



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



In the matter of:

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) ISCR Case No. 14-03641
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Applicant for Security Clearance

Appearances

For Government: Tovah Minster, Esq., Department Counsel

For Applicant: *Pro se*

02/20/2015

Decision

LYNCH, Noreen A., Administrative Judge:

On August 8, 2014, the Department of Defense (DOD) issued a Statement of Reasons (SOR) listing security concerns arising under Guideline E (Personal Conduct) and Guideline F (Financial Considerations). The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense (DoD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG), implemented in September 2006.

Applicant timely answered the SOR and requested a hearing before an administrative judge. The case was assigned to me on November 14, 2014. A notice of hearing was issued on January 6, 2015, scheduling the hearing for January 9, 2015. Government Exhibits (GX) 1-3 were admitted into evidence without objection. Applicant testified and submitted Applicant Exhibits (AX) A-C, which were admitted without objection. I held the record open for additional submissions until February 5, 2015. Applicant timely submitted three packets of documents, which were admitted as AX D-F, without objection. The transcript was received on January 21, 2015. Based on a

review of the pleadings, testimony, and exhibits, eligibility for access to classified information is denied.

Findings of Fact

In her answer to the SOR, Applicant admitted the SOR allegations under Guideline F. She denied the allegation under Guideline E, and provided explanations.

Applicant is 50 years old. She graduated from high school and has taken some college classes. She joined the United States Marine Corps (USMC) in June 1982 and received an honorable discharge in March 1990. Applicant is married and has three children. Applicant has held a security clearance since her time in the military. She has been employed with her current employer for 25 years. (GX 1)

The SOR alleges failure to timely file 2010, 2011, 2012, and 2013 federal and state income tax returns. Applicant readily admits that is the case, but she stated that they have now been filed. (Tr. 22) At the hearing, she did not present any documents to confirm the filings. She believes that she does not owe any money to the federal or state government. (Tr. 10) Applicant stated that she has a meeting soon with the IRS.

Applicant's difficulties began in late 2010, when her husband's corporation was folding and their accountant retired. Applicant was working about 75 hours a week at the time. She stated that there is no suitable explanation, but "it fell through the cracks." (Tr. 18) She believed that since her husband was not working, the filing of the taxes was less urgent. She believed she would not owe any money to the federal, or state government. She realizes that she is obligated to file a tax return. (Tr. 18)

Applicant found another accountant in July 2013. The reason for the delay - the first three accountants did not want to become involved with the tax issues. (Tr.33) She stated that her life became chaotic and time just passed from 2010 until 2014. The filings were completed after her security clearance application and her investigative interview in 2012.

Applicant currently earns a net monthly income of \$3,456. Her husband works in construction but the amount of his earnings vary. There is nothing in the record to reflect any financial counseling. She did not provide the amount of her net monthly remainder.

Applicant submitted three favorable letters of reference. (AX A-C) Her security lead who has know her for over a decade attests to Applicant's loyalty and ability to protect national security with regard to protecting sensitive information. (AX A) Applicant is an "extremely valuable member of the team." Applicant has had a clearance for multiple decades and no one has ever questioned her integrity or candor. This is an isolated incident.

Applicant's current supervisor finds her to be reliable and trustworthy. He states that the issue of the untimely filing of taxes are not consistent with her well established record of reliability during her long period of employment. (AX B) He believes that Applicant has genuine remorse for the mistakes that she made and he remains confident in her ability to be trusted to execute her responsibilities. (AX B)

A colleague who has worked with Applicant since 2004 entrusts her with a high level of responsibility in the department. Applicant enjoys her work, values it, and carries out her duties with professionalism and determination. Applicant admits that she is embarrassed about the tax issues and understands the gravity of the situation as it related to her security clearance. (AX C)

As post-hearing submissions, Applicant submitted copies of signed U.S. income tax returns (Form 1040) for the years 2010, 2011, 2012, and 2013, dated August 15, 2014. (AX D) She received a refund for the years 2010 and 2011. For the years 2012 and 2013, Applicant owes taxes, but the total amount is not clear from the documentation.

Applicant submitted an email copy that stated that she met with the IRS and learned that due to "three year cutoff for filing for refunds", the \$6,600 that was owed to Applicant for 2010 will be diverted to an excess payment fund. Applicant noted that she now owes about \$9,354 to the IRS (interest and penalties). Applicant claims that she is in the process of setting up a payment plan. (AX E).

Regarding the state income tax returns, Applicant sent signed copies of her state income tax forms, dated August 15, 2014. It appears that she is due a refund for each year. At the hearing, Applicant asserted that when she contacted the state, they were unsure of the amount that the state owes to her. (Tr. 26) Applicant has not cashed some of the checks that the state has sent. She is receiving conflicting information from them and wants to talk with them after she resolves the issues with the IRS. (AX F) She did not provide any other information.

Personal Conduct

When Applicant completed her August 2012 security clearance application, she failed to include information concerning the failure to file taxes for tax years 2010 and 2011, in response to Section 26 - Financial Record. Applicant states that was simply an error. She notes the e-QIP is not "particularly user friendly." (Tr. 31).

Applicant did not disclose the information concerning the non-filing of the taxes, but stated that she made no attempt to deceive the investigator during her 2012 interview. When it was pointed out to her, she verified that she marked the wrong block. (Tr. 31) She also stated at the hearing that she knew she had to "get the taxes" done when she completed the security clearance application. (Tr. 36)

Policies

When evaluating an applicant's suitability for a security clearance, an administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, they are applied in conjunction with the factors listed in the adjudicative process. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. Under AG ¶ 2(c), this process is a conscientious scrutiny of a number of variables known as the "whole-person concept." An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record.

The U.S. Government must present evidence to establish controverted facts alleged in the SOR. An applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." ¹ The burden of proof is something less than a preponderance of evidence. ² The ultimate burden of persuasion is on the applicant. ³

A person seeking access to classified information enters into a fiduciary relationship with the Government based on trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to protect classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 10865 provides that decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." ⁴ "The clearly consistent standard indicates that security clearance

¹ See also ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug. 10, 1995).

² *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

³ ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

⁴ See also EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information), and EO 10865 § 7.

determinations should err, if they must, on the side of denials.”⁵ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such information.⁶ The decision to deny an individual a security clearance does not necessarily reflect badly on an applicant’s character. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense established for issuing a clearance.

Analysis

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern pertaining to 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 information.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying:

(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 security clearance eligibility or trustworthiness, or award fiduciary responsibilities;

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information.

In this case AG ¶¶ 16 (a) and (c) applies. Applicant is a seasoned employee who has held a security clearance. I do not accept her explanation that she checked the wrong box and that the application is not user friendly as a reason for not disclosing the failure to file taxes for four years. At the hearing, she stated she knew “she had to get the taxes done” when she was completing the security clearance application. Applicant told her employer about the failure to file in approximately January 2013. (Tr. 38)

⁵ ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

⁶ *Id.*

Applicant's explanations do not persuade me that she is reliable, trustworthy, or has met her burden to mitigate the personal conduct concerns. She has not acknowledged that it was relevant to her security trustworthiness. I find this leaves me with doubts about her eligibility for a security clearance. Any doubts must be resolved in favor of the Government. After considering the mitigating factors, Applicant has not mitigated the personal conduct concerns under Guideline E.

Guideline F, Financial Considerations

The security concern for Financial Considerations is set out in AG ¶ 18:

Failure or an 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." It also states that "an individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

Applicant admitted that she did not timely file her federal and state tax returns for 2010 through 2013 until 2014. Consequently, Financial Considerations Disqualifying Conditions (FC DC) AG ¶ 19(a) (inability or unwillingness to satisfy debts), and FC DC AG ¶ 19(c) (a history of not meeting financial obligations) apply; and, FC DC AG ¶ 19(g) (failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same) applies. With such conditions raised, it is left to Applicant to overcome the case against her and mitigate security concerns.

The nature, frequency, and relative recency of Applicant's financial difficulties make it difficult to conclude that it occurred "so long ago." Applicant's untimely filings of federal and state taxes continued until 2014. She is in the process of starting a payment plan to the IRS for taxes owed. Consequently, Financial Considerations Mitigating Condition (FC MC) AG ¶ 20(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) does not apply.

Financial Considerations Mitigating Condition (FC MC) AG ¶ 20(b) (the conditions that resulted in the behavior 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) applies in part. Applicant and her husband experienced difficulty with his business and lost their accountant in 2010. However, I cannot find that she acted responsibly under the circumstances.

FC MC AG ¶ 20(d), (the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts) has some application. Applicant as noted above recently took steps to arrange payments with the IRS. FC MC AG ¶ 20(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) does not apply.

The Appeal Board has addressed this issue concerning Applicant's responsibility for fulfilling a legal obligation. In regard to federal and state income taxes, the Appeal Board has commented:

A person who fails repeatedly to fulfil his or her legal obligations does not demonstrate the high degree of good judgment and reliability required of persons granted access to classified information. Indeed, the Board has previously noted that a person who has a history of not fulfilling their legal obligation to file income tax returns may be said not to have demonstrated the high degree of judgment and reliability required for access to classified information. See, e.g. ISCR Case No., 98-0608 at 2 (App. Bd. Jun. 27, 2000).

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 an 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. As noted above, the ultimate burden of persuasion is on the applicant seeking a security clearance.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, as well as the whole-person factors. Applicant is 50 years old. She served in the military. She is an educated woman. This is not her first application for a security clearance. She is a seasoned employee who is familiar with security clearance applications. She has been with her current employer since 1990. She has great skills and has received recognition by her employers. She has held a security clearance for many years. She stated that this would never occur again.

Applicant has not provided sufficient information concerning the payment plan with the IRS. The fact that she did not file taxes timely for four years in a row gives me grave doubts about her reliability. The fact that there was some chaos in her life and loss of an accountant does not provide sufficient information to her failure to file federal and state income tax returns until 2015. While the taxes have been filed, Applicant has been on notice for some time about her failure to file. Her recent filing of her tax returns does not mitigate the concerns.

Applicant did not persuade me that she refuted or mitigated the Government's case concerning the personal conduct and financial considerations security concerns. Any doubts must be resolved in the Government's favor. For all these reasons, clearance is denied.

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 :	AGAINST APPLICANT
Subparagraphs 1.a-1.d:	Against Applicant

Paragraph 2, Guideline :	AGAINST APPLICANT
Subparagraph 2.a:	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 a security clearance. Clearance is denied.

NOREEN A. LYNCH.
Administrative Judge