



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
) ISCR Case No. 17-02005
)
 Applicant for Security Clearance)

Appearances

For Government: Tovah Minster, Esq., Department Counsel
For Applicant: *Pro se*

07/18/2018

Decision

HARVEY, Mark, Administrative Judge:

Applicant provided insufficient evidence that she was unable to make payments or otherwise resolve the debt in statement of reasons (SOR) ¶ 1.a. Financial considerations security concerns are not mitigated. Eligibility for access to classified information is denied.

Statement of the Case

On June 15, 2015, Applicant signed a Questionnaire for National Security Positions (SF 86) or security clearance application (SCA). (Government Exhibit (GE) 1) On June 30, 2017, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued an SOR to Applicant under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry*, February 20, 1960; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), January 2, 1992, Security Executive Agent Directive 4, establishing in Appendix A the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AGs), effective June 8, 2017. (Hearing Exhibit (HE) 2)

On July 25, 2017, Applicant provided a response to the SOR, and she requested a hearing. (HE 3) On September 15, 2017, Department Counsel was ready to proceed. On February 18, 2018, the case was assigned to me. On March 13, 2018, the Defense

Office of Hearings and Appeals (DOHA) issued a notice of hearing, setting the hearing for April 9, 2018. (HE 1) Applicant's hearing was held as scheduled.

During the hearing, Department Counsel offered four exhibits; Applicant did not offer any exhibits; there were no objections; and all proffered exhibits were admitted into evidence. (Tr. 11, 14-16; GE 1-4) On April 16, 2018, DOHA received the hearing transcript. Applicant provided two exhibits after her hearing, which were admitted without objections. (Applicant Exhibit (AE) A-AE B) The record closed on June 11, 2018. (Tr. 37)

Findings of Fact¹

In Applicant's SOR response, she admitted she incurred the debts in SOR ¶¶ 1.a and 1.b. (HE 3) She also provided mitigating information. (HE 3) Her admissions are accepted as findings of fact.

Applicant is 57 years old, and she is seeking employment as an investigator for security clearances for a government contractor. (Tr. 6-8; GE 1) In 1978, Applicant graduated from high school, and in 1984, she received a bachelor of arts degree with a major in criminal justice. (Tr. 6-7) In 2004, she received a master's degree in organizational management. (Tr. 7) She has never been married, and her son is 38 years old. (Tr. 7) She has not served in the military. (Tr. 7) She was employed in federal law enforcement for 30 years, and she held an important federal law enforcement leadership position for seven years. (Tr. 16, 19) She retired from federal law enforcement in 2015. (Tr. 16, 19)

Financial Considerations

Aside from her federal law enforcement retirement, she was underemployed or unemployed at times after 2015. Her income after 2015 was from her federal law enforcement retirement (\$5,600 monthly) and several other sources of income (about \$1,200 monthly). (Tr. 20, 27) She received some financial counseling or advice before she retired in 2014. (Tr. 30) Applicant said her two primary delinquent debts resulted from helping her son and his spouse. (Tr. 16) Applicant denied that she had any non-SOR delinquent debts. (Tr. 26)

The SOR alleges five delinquent debts, and the record establishes the status of Applicant's accounts as follows:

SOR ¶ 1.a alleges a credit card debt placed for collection for \$8,357. Applicant opened the account in 2010 or 2011 to assist her sister. (Tr. 20-21) Applicant stopped making payments around 2012. (Tr. 21) The original creditor charged-off the debt. (Tr. 22) Applicant provided pages 13 and 14 of her credit report, the original creditor charged-off the debt; the balance is zero; and the activity designator indicates the debt was transferred or sold. (AE B) SOR ¶ 1.a does not allege a debt owed to the original creditor.

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

SOR ¶ 1.a alleges a debt being collected by a specific collection agent. The debt is listed as a collection debt in her May 10, 2017 credit report. (GE 2) The debt is unresolved.

SOR ¶ 1.b alleges a debt resulting from an apartment lease placed for collection for \$6,569. Around 2012 or 2013, Applicant cosigned with her son for an apartment. (Tr. 22) Her son lost his job, and he was unable to pay his rent. (Tr. 22) Her son was evicted, and the apartment was damaged. (Tr. 23) Her son did not pay the debt, and the landlord sought payment from Applicant. (Tr. 23) Applicant's wages were garnished. (Tr. 23) Applicant said she believed the garnishment was sufficient to pay the debt. (Tr. 23-24) Court records indicate on January 6, 2015 the judgment was paid and satisfied. (AE A)

SOR ¶¶ 1.c and 1.d allege two medical debts placed for collection for \$363 and \$182. Applicant said she was unaware of the source of the debts; she has medical insurance; and she did not believe she is responsible for the two debts. (Tr. 24; SOR response) The two medical debts do not appear on her May 10, 2017 credit report. (Tr. 25; GE 2) These two debts are mitigated.

SOR ¶ 1.e alleges a debt placed for collection for \$120 apparently for a ticket. Applicant denied responsibility for the debt. (Tr. 25-26) She denied that she owed any tickets. (Tr. 26) This debt does not appear on her May 10, 2017 credit report. (GE 2) The debt is refuted.

In sum, the only delinquent debt in her May 10, 2017 credit report is the debt in SOR ¶ 1.a. (GE 2) There is no evidence that she is doing anything to resolve it.

Policies

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

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

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

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sept. 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 includes three disqualifying conditions that could raise a security concern and may be disqualifying in this case: "(a) inability to satisfy debts"; "(b) unwillingness to satisfy debts regardless of the ability to do so"; and "(c) a history of not meeting financial obligations." In ISCR Case No. 08-12184 at 7 (App. Bd. Jan. 7, 2010), the Appeal Board explained:

It is well-settled that adverse information from a credit report can normally meet the substantial evidence standard and the government's obligations under [Directive] ¶ E3.1.14 for pertinent allegations. At that point, the burden shifts to applicant to establish either that [he or] she is not responsible for the debt or that matters in mitigation apply.

(internal citation omitted). The record establishes the disqualifying conditions in AG ¶¶ 19(a), 19(b), and 19(c) requiring additional inquiry about the possible applicability of mitigating conditions.

Five financial considerations mitigating conditions under AG ¶ 20 are potentially applicable in this case:

- (a) the behavior happened so long ago,² 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;

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

(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 DOHA 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 presented some mitigating evidence. She was underemployed or unemployed at times after retiring from federal law enforcement service in 2015. She cosigned on a contract with her son, and he failed to comply with the contract. These are circumstances beyond her control that adversely affected her finances. She does not receive full mitigating credit under AG ¶ 20(b) because she did not act responsibly under the circumstances. She received some financial counseling. I have credited Applicant with mitigation of all of the SOR debts, except for SOR ¶ 1.a.

Mitigation credit is reduced for SOR ¶ 1.b, a debt placed for collection for \$6,569, because Applicant did not voluntarily pay the debt. The creditor had to resort to garnishing her salary to be paid.³ She did not provide any evidence of any payments to address the

³ Payment of a debt "though garnishment rather than a voluntary effort diminishes its mitigating force." Compare ISCR Case No. 08-06058 at 4 (App. Bd. Aug. 26, 2010) with ISCR Case No. 04-07360 at 2-3 (App. Bd. Sept. 26, 2006) (payment of two of four debts through garnishment did not bar mitigation of financial considerations concerns). See also ISCR Case No. 09-05700 at 4 (App. Bd. Feb. 24, 2011) (garnished payments towards delinquent tax debts is not mitigating information in light of other factors); ISCR Case No. 08-06058 at 6 (App. Bd. Sep. 21, 2009) (remanding the case to the administrative judge and stating when addressing an Internal Revenue Service garnishment, "On its face, satisfaction of a debt

debt in SOR ¶ 1.a after 2012. She did not promise to pay the debt in SOR ¶ 1.a in the future.⁴

Applicant indicates that the debt in SOR ¶ 1.a is charged off. Eventually, the charged-off debt will be dropped from her credit report. “[T]hat some debts have dropped off his [or her] credit report is not meaningful evidence of debt resolution.” ISCR Case No. 14-05803 at 3 (App. Bd. July 7, 2016) (citing ISCR Case No. 14-03612 at 3 (App. Bd. Aug. 25, 2015)). The Fair Credit Reporting Act requires removal of most negative financial items from a credit report seven years from the first date of delinquency or the debt becoming collection barred because of a state statute of limitations, whichever is longer.⁵ A debts may be dropped from a credit report upon dispute when the creditor believes the debt is not going to be paid, the creditor fails to timely respond to a credit reporting company’s request for information, or when the debt has been charged off. “Mere evidence that debts no longer appear on credit reports is not reason to believe that they are not legitimate or that they have been satisfactorily resolved.” ISCR Case No. 16-02941 at 2 (App. Bd. Dec. 29, 2017) (citing ISCR Case No. 14-03747 at 2-3 (App. Bd. Nov. 13, 2015)).

Applicant did not prove that she was unable to make any payments to the creditor in SOR ¶ 1.a after 2012. There is insufficient evidence about why Applicant was unable to make greater progress resolving the debt in SOR ¶ 1.a. There is insufficient assurance that this SOR debt is being resolved. Under all the circumstances, she failed to establish that financial considerations security concerns are mitigated.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an Applicant’s eligibility for a security clearance by considering the totality of the Applicant’s conduct and all the circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(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

through the involuntary establishment of a creditor’s garnishment is not the same as, or similar to, a good-faith initiation of repayment by the debtor.”).

⁴ The Appeal Board has indicated that promises to pay off delinquent debts in the future are not a substitute for a track record of paying debts in a timely manner and otherwise acting in a financially responsible manner. ISCR Case No. 07-13041 at 4 (App. Bd. Sept. 19, 2008) (citing ISCR Case No. 99-0012 at 3 (App. Bd. Dec. 1, 1999)). A promise to pay debts is given greater weight when there is a track record of paying other debts.

⁵Title 15 U.S.C. § 1681c. See Federal Trade Commission website, Summary of Fair Credit Reporting Act Updates at Section 605, <https://www.consumer.ftc.gov/articles/pdf-0111-fair-credit-reporting-act.pdf>.

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 Guideline F 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 57 years old, and she is seeking employment as an investigator for security clearances for a government contractor. In 1984, she received a bachelor of arts degree with a major in criminal justice, and in 2004, she received a master’s degree in organizational management. She was employed in federal law enforcement for 30 years, and she held an important federal law enforcement leadership position for seven years. She retired from federal law enforcement in 2015.

Applicant is credited with having a generally good credit report with a solid record of financial responsibility, except for the debt in SOR ¶ 1.a that she admits she owes. She received some financial counsel and has a strong federal law enforcement employment record.

Applicant did not provide any evidence of payments, payment plans, or other actions to resolve the debt in SOR ¶ 1.a. She did not establish she had insufficient income to make any payments. Her actions show a lack of financial responsibility and judgment and raise unmitigated questions about Applicant’s reliability, trustworthiness, and ability to protect classified information. See AG ¶ 18. More information about inability to pay debts, financial history, or documented financial progress is necessary to mitigate security concerns.

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

I have carefully applied the law, as set forth in *Egan*, Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. I conclude that financial consideration concerns are not mitigated.

Formal Findings

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline F: **AGAINST APPLICANT**

Subparagraph 1.a: **Against Applicant**
Subparagraphs 1.b through 1.e: **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 Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

MARK HARVEY
Administrative Judge