



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
) ISCR Case No. 20-00197
)
Applicant for Security Clearance)

Appearances

For Government: Carroll Connelley, Esq., Department Counsel
For Applicant: *Pro se*

10/07/2021

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant mitigated the security concerns under Guideline F, financial considerations. Eligibility for access to classified information is granted.

Statement of the Case

On April 8, 2020, the Defense Counterintelligence and Security Agency (DCSA) issued to Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline F, financial considerations. The action was taken 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) effective within the DOD on June 8, 2017.

On April 30, 2020, Applicant answered the SOR and requested a hearing before an administrative judge. The case was assigned to me on July 2, 2021. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on July 27, 2021. The hearing was convened through the Defense Collaboration Services on August 17, 2021.

The Government offered exhibits (GE) 1 through 7. Applicant offered Applicant Exhibits (AE) A through D. There were no objections and the exhibits were admitted into evidence. The record was held open until August 31, 2021, to allow Applicant to submit additional documents. She provided AE E through H that were admitted without objection, and the record closed. (Hearing Exhibit I is the Department Counsel's response indicating no objections.) DOHA received the hearing transcript on August 24, 2021.

Findings of Fact

Applicant denied the sole SOR allegation. After a thorough and careful review of the pleadings, testimony, and exhibits submitted, I make the following findings of fact.

Applicant is 49 years old. She earned a bachelor's degree in 1996. She married in 1995 and divorced in 2000. She has two children from the marriage, ages 26 and 23. She has a child from another relationship who is 19 years old. She is the president and chief executive officer of her own company, a small business, since 2009. (Transcript (Tr.) 16-17; GE 1)

The sole allegation in the SOR is that Applicant owes delinquent federal taxes in the amount of \$90,875 for tax year 2015. Applicant disputes the allegation. She testified that after filing her 2015 federal income tax return she owed taxes. She stated that she runs her business as an "S" corporation and when she files her tax returns the income from her business is included in her personal income and taxable. When she completed her 2015 federal income tax return in 2016, she was unable to pay the tax liability because her company had lost a large contract that normally would have generated cash income to pay the tax liability. Instead she had a cash flow problem. She made a \$5,000 payment toward her 2015 tax debt, but could not pay the whole amount. She testified that at the time she filed the appropriate forms with the IRS to arrange a payment plan. She stated she never received a response from the IRS on her request. She is the sole owner of the company and is personally responsible for all taxes owed, personal and payroll. (Tr. 18-20, 26)

Applicant provided a spreadsheet indicating the payments she made to the IRS to be applied to her 2015 tax debt. It shows that in 2016 she made a \$5,000 payment and her 2016 tax refund of \$1,863 was applied to the 2015 debt. Applicant testified that in November 2017 she made an electronic payment of \$71,340 to the IRS for her 2015 personal income tax debt. At the time, she believed that this satisfied her 2015 tax debt and it was resolved. However, she testified that this payment was applied to her company's payroll tax account. Because it was not applied to her personal income tax debt, penalties and interest continued to accrue. She provided a copy of her letter to the IRS from April 2020 requesting the IRS reallocate the payment to her personal account instead of her payroll account, which she believes was erroneous. The letter also requested that because she believed the IRS made an error that penalties and interest be waived. She submitted the letter as an Offer in Compromise (OIC). Applicant testified that she did not become aware until late 2018 that her personal income tax payment was

applied to her payroll account. A federal tax lien for \$65,638 was entered in August 2017. (Tr. 20, 26, 28-32, 38, 45; GE 5; AE A)

Applicant testified that she was late in paying her payroll taxes at the time, but they were paid. The \$71,340 she paid was applied to the penalties and interest that had accrued for the payroll taxes. She said she paid the payroll taxes, but on the wrong day, hence accruing penalties and interest. (Tr. 20, 26, 28-32, 38, 45; GE 5; AE A)

Applicant testified that she was proactive in working with a local IRS agent to negotiate a payment plan and pay the tax owed. Applicant said that the local IRS agent would not provide a letter attesting to Applicant's attempts to resolve the issues because it was against IRS policy to do so. Applicant requested the IRS assign a case manager to address the problems with her case and correct the allocation. She was advised that one has not been assigned to-date and has been delayed due to the pandemic. Applicant noted her frustration because she believed the local IRS agent could see that Applicant had made payments, but could not make changes until a case manager was assigned and it went through the IRS review process. (Tr. 18, 21, 23-27 GE 6)

Applicant admitted that she did not timely pay her 2015 federal income taxes due to corporate financial issues, but she has paid the debt. She understands the importance of paying her taxes and debts on time. The unexpected loss of a large contract created a cash flow problem, and she was unable to pay the large tax debt on time. She takes full responsibility for her tax debts and explained she did the best she could at the time. She further testified that in 2016 when she realized she was unable to fully pay the 2015 tax debt, she contacted her corporate attorney who advised her that the fees associated with his service likely would be considerable due to the delays normally associated with dealing with the IRS. He recommended that she deal directly with the IRS. (Tr. 26, 37, 50-51)

On her February 2019 security clearance application (SCA), Applicant disclosed her IRS debt and that she had requested a payment plan with the IRS, but was waiting for a response. During her April 2019 background investigation she also disclosed this information and circumstances regarding her tax debt. (GE 1, 7)

Applicant's 2015 IRS tax transcript shows the \$5,000 payment in October 2016 when she filed her tax return and her 2016 tax year refund that was applied to her debt. A refund of \$39,028 from tax year 2019 was applied to the debt. The transcript reflects that in March 2021, Applicant submitted an offer in compromise to the IRS. No response to date was reflected in the transcript. Three payments of \$15,000 were made in May, June, and August 2021. The transcript reflects a balance owed of \$11,196. Applicant also provided a copy of a \$25,000 check to the IRS from February 2021. She stated that she requested the IRS apply a portion of the amount to satisfy any remaining balance owed for tax year 2015. Applicant stated in her post-hearing letter that she believed her payments should satisfy her 2015 tax debt. She believes she should have a credit in her account based on her payments to the IRS. She was advised by the IRS that release of the lien could take up to 60 days. She testified that she timely paid all of her taxes for the

subsequent tax years and she is paying estimated taxes to ensure there is sufficient money to pay future taxes owed. (Tr. 26-35, 39-42; GE 2; AE F, G, H)

Applicant explained that it is still important to her that the \$71,328 that she paid toward her 2015 personal income tax debt be allocated to her personal account instead of her payroll account. Applicant believes that had the \$71,328 been applied to her personal income tax account and not payroll, she would not have accrued significant penalties and interest. Regardless of how it was applied, Applicant was equally responsible for both. The IRS decides which delinquent account to apply payments to. (Tr. 42-44, 47, 49)

A character letter from a business associate of Applicant's describes her as a resilient leader who openly communicates with clients. There are no delinquencies or past-due debts reflected in Applicant's March 2019 and February 2020 credit reports. (GE 3, 4; AE D)

Policies

When evaluating an applicant's national security eligibility, the administrative judge must consider the AG. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are 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, these guidelines are applied in conjunction with the factors listed in 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." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.15 states an "applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining 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 an applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to 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 concern relating to the guideline for financial considerations is set out 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. 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 conditions that could raise security concerns. The following is potentially applicable:

(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.

Applicant failed to timely pay her 2015 federal income taxes. There is sufficient evidence to support the application of the above disqualifying condition.

The guideline also includes conditions that could mitigate security concerns arising from financial difficulties. The following 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, 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
- (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 tax problem began when she was unable to timely pay a large tax debt owed because her business lost a lucrative contract, resulting in a cash flow problem. This was exacerbated when a payment to resolve the tax debt was applied to her payroll taxes instead of her personal income taxes. It is noted that she owed penalties and interest due to a late payment on her payroll taxes at the time. So although Applicant intended that her payment be applied to her personal income tax debt, late fees were owed, so it was not erroneous on the part of the IRS to apply it to them. But it may have caused additional penalties and interest to accrue on her personal taxes.

Applicant has made independent payments and subsequent tax years' refunds have been applied to the tax debt. I found her testimony credible in that she has been attempting to resolve the tax debt and has not ignored the problem. She disclosed the issue on both her SCA and during her background interview. The evidence supports that this aberration occurred under unique circumstances and it is unlikely to recur in the future. It does not cast doubt on Applicant's current reliability, trustworthiness, and good judgment. AG ¶ 20(a) applies.

The loss of a large contract impacted Applicant's cash flow and her ability to timely pay her income taxes. This condition was beyond her control as she did not anticipate losing the contract or the income associated with it. When she made the \$71,340 payment

in 2017 to the IRS, she anticipated it would satisfy her personal income tax debt for 2015. However, she also owed payroll taxes. She was personally responsible to pay these taxes. She failed to timely do so. Her failure to timely pay her payroll tax was not beyond her control. The IRS applied her payment to her payroll tax debt. She has subsequently provided evidence to show she has made payments to resolve the personal income tax debt. The balance owed as of August 31, 2021, reflected on her 2015 tax transcript, is \$11,196. I am confident Applicant will resolve the remaining balance timely. There is evidence to conclude that once Applicant realized the payment was applied to the payroll tax penalties and interest, she acted responsibly in addressing the personal income tax debt. I found her testimony credible that despite her efforts to engage the IRS and expedite the process she was unsuccessful. However, I find she did not act responsibly in failing to timely pay her payroll taxes, which she is personally responsible to pay. AG ¶ 20(b) does not apply.

There is no evidence Applicant sought financial counseling, which in the future it may behoove her to have an experienced tax accountant involved in the process. I find there is evidence that the problem is being resolved and is under control. I find she has initiated good-faith efforts to pay her tax debt. AG ¶¶ 20(c) partially applies and 20(d) applies.

Although there is not an approved payment plan in place with the IRS, the evidence supports that Applicant has made significant payments to resolve the tax debt. AG ¶ 20(g) has some application.

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 considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my comments under

Guideline F in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under that guideline, but some warrant additional comment.

Applicant failed to timely pay her 2015 income taxes. She has taken significant steps to resolve the debt. The record evidence leaves me with no questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the security concerns arising under Guideline F, financial considerations.

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: FOR APPLICANT

Subparagraphs 1.a: For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national security to grant Applicant's eligibility for a security clearance. Eligibility for access to classified information is granted.

Carol G. Ricciardello
Administrative Judge