



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
) ISCR Case No. 16-01440
)
Applicant for Security Clearance)

Appearances

For Government: Adrienne Driskill, Esq., Department Counsel
For Applicant: Eric A. Eisner, Esq.

10/12/2018

Decision

HEINY, Claude R., Administrative Judge:

Applicant contests the Department of Defense's (DoD) intent to deny her eligibility for a security clearance to work in the defense industry. Applicant had four unpaid judgments, two past-due mortgage accounts, eight collection accounts, and one charged-off mortgage account, which totaled in excess of \$212,000 in delinquent financial obligations. She has mitigated the financial considerations security concerns. Applicant's eligibility for access to classified information is granted.

Statement of the Case

Acting under the relevant Executive Order and DoD Directive,¹ on June 17, 2016, the DoD issued a Statement of Reasons (SOR) detailing financial considerations security

¹ 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 (Sept. 1, 2006 AG) effective within the DoD on September 1, 2006.

concerns. On August 8, 2016, Applicant answered the SOR and requested a hearing before an administrative judge. On May 25, 2017, the DoD issued an amendment to the SOR listing a \$26,993 charged-off mortgage (SOR 1.o). The amended allegation was neither admitted nor denied.² On May 16, 2017, DOHA issued a Notice of Hearing scheduling a hearing for June 29, 2017. On June 21, 2017, a cancellation notice was issued cancelling that hearing. On February 7, 2018, a Notice of Hearing was issued for a hearing that was conducted on March 2, 2018.

At the hearing, Department Counsel offered Government Exhibits (Ex.) 1 through 3. The exhibits were admitted into evidence without objection. Applicant offered exhibits³ A through F, which were also admitted without objection. DOHA received the hearing transcript (Tr.) on March 12, 2018.

While this case was pending a decision, the Director of National Intelligence issued Security Executive Agent Directive 4, establishing the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AGs), which he made applicable to all covered individuals who require initial or continued eligibility for access to classified information or eligibility to hold a sensitive position. The new AGs supersede the Sept. 1, 2006 AGs and are effective “for all covered individuals” on or after June 8, 2017. Accordingly, I have evaluated Applicant’s security clearance eligibility under the new AGs.⁴

Findings of Fact

Applicant admitted, with explanation, the allegations in SOR paragraphs 1.b, 1.e, 1.f, 1.g, 1.j, 1.l and 1.m. She was researching and disputing the collection debt alleged in SOR paragraph 1.h and neither admitted nor denied the allegation in paragraph SOR 1.o. She denied the remaining seven allegations in the June 17, 2016 SOR. After a thorough review of the pleadings and exhibits, I make the following findings of fact

Applicant is a 48-year-old senior electrical engineer working for a defense contractor since March 1995. She seeks to retain a security clearance. She has not served in the military. She received a bachelor of science degree in electrical engineering. (Tr. 19) Her annual salary is \$102,000. (Tr. 60) At one point, she owned the six real estate properties before experiencing financial problems. (Tr. 29) Starting in 2002, she purchased a home as her primary residence and, in the following years, purchased five

² In Applicant’s testimony she explained what caused the delinquent obligation and testified as to the current status of that obligation.

³ Applicant’s submissions were submitted as four sets of exhibits (Set A through Set D) with multiple documents contained within each set, which were also lettered. For clarity, Applicant’s titling of documents was retained. Additionally, Applicant’s documents were Bates stamped on all the pages starting with page Gr. 01.

⁴ Application of the AGs that were in effect as of the issuance of the SOR would not change my decision in this case. The new AGs are available at http://ogc.osd.mil/doha/5220-6_R20170608.pdf.

real estate investment properties. Two of the properties were “four-plexes,” which were four townhouses connected together in one unit. (Tr. 44) She is unsure as to the dates when she purchased each property. (Tr. 40)

Following financial difficulties, Applicant now owns the home that is her primary residence, one multi-unit property, and two other single-family homes. (Tr. 46) All the properties, except her primary residence, are currently rented. Her mother lives in one of the homes and pays rent. (Tr. 41) Applicant has approximately \$330,000 equity in the real estate she owns and has a positive income flow from all the rental units totaling \$1,200 to \$1,300 per month. (Tr. 48)

Sometime between 2009 and 2012, Applicant began experiencing financial problems. (Tr. 22) Prior to her problems, she had good credit with a credit score was over 700, somewhere in the mid-700s. (Tr. 22) As of February 7, 2018, her three credit scores were: 711, 674, and 708. (Ex. Set C, page Gr 70⁵) Even though she had funds in her 401(k) retirement plan, she did not use those funds because she thought she could handle her financial accounts. (Tr. 33) As of February 28, 2018, her 401(k) retirement account had a balance of \$492,336. (Ex. E) She sought financial assistance from attorneys, financial advisors, the state’s attorney, the Federal Reserve, and the U.S. Department of Housing and Urban Development (HUD), and her family members. (Tr. 34)

The SOR lists four judgments against Applicant totaling more than \$93,000. She was approximately \$46,600 past due on two mortgages and had eight collection accounts, which totaled more than \$45,000, plus a \$26,993 charged-off mortgage. The judgment listed in SOR 1.a (\$6,684) was the result of a delinquent credit card account. It was released the in May 2016. (Ex. A, SOR Response Ex. A)

In May 2016, Applicant paid the judgment holder of the judgment listed in SOR 1.a (\$6,684) and the judgment was released. (Ex. A, Gr. 4-6) The judgment holder of the judgment listed in SOR 1.b (\$25,160) accepted a settlement agreement for \$10,500 whereby Applicant was to make \$250 monthly payments for 33 months starting in August 2016 with the last payment in May 2019. (SOR Response Ex. B1) In September 2016, Applicant paid the delinquent obligation, and the judgment was released. (Ex. B, Gr. 7-9) The judgments listed in SOR 1.c (\$37,855) and SOR 1.d (\$25,160) were settled, compromised, and released in September 2015. (Ex. C)

While Applicant was growing up, her father and uncle employed an investment strategy whereby they invested in real estate. Applicant decided investing in real estate was an important financial strategy. (Tr. 20) In 2002, at age 32, she purchased her first property for \$190,000. (Tr. 21, 62) She still lives in that home and the current fair market value is \$262,000. (Tr. 62) She purchased her second property in a city where her sister and mother live. She ultimately owned two single family homes and two multi-unit properties in that city. (Tr. 29, 41) One of the multi-units was foreclosed upon. (Tr. 45) The holder of a second mortgage on the foreclosed property requested Applicant pay the deficit on the second mortgage. The unit sold for a price sufficient to satisfy the primary

⁵ Applicant submitted

mortgage. (Tr. 45) A mortgage company obtained a judgment against her for the delinquent second mortgage, which has since been paid. (Tr. 46)

Applicant has worked for the same company since 1995. After ten years with the company, her company transferred her to another state. (Tr. 42) After renting for four or five years while renting, she decided to purchase a townhouse. (Tr. 26) In August 2005, she purchased the townhouse for \$191,920, with a 30-year mortgage with monthly payments of \$1,291. A year after purchasing the property, she was reassigned to a work location in the state where she had originally worked. When she left the state, she leased the townhouse to renters. (Tr. 44) After the original lease ended she had no success in renting out the property at a price that would cover the mortgage payments on the property. (Tr. 27, 57)

Applicant decided to sell the property. When the house did not sell for the asking price, Applicant considered a short sale. (Ex. Set A – Ex. 1 through Ex. E-3, Gr. Pages 19 – 24) The mortgage balance had increased to \$207,296 (SOR 1.e), which included approximately \$36,600 past due on the mortgage. The past-due amount indicates she failed to make payments on the home for more than 28 months. In an attempted short sale, Applicant found a buyer willing to pay \$169,900 for the property, but the offer was declined by the bank. The bank had set the approved price for a short sale at \$190,000. (Ex. Set A – Ex. 2, Gr. Page 22) The townhouse went into foreclosure in 2010 and sold for \$169,000. (Tr. 61)

Following foreclosure the bank never sought reimbursement from Applicant to pay the deficiency. (Tr. 30) State law requires a mortgage holder to bring suit to collect on deficiencies following a foreclosure within two years. (Ex. F) The two year statute of limitations has passed without action by the lender. The deficiency following the foreclosure is no longer enforceable. (Ex. E-1 through E-3, Ex. F)

In May 2004, Applicant purchased real estate (SOR 1.f) with a mortgage loan of \$174,000 requiring monthly mortgage payments of \$1,410. When her financial problems started, she became approximately \$10,000 past due on the mortgage. The past-due amount indicates she failed to make payments on the property for at least 14 months. Foreclosure proceedings commenced, but in April 2013, Applicant was able to secure a home loan modification on the property. (Ex. Set A – Ex F, Gr. Pages 25 – 40)

Under a second modification⁶, she was to pay \$1,100 on her first mortgage, \$300 on her second mortgage, and escrow fees. (Tr. 35) Each month she made payments of \$1,597. (Tr. 35, Ex. Set B, Gr. Pages 62 – 64) The mortgage was sold to a different company, and she made payments on the property for two years. (Tr. 38) After two years, she was informed by the holder of the second mortgage that she had not made any payments on the second mortgage and was \$26,993 past due (SOR 1.o) on the loan. (Tr. 49) There is no evidence as to why the holder of the second mortgage failed to contact Applicant about nonpayment when payments were not initially received.

⁶ This is a separate loan modification for one of the four-plex properties she owned. (Tr. 35) It is not the mortgage loan modification for the mortgage listed in SOR 1.f.

Applicant said she was naïve and new to the loan modification process. (Tr. 50) She had assumed some of her monthly payments had been applied to her second mortgage since making the loan modification. On September 30, 2015, the current holder of the second mortgage stated in a letter that they would review her account and would inform her of the results of a review her account. (Ex. Set B, Gr. Page 68) The record contains no additional correspondence from the holder of the second mortgage. In April 2017, the second mortgage was charged off. (Ex. Set B, Gr. Page 67) Since disputing the note, she has not received any communication from the company. The company has not filed for a judgment against her and the debt does not appear on her credit report. (Tr. 51)

Applicant asserted she received IRS1099-C, Cancellation of Debt, forms regarding the cancellation of debt on the foreclosed property. (Tr. 53) She stated she provided her attorney with the forms and believes the amount of the cancelled or forgiven debt was added as income on her tax returns. (Tr. 54) She is current on her \$400 per month payments on her 2014 vehicle. (Tr. 60) Applicant had been past due on the mortgage for her current home prior to the loan modification. She is now current on the mortgage of her primary residence. (Ex. Set B pages Gr. 62 – 64)

Applicant followed her financial advisor's advice by addressing the larger debts first. This resulted in smaller accounts becoming delinquent. (Tr. 52) The bank attempting to collect an \$11,661 debt (SOR 1.g) agreed to settle the debt for \$5,000. In November 2016, Applicant paid the \$5,000. (Ex. G, Gr. 42 – 44) Applicant had a \$1,775 collection account (SOR 1.h) with a department store. She asserts the account was closed, which prevented her from paying or settling the delinquent account. She therefore decided to donate \$260 to charity. (Tr. 23, Ex. Set A – Ex. H, page Gr. 45-47) She asserts the \$3,733 mortgage debt listed in SOR 1.i was included in the SOR 1.c and SOR 1.d judgments obtained by the same creditor.

A collection agency was attempting to collect a \$15,295 credit card delinquent obligation (SOR 1.j) Applicant submitted a letter from the collection agency stating they would no longer be attempting to collect the debt. (Ex. I, Gr. 49) The letter does not state the debt has been paid or forgiven. It only stated that particular collection agency would no longer be involved in attempting to collect the debt.

The collection agency attempting to collect a \$3,344 delinquent obligation (SOR 1.l) offered to settle the debt for \$1,672, which was half of the amount owed. (Ex. J, Gr. 51) In December 2016, Applicant paid the amount requested. The collection agency attempting to collect a \$2,425 delinquent bank obligation (SOR 1.m) offered to settle the debt for \$1,092, which was less than half of the amount owed. (Ex. K, Gr. 55) In December 2016, Applicant paid the amount requested. She paid the \$86 medical collection account (SOR 1. n) in May 2016.

When investing in real estate, Applicant has learned whatever the amount of her reserve funds, she need to double that amount. (Tr. 34) She has a reserve of \$5,000 in savings. (Tr. 56)

Applicant submitted four character reference letters. (Ex. Set D, Gr. 72 – 75) A colleague of 20 years states Applicant is remarkably selfless, often helping others in need. She states Applicant is discrete, conscientious, dependable, has a high sense of morals, and one who gives open and frank feedback. A close friend says Applicant is respectful, reliable, trustworthy, dedicated, pragmatic, and a clear-headed counselor. A co-worker says Applicant is motivated, moral, ethical, and has a work ethic she admires. A doctor and close friend, who has known Applicant since the 9th grade, states Applicant is a mentor, is dependable, responsible, candid, selfless, supportive, and consistent. (Ex. D Set, Gr. 72-75)

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which must be considered 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, these guidelines are applied 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(a), the adjudication process is an examination of a sufficient period and a careful weight of a number of variables of an individual's life to make an affirmative determination that the individual is an acceptable security risk. This is known as the whole-person concept.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the 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 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 safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of 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 of 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

Adjudicative Guideline (AG) ¶ 18 articulates the security concerns relating to financial problems:

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 . . . An individual who is financially overextended is at greater risk of having to engage in illegal acts or other questionable acts to generate funds.

Additionally, an individual who is financially irresponsible may also be irresponsible, unconcerned, negligent, or careless in properly handling and safeguarding classified information. Behaving responsibly or irresponsibly in one aspect of life provides an indication of how a person may behave in other aspects of life.

A person's relationship with his creditors is a private matter until evidence is uncovered demonstrating an inability or unwillingness to repay debts under agreed upon terms. Absent evidence of strong extenuating or mitigating circumstances, an applicant with a history of serious or recurring financial difficulties is in a position of risk that is inconsistent with holding a security clearance. Applicant is not required to be debt free, but is required to manage his finances to meet his financial obligations.

AG ¶ 19 includes two disqualifying conditions that could raise a security concern and may be disqualifying in this case: “(a) inability to satisfy debts;” and “(c) a history of not meeting financial obligations.”

Security concerns are established under AG ¶¶ 19(a) and 19(c) because Applicant had a four unpaid judgments, eight collection accounts, was past due on mortgage accounts, and one charged-off delinquent account, which totaled in excess of \$212,000. The burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the security concerns. (Directive ¶ E3.1.15)

Four of the seven 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, a death, divorce or separation, clear victimization by predatory lending practices or identity theft), and the individual acted responsibly under the circumstances;

(c) the person has received or is receiving 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, and

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

Applicant paid or settled and paid on terms acceptable to her creditors for the four judgements. She settled and paid five of the delinquent collection accounts. AG ¶ 20(d) applies to the debts paid or settled and paid. One department store collection account had been closed, which prevented her from settling the debt. She therefore made a \$260 payment to a charity in a demonstration of her willingness to pay the obligation. One of the eight collection accounts was owed to the creditor of the judgments listed in SOR 1.c and SOR 1.d. The collection agency attempting to collect the remaining collection account is no longer attempting to collect the debt. This does not mean this debt has been paid, forgiven, or that some other collection agency will not attempt to collect this \$15,295 delinquent obligation.

Applicant is current on the mortgage on her primary residence. More than two years has passed since the foreclosure on real estate owned by Applicant. Regarding that foreclosure, the past-due mortgage deficiency (\$36,593) is no longer enforceable. Because of changes in financial markets outside of her control, she was unable to find a tenant that would pay sufficient rent to cover the mortgage. She tried a short sale on the home, but the bank refused to accept the amount being offered by the potential buyers. Applicant had located. The house went to foreclosure. When Applicant purchased the townhouse, her credit was good and it was not unreasonable for her to purchase a home where she was working. AG ¶¶ 20(a) and (b) apply.

Applicant sought assistance from attorneys, a financial advisor, the state's attorney, the Federal Reserve, and the U.S. Department of Housing and Urban Development, and family members as to how to best address her financial difficulties.⁷ Since resolving most of her financial difficulties, her credit scores have returned to 711, 674, and 708. She has approximately \$330,000 equity in the real estate she owns and has a positive income flow from her remaining rental units totaling \$1,200 to \$1,300 per

⁷Both Applicant's father and uncle each had a couple of properties that were lost to foreclosure. (Tr. 55)

month. She has almost \$500,000 in her 401(k) retirement plan. It appears her financial problems are under control. AG ¶ 20(c) applies.

An Applicant is not required to be debt-free or to develop a plan for paying off all debts immediately or simultaneously, but she is required to act responsibly given her circumstances and develop a reasonable plan to address her delinquent obligations, accompanied by evidence of a serious intent to effectuate the plan. This she has done.

Whole-Person Analysis

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. An administrative judge must evaluate an Applicant's security eligibility by considering the totality of the Applicant's conduct and all the relevant circumstances. An administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d):

(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. I have incorporated my comments under Guideline F in the whole-person analysis. Some of the factors in AG ¶ 2(a) were previously addressed, but some warrant additional comment. Applicant embarked on a plan for financial security through real estate investment. She purchased six properties and when the market no longer supported renters willing to pay sufficient amounts to cover the mortgages, two of the properties were lost through foreclosure. She has learned from this that she needs to have a larger reserve to cover those times when rent fails to cover the mortgage payments. She will be more cautious in the future about real estate investment.

The issue is not simply whether all Applicant's debts are paid—it is whether her financial circumstances raise concerns about her fitness to hold a security clearance. See AG ¶¶ 2(a) and 2(b). After weighing the disqualifying and mitigating conditions and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the financial considerations security concerns. Accordingly, I conclude that it is

clearly consistent with the interests of national security to grant or continue her eligibility for access to classified information.

Formal Findings

Financial Considerations Security Concern: FOR APPLICANT

Subparagraphs 1.a through 1.o: For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the interests of national security to grant Applicant eligibility for access to classified information. National security eligibility is granted.

CLAUDE R. HEINY II
Administrative Judge