



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 15-04684

Appearances

For Government: Benjamin R. Dorsey, Esq., Department Counsel
For Applicant: *Pro se*

03/23/2017

Decision

HARVEY, Mark, Administrative Judge:

Applicant's delinquent nonpriority unsecured debts were discharged under Chapter 7 of the Bankruptcy Code in May 2012. Applicant's student loans totaling \$49,431 were placed for collection, and she failed to establish her student loan debt is either current or otherwise mitigated. Financial considerations security concerns are not mitigated. Eligibility for access to classified information is denied.

Statement of the Case

On November 11, 2014, Applicant completed and signed a Questionnaire for National Security Positions (SF 86) or security clearance application (SCA). (Item 3) On December 4, 2015, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a statement of reasons (SOR) to Applicant under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry*, February 20, 1960; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), January 2, 1992; and the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), which became effective on September 1, 2006.

The SOR detailed reasons why the DOD CAF did not find under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance

for her, and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked. (Item 1) Specifically, the SOR set forth security concerns arising under the financial considerations guideline.

On January 15, 2016, Applicant responded to the SOR and waived her right to a hearing. (Item 2) On April 22, 2016, Department Counsel completed the File of Relevant Material (FORM). Applicant received the FORM on an unspecified date, and on June 17, 2016, Applicant responded to the FORM. (FORM response) On March 6, 2017, the case was assigned to me. The case file consisted of seven exhibits. (Items 1-7) Applicant did not object to any of the Government exhibits.

Findings of Fact¹

In Applicant's SOR response, she admitted that she owed \$49,431 in student loans (SOR ¶ 1.a), and her debts were discharged under Chapter 7 of the Bankruptcy Code in May 2012 (SOR ¶ 1.b). She said she believed her student loans were discharged through her May 2012 bankruptcy. (Item 3) She also provided extenuating and mitigating information. Her admissions are accepted as findings of fact. Additional factual findings follow.

Applicant is 42 years old, and she has been employed as a procurement specialist for a government contractor since 2008.² (Item 3) In 2011, she received a master's certificate in government contracting. (Item 3) In 2014, she received Senior Professional in Supply Management (SPSM) certification. (Item 3) Applicant has never married, and she has one child who was born in 2003. (Item 3) She has resided with a cohabitant since 1998. (Item 3) She has not served in the U.S. Armed Forces. (Item 3) There is no evidence that she violated security rules, committed any crimes, abused alcohol, or used illegal drugs. There is no evidence of employer performance evaluations.

Financial Considerations

Applicant's history of delinquent debt is documented in her credit reports, SCA, Office of Personnel Management (OPM) personal subject interview (PSI), and SOR response. The status of the SOR allegations is as follows.

SOR ¶ 1.a alleges student loans placed for collection in the approximate amount of \$49,431. In her November 11, 2014 SCA, Applicant said that she fell behind on her student loans "many years ago" due to her inability to make the required payment. (Item 3) She continued, "I am working to bring the student loan out of default status and am told that after 9 consecutive payments, the status will be updated . . . I am making

¹ Some details have been excluded to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

² Unless stated otherwise, the source of the information in this paragraph is Applicant's November 11, 2014 Electronic Questionnaire for National Security Positions (e-QIP) (SF 86) or security clearance application (SCA). (Item 3)

monthly payments and am researching options for refinancing to lower the student loan rate. I have setup online banking to automatically send the payments on my behalf.” (Item 3)

In her January 15, 2016 SOR response, Applicant said:

I admit. To date, I am unsure of the exact status of my student loan. I do not receive balance statements or any communication whatsoever from the [creditor]. At the discharge of my bankruptcy, I began making monthly payments without notification to prevent any type of garnishment action. Shortly after, I reached out by phone and was told to submit my discharge documentation and the [creditor] would be in contact if anything further is required of me. I have not received any further communication nor reached out again by phone. It is still not clear to me whether or not this account was discharged along with the bankruptcy. I am not certain whether the past due status you are referring to as represented in my credit file is past or prior reporting but intend to take further action to gain current perspective and satisfy any requirements associated with this account.

In her June 17, 2016 FORM response, Applicant repeated her comments in her SOR response and added:

I have not received any correspondence on this loan since submitting the discharge documents and have every reason to believe it has been discharged. I have since reached out for assistance with confirming the exact status of my loan and am seeking loan rehabilitation assistance Upon confirmation that my loan is in fact active and has not been discharged, I fully intend to utilize the resources offered by [a debt management company] to resolve and ultimately recover this debt.

SOR ¶ 1.b alleges Applicant’s nonpriority unsecured debts were discharged under Chapter 7 of the Bankruptcy Code in May 2012. Applicant’s monthly income is \$5,261. (Item 7, Schedule I) Her unsecured nonpriority debts total \$69,560, and this total includes student loans of \$49,431. (Item 7, Schedule F) Her bankruptcy shows a \$513 monthly garnishment; however, she did not indicate the \$24,000 judgment obtained by county government in 2011 in her list of debts. (Item 7, Schedule I; OPM PSI; FORM response) Her budget shows monthly rent of \$1,500, monthly food payment of \$695, and a monthly remainder of \$7 among other expenses. (Schedule J, Item 7) The “EXPLANATION OF BANKRUPTCY DISCHARGE in a Chapter 7 Case” reads **Debts that are Not Discharged** . . . d. Debts for most student loans.” ((emphasis in original) Item 7) She received financial counseling as part of the bankruptcy process.

In 2002, Applicant’s father passed away. (FORM response; OPM PSI) Applicant and several family members were the beneficiaries on her father’s will. (OPM PSI) The property received fines exceeding \$24,000 because of the condition of the property. (FORM response) Applicant did not live on the property. In 2011, Applicant’s salary was

garnished to pay the fine. She said in May 2011, her aunt paid the fines on the property, and the lien was released. (FORM response) The lien does not appear on her credit report or bankruptcy and is not a security issue.

Aside from Applicant's uncorroborated statements, there is no documentary evidence that Applicant paid, arranged to pay, settled, compromised, or otherwise resolved her student loans. The record lacks corroborating or substantiating documentation and detailed explanations of the causes for her financial problems and other mitigating information. The FORM noted that Applicant had 30 days from the receipt of the FORM "in which to submit a documentary response setting forth objections, rebuttal, extenuation, mitigation, or explanation, as appropriate. If you do not file any objections or submit any additional information . . . your case will be assigned to an Administrative Judge for a determination based solely" on the evidence set forth in this FORM. (FORM at 3)

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. Thus, nothing in this decision should be construed to suggest that it is based, 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 his 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

Financial Considerations

AG ¶ 18 articulates the security concern for 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.

The Appeal Board explained the scope and rationale for the financial considerations security concern as follows:

This concern is broader than the possibility that an applicant might knowingly compromise classified information in order to raise money in satisfaction of his or her debts. Rather, it requires a Judge to examine the totality of an applicant’s financial history and circumstances. The Judge must consider pertinent evidence regarding the applicant’s self-control, judgment, and other qualities essential to protecting the national secrets as well as the vulnerabilities inherent in the circumstances. The Directive

presumes a nexus between proven conduct under any of the Guidelines and an applicant's security eligibility.

ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012) (citation omitted).

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." Applicant's history of delinquent debt is documented in her credit reports, OPM PSI, and SOR response. The Government established the disqualifying conditions in AG ¶¶ 19(a) and 19(c) requiring additional inquiry about the possible applicability of mitigating conditions.

Five mitigating conditions under AG ¶ 20 are potentially applicable:

(a) the behavior happened so long ago,³ 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;⁴ and

³ A debt that became delinquent several years ago is still considered recent because "an applicant's ongoing, unpaid debts evidence a continuing course of conduct and, therefore, can be viewed as recent for purposes of the Guideline F mitigating conditions." ISCR Case No. 15-06532 at 3 (App. Bd. February 16, 2017) (citing ISCR Case No. 15-01690 at 2 (App. Bd. Sep. 13, 2016)).

⁴ The Appeal Board has previously 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].

(internal citation and footnote omitted) ISCR Case No. 02-30304 at 3 (App. Bd. Apr. 20, 2004) (quoting ISCR Case No. 99-9020 at 5-6 (App. Bd. June 4, 2001)).

(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.

The Appeal Board concisely explained Applicant's responsibility for proving the applicability of mitigating conditions as follows:

Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in security clearance decisions is that articulated in *Egan, supra*. "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." Directive, Enclosure 2 ¶ 2(b).

ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013).

Applicant described the problem with her inheritance resulting in a \$24,000 fine and garnishment of her pay. These circumstances beyond her control adversely affected her finances. Applicant's choice in 2012 to utilize bankruptcy to discharge her nonpriority unsecured debts is reasonable. The discharge of her debts was approved by the bankruptcy judge and is presumptively warranted and lawful. She is credited with mitigating SOR ¶ 1.b.

Applicant contends that her student loans were discharged in her 2012 Chapter 7 bankruptcy. Applicant resides in a state under the jurisdiction of the Fourth Circuit Court of Appeals. A bankruptcy court can discharge student loans only if repayment of those loans would constitute an undue hardship on a debtor and the debtor's dependents. Title 11 U.S.C. § 523(a)(8). To determine whether the debtor's repayment of a student loan would constitute an undue hardship, the bankruptcy court in Applicant's case would have applied the three-part test annunciated in *Brunner v. New York State Higher Educ. Services*, 831 F.2d 395 (2d Cir. 1987) and adopted by the Fourth Circuit. See *Educ. Credit Mgmt. Corp. v. Mosko (In re Mosko)*, 515 F.3d 319 (4th Cir. 2008). The Brunner test requires the debtor to establish, by a preponderance of the evidence, that (1) he or she cannot maintain, based on current income and expenses, a minimal standard of living for themselves and their dependents if forced to repay the loans; (2) additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loan; and (3) he or she has made good-faith efforts to repay the student loans. Applicant fails to meet all three tests. She has income exceeding \$60,000 a year. After the county lien was paid, \$511 was available monthly to pay her student loans, according to her budget. She did not establish her inability to further reduce her expenses indicated in her budget. She has been employed since 2008, and she provided no evidence of any payments to the student loan creditor.

The role of her cohabitant in paying household expenses is undefined. There is no evidence Applicant filed a formal complaint with the bankruptcy court, called a Complaint to Determine Dischargeability, which should be used to request discharge of government guaranteed student loans. See e.g., *Lokey v. U.S. Dep't of Educ. (In re Lokey)*, 98 Fed. Appx. 938, 939 (4th Cir. 2004) (unpub.).

Applicant did not provide enough details about what she did to address her student loan debt over the last four years. She did not provide documentation showing: (1) proof of payments, such as checking account statements, photocopies of checks, or a letter from the creditor proving that she paid or made any payments to the creditor; (2) correspondence to or from the creditor to establish maintenance of contact;⁵ (3) credible debt disputes indicating she did not believe she was responsible for the debt and why she held such a belief; (4) more evidence of attempts to negotiate payment plans, such as settlement offers or agreements to show that she was attempting to resolve her student loan debt; or (5) other evidence of progress or resolution. Applicant failed to establish mitigation under AG ¶ 20(e) because she did not provide documented proof to substantiate the existence, basis, or the result of any debt dispute.

There is insufficient evidence about why Applicant was unable to make greater progress resolving her student loan debt. There is insufficient assurance that her financial problems are being resolved, are under control, and will not recur in the future. Under all the circumstances, she failed to establish that financial considerations security concerns are mitigated.

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 the 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.

⁵ "Even if Applicant's financial difficulties initially arose, in whole or in part, due to circumstances outside his [or her] control, the Judge could still consider whether Applicant has since acted in a reasonable manner when dealing with those financial difficulties." ISCR Case No. 05-11366 at 4 n.9 (App. Bd. Jan. 12, 2007) (citing ISCR Case No. 99-0462 at 4 (App. Bd. May 25, 2000); ISCR Case No. 99-0012 at 4 (App. Bd. Dec. 1, 1999); ISCR Case No. 03-13096 at 4 (App. Bd. Nov. 29, 2005)). A component is whether he or she maintained contact with creditors and attempted to negotiate partial payments to keep debts current.

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 have incorporated my comments under Guideline F in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

Applicant is 42 years old, and she has been employed as procurement specialist for a government contractor since 2008. In 2011, she received a master's certificate in government contracting. In 2014, she received SPSM certification. She has one child who was born in 2003. She has resided with a cohabitant since 1998. There is no evidence that she violated security rules, committed any crimes, abused alcohol, or used illegal drugs. There is no evidence of employer performance evaluations.

Applicant's finances were adversely affected by a county government obtaining a \$24,000 judgment and garnishing Applicant's pay. Applicant's aunt paid this debt. She is crediting with mitigating SOR ¶ 1.b.

Applicant did not provide documented resolution of her student loan debt. She provided insufficient corroborating or substantiating documentary evidence of payments and an established payment plan addressing her delinquent student loan. Her actions show lack of financial responsibility and judgment, and raise unmitigated questions about Applicant's reliability, trustworthiness, and ability to protect classified information. See AG ¶ 18. More information about inability to pay debts, financial history, or documented financial progress is necessary to mitigate security concerns.

It is well settled that once a concern arises regarding an applicant's security clearance eligibility, there is a strong presumption against the grant or renewal of a security clearance. See *Dorfmont*, 913 F. 2d at 1401. Unmitigated financial considerations concerns lead me to conclude that grant of a security clearance to Applicant is not warranted at this time. This decision should not be construed as a determination that Applicant cannot or will not attain the state of reform necessary for award of a security clearance in the future. With more effort towards documented resolution of her past-due debt, and a track record of behavior consistent with her obligations, she may well be able to demonstrate persuasive evidence of her security clearance worthiness.

I have carefully applied the law, as set forth in *Egan*, Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. I conclude that financial consideration security concerns are not mitigated, and it is not clearly consistent with the national interest to grant Applicant security clearance eligibility at this time.

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

Conclusion

In light of all of the circumstances in this case, it is not clearly consistent with the national interest to grant or continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

MARK HARVEY
Administrative Judge