



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



In the matter of:)
)
 REDACTED) ISCR Case No. 18-01103
)
 Applicant for Security Clearance)

Appearances

For Government: Nicholas T. Temple, Esq., Department Counsel
For Applicant: *Pro se*

11/19/2018

Decision

MATCHINSKI, Elizabeth M., Administrative Judge:

Applicant did not timely file her Federal and state income tax returns for tax years 2013 and 2014. Her Federal income tax return for tax year 2014 was filed in June 2018, but her ongoing failure to file her delinquent returns for 2013 and her state income tax return for 2014 casts doubt about her judgment and reliability. Clearance is denied.

Statement of the Case

On May 4, 2018, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) to Applicant, detailing a security concern under Guideline F, financial considerations. The SOR explained why the DOD CAF was unable to find it clearly consistent with the national interest to grant or continue security clearance eligibility for her. The DOD CAF took the action under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AG) effective within the DOD on June 8, 2017.

Applicant responded to the SOR on May 29, 2018, and requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA). On July 18, 2018, the case was assigned to me to conduct a hearing to determine whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. On August 6, 2018, I scheduled a hearing for September 17, 2018.

At the hearing, three Government exhibits (GEs 1-3) were admitted. A June 25, 2018 letter forwarding the proposed GEs to Applicant was marked as a hearing exhibit (HE 1) for the record but not admitted in evidence. Seven Applicant exhibits (AEs A-G) were admitted in evidence. Applicant testified, as reflected in a transcript (Tr.) received on September 26, 2018.

Findings of Fact

The SOR alleges under Guideline F that Applicant failed to file, as required, her Federal and state income tax returns for tax years 2013 and 2014 (SOR ¶ 1.a). Applicant admitted the allegation, but indicated that she had completed her tax returns for tax year 2014 as of May 29, 2018. After considering the pleadings, exhibits, and transcript, I make the following findings of fact.

Applicant is a 65-year-old widow with a 29-year-old son, who has had mental-health issues since he was a young child. Her son lives with her, and he has Social Security disability income. Applicant has a bachelor's degree awarded in June 1982. She spent most of her career in the commercial sector. In June 2015, she lost her employment of 33 years when she was laid off during a reduction-in-force. She was unemployed until August 2016, when she began working in the defense industry as a technical content manager for her current employer. (GEs 1, 3; Tr. 47, 50-51.)

Applicant did not file her Federal and state income tax returns when they were due for tax years 2013 and 2014. She filed for an extension to October 2014 to file her income tax returns for tax year 2013. Shortly before the deadline, her son was hospitalized for six weeks from October 2014 to November 2014. Insurance claims show that the institutional provider filed medical claims with Applicant's then insurer for \$18,084 for her son on October 14, 2014, and for \$18,084 on November 1, 2014. Applicant had medical issues of her own from January 2014 through May 2015. (AE D.) She did not file her tax returns for 2013, but paid the Internal Revenue Service (IRS) an estimated tax liability of \$462. When her Federal and state income tax returns for 2014 were due in 2015, she attempted to file for an extension using tax software but was unsuccessful because she had not filed her income tax returns for 2013. She made a Federal tax payment of \$400 for tax year 2014 at the tax deadline without submitting her tax return. (GE 2; AE E; Tr. 40-42.)

On July 28, 2016, Applicant completed and certified to the accuracy of a Questionnaire for National Security Positions (SF 86) for a DOD security clearance needed for access to military bases without an escort. (Tr. 45.) In response to financial record inquiries concerning whether she had failed to file or pay any Federal, state, or other taxes,

Applicant indicated that she had failed to file state income taxes for 2013, but that she had satisfied a tax assessment of \$196 in May 2016. (GE 1.)

On September 26, 2017, Applicant was interviewed by an authorized investigator for the Office of Personnel Management (OPM). She volunteered that she prepares and files her income tax returns, and that she failed to file her Federal and state income tax returns for tax year 2013. She asserted that she paid a \$500 late filing fee, but had not yet filed her returns for 2013. She denied any intention to evade taxes and attributed her failure to file to procrastination; to having to locate some paperwork needed for her tax returns for tax year 2013; and to feeling overwhelmed at times about filing her tax returns. Applicant stated that she had filed her returns for subsequent tax years. She explained that she was considering hiring a professional accountant to file her tax returns for 2013 and all income tax returns due in the future. (GE 3.) She did not recall at the time that she had also not filed her income tax returns for tax year 2014. (Tr. 40.)

On October 25, 2017, Applicant was re-interviewed by telephone. She admitted she had not yet filed her delinquent Federal and state income tax returns for tax years 2013. She clarified that she paid fees of \$500 to the IRS and \$196 to the state for not filing her returns for tax year 2013. (GE 3.)

In response to a January 23, 2018, request from the DOD CAF, Applicant provided on March 23, 2018, her IRS tax account transcripts for tax years 2013 through 2016. The IRS account transcripts showed that she had paid the IRS \$426 in April 2014 for tax year 2013 and \$400 in April 2015 for tax year 2014, with no returns filed for those tax years. She filed her Federal tax return for tax year 2015 on time and was entitled to a \$170 refund on adjusted gross income of \$69,447. She submitted her Federal income tax return for tax year 2016 within the extended deadline and was issued a Federal tax refund of \$2,387 on adjusted gross income of \$36,372. As of May 23, 2018, state tax records showed that she paid \$196 in May 2016 for tax year 2013, and \$200 on April 15, 2015, for tax year 2014. Tax returns had not been received by the state for tax year 2013 or 2014. She filed her state income tax returns on time for tax year 2015 and 2016. She paid \$146 for tax year 2015 and was credited \$1,216 for tax year 2016. (GE 2.)

Applicant filed her Federal income tax return for tax year 2014 on June 1, 2018, using tax software. She was assessed penalties for late filing and late payment. She paid almost \$277 on August 21, 2018, in full resolution of her Federal tax delinquency for tax year 2014. (AE E; Tr. 42-43, 52.) As of her hearing in September 2018, she had completed her state income tax return for tax year 2014 using tax software, but she had not submitted it. She expected a state tax refund of \$500 for tax year 2014. (Tr. 52.)

Applicant had not filed her Federal or state income tax returns for tax year 2013 as of her September 17, 2018 hearing. (Tr. 51-52.) It is too late to file online for tax year 2013 so she has to obtain the paper forms to file the returns. (Tr. 43, 54.) She believes that she has a “mental block against [filing] taxes.” She consulted psychotherapists and behavioral therapists “probably before 2014 and 2015” about her anxiety in that regard. (Tr. 46, 53-54.) She also has “trouble with the paperwork and getting all the records together because

[she is] a little bit disorganized, especially with paperwork, and [she tends] to put things off.” (Tr. 47.) She finds tax preparation confusing but has not sought professional assistance because gathering the paperwork is her responsibility, and she has difficulty doing it. (Tr. 56-57.)

Applicant had not filed her Federal and state income tax returns for tax year 2017 as of September 2018, but she had an extension to file to mid-October 2018. (Tr. 57.) When asked about her intention regarding filing her tax returns on time in the future, she responded:

Well, I can't give you a big guarantee, but I will try because this is kind of a big mess. And I'm not sure if I will be working next year on April 15th, but I'll have plenty of time to get the paper—get the things together, get all the papers together. I've had some medical issues, so that's kind of, you know, I come home and I just go to bed. But, you know, I mean, basically it's my responsibility. It's my—you know, I'm not saying that those things are the reasons why I haven't done it, but it is definitely my big—my big sore spot. And it doesn't really make sense, because I think that I would have had more money in refunds if I had filed my taxes on time and, you know, found the paperwork to do the insurance correctly and, you know, the medical deductions and all that stuff. (Tr. 64-65.)

Applicant's annual gross income is approximately \$85,000. (Tr. 58.) She has an investment portfolio with a value exceeding \$500,000 as of late April 2018. (AE A.) She has a mortgage on her home that she repays at \$2,248 per month. As of early June 2018, the principal balance of her mortgage loan was \$203,565. She has more than \$400,000 in equity in her home. (AE B.)

A military officer familiar with Applicant's work performance attested that her attention to detail and commitment to her duties is invaluable. She has been an “overall contributor” to the organization's success. He has “utmost confidence” in her dedication and her abilities to execute her duties, and he considers her to be of “great moral character.” In his opinion, Applicant has demonstrated that she is worthy of being trusted with the security clearance needed to perform her work more effectively. (AE G.)

A co-worker described Applicant as “efficient, detail-oriented, and extremely competent.” Applicant has been extremely responsible and a leader when it comes to meeting project schedules with quality. She has demonstrated an understanding of complex technical content and high interpersonal skills. This co-worker highly recommends Applicant as a valuable asset. (AE F.)

Policies

The U.S. Supreme Court has recognized the substantial discretion the Executive Branch has 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). When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are required to be considered in evaluating an applicant's eligibility for access to classified information. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overall adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(a), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The 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 national security eligibility will be resolved in favor of the 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. Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." The applicant has the ultimate burden of persuasion to obtain a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon 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 that 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. Section 7 of EO 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." See also EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline F: Financial Considerations

The security concerns about financial considerations are articulated in AG ¶ 18:

Failure 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. . . .

The Appeal Board explained the scope and rationale for the financial considerations security concern in ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012) (citation omitted) as follows:

This concern is broader than the possibility that an applicant might knowingly compromise classified information in order to raise money in satisfaction of his or her debts. Rather, it requires a Judge to examine the totality of an applicant's financial history and circumstances. The Judge must consider pertinent evidence regarding the applicant's self-control, judgment, and other qualities essential to protecting the national secrets as well as the vulnerabilities inherent in the circumstances. The Directive presumes a nexus between proven conduct under any of the Guidelines and an applicant's security eligibility.

Applicant did not timely file her Federal and state income tax returns for tax years 2013 and 2014. She did not intend to evade any taxes and paid what she estimated she owed when the tax returns were due. Even so, Guideline F security concerns are established when an individual fails to comply with her tax filing obligations whether or not any taxes are owed. Disqualifying condition AG ¶ 19(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," applies.

Applicant has the burden of establishing that matters in mitigation apply. Regarding possible mitigation under the AGs, one or more of the following conditions under AG ¶ 20 may apply:

- (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 person has received or is receiving 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; 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.

Applicant's Federal and state income tax returns for 2013 were due in October 2014 because she had timely requested an extension of the filing deadline. Her Federal and state income tax returns for 2014 were due in April 2015 because she did not obtain the six-month automatic extension of the filing deadline.¹ Her initial noncompliance was not recent, but she had not filed any of her delinquent tax returns by the issuance of the SOR on May 4, 2018. As of her September 2018 hearing, she had not filed her Federal and state income tax returns for tax year 2013 or her state income tax return for tax year 2014. Her failure to comply with her tax-filing obligation is an ongoing course of conduct that is not mitigated under AG ¶ 20(a).

Applicant has a case for partial mitigation under AG ¶ 20(b) in that her son had serious mental-health issues that led to his hospitalization shortly before her income tax returns were due for tax year 2013. Applicant submitted some medical insurance claims information (AE D) for herself and her disabled son from January 2014 through May 2015, which could explain some delay in filing her income tax returns for tax year 2014 as well. However, AG ¶ 20(b) requires that an individual act responsibly once the crisis has passed, and Applicant has not provided sufficient evidence of unforeseen circumstances or situations outside of her control that could justify the inordinate delay in addressing her delinquent tax returns for 2013 and 2014. She attributed her difficulty in filing her tax returns to psychological issues ("mental block" and anxiety) for which she sought treatment before 2015, but she managed to file her tax returns for 2015 and 2016 on time. She was unemployed from June 2015 until August 2016 and yet did not gather the paperwork needed and file all of her delinquent tax returns. AG ¶ 20(b) does not fully apply.

AGs ¶¶ 20(c), 20(d), and 20(g) have some applicability because she filed her Federal income tax return for tax year 2014 in June 2018, after she received the SOR. She had her state income tax return for 2014 ready for electronic filing as of her September 2018 security clearance hearing, but inexplicably had not submitted her return.

Applicant is credited with filing her income tax returns for tax years 2015 and 2016 on time. This shows some ability to comply with her tax-filing obligations, notwithstanding her reported anxiety about tax filing and difficulties in gathering her paperwork. Even where tax problems have been corrected and an applicant is motivated to prevent such problems in the future, the administrative judge is not precluded from considering an applicant's trustworthiness in light of longstanding prior behavior evidencing irresponsibility. See e.g.,

¹ The state allows for an automatic six-month extension to file the state income tax return provided Applicant paid at least 80% of the total amount of taxes due on or before the due date. However, the taxpayer is required to apply for the extension for it to be granted.

ISCR Case No. 14-01894 at 5 (App. Bd. Aug. 2015). The Appeal Board has long held that the failure to file tax returns suggests a problem with complying with well-established government rules and systems. See e.g., ISCR Case No. 14-04437 (App. Bd. Apr. 15, 2016). Moreover, the Appeal Board recently reaffirmed that the timing of corrective action is an appropriate factor to consider in applying AG ¶ 20(g). See e.g., ISCR Case No. 17-01382 at 4 (App. Bd. May 16, 2018) (citing ISCR Case No. 17-01807 at 3-4 (App. Bd. Mar. 7, 2018)). In reversing favorable clearance grants to applicants with tax issues by DOHA judges in ISCR Case No. 17-01382 (App. Bd. May 16, 2018) and ISCR Case No. 16-01211 (App. Bd. May 30, 2018), the Appeal Board noted that applicants who only begin to address their delinquent tax returns after having been placed on notice that their clearance might be in jeopardy may not comply with laws, rules, and regulations when their immediate interests are not imperiled.

Applicant was placed on notice as of her July 2016 SF 86 that failure to file tax returns when required by law was an issue for the DOD in granting security clearance eligibility. During her September 2017 interview and on receipt of January 2018 interrogatories from the DOD CAF, Applicant was reminded that her tax matters were of concern. As of her September 2018 hearing, she had not filed three of the four delinquent tax returns. While there is nothing in the Directive that requires an individual to resolve all of the SOR concerns before she can be granted a security clearance, doubt persists about whether she can be counted on to comply with her tax filing obligations in the future. Her testimony that she “will try because this is kind of a big mess” does not inspire confidence in her ability or willingness to attend to this important civic and legal responsibility. The financial considerations security concerns are not fully mitigated.

Whole-Person Concept

In assessing the whole person, the administrative judge must consider the totality of an applicant’s conduct and all relevant circumstances in light of the nine adjudicative process factors in AG ¶ 2(d). The analysis under Guideline F is incorporated in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under that guideline, but some warrant additional comment.

The security clearance adjudication involves an evaluation of an applicant’s judgment, reliability, and trustworthiness in light of the security guidelines in the Directive. See ISCR Case No. 09-02160 (App. Bd. Jun. 21, 2010). Applicant’s dedication to her work with a defense contractor is unassailable, and there is no indication that she has exercised poor judgment on the job. Applicant understandably was distracted by her son’s mental health issues requiring hospitalization when her tax returns for 2013 were due. Applicant showed good judgment in seeking professional help to address her anxiety about filing tax returns. However, Applicant’s ongoing inattention to her tax return filings for tax year 2013, without adequate justification, raises considerable doubt about whether she fully appreciates the importance of complying with her tax-filing obligations. The Appeal Board has repeatedly held that the government need not wait until an applicant mishandles or fails to safeguard classified information before denying or revoking security clearance eligibility. See, e.g., ISCR Case No. 08-09918 (App. Bd. Oct. 29, 2009) (citing *Adams v.*

Laird, 420 F.2d 230, 238-239 (D.C. Cir. 1969)). 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 v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990). Under Appeal Board precedent, an applicant who waits to address tax issues until his or her immediate interests are at stake does not show sound judgment and reliability. Her failure to give priority to such an important obligation as filing tax returns required by law causes lingering doubt about her security worthiness that has not been fully mitigated.

Formal Finding

Formal finding for or against Applicant on the allegation set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, is:

Paragraph 1, Guideline F:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant

Conclusion

In light of all of the circumstances, 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.

Elizabeth M. Matchinski
Administrative Judge