



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 14-04823

Appearances

For Government: Candace Garcia, Esq., Department Counsel
For Applicant: *Pro se*

10/06/2015

Decision

HARVEY, Mark, Administrative Judge:

Applicant's statement of reasons (SOR) alleges state tax debts for 2007 and 2008, failure to timely file her state tax returns for 2010 through 2012, and two medical collection accounts totaling \$566. She failed to file her state tax returns as required, and she failed to provide sufficient documentation of her progress in resolving her financial problems. Financial considerations concerns are not mitigated. Eligibility for access to classified information is denied.

Statement of the Case

On February 12, 2013, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP) version of a security clearance application (SF 86). (Government Exhibit (GE) 1) On April 2, 2015, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued an SOR to Applicant, pursuant to Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended; and the adjudicative guidelines (AG), which became effective on September 1, 2006.

The SOR alleged security concerns under Guideline F (financial considerations). (Hearing Exhibit (HE) 2) The SOR detailed reasons why the DOD CAF was unable to find that it is clearly consistent with the national interest to continue Applicant's access to classified information and recommended referral to an administrative judge to determine whether Applicant's clearance should be continued or revoked. (HE 2)

On May 8, 2015, Applicant responded to the SOR allegations and requested a hearing. (HE 3) On July 21, 2015, Department Counsel was ready to proceed. On July 30, 2015, the case was assigned to me. On August 12, 2015, the Defense Office of Hearings and Appeals (DOHA) issued a notice setting Applicant's hearing for September 17, 2015. Applicant's hearing was held as scheduled. On September 28, 2015, DOHA received the transcript of Applicant's hearing. Department Counsel offered seven exhibits into evidence, and Applicant offered six exhibits into evidence. (Tr. 16-19; Government Exhibit (GE) 1-7; Applicant Exhibit (AE) A-F) All proffered exhibits were admitted into evidence without objection. (Tr. 17, 19-20; GE 1-7; AE A-F) Applicant was given until October 1, 2015, to submit additional evidence. (Tr. 46) On October 1, 2015, Applicant provided one exhibit with 18 pages, which was admitted into evidence without objection. (AE G)

Findings of Fact¹

In Applicant's SOR response, she admitted the SOR allegations in ¶¶ 1.a, 1.b, 1.c, and 1.e. She denied responsibility for the debt in SOR ¶ 1.d because she was unable to identify the debt. She provided extenuating and mitigating information as part of her SOR response. Applicant's admissions are accepted as findings of fact.

Applicant is a 29-year-old computer specialist, who has worked for defense contractors for about two years.² (Tr. 6, 8, 24; GE 1) In 2003, she graduated from high school. (Tr. 6) She has completed about 112 quarter credits towards a bachelor's of science degree in computer networking. (Tr. 7) She has never been married, and she does not have any children. (Tr. 7) She has never served in the military. (Tr. 7; GE 1) She currently holds a security clearance. (Tr. 8, 25) There is no evidence of security violations or abuse of alcohol.

Financial Considerations

In 2007, Applicant began working full time for the first time in her life. (Tr. 21) She failed to withhold sufficient funds to pay her taxes. (Tr. 21, 25) In 2008, she discovered the insufficient withholding when she went to file her tax returns. (Tr. 26) In 2008, she decided that she could not afford to have money withheld from her paycheck for state taxes because she needed the money to make her car payment. (Tr. 22, 26) Since

¹Some details have not been included in order to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

²Unless stated otherwise, Applicant's February 12, 2013 Electronic Questionnaires for Investigations Processing (e-QIP) version of a security clearance application (SF 86) is the source for the facts in this paragraph and the next paragraph. (GE 1)

2009, she had more funds withheld from her paycheck for her state and federal taxes. (Tr. 26) Applicant explained her state of mind for her financial decisions as follows:

[T]his was just a situation just kind of just got out of hand. It was more like out of sight, out of mind, and I completely forgot about it, and it was almost like I wasn't ready to deal with it. But now that I'm, like, forced to deal with it, you know, I'm really just trying to get everything reconciled and taken care of, so that's all I have to say. (Tr. 23-24)

Applicant is indebted to the state for a tax lien entered in 2010 for tax years 2007 and 2008 in the approximate amount of \$4,000. (Response to SOR ¶ 1.a) She is indebted to the state for a tax lien entered in 2011 for tax year 2009 in the approximate amount of \$2,000. (Response to SOR ¶ 1.b)

Applicant worked for the same employer from February 2007 to November 2012. (Tr. 25) She was unemployed from November 2012 to March 2013. (Tr. 35)

Applicant thought she filed her state tax returns in 2010 and 2011; however, for some reason the state tax returns were not actually filed. (Tr. 37-38)³ She may have filed her other state tax returns at some point. (Tr. 38) In any event, Applicant filed her state tax returns for 2010 through 2014 in May 2015.⁴ She did not have any money withheld from her salary for her 2010 state taxes, and her 2010 state tax return shows she owed the state \$1,967. After her hearing, she provided a 2010 state tax return showing she owed the state tax authority \$1,827. (AE G at 10) Most of her 2011 state tax return submitted with her SOR response was blank. After her hearing, she provided another 2011 state tax return, which showed she owed the state tax authority \$1,832. (AE G at 4) Her 2010 federal income tax return showed she was eligible for a \$1,116 refund. (AE G at 7), and her 2011 federal income tax return showed she was eligible for a \$2,277 refund. (AE G at 16)

For 2012, she did not have any money withheld from her salary for state taxes, and her tax return shows she owed the state \$2,040.⁵ For 2013, her state tax return shows she owed the state \$448, and her 2014 state tax return shows she owed the state \$601. (SOR response) At the time of her hearing, she did not have a payment plan established to address her state tax debt.

³Applicant's SOR response includes state tax returns for 2010 through 2014. They are stamped on the first page, indicating they were received by the state tax authority in May 2015. Unless indicated otherwise, these documents are the sources for the information in this paragraph.

⁴Applicant's February 12, 2013 SF 86 indicates she answered, "No," to the question "In the past seven (7) years have you failed to file or pay Federal, state, or other taxes when required by law or ordinance?". (GE 1)

⁵In June 2015, the state wrote Applicant indicating she owed \$2,840 for tax year 2012, \$565 for tax year 2013, and \$612 for tax year 2014. (AE D, E, F) The amounts owed are greater than the amounts on her tax returns because the state added interest and penalties.

Applicant owes the Internal Revenue Service (IRS) \$15,000, which was possibly for tax years 2008 through 2013 or 2014. (Tr. 27-28)⁶ She made several payments to the IRS. (Tr. 29) Then she stopped making payments to the IRS, and she is working with an IRS tax advocate to set up a new payment plan. It is unclear whether the 2010 and 2011 federal income tax returns she provided after hearing were credited against her \$15,000 IRS debt.

In regard to her failure to timely file her state tax returns, Applicant said she recently learned that the state and federal taxing authorities were separate entities. (Tr. 30-31) Previously she believed the IRS was collecting the state taxes too, and she did not understand that when she filed a state and federal tax return that they were being sent to two different entities. (Tr. 31-33, 35) Now that she knows they are separate debts she intends to work with the state to set up a payment plan. (Tr. 32, 51)

After her hearing, Applicant provided a state tax form indicating she intended or had applied for a state tax amnesty. (AE G at 1) To qualify, she must pay all tax and one-half of interest owed between September 1, 2015, and October 30, 2015, or she must establish a qualifying payment plan. (AE G at 18) If she qualifies for the amnesty plan, the state will forgive the civil penalties and one half of the interest owed on her taxes. (AE G at 18)

Applicant said she did not believe she was responsible for the \$466 medical collection debt in SOR ¶ 1.c. (Tr. 39-40; SOR response) She contacted the SOR ¶ 1.c creditor, and the creditor could not locate the debt. (Tr. 41-42) Applicant said she paid the \$100 medical debt in SOR ¶ 1.d. (Tr. 40) Applicant has medical insurance. (Tr. 42)

Applicant has not received financial counseling. (Tr. 43) She said she plans to pay her debts after ensuring that she is responsible for them. (Tr. 43-45) Three character statements from coworkers and friends indicate Applicant is kind, generous, loyal, responsible, caring, dedicated, honest, she learns from her mistakes and sincerely desires to correct her finances and pay her debts. (AE A-C)

⁶Applicant's SOR does not allege that she intentionally failed to provide accurate information about her taxes on her SF 86. See note 4, *supra*. Her SOR does not allege she failed to pay her federal income taxes as required. In ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006), the Appeal Board listed five circumstances in which conduct not alleged in an SOR may be considered stating:

- (a) to assess an applicant's credibility; (b) to evaluate an applicant's evidence of extenuation, mitigation, or changed circumstances; (c) to consider whether an applicant has demonstrated successful rehabilitation; (d) to decide whether a particular provision of the Adjudicative Guidelines is applicable; or (e) to provide evidence for whole person analysis under Directive Section 6.3.

Id. (citing ISCR Case No. 02-07218 at 3 (App. Bd. Mar. 15, 2004); ISCR Case No. 00-0633 at 3 (App. Bd. Oct. 24, 2003)). Applicant's failure to disclose her tax issues on her SF 86 and her failure to pay her federal income taxes as required will not be considered for any purpose, except in the whole-person discussion.

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.

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. I have not based this decision, 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 and the Secretary of Defense 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 relating to financial problems:

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 and regulations, all of which can raise questions about an individual’s reliability, trustworthiness, and ability to protect classified information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

AG ¶ 19 provides three disqualifying conditions that could raise a security concern and may be disqualifying in this case: “(a) inability or unwillingness to satisfy debts”; “(c) a history of not meeting financial obligations”; and “(g) failure to file annual federal, state, or local income tax returns as required” In ISCR Case No. 08-12184 at 7 (App. Bd. Jan. 7, 2010), the Appeal Board explained:

It is well-settled that adverse information from a credit report can normally meet the substantial evidence standard and the government’s obligations under [Directive] ¶ E3.1.14 for pertinent allegations. At that point, the burden shifts to applicant to establish either that [he or] she is not responsible for the debt or that matters in mitigation apply.

Id. (internal citation omitted).

Applicant’s history of delinquent debt is documented in her credit reports, hearing record, and SOR response. Applicant admitted that she has state tax debts for 2007, 2008, and 2009, resulting in tax liens totaling about \$6,000, and she failed to timely file her state tax returns for 2010 through 2012. The two collection accounts totaling \$566 are not established. The Government established the disqualifying conditions in AG ¶¶ 19(a), 19(c), and 19(g) requiring additional inquiry about the possible applicability of mitigating conditions.

Five mitigating conditions under AG ¶ 20 are potentially applicable:

(a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual’s current reliability, trustworthiness, or good judgment;

(b) the conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation), and the individual acted responsibly under the circumstances;

(c) the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control;

(d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts;⁷ and

(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.

The Appeal Board concisely 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).

ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013).

⁷The Appeal Board has previously explained what constitutes a good-faith effort to repay overdue creditors or otherwise resolve debts:

In order to qualify for application of [the good-faith mitigating condition], an applicant must present evidence showing either a good-faith effort to repay overdue creditors or some other good-faith action aimed at resolving the applicant's debts. The Directive does not define the term "good-faith." However, the Board has indicated that the concept of good-faith "requires a showing that a person acts in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation." Accordingly, an applicant must do more than merely show that he or she relied on a legally available option (such as bankruptcy) in order to claim the benefit of [the good-faith mitigating condition].

(internal citation and footnote omitted) ISCR Case No. 02-30304 at 3 (App. Bd. Apr. 20, 2004) (quoting ISCR Case No. 99-9020 at 5-6 (App. Bd. June 4, 2001)).

Applicant's conduct in resolving her delinquent debt does not establish full application of any mitigating conditions to her failure to timely file her state tax returns, and to pay her state tax debts. She was unemployed from November 2012 to March 2013, which is a circumstance largely beyond her control. Applicant did not act responsibly under the circumstances. She presented insufficient evidence about what she has done since becoming employed over the last two years to address her state tax debt.

Applicant's failure to prove that she has made more substantial steps to resolve her state and federal tax debts shows a lack of judgment and responsibility that weighs against approval or continuation of her security clearance. There is insufficient evidence that she was unable to make greater progress resolving her delinquent state and federal tax debts, or that her financial problems are being resolved, are under control, and will not recur in the future. Under all the circumstances, she failed to establish that financial consideration concerns are mitigated.

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(a):

(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 continue Applicant's eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. I have incorporated my comments under Guideline F in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under Guideline F, but some warrant additional comment.

There is some evidence supporting approval of Applicant's clearance. Applicant is a 29-year-old computer specialist, who has worked for defense contractors for about two years. In 2003, she graduated from high school, and she has completed about 112 quarter credits towards a bachelor's of science degree in computer networking. She indicates that she plans to pay her tax debts. Three character statements from coworkers and friends describe Applicant as kind, generous, loyal, responsible, caring, dedicated, honest, and a person who learns from her mistakes and sincerely desires to

correct her finances and pay her debts. She currently holds a security clearance. There is no evidence of security violations or abuse of alcohol.

The financial evidence against approval of Applicant's clearance is more substantial at this time. Applicant has a history of financial problems. She did not disclose her failure to file her state income tax returns on her February 12, 2013 SF 86. She is indebted to the state for a tax lien for tax years 2007 and 2008 in the approximate amount of \$4,000, and she is indebted to the state for a tax lien for tax year 2009 in the approximate amount of \$2,000. She did not timely file her 2010 through 2013 state income tax returns. She owes more than \$10,000 to the state for income taxes and about \$10,000 to \$15,000 to the IRS for income taxes. She has not established a payment plan to address her state and federal tax debts. Her failure to pay her taxes shows lack of financial responsibility and judgment and raises unmitigated questions about Applicant's reliability, trustworthiness, and ability to protect classified information. See AG ¶ 18.

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. Financial considerations concerns are not mitigated.

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
Subparagraphs 1.c and 1.d:	For Applicant
Subparagraph 1.e:	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 or continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Mark Harvey
Administrative Judge