



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
) ISCR Case No. 19-01324
)
Applicant for Security Clearance)

Appearances

For Government: Aubrey M. De Angelis, Esq., Department Counsel
For Applicant: *Pro se*

December 16, 2019

Decision

GLENDON, John Bayard, Administrative Judge:

This case involves security concerns raised under Guideline F (financial considerations). Applicant failed to file her federal and state income tax returns as required for tax years 2014, 2015, and 2017, and she failed to fully pay her federal tax obligations for tax years 2014 through 2018. National security eligibility for access to classified information is revoked.

Statement of the Case

On June 2, 2016, Applicant submitted a security clearance application (SCA) seeking to renew a previously granted clearance. On June 20, 2019, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent Applicant a Statement of Reasons (SOR) alleging security concerns under Guideline F. The DOD CAF acted under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended (Exec. Or.); DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (December 10, 2016) (AG) effective for all adjudicative decisions on or after June 8, 2017.

Applicant responded to the SOR on July 17, 2019, and elected to have the case decided on the written record in lieu of a hearing. She admitted all or part of the seven SOR allegations and provided one document and a written statement setting forth certain facts in mitigation. Previously, she had responded to two sets of interrogatories regarding her tax-filing and payment history and a summary of her May 16, 2018 background interview.

Department Counsel submitted the Government's written case in an undated File of Relevant Material (FORM), which included six attached documents identified as Items 1-6. A complete copy of the FORM was provided to Applicant, who was afforded an opportunity to file objections, submit a written response, and documents to refute, extenuate, or mitigate the security concerns raised by the SOR allegations. In a response received by DOHA on July 23, 2019, she provided a one-page statement with no attachments in mitigation of the issues raised in the SOR and the FORM.

In her response to the FORM, Applicant raised no objection to the admission of FORM Item 6, which included an unauthenticated report of investigation summarizing Applicant's May 16, 2018 background interview. In her FORM, Department Counsel had advised Applicant that she had the right to object to the admissibility of this evidence as unauthenticated. Department Counsel also informed Applicant that she had failed to sign her earlier responses to DOHA's interrogatories, as required. In her response to the FORM, Applicant commented that she thought she had signed her interrogatory response and had not intentionally refused to sign the document. I conclude that she adopted her interrogatory responses by virtue of making this statement in her response to the FORM and thereby adopted the summary of her background interview with the intent that it be included in the written record in this case. I have marked Items 1 through 6 attached to the FORM as Government Exhibit (GE) 1-6, respectively. All documents, including Applicant's FORM response, are admitted without objection. The case was assigned to me on November 19, 2019.

Findings of Fact

I have incorporated Applicant's admissions in her response to the allegations set forth in SOR ¶¶ 1.a-1.g in my findings of fact and have noted her denials. Applicant's personal information is extracted from GE 4, her SCA, unless otherwise indicated by a parenthetical citation to the record. After a thorough and careful review of the pleadings, the Government's FORM, and the documentary evidence in the record, I make the following findings of fact:

Applicant, 60, has married twice and divorced once. She has been separated from her current husband for a number of years and has had no recent contact with him. She has three adult children from her first marriage. In 1977, she earned a high school diploma. Since 2006, she has worked as an inspector for a DOD contractor. She has also worked part time since 2009 as a child-care provider. Applicant was granted a security clearance in 2007 in connection with her employment with the defense contractor. With

the submission of her June 2016 SCA, she seeks to renew her clearance eligibility. (GE 6 at 5-6.)

In her SCA, she disclosed that she had failed to file her 2014 and 2015 federal and state tax returns as required because she did not have the funds to pay her taxes. She also wrote that she planned “to resolve this shortly.” In her May 2018 background interview, she discussed her failure to file and pay only as to tax years (TY) 2014 and 2015. She estimated that she owed \$2,000 for each of the two years. She said that she intended to file and pay her taxes in 2018. Her response to DOHA’s interrogatories revealed for the first time that she also had failed to file her federal TY 2017 return on time and had failed to pay her federal taxes each year from TY 2016 through 2018 in addition to TY 2014 and 2015. She disclosed that she owes approximately \$17,000 in back taxes. (GE 6 at 8, 12.)

With her interrogatory responses, Applicant also provided IRS account transcripts for TY 2014 through 2018. The transcripts reflect she filed her TY 2014 return on June 17, 2019; her TY 2015 return on June 10, 2019; and her TY 2017 return on April 15, 2019. The TY 2016 transcripts evidenced that Applicant’s 2016 return was filed on August 7, 2017 and that she had filed an extension, giving her until October 15, 2017 to file. Accordingly, this return was filed in a timely manner. The TY 2018 transcript shows that her return was filed on June 3, 2019, without an extension. On August 30, 2017, the IRS agreed to an installment payment plan of \$100 per month for TY 2016. The 2016 tax transcript shows that she made monthly payments of \$100 for 19 months starting in October 2017 and ending in April 2019, leaving a balance due for TY 2016 of about \$2,000. (GE 6 at 18-19, 20-33.)

The SOR alleges that Applicant failed to file her federal and state tax returns as required for a four-year period, TY 2014 through 2017, and that she owed delinquent taxes for the five-year period TY 2014 through 2018 in the approximate amount of \$18,000. Applicant admitted these allegations, except she denied that her TY 2016 federal and state tax returns were not filed. She also explained that she had entered into an installment agreement to pay her delinquent federal taxes for TY 2016, but that agreement was suspended in mid-2019 due to the filing of her TY 2014, 2015, 2017, and 2018 federal returns earlier in 2019.

This evidence, along with Applicant admissions in her SOR response, establish the facts alleged in the SOR, except for the allegation of late filing for TY 2016. According to the transcripts, she now owes approximately \$21,000 in delinquent federal taxes. In a letter dated July 8, 2019, the IRS accepted Applicant’s newly proposed installment-payment plan to pay \$288 per month towards her back taxes. In her July 23, 2019 response to the FORM, she provided no evidence of any payments under this agreement. (GE 3 at 3; GE 6 at 20-33.)

With respect to her state tax returns, Applicant wrote in her interrogatory response that she filed these returns on March 22, 2019 (TY 2014 and 2015); June 29, 2017 (TY 2016); March 22, 2019 (TY 2017); and April 12, 2019 (TY 2018). Assuming that she filed

for an extension to file her 2016 return after April 15, 2017, as she did with the IRS, her TY 2016 and 2018 returns were timely filed and her TY 2014, 2015, and 2017 state returns were not filed as required. She claims that she owes less than \$100 in delinquent state taxes. In response to DOHA's interrogatory request for state tax account transcripts for the years in question, she wrote that her state tax authority does not provide annual account transcripts or the equivalent. She did provide a letter from the state tax authority with respect to tax year 2016, which shows that she owed a nominal amount for that year. (GE 5 at 9.)

In her SCA, background interview, and again in her SOR response, Applicant explained that she fell behind on her tax filings and payments because she was unable to pay her taxes when they were due. She claims this was due to illness and two knee surgeries, one in 2014 and a second in 2015. She asserts, without supporting evidence, that she lost income because of these and other serious medical problems. That may be true, but her tax transcripts reflect that any loss of income was more than offset by other factors. Using her 2014 income as a baseline, her adjusted gross income increased almost \$15,000 in 2015; \$1,000 in 2016; \$9,000 in 2017; and almost \$6,000 in 2018. In each year, her taxes were not fully paid due to insufficient withholding or a failure to pay quarterly estimated taxes as a 1099 self-employed, independent contractor working in her part-time, child-care position. (GE 6 at 20-33.)

The record reflects that Applicant received financial counseling with respect to her consumer and medical debts. With the assistance of a debt-consolidation firm, she paid off her credit cards and other debts and was basically debt free by the end of 2017. The record contains no evidence that she received any financial counseling from a legitimate and credible tax advisor, nor is there any evidence, except her history of medical problems, as to why she did not attempt to address her unfiled tax returns and tax debts until 2019, with the single exception of her TY 2016 returns and delinquent taxes for that year. (GE 6 at 8-10.)

Policies

"[N]o 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 applicants 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 § 2.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines 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 and 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 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.

Clearance decisions must be made “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance 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. 15-01253 at 3 (App. Bd. Apr. 20, 2016).

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 burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531.

Analysis

Guideline F, Financial Considerations

The security concern under this guideline is set out in AG ¶ 18 as follows:

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. . . . An individual who is financially overextended is at greater risk of having to engage in illegal or otherwise questionable acts to generate funds. . . .

This concern is broader than the possibility that a person might knowingly compromise classified information to raise money. It encompasses concerns about a person's self-control, judgment, and other qualities essential to protecting classified information. A person who is financially irresponsible may also be irresponsible, unconcerned, or negligent in handling and safeguarding classified information.

Applicant's admissions in her SOR answer, response to the FORM, and the documentary evidence in the record establish the following potentially disqualifying conditions under this guideline: AG ¶¶ 19(a) ("inability to satisfy debts"), 19(c) ("a history of not meeting financial obligations"), and 19(f) (failure to file . . . annual Federal, state, or local income tax returns or failure to pay annual Federal, state, or local income tax as required").

The following mitigating conditions are potentially applicable:

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;

AG ¶ 20(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;

AG ¶ 20(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;

AG ¶ 20(d): the individual initiated and is adhering to a good-faith effort to repay creditors or otherwise resolve debts; and

AG ¶ 20(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 dilatory behavior with respect to the filing of her tax returns and the payment of her taxes is recent, frequent, and occurred year after year under

circumstances that were not so unusual as to make it unlikely to recur. This behavior cast doubts upon her current reliability, trustworthiness, and good judgment. AG ¶ 20(a) is not established.

Applicant attributes her inability to pay her taxes to lost income caused by her knee surgeries and recurring illnesses. These excuses in no way affected her ability to earn a living during the 2014-to-2018 period or to file her tax returns on her own or with the assistance of a tax advisor. She claims that she lost pay due to being ill and was unable to work at times, but she failed to provide any evidence to support that claim. As noted, her annual income actually increased every year over the relevant period. This fact undercuts her claim that her poor health was the cause of her failure to pay her taxes. Moreover, the evidence demonstrates that Appellant failed to withhold sufficient taxes from her income or pay a sufficient amount of estimated taxes to cover her tax liability each year. To the extent that Applicant's health was a contributing factor to her tax delinquencies, she failed to act responsibly under the circumstances. AG ¶ 20(b) is only partially established.

Applicant presented no evidence that she received counseling to address her tax delinquencies. She did receive counseling to help her with her consumer and medical debts. She prioritized, however, paying these debts off a year or two before she began to deal with her tax-filing delinquencies and indebtedness, with the exception of her 2016 taxes. Applicant presented a July 2019 letter from the IRS showing that she finally was able to reach an installment payment plan with the IRS to begin to pay all of her past-due taxes, not just one random year. This constitutes evidence that she is beginning to resolve her tax problems, but in the absence of evidence of any payments under this new installment agreement, the IRS letter does not constitute clear evidence that her problem is being resolved. AG ¶ 20(c) is not established.

As noted, Applicant has initiated a good-faith effort to resolve her tax debts, which first required her to file her tax returns. The absence of a track record of payments under the new installment agreement, however, renders it impossible to characterize her efforts as adhering to that agreement. AG ¶ 20(d) is not established.

Applicant has filed her federal tax returns and claims that she has also filed her state tax returns. She has made appropriate arrangements with the IRS to begin to pay her delinquent taxes. Since those arrangements were finalized just a few days prior to the close of the record, there is no evidentiary basis upon which it can be concluded that she is in compliance with her arrangements with the IRS. AG ¶ 20(g) is partially established.

Whole-Person Concept

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. In applying the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a

security clearance by considering the totality of the applicant's conduct and all relevant circumstances and applying the adjudicative factors in AG ¶ 2(d). These factors are:

- (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.

I have incorporated my comments under Guideline F in my whole-person analysis and applied the adjudicative factors in AG ¶ 2(d). Some factors warrant additional comments. I have taken into account Applicant's age and maturity. As a mature person, she knew better than to ignore her tax responsibilities, especially as a holder of a security clearance. As her income increased over the years, she emphasized the elimination of her consumer debts at the expense of meeting her obligations as a U.S. citizen to file and pay her taxes through the payment of an appropriate amount of withholding taxes every pay period. I have considered the seriousness of her behavior, and I have weighed the fact that she eventually filed her tax returns, but only after she applied to renew her clearance and it became evident that her clearance was in jeopardy. From the date of her filing of her SCA in 2016, she has represented to the Government that she intends to resolve her tax problems in the near future. She did not, however, begin to address her taxes in earnest until 2019.

After weighing the disqualifying and mitigating conditions under Guideline F, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns raised by her untimely tax filings and her delinquent tax debt.

Formal Findings

I make the following formal findings on the allegations in the SOR:

Paragraph 1. Guideline F:	AGAINST APPLICANT
Subparagraphs 1.a - 1.g:	Against Applicant

Conclusion

I conclude that it is not clearly consistent with the national security interests of the United States to continue Applicant's eligibility for access to classified information. Clearance is revoked.

John Bayard Glendon
Administrative Judge