



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



In the matter of:)
)
) ISCR Case No. 15-00306
)
Applicant for Security Clearance)

Appearances

For Government: Robert J. Kilmartin, Esq., Department Counsel
For Applicant: Daniel A. Corbin, Esq.

06/28/2016

Decision

HARVEY, Mark, Administrative Judge:

In January 2014, the single delinquent account listed on Applicant’s statement of reasons (SOR) was resolved when the creditor accepted a deed in lieu of foreclosure and any debt owed was waived. She filed her 2010 federal income tax return 17 months late. In February 2013, the Internal Revenue Service (IRS) indicated her federal income taxes for the 2010 tax year were paid, which was more than two years before the SOR was issued. Several non-SOR debts are paid or are in current payment plans. She is communicating with her creditors and has assured she intends to continue to pay her debts. She has established a track record of debt payment and resolution. Financial considerations security concerns are mitigated. Access to classified information is granted.

History of the Case

On February 23, 2012, Applicant completed and signed a Questionnaire for National Security Positions (SF 86). (Government Exhibit (GE) 1) On August 15, 2015, 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 (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. (HE 2) Specifically, the SOR set forth security concerns arising under the financial considerations guideline.

On September 3, 2015, Applicant responded to the SOR, and she requested a hearing. On January 14, 2016, Department Counsel was ready to proceed. On February 11, 2016, the case was assigned to me. On March 11, 2016, the Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing, setting the hearing for March 31, 2016. (HE 1) Applicant waived her right to 15 days of notice of the date, time, and location of the hearing. (Tr. 7) The hearing was held as scheduled on March 31, 2016.

Department Counsel offered 4 exhibits, and Applicant offered 15 exhibits, which were admitted into evidence without objection. (Transcript (Tr.) 13-20; Government Exhibit (GE) 1-4; Applicant Exhibit (AE) 1-15) On April 8, 2016, DOHA received a copy of the transcript of the hearing.

Findings of Fact

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

Applicant is 38 years old, and she has been employed by a defense contractor as a logistician, technical writer, or in base operations since 2006. (Tr. 21; GE 1) In 1988, she graduated from high school. (Tr. 48) She has two years of college credits. (Tr. 48) In 1991, she married, and her three children are ages 20, 24, and 27. (Tr. 39) Her husband retired from the Army as a sergeant first class (E-7) in 2012. (Tr. 40) He was injured in Iraq, and the Department of Veterans Affairs (VA) has determined he has a 90 percent disability rating. (Tr. 45, 52-53)

Financial Considerations

Applicant has paid and kept current numerous debts over the previous five years. (Tr. 21-30; AE 12-14) Her 2016 credit reports and statements from her landlords corroborate her statements about having a track record of paying her debts. (Tr. 28-30; AE 12-14)

Applicant disclosed a delinquent mortgage and her failure to file her 2010 federal income tax return on her February 23, 2012 SF 86. (GE 1) Applicant and her spouse lived in a home near a military installation on the West Coast they had purchased in 2006, for about \$397,000. (Tr. 22-23, 35-36) Her husband was in the Army, and in May 2011, he was transferred to the middle of the United States. (Tr. 23, 34) They attempted to sell their residence; however, due to the decline in residential real estate values, the fair market value of their home was about \$265,000. (Tr. 23) They obtained a short-sale contract; however, after a lengthy negotiation, the mortgage company did not accept the

offer. (Tr. 24) They kept the VA, the guarantor for their mortgage loan, informed of the situation. (Tr. 36-37; AE 13) On January 2, 2014, the creditor wrote and informed Applicant that the VA and creditor waived any deficiency against Applicant and her husband. (Tr. 37; AG 10) They received an IRS Form 1099-C loan forgiveness document. (Tr. 38)

Applicant moved to the Midwest several months ahead of her husband. There was confusion in their personal affairs due to the move. Her husband filed for an extension with the IRS and then filed their 2010 federal income tax return 17 months late on April 15, 2015. (Tr. 26; AE 8-9) Applicant withheld at one or zero dependents from her paycheck for her federal income taxes; however, her spouse did not have an adequate amount withheld from his paycheck. (Tr. 26-27) For the last three years, they had refunds of at least \$3,000 on their federal income tax returns. (AE 8-9):

Applicant completed a budget. (Tr. 25-26) Applicant and her spouse currently have a \$2,148 positive monthly cash flow. (AE 5) They have accumulated a positive net worth of \$24,453. (AE 1) Dave Ramsey is a nationally known expert on debt counseling. Applicant and her spouse listened to Dave Ramsey's presentations, attended a class, and completed workbooks to learn about establishing their financial stability. (Tr. 32, 42-43) They have a specific plan for paying off their two remaining accounts. (Tr. 33, 42) Applicant expressed remorse for her financial problems. (Tr. 49) She promised that she would ensure she maintained her financial responsibility. (Tr. 49)

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 revised 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.

AG ¶ 19 provides three disqualifying conditions that could raise a security concern and may be disqualifying in this case: “(a) inability or unwillingness to satisfy debts;” “(c) a history of not meeting financial obligations;” and “(g) failure to file annual Federal, state, or local income tax returns as required” Applicant admitted that her

mortgage became delinquent, and she and her husband failed to timely file their federal income tax return for tax year 2010. The Government established the disqualifying conditions in AG ¶¶ 19(a), 19(c), and 19(g) 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;¹ 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 security clearance eligibility, there is a strong presumption against the grant or maintenance

¹The 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)).

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).

AG ¶¶ 20(a) through 20(e) apply. Applicant’s financial problems resulted from their move from one military installation to another, her husband’s failure to withhold sufficient funds from his salary to pay his share of their federal income taxes, his pending retirement from the Army, and distractions from his military retirement, such as processing for his 90 percent VA disability rating. They were unable to fully pay their 2010 federal income taxes and their mortgage after moving to a different state. These unusual circumstances caused or contributed to their financial problems.

Applicant attempted to resolve her mortgage debt with a short sale. When that was unsuccessful, the account was resolved with a deed in lieu of foreclosure. The creditor wrote that any debt from the mortgage was resolved.²

Applicant failed to timely file her federal income tax return for tax year 2010. The DOHA Appeal Board has commented:

Failure to file tax returns suggests that an applicant has a problem with complying with well-established governmental rules and systems. Voluntary compliance with such rules and systems is essential for protecting classified information. ISCR Case No. 01-05340 at 3 (App. Bd.

²The VA loan guarantee is as follows: “For loans between \$45,000 and \$144,000, the minimum guaranty amount is \$22,500, with a maximum guaranty, of up to 40 percent of the loan up to \$36,000, subject to the amount of entitlement a veteran has available.” As to whether the VA loss on a loan must be repaid, the VA explains:

Must the loan be repaid?

Yes. A VA guaranteed loan is not a gift. It must be repaid, just as you must repay any money you borrow. The VA guaranty, which protects the lender against loss, encourages the lender to make a loan with terms favorable to the veteran. But if you fail to make the payments you agreed to make, you may lose your home through foreclosure, and you and your family would probably lose all the time and money you had invested in it. If the lender does take a loss, VA must pay the guaranty to the lender, and the amount paid by VA must be repaid by you. If your loan closed on or after January 1, 1990, you will owe the Government in the event of a default only if there was fraud, misrepresentation, or bad faith on your part.

Factsheet VAP 26-4 is available on the VA website at http://www.google.com/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&cad=rja&uact=8&ved=0CD4QFjAA&url=http%3A%2F%2Fwww.benefits.va.gov%2Fhomeloans%2Fdocs%2Fvap_26-4_online_version.pdf&ei=q4QbU_zSCaST0QH0mIDwAg&usq=AF_QjCNFv0-ay6SGFdfcDFIaE7aENpSq0cA.

Dec. 20, 2002). As we have noted in the past, a clearance adjudication is not directed at collecting debts. See, e.g., ISCR Case No. 07-08049 at 5 (App. Bd. Jul. 22, 2008). By the same token, neither is it directed toward inducing an applicant to file tax returns. Rather, it is a proceeding aimed at evaluating an applicant's judgment and reliability. *Id.* A person who fails repeatedly to fulfill his or her legal obligations does not demonstrate the high degree of good judgment and reliability required of those granted access to classified information. See, e.g., ISCR Case No. 14-01894 at 5 (App. Bd. Aug. 18, 2015). See *Cafeteria & Restaurant Workers Union Local 473 v. McElroy*, 284 F.2d 173, 183 (D.C. Cir. 1960), *aff'd*, 367 U.S. 886 (1961).

ISCR Case No. 14-04437 at 3 (App. Bd. Apr. 15, 2016). See ISCR Case No. 14-05476 at 5 (App. Bd. Mar. 25, 2016) (citing ISCR Case No. 01-05340 at 3 (App. Bd. Dec. 20, 2002)). ISCR Case No. 14-01894 at 4-5 (App. Bd. Aug. 18, 2015). The Appeal Board commented that even in instances where an “[a]pplicant has purportedly corrected [the applicant’s] federal tax problem, and the fact that [applicant] is now motivated to prevent such problems in the future, does not preclude careful consideration of [a]pplicant’s security worthiness in light of [applicant’s] longstanding prior behavior evidencing irresponsibility” including a failure to timely file federal income tax returns. See ISCR Case No. 15-01031 at 3 and note 3 (App. Bd. June 15, 2016) (characterizing “no harm, no foul” approach to an Applicant’s course of conduct and employed an “all’s well that ends well” analysis as inadequate to support approval of access to classified information with focus on timing of filing of tax returns after receipt of the SOR).

Applicant resolved her federal income tax problem for tax year 2010 two years before the SOR was issued. There is no evidence of tax liens or levies. For the previous three years (2013 through 2015), Applicant withheld more funds than necessary to pay her federal income taxes. Her federal income taxes are current.

Applicant has several non-SOR accounts that are paid or are in current payment plans. She is communicating with her creditors, and has assured she intends to pay her accounts. She has established a track record of account payment and debt resolution. I am confident that Applicant will conscientiously endeavor to maintain her financial responsibility.

Based on Applicant’s credible and sincere promise to timely pay her debts and file her tax returns, future new delinquent debt “is unlikely to recur and does not cast doubt on [Applicant’s] current reliability, trustworthiness, or good judgment,” and “there are clear indications that the problem is being resolved or is under control.” Her payments of her debts showed good faith. She has sufficient income to keep her accounts in current status and to continue making progress paying her remaining accounts. Her efforts are sufficient to mitigate financial considerations security concerns. Even if Applicant provided insufficient information to mitigate security concerns under AG ¶ 20, she mitigated security concerns under the whole-person concept, *infra*.

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 38 years old, and she has been employed by defense contractors as a logistician, technical writer, or in base operations since 2006. She has two years of college credits. Her husband retired from the Army as a sergeant first class in 2012. He was injured in Iraq, and the VA has determined he has a 90 percent disability rating.

Applicant failed to timely file her federal income tax return for tax year 2010. There is no evidence that the IRS filed any tax liens or levies, and Applicant maintained communications with the IRS. She paid her 2010 federal income tax debt in 2013, more than two years before the SOR was issued. For tax years 2013 to 2015, she was entitled to federal income tax refunds. All of her federal income taxes are current.

The SOR alleges one delinquent account, and this account was resolved before the SOR was issued. Several non-SOR accounts are paid or are in current payment plans. She is communicating with her creditors, and has assured she intends to pay her debts. She understands that she needs to pay her debts, timely file her tax returns and the conduct required to retain her security clearance. The Appeal Board has addressed a key element in the whole-person analysis in financial cases stating:

. . . the concept of meaningful track record necessarily includes evidence of actual debt reduction through payment of debts. However, an applicant is not required, as a matter of law, to establish that he has paid off each and every debt listed in the SOR. All that is required is that an applicant demonstrate that he has . . . established a plan to resolve his financial problems and taken significant actions to implement that plan. The Judge can reasonably consider the entirety of an applicant's financial situation

and his actions in evaluating the extent to which that applicant's plan for the reduction of his outstanding indebtedness is credible and realistic. See Directive ¶ E2.2(a) (Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination.) There is no requirement that a plan provide for payments on all outstanding debts simultaneously. Rather, a reasonable plan (and concomitant conduct) may provide for the payment of such debts one at a time. Likewise, there is no requirement that the first debts actually paid in furtherance of a reasonable debt plan be the ones listed in the SOR.

ISCR Case No. 07-06482 at 2-3 (App. Bd. May 21, 2008) (internal citations and quotation marks omitted). Applicant has established a "meaningful track record" of debt re-payment, and I am confident she will maintain her financial responsibility.

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. Financial considerations concerns are 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:	FOR APPLICANT
Subparagraphs 1.a and 1.b:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with national security to grant or continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is granted.

MARK HARVEY
Administrative Judge