



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



In the matter of:)
)
) ISCR Case No. 16-02958
)
Applicant for Security Clearance)

Appearances

For Government: Chris Morin, Esq., Department Counsel
For Applicant: *Pro se*

03/23/2018

Decision

TUIDER, Robert, Administrative Judge:

Applicant mitigated security concerns regarding Guideline E (personal conduct), but did not mitigate security concerns regarding Guideline F (financial considerations). Clearance is denied.

Statement of the Case

On October 15, 2015, Applicant submitted a Questionnaire for National Security Positions (SF-86). On November 22, 2016, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended; and the adjudicative guidelines (AG) promulgated on December 29, 2005.

The SOR alleged security concerns under Guidelines E and F. The SOR detailed reasons why the DOD CAF was unable to find that it is clearly consistent with the national interest to grant a security clearance for Applicant, and it recommended

that her case be submitted to an administrative judge for a determination whether her clearance should be granted, continued, denied, or revoked.

By an undated response, Applicant responded to the SOR. On January 25, 2017, Department Counsel was ready to proceed. On May 26, 2017, the Defense Office of Hearings and Appeals Office (DOHA) assigned Applicant's case to me. On June 26, 2017, DOHA issued a hearing notice, setting the hearing for August 16, 2017. Applicant's hearing was held as scheduled. At the hearing, Department Counsel offered Government Exhibits (GE) 1 through 4, which were received into evidence without objection. Applicant testified, did not call witnesses, and did not offer any evidence. On August 24, 2017, DOHA received the hearing transcript (Tr.).

While this case was pending a decision, the Director of National Intelligence issued Security Executive Agent Directive 4, establishing *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 September 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, as required.¹

Procedural Matters

Department Counsel moved to withdraw SOR ¶ 1.k, as it was a duplicate of SOR ¶ 1.f. Without objection from Applicant, I granted Department Counsel's motion. (Tr. 7-8)

Findings of Fact

In her SOR answer, Applicant admitted all of the allegations except SOR ¶¶ 1.e, 1.l, and 1.o, with explanations. Applicant's answers are incorporated as findings of fact. After a thorough review of the evidence, I make the following additional findings of fact.

Background Information

Applicant is a 45-year-old transportation assistant employed by a defense contractor since October 2016. She seeks a security clearance in conjunction with her current employment. (GE 1; Tr. 17-18, 26-27)

Applicant graduated from high school in June 1991. (Tr. 18-19) She served in the U.S. Army from October 1991 to April 1992, and received an "uncharacterized" discharge after she sustained a stress fracture. (GE 1; Tr. 21) She attended college

¹ The new AGs are available at http://ogc.osd.mil/doha/5220-6_R20170608.pdf.

from 2012 to 2015, and earned approximately 56 credit hours. (GE 1; Tr.19) She has two adult children. (Tr. 19-20)

Financial Considerations

The SOR now alleges 18 separate debts totaling \$40,218. These debts are established through Applicant's admissions, in part, and the Government's exhibits. (SOR answer; GE 1 – 4)

Applicant traces her financial problems to 2014 because she was unable to work for four months for medical reasons. (Tr. 22) She returned to work part-time after four months, but by then she was in serious financial trouble. (Tr. 23) In October 2015, she moved to a different state for a better paying job, however, her salary dropped significantly shortly after relocating. (Tr. 24-25)

Applicant earns approximately \$3,400 a month. After she pays all of her expenses, she estimated she has \$400 remaining for food. Applicant described her situation as living paycheck to paycheck. She does not have a savings account, little or nothing in her checking account, and does not have a retirement plan. (Tr. 32-36) Applicant testified that she has been unable to make any progress in addressing her debts. She anticipated losing her job in September 2017 when her contract expired. (Tr. 25-26) Applicant added that she did not see the point in pursuing a clearance with her job ending. (Tr. 27) She does not have the funds to pay her creditors. (Tr. 27-28)

In conclusion, there is no evidence that Applicant paid, arranged to pay, settled, compromised, disputed, or otherwise resolved her SOR allegations. She did not describe financial counseling or present a budget. Applicant described a short period of unemployment in 2014 attributable to medical issues, but did not describe efforts to regain financial responsibility since then.

Personal Conduct

Under this concern, the SOR alleges that Applicant deliberately failed to disclose her delinquent debts on her October 2015 SF-86. She acknowledges that she had debt, but added that she was under the impression she could later update her SF-86 after she reviewed her credit report. She claimed to have a co-worker who was able to correct his SF-86 after he submitted it. Applicant does not remember certifying her answers to be true and correct because she "probably didn't even read where it said certification when I signed it." (Tr. 28-30) Applicant credibly stated that, "I wasn't trying to hide anything." (Tr. 30)

Applicant also stated after she moved, the post office did not forward her mail, which would account for her not getting her bills. She filled out a change of address form. (Tr. 31) During her December 28, 2015 Office of Personnel Management Personal Subject Interview (OPM PSI), she discussed her finances in great detail with the investigator. She was open and forthright. The investigator discussed a number of

other omissions or mistakes Applicant made when completing her SF-86 that dealt with her residences, education, employment, military record, references, and family/associates. (GE 2)

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information.” *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicant’s eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

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

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The

guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

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

Analysis

Financial Considerations

AG ¶ 18 articulates the security concern for 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 or otherwise questionable acts to generate funds. . . .

The Appeal Board explained the scope and rationale for the financial considerations security concern in ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012) (citation omitted) 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.

AG ¶ 19 provides 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." The record established the disqualifying conditions in AG ¶¶ 19(a) and 19(c), requiring additional inquiry about the possible applicability of mitigating conditions.

AG ¶ 20 lists five potential mitigating conditions:

- (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 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;
- (d) the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts; and
- (e) the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue.

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 [trustworthiness] eligibility, there is a strong presumption against the grant or maintenance of a [trust position]. 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 [trustworthiness] concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in [public trust positions] is that articulated in *Egan, supra*. "Any doubt concerning personnel being considered for access to [sensitive] 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).

No mitigating conditions fully apply. Applicant has been gainfully employed for the majority of her adult life. She provided no evidence suggesting her long-standing financial problems are being addressed leaving doubts about her suitability for access

to sensitive information. Protection of the national interest is the principal focus of these adjudications. According, those doubts must be resolved against Applicant.

Personal Conduct

AG ¶ 15 articulates the security concern for personal conduct:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes.

AG ¶ 16 describes one condition that could raise a security concern and may be disqualifying in this case:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine national security eligibility or trustworthiness, or award fiduciary responsibilities.

Applicant denied deliberately falsifying her October 2015 SF-86, stating that she was not trying to hide anything and was under the impression she could update her SF-86 at a later time. She was open and forthcoming during her OPM PSI about her finances and readily acknowledged her omission. I also note that she made numerous other mistakes when completing her SF-86.

Based on the available information, it appears Applicant was confused or careless when completing her October 2015 SF-86. Her lack of attention to detail cannot be imputed as a willful and deliberate attempt to undermine the investigative process. Although the information she provided about her past financial situation proved to be incorrect, as was other information she provided, I attribute these lapses to carelessness and am satisfied that she did not deliberately fail to disclose her delinquent debts with intent to deceive.²

² The Appeal Board has cogently explained the process for analyzing falsification cases, stating:

(a) when a falsification allegation is controverted, Department Counsel has the burden of proving falsification; (b) proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred; and (c) a Judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning the applicant's intent or state of mind at the time the omission occurred.

ISCR Case No. 03-10380 at 5 (App. Bd. Jan. 6, 2006) (citing ISCR Case No. 02-23133 (App. Bd. June 9, 2004)).

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(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), "[t]he 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. My comments under Guidelines F and E are incorporated in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under that guideline but some warrant additional comment.

Applicant is a 45-year-old transportation assistant employed by a defense contractor since October 2016. She has successfully raised two adult children. There is nothing in the record to suggest that she is anything other than a valued employee and responsible member of her community. However, given her current financial situation, the Guidelines leave little or no latitude to grant Applicant a clearance given her current financial situation.

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.

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 – 1.j:	Against Applicant
Subparagraph 1.k:	Withdrawn
Subparagraphs 1.l – 1.s:	Against Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	For Applicant

Conclusion

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

Robert Tuidier
Administrative Judge