



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



In the matter of:)
)
) ISCR Case No. 22-02635
)
Applicant for Security Clearance)

Appearances

For Government: Brittany White, Esq., Department Counsel
For Applicant: *Pro se*

11/14/2023

Decision

HARVEY, Mark, Administrative Judge:

Guideline F (financial considerations) security concerns are not mitigated. Eligibility for access to classified information is denied.

Statement of the Case

On August 3, 2020, Applicant completed an Electronic Questionnaires for Investigations Processing or security clearance application (SCA). (Government Exhibit (GE) 1) On February 28, 2023, the Defense Counterintelligence and Security Agency (DCSA) issued a statement of reasons (SOR) to Applicant under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960); Department of Defense (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 DCSA 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 27, 2023, Applicant provided a response to the SOR, and she requested a hearing. (HE 3)

On April 13, 2023, Department Counsel was ready to proceed. On May 15, 2023, the case was assigned to me. On May 20, 2023, Applicant agreed to a hearing date of August 8, 2023. (HE 1) On August 1, 2023, the Defense Office of Hearings and Appeals (DOHA) issued a notice setting the hearing for August 8, 2023. (HE 1A) The hearing was held as scheduled using the Microsoft Teams video teleconference system. (*Id.*)

During the hearing, Department Counsel offered three exhibits into evidence, and Applicant did not offer any documents into evidence. (Tr. 11, 15-17; GE 1-GE 3) All proffered exhibits were admitted into evidence without objection. (Tr. 17; GE 1-GE 3) On August 21, 2023, DOHA received a copy of the transcript. On September 8, 2023, Applicant provided 38 pages of tax documents. (Applicant Exhibit (AE) A), which were admitted into evidence without objection. Emails from Applicant are marked as Hearing Exhibit 4. The record closed on September 8, 2023. (Tr. 44, 45)

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 SOR allegations. (HE 3) She also provided mitigating information. Her admissions are accepted as findings of fact.

Applicant is a 29-year-old database administrator who has worked for her current employer for about two years. (Tr. 6, 8, 41) In 2012, she graduated from high school. (Tr. 6) She attended college, and she has less than 25 college credits. (Tr. 7) She served in the Air Force from 2014 to 2017, and she received a general discharge under honorable conditions. (Tr. 7, 20-21)

Applicant was married from 2015 to 2017, and she has an eight-year-old daughter. (Tr. 8-9) After Applicant's daughter was born, she had postpartum depression, and she received inpatient mental-health treatment for a week. (Tr. 35) She received medication for depression for about three months after her discharge from the hospital. (Tr. 36) She also suffered from undiagnosed Attention-deficit/hyperactivity disorder (ADHD). (Tr. 21) While she was in the Air Force, her residence was filthy, and she was accused of child neglect. (Office of Personnel Management (OPM) personal subject interview) After her divorce, she did not receive any child support payments. She said her former husband was diagnosed as bipolar and a sociopath. (Tr. 38) The father of her daughter passed away two years ago from COVID. (Tr. 21)

Financial Considerations

Applicant said her gross annual pay is about \$65,000. (Tr. 30) She was unsure about her net pay. (Tr. 30) Her mother lives with her and helps her manage her bills and taxes. (Tr. 29, 32-33) The SOR alleges the following financial concerns:

SOR ¶¶ 1.a and 1.b allege Applicant failed to file as required federal and state income tax returns for tax years (TY) 2017, 2018, and 2019. In Applicant's August 3, 2020 SCA, she disclosed that she failed to file her federal income tax returns for TYs 2017 and 2018 due to forgetfulness, and she intended to get these tax returns filed. (GE 1)

In Applicant's September 2, 2020 OPM personal subject interview, she indicated she failed to file her tax returns for TYs 2017, 2018, and 2019. (GE 3) She said she was forgetful, and she needed to obtain her divorce decree to enable her to take a dependent deduction for her daughter. (*Id.*) She promised to take care of her tax returns within one week of her OPM interview. (*Id.*) She subsequently learned that her former husband was authorized under her divorce decree to take the dependent deduction for her daughter. (Tr. 37)

In response to DOHA interrogatories, Applicant provided a tax return transcript for TY 2019, which indicated she filed her tax return for TY 2019 on February 15, 2022. (Tr. 26; GE 2) In her SOR response, Applicant said:

My failing to file is not due to financial instability, but a mixture of poor memory and execution paralysis which are symptoms of my ADHD. I have since acquired assistance [to] ensure that I have timely filed ever since. Admittedly, during this investigation I have struggled to file these years and acquire transcripts in a timely manner. I have managed to file 2 of the 3 years thus far and [I provided] transcripts for one. (HE 2)

Applicant said during her hearing that she filed her federal income tax returns for TYs 2018, 2019, and 2020; however, she has not filed her tax returns for 2017 because she has not received a W2 from the Defense Finance and Accounting Service (DFAS). (Tr. 19) She was unsure about when she filed her TY 2018 federal income tax return. (Tr. 27) She believed she received refunds for TYs 2018 and 2019. (Tr. 27) She had memory issues, and it was difficult for her to focus on completion of her tax returns. (Tr. 22) She believed she filed her TY 2020 federal income tax return on time. (Tr. 28)

In April 2023, Applicant asked the IRS to provide her W2s for TY 2017. (Tr. 24) She believes the IRS will prepare and file her 2017 federal income tax return around April of 2024. (Tr. 24, 34) Applicant admitted that she failed to file her state tax returns for TYs 2017, 2018, and 2019 in her SOR response, and she gave the same explanation and mitigating information that she provided for her federal income tax returns, which were not timely filed.

On August 20, 2023, Applicant asked the IRS to provide her tax transcripts for TYs 2018 through 2022. (AE A at 1) The tax transcripts show the IRS received her TY 2019 tax return on February 15, 2022, her TY 2020 tax return on April 15, 2021, her TY 2022 tax return on April 15, 2022, and her tax return for TY 2022 on April 15, 2023. (AE A at 6, 22, 26, 31, 34)

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 one disqualifying condition that could raise a security concern and may be disqualifying in this case: “(f) failure to file . . . annual Federal, state, or local income tax returns . . . as required.” The record establishes the disqualifying condition in AG ¶ 19(f) requiring additional inquiry about the possible applicability of mitigating conditions. Discussion of the disqualifying condition is contained in the mitigation section, *infra*.

The financial considerations mitigating conditions under AG ¶ 20 which may be applicable in this case 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; 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. She said she filed her tax returns for TYs 2018 and 2019; however, she filed them late, most likely around February 2022. A willful failure to timely make (means complete and file with the IRS) a federal income tax return is a misdemeanor-level federal criminal offense. Title 26 U.S.C. § 7203, willful failure to file return or supply information, reads:

Any person . . . required by this title or by regulations made under authority thereof to make a return, keep any records, or supply any information, who willfully fails to . . . make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor

A willful failure to make return, keep records, or supply information when required, is a misdemeanor without regard to the existence of any tax liability. *Spies v. United States*, 317 U.S. 492 (1943); *United States v. Walker*, 479 F.2d 407 (9th Cir. 1973); *United*

States v. McCabe, 416 F.2d 957 (7th Cir. 1969); *O'Brien v. United States*, 51 F.2d 193 (7th Cir. 1931). For purposes of this decision, I am not weighing Applicant's failure to timely file her federal income tax returns against her as a crime. In regard to the failure to timely file her federal income tax returns for TYs 2017 through 2019, the DOHA Appeal Board has commented:

Failure to file tax returns suggests that an applicant has a problem with complying with well-established governmental rules and systems. Voluntary compliance with such rules and systems is essential for protecting classified information. ISCR Case No. 01-05340 at 3 (App. Bd. Dec. 20, 2002). As we have noted in the past, a clearance adjudication is not directed at collecting debts. See, e.g., ISCR Case No. 07-08049 at 5 (App. Bd. Jul. 22, 2008). By the same token, neither is it directed toward *inducing an applicant to file tax returns*. Rather, it is a proceeding aimed at evaluating an applicant's judgment and reliability. *Id.* A person who fails repeatedly to fulfill his or her legal obligations does not demonstrate the high degree of good judgment and reliability required of those granted access to classified information. See, e.g., ISCR Case No. 14-01894 at 5 (App. Bd. Aug. 18, 2015). See *Cafeteria & Restaurant Workers Union Local 473 v. McElroy*, 284 F.2d 173, 183 (D.C. Cir. 1960), *aff'd*, 367 U.S. 886 (1961).

ISCR Case No. 14-04437 at 3 (App. Bd. Apr. 15, 2016) (emphasis in original). See ISCR Case No. 15-01031 at 4 (App. Bd. June 15, 2016) (citations omitted); ISCR Case No. 14-05476 at 5 (App. Bd. Mar. 25, 2016) (citing ISCR Case No. 01-05340 at 3 (App. Bd. Dec. 20, 2002)); ISCR Case No. 14-01894 at 4-5 (App. Bd. Aug. 18, 2015). 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).

In ISCR Case No. 15-01031 (App. Bd. June 15, 2016), the Appeal Board explained that in some situations, even if no taxes are owed when tax returns are not timely filed, grant of access to classified information is inappropriate. In ISCR Case No. 15-1031 (App. Bd. June 15, 2016) the applicant filed his 2011 federal income tax return in December 2013, his 2012 federal tax return in September 2014, and his 2013 federal tax return in October 2015. He received federal tax refunds of at least \$1,000 for each year. Nevertheless, the Appeal Board reversed the administrative judge’s decision to grant access to classified information.

In ISCR Case No. 15-06440 at 4 (App. Bd. Dec. 26, 2017) the Appeal Board reversed the grant of a security clearance, discussed how AG ¶ 20(g) applied, and noted:

The timing of the resolution of financial problems is an important factor in evaluating an applicant's case for mitigation because an applicant who begins to resolve financial problems only after being placed on notice that his clearance was in jeopardy may lack the judgment and self-discipline to follow rules and regulations over time or when there is no immediate threat to his own interests. In this case, applicant's filing of his Federal income tax returns for 2009-2014 after submitting his SCA, undergoing his background interview, or receiving the SOR undercuts the weight such remedial action might otherwise merit.

In this instance, Applicant did not file two of her overdue federal and state income tax returns until after she completed her SCA and had her OPM interview, but before she received the SOR. She had not filed her federal and state income tax return for TY 2017 as of the date of her hearing. Under all the circumstances, Applicant's failures to timely file her federal and state income tax returns for TYs 2017 through 2019 are not mitigated at this time.

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 common-sense 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 29-year-old database administrator who has worked for her current employer for about two years. In 2012, she graduated from high school. She attended college, and she has less than 25 college credits. She served in the Air Force from 2014 to 2017, and she received a general discharge under honorable conditions. Applicant was diagnosed with postpartum depression, and she also suffered from undiagnosed ADHD.

(Tr. 21) She was married from 2015 to 2017, and she has an eight-year-old daughter. The father of her daughter passed away two years ago from COVID.

Applicant provided important financial considerations mitigating information. She admitted that she made errors in regard to filing her tax returns; she intends to learn from those mistakes; and she promised not to repeat them. She has been making progress getting her tax returns filed. She is receiving assistance in financial matters from her mother who lives with her.

The evidence against grant of a security clearance is detailed in the financial considerations section, *supra*, and this evidence is more substantial at this time than the evidence of mitigation. Applicant did not establish that she was unable to timely file her federal and state income tax returns for TYs 2017, 2018, and 2019. Her failure to take timely, prudent, responsible, good-faith actions from 2018 to 2020 (when those tax returns were due) to get her tax returns timely filed 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)).

This decision should not be construed as a determination that Applicant cannot or will not attain the state of reform necessary for award of a security clearance in the future. With more effort towards establishment of a track record of timely filing her tax returns, she may well be able to demonstrate persuasive evidence of her security clearance worthiness.

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: Against 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