



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



In the matter of:)
)
-----) ISCR Case No. 21-00772
)
Applicant for Security Clearance)

Appearances

For Government: Aubrey De Angelis, Esq., Department Counsel
For Applicant: Matthew T. Foley, Esq.

02/23/2023

Decision

WESLEY, ROGER C. Administrative Judge

Based upon a review of the case file, pleadings, exhibits, and testimony, Applicant did not mitigate financial consideration concerns. Eligibility for access to classified information or to hold a sensitive position is denied.

Statement of the Case

On January 18, 2022, the Defense Counterintelligence and Security Agency (DCSA) Consolidated Central Adjudications Facility (CAF) issued a statement of reasons (SOR) to Applicant detailing reasons why under the financial considerations guideline the DCSA could not make the preliminary affirmative determination of eligibility for granting a security clearance, and recommended referral to an administrative judge to determine whether a security clearance should be granted, continued, denied, or revoked. The action was taken 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*, (January 2, 1992) (Directive); 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.

Applicant responded to the SOR on February 24, 2022, and requested a hearing. This case was assigned to me on May 23, 2022. A hearing was scheduled for December 13, 2022, via Teams Teleconference Services, and was heard on the scheduled date. At the hearing, the Government's case consisted of six exhibits. (GEs 1-6) Applicant relied on one witness (herself) and 12 exhibits. The transcript (Tr.) was received on December 29, 2022.

Procedural Issues

Before the close of the hearing, Applicant requested the record be kept open to permit her the opportunity to supplement the record with documented proof of a tax claim of the Internal Revenue Service (IRS) filed in Applicant's 2022 Chapter 7 bankruptcy petition. For good cause shown, Applicant was granted 30 days to supplement the record. Department Counsel was afforded two days to respond. Within the time permitted, Applicant documented her Chapter 7 bankruptcy petition and discharge (inclusive of the IRS's proof of claim for tax year 2018). (Tr. 61) Applicant's post-hearing submissions were admitted as AEs (M-O) In her post-hearing submissions, Applicant also supplied a set of IRS regulations covering the liability collection process. This summary is admitted as a hearing exhibit for reference. (HE 1)

Summary of Pleadings

Under Guideline F of the SOR, Applicant allegedly (a) is indebted to the IRS for the amount of \$13,782 for tax year 2016; (b) is indebted to the IRS for \$102,471 for tax year 2018; and (c) accumulated two 13 delinquent consumer debts exceeding \$38,000. Allegedly, these debts have not been resolved.

In her response to the SOR, Applicant admitted all of the allegations with explanations and clarifications. She claimed that the truck debt covered by SOR ¶ 1.d was discharged in her Chapter 7 bankruptcy; even though the consumer creditor has declined to pick up the vehicle. She also claimed that the federal tax debts were associated with her husband's masonry business and are his responsibility to resolve and satisfy.

Findings of Fact

Applicant is a 42-year-old civilian of a defense contractor who seeks a security clearance. Admitted facts are adopted and incorporated by reference. Additional findings of fact follow.

Background

Applicant married in December 2016, separated in December 2019, and divorced in November 2021. (GEs 1-2 and AE K; Tr. 24, 36, 48) She has two children from this marriage: a daughter (age 5) and a son (age 18). (GE 1) She attended college classes

between January 2010 and May 2016, but did not earn a diploma or degree. (GE 1) Applicant reported no military service. (GE 1)

Since March 2020, Applicant has been employed by her current employer as a lobby receptionist. (GE 1; Tr. 31). Between December 2017 and December 2019, she worked for her husband's privately owned masonry business: initially with general assistance to her husband's business and later (beginning in 2018) as an office manager. (GE 2; Tr. 36-39) Before her marriage, she was employed as an assistant manager for a dentist, where she worked for over 12 years. (GE 1; Tr. 24) She has never held a security clearance.

Applicant's finances

Before her marriage in December 2016, Applicant enjoyed good credit and stable finances. Following her marriage in December 2016, she began helping her husband in his masonry business with cleaning and filing. (Tr. 36) By 2018, she had assumed other company tasks and responsibilities, including keeping track of business purchases and payouts and managing the company's payroll. (Tr. 37-40) During her tenure with her husband's company, she aided the company's formal office manager and was given a company business card to facilitate her ability to sign company checks when the office manager was unavailable. (Tr. 40) While Applicant never owned any proprietary interest in her husband's business, held any officer's position in the business, or exercised any control over the business, she and her husband presumably filed joint tax returns for tax years 2017-2018. These tax returns could be expected to include reported income and expenses from her husband's business.

In 2019, an IRS agent visited Applicant's work site. (Tr. 34) During one of the agent's visits, he inquired about her company's 2018 tax debt. (Tr. 41) Applicant acknowledged to the agent her understanding that her husband owed money on his company's 2018 federal taxes. (Tr. 41) Asked why he owed business taxes, she told the agent she did not know. (Tr. 42) While Applicant's involvement with her husband's business in 2018 was very limited, she was listed on the company's signature card. It was her listing on the company's business card that prompted the agent's questions about her husband's company and taxes owed. (Tr. 43)

In April 2019, the IRS filed a notice of federal tax lien against both Applicant and her husband for federal taxes owed for tax year 2016 in the amount of \$13,782. (GE 4; Tr. 43) For this tax year, Applicant and her husband filed separate federal income tax returns due to their late marriage in December 2016. (Tr. 43) Because Applicant had nothing to do with her husband's business before their marriage, she denied any responsibility for the taxes owed for tax year 2016. (GE 4; Tr. 43-44) For further proof that she does not personally owe any federal taxes for tax year 2016, she cited to the Government's failure to file any proof of claim in her January 2022 Chapter 7 bankruptcy petition. (Tr. 45-46) To date, the IRS's 2016 tax lien remains unsettled and unresolved.

In November 2019, the IRS filed a notice of federal tax lien against Applicant exclusively for federal taxes owed for tax year 2018 in the amount of \$102,471. (GE 5 and AE A) The lien covers an original tax assessment of \$17,300, along with added assessments throughout the 2018 tax year for accrued penalties and interest. (GE 5, AE A, and HE 1)

While Applicant has made in-person inquiries to the IRS of why she owes taxes for her husband's business, she has not to date received any substantive assistance from the IRS on how she can resolve this 2018 company tax debt. (Tr. 50-51) Even with her extra jobs, she is not in a current position to address this debt without help from either her ex-husband, her father-in-law (previous owner of her ex-husband's business), or both. (Tr. 29-30, 42, 53-55)

Applicant's stated intentions are to repay the IRS on this 2018 tax debt, but she needs a manageable repayment plan or compromise of the debt with the IRS to do so. (Tr. 55) Applicant assured she will continue to work with her legal counsel and accountant to achieve a compromise of the tax debt that she can safely manage. (Tr. 56) Afforded a post-hearing opportunity to document applications to the IRS for either an installment agreement, abatement of penalties and interest, or compromise of debt, she has not provided any.

Applicant has continued to look to her ex-husband to fulfill his accepted responsibilities for federal taxes owed for tax years 2016 and 2018, both explicit under the terms of their divorce decree and implicit by virtue of his 100% ownership interest in his business. (AE A and K; Tr. 25-28) Nothing in Applicant's divorce decree, however, binds the IRS to pursue her husband exclusively in its enforcement initiatives.

Because Applicant and her ex-husband filed joint federal tax returns for tax year 2018, they became jointly and severally liable for federal income taxes for 2018. And, the IRS federal tax lien for tax year 2018 lists only Applicant and her social security number as the taxpayer covered by the IRS tax lien. (GE 5 and AEs B and O) Presumably, the IRS filed a similar tax lien against Applicant's ex-husband (using her husband's social security number); although, this is not documented in the record. (GEs 5; Tr. 27-28) Whether the IRS ever pursued Applicant's husband to enforce satisfaction of its 2016 and 2018 tax liens is unclear.

Since the issuance of IRS tax liens for tax years 2016 and 2018 in November 2019 against Applicant (and presumably her husband as well), Applicant has taken no documented steps to address her reported tax liabilities for these covered tax years, despite the plethora of payment options available to her. Options available to her since 2019 include applications for installment agreement relief using IRS form 9465. Required information in this request form includes data about the taxpayer's income receipts and affordable monthly payments to facilitate IRS means testing.

Other available tax relief options include (a) claims for refund and requests for abatement using IRS form 843 and (b) offers in compromise based on the taxpayer's

documented ability to pay (calculated by consideration of the taxpayer's income and expenses and asset equity). Neither these latter stated options nor the installment agreement option were apparently availed of by Applicant or her tax accountants (either before her hearing or post-hearing) to seek cancellation, or abatement, or compromise of the covered assessments in issue. Whether Applicant's ex-husband ever addressed the taxes owed by his company for the tax years in issue is unclear.

This is not to minimize the financial hardships Applicant's ex-husband has placed on her and her children. Not only has her ex-husband left her with heavy tax debts that rightfully belong to him, but he has failed to meet the child support obligations he agreed to in his 2017 court-approved parenting plan. (AE L; Tr. 70-71) Nor has Applicant's ex-husband reportedly complied with court-ordered monthly child support payments (\$445 a month) since the entry of the child support order in November 2021. (AE I) Asked whether she had ever considered taking legal steps against her ex-husband to enforce child support compliance, she replied that "I cannot find him." (Tr. 71)

Essentially, from Applicant's accounts, her ex-husband abandoned her and her children and left her to fend for herself in raising her family and covering her ex-husband's tax obligations. Considering all of the facts and circumstances of Applicant's tax and family difficulties, her claims are laden with equities worthy of consideration were such claims to be evaluated *inter se* by a court of competent jurisdiction over the marital disputants. Third parties like the IRS, however, fall outside of the jurisdiction and authority of a state family court and cannot be bound by a state court's orders arising from a marital dispute.

In May 1992, Applicant petitioned for Chapter 7 bankruptcy relief. (AE N) She scheduled assets of \$35,136 and liabilities of \$51,364. Her listed liabilities were comprised of secured claims totaling \$27,741 and unsecured non-priority claims of \$23,364. (AE N) Applicant's non-priority unsecured claims included SOR debts covered by SOR ¶ 1.c (for \$11,087) and SOR ¶ 1.d (for \$27,741).

In an amended Schedule E filing in May 2022, Applicant added a priority IRS 2018 tax debt (\$108,696) to her scheduled unsecured creditors. (AE N) The IRS, in turn, filed a proof of claim in June 2022 in the amount of \$93,504. (AE P) Whether this reduced figure represents a calculated reduction of the tax amount covered by its 2019 tax lien against Applicant for tax year 2018 is unclear.

Applicant's listed secured and unsecured claims were discharged in bankruptcy by order of the bankruptcy court in August 2022. (AE N) Dispositions of both the 2018 and 2016 tax liens remain pending and unresolved.

While both of the consumer debts listed in the SOR (SOR ¶¶ 1.c and 1.d) have been discharged in bankruptcy and are no longer enforceable, Applicant still retains the vehicle covered by SOR ¶¶ 1.d. (Tr. 66-68) Although the discharged creditor has continued to decline taking possession of the vehicle, Applicant's retention of the

vehicle (even without title to the vehicle) does not affect her bankruptcy discharge. (Tr. 68-70)

Policies

By virtue of the jurisprudential principles recognized by the U.S. Supreme Court in *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988), “no one has a ‘right’ to a security clearance.” 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. Eligibility for access to classified information may only be granted “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 AGs list guidelines to be considered by judges in the decision-making process covering DOHA cases. These guidelines take into account factors that could create a potential conflict of interest for the individual applicant, as well as considerations that could affect the individual’s reliability, trustworthiness, and ability to protect classified information. These guidelines include conditions that could raise a security concern and may be disqualifying (disqualifying conditions), if any, and all of the conditions that could mitigate security concerns, if any.

These guidelines must be considered before deciding whether or not a security clearance should be granted, continued, or denied. Although, the guidelines do not require judges to place exclusive reliance on the enumerated disqualifying and mitigating conditions in the guidelines in arriving at a decision.

In addition to the relevant AGs, judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in ¶ 2(a) of the AGs, which are intended to assist the judges in reaching a fair and impartial, commonsense decision based on a careful consideration of the pertinent guidelines within the context of the whole person. The adjudicative process is designed to examine a sufficient period of an applicant’s life to enable predictive judgments to be made about whether the applicant is an acceptable security risk.

When evaluating an applicant’s conduct, the relevant guidelines are to be considered together with the following ¶ 2(d) factors: (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 of the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Viewing the issues raised and evidence as a whole, the following individual guidelines are pertinent herein:

Financial Considerations

The Concern: Failure or inability 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 or 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 acts or otherwise questionable acts to generate funds. . . . AG ¶ 18.

Burdens of Proof

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. See also Exec. Or. 12968 (Aug. 2, 1995), § 3.1.

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

Security concerns are raised over Applicant's reported accumulation of four delinquent accounts. Applicant's delinquent debts are comprised of two federal tax liens filed in 2019 for tax years 2016 and 2018, respectively and two consumer debts totaling more than \$38,000. Applicant's debt delinquencies warrant the application of three disqualifying conditions under the financial consideration guidelines: DC ¶¶ 19(a), "inability to satisfy debts"; 19(c), "a history of not meeting financial obligations"; and 19(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 four admitted debts with explanations and clarifications require no independent proof to substantiate them. See Directive 5220.6 at E3.1.1.14; *McCormick on Evidence* § 262 (6th ed. 2006). Her admitted debts are fully documented and create judgment issues as well over the management of her finances. See ISCR Case No. 03-01059 (App. Bd. Sept. 24, 2004). Although she qualified her admissions with explanations, her admissions can be weighed along with other evidence developed during the hearing.

Financial stability in a person cleared to protect classified information is required precisely to inspire trust and confidence in the holder of a security clearance that entitles the person to access classified information. While the principal concern of a security clearance holder's demonstrated difficulties is vulnerability to coercion and influence, judgment and trust concerns are implicit in cases involving delinquent debts.

Historically, the timing of addressing and resolving tax and other debt delinquencies are critical to an assessment of an applicant's trustworthiness, reliability, and good judgment in following rules and guidelines necessary for those seeking access to classified information or to holding a sensitive position. See ISCR Case No. 14-06808 at 3 (App. Bd. Nov. 23, 2016); ISCR Case No. 14-01894 at 5 (App. Bd. Aug. 18, 2015).

Applicant's cited difficulties in addressing the federal tax liens associated with her ex-husband's wholly-owned business are accompanied by considerable extenuating

circumstances. Considered together contextually, these circumstances enable her to take partial advantage of mitigating condition MC ¶ 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” Because she has not followed up with documented initiatives to address and resolve her federal tax liens with the options available to since the IRS liens were filed in 2019, she may not at this time take advantage of the second prong (“acting responsibly under the circumstances”) of MC ¶ 20(b).

Two major consumer debts (SOR ¶¶ 1.c and 1.d) have been satisfied and resolved by Applicant through her discharged Chapter 7 bankruptcy. For these two resolved accounts, application of MC ¶ 20(d), “the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts” bears partial application to Applicant’s financial situation. In addressing her remaining federal tax liens, Applicant has been less successful. Afforded hearing and post-hearing opportunities to address her still unresolved federal tax lien accounts, Applicant provided no supplemental documentation of pursuing the options available to her such as applying for an installment agreement, seeking rebatement of accrued penalties and interest, and/or requesting a compromise of tax debts.

To be sure, Applicant’s difficulties with her former spouse provide important mitigation as circumstances beyond her control. There are many equities and merit in Applicant’s claims for tax relief, or at the very least, abatement of taxes associated with her ex-husband’s business. But DOHA is not the proper forum to resolve her claims. DOHA’s jurisdictional reach is limited to resolving issues related to security clearance eligibility.

DOHA authority does not empower its judges to resolve federal or state tax disputes, no matter how persuasive Applicant’s equities might appear from her presented evidence. Applicant’s potential remedies for her tax grievances lie with the IRS, and beyond to the U.S. Tax Court, once she exhausted her administrative remedies with the IRS. Without more documented successful efforts to resolve her tax debts in this proceeding, her promises to continue working on resolving her tax debts with her lawyers and accountants reflect still unfulfilled promises to resolve the underlying debts.

In evaluating Guideline F cases, the Appeal Board has stressed the importance of a “meaningful track record” that includes evidence of actual debt reduction through the voluntary payment of accrued debts. See ISCR Case No. 14-06808 at 2 (App. Bd. Nov. 23, 2016); ISCR Case No. 14-00221 at 2-5 (App. Bd. June 29, 2016); and ISCR Case No. 14-01894 at 5-6 (App. Bd. August 18, 2015); ISCR Case No.19-02593 at 4-5 (App. Bd. Oct. 18, 2021); ISCR Case No. 19-01599 at 3 (App. Bd. Jan. 20, 2020).

Based on the evidence presented, Applicant is not able to demonstrate a sufficient tangible track record of actual debt reduction to satisfy Appeal Board guidance. Debt resolution promises alone that are not accompanied by documented material good-faith resolution efforts and still reflect promises to pay or resolve that do not meet the good-faith payment and resolution requirements of MC 20(d).

Whole-person assessment

Whole-person assessment of Applicant's clearance eligibility requires consideration of whether her finances are fully compatible with minimum standards for holding a clearance. Taking into account Applicant's credited defense contributions and her explanations of the tax debts attributed to her in the SOR, insufficient evidence has been presented to enable her to mitigate the federal tax liens attributable to her joint and several accrual of delinquent federal taxes. With these federal tax liens still unsettled and unresolved, she is not able to produce enough mitigating evidence to ensure her ability to maintain sufficient control of her finances to meet minimum standards for holding a security clearance.

I have carefully applied the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. I conclude financial considerations security concerns are not mitigated. Eligibility for access to classified information is denied.

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:

Guideline F (FINANCIAL CONSIDERATIONS):	AGAINST APPLICANT
Subparagraphs 1.a-1.b:	Against Applicant
Subparagraphs 1.c-1.d:	For 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.

Roger C. Wesley
Administrative Judge