



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



In the matter of:)
)
-----) ISCR Case No. 08-07976
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Gina L. Marine, Esquire, Department Counsel
For Applicant: *Pro Se*

March 9, 2010

Decision

MATCHINSKI, Elizabeth M., Administrative Judge:

As of September 2009, Applicant had not filed federal or state income tax returns for tax years 1997 through 2008. Based on her income, returns were required for at least tax years 1998 and 2008. Her efforts to contact the Internal Revenue Service (IRS) in June 2009 are not enough to overcome the security concerns raised by her failure to file timely returns. Clearance is denied.

Statement of the Case

Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) on April 28, 2008. On April 1, 2009, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a statement of reasons (SOR) detailing the security concerns under Guideline F, financial considerations, that provided the basis for its preliminary decision to deny her a security clearance and to refer the matter to an administrative judge. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review*

Program (January 2, 1992), as amended (Directive); and the revised adjudicative guidelines (AG) effective within the Department of Defense as of September 1, 2006.

On April 21, 2009, Applicant requested an extension to respond to the SOR. She submitted her response on May 28, 2009, and requested a hearing.¹ On June 10, 2009, the government notified Applicant of amendments to the SOR. Applicant was informed that if she did not respond within 20 days of receipt, processing of her case would be discontinued. Applicant responded to the allegations on August 6, 2009. On August 12, 2009, the case was assigned to me to conduct a hearing and to determine whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. I scheduled a hearing for September 15, 2009.

The hearing was convened as scheduled. Three government exhibits (Exs. 1-3) were admitted into evidence without objection. Applicant testified and submitted six exhibits (Exs. A-F) that were entered into the record without objection, as reflected in a transcript (Tr.) received on September 24, 2009.

At Applicant's request, I held the record open until September 22, 2009, for her to submit a character reference from her employer's facility security officer (FSO). On September 18, 2009, Applicant forwarded a reference from her FSO, which was entered as Exhibit G without objection.²

Procedural Rulings

On June 10, 2009, the government moved to amend the SOR. The stated justification for the amendments was to correct clerical error. However, the government materially altered SOR 1.a by alleging that Applicant failed to file state income tax returns for tax years 1997 through 2007. SOR 1.a as originally drafted pertained to federal income taxes,³ conduct that was already covered under SOR 1.b.

Before the case is assigned to an administrative judge, Department Counsel has the authority under ¶ E3.1.6 of the Directive to take appropriate action, including but not limited to withdrawing the SOR if allegations are unfounded. By logical extension, and consistent with ¶ E3.1.3, which requires a written SOR as detailed and comprehensive as the national security permits, Department Counsel may amend the allegations.

¹At the government's request, and with no objections from Applicant, her request for extension and her May 28, 2009, response, were considered to be part of her Answer, since she made representations therein concerning her contacts with the IRS.

²On February 24, 2010, Applicant contacted me to inquire about when she could expect a decision in her case. She referenced a request for expedited proceeding from her FSO in December 2009 of which I had no prior knowledge. On February 24, 2010, I received a copy of the FSO's request for expedited consideration, dated December 16, 2009.

³In the original SOR, allegations 1.a and 1.b pertained to federal income tax issues, and it was unclear what DOHA was alleging in SOR 1.a ("You have not failed [sic] your federal income tax from April 1998 to present.").

Once the case has been assigned for a hearing, the DOHA administrative judge is authorized under ¶ E3.1.10 to “rule on questions on procedure, discovery, and evidence,” including whether Applicant has been provided with notice and an adequate opportunity to respond to proposed SOR amendments. At her hearing on September 15, 2009, Applicant did not object to the amendments, and she was prepared to address the government’s concerns as alleged in the amended SOR, including concerning her failure to timely file state income tax returns. Accordingly, before the introduction of any evidence, I allowed the amendments proposed by the government on June 10, 2009.

After Applicant presented her case, Department Counsel moved under ¶ E3.1.17 of the Directive to amend the SOR to conform to Applicant’s testimony that she had not filed her income tax returns, state or federal, for 2008 as well as 1997 through 2007. Applicant did not object, or request additional time to respond, so I granted the motion. Accordingly, the SOR was amended, as follows:

1.a. As of September 15, 2009, you had not filed your state income tax returns for the tax years 1997 through 2008.

1.b. As of September 15, 2009, you had not filed your federal income tax returns for the tax years 1997 through 2008.

Findings of Fact

In response to the amended SOR, Applicant admitted returns had not been filed as alleged, although she presented evidence raising considerable doubt as to whether returns were required for some years. After considering the pleadings, exhibits, and transcript, I make the following findings of fact.

Applicant is a 60-year-old college graduate, who has been employed full-time by a defense contractor since April 2008 (Exs. 1, G). She was initially hired by the company as a part-time associate administrative assistant in April 2006 (Exs. 1, 2, G, Tr. 27, 53). She assumed full-time responsibilities in the security office as assistant FSO in June 2008 (Ex. G, Tr. 28). She seeks a security clearance for her duties, which include administering routine aspects of the DoD industrial security program within their local facility, performing internal security inspections, assisting in investigations of security violations, maintaining security education programs, and monitoring security procedures (Ex. F).

Applicant was married from June 1973 until February 1978 (Exs. 1, 2). A daughter was born of this brief union in June 1976. On their divorce, Applicant became the primary custodial parent for her daughter (Ex. 1).

In September 1979, Applicant left the teaching profession, and she went to work for her father, who holds patents for systems to track financial instruments, such as traveler checks, and to print insurance records on demand (Tr. 44-46). In 1981,

Applicant, her father, and two of her siblings (Ex. 1, Tr. 47), spun off the international division of her father's business into a separate company (Tr. 49).

In about 1989, Applicant's mother was diagnosed with brain cancer, and she died in 1990 (Tr. 38, 65). During his spouse's illness, Applicant's father ceded day-to-day operations of the company to his executive vice president and to Applicant's brother (Tr. 47). They expanded based on an anticipated \$5 million contract that did not materialize. To get out of a financial bind, they went public with the company, and Applicant and her father became contract employees of the new owner from 1990 to 1992. In 1992, Applicant and her father were separated from the company (Tr. 46-48), and Applicant and her daughter moved in with her father that September (Ex. 1, Tr. 38). Her father paid the mortgage on his social security benefit income. Applicant covered her own expenses and she bought food for the household (Tr. 72). Applicant also assisted her elder sister, who had Down's Syndrome and was living in the family home (Tr. 67). Her sister attended a day program five days per week, and she was capable of functioning within her community (Tr. 67).

Applicant's father operated a separate design and consulting firm (Tr. 43) with Applicant as one of the shareholders (Tr. 50).⁴ Applicant handled the office administrative duties, including billing, but she also prepared reports and contract proposals, and interacted with customers in the U.S. and abroad (Ex. 1, Tr. 50). She was compensated as an employee in the amount of \$259 in 1997 (Ex. C). The company had sufficient assets to pay Applicant a salary of \$18,288 for 1998, and to employ a full-time employee starting in 1998. Otherwise, the company contracted with only two others on a part-time basis over the next ten years. Based on her shareholder returns filed for tax years 1998 through 2008, Applicant claimed significant personal business losses,⁵ from highs of \$82,552, for 1998, and \$83,233, for 1999, to a low of \$6,863 in 2008 (Ex. E).

From 1999 through 2005, most, if not all, of Applicant's income came from part-time employment leading lantern-light tours over the Christmas holidays (Tr. 51). Her social security earnings for 1999 were only \$6,282, \$453 in 2000, \$1,470 in 2001, \$231 in 2002, \$330 in 2003, \$439 in 2004, and \$589 in 2005 (Ex. C). Yet, she took pleasure trips to Europe in 1999 and 2004, and went on a cruise to Bermuda in June 2001 (Ex. 1). The trip in 2004 cost her about \$3,000, and the cruise was about \$700 (Tr. 76).

After about two years of noticeable decline, Applicant's sister was diagnosed with Alzheimer's disease in 2004 (Tr. 67). In addition to caring for her sister and working in the family business, Applicant began part-time employment, ten hours a week, with her current defense contractor employer in April 2006 (Ex. 2, Tr. 53). Her social security

⁴Applicant, her father, and two unrelated business partners are the current shareholders (Tr. 42).

⁵Applicant testified that she had significant business losses that far exceeded her income (Tr. 61). She provided IRS Schedule K-1 forms showing business losses for 1998, 1999, 2001, 2002, 2003, 2004, 2005, 2007, and 2008 (Ex. E). She has been unable to find the forms for tax years 2000 and 2006 (Tr. 33), but corporate returns were filed for those years (Tr. 55).

earnings increased to \$4,644 in 2006 and \$7,341 in 2007 (Ex. C), excluding part-time income of up to \$1,000 annually as a part-time retail candle consultant starting in 2006 (Tr. 62-63). Applicant acknowledged she was responsible for reporting her income to the IRS and paying any taxes due from her consulting work (Tr. 63).

In February 2008, Applicant and her father placed her sister in a group residential setting when her sister could no longer be cared for safely in their home (Exs. 1, 2, Tr. 64-65). They moved business operations into their home in an effort to make the company profitable (Ex. 2, Tr. 38, 41), and Applicant continued to work in the family business for little to no pay (Ex. 2). In April 2008, Applicant began full-time employment with the defense contractor, and she earned income of \$24,150 that year, not counting any income from her independent consulting (Ex. C).

On April 28, 2008, Applicant applied for a top-secret security clearance for her duties (Tr. 91). In response to question 28.a on the e-QIP concerning whether she had been over 180 days delinquent on any debts in the last seven years, Applicant indicated that she had not filed her federal tax returns since 1997 due to theft of her laptop computer containing all her financial records in the late fall of 1996, two office moves, no regular income since 1996, significant business and real estate losses, and primary caretaker responsibilities for an elderly parent and an intellectually disabled sibling. She added she was in the process of gathering her data to file her tax returns, which could take another three to six months (Ex. 1).

On June 10, 2008, Applicant was interviewed by a government investigator, in part about her failure to file income tax returns for tax years 1997 through 2007. Applicant indicated she had received no income from her work for her father since 1996 with the exception of tax year 1998. She cited her minimal income and her family responsibilities as the reasons for her failure to file tax returns. Applicant asserted she was in the process of acquiring the information needed to file the returns through her accountant, which she estimated would take three to six months (Ex. 2).

The family business remained unprofitable, and in October 2008, Applicant, her father, her daughter, and her granddaughter vacated their 16-room home and moved into an eight-room cottage owned by their neighbors (Tr. 73). Her father took one room for his office (Ex. 1, Tr. 39), and he filed for bankruptcy to avoid foreclosure of the mortgage on the family home (Tr. 84). In December 2008, her father listed the family home for sale. It had not sold by mid-September 2009 (Tr. 82).

On November 20, 2008, Applicant informed DOHA that she was still in the process of gathering the documents needed to file her personal income tax returns, and that she would contact the IRS in early December 2008 to initiate the filing of delinquent returns (Ex. 2). By late May 2009, Applicant had not been able to find her financial records in the boxes packed during her recent office and residential moves. At the suggestion of a local IRS business agent who has dealt with the company's tax matters, Applicant sent a letter to the IRS in June 2009 asking for a literal transaction of her accounts and wage and compensation documents for the years 2001 to 2008. This was her first attempt to obtain all of the documents needed to file returns (Ex. A, Tr. 59-60).

The IRS acknowledged receipt of her request on July 17, 2009 (Ex. B). As of September 15, 2009, Applicant had not filed any income tax returns for tax years 1997 through 2008. She had an extension to file her 2008 federal return until August 31, 2009 (Tr. 77, 93), but she had not filed for an extension to file her state income tax return (Tr. 90, 93). She planned to have the documentation needed to file her 2008 returns to her accountant by October 15, 2009, if not earlier (Tr. 77). But she was still missing her W-2 from her defense contractor employment and her expense records from her independent consulting in 2008 (Tr. 88).

Applicant's annual salary from her defense contractor employment is about \$33,000 (Tr. 77). Since October 2008, when they moved into a leased cottage, Applicant, her father, and her daughter have each contributed \$500 monthly for the rent (Tr. 73, 81). Applicant purchases the groceries. Applicant has about \$300 on deposit in her checking account and \$12 in savings as of mid-September 2009. She had depleted all but \$2,000 of \$25,000 in individual retirement account assets when she was not receiving a salary. Applicant is paying \$300 per month toward \$5,000 in credit card debt that was incurred for clothing, groceries, and possibly to pay for her trip in 2004 (Tr. 72-75).

Applicant's supervisor attests to Applicant having acted professionally and with "extreme attention to detail" in fulfilling her responsibilities in the security office. Applicant is involved in the community in several charitable endeavors that reflect favorably on her character (Ex. G).

Policies

The U.S. Supreme Court has recognized the substantial discretion the Executive Branch has 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). When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are required to be considered in evaluating an applicant's eligibility for access to classified information. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have avoided drawing inferences

grounded on mere speculation or conjecture. Under Directive ¶ E3.1.14, the government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . .” The applicant has the ultimate burden of persuasion as to obtaining a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information. Section 7 of Executive Order 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline F, Financial Considerations

The security concern about finances is set out in AG ¶ 18:

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.

Applicant admits that she has not filed federal or state personal income tax returns for tax years 1997 through 2008. Under federal income tax law, single individuals under age 65 were required to file an income tax return if their gross income met or exceeded the following minimum (single head of household in parentheses) for the respective tax year: \$6,800 (\$8,700) in 1997, \$6,950 (\$8,950) in 1998, \$7,050 (\$9,100) in 1999, \$7,200 (\$9,250) in 2000, \$7,450 (\$9,550) in 2001, \$7,700 (\$9,900) in 2002, \$7,800 (\$10,050) in 2003, \$7,950 (\$10,250) in 2004, \$8,200 (\$10,500) in 2005, \$8,450 (\$10,850) in 2006, \$8,750 (\$11,250) in 2007, and \$8,950 (\$11,500) in 2008 (Ex. 3). Based on her reported social security earnings, Applicant’s gross income exceeded the minimum required to file federal tax returns only for tax years 1998 and 2008. Even if she earned about \$1,000 in income from her independent candle sales in 2007, her gross income for that year would have been around \$8,341, less than the \$8,750 required for a single filer.

Concerning her failure to file state income tax returns for tax years 1997 through 2008, I cannot assume that the state filing requirements were the same or similar to the federal requirements for any of the tax years at issue. Pertinent state law is appropriate for judicial notice, and review of the applicable state's tax laws confirms that the state imposes a tax on income, for single persons at 3% or 4.5% for 1998 and 3% or 5% for 2008 depending on income. While it is unclear whether Applicant owes any taxes, given the personal exemptions and state tax credits on adjusted gross income,⁶ the state imposes a tax on income for "any person who files a return under the federal income tax for such taxable year." Since Applicant met the income threshold requiring her to file federal returns for tax years 1998 and 2008, she was likely required to file state income tax returns for those two tax years. AG ¶ 19(g), "failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same," applies because of her failure to timely file individual federal and state income tax returns for tax years 1998 and 2008.

As of mid-September 2009, Applicant had not filed her delinquent returns, despite knowing as of June 2008, if not before when she completed her e-QIP, that her unresolved tax matters were of concern to the Department of Defense. She did not seek to justify the delay ("I don't think there's really a very good reason for it." Tr. 60), but candor is not enough to mitigate the security concerns raised by recent non-compliance. AG ¶ 20(a), "the behavior happened so long ago, was so infrequent, or it 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," cannot reasonably apply in mitigation.

Applicant's minimal income, and the theft in late 1996 of the laptop, which held her financial records, caused her to not file income tax returns for 1997. The theft of her laptop is a circumstance that would fall within AG ¶ 20(b), "the conditions that resulted in the family 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." But the loss of financial data pertinent to 1996 and previous years cannot reasonably excuse her failure to report and pay taxes on her income for tax year 1998. Nor were Applicant's family responsibilities so extensive to excuse her failure to comply with her tax obligation. Her sister attended a day program five days per week at that time, and she was capable of functioning within her community. Caregiver responsibilities also cannot justify her failure to file her 2008 returns by the August 31, 2009, extended deadline. Applicant's sister had been placed in a residential setting in February 2008, and Applicant's father,

⁶Based on her social security earnings of \$18,288 for tax year 1998, the state tax rate was \$225 plus 4.5% of the excess over \$7,500 (\$360 plus 4.5% of the excess over \$7,500). Applicant would have been entitled to a personal exemption of \$12,000 if single or of \$19,000 if head of household for 1998. Furthermore, the state provided for a credit on adjusted gross income in determining the amount of tax liability. For a single person with an adjusted gross income of more than \$18,000 but less than \$18,500, the credit was 40%. Based on her social security earnings of \$24,250 for tax year 2008, the state tax rate was \$300 plus 5% of the excess over \$10,000 for single filers (\$480 plus 5% of the excess over \$16,000 if head of household), the personal exemption was \$13,000, and the tax credit was 15%. See [state abbreviation omitted] Gen. Stat. §§ 12-700, 12-702, 12-703.

although elderly, did not require her continuous attention. Office and residential moves in 2008 were not factors outside of her control that could extenuate her failure to file her 2008 returns on time. AG ¶ 20(b) does not mitigate her failure to file her required returns.

Applicant intends to satisfy her filing obligations by October 15, 2009, but there is little assurance that she will meet her self-imposed deadline. Applicant told a government investigator in June 2008 that she was in the process of gathering the information required to file the appropriate tax returns within the next three to six months. As of May 28, 2009, she was still in the process pulling together her financial records. On the advice of an IRS case worker, she filed with the IRS in June 2009 a request for wage and compensation information and a literal transaction of accounts for 2001 through 2008. She did not ask for information covering 1998, and the income and expense data for her independent consulting in 2008 would not be known to the IRS. So even if the information requested is forthcoming from the IRS, she would not have all the documentation needed to file her delinquent returns. It would be premature to apply AG ¶ 20(c), “the person has received or is receiving counseling for the problem and there are clear indications that the problem is being resolved or is under control.”

AG ¶ 20(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,” applies to the extent that Applicant has provided income information sufficient to raise substantial doubt about whether she was required to file federal or state income tax returns for several tax years. AG ¶ 20(e) does not mitigate her failure to file for 1998 and 2008, which are not subject to reasonable dispute.

Applicant has not attributed her failure to file her income tax returns to an inability to afford taxes. She could be entitled to refunds for the tax years for which she has not filed returns. But her financial situation has been tenuous for some time. She depleted all but \$2,000 of a \$25,000 individual retirement account to pay expenses when she had little income. In her favor, she began working for her current employer part-time in 2006 to supplement her earnings, and she began full-time employment in April 2008. Yet, as of September 2009, she had only \$12 in savings and \$300 in checking deposits. She owed \$5,000 on a credit card account, which she was repaying at \$300 per month. Should she eventually file her delinquent returns, it is unclear whether she will be able to afford back taxes or penalties, if any, assessed for late filing. Financial considerations are not fully 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 conduct and all the circumstances in light of 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.

Applicant has carried out her duties at work with an attention to detail described as "impeccable." But she has not displayed similar thoroughness or dedication in handling her personal tax matters. Applicant has not filed a federal or state income tax return since 1998, when the returns for tax year 1997 would have been due. For several of the ensuing years, her wage earnings did not meet the minimum required for her to file. However, for 1998 and 2008, when she met the income threshold, Applicant made no effort to comply with her obligation to file timely returns. Starting in 2006, she began to supplement her income through an independent consulting business, and she did not report that income to tax authorities. Applicant knew for over a year that the government was concerned about her failure to file. Despite needing her income from her defense contractor employment, she did not make filing her returns a priority. Applicant's failure to comply with her tax obligations raises substantial concerns about her overall judgment and reliability that are not fully mitigated.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the amended SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline F: AGAINST APPLICANT

Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant

Conclusion

In light of 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.

Elizabeth M. Matchinski
Administrative Judge