



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



In the matter of:)
)
) ISCR Case No. 21-01932
)
Applicant for Security Clearance)

Appearances

For Government: Bryan J. Olmos, Esq., Department Counsel
For Applicant: *Pro se*

07/22/2022

Decision

HARVEY, Mark, Administrative Judge:

Applicant does not have an established payment plan for her federal income tax debt which is about \$90,000. She has been aware of her federal income tax debt for about 10 years. Guideline F (financial considerations) security concerns are not mitigated. Eligibility for access to classified information is denied.

Statement of the Case

On February 25, 2020, Applicant completed an Electronic Questionnaires for Investigations Processing or security clearance application (SCA). (Government Exhibit (GE) 1) On October 18, 2021, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a statement of reasons (SOR) to Applicant under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960); DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive) (January 2, 1992), as amended; and Security Executive Agent Directive 4, establishing in Appendix A, the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AGs), effective June 8, 2017. (Hearing Exhibit (HE) 2)

The SOR detailed reasons why the DOD CAF did not find under the Directive that it is clearly consistent with the interests of national security to grant or continue a security clearance for Applicant and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

Specifically, the SOR set forth security concerns arising under Guideline F. (HE 2) On March 7, 2022, Applicant provided her response to the SOR, and she requested a hearing. (HE 3)

On April 5, 2022, Department Counsel was ready to proceed. On April 8, 2022, the case was assigned to me. On April 11, 2022, the Defense Office of Hearings and Appeals (DOHA) issued a Notice setting the hearing for May 12, 2022. (HE 1) Her hearing was held as scheduled in the vicinity of Arlington, Virginia using the DOD Microsoft Teams video teleconference system. (*Id.*)

During the hearing, Department Counsel offered eight exhibits into evidence, and all proffered exhibits were admitted into evidence without objection. (Tr. 15, 20-21; GE 1-GE 8) Applicant did not offer any documents for admission into evidence. On May 31, 2022, DOHA received a copy of the transcript. On June 15, 2022, the record closed. (Tr. 92, 99; HE 4) No post-hearing documents were received.

Some details were excluded to protect Applicant's right to privacy. Specific information is available in the cited exhibits and transcript.

Findings of Fact

In Applicant's SOR response, she admitted all of the SOR allegations. (HE 3) She also provided mitigating information. (*Id.*) Her admissions are accepted as findings of fact.

Applicant is a 58-year-old senior quality inspector employed by a DOD contractor for the last 34 months. (Tr. 9-10) Before her current employment, she worked for an automobile company as a senior quality inspector for 42 months and for a life insurance company selling insurance for 21 years (1993 to 2014). (Tr. 11, 23; GE 1) In 1981, she graduated from high school. (Tr. 9) She received an associate's degree, a bachelor's degree in 2016, and a master's degree in industrial organization psychology in 2018. (Tr. 10) In 1999, she married for the second time, and she has two sons who are ages 31 and 39. (Tr. 12)

Financial Considerations

In 2016, Applicant's husband had a surgery, and he was unable to work. (Tr. 53) He returned to work for about 18 months, and then he had another surgery. (Tr. 53) He receives or received Social Security disability of \$1,300 per month, and he has part-time employment where he earns \$850 per month. (Tr. 53, 77-78) He is 69 years old, and he may be receiving Social Security retirement rather than Social Security disability payments. (Tr. 90) Applicant was off from work for six months due to knee surgeries in September 2017 and March 2018, and her pay was reduced 50 percent while she was not working. (Tr. 54-55; SOR response) She received treatments for cancer from September 2020 to March 2021. (SOR response) Applicant's life was also complicated because of caring for a sick parent and traveling to visit her parent. (Tr. 42) Her annual income is about \$45,000. (Tr. 77)

The SOR alleges the following financial concerns:

SOR ¶¶ 1.a and 1.b allege Applicant filed for bankruptcy under Chapter 13 of the Bankruptcy Code in March 2018, and this bankruptcy was dismissed in August 2018. She and her husband jointly filed for bankruptcy under Chapter 13 of the Bankruptcy Code in September 2018, and this bankruptcy was dismissed in May 2019. Their first bankruptcy was dismissed possibly because the trustee sent the bills for monthly payments to the wrong employer. (Tr. 55-57) Applicant became briefly unemployed in 2019, and the second bankruptcy filing was dismissed because of her unemployment. (Tr. 58) She is making payments to or paid most of the creditors listed in the bankruptcy documents. (Tr. 58-64) She received financial counseling through the bankruptcy process. (Tr. 87-88)

SOR ¶¶ 1.c and 1.d allege Applicant failed to pay her federal income taxes when due for tax years (TY) 2007, 2008, 2009, 2015, and 2016, and she owes the federal government about \$91,490 for those five TYs. She files her tax returns separately from her husband. (Tr. 86) She was an IRS Form 1099 contractor when she was selling insurance starting around 2007. (Tr. 24-34) She had an IRS audit possibly around 2010 or 2011, and there were changes in her company's payment policies. (Tr. 24-28) Her pay or bank account had an allotment to pay her federal income taxes for about two years, and it paid some of her taxes for TYs 2007 and 2008. (Tr. 28-30) She made inconsistent quarterly tax payments to the IRS because of large variations in her commission-based income. (Tr. 30, 35) When she had extra money available, she made payments to the IRS. (Tr. 30) She realizes now that she should have consistently paid her quarterly taxes. (Tr. 30) Around 2013 or 2014, she started receiving a regular salary, and she was able to make more consistent payments to the IRS. (Tr. 31-32) She estimated she may owe the IRS about \$2,000 for TY 2021. (Tr. 47-48)

The IRS audited Applicant's income and concluded her income was much higher than Applicant believed it was, and the auditor assessed that Applicant owed a substantial federal tax debt. (Tr. 37-38) On July 10, 2012, the IRS recorded three tax liens as follows. (GE 5 at 17)

Tax Year	Assessed	Refile Deadline	Unpaid Balance
2007	September 2011	October 2021	\$17,598
2008	September 2011	October 2021	\$22,671
2009	September 2011	October 2021	\$22,030
Total			\$62,298

On November 28, 2018, in connection with Applicant's bankruptcy filing in September 2018, the IRS filed a Proof of Claim for Internal Revenue Taxes for Applicant and her husbands' bankruptcy with total secured claims of \$67,284 with the following information. (GE 5 at 15)

Tax Year	Date Tax Assessed	Tax Due	Penalty	Interest
2007	September 2011	\$8,420	\$7,603	\$5,770
2008	September 2011	\$17,211	\$9,942	\$6,839
2009	September 2011	\$11,499	\$0	\$0
Total		\$37,130	\$17,546	\$12,608

On November 28, 2018, the IRS filed a Proof of Claim for Internal Revenue Taxes for Applicant and her husbands' bankruptcy with total unsecured priority claims of \$2,227 with the following information. (GE 5 at 15)

Tax Year	Date Tax Assessed	Tax Due	Penalty	Interest
2015	March 2017	\$1,744	\$0	\$186
2016	October 2017	\$279	\$0	\$18
2017	December 2018	\$0	\$0	\$0
Total		\$37,130	\$0	\$204

Applicant said almost all of her tax returns were timely filed. (Tr. 36, 40) She may have filed her federal income tax returns for TYs 2016, 2017, and 2018 in 2021. (Tr. 41-42, 91) However, as indicated in the IRS' filing in Applicant's 2018 bankruptcy, the IRS assessed her federal income taxes for TYs 2016 in October 2017, and for TY 2017 in December 2018. (GE 5 at 15) All of her federal income tax returns are filed except for her return for TY 2021. (Tr. 39)

On November 28, 2018, the IRS filed a Proof of Claim for Internal Revenue Taxes for Applicant and her husbands' bankruptcy with total unsecured general claims of \$21,979 with the following information. (GE 5 at 15)

Tax Year	Date Tax Assessed	Tax Due	Penalty	Interest
2009	September 2011	\$5,908	\$10,107	\$5,963

SOR ¶¶ 1.e and 1.f allege Applicant owes \$2,531 for TY 2018 and \$4,244 for TY 2019. On July 12, 2021, the IRS sent a notice of intent to levy property to Applicant seeking payment of these two federal income tax debts. (GE 3 at 10-11)

SOR ¶ 1.g alleges Applicant has a charged-off debt for \$493. She said she paid the \$493 debt, and the account has a zero balance. (Tr. 66; SOR response) Her April 27, 2021 credit report indicates paid account with a zero balance for this creditor. (GE 7 at 6-7) She said in her SOR response that there was a letter attached; however, there was no such letter attached to her SOR response. (Tr. 66-67; SOR response)

SOR ¶ 1.h alleges Applicant's mortgage is past due in the amount of \$1,678 with a total balance of \$68,366. She said the mortgage was her mother's mortgage, and her mother passed away around 2015. (Tr. 69, 72, 90) Two of Applicant's siblings moved into the house. (Tr. 73) Applicant and three others inherited the property; however, Applicant did not believe her name was on the title to the property. (Tr. 72, 76) A tax lien was filed against the property, and she suggested the IRS may have filed the lien. (Tr. 73, 75) The

tax lien could also have been for delinquent property taxes. The Federal Housing Administration (FHA) guaranteed the mortgage, and the house was foreclosed. (Tr. 74, 89; GE 8 at 5) Her April 27, 2021 credit report indicated for this mortgage account “claim filed with government.” (GE 7 at 2) The state billed Applicant for property taxes; however, delinquent property taxes were not alleged in the SOR. (Tr. 75) She did not believe she was one of the owners of the property. (Tr. 76)

Applicant estimated that she owed the IRS about \$90,000. (Tr. 43, 50) About three months before her hearing, she sent the IRS a proposed payment plan. (Tr. 43, 45-46, 52) The IRS has not responded to her proposal. (Tr. 46) She has not made any payments to the IRS since July 2019. (Tr. 45) She did not provide a copy of her proposed payment plan.

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, “no 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 applicant’s 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, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

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, these guidelines are applied 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, 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 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 “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See Exec. Or. 10865 § 7. Thus, nothing in this decision should be construed to suggest that it is based, in whole or in part, on any express or implied determination about applicant’s allegiance, loyalty, or patriotism. It is merely an indication the applicant has not met the strict guidelines the President, Secretary of Defense, and Director of National Intelligence 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. 95-0611 at 2 (App. Bd. May 2, 1996).

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 ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his [or her] security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

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.

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.

AG ¶ 19 includes disqualifying conditions that could raise a security concern and may be disqualifying in this case: "(a) inability to satisfy debts"; "(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." The record establishes the disqualifying conditions in AG ¶¶ 19(a), 19(c), and 19(f) requiring additional inquiry about the possible applicability of mitigating conditions. Discussion of the disqualifying conditions is contained in the mitigation section, *infra*.

The financial considerations mitigating conditions under AG ¶ 20 are as follows:

(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;

(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;

(f) the affluence resulted from a legal source of income; 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.

In ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013), the DOHA Appeal Board explained Applicant's responsibility for proving the 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*. "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." Directive, Enclosure 2 ¶ 2(b).

Applicant provided some important mitigating information. In 2016, Applicant's husband had a surgery, and he was unable to work. He returned to work for about 18 months, and then he had another surgery. He receives or received Social Security disability of \$1,300 per month, and he has part-time employment where he earns \$850 per month. He is receiving benefits from Social Security.

Applicant was off from work for six months due to two knee surgeries in September 2017 and March 2018, and her pay was reduced 50 percent while she was not working. In 2019, she was briefly unemployed at the time that her bankruptcy was dismissed. She received treatments for cancer from September 2020 to March 2021. Her life was further complicated because of caring for a sick parent and traveling to visit her parent. These circumstances were beyond her control, and they adversely affected her finances. However, "[e]ven if applicant's financial difficulties initially arose, in whole or in part, due to circumstances outside his [or her] control, the judge could still consider whether applicant has since acted in a reasonable manner when dealing with those financial difficulties." ISCR Case No. 05-11366 at 4 n.9 (App. Bd. Jan. 12, 2007) (citing ISCR Case No. 03-13096 at 4 (App. Bd. Nov. 29, 2005); ISCR Case No. 99-0462 at 4 (App. Bd. May 25, 2000); ISCR Case No. 99-0012 at 4 (App. Bd. Dec. 1, 1999)).

Another component under AG ¶ 20(b) is whether Applicant maintained contact with creditors and attempted to negotiate partial payments to keep debts current. She did not prove that she maintained contact with the IRS over the years or that she worked diligently to timely pay her federal income taxes.

Applicant is credited with mitigating SOR ¶¶ 1.a and 1.b because she explained why the bankruptcies were dismissed. She mitigated the debts in SOR ¶¶ 1.g and 1.h because after her and her husband's bankruptcy was dismissed, she paid her debts on her own, except for her federal income tax debt and her mortgage debt. The mortgage debt was resolved through the FHA paying any deficiency.

Applicant estimated that she owes the IRS about \$90,000. She has owed delinquent taxes since the IRS audit in 2011 of her federal income taxes. About three

months before her hearing, she said she sent the IRS a proposed payment plan; however, the IRS has not responded to her proposal.

The Appeal Board clarified that even in instances where an “[a]pplicant has purportedly corrected [his or her] federal tax problem, and the fact that [applicant] is now motivated to prevent such problems in the future, does not preclude careful consideration of [a]pplicant’s security worthiness in light of [his or her] longstanding prior behavior evidencing irresponsibility” including a failure to timely file federal income tax returns. See ISCR Case No. 15-01031 at 3 & n.3 (App. Bd. June 15, 2016) (characterizing “no harm, no foul” approach to an applicant’s course of conduct and employing an “all’s well that ends well” analysis as inadequate to support approval of access to classified information with focus on timing of filing of tax returns after receipt of the SOR).

Applying the Appeal Board’s jurisprudence, SOR ¶¶ 1.c, 1.d, 1.e, and 1.f are not mitigated. She did not prove that she was unable to make greater progress sooner establishing a payment plan with the IRS and paying her federal income taxes. Under all the circumstances, she failed to establish mitigation of financial considerations security concerns.

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), “[t]he ultimate determination” of whether to grant a security clearance “must be an overall commonsense judgment based upon careful consideration of the guidelines” and the whole-person concept. My comments under Guideline F are incorporated in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under that guideline but some warrant additional comment.

Applicant is a 58-year-old senior quality inspector employed by a DOD contractor for the last 34 months. Before her current employment, she worked for an automobile company as a senior quality inspector for 42 months and for a life insurance company selling insurance for 21 years (1993 to 2014). She received an associate’s degree, a bachelor’s degree in 2016, and a master’s degree in industrial organization psychology in 2018.

Applicant provided important financial considerations mitigating information. She provided multiple reasons for her financial difficulties. Aside from her delinquent federal income taxes, she has done a good job paying her creditors and maintaining her financial responsibility.

The evidence against grant of a security clearance is more substantial at this time. Applicant did not establish that she was unable to make greater progress sooner establishing a payment plan for her delinquent federal income taxes and paying her federal income tax debt, which she estimates to total about \$90,000. Her failure to take prudent responsible actions raise unmitigated questions about her reliability, trustworthiness, and ability to protect classified information. See AG ¶ 18.

It is well settled that once a concern arises regarding an applicant's security clearance eligibility, there is a strong presumption against granting a security clearance. See *Dorfmont*, 913 F. 2d at 1401. "[A] favorable clearance decision means that the record discloses no basis for doubt about an applicant's eligibility for access to classified information." ISCR Case No. 18-02085 at 7 (App. Bd. Jan. 3, 2020) (citing ISCR Case No.12-00270 at 3 (App. Bd. Jan. 17, 2014)).

I have carefully applied the law, as set forth in *Egan*, Exec. Or. 10865, the Directive, the AGs, and the Appeal Board's jurisprudence to the facts and circumstances in the context of the whole person. Applicant failed to mitigate financial considerations security concerns.

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:	AGAINST APPLICANT
Subparagraphs 1.a and 1.b:	For Applicant
Subparagraphs 1.c through 1.f:	Against Applicant
Subparagraphs 1.g and 1.h:	For Applicant

Conclusion

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

Mark Harvey
Administrative Judge