

DATE: July 18, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-16615

DECISION OF ADMINISTRATIVE JUDGE

ROGER E. WILLMETH

APPEARANCES

FOR GOVERNMENT

Catherine Engstrom, Department Counsel

Jonathan Beyer, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

A 44-year-old Applicant, employed by a defense contractor as a financial manager, mitigated her failure to file Federal and state income tax returns for three years. She filed all the delinquent returns specified in the Statement of Reasons, as well as those for an additional year for which she had not filed, and did not owe taxes on any of them. She further demonstrated her professed rehabilitation by filing early returns for the most current tax year. To the extent that delinquent debts were not rebutted or shown to have been previously paid, Applicant mitigated them by paying them off and demonstrating that her finances are in order. Clearance is granted.

STATEMENT OF THE CASE

On August 26, 2002, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified, issued a Statement Reasons (SOR) to Applicant. The SOR states that DOHA was unable to find that it is clearly consistent with the national interest to grant her access to any classified information and recommends that her case be submitted to an Administrative Judge. On September 13, 2002, Applicant executed a response to the SOR and requested a hearing. This case was assigned to the undersigned Administrative Judge on January 8, 2003. A notice of hearing was issued on March 5, 2003, and the hearing was held on March 21, 2003. During the hearing, six Government (Govt) exhibits, eleven Applicant (Ap) exhibits, and the testimony of Applicant were received. The transcript (Tr) was received on arch 31, 2003.

PROCEDURAL ISSUE

At the hearing in this case, Applicant provided documentary proof of payment of all delinquent debts except for the water bill specified in SOR ¶ 2.d. Since it appeared that Applicant had such evidence in her possession, I permitted her

one week to submit it through Department Counsel. ⁽¹⁾ Applicant submitted the same on March 25, 2003 and Department Counsel forwarded it to me on March 26, 2003. Department Counsel agreed that it supports Applicant's claim that she satisfied the debt but she reasserted the Government's concerns with Applicant under Guideline F. I have marked Applicant's submission, including Department Counsel's response, as Ap Ex L and have considered it in rendering this decision.

FINDINGS OF FACT

Having thoroughly considered the evidence in the record, I make the following findings of fact:

Applicant is a 44-year-old financial manager employed by a defense contractor and is seeking a security clearance. Her financial problems began when her husband left her and her three-year-old daughter in 1985. He closed out their credit and bank accounts and gave notice on their apartment. Applicant was a student and had no job. She was able to obtain rooms with another woman and obtained a part-time internship. Applicant received spousal support for 18 months, at which point she began receiving child support of \$300.00 per month. At this time she was "living off credit cards." ⁽²⁾

In 1996, Applicant was diagnosed with carpal tunnel syndrome and began treatment with a chiropractor. This exacerbated her financial problems because the chiropractor was not covered under her medical insurance. Applicant elected to pay her chiropractic bills instead of other bills. ⁽³⁾ Her indebtedness at this time was approximately \$10,000.00. Applicant borrowed funds from her 401K account to pay off debt. ⁽⁴⁾

In April 1997, Applicant became a family caretaker of her nephews, ages two and four, when they became wards of the state. She cared for them for 14 months and received support from the state for their care, which was not quite sufficient to cover her added expenses. However, the oldest boy had asthma and Applicant had to take a lot of time off from work without pay to get him to medical appointments, counseling appointments, and supervised visitations. ⁽⁵⁾

In 1998, Applicant again borrowed funds from her 401K account to pay off debts. In 1999, another older nephew moved in with her and stayed for a year. Applicant's employer transferred her from the west coast to the east coast in 2000 and she had added expenses due to the move. In 2002, she incurred the cost of returning to the west coast on two occasions, when her grandfather died and later when her best friend died. ⁽⁶⁾ Applicant is providing support to her daughter, who is attending college. ⁽⁷⁾

Applicant failed to file her Federal income tax returns for tax years 1998 (SOR ¶ 1.a), 1999 (SOR ¶ 1.c), and 2000 (SOR ¶ 1.e) by the required filing dates. She also failed to file her state income tax returns for 1998 (SOR ¶ 1.b) and 1999 (SOR ¶ 1.d), as well as both her west coast state income tax return (SOR ¶ 1.f) and her east coast state income tax return (SOR ¶ 1.g) for tax year 2000, by the required filing dates. Applicant filed all seven of these tax returns on September 12, 2002. On her Federal returns, she received refunds of \$878.60 for 1999 and \$2481.52 for 2000. ⁽⁸⁾ Applicant forfeited a Federal refund of \$2669.70 for tax year 1998 by filing more than three years after the due date. ⁽⁹⁾ On her state returns, she received refunds of \$1263.86 for 1998, \$198.50 for 1999, and \$366.24 on her west coast state return for 2000 ⁽¹⁰⁾ On her east coast state return for 2000, Applicant received a refund of \$264.54. ⁽¹¹⁾

Applicant filed her Federal income tax return and her state income tax return for tax year 2001, but not by the required due date. She received refunds of \$3165.00 on her Federal return and \$412.62 on her state return. ⁽¹²⁾ Applicant filed both her Federal income tax return and her state income tax return for tax year 2002 before the due date. ⁽¹³⁾

Applicant incurred a delinquent debt to a cable television company (SOR ¶ 2.a). ⁽¹⁴⁾ She paid off this debt, totaling \$318.30, on September 6, 2002. ⁽¹⁵⁾

Applicant incurred a bad debt, totaling \$1870.00, on a credit card account in 1995 (SOR ¶ 2.b). ⁽¹⁶⁾ She paid off this debt by May 6, 1998. ⁽¹⁷⁾

Applicant incurred a delinquent debt to a mobile phone service provider in 1998 (SOR ¶ 2.c).⁽¹⁸⁾ She paid off this debt, totaling \$290.00, by September 12, 2002.⁽¹⁹⁾

Applicant incurred a delinquent debt for a bill from a water company that was referred to a collection agency in 1998 (SOR ¶ 2.d).⁽²⁰⁾ She paid off this debt, totaling \$312.76, on September 12, 2002.⁽²¹⁾

Applicant incurred a delinquent debt for utility service from a gas and electric supplier, totaling \$253.00 (SOR ¶ 2.e).⁽²²⁾ She paid off this debt.⁽²³⁾

Applicant incurred a delinquent debt to a telephone company in 2001 (SOR ¶ 2.f).⁽²⁴⁾ She paid off this debt, totaling \$368.41, by October 4, 2002.⁽²⁵⁾

Applicant no longer has any delinquent debts.⁽²⁶⁾ Within recent years, she has been no more than 30 days late on any credit payment.⁽²⁷⁾ She has accumulated more than \$15,000.00 in checking and savings accounts and her monthly salary of \$7320.00 is more than sufficient to pay her monthly expenses and provide \$500.00 to her daughter.⁽²⁸⁾

POLICIES

Section E2.2.2 of the Directive requires that "any doubt as to whether access to classified information is clearly consistent with national interest will be resolved in favor of national security." The burden of producing evidence initially falls on the Government to present evidence, in accordance with the Directive, that it is not clearly consistent with the national interest to grant or continue an applicant's access to classified information. Directive E3.1.14. Once the Government meets its burden, the burden then shifts to the applicant to present evidence to refute or mitigate the Government's evidence and to ultimately demonstrate it is clearly consistent with the national interest to grant or continue the applicant's clearance. Directive E3.1.15.

Eligibility for access to classified information is predicated upon an individual meeting adjudicative guidelines discussed in Enclosure 2 of the Directive. An evaluation of whether an applicant meets these guidelines includes the consideration of a number of variables known as the "whole person concept." Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a decision. This assessment should include the following 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 voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent 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.

Enclosure 2 provides conditions for each guideline that could raise a concern and may be disqualifying, as well as further conditions that could mitigate a concern and support granting a clearance. The following guidelines are applicable to this case.

Guideline J: Criminal Conduct

The concern under Guideline J is a history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

Conditions that could raise a security concern and may be disqualifying include:

Allegations or admission of criminal conduct, regardless of whether the person was formally charged (Disqualifying Condition 1).

Conditions that could mitigate security concerns include:

There is clear evidence of successful rehabilitation (Mitigating Condition 6).

Guideline F - Financial Considerations: the concern is that an individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

Conditions that could raise a security concern and may be disqualifying include:

A history of not meeting financial obligations (Disqualifying Condition 1);

Inability or unwillingness to satisfy debts (Disqualifying Condition 3).

Conditions that could mitigate security concerns include:

The conditions that resulted in the behavior were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation) (Mitigating Condition 3);

The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts (Mitigating Condition 6).

CONCLUSIONS

Guideline J

The evidence of record establishes that Applicant failed to file both her Federal and state income tax returns for three consecutive years. Even though she has not been charged for these criminal misdemeanors, this constitutes criminal conduct (Disqualifying Condition 1). The Federal statute and the east coast state statute require that the failure to file be willful. This requires that the failure to file a return be done purposefully, as distinguished from inadvertently, negligently, or mistakenly. *U.S. v. Matosky*, 421 F.2d 410 (7th Cir. 1970), certiorari denied 398 U.S. 904. Applicant acknowledged to the DSS special agent that she "worked the tax forms" but did not file due to "laziness." (29) This admission is sufficient to demonstrate that Applicant acted willfully in not filing the tax returns.

After receiving the SOR, Applicant filed all seven of the income tax returns specified in the SOR (SOR ¶ 2.a through SOR ¶ 2.g). She also filed the income tax returns she owed for 2001. Applicant did not owe any tax on any of these returns but received refunds for all of them, with the exception of her Federal return for 1998, for which she forfeited a refund by filing more than three years after the due date.

Applicant testified that the process in this case had showed her the gravity of not filing her tax returns (even if no tax is owed) and that she would file both before the deadline in the future. (30) Moreover, she has manifested that intent, to the extent she can at this point, by having filed both her Federal and state tax returns for 2002 prior to the due date. Applicant also paid off all of the other debts specified in the SOR that were still outstanding.

I believe that it has become abundantly clear to Applicant that any failure on her part to properly file her tax returns in the future or pay her debts will make her ineligible for a security clearance. Given Applicant's demeanor at the hearing, the decisive actions she has taken to properly resolve all of the allegations in the SOR, as well as additional obligations not specified in the SOR, and her actions in filing the latest income tax returns before the date they were due, I conclude that there is clear evidence of successful rehabilitation on the part of Applicant (Mitigating Condition 6).

Guideline F

The evidence in the record establishes both a history of not meeting financial obligations (Disqualifying Condition 1), as well as an inability or unwillingness to satisfy debts on the part of Applicant (Disqualifying Condition 3).

Applicant has successfully rebutted the Government's evidence that she has state tax liability for tax year 1999 (SOR ¶ 2.g). Evidence in the record establishes that she filed the return and received a refund of \$198.50. (31) Although Applicant did incur the bad debt, Applicant provided correspondence from the creditor's collection agency that she paid off the largest of the remaining delinquent debts specified in the SOR in 1998, more than four years before the SOR was

issued (SOR ¶ 2.b).⁽³²⁾ I find that evidence more compelling than the 2001 credit report on Applicant, which still listed the debt. Moreover, the pay off is confirmed by the 2003 credit report on Applicant, which no longer reflects the debt.

The evidence of record demonstrates that Applicant financial problems, both initially and at later times, resulted from conditions that were largely beyond her control (Mitigating Condition 3). When her husband left her in 1985, she was not employed and had no means of supporting both herself and her three-year-old child. In 1996, her need for chiropractic care caused her to pay for that treatment at the expense of other bills. Taking on the care of two young nephews for over a year, beginning in 1997, and the care of an older nephew for nearly a year, beginning in 1999, also contributed to Applicant's financial challenges. Finally, her need to return to the west coast on two occasions in 2002, as a result of the death of her grandfather and later the death of her best friend, also affected Applicant's ability to resolve her finances.

The most compelling evidence of record on behalf of Applicant is that she has paid off all of the remaining delinquent debts specified in the SOR (SOR ¶ 2.a, SOR ¶ 2.c through SOR ¶ 2.f, and SOR ¶ 2.h).⁽³³⁾ In addition, her credit history for recent years reflects substantial improvement in her management of her finances. Based on her current income, the assets she has accumulated, as well as her professed reform in filing her taxes and paying her bills, Applicant is not currently experiencing financial difficulties and should avoid them in the future. Having heard her testimony and assessed her credibility, I conclude that applicant has paid off all remaining delinquent debts in a good faith effort to resolve them and is committed to avoiding such delinquencies in the future, thereby satisfying the requirements of Mitigating Condition 6.

FORMAL FINDINGS

Formal findings, as required by section E3.1.25 of Enclosure 3 of the Directive, are as follows:

Paragraph 1. Guideline J: FOR APPLICANT

Subparagraph 1.a: For Applicant

Subparagraph 1.b: For Applicant

Subparagraph 1.c: For Applicant

Subparagraph 1.d: For Applicant

Subparagraph 1.e: For Applicant

Subparagraph 1.f: For Applicant

Subparagraph 1.g: For Applicant

Paragraph 2. Guideline F: FOR APPLICANT

Subparagraph 2.a: For Applicant

Subparagraph 2.b: For Applicant

Subparagraph 2.c: For Applicant

Subparagraph 2.d: For Applicant

Subparagraph 2.c: For Applicant

Subparagraph 2.d: For Applicant

Subparagraph 2.e: For Applicant

Subparagraph 2.f: For Applicant

Subparagraph 2.g: For Applicant

Subparagraph 2.h: For Applicant

DECISION

In light of all the evidence in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.

Signed

Roger E. Willmeth

Administrative Judge

1. Tr 53-55.

2. Tr 31.

3. Govt Ex 2 at 2.

4. Tr 32.

5. Tr 33.

6. Tr 34, 45.

7. Tr 48.

8. Ap Ex B at 1-2.

9. Ap Ex A at 1-3.

10. Ap Ex A at 4; Ap Ex B at 2.

11. Ap Ex C at 11.

12. Ap Ex D at 1-2.

13. Ap Ex E at 1-3.

14. Govt Ex 4 at 7.

15. Tr 24; Ap Ex F.

16. Govt Ex 5 at 5.

17. Tr 25; Ap Ex G.

18. Govt Ex 5 at 7.

19. Tr 26; Ap Ex H.

20. Govt Ex 5 at 7.

21. Tr 49; Ap Ex L at 3.

22. Govt Ex 5 at 7.

23. Tr 52-53; Ap Ex K at 17.

24. Govt Ex 5 at 8.

25. Tr 26-27; Ap Ex I.

26. Ap Ex K.

27. *Id.*

28. Ap Ex J; Tr 48.

29. Govt Ex 2 at 3.

30. Tr 46-47.

31. Ap Ex B at 2.

32. Ap Ex G.

33. Although Applicant did not realize it, her exhibit confirmed that the debt specified in SOR ¶ 2.e had been paid. However, it does not provide the date of the pay off. Tr 52-53; Ap Ex K at 17.