DOHA interrogatories on June 11, 2012, Applicant stated that they had filed their federal and state income tax returns through tax year 2007 and were in the process of completing the returns for the remaining years. (Item 6 at 2.) Applicant's response to the DOHA interrogatories indicates that she filed her tax returns at some time after June 11, 2012. The IRS billing notices sent to Applicant in October 2012 reflect that a failure-to-file penalty was assessed in addition to the failure-to-pay penalty for the 2008, 2009, and 2010 returns, indicating that the returns were not filed by the due date or within any extensions of time to file. The failure-to-file penalties for 2008, 2009, and 2010 total \$3,649, the failure-to-pay penalties total \$2,335, and the accrued interest totals \$1,650. (Item 3 at 10, 11, and 12.) The IRS billing notice for 2011 assessed a \$76 failure-to-pay penalty and \$35 in interest, but no failure-to-file penalty, indicating that the 2011 return was timely filed. (Item 3 at 13.)

On November 20, 2012, shortly before Applicant answered the SOR, she and her husband made a payment agreement with the state providing for monthly \$133.67 payments, and they made the required payments in December 2012 through March 2013. (Response to FORM, SOR ¶ 1.q Exhibits 1 and 2.) In January 2013, Applicant and her husband made a payment agreement with the IRS for the taxes due for 2008 through 2011, providing for monthly \$350 payments. They made a \$1,000 payment in January 2013, and \$350 payments in February and March 2013. (Response to FORM, SOR ¶ 1.p Exhibits 1 and 2.)

The record does not contain a personal financial statement from Applicant. However, the unsigned and undated copies of tax returns submitted with Applicant's answer to the SOR reflect that Applicant and her husband had gross income of \$91,230 in 2008; \$93,930 in 2009; \$90,813 in 2010; and \$93,878 in 2011. (Item 3 at 15-45.)

Policies

"[N]o 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 applicants 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 AG. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines 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 and 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 that 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 made “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. Thus, a decision to deny a security clearance 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. 92-1106 at 3, 1993 WL 545051 at *3 (App. Bd. Oct. 7, 1993).

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 burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

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). “[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 amended SOR alleges a Chapter 7 bankruptcy (SOR ¶ 1.a), 13 delinquent debts (SOR ¶¶ 1.b-1.n), failure to file federal and state income tax returns for tax years 2008 to 2011 (SOR ¶ 1.o), a federal tax debt (SOR ¶ 1.p), and a state tax debt (SOR ¶ 1.q.). The concern under this guideline 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.

This concern is broader than the possibility that an individual might knowingly compromise classified information in order to raise money. It encompasses concerns about an individual’s self-control, judgment, and other qualities essential to protecting classified information. An individual who is financially irresponsible may also be irresponsible, unconcerned, or negligent in handling and safeguarding classified information. See ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012).

The following disqualifying conditions under this guideline are potentially applicable:

AG ¶ 19(a): inability or unwillingness to satisfy debts;

AG ¶ 19(c): a history of not meeting financial obligations; and

AG ¶ 19(g): failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same.

Department Counsel conceded that the delinquent debt alleged in SOR ¶ 1.b duplicates the debt alleged in SOR ¶ 1.f, and the debt alleged in SOR ¶ 1.h duplicates the debt alleged in SOR ¶ 1.n. Applicant’s evidence in response to the FORM reflects that the debts alleged in SOR ¶¶ 1.h and 1.n are included in SOR ¶ 1.e. When the same conduct is alleged more than once in the SOR under the same guideline, the duplicative allegations should be resolved in Applicant’s favor. See ISCR Case No. 03-04704 (App.

Bd. Sep. 21, 2005) at 3 (same debt alleged twice). Thus, I will resolve SOR ¶¶ 1.f, 1.h, and 1.n in Applicant's favor, and they will not be discussed further in the analysis below.

Applicant's admissions in her answer to the SOR, her admissions during the PSI, and the credit bureau reports and bankruptcy records submitted by Department Counsel establish AG ¶¶ 19(a) and (c). The tax records and Applicant's response to DOHA interrogatories reflect failure to timely file federal and state tax returns for 2008, 2009, and 2010, thereby establishing AG ¶ 19(g).

The following mitigating conditions are potentially relevant:

AG ¶ 20(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;

AG ¶ 20(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;

AG ¶ 20(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

AG ¶ 20(d): the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

AG ¶ 20(a) is not established. Applicant's delinquent debts are numerous and not yet resolved. Her husband's illness and disability were circumstances that are unlikely to recur, but their impact on her financial situation is continuing.

The first prong of AG ¶ 20(b) (conditions beyond Applicant's control) is established by the evidence of Applicant's temporary unemployment and subsequent reduction in income in 2000, her husband's illness and disability that caused loss of income and medical expenses, the interruption of her husband's disability payments, and the malfunction of their personal computer containing their 2008 tax data. The second prong (responsible conduct) is established for the bankruptcy alleged in SOR ¶ 1.a and the debts alleged in SOR ¶¶ 1.i and 1.j, which were included in the bankruptcy. It is established for the debts alleged in SOR ¶¶ 1.e, 1.g, 1.l, and 1.m, which are paid or are being resolved by payment plans.

However, the second prong of AG ¶ 20(b) is not established for SOR ¶¶ 1.b, 1.c, 1.d, 1.k, 1.o, 1.p, and 1.q. Applicant took no action to resolve the debts in SOR ¶¶ 1.b and 1.c until she received the FORM. In her answer to the SOR, she stated that she would contact the creditors in SOR ¶¶ 1.d and 1.k when her tax liability was determined.

However, she presented no evidence of attempts to contact the creditors, payments, or payment agreements in her April 2013 response to the FORM, even though her federal tax liability was determined in October 2012, her state tax payments were determined in November 2012, and her federal tax payments were determined in January 2013. Applicant has not adequately explained why the loss of 2008 tax data prevented her from timely filing her tax returns in 2009 and 2010. While Applicant offered a plausible and reasonable explanation for not filing the 2008 returns on time, she has not explained why she did not file the 2008, 2009, and 2010 returns until after she responded to the DOHA interrogatories on June 12, 2012. Even if she was unable to pay the tax due for those years, she could have avoided the failure-to-file penalties by timely filing in 2009 and 2010 and seeking a payment plan for the taxes due.

AG ¶ 20(c) is not fully established. Applicant presented no evidence of financial counseling, although it likely was required in connection with her Chapter 7 bankruptcy in 2005. She has paid the debts in SOR ¶¶ 1.c, 1.g, and 1.m. She is making payments on the debts in SOR ¶¶ 1.b, 1.e, 1.i, 1.p, and 1.q. However, she has not shown that the debts alleged in SOR ¶¶ 1.d and 1.k are being resolved.

AG ¶ 20(d) requires a “good-faith” effort to resolve debts. Good faith means acting in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation. ISCR Case No. 99-0201, 1999 WL 1442346 at *4 (App. Bd. Oct. 12, 1999). Evidence of past irresponsibility is not mitigated by payment of debts only under pressure of qualifying for a security clearance.

A security clearance adjudication is aimed at evaluating an individual’s judgment, reliability, and trustworthiness. It is not a debt-collection procedure. ISCR Case No. 09-02160 (App. Bd. Jun. 21, 2010.) A person is not required, as a matter of law, to establish resolution of every debt alleged in the SOR. He or she need only establish a plan to resolve financial problems and take significant actions to implement the plan. The adjudicative guidelines do not require that an individual make payments on all delinquent debts simultaneously, nor do they require that the debts alleged in the SOR be paid first. See ISCR Case No. 07-06482 at 2-3 (App. Bd. May 21, 2008).

I conclude that AG ¶ 20(d) is established for the bankruptcy alleged in SOR ¶ 1.a and the debts alleged in SOR ¶¶ 1.e, 1.g, 1.i, 1.j, 1.l, and 1.m. It is not established for the debts alleged in SOR ¶ 1.d and 1.k, which are unresolved. The timing of the payments on the debts alleged in SOR ¶¶ 1.b and 1.c, the filing of the tax returns for 2009 through 2010, and the payment plans for the tax debts alleged in SOR ¶¶ 1.p and 1.q indicates that Applicant was motivated more by concern for protecting her security clearance than by a sense of obligation. Thus, I conclude that AG ¶ 20(d) is not established for the failure to timely file tax returns for 2008 through 2010 and for the debts alleged in SOR ¶¶ 1.b, 1.c, 1.d, 1.k, 1.p, and 1.q.

Whole-Person Concept

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. In applying the whole-person concept, an 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. An 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.

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 defense contractors and held a security clearance for many years. Her husband's illness and disability caused them a serious financial setback. She initially acted responsibly to resolve their debts through bankruptcy and attempted to save their home from foreclosure. However, she has not acted responsibly regarding her federal and state taxes and several delinquent debts. After weighing the disqualifying and mitigating conditions under Guideline F, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns based on financial considerations. Accordingly, I conclude she has not carried her burden of showing that it is clearly consistent with the national interest to continue her eligibility for access to classified information.

Formal Findings

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline F (Financial Considerations): **AGAINST APPLICANT**

Subparagraph 1.a:	For Applicant
Subparagraphs 1.b-1.d:	Against Applicant
Subparagraphs 1.e-1.j:	For Applicant
Subparagraph 1.k:	Against Applicant
Subparagraph 1.l-1.n:	For Applicant
Subparagraph 1.o-1.q:	Against Applicant

Conclusion

I conclude that it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

LeRoy F. Foreman
Administrative Judge