



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



In the matter of:)	
)	
)	ISCR Case No. 11-12168
)	
Applicant for Security Clearance)	

Appearances

For Government: Tovah Minster, Esq., Esquire, Department Counsel
For Applicant: J. Carlton Howard, Jr., Esq.

07/24/2013

Decision

ANTHONY, Joan Caton, Administrative Judge:

After a thorough review of the pleadings, testimony, and exhibits, I conclude that Applicant mitigated the Government's security concerns under Guideline F, Financial Considerations. Her eligibility for a security clearance is granted.

Statement of the Case

Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) on June 6, 2011. On March 20, 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's notarized answer to the SOR was dated April 16, 2013. She requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA). The case was assigned to me on May 23, 2013. I convened a hearing on June 24, 2013, to consider whether it is clearly consistent with the national

interest to grant or continue a security clearance for Applicant. The Government called no witnesses and introduced three exhibits, which were marked Ex. 1 through Ex. 3 and entered in the record without objection. Applicant testified, called one additional witness, and introduced 14 exhibits, which were identified and marked as Applicant's Ex. A through Ex. N and entered in the record without objection. At the conclusion of the hearing, I left the record open until close of business July 8, 2013, so that Applicant could, if she wished, submit additional information. Applicant timely submitted an exhibit, which consisted of an explanatory letter from her counsel, an updated financial statement, and copies of 48 personal checks paid to the Internal Revenue Service (IRS). I marked Department Counsel's memorandum transmitting Applicant's post-hearing submissions as Hearing Exhibit 1 and entered it in the record. I then marked Applicant's post-hearing submission as Ex. O and entered it in the record without objection. DOHA received the hearing transcript (Tr.) on July 2, 2013.

Findings of Fact

The SOR contains two allegations of financial conduct that raise security concerns under Guideline F, Financial Considerations (SOR ¶¶ 1.a. and 1.b.) In her Answer to the SOR, Applicant admitted the allegation at SOR ¶ 1.b., and she denied the allegation at SOR ¶ 1.a. Applicant's admission is entered as a finding of fact.

Applicant, who earned a high school diploma, is 46 years old. She was married for the first time in 1993. She and her husband divorced in 1999. In 2004, she married again, and she is currently separated from her second husband and intends to divorce him. Applicant has been employed by her current employer for two years as an administrative officer. She seeks a security clearance. (Ex. 1; Tr. 106, 120-121.)

In 2003, Applicant purchased a townhouse for approximately \$240,000. She testified that she was able to make her mortgage payments on the townhouse comfortably with her income at the time. (Tr. 99-100.)

Applicant's second husband was employed, on commission, as a certified mortgage planner and loan officer. In 2005, not long after their marriage, Applicant's husband suggested they refinance her townhouse and include him as a co-owner. Applicant agreed, and after the refinancing, the couple used the approximately \$80,000 gain to invest in other real estate. (Ex. 2; Ex. J; Tr. 74-78.)

Applicant and her husband then acquired property and proceeded to build a home valued at approximately one million dollars. They financed the property with an adjustable rate mortgage. Despite the husband's high earnings, they were unable to pay the mortgage debt on the new property and also meet their other financial obligations. In September 2007, Applicant and her husband filed for Chapter 7 bankruptcy.¹ Their

¹ Applicant's 2007 Chapter 7 bankruptcy is alleged at SOR ¶ 1.b.

debts, including the delinquent mortgage on their home, were discharged in February 2009.²

The bankruptcy attorney that Applicant and her husband consulted advised them to file their federal income tax returns as “married filing jointly.” However, the accountant who assisted them in the preparation of their federal tax returns suggested that they file separate federal tax returns. Applicant’s husband had a high income but did not have sufficient income tax withheld. Applicant’s annual income was much lower than her husband’s and based upon a salary. The accountant appeared as a witness and testified that he advised Applicant and her husband to file separate income tax returns because he did not want Applicant to be responsible for her husband’s tax liability. He further advised that Applicant file for relief as an innocent spouse. However, Applicant and her husband followed the bankruptcy attorney’s advice and filed joint tax returns in 2004, 2005, 2006, and 2007.³ (Ex. 2; Tr. Ex. A; Ex. B; Ex. C; Ex. D; Ex. E; Ex. F; Tr. 42-44, 66-67.)

The IRS notified Applicant that she owed delinquent taxes for tax years 2008, 2009, 2010, and 2011. In July 2012, the IRS calculated Applicant’s debt for federal tax year 2011 at \$2,044.10, and, in September 2011, the IRS calculated her debt for federal tax year 2010 at \$3,163.52. Also in September 2011, the IRS calculated Applicant’s debt for federal tax year 2009 at \$1,858.39. In October 2012, the IRS calculated her debt for federal tax year 2008 at \$12,317.67.⁴ The four tax debts total \$19,383.68. The tax debts for 2009, 2010, and 2011 total \$7,066.01. (Ex. 2.)

The record contains a notice of federal tax lien, addressed to Applicant’s husband and dated July 6, 2011, reciting an unpaid balance of assessment of \$35,887.75 for tax year 2004; an unpaid balance of assessment of \$55,013.50 for tax year 2005; and an unpaid balance of assessment of \$42,495.51 for tax year 2006. By letter dated July 31, 2012, the IRS informed Applicant that she was responsible for an unpaid balance of \$133,706.25 for tax years 2005, 2006, 2009, 2010, and 2011.⁵ The IRS also informed Applicant that it had determined she lacked the resources to pay the debt at the present time and was, therefore, temporarily closing her collection case. The IRS also stated that it would accept voluntary payments from Applicant if she chose to make them. (Ex. F; Ex. I; Ex. 2; Ex. 68, 89.)

At her hearing, Applicant testified that she filed her 2012 federal income tax return as “married, filing separately” and received a refund because more money had

² The debts discharged in the bankruptcy included a home mortgage of \$960,000. (Tr. 101.)

³ Applicant later applied to the IRS for innocent spouse status. She was granted such status for tax year 2004, but not for tax years 2005 and 2006. Applicant testified that she was unemployed from March 2006 until September 2007. (Tr. 93, 108.)

⁴ These amounts included interests and penalties. (Ex. 2.)

⁵ These facts are alleged at SOR ¶ 1.a.

been withheld than she owed in taxes. In post-hearing documentation, she provided cancelled checks corroborating estimated payments of \$1,288 on her 2012 federal income tax obligation. (Ex. O; Tr. 83.)

In addition to her estimated tax payments for tax year 2012, Applicant made \$2,355 in voluntary payments to the IRS, beginning in October 2011 and continuing through March 2013. These payments were directed at her 2009, 2010, and 2011 delinquent tax debts. Additionally, in April 2013, Applicant borrowed \$5,500 to pay a portion of her delinquent tax debt for 2009, 2010, and 2011. Applicant's payments in satisfaction of her delinquent federal tax liability for 2009, 2010, and 2011 total \$7,855. Applicant testified that she spoke with an IRS agent while in her attorney's office and was told that the payments she had made satisfied her tax delinquencies for 2009, 2010, and 2011. (Ex. O; Tr. 83-84, 111-112.)

The record reflects that Applicant owes further delinquencies for tax years 2005 and 2006, when she and her husband filed joint tax returns. As a married joint filer, Applicant is co-responsible for the tax delinquencies for those years, which, as of July 2011, totaled \$97,509.01. Moreover, the record reflects that on October 29, 2012, Applicant was served with a notice of tax delinquency for tax year 2008 totaling \$11,111.04.⁶ (Ex. 2; Ex. F.)

In another post-hearing submission, Applicant provided a current personal financial statement. The personal financial statement reflected that Applicant's net monthly income is \$3,861.12. She reported the following monthly expenses: rent, \$1,295; groceries, \$200; clothing, \$50; car expenses, \$400; utilities, \$400; life and other insurance, \$300; medical expense, \$50; and miscellaneous, \$200. She reported the following monthly debt payments: vehicle loan, \$336; repayment of loan to pay IRS, \$209; credit card loan debt, \$263; and credit card debt, \$50. Her monthly fixed expenses total \$2,895, and her monthly debt repayments total \$858. Applicant has a net monthly remainder of \$108. (Ex. O.)

When asked if she intended to reconcile with her husband, Applicant stated that her husband was unreliable and "a negative." She explained that he had moved to another state and had moved from job to job. She stated that she believed he was getting financial help from his family. She stated that he told her his family members no longer trusted him with money. (Tr. 122-124.)

Applicant stated that it was in her interest to stay focused, pursue a divorce, and pay her debts. She also stated that she was trying to eliminate unnecessary expenses. Her major concern was that her vehicle was unreliable and causing her unanticipated expenses. (Tr. 128-130.)

⁶ In addition, the IRS imposed interest charges of \$1,206.63. (Ex. 2.)

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 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 and modified.

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

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, 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 as to potential, rather than actual, risk of compromise of classified information.

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

Analysis

Guideline F, Financial Considerations

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

Failure or inability to live within one’s means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual’s reliability, trustworthiness and ability to protect classified information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

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

Before she married her second husband, Applicant was financially stable. After her marriage, her husband persuaded her to refinance her home, include him as a co-owner, and take on additional real estate investments.

Applicant’s income came from her salary. Her husband’s income from his work as a certified mortgage planner and loan officer was based on commissions. His earnings were high, but he did not have sufficient income tax withheld. Applicant and her husband filed federal income tax returns in 2004, 2005, 2006, and 2007 as “married, filing jointly.” Applicant and her husband became financially overextended and were unable to pay their commercial creditors and their federal income tax obligations. In 2007, they filed for Chapter 7 bankruptcy. This evidence is sufficient to raise potentially disqualifying conditions at AG ¶¶ 19(a) and 19(c).

The guideline also includes examples of conditions that could mitigate security concerns in this case. 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))

Applicant admitted a history of financial difficulties which arose after her marriage to her second husband. She was persuaded by her husband to refinance her home and designate him as a co-owner. She and her husband used the proceeds from the refinance to purchase more expensive real estate, which they were eventually unable to pay for. Their financial delinquency led them to file for bankruptcy protection. Their bankruptcy attorney advised them to file their federal income taxes as “married, filing jointly.” This filing status was particularly harmful for Applicant, who was then considered to be co-responsible for large deficiencies caused by her husband’s failure to pay tax on his high income.

Their accountant advised Applicant and her husband to file “married, filing separately” federal tax returns, so that Applicant could be protected by the innocent spouse tax provision. However, Applicant and her husband followed the bankruptcy attorney’s advice.

Applicant and her spouse separated, and she intends to pursue a divorce. Since the separation, she has attempted to regain her financial stability. She provided documentation corroborating payment of federal income tax deficiencies in 2009, 2010, and 2011. She provided a financial statement documenting that she is living within her means.

However, Applicant remains responsible for tax delinquencies in 2005 and 2006. These delinquencies arose when she filed joint tax returns with her husband, and they total at least \$93,000. Additionally, the record reflects that Applicant is responsible for a 2008 tax delinquency of over \$12,000. Applicant provided documentation from the IRS stating that it recognized Applicant’s current financial situation prevented her from paying the large delinquencies attributed to her, and it did not intend to pursue collection.

In order to pay her tax delinquencies for 2009, 2010, and 2011, Applicant took out a personal loan for \$5,500. Additionally, in a post-hearing submission, Applicant provided documentation establishing that she made 48 voluntary payments to the IRS to satisfy her 2009, 2010, and 2011 tax delinquencies and to make estimated tax

payments for tax year 2012. These payments were made from October 2011 until April 2013. Applicant provided documentation supporting payment of \$7,855 in satisfaction of her 2009, 2010, and 2011 tax debts. Since the record indicates that the tax debts for 2009, 2010, and 2011 total \$7,066.01, it appears that Applicant has fully satisfied these debts.

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. 02-30304 at 3 (App. Bd. April 20, 2004) (quoting ISCR Case No. 99-9020 at 5-6 (App. Bd. June 4, 2001)).

Applicant joined her husband in filing for bankruptcy protection in 2007. However, unlike her husband, Applicant also made a good-faith effort, within her means, to satisfy her federal income tax delinquencies.

While it is true that not all of Applicant's delinquent federal income tax debts have been fully satisfied, DOHA's Appeal Board has explained that an individual's good-faith partial payment of debts need not be a bar to access to classified information:

In evaluating Guideline F cases, the Board has previously noted that the concept of "meaningful track record" necessarily includes evidence of actual debt reduction through payment of debts." However, an applicant is not required, as a matter of law, to establish that he has paid off each and every debt listed in the SOR. All that is required is that an applicant demonstrate that he has ' . . . established a plan to resolve his financial problems and taken significant actions to implement that plan.' The Judge can reasonably consider the entirety of an applicant's financial situation and his actions in evaluating the extent to which that applicant's plan for the reduction of his outstanding indebtedness is credible and realistic. See Directive ¶ E2.2(a) ('Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination.') There is no requirement that a plan provide for payments on all outstanding debts simultaneously. Rather, a reasonable plan (and concomitant conduct) may provide for the payment of such debts one at a time. Likewise, there is no

requirement that the first debts actually paid in furtherance of a reasonable debt plan be the ones listed in the SOR.

ISCR Case No. 07-06482 at 2-3 (App. Bd. May 21, 2008) (internal citations omitted).

I conclude that the circumstances which gave rise to Applicant's financial delinquencies are not likely to recur in the future. Additionally, she acted responsibly and made voluntary payments on her tax debts when faced with her husband's tax delinquencies, a situation that was beyond her control. She has acted in good faith to pay her delinquent federal tax debts, and although she has not satisfied them fully, she has displayed a determination to satisfy her federal income obligations in the future. I conclude, therefore, that AG ¶¶ 20(a), 20(b), 20(c), and 20(d) apply in mitigation in this 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 an applicant's conduct and all relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

(1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept.

I observed Applicant carefully at her hearing, and I questioned her about her future plans. I found her to be credible and sincere in her determination to avoid the financial problems that arose during her relationship with her second husband. I conclude she has acted responsibly and in good faith to begin to repair her financial life.

Applicant has a net monthly remainder of about \$108. In order to meet her current financial obligations, she will be required to exercise rigorous financial discipline. She appears to have the judgment and determination to do so.

Overall, the record evidence leaves me with no questions or doubts about Applicant's eligibility and suitability for a security clearance. For these reasons, I

conclude Applicant mitigated 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: FOR APPLICANT

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

Conclusion

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

Joan Caton Anthony
Administrative Judge