



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



In the matter of:

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ISCR Case No. 15-05831

Applicant for Security Clearance

Appearances

For Government: Braden M. Murphy, Esq., Department Counsel
For Applicant: *Pro se*

01/24/2017

Decision

HARVEY, Mark, Administrative Judge:

Applicant's statement of reasons (SOR) alleges 12 delinquent debts totaling \$29,712 and discharge of her debts through Chapter 7 of the Bankruptcy Code in 2006. She mitigated three debts totaling about \$1,000; however, she has not established a sufficient track record of debt payments. Financial considerations security concerns are not mitigated. Access to classified information is denied.

History of the Case

On June 10, 2014, Applicant completed and signed a Questionnaire for National Security Positions (SF 86) or security clearance application (SCA). (Government Exhibit (GE) 1) On February 21, 2016, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued an SOR to Applicant pursuant to 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. (Hearing Exhibit (HE) 2)

Specifically, the SOR set forth security concerns arising under the financial considerations guideline.

On May 23, 2016, Applicant responded to the SOR and requested a hearing. On June 29, 2016, Department Counsel indicated he was ready to proceed. On August 15, 2016, the case was assigned to me. On September 12, 2016, the Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing, setting the hearing for October 7, 2016. (HE 1) Applicant's hearing was held as scheduled.

Department Counsel offered 7 exhibits; Applicant offered 4 exhibits; and all proffered exhibits were admitted into evidence without objection. (Tr. 16-19, 34-36; GE 1-7; Applicant Exhibits (AE) A-D) On October 18, 2016, DOHA received the transcript of the hearing.

Findings of Fact¹

In Applicant's SOR response, she admitted the allegations in SOR ¶ 1.a through 1.m. She also provided extenuating and mitigating information. Applicant's admissions are accepted as findings of fact.

Applicant is a 46-year-old administrative assistant who has been employed by a government contractor for 10 years. (Tr. 6, 20) Before becoming a government contractor, she worked as a federal employee for nine years. (Tr. 7) She has not been unemployed since at least 1997. (Tr. 7, 21) In 1990, she graduated from high school. (Tr. 6) She did not serve in the military. (Tr. 6) She has held a security clearance for about 19 years, and there is no evidence of security violations. (Tr. 22)

In 1999, Applicant married, and she has four children, who are ages 16, 18, 20, and 24. (Tr. 7-8) She has been separated from her husband since 2012. (Tr. 43) Her current annual salary is \$55,000. (Tr. 23)

Financial Considerations

Applicant said her financial problems were caused by her husband's unemployment. (Tr. 24) Her husband was a custodian, and his employment has been sporadic since 2001. (Tr. 25-26) He has been unemployed since 2012 because of several illnesses. (Tr. 26) Two of her four children live at home, and she is financially responsible for them. (Tr. 27) She is supporting her oldest daughter who is attending school. (Tr. 27) She also provides some financial support to her mother. (Tr. 49-50)

Applicant's history of delinquent debt is documented in her credit reports, SOR response, and hearing record. Her SOR alleges 12 delinquent debts totaling \$29,712 and discharge of her debts through Chapter 7 of the Bankruptcy Code. The status of the SOR allegations is as follows:

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

SOR ¶ 1.a alleges and the record establishes that in 2005, Applicant filed for bankruptcy protection under Chapter 7 of the Bankruptcy Code, and in 2006, her debts were discharged. (Tr. 28; SOR response; AE A)

Applicant did not make any payments to address the following SOR debts: 1.b is a judgment filed in 2010 for \$10,687 for a vehicle purchased and repossessed in 2006; 1.c is a judgment filed in 2009 for \$804, which is based on a credit card debt; 1.e, 1.f, 1.g, 1.k, and 1.l are five telecommunications collection debts owed to four different companies for \$478, \$754, \$578, \$834, and \$1,175; 1.h is a collection debt for \$7,032 related to an apartment where applicant lived from 2009 to 2012; and 1.i is a charged-off debt for \$6,418 relating to a vehicle that was repossessed around 2013. (Tr. 37-43)

Applicant paid the following SOR debts in June 2016: 1.d is a state tax lien entered in 2012 for \$879; 1.j is a credit union debt for \$23; and 1.m is medical debt for \$50. (Tr. 34-36; AE B-AE D)

In 2013, Applicant paid a firm for four or five months to challenge the negative entries on her credit report. (Tr. 44) In March 2016, she again retained the firm to challenge or dispute the negative entries on her credit report. (Tr. 31, 33) She said she pays the firm \$100 monthly, and the firm pays some of the debts from the \$100 she pays to the firm. (Tr. 32-33) On May 23, 2016, Applicant received financial counseling. (Tr. 30; SOR response, Tabs E and F)

In her June 10, 2014 SCA, Applicant answered “no” to the following question, “In the past seven (7) years have you failed to file or pay Federal, state, or other taxes when required by law or ordinance?” (GE 1) At her hearing, Applicant disclosed that she owes \$9,000 for her federal income taxes and \$15,000 for state income taxes for tax years 2012 to 2015.² (Tr. 48-49) She said she always filed her tax returns. (Tr. 48-49) She entered into a payment plan with the Internal Revenue Service (IRS) and the state tax authority in 2014. (Tr. 48-49)

On May 20, 2016, Applicant completed a budget, and she indicated a monthly negative cash flow of \$3,276. (Tr. 50; SOR response, Tab E at 1) She said she estimated

²Applicant’s SOR does not allege: she failed to disclose her tax debt on her June 10, 2014 SCA; and she owes state and federal income taxes totaling \$24,000. In ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006), the Appeal Board listed five circumstances in which conduct not alleged in an SOR may be considered stating:

- (a) to assess an applicant’s credibility; (b) to evaluate an applicant’s evidence of extenuation, mitigation, or changed circumstances; (c) to consider whether an applicant has demonstrated successful rehabilitation; (d) to decide whether a particular provision of the Adjudicative Guidelines is applicable; or (e) to provide evidence for whole person analysis under Directive Section 6.3.

Id. (citing ISCR Case No. 02-07218 at 3 (App. Bd. Mar. 15, 2004); ISCR Case No. 00-0633 at 3 (App. Bd. Oct. 24, 2003)). *See also* ISCR Case No. 12-09719 at 3 (App. Bd. April 6, 2016) (citing ISCR Case No. 14-00151 at 3, n. 1 (App. Bd. Sept. 12, 2014); ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006)). Applicant’s failure to disclose her tax debt on her June 10, 2014 SCA, and her state and federal income taxes totaling \$24,000 will not be considered except for the five purposes listed above.

some of the expenses listed on her budget too high. (Tr. 52) She believes she can increase her income by getting a second job, and perhaps her children can provide some financial support to Applicant. (Tr. 50) She sincerely expressed her intention to pay her delinquent debts. (Tr. 53-54)

Character Evidence

Two of Applicant's colleagues provided character statements supporting Applicant's access to classified information. (SOR response, Tab A) They described her as reliable, responsible, kind, generous, honest, trustworthy, conscientious about compliance with rules, and diligent.

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 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 his or 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

Financial Considerations

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.

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).

Applicant's history of delinquent debt is documented in her credit reports, SOR response, and hearing record. 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." The record 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, 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;³ 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.

³The 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)).

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's presented some mitigating information. She said her financial problems were caused by her husband's unemployment. Her husband's employment has been sporadic since 2001, and he has been unemployed since 2012 because of several illnesses. Two of her four children live at home, and she is financially responsible for them. She is supporting her oldest daughter who is attending school. She also provides some financial support to her mother. She received financial counseling, and she generated a budget. She paid a firm to challenge the negative entries on her credit report and to pay some debts. In June 2016, she paid the debts in SOR ¶¶ 1.d (\$879), 1.j (\$23), and 1.m (\$50).

Applicant did not provide sufficient mitigating documentation relating to her other SOR debts (not the debts in SOR ¶¶ 1.d, 1.j, and 1.m): (1) proof of payments, such as checking account statements, photocopies of checks, or a letter from creditors proving that she paid or made payments to the creditors; (2) correspondence to or from any creditors to establish maintenance of contact with creditors;⁴ (3) credible debt disputes indicating she did not believe she was responsible for the debts and why she held such a belief; (4) attempts to negotiate payment plans, such as settlement offers or agreements to show that she was attempting to resolve debts; or (5) other evidence of progress or resolution of her debts. Applicant failed to establish mitigation under AG ¶ 20(e) for any other SOR debts because she did not provide documented proof to substantiate the existence, basis, or the result of any debt disputes.

There is insufficient evidence about why Applicant was unable to make greater progress resolving her SOR debts. She accrued about \$24,000 in delinquent state and federal income tax debt. Her financial problems extend for more than 10 years as

⁴"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.

indicated by her bankruptcy in 2006. 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 mitigation of financial considerations security concerns.

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.

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 Guideline F, but some warrant additional comment.

Applicant is a 46-year-old administrative assistant who has been employed by a government contractor for 10 years. She has held a security clearance for about 19 years, and there is no evidence of security violations. In 1999, Applicant married, and she has four children, who are ages 16, 18, 20, and 24. She has been separated from her husband since 2012. Her current annual salary is \$55,000. Her spouse's unemployment, especially since 2012, has adversely affected her family's finances.

Two of Applicant's colleagues provided character statements supporting Applicant's access to classified information. They described her as reliable, responsible, kind, generous, honest, trustworthy, conscientious about compliance with rules, and diligent.

Applicant has a history of financial problems. His SOR alleges 12 delinquent debts totaling \$29,712 and discharge of her debts through Chapter 7 of the Bankruptcy Code in 2006. Applicant is credited with mitigating the debts in SOR ¶¶ 1.d (\$879); 1.j (\$23); and 1.m (\$50); however, she owes about \$24,000 for state and federal income taxes. Applicant did not provide documentation showing her attempts to resolve nine of her SOR debts in good faith. 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, and especially 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 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 debts, 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 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
Subparagraphs 1.a through 1.c:	Against Applicant
Subparagraph 1.d:	For Applicant
Subparagraphs 1.e through 1.i:	Against Applicant
Subparagraph 1.j:	For Applicant
Subparagraphs 1.k and 1.l:	Against Applicant
Subparagraph 1.m:	For 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 or reinstate Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

MARK HARVEY
Administrative Judge