



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



In the matter of:

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ISCR Case No. 18-00508

Applicant for Security Clearance

Appearances

For Government: Carroll Connelley, Esq., Department Counsel

For Applicant: *Pro se*

04/23/2019

Decision

HARVEY, Mark, Administrative Judge:

Applicant has several unresolved debts including delinquent federal income taxes and local taxes. She did not make sufficient progress resolving her delinquent debts. Financial considerations security concerns are not mitigated. Eligibility for access to classified information is denied.

Statement of the Case

On July 27, 2017, Applicant completed and signed a Questionnaire for National Security Positions (SF 86) or security clearance application (SCA). (Government Exhibit (GE) 1) On July 3, 2018, 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 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)

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 26, 2018, Applicant responded to the SOR, and she requested a hearing. (HE 3) On October 19, 2018, Department Counsel was ready to proceed. On October 29, 2018, the case was assigned to me. Applicant was unavailable in December 2018, and the case was delayed until January 2019. (HE 1A) On January 17, 2019, the Defense Office of Hearings and Appeals (DOHA) issued a notice scheduling Applicant's hearing for January 24, 2019. (HE 1B) The hearing was delayed due to snow at Applicant's location. (HE 1C) On January 28, 2019, DOHA issued a notice of hearing, setting the hearing for February 8, 2019. (HE 1D) The hearing was held as scheduled using video teleconference.

Department Counsel offered nine exhibits; Applicant did not offer any exhibits; there were no objections to the documents; and they were admitted into evidence. (Tr. 13, 17; GE 1-9) On February 21, 2019, DOHA received a copy of the transcript of the hearing. The record initially closed on April 10, 2019. (Tr. 38-39) I granted an extension to April 17, 2019. (Applicant Exhibit (AE) B) Applicant provided six exhibits. (AE C-AE H)

Findings of Fact

In Applicant's SOR response, she admitted the allegations in SOR ¶¶ 1.d through 1.n. (HE 3) She also provided extenuating and mitigating information. Applicant's admissions are accepted as findings of fact.

Applicant is a 56-year-old supply quality engineer, and she has been employed by her current defense-contractor employer since August 2017. (Tr. 5-6; GE 1) She has never served in the military. (Tr. 6) In 1987, she married, and her children are ages 24 and 27. (Tr. 6) Her husband has driven a truck for several years, and he has been an owner-operator of a truck for the previous two years. (Tr. 7)

In 1981, Applicant graduated from high school, and in 1986, she received a bachelors of science degree in electrical engineering. (Tr. 7-8) She has held a security clearance for 28 years, and there is no evidence that she ever compromised security. (Tr. 19)

Financial Considerations

Applicant attributed most of her financial problems, including her federal income tax debts, to her unemployment for about 30 months and her husband's occasional unemployment. (Tr. 8-9, 22) She was unemployed from 2014 to 2016 and for several months in 2017 until August 2017. (Tr. 8-9) She was continuously employed from 1986 to 2013 by two large defense contractors. (Tr. 8-9) Applicant and her husband have separate households in different states because of employment requirements, which results in additional expenses. (Tr. 26) Applicant's SOR alleges the following financial issues:

SOR ¶¶ 1.a through 1.c allege Applicant failed to timely file her federal income tax returns for tax years 2011, 2012, and 2016. Her 2011 federal income tax return was filed three months late. (Tr. 27) She provided an IRS Form 1040 for her 2012 federal income tax return, and it is undated. (AE C) Her federal income tax transcript shows her 2016 federal income tax return was timely filed. (AE D)

SOR ¶¶ 1.d through 1.g allege Applicant owes federal income taxes totaling \$40,828, for the following amounts and tax years: \$13,695 for 2009; \$4,674 for 2010; \$4,050 for 2011; and \$18,409 for 2014. She made payments to the IRS under an installment program from October 2015 to April 2017. (Tr. 22-23) She stopped making payments in April 2017, due to unemployment. (Tr. 23-24) Her payments under the installment agreement may also have been affected by her Chapter 13 bankruptcy filing. (Tr. 25) She currently owes the IRS about \$75,000. (Tr. 25) In July or August 2018, she contacted the IRS and attempted to establish another installment agreement; however, "it fell through." (Tr. 25-26) Applicant did not know why it was not reestablished. (Tr. 26) Her most recent payment to the IRS under an installment agreement was in April 2017. (Tr. 27)

SOR ¶ 1.h alleges Applicant filed a Chapter 13 bankruptcy in about September 2016, and the bankruptcy was dismissed in about February 2017. Applicant completed financial counseling. (Tr. 29) The bankruptcy court wanted her to pay \$1,600 monthly, and she considered this amount to be unaffordable. (Tr. 29) The bankruptcy was dismissed. (Tr. 29; GE 8)

SOR ¶ 1.i alleges Applicant had a mortgage in the amount of \$448,867, and her mortgage was foreclosed around 2016. For one year, Applicant made her mortgage payments using funds from her 401(k) account. (Tr. 30) During her unemployment, she was unable to make payments on her mortgage, and she had "to walk away." (Tr. 31) She did not know how much the bank lost on the sale of her home. (Tr. 31) Her Chapter 13 documentation filed in September 2016, indicated the value of her residence was \$293,609, the amount of the mortgage debts were first mortgage: \$417,160 and second mortgage: \$24,800, and the unsecured portion of the debt was about \$148,000. (GE 8 at 17-18) As of May 3, 2017, her mortgage arrearage was \$32,121. (GE 9 at 3) The mortgage debt is listed on her October 19, 2018 credit report as a foreclosure account with a last payment in February 2016, a balance of \$448,867; however, the past due amount is zero. (GE 5) The current status of the two mortgage accounts is unspecified in her October 19, 2018 credit report. From the information submitted, I infer the foreclosure has been completed, and there is no proof of a deficiency. The debt is resolved.

SOR ¶ 1.j alleges an account placed for collection for \$80. Applicant said she paid this debt. (SOR response) The debt is resolved.

SOR ¶ 1.k alleges a past-due debt of \$693 on a vehicle loan for \$17,892. Applicant indicated she was not current on her vehicle payments. (Tr. 31; AE A, email of Feb. 8, 2019) She said she would provide evidence after the hearing showing the status of the debt; however, she did not provide it. (Tr. 32)

SOR ¶ 1.l alleges a delinquent debt owed to a city for \$2,503; SOR ¶ 1.m alleges a delinquent debt owed to a county for \$1,765; and SOR ¶ 1.n alleges a delinquent debt owed to a school district for \$4,727. These three debts relate to her residence that was foreclosed. (Tr. 32-33) While those three debts may have been paid by the mortgage lender to ensure clear title for the transfer of the property, Applicant may still owe them. (Tr. 33) Applicant did not provide updated status information on the three debts. The three debts are unresolved.

Applicant and her husband's adjusted gross income on their 2015 federal income tax return was \$175,760, and she indicated that part of this income included funds from her 401(k) account. (Tr. 36) She owed the IRS \$22,000 for tax year 2015. (Tr. 36-37)

Applicant's budget shows the following monthly amounts: gross income of \$12,600; net income of \$10,071; expenses of \$5,801; debt payments of \$1,579 (no payment to the IRS listed); and net remainder of \$2,620. (AE E)

A manager where Applicant is employed described Applicant as diligent and highly motivated with exceptional potential. He is a retired Navy officer, and he supports reinstatement of her security clearance. (AE G) Another manager lauded her work performance, positive attitude, and effectiveness. (AE H)

Applicant's post-hearing statement concluded:

I am not trying to avoid my responsibilities, and I am embarrassed that I am even in this position in the first place. To begin this process, I am trying to work with the IRS as well as a credit management company. I have the upmost respect for my Country and my company and would not put either at risk. Just as I love and respect my family and self that is how dearly I hold the responsibility of the clearance. I know if given the opportunity I can work on my finances and clear the concerns that this has set for the granting of the Security Clearance. (AE F)

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 "(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." SOR ¶¶ 1.d through 1.g allege, and Applicant admitted that she owes federal income taxes totaling about \$40,000 for tax years 2009, 2010, 2011 and 2014. Her historical financial record shows a mortgage foreclosure, delinquent local taxes, delinquent vehicle loan, and a Chapter 13 bankruptcy dismissed for failure to make payments. The Government established the disqualifying conditions in AG ¶¶ 19(a), 19(c), and 19(f) requiring additional inquiry about the possible applicability of mitigating conditions.

Seven 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

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)).

(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;

(f) the affluence resulted from a legal source of income; 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. Sept. 24, 2013).

No mitigating conditions apply to all SOR allegations; however, Applicant presented some important mitigating information. Applicant and her spouse had multiple periods of unemployment, and she and her spouse currently have separate households. These unusual circumstances were beyond Applicant's control and caused or contributed to her financial problems. Applicant is credited with mitigating several SOR allegations. Almost all of her federal income tax returns were timely filed, and at present all of them are filed. SOR ¶¶ 1.a, 1.b, and 1.c are mitigated. The dismissal of her Chapter 13 and her mortgage foreclosure were caused by unemployment, and SOR ¶¶ 1.h and 1.i are mitigated. She said she paid the debt for \$80, and SOR ¶ 1.j is mitigated.

Applicant owes about \$75,000 in delinquent federal income taxes,² and she has been employed since August 2017. Her tax debt is for tax years 2009, 2010, 2011, 2014,

² Applicant's SOR alleges a federal income tax debt of \$40,828 in SOR ¶¶ 1.d through 1.g. The SOR does not allege that she owes a total of about \$75,000 in delinquent federal income taxes for tax years in addition to those alleged in SOR ¶¶ 1.d through 1.g. In ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006), the Appeal Board listed five circumstances in which conduct not alleged in an SOR may be considered stating:

(a) to assess an applicant's credibility; (b) to evaluate an applicant's evidence of extenuation, mitigation, or changed circumstances; (c) to consider whether an applicant

and 2015. She under withheld federal income taxes from her pay, and did not pay her federal income taxes in full when due. She has not been making payments to the IRS since August 2017, when she resumed employment.

The Appeal Board clarified 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.” 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).

Applicant failed to provide sufficient evidence of progress resolving her delinquent federal income tax debt, her vehicle debt, and three local tax debts pertaining to her foreclosed residence. Financial considerations security concerns are not 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 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 that guideline, but some warrant additional comment.

has demonstrated successful rehabilitation; (d) to decide whether a particular provision of the Adjudicative Guidelines is applicable; or (e) to provide evidence for whole person analysis under Directive Section 6.3.

Id. (citing ISCR Case No. 02-07218 at 3 (App. Bd. Mar. 15, 2004); ISCR Case No. 00-0633 at 3 (App. Bd. Oct. 24, 2003)). See also ISCR Case No. 12-09719 at 3 (App. Bd. April 6, 2016) (citing ISCR Case No. 14-00151 at 3, n. 1 (App. Bd. Sept. 12, 2014); ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006)). Applicant’s federal income tax debt exceeding \$40,828 for additional tax years not alleged in SOR ¶¶ 1.d through 1.g will not be considered except for the five purposes listed above.

Applicant is 56-year-old supply quality engineer, and she has been employed by her current defense-contractor employer since August 2017. In 1987, she married, and her children are ages 24 and 27. In 1981, Applicant graduated from high school, and in 1986, she received a bachelors of science degree in electrical engineering. She has held a security clearance for 28 years, and there is no evidence that she ever compromised classified information.

A manager where Applicant is employed described Applicant as diligent and highly motivated with exceptional potential. Another manager lauded her work performance, positive attitude, and effectiveness. Her employment record supports reinstatement of her security clearance.

When Applicant and her spouse were unemployed, her family income was significantly reduced and her debts became delinquent. Applicant and her husband had to arrange separate households because of their employment in different states. I have taken into consideration these circumstances beyond her control; however, she did not establish her financial responsibility once she obtained employment. She owed three local tax debts related to her foreclosed residence, and she did not establish resolution of the three debts or payment plans. She did not establish that her vehicle loan is current.

Most importantly, Applicant has a history of delinquent federal income taxes. Her current tax debt totals about \$75,000 for tax years 2009, 2010, 2011, 2014, and 2015.³ When an issue involving taxes arises, an administrative judge is required to consider how the tax debt arose and the payment history on the tax debt.⁴ She did not provide a good reason for failing to resume payments once she obtained employment in August 2017.

³ See ISCR Case No. 14-03358 at 3, 5 (App. Bd. Oct. 9, 2015) (reversing grant of a security clearance, noting \$150,000 owed to the federal government, 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.”).

⁴ See ISCR Case No. 14-05794 at 7 (App. Bd. July 7, 2016) (reversing grant of security clearance and stating, “His delay in taking action to resolve his tax deficiency for years and then taking action only after his security clearance was in jeopardy undercuts a determination that Applicant has rehabilitated himself and does not reflect the voluntary compliance of rules and regulations expected of someone entrusted with the nation’s secrets.”); ISCR Case No. 14-01894 at 2-6 (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, noting two tax liens totaling \$175,000 and garnishment of Applicant’s wages, 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, noting not all tax returns filed, and insufficient discussion of Applicant’s efforts to resolve tax liens). More recently, in ISCR Case No. 14-05476 (App. Bd. Mar. 25, 2016) the Appeal Board reversed a grant of a security clearance for a retired E-9 and cited applicant’s failure to timely file state tax returns for tax years 2010 through 2013 and federal returns for tax years 2010 through 2012. Before his hearing, he filed his tax returns and paid his tax debts except for \$13,000, which was in an established payment plan. The Appeal Board highlighted his annual income of over \$200,000 and discounted his non-tax expenses, contributions to DOD, and spouse’s medical problems. The Appeal Board emphasized “the allegations regarding his failure to file tax returns in the first place stating, it is well settled that failure to file tax returns suggest that an applicant has a problem with complying with well-established government rules and systems. Voluntary compliance with such rules and

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 security 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, 1.b, and 1.c:	For Applicant
Subparagraphs 1.d, 1.e, 1.f, and 1.g:	Against Applicant
Subparagraphs 1.h, 1.i, and 1.j:	For Applicant
Subparagraphs 1.k, 1.l, 1.m, and 1.n:	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 or continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

MARK HARVEY
Administrative Judge

systems is essential for protecting classified information." *Id.* at 5 (citing ISCR Case No. 01-05340 at 3 (App. Bd. Dec. 20, 2002) (internal quotation marks and brackets omitted).