



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



In the matter of:)
)
-----) ISCR Case No. 16-00261
)
Applicant for Security Clearance)

Appearances

For Government: Daniel Crowley, Esq., Department Counsel
For Applicant: Alan Edmunds, Esq.

02/13/2018

Decision

KATAUSKAS, Philip J., Administrative Judge:

Applicant contests the Defense Department's intent to revoke her eligibility for access to classified information. She presented sufficient evidence to explain, extenuate, and mitigate the security concern stemming from her problematic financial history. Accordingly, this case is decided for Applicant.

Statement of the Case

On August 15, 2016, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) sent Applicant a Statement of Reasons (SOR) alleging that her circumstances raised security concerns under the financial considerations guideline.¹ Applicant answered the SOR on October 10, 2016, and requested a hearing to establish her eligibility for continued access to classified information.

On November 27, 2017, a date mutually agreed to by the parties, a hearing was held. Applicant testified at the hearing and called one fact witness and three combination

¹ The DOD CAF took this action under Executive Order (E.O.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive).

fact and character witnesses. The Government offered ten exhibits, which were marked for identification as GE 1 through 10. Applicant's counsel objected to GE 3, a report of investigation summarizing Applicant's interview that took place during the August 2015 background investigation on the grounds that the report lacked foundation and was not authenticated. I sustained the objection and admitted GE 1, 2 and GE 4 through GE 10 into evidence.² Applicant's Exhibits (AE) A through S were admitted without objection. At the request of Applicant, and without objection, the record remained open until December 4, 2017. Applicant timely submitted AE T and U, which were admitted without objection. The transcript of the hearing (Tr.) was received on December 5, 2017.

Procedural Issue

On December 10, 2016, the Security Executive Agent issued Directive 4 (SEAD-4), establishing a "single, common adjudicative criteria for all covered individuals who require initial or continued eligibility for access to classified information or eligibility to hold a sensitive position."³ The National Security Adjudicative Guidelines (hereinafter "new adjudicative guidelines" or "AG"), which are found in Appendix A to SEAD-4, are to be used in all security clearance cases decisions issued on or after June 8, 2017.⁴ In light of this explicit direction (and absent lawful authority to the contrary), I have applied the new adjudicative guidelines. ISCR Case No. 02-00305 at 3 (App. Bd. Feb. 12, 2003) (security clearance decisions must be based on current DoD policy and standards).⁵ DOD CAF adjudicators reviewed this case using the previous version of the adjudicative guidelines, dated September 1, 2006, which were in effect at the time. My decision and formal findings under the revised Guideline F would not be different under the 2006 Guideline F.

Findings of Fact

Applicant is 58 years old and has a Bachelor's and a Master's degree. She has been divorced since 1995 and has no children. Since December 1998, Applicant has been employed by a defense contractor as a training specialist schooling Government employees on the use of management systems programs.⁶

The SOR alleges that Applicant filed four bankruptcies, a Chapter 7 in December 2014 (dismissed in April 2015), a Chapter 13 in August 2014 (dismissed in September 2014), a Chapter 13 in April 2014 (dismissed in June 2014), and a Chapter 13 in August 2011 (dismissed in November 2011). The SOR also alleges that Applicant is: (1) indebted

² Tr. 15-19.

³ SEAD-4, ¶ B, *Purpose*.

⁴ SEAD-4, ¶ C, *Applicability*.

⁵ See also ISCR Case No. 07-00029 at 3 (App. Bd. Dec. 7, 2007) (when the guidelines were last revised, the Board stated: "Quasi-judicial adjudications must be made within the bounds of applicable law and agency policy, not without regard to them.")

⁶ GE 1; Tr. 40.

to the IRS for a tax lien filed in August 2015 for \$33,035; (2) indebted to her state of residence for a tax lien filed in September 2015 in the amount of \$13,098; and (3) indebted on a home loan mortgage account that went into foreclosure in September 2015 with a balance due of \$247,000.⁷ Although Applicant denies these allegations “as written,” there is record evidence supporting them.⁸ Beyond Applicant’s denials and the evidence supporting the SOR allegations, the story gets somewhat complicated.

In Applicant’s position as a training specialist, she travels to Government facilities all over the world (e.g., Europe, Africa), often being out of the country six times a year or more, trips that last six to ten days, depending on the destinations.⁹ Because of being a homeowner and frequently absent from the country, she hired a financial advisor (the “Advisor”) to attend to her financial matters, principally mortgage payments and taxes. She in fact gave him a power of attorney. The Advisor was recommended by associates of Applicant who had used the Advisor in the same capacity. Applicant knew the Advisor for a few years before retaining him. He told Applicant that he had experience with mortgages and mortgage modifications. The arrangement was for the Advisor to handle Applicant’s finances when she was on travel.¹⁰ The record is not clear exactly when Applicant’s arrangement with the Advisor was first consummated. Applicant first mentions seeking advice from the Advisor in 2012 after she had fallen behind in her mortgage payments.¹¹

Applicant testified that she knew of the Chapter 7 filing. She directed her Advisor to file it, because she was on constant travel, suffered from depression, and had fallen into arrears on her mortgage payment.¹² That bankruptcy was dismissed, because Applicant did not meet the threshold requirements for a Chapter 7.¹³ Applicant also testified that although she was aware of the Chapter 7 filing, she did not learn of the three Chapter 13 bankruptcies until they were called to her attention during the August 2015

⁷ SOR ¶ 1.

⁸ Answer ¶ 1; GE 6 and 7.

⁹ Tr. 27, 34, 40, 47, and 51-52.

¹⁰ Tr. 26, 36-37, 52-54, 70-73.

¹¹ GE 4.

¹² Tr. 53-55. Applicant was also dealing with her terminally ill father. GE 4. By the time Applicant completed her security clearance application in January 2015, her father had died. GE 1. Applicant provided evidence that her health adversely affected her finances. She continues to seek treatment for that condition, and her health has improved. AE Q (March 12, 2016, letter from Applicant’s Licensed Certified Social Worker). Tr. 59.

¹³ Answer ¶ 1a; GE 4 (“There weren’t enough creditors to meet the required standards per the trustee.”). The dismissal order states that the proceeding was dismissed for failure to complete required filings. It was dismissed in April 2015. GE 10.

subject interview. Thus, she only learned after the fact, during the clearance process, that her Advisor had filed three other bankruptcies on her behalf.¹⁴

Sometime in 2015, while she was on travel, Applicant was informed by her Advisor that due to being in arrears on her mortgage, her mortgage company planned to foreclose on her home. He also informed Applicant that she would need to make a payment of \$9,800 in order prevent foreclosure. Applicant was surprised by that, because her Advisor was supposed to be negotiating a mortgage modification.¹⁵ Since Applicant was out of town, she arranged for two close friends to pitch in to raise the \$9,800 and for one of them to deliver the money to the Advisor.¹⁶ Applicant learned from one of those friends that notwithstanding raising and delivering that payment to the Advisor, the mortgage company proceeded to foreclosure. It was later learned that the Advisor never made that payment to the mortgage company. Instead, he absconded with that money, having not accomplished a loan modification. Applicant learned of this late in October 2015, and since her home had already been foreclosed, she could not seek a loan modification.¹⁷

Applicant submitted a series of emails documenting eight payments she made to the Advisor between December 2014 and July 2015 in amounts ranging from \$500 to \$2,175 (totaling \$13,750), which she believed were for an escrow account to keep her current on her mortgage while awaiting a loan modification. The Advisor never returned those payments. Applicant believes the Advisor defrauded her.¹⁸ Because her home was foreclosed upon, Applicant presented evidence that her mortgage company forgave the debt, thus showing the resolution of the debt alleged in SOR ¶ 1.g.¹⁹ Applicant considered filing a suit against the Advisor or joining a lawsuit already filed by one of her friends against the Advisor. Applicant consulted an attorney, who advised that she did not have a good case. Applicant was also concerned that a lawsuit might adversely affect her clearance.²⁰

Applicant blames her Advisor for failing to file and pay her state and federal income taxes, thus resulting in two tax liens being filed against her. Until she was audited, she was unaware that she owed back taxes. When she did learn, she retained an account to assist with putting payment plans in place.²¹ Applicant provided documentation showing installment agreements with the IRS in 2017. She also provided documentation that she

¹⁴ Tr. 53-55, 60-61.

¹⁵ Tr. 55; AE B.

¹⁶ AE H.

¹⁷ Tr. 27-30, 68-69. Applicant repaid her two friends who raised the \$9,800. Tr. 57.

¹⁸ AE R; Tr. 56-58. Each payment included a \$25 fee for her Advisor.

¹⁹ AE N; Tr. 57.

²⁰ Tr. 67-73.

²¹ Answer ¶¶ 1.e and f.

is adhering to those agreements.²² Applicant provided similar documentation of a 2016 installment agreement with her state taxing authority and her adherence to that agreement.²³ Applicant is also current with her tax filings.²⁴ Applicant has successfully addressed her tax liabilities, thus resolving SOR ¶¶ 1.e and f.

Applicant has attended credit counseling. It helped her with budgeting and using online tools to track spending. She makes about \$100,000 annually and is doing well financially, paying everyone on time.²⁵

Applicant called three witnesses to attest to her good character and reliability. One witness was Applicant's cousin and a former co-worker with the Government. The other two witness had known Applicant for 10 and 18 years, respectively. They all knew about Applicant's financial problems.²⁶ They characterized Applicant as "trustworthy," "very honest," and "very diligent."²⁷ Applicant also submitted letters of recommendation. The authors knew her for from eight years to 25 years. They described Applicant as displaying a "a high level of trustworthy behavior and responsibility," "very honest", and "trustworthy."²⁸ The record establishes that Applicant is held in high esteem by her friends and the professionals with whom she has worked.

Law and Policies

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). Individuals are eligible for access to classified information "only upon a finding that it is clearly consistent with the national interest" to authorize such access. E.O. 10865 § 2; SEAD-4, ¶ E.4.

When evaluating an applicant's eligibility for a security clearance, an administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations, the guidelines list potentially disqualifying and mitigating conditions. The guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies the guidelines in a commonsense manner, considering all available and reliable information, in arriving at a fair and impartial decision. SEAD-4, Appendix A, ¶¶ 2(c), 2(d).

²² Tr. 58-59; AE K, O and P.

²³ Tr. 62-63; AE J.

²⁴ AE T and U.

²⁵ Tr. 59, 61-63.

²⁶ Tr. 24-25, 29, 41, 47, 49.

²⁷ Tr. 28, 43, 47.

²⁸ AE D.

Department Counsel must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.14. Applicants are responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven . . . and has the ultimate burden of persuasion as to obtaining a favorable clearance decision.” Directive ¶ E3.1.15.

Administrative Judges are responsible for ensuring that an applicant receives fair notice of the issues raised, has a reasonable opportunity to litigate those issues, and is not subjected to unfair surprise. ISCR Case No. 12-01266 at 3 (App. Bd. Apr. 4, 2014). In resolving the ultimate question regarding an applicant’s eligibility, “[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security.” SEAD-4, Appendix A, ¶ 2(b). See *also* SEAD-4, ¶ E.4. Moreover, the Supreme Court has held that officials making “security clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531.

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. 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 an applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Discussion

Guideline F, Financial Considerations

The SOR alleges that Applicant has a number of delinquent debts, which purportedly raise a security concern under Guideline F. The financial considerations security concern is explained at AG ¶ 18, which in pertinent part, states:

Failure 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 or sensitive information. Financial distress can also be caused or exacerbated by, and thus can be a possible indicator of, other issues of personnel security concern such as excessive gambling, mental health conditions, substance misuse, or alcohol abuse or dependence.

Guideline F is not limited to a consideration of whether a person with financial issues might be tempted to compromise classified information or engage in other illegality to pay their debts. It also addresses the extent to which the circumstances giving rise to

delinquent debt and other security-significant financial issues cast doubt upon a person's self-control, judgment, and other qualities essential to protecting classified information.²⁹

In assessing Applicant's case, I considered the following pertinent disqualifying and mitigating conditions:

AG ¶ 19(a): inability to satisfy debts;

AG ¶ 19(c): a history of not meeting financial obligations;

AG ¶ 19(f): failure to file...annual Federal, state, or local income tax returns or failure to pay annual Federal, state, or local income tax as required;

AG ¶ 20(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;

AG ¶ 20(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, a death, divorce or separation, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances;

AG ¶ 20(c): the individual has received or is receiving financial counseling for the problem from a legitimate and credible source, such as a non-profit credit counseling service, and there are clear indications that the problem is being resolved or is under control;

AG ¶ 20(d): the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts; and

AG ¶ 20(g): the individual has made arrangements with the appropriate tax authority to file or pay the amount owed and is in compliance with those arrangements.

A security clearance adjudication is not a debt-collection process. Rather, an administrative judge examines the way an applicant handles his or her personal financial obligations to assess how they may handle their security obligations.³⁰ Here, Applicant's security clearance eligibility was called into question by her past financial problems. I conclude that disqualifying conditions AG ¶ 19(a), (c) and (f) apply. The next inquiry is whether any mitigating conditions apply.

²⁹ ISCR Case No. 11-05365 at 3 (App. Bd. May. 1, 2012).

³⁰ See *generally* ISCR Case No. ISCR Case No. 12-09719 at 2-3 (App. Bd. Apr. 6, 2016).

At the time Applicant began having financial difficulties, she had a job with a demanding international travel schedule, a dying father, and bouts of depression. Those factors contributed to her financial problems. Since those conditions were largely beyond Applicant's control, the first part of AG ¶ 20(b) applies. The next inquiry, however, is whether Applicant acted responsibly in light of those adverse circumstances.

Sometime in 2012, Applicant retained a financial advisor, who had been recommended by associates of Applicant. The Advisor's role was to handle financial matters (taxes, mortgage) on Applicant's behalf during her frequent absences from the country. To that end, Applicant gave the Advisor her power of attorney. The Advisor was also tasked with negotiating a mortgage modification. The record shows no financial problems until sometime in 2014, prompting Applicant to direct the Advisor to file a Chapter 7 bankruptcy, which he did in December 2014. That proceeding was, however, dismissed in April 2015, because it failed to meet the threshold for a Chapter 7. The filing of a Chapter 7 appears to be a responsible step under the circumstances, even if it ultimately failed to meet the threshold requirements, thus satisfying the second prong of AG ¶ 20(b).³¹ SOR ¶ 1.a is mitigated.

Later in 2015, while Applicant was on travel, she was told by her Advisor that the mortgage company needed to be paid \$9,800 to prevent a foreclosure. This no doubt surprised Applicant, because between December 2014 and July 2015 she had sent her Advisor eight payments totaling \$13,750, which she believed were being deposited in an escrow account to make mortgage payments. Nevertheless, Applicant enlisted two friends to loan her the \$9,800 and have it delivered to the Advisor, which they did.³² In late October 2015, Applicant learned that the Advisor never paid that amount to the mortgage company, nor had he negotiated a mortgage modification. Instead, he simply took the money and ran.³³ As a result, Applicant's home was foreclosed. In connection with the foreclosure the mortgage was forgiven, thus mitigating SOR ¶ 1.g. This episode fully satisfies AG ¶¶ 20(a) and (b).

Finally, Applicant learned only after a tax audit that the Advisor failed to file and pay her federal and state income taxes, resulting in two liens being filed against her. Applicant established at hearing that she has payment arrangements in place with the IRS and her home state and is current on those arrangements. SOR ¶¶ 1.e and f are mitigated under AG ¶¶ 20(a), (b) and (g).³⁴

³¹ Applicant testified credibly at hearing that the three Chapter 13 filings were done by her advisor without her knowledge. Therefore, SOR ¶¶ 1.b through 1.d. are mitigated by AG ¶ 20(a) (under such circumstances unlikely to recur).

³² Applicant repaid her two friends.

³³ Applicant consulted a lawyer about suing the Advisor, but she was advised that she did not have a viable case.

³⁴ Applicant has received credit counseling, which has assisted her in managing her finances. And she now is current with all her creditors. I give her credit under AG ¶ 20(c).

The record does not raise doubts about Applicant's reliability, trustworthiness, good judgment, and ability to protect classified information. In reaching this conclusion, I weighed the evidence as a whole and considered if the favorable evidence outweighed the unfavorable evidence or *vice versa*. I also gave due consideration to the whole-person concept.³⁵ Accordingly, I conclude that Applicant met her ultimate burden of persuasion to show that it is clearly consistent with the national interest to grant her eligibility for access to classified information.

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 (Financial Considerations): For Applicant

Subparagraphs 1.a – 1.g: For Applicant

Conclusion

In light of the record as a whole, it is clearly consistent with the national interest to grant Applicant access to classified information.

Philip J. Katauskas
Administrative Judge

³⁵ AG ¶ 2(a)(1)-(9).