



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



In the matter of:)
)
) ISCR Case No. 20-03027
)
Applicant for Security Clearance)

Appearances

For Government: Jeff Nagel, Esq., Department Counsel
For Applicant: Daniel P. Meyer, Esq.

09/29/2022

Decision

COACHER, Robert E., Administrative Judge:

Applicant has not mitigated the financial considerations security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On February 5, 2021, the Defense Counterintelligence and Security Agency Consolidated Adjudications Facility (DCSA CAF) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline F, financial considerations. Department of Defense (DOD) acted 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 effective June 8, 2017 (AG).

Applicant answered the SOR on March 25, 2021, and she requested a hearing before an administrative judge. The case was assigned to me on February 25, 2022. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on May 25, 2022, and the hearing was convened as scheduled on June 23, 2022. The

Government offered exhibits (GE) 1 through 5, which were admitted into evidence without objection. The Government's exhibit list was marked as a hearing exhibit (HE I) and the discovery letter sent to Applicant was marked as HE II. Applicant testified, and offered exhibit (AE) A (pp. 1-51) at her hearing, which was admitted without objection. The record was kept open until August 1, 2022, to allow her to submit additional evidence. She submitted AE B-D, E (pp. 1-155), and F-H, which were admitted without objection. (Note: I did not refer to the tab lettering Applicant used in her exhibits) Based upon the letter submitted by Applicant's prospective facility security officer (FSO) (HE III). I find that jurisdiction exists to hear this case. DOHA received the hearing transcript (Tr.) on July 6, 2022.

Findings of Fact

Applicant admitted the SOR allegation. Her admission is adopted as a finding of fact. After a review of the pleadings and evidence, I make the additional findings of fact.

Applicant is a 48-year-old prospective employee of a defense contractor. She has been offered a position contingent on holding a security clearance. That government contractor is sponsoring her for a clearance. She has had intermittent employment since she was medically retired from the U.S. Army in 2016. She held the rank of major when she was retired. She receives retirement pay from the Army of \$1,400 monthly and a disability pension from the Department of Veterans' Affairs (VA) of \$692 monthly, based upon a 40 percent VA disability rating. She holds a master's degree. She recently married and has no children. (Tr. at 19, 24; GE 1)

The SOR alleged that Applicant failed to timely file her 2013-2017 federal income tax returns. (SOR ¶ 1.a).

Applicant admitted the single allegation in her SOR answer. She provided a variety of reasons why she was unable to timely file her federal tax returns for years 2013-2017. Those reasons include: she was either performing duties as an Army reservist or placed on active duty orders, which created pay/tax issues for her; she rented her house out half the year, which caused tax issues; in April 2014, tax filing time for tax year 2013, she was assigned to a task force requiring her to work 15-18 hours a day so she did not have the time to file her taxes, but she did file for a six-month filing extension; her tax records were stored at her home in a different state and she had little opportunity to access them; she had medical issues involving the functioning of her brain, a condition which was later diagnosed as multiple sclerosis, which ultimately led to her medical retirement from the Army in 2016; she was homeless for approximately 18 months staying with friends on occasion. (Tr. 21-24, 42-43)

Applicant received a lump-sum payment of approximately \$197,000 from a family trust fund in 2016 or 2017. She did not use this money to hire an accountant or tax professional to prepare her unfiled federal returns from 2013-2017. She claimed to interview several certified public accountants about her situation, but she asserted that despite the lump sum payment, she could not afford to pay any of them a fee of \$10,000. She used the proceeds from the trust payment to pay her mortgage

arrearrages, to pay medical expense, and to live on. That fund is now depleted. Applicant claimed that she was unaware of the military tax assistance programs available on military bases to active duty and retired military members. She stated that in 2017-2018, she received some financial counseling assistance from a group that works with military veterans. (Tr. 24, 26, 28-29, 60-61)

In April 2019, Applicant completed interrogatories sent by DCSA CAF adjudicators. As part of her response, she provided wage and income transcripts obtained by her from the IRS for tax years 2013-2017. At that time, she had not filed her federal returns for those years. She stated in her response, "I hope to have all returns finished by December, including 2018." Presumably, her reference to December meant December 2019. She did not file her federal returns by her hopeful deadline. (GE 2)

As stated above, the SOR was issued to Applicant in February 2021. She testified that she hired a tax attorney/CPA to file all of her unfiled federal returns from 2013-2020. Applicant admitted she did not timely file her federal returns for years 2018-2020. Since the unfiled tax returns for those years were not alleged in the SOR, I will not use that evidence for disqualification purposes, but I may use it to assess credibility, for the applicability of any mitigating conditions, and in considering the whole-person factors. Applicant presented documentation showing that her 2013 federal return was filed in August 2022 (AE F); her 2014-2016 returns were filed in November 2021 (AE E, pp. 1, 44, 89); and her 2017 return was filed in August 2022 (AE G).

Applicant testified that she did not deliberately refuse to file her federal tax returns. She needed help with the task and did not get it. Her medical issues impacted her ability to complete her taxes. (Tr. 32-34, 49)

Applicant provided character letters from five colleagues and former supervisors, including two retired Army major generals. All of her references state that Applicant is trustworthy and reliable based upon their personal knowledge of her. They all seem to place the responsibility on the Army for not providing Applicant the proper means to transition out of the service with her medical problems. This they believe ultimately led to her tax problems. All recommend that her clearance be continued.

Policies

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 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(a), 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.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, 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 to obtain 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 about 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

AG ¶ 18 expresses the security concerns for financial considerations:

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.

The guideline notes several conditions that could raise security concerns. I have considered all of them under AG ¶ 19 and the following potentially applies:

(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's admissions and documentary evidence establish that she failed to timely file her 2013-2017 federal tax returns. I find the above disqualifying condition is raised.

The guideline also includes conditions that could mitigate security concerns arising from financial difficulties. I have considered all of the mitigating conditions under AG ¶ 20 and the following potentially apply:

(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; 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.

When a tax issue is involved, an administrative judge is required to consider how long an applicant waits to file his or her tax returns, whether the IRS generates the tax returns, and how long the applicant waits after a tax debt arises to begin and complete making payments. The Appeal Board's emphasis on security concerns arising from tax cases is instructive. See ISCR Case No. 14-05794 at 7 (App. Bd. July 7, 2016 (reversing grant of security clearance and stating, "His delay in taking action to resolve his tax deficiency for years and then taking action only after his security clearance was in jeopardy undercuts a determination that Applicant has rehabilitated himself and does not reflect the voluntary compliance of rules and regulations expected of someone entrusted with the nation's secrets."); ISCR Case No. 14-01894 at 2-6 (App. Bd. Aug. 18, 2015) (reversing grant of a security clearance, discussing lack of detailed corroboration of circumstances beyond applicant's control adversely affecting finances, noting two tax liens totaling \$175,000 and garnishment of Applicant's wages, and emphasizing the applicant's failure to timely file and pay taxes); ISCR Case No. 12-05053 at 4 (App. Bd. Oct. 30, 2014) (reversing grant of a security clearance, noting not all tax returns filed, and insufficient discussion of Applicant's efforts to resolve tax liens).

Applicant stated that there were a number of reasons why she was unable to file her federal tax returns for 2013-2017 in a timely manner. While several of those circumstances were beyond her control, e.g. her medical issues and her medical retirement, some of them were not. She had the financial resources when she received her lump-sum trust fund payment of almost \$200,000 in 2016-2017 to hire a professional to complete her federal tax returns. She chose not to do so. She also failed to inquire about seeking tax assistance from the military tax assistance offices. She finally acted to hire a tax professional in 2021 who filed her missing returns in either June 2021 or August 2022, after the SOR had issued. Applicant's actions do not amount to responsible actions under the circumstances. While it appears Applicant's missing 2013-2017 tax returns are all filed, they are all at least four years late and as much as eight years late. Additionally, she continued her pattern of failing to timely file her federal returns after 2017. Her non-filing and delay in filing shows a lack of reliability, trustworthiness, and good judgment. AG ¶¶ 20(b) and 20(g) do not apply.

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 guideline and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all relevant 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.

I considered Applicant's medical issues that hampered her filing her tax returns, her medical retirement, her personal difficulties in accessing her tax records, and her good character evidence. However, her lack of priority in handling her tax issues over a multi-year period causes me to question her trustworthiness, reliability, and good judgment, and thus, her eligibility for access to classified information.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the 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: AGAINST APPLICANT

 Subparagraph 1.a: Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Robert E. Coacher
Administrative Judge