



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



In the matter of:)
)
) ISCR Case No. 15-01187
)
Applicant for Security Clearance)

Appearances

For Government: Ross Hyams, Esq., Department Counsel
For Applicant: *Pro se*

08/16/2016

Decision

TUIDER, Robert J., Administrative Judge:

Applicant has mitigated security concerns pertaining to Guideline F (financial considerations). Clearance is granted.

Statement of the Case

On July 19, 2012, Applicant submitted a Questionnaire for National Security Positions (SF-86). On August 20, 2015, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended; and the adjudicative guidelines (AG), which became effective on September 1, 2006.

The SOR alleged security concerns under Guideline F (financial considerations). The SOR detailed reasons why the DOD CAF was unable to find that it is clearly consistent with the national interest to grant a security clearance for

Applicant, and it recommended that her case be submitted to an administrative judge for a determination whether her clearance should be granted or denied.

On September 17, 2015, Applicant responded to the SOR. On February 29, 2016, Department Counsel was ready to proceed. On March 9, 2016, DOHA assigned Applicant's case to me. On April 1, 2016, the Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing, setting the hearing for April 19, 2016. The hearing was held as scheduled.

At the hearing, Department Counsel offered Government Exhibits (GE) 1 through 5, which were received into evidence without objection. Applicant testified, did not call any witnesses, and offered Applicant Exhibits (AE) A through C, which were received into evidence without objection. On April 26, 2016, DOHA received the hearing transcript. I held the record open until May 6, 2016; however, the Applicant did not submit any additional evidence.

Procedural Matters

Department Counsel moved to withdraw SOR ¶ 1.m. Without objection from the Applicant, I granted Department Counsel's motion. (Tr. 7-8)

Findings of Fact

Applicant denied all of the SOR allegations. After a thorough review of the evidence, I make the following findings of fact.

Background Information

Applicant is a 31-year-old program analyst employed by a defense contractor since July 2012. She seeks a secret security clearance to enhance her position within her company. (GE 1; Tr. 12-14)

Applicant graduated from high school in May 2004. She was awarded a bachelor of science degree in December 2015. (GE 1; Tr. 14-15) Applicant has never married and has a seven-year-old son. Applicant was awarded \$422 in monthly child support from her son's father; however, she described that support as "sporadic." Applicant did not serve in the U.S. armed forces. (GE 1, GE 2; Tr. 15-17)

Financial Considerations

Applicant's SOR lists 12 debts totaling \$27,677. The majority of these debts stem from student loans. Her debts were established through record evidence. (SOR ¶¶ 1.a – 1.i; GE 1 – 5; AE A - C)

Applicant's financial problems began when she became pregnant in 2008. Her employment at the time did not provide health care insurance, and as a result she was

responsible for her pregnancy-related medical expenses. She moved in with her parents during her pregnancy and stayed with them for a short time after her son was born. Applicant was unemployed from April 2009 to November 2009. Applicant's financial difficulties continued as a single parent. She struggled to make ends meet working minimum wage jobs while pursuing her undergraduate degree and took out payday loans to survive. All but one of her SOR debts are pay day loans or student loans. (GE 1; Tr. 17-23, 37-39)

To address her debts, Applicant contacted a bankruptcy attorney and filed for Chapter 13 bankruptcy in September 2015. However, the following month in October 2015, Applicant filed a petition to convert her Chapter 13 bankruptcy to a Chapter 7 bankruptcy. In her petition to amend, Applicant reaffirmed the loan on her 2015 Toyota Camry. In December 2015, Applicant's Chapter 7 petition was approved and she was awarded a discharge. Her Summary of Schedules lists \$70,094 in liabilities. All of the SOR debts apart from her student loans were discharged in her bankruptcy. Applicant completed the required financial counseling as part of the bankruptcy process. (GE 5; AE A – AE C; Tr. 23-24, 33-34, 37, 39-47)

When Applicant answered her SOR in September 2015, her student loans were in deferment. Before her hearing, Applicant consolidated her student loans and began making \$50 monthly payments on those loans. (SOR answer; Tr. 24-31, 34-36)

Applicant's annual income is "about \$40,000 a year" and she nets "1,000 to \$1,200" every two weeks on pay day. (Tr. 27-28) She estimates her net monthly remainder is "about \$400." (Tr. 33) Applicant is in the process of regaining financial responsibility since her Chapter 7 bankruptcy discharge. She has about \$300 in her savings account and "a little over \$3,000" in her 401(k) retirement account. She has no new debt has no plans to incur any additional debt. (Tr. 47-48)

Policies

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

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An

administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information. Clearance decisions must be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See Exec. Or. 10865 § 7. See also Executive Order 12968 (Aug. 2, 1995), § 3.1. Thus, nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination about applicant's allegiance, loyalty, or patriotism. It is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. "Substantial evidence" is "more than a scintilla but less than a preponderance." See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue her security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

AG ¶ 18 articulates the security concern relating to financial problems:

Failure or inability to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness, and ability to

protect classified information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

AG ¶ 19 provides two disqualifying conditions that could raise a security concern and may be disqualifying in this case: “(a) inability or unwillingness to satisfy debts”; and “(c) a history of not meeting financial obligations.” AG ¶¶ 19(a) and 19(c) are established through Applicant’s admissions and evidence presented. Further inquiry about the applicability of mitigating conditions is required.

Five financial considerations mitigating conditions under AG ¶ 20 are potentially applicable:

(a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual’s current reliability, trustworthiness, or good judgment;

(b) the conditions that resulted in the financial problem were largely beyond the person’s control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation), and the individual acted responsibly under the circumstances;

(c) the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control;

(d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts; and

(e) the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue.

AG ¶¶ 20(a) through 20(d) apply. Applicant’s finances were adversely affected by her unemployment and underemployment, which are conditions largely beyond her control. She acted responsibly under the circumstances when she sought counsel from a bankruptcy attorney and all of her delinquent nonpriority, unsecured debts were discharged under Chapter 7 of the Bankruptcy Code.¹ Applicant is repaying her

¹In a bankruptcy filing, most debtors list potential creditors, even when the debt may have been resold or transferred to a different collection agent or creditor, to ensure notice, and reduce the risk of subsequent dismissal of the bankruptcy. If Applicant failed to list some nonpriority unsecured debts on his bankruptcy schedule, this failure to list such debts does not affect their discharge. Absent fraud, in a no-asset bankruptcy, all unsecured, nonpriority debts are discharged when the bankruptcy court grants a discharge, even when they are not listed on a bankruptcy schedule. See *Judd v. Wolfe*, 78 F.3d 110,

student loans as agreed and is current on her car loan, a debt she reaffirmed. At Applicant's hearing, it was evident that she takes this process seriously. She struggled as a single parent, working part-time in low-paying jobs, while earning her undergraduate degree. Her son's father is not forthcoming with child support leaving Applicant with the responsibility of shoring up any deficiency. Since Applicant began her current employment and was granted a bankruptcy discharge, she has been making inroads towards regaining financial responsibility.

Applicant received financial counseling and generated a budget as part of the bankruptcy process. Her negative financial situation "occurred under such circumstances that it is unlikely to recur and does not cast doubt on the [Applicant's] current reliability, trustworthiness, or good judgment" under AG ¶ 20(a). She "acted responsibly under the circumstances," and "the problem is being resolved or is under control" as required under AG ¶¶ 20(b) and 20(c). Applicant disputed the debt in SOR ¶ 1.m, which was withdrawn by Department Counsel, and receives credit under AG ¶ 20(e) as it pertains to this debt.

In sum, Appellant has mitigated all of the delinquent debts listed on her SOR. She has not generated any new delinquent debts after December 2015, when her nonpriority unsecured debts were discharged under Chapter 7 of the Bankruptcy Code. Applicant continues to pay her student loans as agreed. Her resolution of her delinquent debts through the bankruptcy process as well as repaying her student loans and car loan shows sufficient effort, good judgment, trustworthiness, and reliability to warrant mitigation of financial considerations concerns.

Whole-Person Analysis

In all adjudications, the protection of our national security is the paramount concern. The adjudicative process is a careful weighing of a number of variables in considering the whole-person concept. It recognizes that we should view a person by the totality of his or her acts, omissions, and motivations as well as various other variables. Each case must be adjudged on its own merits, taking into consideration all relevant circumstances and applying sound judgment, mature thinking, and careful analysis. Under the whole-person concept, 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

114 (3d Cir. 1996); *Francis v. Nat'l Revenue Service, Inc.*, 426 B.R. 398 (Bankr. S.D. FL 2010), *but see First Circuit Bucks Majority on Discharge of Unlisted Debt in No-Asset Case*, American Bankruptcy Institute, 28-9 ABIJ 58 (Nov. 2009). There is no requirement to re-open the bankruptcy to discharge the debt. *Collier on Bankruptcy*, Matthey Bender & Company, Inc., 2010, Chapter 4-523, ¶ 523(a)(3)(A). Some categories of priority obligations are listed on bankruptcy schedules, but are not discharged by bankruptcy, such as tax debts, student loan debts, and child support obligations.

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 a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. 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.

The rationale for reinstating Applicant's clearance is more substantial than the reasons for denying her clearance. Appellant is a 31-year-old program analyst working for a defense contractor since July 2012. She got off to a rough start in life, but is doing her best to recover. Applicant is a responsible single parent raising her seven-year-old son with little support from her son's father. There is no evidence of any security violations, abuse of alcohol, use of illegal drugs, or reportable criminal offenses.

Appellant acted responsibly under the circumstances when all of her delinquent nonpriority, unsecured debts were discharged under Chapter 7 of the Bankruptcy Code. She has received a fresh financial start. She is motivated to continue her career as a defense contractor. She understands that she needs to pay her debts, and the conduct required to retain her security clearance. Her efforts at debt resolution have established a "meaningful track record" of debt re-payment. I am confident she will continue to resolve her student loans on her SOR and maintain her financial responsibility.²

I have carefully applied the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. I conclude financial considerations concerns are mitigated, and eligibility for access to classified information is granted.

²Of course, the Government can re-validate Applicant's financial status at any time through credit reports, investigation, and additional interrogatories. Approval of a clearance now does not bar the Government from subsequently revoking it, if warranted. "The Government has the right to reconsider the security significance of past conduct or circumstances in light of more recent conduct having negative security significance." ISCR Case No. 10-06943 at 4 (App. Bd. Feb. 17, 2012). An administrative judge does not have "authority to grant an interim, conditional, or probationary clearance." ISCR Case No. 10-06943 at 4 (App. Bd. Feb. 17, 2012) (citing ISCR Case No. 10-03646 at 2 (App. Bd. Dec. 28, 2011)). See also ISCR Case No. 04-03907 at 2 (App. Bd. Sep. 18, 2006) (stating, "The Board has no authority to grant [a]pplicant a conditional or probationary security clearance to allow her the opportunity to have a security clearance while she works on her financial problems."). This footnote does not imply that this Applicant's security clearance is conditional.

Formal Findings

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline F: FOR APPLICANT

Subparagraphs 1.a to 1.l: For Applicant

Subparagraph 1.m: Withdrawn

Conclusion

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue Applicant's eligibility for a security clearance. Clearance is granted.

Robert J. Tuidor
Administrative Judge