



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



In the matter of:)
)
) ISCR Case No. 19-01513
)
)
Applicant for Security Clearance)

Appearances

For Government: Adrienne Driskill, Esq., Department Counsel
For Appellant: Mark A. Myers, Esq.

February 26, 2020

Decision

GLENDON, John Bayard, Administrative Judge:

This case involves security concerns raised under Guideline F (financial considerations). Applicant failed to file her federal personal income tax returns for the years 2012 through 2017, and failed to provide satisfactory evidence to show that she had filed her state tax returns for the same period. Applicant’s evidence was insufficient to mitigate the security concerns raised by her six-year pattern of not filing her tax returns. National security eligibility for access to classified information is denied.

Statement of the Case

On April 11, 2018, Applicant filed a security clearance application (SCA). The Department of Defense Consolidated Adjudications Facility (DOD CAF) sent Applicant a Statement of Reasons (SOR) on May 31, 2019, setting forth three allegations under Guideline F. The DOD CAF acted under Executive Order 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) promulgated in Security Executive Agent

Directive 4, *National Security Adjudicative Guidelines* (Dec. 10, 2016), effective for all adjudicative decisions on or after June 8, 2017.

On August 28, 2019, Applicant responded to the SOR. She requested a hearing before an administrative judge of the Defense Office of Hearings and Appeals (DOHA). On October 31, 2019, the case was initially assigned to another administrative judge, and was reassigned to me on November 26, 2019. DOHA issued a notice of hearing on November 19, 2019, scheduling the hearing on January 9, 2020.

I convened the hearing as scheduled. Department Counsel presented three proposed exhibits. I marked her exhibits as Government Exhibits (GE) 1 through 3, and I marked her exhibit list as Hearing Exhibit I. Applicant testified, called one additional witness, and offered no documentary evidence at the hearing, but requested additional time to submit proposed exhibits after the hearing. I granted her request and gave her a deadline of February 14, 2020. On February 10, 2020, her attorney's office emailed seven proposed exhibits to DOHA, which I marked as Applicant's Exhibits (AE) A through G. I marked that email as Hearing Exhibit II. Absent any objections, I admitted all exhibits into the record. DOHA received the hearing transcript (Tr.) on January 21, 2020.

Findings of Fact

Applicant's personal information is extracted from her SCA unless otherwise indicated by a parenthetical citation to the record. After a thorough and careful review of the pleadings, including Applicant's admissions to two of the three SOR allegations, Applicant's testimony and that of her witness at the hearing, and the documentary evidence in the record, I make the following findings of fact:

Applicant, 60, has worked as a software engineer for a major U.S. Government contractor since 2003. She has held a security clearance since at least 2008. She was awarded a bachelor's degree in 1981 and a master's degree in 2008. In addition, she has earned two professional certifications in her field. She married in 1987 and divorced in 2003. She has no children. She has owned her present home since at least 2011. (Tr. at 39, 40, 42.)

In her SCA, Applicant disclosed that she had not filed her federal and state income tax returns for the tax years (TY) 2012 through 2016. In her September 2018 background interview, she stated that she had filed for an extension to file her TY 2017 tax returns that expired in October 2018. In her SOR answer, she admitted that she still had not filed her 2012 through 2016 federal and state tax returns and that she had not filed her 2017 returns. At the hearing, she testified that these returns remained unfiled and that she had also not filed her TY 2018 federal and state tax returns. Since her failure to file her 2018 returns was not alleged in the SOR, this fact will only be used to determine mitigation. (GE 2 at 2; Tr. at 52, 57-58.)

Applicant claims that she did not file her federal and state personal income tax returns for TY 2012 through 2015 because her 2010 and 2011 federal tax returns were

under audit by the IRS. The IRS examined certain tax deductions taken by Applicant in those returns. She testified that she felt strongly that her deductions were proper. The IRS disagreed in part and the audits were concluded in January 2016. The IRS advised her in a letter what deductions were permissible and what were not. She was also advised that she would be subjected to penalties for failing to file her returns on time. (Tr. at 47-51, 60-63.)

As noted, the IRS disallowed some of Applicant's contested tax deductions in 2010 and 2011. She claimed that she has paid the taxes due for 2010. Applicant Exhibit A, however, reflects that she has an outstanding balance of about \$2,000. The exhibit also notes that the balance is "currently not collectable." She admitted that she owed about \$16,000 for 2011. She claims she is paying that debt, but AE B reflects that her last payment on her TY 2012 taxes was made in April 2016. AE B also states that as of March 2019, this tax debt is "currently not collectable." (AE A at 2; AE B at 4; Tr. at 47-52.)

Since the completion of the audits for TY 2010 and 2011 in 2016, Applicant has not filed her returns for TY 2012 through 2015, nor has she filed her more recent returns. She claims that she had extenuating circumstances that prevented her from filing. Her 2012 tax returns were not filed on time because the mortgage lender on her home was seeking to foreclose on the property. In 2013, she was successful in obtaining a modification of the mortgage loan. At that point, she was involved in a contentious dispute with the IRS over her tax deductions. She refused to file any further returns until the issue was resolved because she knew she would be claiming the same deductions in her returns for the years after 2011. (Tr. at 45-48.)

Applicant had a number of other excuses for her delay after the completion of the audit. The main one was that she learned in 2016 that she had mold in her house. She began to experience health issues due to the mold. She was on disability for four months at the end of 2016. More mold was discovered in 2017. She was also busy traveling to Europe for work. On one occasion her roof leaked and caused additional mold problems. On another occasion, her garage was flooded causing more mold. She kept her tax paperwork in the garage. She was frequently displaced from her house while contractors repaired the recurring mold damage. At the time of the hearing, she had been living in a hotel for most of 2019. (Tr. at 37-38, 52-58.)

Applicant hired a tax advisor a week or two before the hearing. The advisor testified that the returns would be filed by February 6, 2020, because that was the deadline imposed by the IRS. She had contacted the IRS and was told that the IRS did not require Applicant to file returns for TY 2012 and 2013. Applicant testified that her home contractors are helping her by removing boxes of financial records from her residence so that she can turn the records over to her tax advisor. After the hearing, no evidence was provided that the delinquent federal tax returns were filed. Also, no reason was given to explain the lack of such evidence. (Tr. at 16-17, 57-58.)

After the hearing, the office of Applicant's counsel provided the first page of state tax returns for TY 2014 through 2017. The exhibits only reflect Applicant's identifying

information, filing status, and single personal exemption. There is no indication that these returns have been completed, signed, and filed or whether she owes any state taxes. There is also no accompanying representation from Applicant, her tax advisor, or her attorney that these returns have been filed. Furthermore, there is no explanation for the omission of state tax returns TY 2012 and 2013, the first two years alleged in the SOR. The record is similarly silent as to whether Applicant filed her 2018 state tax returns. Applicant Exhibit C, however, is a letter from her state tax authorities. It reflects that Applicant's state taxes for TY 2014 were fully paid in 2018. (AE C-G.)

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.

The following disqualifying conditions under this guideline potentially apply:

AG ¶ 19(a) (“inability to satisfy debts”),

AG ¶ 19(c) (“a history of not meeting financial obligations”), and

AG ¶ 19(f) (“failure to file . . . annual Federal, state, or local income tax returns . . . as required.”)

AG ¶¶ 19(c) and 19(f) are established by Appellant's SOR admissions, testimony, and the documentary evidence in the record. Applicant failed to meet her financial obligation to file her tax returns. However, AG ¶ 19(a) is not established because there is no SOR allegation that Applicant had a tax debt or that she was unable to satisfy it. SOR ¶¶ 1.a and 1.b allege Applicant's failure to file federal and state tax returns for TY 2012 through 2017. SOR ¶ 1.c alleges that the IRS had selected for audit Applicant's federal income tax returns for TY 2010 and 2011. This subparagraph also alleges that as of the date of the SOR, Applicant's taxes for those years "remain unresolved." The evidence established that the audits were resolved by 2016. Department Counsel moved to delete the second sentence of SOR ¶ 1.c regarding the absence of a resolution of the audits. (Tr. at 72.) I grant that request.

The fact that the IRS audited two years of Applicant's tax returns is not disqualifying. The SOR does not allege that Applicant owes any taxes for either TY 2010 or 2011. Department Counsel declined to amend the SOR to conform to the evidence at the hearing that Applicant had an outstanding federal tax debt for TY 2011. She elected instead to leave the unpaid 2011 tax debt for consideration as part of the entirety of the record evidence. (Tr. at 72-73.)

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 overdue 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.

The facts established by the record evidence demonstrate that Applicant's tax filing delinquencies are recent, frequent, and did not occur under any unusual circumstances.

Applicant's failure to file her tax returns was due to her refusal to comply with her filing requirement, and her desire to prove that the IRS was wrong in not allowing all of her tax deductions. After the audits were concluded in 2016, Applicant blames her failure to file her past and ongoing returns on various excuses, none of which persuade me that the circumstances she experienced in the more recent years were the actual cause of her failure to file her state and federal tax returns. The current state of the record is that she still has not filed her federal tax returns, and has not convincingly established that she has filed her state tax returns, for the limited period of TY 2014 through 2017. Applicant's actions cast doubts about her reliability, trustworthiness and good judgment. Moreover, she has not acted responsibly under the circumstances. AG ¶¶ 20(a) and 20(b) are not established.

AG ¶ 20(c) is partially established. Days before the hearing, Applicant hired a tax professional to assist her in preparing her delinquent tax returns. The absence of evidence that Applicant has filed her 2014 to 2017 federal tax returns by the deadline imposed by the IRS suggests that the tax advisor was unsuccessful in meeting the deadline or the last date for the submission of additional evidence in this proceeding. With respect to the partial state tax returns in the record, I conclude that the evidence is inconclusive that these returns were fully prepared, signed, and filed. I note that I received no requests from Applicant for additional time to make an additional submission. Given the state of the record, there are no clear indications that Applicant's tax filing delinquencies are under control or are being resolved.

AG ¶ 20(d) is inapplicable because the SOR contains no allegation regarding any debts owed by Applicant.

AG ¶ 20(g) is not established. There is no evidence in the record that Applicant has filed any tax returns for the years in question. As noted above, I reject Applicant's scant evidence regarding her state tax returns as persuasive evidence that any state returns have been completed, signed, and filed.

Whole-Person Analysis

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), specifically: (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). After weighing the disqualifying and mitigating conditions under Guideline F and evaluating all of the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns raised by her tax filing delinquencies.

Formal Findings

Guideline F, Financial Considerations:	AGAINST APPLICANT
Subparagraphs 1.a through 1.c:	Against Applicant

Conclusion

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

John Bayard Glendon
Administrative Judge