



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



| | | |
|----------------------------------|---|------------------------|
| In the matter of: |) | |
| |) | |
| |) | ISCR Case No. 11-10813 |
| |) | |
| Applicant for Security Clearance |) | |

Appearances

For Government: Stephanie Hess, Esq., Department Counsel
For Applicant: *Pro se*

09/10/2013

Decision

ANTHONY, Joan Caton, Administrative Judge:

After a thorough review of the pleadings, testimony, and exhibits, I conclude that Applicant failed to mitigate the Government’s security concerns under Guideline F, Financial Considerations. Her eligibility for a security clearance is denied.

Statement of the Case

Applicant completed a Questionnaire for Investigations Processing (e-QIP) on March 25, 2011. On January 10, 2013, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline F, Financial Considerations. DOD acted under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within DOD for SORs issued after September 1, 2006.

Applicant elected to have a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA). The case was assigned to me on May 9, 2013. A Notice of Hearing, setting Applicant’s hearing for July 1, 2013, was

issued June 11, 2013. I convened the hearing as scheduled¹ to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.²

The Government called no witnesses and introduced seven exhibits, which were marked Ex. 1 through 7 and entered in the record without objection.³ Applicant called one witness, testified, and introduced 25 exhibits, which were marked as Ex. A through Ex. Y and entered in the record without objection.

DOHA received the transcript of the July 1, 2013 hearing on July 9, 2013. This transcript is identified as Tr. 1. DOHA received the transcript of the July 8, 2013 hearing on July 16, 2013. This transcript is identified as Tr. 2. DOHA received the transcript of the July 17, 2013 hearing on July 25, 2013. This transcript is identified as Tr. 3.

Findings of Fact

The SOR contains two allegations of disqualifying conduct under AG F, Financial Considerations. Applicant admitted the two allegations and offered additional information. (SOR; Answer to SOR, dated July 2, 2013.)

Applicant is 53 years old and employed by a government contractor as a senior financial analyst. She is married and the mother of three grown children. She seeks a security clearance for the first time. (Ex.2.)

Applicant's husband is a retired U.S. military officer. After his retirement, he worked as a government contractor and earned about \$285,000 annually. He was diagnosed with a terminal illness and laid off from his employment in February 2012, when there was a reduction of force. He is currently unemployed. (Answer to SOR, dated July 2, 2013; Ex. D; Tr. 2, 88; Tr. 3, 47.)

¹ Procedural matters arose that required Applicant's hearing to be continued and rescheduled twice. On July 1, 2013, the hearing was convened, continued, and rescheduled for July 8, 2013. On July 8, 2013, the hearing was convened. It was continued, rescheduled, and convened again on July 17, 2013.

² The record also contains an SOR dated December 11, 2012, which alleges the same matters as the SOR dated January 10, 2013. Applicant replied to the December 11, 2012 SOR by letter, dated December 27, 2012, and addressed to a specialist at the DOD Consolidated Adjudications Facility. When it became clear at her July 1, 2013 hearing that she had not replied to the SOR of January 10, 2013, and that her answer of December 27, 2012, had been entered in the record as a response to the SOR of January 10, 2013, I continued the hearing for one week to give Applicant an opportunity to respond to the more recent SOR. On July 8, 2013, Applicant's answer to the SOR of January 10, 2013, was received and entered in the record. The SOR dated December 11, 2012 is entered in the record as Ex. 1.

³ Applicant asserted during the cross examination of her witness on July 8, 2013, that she had not been served copies of the Government's proposed exhibits during the discovery process. Accordingly, she was provided with a set of the Government's exhibits, and her signed receipt upon acceptance of the exhibits is entered in the record as Hearing Exhibit (HE) 1. I also continued the hearing for one week, until July 17, 2013, so that Applicant could review the Government's exhibits.

In May 2011, Applicant was interviewed by an authorized investigator from the Office of Personnel Management. She told the investigator that in October 2001, she and her husband purchased a home for approximately \$600,000. They financed the property with two mortgage loans. Their monthly mortgage payments were \$5,600. (Ex. 4.)

The home they purchased in 2001 was not their first experience as homeowners. Applicant and her husband had previously owned a home, which they sold for \$100,000 over the asking price two days after putting it on the market. (Tr. 2, 82-83.)

In 2006, Applicant and her husband found a new home they wished to purchase. Applicant's husband testified that he and Applicant "were kind of talked into purchasing a new home" by a neighbor and friend. They could not afford to pay mortgages on two properties, and so they made the purchase of the second property contingent on the sale of their first property. They put their house on the market, but it did not sell. After some time, they decided to remove the contingency. They then purchased and took possession of the second property even though they had not sold their existing home. When they closed on the second property, they made three mortgage payments in advance of their due dates on the first home, with the expectation that the home would sell within the three-month period. (Ex. 4; Tr. 2, 46-70.)

When the three-month period had run, their first home had still not sold. However, Applicant and her husband made no further payments on the two mortgages securing that home. They sought legal advice. They contacted the creditors who held the mortgages on their first home and suggested that any delinquency owed after the sale of the first home be rolled over into their mortgages on the second home. The lenders did not contact Applicant and her husband regarding delinquencies owed on the first home. The mortgages on the first home remained unpaid, and the property was sold at foreclosure in 2007. The SOR alleges at ¶ 1.a. that Applicant is responsible for a delinquency of \$25,818 on the first mortgage. The SOR alleges at ¶ 1.b. that Applicant is responsible for a delinquency of \$15,586 on the second mortgage. Both delinquent debts are listed on Applicant's credit report of May 17, 2011. (Ex. 6; Ex. 7; Tr. 2, 70-82.)

Applicant and her husband attempted to contact the companies holding the mortgages on their first home for three or four months after they purchased their second home. They did not search land records or inquire whether the house had been sold. In about 2010, when his security clearance was being investigated, Applicant's husband again made verbal inquiry about the mortgages and any debt they might owe. In her security interview in May 2011, Applicant stated that she would contact the creditor identified at SOR ¶ 1.a. and make payment arrangements if she owed the debt. Applicant acknowledged that she did not follow up and write to the mortgage creditor to inquire about the status of the debt. Despite setbacks arising from her husband's health and unemployment, Applicant and her husband stated that they are financially stable. They stated that if the mortgage creditors contacted them, they would work with them to resolve the debts. On July 9, 2013, after researching land records pertaining to their first home, Applicant and her husband wrote to the creditors holding their delinquent

mortgages and requested information. (Ex. 4; Ex. R; Ex. S; Ex. T; Ex. U; Ex. V; Ex W; Tr. 2, 77-99.)

In September 2012, in response to DOHA interrogatories, Applicant submitted a personal financial statement. At her hearing, she provided additional information. She reported that her net monthly income from her salary as a government contractor was \$4,884. In addition, her husband receives \$4,314 in military retirement pay each month.⁴ Applicant's husband also does some intermittent work which brings in some income. Applicant's total net monthly income, not including intermittent income, was \$8,548. (Ex. 3; Tr. 3, 47-48.)

Applicant reported the following monthly expenses: primary mortgage on current home, \$3,900; secondary mortgage on current home, \$898; groceries, \$127; clothing, \$50; utilities, \$585; car expenses, \$1,267⁵; tractor expenses, \$510; life and other insurance, \$399; and miscellaneous, \$200. Applicant's reported monthly expenses total \$7,936. Applicant's net monthly remainder is \$612. (Ex. 3; Tr. 3, 46-58.)

Additionally, in September 2012, Applicant listed the following financial assets: real estate, \$745,000; Applicant's bank savings, \$1,200; joint savings, \$2,424; and eight vehicles, \$202,175. Applicant's husband testified that he had sold two motorcycles and a bike trailer for \$8,000, thus reducing the value of their vehicle assets. In her interview with the authorized investigator, Applicant stated that she had not had financial credit counseling. (Ex. 2; Ex. 3; Tr. 3, 61-62.)

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, and it has emphasized that "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information. *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant an 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 and modified.

When evaluating an applicant's suitability for a security clearance, an administrative judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list

⁴ Applicant's husband testified that \$650 of his monthly retirement pay went into another account and was not used for joint living expenses. (Tr. 3, 64.)

⁵This amount includes an \$862 monthly payment on Applicant's 2010 Toyota hybrid. (Tr. 3, 53.)

potentially disqualifying conditions and mitigating conditions, which are useful 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, the administrative judge applies these guidelines 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 ¶ 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, the applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." The applicant has the ultimate burden of persuasion in seeking to obtain 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 the applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about 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.

The guideline notes two conditions that could raise security concerns in this case. Under AG ¶ 19(a), an "inability or unwillingness to satisfy debts" is potentially disqualifying. Similarly under AG ¶ 19(c), "a history of not meeting financial obligations" may raise security concerns.

In 2006, Applicant and her husband owned a home and decided to purchase another home. Their initial offer on the purchase of the second home was contingent upon the sale of their existing home. However, when their existing home did not sell timely, they removed the contingency and purchased the second home anyway. At the closing on their second home, Applicant and her husband made three additional mortgage payments on the first home, with the expectation that the home would sell in three months and they would have fulfilled their mortgage obligations. Their first home did not sell in three months. Thereafter, Applicant and her husband made no more mortgage payments on their first home. Their mortgages became delinquent, and their first home was sold at foreclosure in 2007. Neither delinquent debt alleged in the SOR has been satisfied. This record evidence is sufficient to raise the potentially disqualifying conditions found at AG ¶¶ 19(a) and 19(b).

The guideline also includes examples of conditions that could mitigate security concerns arising from financial difficulties. Several Guideline F mitigating conditions could apply to the security concerns raised by Applicant's financial delinquencies. Unresolved financial delinquency might be mitigated if it "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(a)) Additionally, unresolved financial delinquency might be mitigated if "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(b)) Still other mitigating circumstances that might be applicable include evidence that "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" (AG ¶ 20(c)) or "the individual has initiated a good-faith effort to repay overdue creditors or otherwise resolve debts." (AG ¶ 20(d)) Finally, if "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 options to resolve the issue," then AG ¶ 20(e) might apply.

Applicant's financial delinquencies arose in 2006 when she elected to purchase one property before selling another, thereby becoming responsible for mortgage debts on both properties. When she lacked sufficient resources to pay mortgages on both properties, she contacted the company holding the mortgages on her first property. The company advised that it would keep her informed, but Applicant did not press the company for information. After making three advance payments on the mortgages on her first property when she closed on the second property, Applicant made no further payments. The first property was foreclosed upon and was sold in 2007. The delinquent mortgage debts remain unsatisfied and current. I conclude that AG ¶ 20(a) does not apply in mitigation.

Applicant and her husband have experienced unfortunate hardships in recent years. Her husband is suffering from a terminal illness, and he has been unemployed since February 2012. To their credit, they have managed to remain financially stable.

In 2006, however, Applicant and her husband had not experienced these misfortunes. They contracted to purchase a new home. Their initial offer to purchase the second home was contingent upon the sale of the home they had purchased and lived in since 2001. When their old home did not sell as soon as they had hoped, Applicant and her husband removed the contingency and purchased the second home before selling the first. Thus, they accepted responsibility for paying mortgages on two homes simultaneously, something they could not afford to do.

The circumstances which gave rise to Applicant's financial problem were not beyond her control, and her decision to take on more debt than she could afford was not responsible. I conclude that AG ¶ 20(b) does not apply to the facts of Applicant's case.

Applicant has not had financial credit counseling. While she and her husband made intermittent inquiries about the delinquent mortgage debts, they did not diligently pursue information on their status, and they did not try to work out a payment plan with the mortgage creditors. At her personal subject interview in 2011, Applicant stated that she intended to contact the mortgage creditors and would make payment arrangements, provided the debts were determined to be her responsibility. However, she did not do this. In July 2013, while her security hearing was continued on a different matter, Applicant researched relevant land records and wrote to the creditors to request additional information.

DOHA's Appeal Board has 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.]

(ISCR Case No. 06-14521 at 2 (App. Bd. Oct. 15, 2007) (quoting ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006))).

Applicant’s efforts in July 2013 to obtain more information about her mortgage debts dating to 2007 show some effort to address her delinquencies but do little to demonstrate a good-faith effort to resolve them. By failing to timely adhere to her contractual agreement with the mortgage lender, Applicant did not fulfill her obligation as a borrower, and she did not act in good faith. I conclude that AG ¶¶ 20(c), 20(d), and 20(e) do not apply to the facts of Applicant’s case.

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 the facts and circumstances surrounding this case. Applicant is a mature adult of 53 years. She had been a homeowner at least twice before purchasing her present property, and she was aware of her obligations as a borrower to pay her mortgages.

Since defaulting on her mortgages, Applicant has suffered hardships unrelated to her earlier financial conduct. Her husband’s unfortunate illness after years of service to his country and his current unemployment are circumstances beyond her control. They merit sympathy. However, they happened long after her decision not to pay the mortgages on the home she purchased in 2001.

The debts alleged on the SOR total approximately \$41,404. On her personal financial statement, Applicant reported jointly-held assets totaling approximately \$950,800. While not all of these assets were liquid, it would appear that she had sufficient resources to establish and follow a payment plan to satisfy her delinquent mortgage debts.

Overall, the record evidence leaves me with questions and doubts at the present time as to Applicant's eligibility and suitability for a security clearance. Accordingly, I conclude, after a careful review of the facts of her case, the financial considerations adjudicative guideline, and the whole-person analysis, that Applicant failed to mitigate the security concerns arising from her financial delinquencies.

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: AGAINST APPLICANT

Subparagraphs 1.a. - 1.b.: Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Joan Caton Anthony
Administrative Judge