



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



In the matter of:)
)
) ISCR Case No. 11-13507
)
Applicant for Security Clearance)

Appearances

For Government: John Bayard Glendon, Esq., Deputy Chief Department Counsel
For Applicant: *Pro se*

08/07/2013

Decision

ANTHONY, Joan Caton, Administrative Judge:

After a thorough review of the pleadings, testimony, and exhibits in this case, and after evaluating the evidence in light of the appropriate adjudicative guideline and the whole-person concept, I conclude that Applicant failed to mitigate security concerns under Guideline F, Financial Considerations. Her eligibility for a security clearance is denied.

Statement of the Case

Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) on August 12, 2011. The Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline F, Financial Considerations, on February 27, 2013. 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 the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR on March 18, 2013, and requested a decision on the written record. Pursuant to Section E3.1.7 of the Directive, Department Counsel requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA). On May 8, 2013, the case was assigned to me. I convened a hearing on June 26, 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 eight exhibits, which were marked Ex. 1 through Ex. 8 and entered in the record without objection. Applicant testified, called no witnesses, and introduced 29 exhibits, which were identified and marked as Applicant's Ex. A through Ex. Z and Ex. AA through Ex. CC. Applicant withdrew Ex. I. Applicant's remaining 28 exhibits were entered in the record without objection. At the conclusion of the hearing, I left the record open until close of business on July 8, 2013, so that Applicant could, if she wished, provide additional information. Applicant timely filed three additional exhibits, which I marked as Ex. DD, Ex. EE, and Ex. FF and admitted without objection. Applicant's e-mail communication with Department Counsel about her post-hearing exhibits is marked as Hearing Exhibit (HE) 1. Department Counsel's transmittal e-mail advising he had no objection to the post-hearing submission is marked as HE 2. DOHA received the hearing transcript (Tr.) on July 8, 2013.

Findings of Fact

The SOR dated February 27, 2013 contains two allegations of disqualifying conduct under Guideline F, Financial Considerations (SOR ¶¶ 1.a. and 1.b.). In her Answer to the SOR, Applicant admitted the two allegations. On March 28, 2013, Department Counsel amended the SOR to include two additional allegations under Guideline F. Applicant admitted the two new allegations in the amended SOR. Her admissions are entered as findings of fact.

Applicant is 48 years old. She has been married and divorced twice, and she is the mother of three adult children, all of whom are self-sufficient. In 1996, after her first divorce, Applicant filed for Chapter 7 bankruptcy when she and her ex-husband were unable to pay their accumulated debts. (Ex. 1, Ex. 3.)

In 2002, Applicant earned a bachelor's degree. She is currently employed as an independent contractor by a government contracting company. As an independent contractor, she is responsible for withholding and then paying her state and federal income taxes. She must also provide her own health insurance. These financial obligations are not deducted from her pay by her employer. She has worked for her present employer since 2011. However, her status as an independent contractor is recent, and she previously received a taxable salary and benefits from this employer. In a post-hearing document, she stated that she will have an option to again become a salaried employee on September 1, 2013. (Ex. 1, Ex.3, Ex. EE; Tr. 94-95, 121-123.)

Applicant worked as a term employee for a federal government department for one year, beginning in March 2009, and during that employment, she applied for a security clearance. It was her understanding that her term appointment would be

renewed for two more years. In an interview with an authorized investigator in October 2009, she acknowledged approximately 18 delinquent debts and asserted she was unable to pay them. She acknowledged a voluntary repossession of a motorcycle, with a deficiency of \$12,000, which she was unable to pay.¹ Additionally, she acknowledged an outstanding debt to the Internal Revenue Service (IRS) of \$2,400 for tax years 2004 and 2006.² She was granted an interim security clearance, which was later rescinded. (Ex. 3, Ex. O; Tr. 72-73.)

Applicant's security clearance was not granted in 2009. Applicant claimed she was not timely informed of her opportunity to respond to the agency's initial decision to deny her clearance, and she was therefore unable to provide information to rebut or mitigate allegations of financial delinquency. Additionally, her employment with the department ended before the matter of her security clearance eligibility could be resolved. (Ex. O; Tr. 72-73, 95-98.)

Applicant reported that the contract renewing her temporary appointment was incorrectly coded, with the result of putting her in non-pay status for three weeks. In an attempt to remedy this, the agency responsible for payroll gave Applicant a lump-sum check for \$17,000. Applicant's command and the payroll agency advised her to cash the check and deposit it in a savings account until the overpayment could be resolved. Two weeks later, Applicant was terminated when her employer experienced a budget cut and could no longer employ her. Applicant's debt was later referred to the Department of the Treasury (agency) for collection, which took action to collect the debt by garnishment. The SOR alleges at ¶ 1.b. that Applicant owes the agency a debt of approximately \$7,000 that is 90 days or more past due. (Ex. Y; Tr. 74-77.)

Applicant believed that the decision to garnish her wages was taken without giving her the benefit of due process. She contested the amount of the debt and complained that she was not provided with forms to defer repayment. The agency granted her request for an administrative hearing. (Ex. Y; Tr. 99-104.)

After review of her case, the agency, on October 15, 2012, found no evidence that Applicant requested forms to defer payment of her debt. Additionally, it found that she informed the agency she had agreed to pay her former employer approximately \$240 a month for 36 months, beginning in September 2011, to settle the debt, but no payments were received and the repayment agreement was cancelled in February 2012. (Ex. Y.)

¹ Credit bureau reports in the record indicate Applicant addressed many of the delinquent debts identified in her personal subject interview. (Ex. 4, Ex. 5, Ex. 6, Ex. 7.)

² Applicant provided a statement from the IRS, dated March 12, 2012, showing that she was credited with an overpayment of \$875.97 on her 2009 federal tax return. The IRS report noted that \$788.54 of the overpayment was applied to a 2004 tax delinquency that Applicant owed, and \$87.43 was applied to a 2006 tax delinquency she owed. These delinquencies were not alleged on the SOR. (Ex. N.)

When Applicant did not resolve the debt before it became delinquent, it was referred to the agency for collection by garnishment. Applicant did not timely file a request for a hearing, and the garnishment process began. Additionally, two income tax refunds, one for \$131.41 and one of \$368.20, were intercepted and applied to the debt. The total debt, including interest, penalties, and fees, was \$9,253³ as of October 15, 2012, the date of the administrative decision. (Ex. Y.)

At her hearing, Applicant testified that she made a payment of \$3,800 on the debt on June 21, 2013, five days before her hearing. She also testified that she planned to pay the remainder of the debt, which she estimated to be “a little over \$4,000,” by July 22, 2013. (Tr. 104-105.)

The SOR alleges at ¶ 1.a. that Applicant is responsible for a state tax lien of \$5,582. The record reflects that the lien was filed in August 2011. The amended SOR also alleges at ¶¶ 1.c. and 1.d that Applicant failed to file her 2007, 2008, and 2009 state and Federal income tax returns as required. Applicant stated that she thought she was not obligated to file a tax return if she also thought she would receive a tax refund. At her hearing, she acknowledged that she had not consulted a tax advisor or received recent financial credit counseling. (Tr. 114-115.)

Applicant filed her Federal income tax returns for 2007, 2008, and 2009 in January 2012. She filed her 2007, 2008, and 2009 state tax returns in December 2012, and she explained at her hearing that they were being reviewed by the state tax authority. She stated that she believed the tax authority would find she did not owe the amount identified in the lien, and she anticipated that she would be credited with refunds. She estimated that once the refunds for the three tax years were credited, she would owe approximately \$4,354. She provided documentation showing she had entered into an installment agreement to pay her 2007, 2008, and 2009 state income taxes. However, she stated that she intended to pay the debt in full before the end of the installment period. (Answer to SOR; Ex. C, Ex. D, Ex. E, Ex. F., Ex. G, Ex. H, Ex. AA, Ex. 8; Tr. 85, 105-113.)

At her hearing, Applicant testified that she had not lived beyond her means for four years. She stated that her employer would hire her as an employee if she acquired a security clearance. She provided a personal financial statement, dated December 17, 2012, which reported the following: total net monthly income, \$5,564; total monthly expenses, \$2,709; and total monthly debt payments, \$450.⁴ Applicant’s net remainder each month was \$2,405. She reported that she had no assets. (Ex. 2; Tr. 87, 118.)

³ Applicant was notified in January 2010 that the outstanding debt was \$9,512.36. As she was still working for her employer until February 27, 2010, \$1007.54 was collected during that time by payroll deduction and applied to the reduction of the debt, resulting in an uncollected debt balance of \$8,504.82. (Ex. Y.)

⁴ Applicant’s personal financial statement did not include payments on the state tax lien or the debt to the Federal government agency. (Ex. 2.)

In a post-hearing submission, she provided a personal financial statement that reflected her status as an independent contractor. After her hearing, she consulted with an accountant who advised her on the amount of money she should set aside each quarter to pay her state and federal income taxes. She also provided a plan for paying the debts alleged at SOR ¶¶ 1.a. and 1.b. (Ex. DD.)

Applicant provided several letters of character reference for the record. Her current supervisor stated that Applicant “demonstrates the highest level of trust and integrity” in carrying out her assigned duties. The supervisor also praised Applicant’s efforts as a community volunteer. (Ex. CC.)

Three other individuals who knew Applicant as a coworker over a period of several years praised her professional skills and strong work ethic. They also noted that she possessed high moral character and was trustworthy. (Ex. CC; Ex. FF.)

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 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.

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 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 three 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. Under AG ¶ 19(g), “failure to file annual Federal, state, or local income tax returns as required” can also be a matter of security concern.

Applicant has a history of financial difficulties. In 1996, she filed for Chapter 7 bankruptcy when she and her ex-husband divorced and were unable to pay their accumulated debts. After receiving a fresh start through the discharge of her debts in bankruptcy, she failed to timely file her state and Federal income tax returns in 2007, 2008, and 2009. Also, in 2009, when she applied for a security clearance, Applicant's credit bureau report reflected that she was responsible for numerous unresolved financial delinquencies, which she admitted when interviewed by an authorized investigator.

To her credit, Applicant addressed many of the delinquencies identified on her 2009 credit bureau report. However, her failure to address her income tax responsibilities resulted in a state tax lien filed against her in 2011. Additionally, she remains responsible for a debt to a federal agency, which, while not of her making, brought her unearned income that required repayment. This evidence is sufficient to raise security concerns under AG ¶¶ 19(a), 19(c), and 19(g).

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

Applicant's efforts to resolve her current financial delinquencies are relatively recent. She made a \$3,800 payment on the debt alleged at SOR ¶ 1.b. five days before her hearing, and she provided in a post-hearing submission a plan for future payments. However, at this time, it is not clear that Applicant's financial delinquencies occurred under circumstances that are unlikely to recur and do not cast doubt on her current reliability and good judgment. I conclude that AG ¶ 20(a) does not apply in this case.

Applicant received a large payment in error from her employer's pay agent. This was a circumstance beyond her control, and AG ¶ 20(b) partially applies. However, she was advised by her supervisor to put the overpayment in a separate account until the matter could be clarified. If this had occurred, she would have been able to remit the overpayment in full when it was demanded. The record reflects that Applicant followed a payment plan to resolve the debt briefly, but she did not follow through on a later payment plan. Her claim of lack of due process before her wages were garnished to pay

the debt was reviewed by the agency and found to be without merit. In summary, Applicant failed to act responsibly when confronted with a situation over which she initially had no control.

At her hearing, Applicant stated that she had not had financial credit counseling in recent years, and she did not seek counsel from an accountant or an attorney before failing to timely file her state and Federal income tax returns in 2007, 2008, and 2009. After her hearing, she consulted with an accountant and in a post-hearing submission, provided tax and debt repayment information from the accountant. However, this new information, while no doubt helpful to Applicant, cannot be relied on as an accurate predictor of her future actions to manage her income and satisfy her debts.

Applicant's partial payment of \$3,800 on the payroll debt she owes to the agency occurred five days before her hearing. The status of her state income tax indebtedness remains unresolved because Applicant's 2007, 2008, and 2009 state income tax returns are still under review. Applicant had notice in 2011 that a state tax lien had been filed against her. While Applicant receives some credit for her partial payment on her payroll debt and her state income tax filings, her delays in initiating resolution do not merit full application of AG ¶ 20(d), especially when Applicant's financial statement suggests she has had the resources on hand to satisfy the debts in a more timely manner.

I conclude that while AG ¶ 20(a) is not applicable, AG ¶¶ 20(b), 20(c), and 20(d) are applicable only in part.

Whole-Person Concept

Under the whole-person concept, an 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 considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant is a mature adult. She is

educated and holds a bachelor's degree. Her supervisor and coworkers consider her to be a valued colleague.

Applicant has a history of financial problems. While she has successfully addressed many of her financial delinquencies in the past, she has not been able to prevent new financial delinquencies, and this raises a security concern. Additionally, she has addressed her current financial delinquencies relatively recently. While she appears to be determined in her efforts to address her delinquencies in order to obtain a security clearance, it is not clear that she will be able to maintain financial stability in the future.

Overall, the record evidence leaves me with doubts about Applicant's eligibility and suitability for a security clearance at this time. For these reasons, I conclude that Applicant failed to mitigate security concerns about her financial delinquency.

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 |
| Subparagraph 1.a.: | Against Applicant |
| Subparagraph 1.b.: | For Applicant |
| Subparagraphs 1.c. and 1.d.: | Against Applicant |

Conclusion

In light of all of the circumstances presented by the record in this case, 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.

Joan Caton Anthony
Administrative Judge