



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



In the matter of:)
)
) ISCR Case No. 18-01622
)
Applicant for Security Clearance)

Appearances

For Government: Chris Morin, Esq., Department Counsel
For Applicant: *Pro se*

July 17, 2019

Decision

TUIDER, Robert, Administrative Judge:

Applicant failed to mitigate security concerns under Guideline F (financial considerations). Clearance is denied.

Statement of the Case

On August 30, 2017, Applicant submitted a Questionnaire for National Security Positions (SF-86). On June 26, 2018, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline F. The SOR detailed reasons why DOD CAF was unable to find that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.

On August 8, 2018, Applicant answered the SOR and elected to have her case decided on the written record in lieu of a hearing. A complete copy of the file of relevant material (FORM), dated August 28, 2018, was provided to her by letter on August 29, 2018. Applicant received the FORM on November 5, 2018. She was afforded a period of 30 days to file objections and submit material in refutation, extenuation, or mitigation.

Applicant timely submitted a 46-page response to the FORM. On December 20, 2018, the case was assigned to me. Department Counsel submitted six documents with his FORM, marked as Items 1 through 6. Applicant's response to the FORM is marked Item 7. Items 1 through 7 are admitted into evidence.

Findings of Fact

Background Information

Applicant is a 47-year-old quality auditor employed by a defense contractor since April 2017. (Item 3) She seeks a security clearance in conjunction with her current employment.

Applicant graduated from high school in 1990, and attended junior college from 1990 to 1992, but did not earn a degree. She married her current husband in 2013. Applicant was previously married two times, and both of those marriages ended by divorce. She has two adult stepchildren. (Item 3)

Financial Considerations

Applicant's SOR lists 15 allegations -- failure to file her 2015 and 2016 Federal income tax returns, a \$2,000 debt to the Federal Government for delinquent taxes, and 13 delinquent consumer accounts totaling \$23,904. In her SOR Answer, Applicant admits each of the allegations. These allegations are further established by her November 2017 and May 2018 credit reports, as well as by her Office of Personnel Management Personal Subject Interviews (OPM PSI) conducted in February and March 2018. (SOR ¶¶ 1.a – 1.o.; Items 1, 2, 4, 5, 6)

In Applicant's SOR Answer, she claimed that she was "actively resolving [her] debts," and had hired a tax preparation company to file all of her back taxes. She also stated that her 2014 Federal income tax returns were ready to file. Her failure to file her 2014 Federal income returns was not alleged in the SOR. (Item 2)

Department Counsel noted that Applicant claimed that she filed her 2015 and 2016 Federal income tax returns and that a \$2,100 consumer debt was current. He also noted that Applicant failed to provide any documentary evidence that her Federal income tax returns were filed, nor had she provided any documentary evidence that her \$2,000 in unpaid taxes or her remaining 13 consumer accounts had been paid, were the subject of a payment plan, or were otherwise settled or resolved.

Applicant explained that she did not file her 2015 and 2016 Federal income tax returns because she was working as a contractor in Kuwait and was waiting until she returned to the United States to file her returns with a tax preparer familiar with filing taxes on U.S. derived income while employed in a foreign country. Applicant was employed overseas from December 2015 to April 2017. Applicant stated that she incurred estimated penalties of \$2,200 for filing her 2016 returns after the due date and had set up a payment plan with the IRS. (Items 2, 4) During her OPM PSI, Applicant

stated that she would set up a payment plan by August 2018 to address her remaining SOR debts. (Item 4)

Applicant's FORM response contained documentation dated March 5, 2018, showing that her 2015 and 2016 Federal income tax returns had been filed, with her receiving respective refunds of \$3,741 and \$1,337. (Item 7) In that same response, she submitted documentation that her first \$250 installment had been debited from her checking account towards her \$2,000 delinquent tax debt on October 9, 2018. (Item 7). It is unclear from the record why Applicant's refunds were not applied to her delinquent tax debt.

Department Counsel's FORM discussed specific shortcomings of Applicant's SOR answer, and emphasized long-standing DOHA case law concerning the necessity for applicants to provide mitigating documentation. Except as discussed above, Applicant's SOR Answer and FORM Response contained no documentation that addressed her remaining SOR debts.

Applicant concluded her response to the FORM by stating that her personal debt had not compromised her integrity to hold a security clearance and that she had not engaged in any illegal or questionable acts to generate funds nor had she had sources of unknown income. (Item 7)

Policies

This case is adjudicated 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 adjudicative guidelines (AG), which became effective on June 8, 2017.

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 to be used 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, administrative judges apply the guidelines in conjunction with the factors listed in AG ¶ 2 describing the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), 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.”

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 the applicant or proven by Department Counsel.” The applicant has the ultimate burden of persuasion to obtain a favorable clearance 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 the applicant may deliberately or inadvertently fail to safeguard 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 EO 10865 provides that adverse 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

Financial Considerations

AG ¶ 18 articulates the security concern for financial problems:

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. Affluence that cannot be explained by known sources of income is also a security concern insofar as it may result from criminal activity, including espionage.

AG ¶ 19 provides four disqualifying conditions that could raise a security concern and may be disqualifying in this case: “(a) inability to satisfy debts;” “(b) unwillingness to satisfy debts regardless of the ability to do so;” (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.” Based on the evidence contained in the record, AG ¶¶ 19(a), 19(b), 19(c) and 19(f) are applicable. Further review is necessary.

AG ¶ 20 lists six potentially mitigating conditions under these facts:

(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; and

(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 explained an applicant's responsibility to prove 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*. (You already said this above)

ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013).(deletion cures orphan)

Applicant has not yet fully established any of these conditions except for AG ¶ 20(g). The principal reason, of being deployed overseas, proffered by Applicant for not timely meeting her 2015 and 2016 filing responsibility does not constitute good faith as contemplated by the Directive, or as defined by the DOHA Appeal Board precedent, and accordingly does not fully mitigate the security concern raised by her financial conduct. Applicant avers that while working in Kuwait, she decided to wait until she returned to the United States to deal with her taxes. This belies the fact that Kuwait is a developed and modern country offering international telephone and internet connectivity as well as postal and commercial mail capabilities; all of which, singularly and collectively, could and should have been used by Applicant to timely prepare and file her tax returns. There is no evidence in the record documenting that Applicant sought or received an extension to file her tax returns late.

Although Applicant filed her 2015 and 2016 Federal income tax returns and established a payment plan to repay her delinquent taxes in 2018, her failure to timely file her tax returns and resolve her delinquent accounts precludes finding she has the good judgment and reliability needed to be cleared for access to classified information. Applicant must demonstrate that she has acted reasonably under the circumstances. Beyond the statement she provides in her SOR answer, the record does not establish when or how Applicant intends to resolve the remaining delinquencies.

In addition to evaluating the facts and applying the appropriate adjudicative factors under Guideline F, I have reviewed the record before me in the context of the whole-person factors listed in AG ¶ 2(d). Applicant is presumed to be a mature, responsible citizen. Nonetheless, without sufficient information, including corroborating documentation, suggesting that her long-standing financial problems are being addressed, doubts remain about her suitability for access to classified information. Protection of the national interest is the principal focus of this adjudication. Accordingly, those doubts must be resolved against Applicant.

Applicant chose to rely on the written record, but failed to submit sufficient evidence to supplement the record with relevant and material facts regarding her circumstances, articulate her position, or mitigate the financial security concerns. She failed to offer evidence of financial counseling or provide documentation regarding her efforts to address her delinquent debt. Absent such information, financial considerations security concerns remain.

Formal Findings

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline F:	AGAINST APPLICANT
Subparagraphs 1.a – 1.o:	Against Applicant

Conclusion

In light of the record as a whole, it is not clearly consistent with the national interest to grant Applicant national security eligibility. Clearance is denied.

ROBERT TUIDER
Administrative Judge