



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 15-00493

Appearances

For Government: Rhett Petcher, Esq., Department Counsel
For Applicant: *Pro se*

11/21/2015

Decision

HARVEY, Mark, Administrative Judge:

Applicant failed to provide sufficient information about her finances and progress resolving her 2010 state tax lien for \$98,000. Her unsecured, nonpriority debts were discharged under Chapter 7 of the Bankruptcy Code in July 2013; however, she did not provide enough information to establish good faith in the handling of her finances leading up to her bankruptcy. Financial considerations concerns are not mitigated. Access to classified information is denied.

History of the Case

On May 8, 2014, Applicant completed and signed an Electronic Questionnaires for Investigations Processing (e-QIP) (SF-86) (Item 2) On July 16, 2015, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued Applicant a statement of reasons (SOR) pursuant to Executive Order (Exec. Or.) 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), which became effective on September 1, 2006.

The SOR detailed reasons why the DOD CAF made a preliminary decision to deny or revoke Applicant's eligibility for access to classified information. Specifically, the SOR set forth security concerns arising under the financial considerations guideline.

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On August 1, 2015, Applicant responded to the SOR, and she waived her right to a hearing. On September 10, 2015, Department Counsel completed the File of Relevant Material (FORM). On September 28, 2015, Applicant received the FORM. Applicant provided an undated response to the FORM.¹ On October 28, 2015, Department Counsel stated he had no objection to the Applicant's FORM response. On November 5, 2015, the case was assigned to me. Applicant did not object, and the Government's case consisting of six exhibits was admitted into evidence. (Items 1-6)

Findings of Fact²

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

Applicant is a 67-year-old employee of a defense contractor, who is seeking a security clearance. (FORM response)³ She received a bachelor's degree in 1982, and a master's degree in 1988. In 1994, she was awarded a Ph.D. (FORM response) She has never served in the military. She has worked for a DOD contractor as an acquisition program management specialist from March 2010 to the present. From October 2007 to March 2010, she worked for federal contractors as an executive assistant. From October 2005 to October 2007, she worked for a federal contractor as an administrative assistant. From January 2005 to June 2007, she was also working as an independent consultant. From June 2002 to January 2005, she was self-employed, and she operated a web-based business.

In 1967, Applicant married, and in 1981, she divorced. In 1983, Applicant married. Her children were born in 1967 and 1969. Her stepchildren were born in 1958 and 1961. In March 2013, she filed a bankruptcy petition under Chapter 11 of the Bankruptcy Code,⁴ and her SF-86 indicated the amount involved was about \$208,000.

¹The Defense Office of Hearings and Appeals (DOHA) transmittal letter is dated September 10, 2015, and Applicant's receipt is dated September 28, 2015. The DOHA transmittal letter informed Applicant that she had 30 days after her receipt to submit information.

²Some details have been excluded in order to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

³Unless stated otherwise, the source for the information in this paragraph and the next three paragraphs is Applicant's May 8, 2014 Electronic Questionnaires for Investigations Processing (e-QIP) (SF-86). (Item 2)

⁴See U.S. Courts, Chapter 11 - Bankruptcy Basics/United States, <http://www.google.com/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=3&cad=rja&uact=8&sqi=2&ved=0CDAQFjACahUKEwiE6OLhuvzIAhVGlx4KHbCRDy8&url=http%3A%2F%2Fwww.uscourts.gov%2Fservices-forms%2Fbankruptcy%2Fbankruptcy-basics%2Fchapter-11-bankruptcy-basics&usq=AFQjCNG8z2j4t9TEEY5o8oTjxDk-hqNjJg&bvm=bv.106923889,d.cVWw> ("This chapter of the Bankruptcy Code generally provides for reorganization, usually involving a corporation or partnership. A chapter 11 debtor usually proposes a plan of reorganization to keep its business alive and pay creditors over time. People in business or individuals can also seek relief in chapter 11."). (HE 1)

Applicant described the source of her financial problems to bad financial advice from a major retirement financial advisor, her spouse's medical problems, the need for her to care for a grandchild, underemployment, and unemployment. (SOR response; FORM response) The information about special circumstances adversely affecting her finances was not specific about the impact on her finances, such as the costs of medical care, the periods of unemployment and underemployment, etc.

Applicant's history of delinquent debt is documented in her credit reports, bankruptcy schedules, SF-86, SOR response, and FORM response. Applicant disclosed a state tax debt of about \$135,000 discovered in 2004, which she said resulted from bad financial advice about withholding part of retirement funds for taxes that were used to upgrade their residence. Applicant and her spouse used retirement funds to upgrade their residence. "That meant the amount owed and penalties became quite large. . . . We are making monthly payments and have repaid approximately \$47,000." An October 2, 2015 letter from her lawyer states she established a \$500 monthly payment plan to address her state tax lien in March 2014; the most recent payment was received on September 14, 2015; and her plan is current. (FORM response)

Applicant has a state tax lien for \$96,239. (SOR ¶ 1.b) A handwritten note from Applicant indicates a \$96,240 state tax debt, payment of \$12,993, and a balance owed of \$83,247. (SOR response) She included a photocopy of a July 10, 2015 check for \$500 written to the state tax authority and a May 20, 2015 letter from the state tax authority intercepting her \$138 state tax refund to address her 2001 state tax debt. (SOR response) Applicant said the letter from her law firm "has been the only documentation that we have of our repayment. Prior to my request for this documentation – all communication has been via phone." (FORM response) Applicant did not explain why or how she paid the state \$47,000 as indicated on her May 8, 2014 SF 86 and why she needed to utilize a law firm to handle the \$500 monthly payment plan.

Applicant's FORM response states:

We are certainly willing to pay all debts that we incur. We did go through a bankruptcy in the past, but we have not used a credit card for approximately 7-8 years and have not had a credit card for almost that length as well. We pay our bills and have been faithfully repaying the tax issue. We, much to our regret, had one instance of bankruptcy. For decades and decades before that occurrence we had paid all our indebtedness and we have paid our debts since the bankruptcy. Furthermore, we have taken steps to ensure we do not incur future credit issues by not having credit cards.

In 2001, Applicant had a \$137,000 tax debt owed to the Internal Revenue Service (IRS). A lien was placed on Applicant's house for five years, and it was lifted in

2013. As of May 8, 2014, Applicant said she and her husband had paid the IRS approximately \$47,000.⁵

At some point, Applicant's bankruptcy was converted from Chapter 11 to Chapter 7. The March 13, 2013 summary of schedules for Applicant's Chapter 7 bankruptcy indicates: real property of \$195,940; personal property of \$12,591; creditors holding secured claims of \$429,018; unsecured nonpriority claims of \$199,976; current monthly income of \$6,323; and current monthly expenditures of \$6,323. The only secured property is Applicant's residence. Her bankruptcy indicates her home mortgage was \$248,567 and the unsecured portion was \$52,627. (Schedule D)⁶ Her federal tax lien was \$81,880, and her state tax lien was \$98,571. (Schedule D) Federal tax monthly payment is \$650, and state tax monthly payment is \$700. (Schedule J) Applicant received financial counseling as part of the bankruptcy process. In July 2013, Applicant's unsecured nonpriority debts were discharged under Chapter 7 of the Bankruptcy Code.

Applicant's manager provided his "highest recommendation" for Applicant. (FORM response) She is a "pivotal part" of the team; she is self-directed, effective, professional; she blends administrative, technical, and interpersonal skills; and she adds value to all projects. (FORM response) There is no evidence of security violations, abuse of alcohol, or use of illegal drugs.

Applicant's FORM noted the absence of corroborating documentation and detailed explanations of the causes for her financial problems and other mitigating information. It explained that Applicant had 30 days from the receipt of the FORM "in which to submit a documentary response setting forth objections, rebuttal, extenuation, mitigation, or explanation, as appropriate. If you do not file any objections or submit any additional information . . . your case will be assigned to an Administrative Judge for a determination based solely" on the evidence set forth in this FORM. (FORM at 3) Applicant submitted some additional information; however, she did not provide state tax information explaining in detail why she was assessed such a large state tax lien, and what her payments have been over the years to address this debt.

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

⁵The SOR did not indicate that the debt owed to the Internal Revenue Service (IRS) raised a security concern. The information about the federal tax debt will not be used except in the whole-person analysis because Applicant has not received sufficient notice of the security relevance of this debt.

⁶It is unclear whether the "unsecured" debt listed in her bankruptcy is unpaid interest on the mortgage debt.

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 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 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 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's history of delinquent debt is documented in her credit reports, bankruptcy schedules, SF-86, SOR response, and FORM response. Applicant's SOR alleges, and the evidence establishes Applicant has a 2010 state tax lien for \$98,000, indicating she did not pay her taxes "as required," and her unsecured, nonpriority debts were discharged under Chapter 7 of the Bankruptcy Code in July 2013. 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;⁷ and

⁷The Appeal Board has previously explained what constitutes a "good faith" effort to repay overdue creditors or otherwise resolve debts:

(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 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's conduct in resolving her delinquent debt does not warrant full application of any mitigating conditions to all of her SOR debts; however, she presented some important mitigating information. The following circumstances beyond Applicant's control adversely affected her finances: Applicant and her husband received bad financial advice from a major retirement financial advisor about the deductibility of income received from retirement accounts; her husband's medical problems; her care for her grandchild; her unemployment; and her underemployment. She received financial counseling as part of the bankruptcy process. Her 2010 state tax lien is in a \$500 monthly payment plan. She paid \$47,000 to address her state tax lien.

Applicant did not provide sufficient evidence about her state tax lien. She did not indicate when and the how much was withdrawn from her husband's retirement plan. She did not describe what she did from 2004, when she learned of her state tax

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)).

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problem, until 2010, when the state tax lien was filed. She did not provide the history of her state tax payments.

Applicant did not explain why or how she generated such a large amount of delinquent debts that were included in her Chapter 7 bankruptcy. She did not provide correspondence to or from any creditors to establish maintenance of contact with creditors,⁸ documented attempts to negotiate payment plans, such as settlement offers or agreements to show that she was attempting to resolve these debts, or other evidence of progress or resolution of her debts prior to filing for bankruptcy protection under Chapters 11 or 7.

Applicant's failure to provide more detailed information about her state tax lien and her nonpriority unsecured debts listed in her bankruptcy shows a lack of judgment and responsibility that weighs against approval of her security clearance. There is insufficient evidence about how her debts were generated and why she was unable to make greater progress resolving her state tax lien. There is insufficient assurance that her financial problems are being resolved, are under control, and will not recur in the future. Under all the circumstances, she failed to establish that financial consideration 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(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

⁸"Even if Applicant's financial difficulties initially arose, in whole or in part, due to circumstances outside his [or her] control, the Judge could still consider whether Applicant has since acted in a reasonable manner when dealing with those financial difficulties." ISCR Case No. 05-11366 at 4 n.9 (App. Bd. Jan. 12, 2007) (citing ISCR Case No. 99-0462 at 4 (App. Bd. May 25, 2000); ISCR Case No. 99-0012 at 4 (App. Bd. Dec. 1, 1999); ISCR Case No. 03-13096 at 4 (App. Bd. Nov. 29, 2005)). A component is whether he or she maintained contact with creditors and attempted to negotiate partial payments to keep debts current.

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.

There is some evidence supporting approval of Applicant's clearance. Applicant is a 67-year-old acquisition program management specialist, who has been employed by a DOD contractor from March 2010 to present. In 1994, she was awarded a Ph.D. Applicant described the sources of her financial problems as originating from bad financial advice from a major retirement financial advisor, her spouse's medical problems, the need for her to care for a grandchild, underemployment, and unemployment. These are circumstances beyond her control that adversely affected her finances. Applicant's manager provided his "highest recommendation" for Applicant, and described her as a "pivotal part" of the team. (FORM response) Applicant is self-directed, effective, and professional. There is no evidence of security violations, abuse of alcohol, or use of illegal drugs. She disclosed her financial problems on her May 8, 2014 SF 86.

The financial evidence against approval of Applicant's clearance is more substantial at this time. Applicant has a history of financial problems. In 2004, she learned she had a state tax debt, and in 2010, the state filed a tax lien for \$98,000. According to her bankruptcy filing, she has a federal tax lien for \$81,880.⁹ When an issue of delinquent taxes is involved, an administrative judge is required to consider how long the applicant waits after a tax debt arises to begin making payments and whether payments begin before or after a tax lien or levy is filed.¹⁰ A large amount of unsecured, nonpriority debts were discharged under Chapter 7 of the Bankruptcy Code in July 2013. As for the nonpriority unsecured debts listed on her bankruptcy, she did not provide any evidence of payments to those creditors, payment plans, or her communications to those creditors, showing her attempts to resolve those debts in good faith. She failed to provide sufficient documentation of progress resolving her financial problems. Her failure to provide more corroborating documentation shows a lack of financial responsibility and judgment and raises unmitigated questions about Applicant's reliability, trustworthiness, and ability to protect classified information. See AG ¶ 18.

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

⁹See ISCR Case No. 14-03358 (App. Bd. Oct. 9, 2015) (reversing grant of a security clearance and stating "A security clearance represents an obligation to the Federal Government for the protection of national secrets. Accordingly failure to honor other obligations to the Government has a direct bearing on an applicant's reliability, trustworthiness, and ability to protect classified information.").

¹⁰ See ISCR Case No. 14-01894 at 4-6 (App. Bd. Aug. 18, 2015) (reversing grant of a security clearance, discussing lack of detailed corroboration of circumstances beyond applicant's control adversely affecting finances, and emphasizing the applicant's failure to timely file and pay taxes); ISCR Case No. 12-05053 at 4 (App. Bd. Oct. 30, 2014) (reversing grant of a security clearance and noting insufficient discussion of Applicant's efforts to resolve tax liens).

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 debts, and a track record of behavior consistent with her obligations, she may well be able to demonstrate persuasive evidence of her security clearance worthiness. Based on the facts before me and the adjudicative guidelines that I am required to apply, I conclude that it is not clearly consistent with the national interest to grant Applicant security clearance eligibility at this time.

I have carefully applied the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. Financial considerations 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

Subparagraphs 1.a and 1.b: Against 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 eligibility for a security clearance. Eligibility for access to classified information is denied.

MARK HARVEY
Administrative Judge