



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



In the matter of:)
)
) ISCR Case No. 17-03500
)
Applicant for Security Clearance)

Appearances

For Government: Daniel F. Crowley, Esq., Department Counsel
For Applicant: *Pro se*

03/20/2019

Decision

RIVERA, Juan J., Administrative Judge:

Applicant failed to timely file her federal and state income tax returns for tax years 2012 through 2015. Her recent income tax return filings are insufficient to establish a track record of financial responsibility. She failed to demonstrate good judgment, reliability, and willingness to comply with the law. The financial considerations security concerns are not mitigated. Clearance is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on May 15, 2016, seeking the continuation of her clearance eligibility required for her position with a federal contractor. After reviewing the information gathered during the background investigation, the Department of Defense (DOD) issued a Statement of Reasons (SOR) on October 26, 2017, alleging security concerns under Guideline F (financial considerations). Applicant answered the SOR on June 21, 2018, and requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA).

DOHA assigned the case to me on September 12, 2018, and issued a notice of hearing on November 6, 2018, setting the hearing for December 19, 2018. Applicant

requested a delay due to health problems on December 18, 2018. I rescheduled the hearing for January 11, 2019. At the hearing, the Government offered seven exhibits (GE 1 through 7). Applicant objected to GE 3 - an unauthenticated summary of her interview with a background investigator, and I excluded the document. GE 3 was made part of the record, but it was not considered as evidence. Applicant testified and submitted 10 exhibits (AE 1 through 10). AE 10 was received post-hearing. All exhibits were admitted without objection, except for GE 3, as noted above. DOHA received the hearing transcript (Tr.) on January 23, 2019.

Findings of Fact

Applicant admitted that she failed to timely file her federal and state income tax returns for tax years 2012 through 2015. (SOR ¶ 1.a) She denied the remaining seven SOR allegations (¶¶ 1.b through 1.h), claiming that she had either paid or disputed them. Her SOR admission, and those at the hearing, are incorporated herein as findings of fact. After a thorough review of the record evidence, I make the following additional findings of fact:

Applicant is a 41-year-old employee of a federal contractor. She received an associate's degree in 2003, and has completed several technical certifications thereafter. She married in 2002 and divorced in 2006. She has two children, ages 16 and 4. She receives \$1,800 a month in child support.

Applicant has worked for many federal contractors from 2004 to present, except for a short period of unemployment between July 2008 and August 2008. She also was laid off in October 2015, and worked as an independent contractor for federal contractors between October 2015 and May 2016. She received eligibility for a secret clearance in 2006, which has been continued to present without any issues or concerns, except for those in the SOR. Her current employer hired Applicant in May 2016.

In her response to Section 26 (Financial Record) of her 2016 SCA, Applicant disclosed financial problems, which included her failure to timely file her federal and state tax returns for tax years 2012 through 2014, a state tax lien filed against her for her 2012 unpaid taxes, and several medical and consumer accounts that were delinquent or in collection.

Applicant failed to timely file her federal and state income tax returns for tax years 2012 through 2017. Specifically, she filed her 2012 and 2013 income tax returns in 2017; and filed her federal and state 2014, 2015, 2016, and 2017 income tax returns in 2019. According to her income tax returns, Applicant owes \$3,217 in taxes for tax year 2012. The IRS denied her refund of \$1,755 for tax year 2013 because she filed more than three years late. She owed no taxes for tax year 2014, but she owed \$573 for tax year 2015. For tax year 2016, she owed \$11,314 in taxes; and she owed no taxes for tax year 2017. (See AEs 1, 2, 3, 10(a) and 10(b), and documents submitted with her SOR answer.)

Applicant testified that she agreed with her state tax authorities to pay \$350 a month until the state determines her balance. Any overpayments she makes will be refunded. She is waiting for the IRS to provide her with a final balance.

SOR ¶¶ 1.b and 1.f alleged debts in collection for telecommunications providers. Applicant disputed both accounts, but then paid SOR ¶ 1.f in January 2019. (AE 6) The remaining SOR allegations (¶¶ 1.c through 1.e, 1.g, and 1.h) alleged small medical debts, likely for unpaid insurance co-payments. Applicant paid SOR ¶ 1.h in April 2018. (AE 8) She testified that she either paid or disputed the remaining debts because she could not identify the creditor. Considering the evidence as a whole, I resolve SOR ¶¶ 1.b through 1.h for Applicant.

Applicant testified that she prepared and filed all her income tax returns before 2012. She failed to file her 2012 tax return because of complications resulting from multiple states assessing income taxes against her. She was a stay-at-home employee with work connections to three different states. She did not know how to file her tax returns and procrastinated doing so. (Tr. 72) Applicant visited an IRS office in 2017, and they advised her they were not interested in her 2012 income tax returns, but on her more recent delinquent returns. She retained an accountant to help her file her delinquent income tax returns in 2017.

Concerning her failure to timely file her 2013, 2014, and 2015 income tax returns, Applicant stated that she was under the mistaken belief that if she paid her taxes upfront (by automatic pay deductions), she would not have any problems if she were to file her income tax returns late. She noted that after her uncle, an attorney, corrected her mistaken belief, she has been making every effort to file her income tax returns as soon as possible. Applicant believes that she has been open and forthcoming during the clearance process about not filing her tax returns. She testified that she takes her duties and clearance responsibilities seriously.

The filing of Applicant's income tax return for year 2016 was complicated because she was working as an independent contractor and was missing documents (bank statements and information from her business accounts). Her business failed when she got sick in 2017, and she claimed not having access to her business records and accounts.

Applicant noted that her efforts to file her delinquent income taxes were hampered by her recent medical problems. In about September 2017, she was diagnosed with Cushing's disease. The day before her operation for Cushing's disease, she was diagnosed also with breast cancer. As a result, she underwent two operations and was incapacitated and unable to work for about seven months. During that period, she was unable to make any progress filing her delinquent tax returns.

Applicant expressed sincere remorse for not filing her income tax returns on time. She claimed that she has learned a hard lesson and promised to timely file her income tax returns and to pay her taxes in the future. She is very concerned about losing her

clearance and her job because she is the sole provider for her children and she has serious ongoing medical problems. Applicant's 2016 income tax returns shows that her income was \$64,587; and for tax year 2017 her income was \$84,657. (AE 10(b), AE 3)

Policies

The SOR was issued under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), as amended; and DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive) (January 2, 1992), as amended. The case will be adjudicated under the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AGs), applicable to all adjudicative decisions issued on or after June 8, 2017.

Eligibility for access to classified information may be granted “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. The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

The AG list disqualifying and mitigating conditions for evaluating a person's suitability for access to classified information. Any one disqualifying or mitigating condition is not, by itself, conclusive. However, the AG should be followed where a case can be measured against them, as they represent policy guidance governing access to classified information. Each decision must reflect a fair, impartial, and commonsense consideration of the whole person and the factors listed in SEAD 4, App. A ¶¶ 2(d) and 2(f). All available, reliable information about the person, past and present, favorable and unfavorable, must be considered.

Security clearance decisions resolve whether it is clearly consistent with the national interest to grant or continue an applicant's security clearance. The Government must prove, by substantial evidence, controverted facts alleged in the SOR. If it does, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. The applicant bears the heavy burden of demonstrating that it is clearly consistent with the national interest to grant or continue his or her security clearance.

Persons with access to classified information enter into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability, and trustworthiness of those who must protect national interest as their own. The “clearly consistent with the national interest” standard compels resolution of any reasonable doubt about an applicant's suitability for access in favor of the Government. “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; SEAD 4, ¶ E(4); SEAD 4, App. A, ¶¶ 1(d) and 2(b). Clearance

decisions are not a determination of the loyalty of the applicant concerned. They are merely an indication that the applicant has or has not met the strict guidelines the Government has established for issuing a clearance.

Analysis

Financial Considerations

AG ¶ 18 articulates the security concern for 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 or sensitive information. Financial distress can also be caused or exacerbated by, and thus can be a possible indicator of, other issues of personnel security concern such as excessive gambling, mental health conditions, substance misuse, or alcohol abuse or dependence. An individual who is financially overextended is at greater risk of having to engage in illegal or otherwise questionable acts to generate funds

Applicant's history of financial problems is documented in the record. She failed to timely file her federal and state income tax returns for tax years 2012 through 2015. Additionally, she had seven delinquent or collection accounts. AG ¶ 19 provides disqualifying conditions that raise a security concern and may be disqualifying in this case: "(a) inability to satisfy debts"; "(c) a history of not meeting financial obligations"; and "(f) failure to file or fraudulently filing annual Federal, state, or local income tax returns or failure to pay annual Federal, state, or local income tax as required." The record established the disqualifying conditions, requiring additional inquiry about the possible applicability of mitigating conditions.

Six 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, a death, divorce or separation, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances;

(c) the individual has received or is receiving financial counseling for the problem from a legitimate and credible source, such as a non-profit credit

counseling service, and there are clear indications that the problem is being resolved or is under control;

(d) the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts;

(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; and

(g) the individual has made arrangements with the appropriate tax authority to file or pay the amount owed and is in compliance with those arrangements.

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. Sep. 24, 2013).

Considering the evidence as a whole, I find that none of the mitigating conditions are sufficiently raised by the evidence and are not applicable. AG ¶ 20(a) does not apply because Applicant failed to timely file her taxes for five consecutive years and she finished filing her 2012 and 2016 delinquent tax returns after her clearance hearing. I find her behavior was frequent and recent.

Applicant failed to file income tax returns because some returns were complicated, her procrastination, her negligence seeking professional tax assistance, and her mistaken belief that if she paid any taxes due up-front she did not have to file her returns. She averred that she failed to file her returns any sooner because she was hampered by her recent medical problems. I note that she was not diagnosed with Cushing's disease until September 2017. She presented no evidence of any medical problems before September 2017 that could have prevented her from filing her income tax returns.

Giving due consideration to Applicant's difficulties and challenging life events, I find that she failed to demonstrate financial responsibility under the circumstances. She failed to provide convincing evidence of efforts to timely file her federal and state income tax returns when they were due. Applicant's efforts to file her delinquent income tax returns did not start until after she received the October 2017 SOR. I give Applicant credit for her recent efforts to file her late income tax returns and to pay her delinquent state taxes.

Applicant acknowledged that her failure to timely file her federal and state income tax returns resulted primarily from her lack of diligence. She neglected her legal obligation to timely file her income tax returns over an extended period. "Failure to comply with federal and state tax laws suggests that an applicant has a problem with abiding to well-established Government rules and regulations. Voluntary compliance with rules and regulations is essential for protecting classified information." ISCR Case No. 14-04437 at 3 (App. Bd. Apr. 15, 2016). This is true even if the returns have been filed. See ISCR Case No. 15-03481 at 5 (App. Bd. Sep. 27, 2016).

Applicant's repeated failure to file her federal and state income tax returns in a timely manner does not demonstrate the high degree of good judgment and reliability required of persons granted access to classified information. See, ISCR Case No. 14-01894 at 5 (App. Bd. Sept. 27, 2016). In sum, Applicant failed to demonstrate financial responsibility. The financial considerations security concerns are not mitigated.

Whole-Person Concept

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, and under the whole-person concept. Security Executive Agent Directive (SEAD) 4, App. A, ¶¶ 2(a) and 2(d). I have incorporated my comments under Guideline F in my whole-person analysis. Some of these factors were addressed under that guideline, but some warrant additional comment.

Applicant, 41, has been employed with federal contractors since 2004, and has held a clearance since 2006. Because of her 13 years holding a clearance and working for federal contractors, Applicant was aware she was required to maintain her financial responsibility to be eligible for a clearance. She failed to demonstrate good judgment and reliability. Her failure to timely file her tax returns for six consecutive years shows that she has a problem complying with well-established government rules. At this time, her evidence is insufficient to establish a track record of financial responsibility.

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 delinquent taxes and other delinquent debts, a healthy financial picture, and a track record of behavior consistent with her obligations, she may well be able to demonstrate persuasive evidence of her security clearance worthiness.

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 - 1.h:	For Applicant

Conclusion

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national security interests of the United States to continue Applicant's eligibility for a security clearance. Clearance is denied.

JUAN J. RIVERA
Administrative Judge