



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



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| In the matter of: |) | |
| |) | |
| ----- |) | ISCR Case No. 09-00223 |
| SSN: ----- |) | |
| |) | |
| Applicant for Security Clearance |) | |

Appearances

For Government: Michael Lyles, Esq., Department Counsel
For Applicant: James C. Breeden, Esq.

April 19, 2010

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guideline F (Financial Considerations) by Applicant's failure to timely file her federal and state income tax returns and pay the taxes due. Eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted a security clearance application on November 8, 2007. On October 29, 2009, the Defense Office of Hearings and Appeals (DOHA) sent her a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny her application, citing security concerns under Guideline F. DOHA acted 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 adjudicative guidelines (AG) promulgated by the President on December 29, 2005.

Applicant received the SOR on November 9, 2009; answered it on November 23, 2009; and requested a hearing before an administrative judge. DOHA received the

request on November 25, 2009. Department Counsel was ready to proceed on December 31, 2009, and the case was assigned to me on January 4, 2010. DOHA issued a notice of hearing on January 19, 2010, scheduling the hearing for February 19, 2010. I convened the hearing as scheduled. Government Exhibits (GX) 1 and 2 were admitted without objection. Applicant testified, presented the testimony of three witnesses, and submitted Applicant's Exhibits (AX) A through Z, which were admitted without objection. DOHA received the hearing transcript (Tr.) on March 1, 2010.

Findings of Fact

In her answer to the SOR, Applicant admitted the allegations of failing to timely file state and federal tax returns alleged in SOR ¶¶ 1.a-1.f, and she offered explanations. She denied the allegation of an unpaid tax debt alleged in SOR ¶ 1.g. Her admissions in her answer and at the hearing are incorporated in my findings of fact.

Applicant is a 50-year-old software engineer employed by a defense contractor since July 1997. She has held a security clearance since October 1997. Her most recent performance appraisal rates her as a "3" on a five-point scale, signifying that she "meets expectations." Her supervisor commented, "I have total confidence in [Applicant] and her abilities." (AX J.)

Applicant married in November 1978 and divorced in May 1982. She married her current spouse in April 1985. She and her current spouse have three children, ages 22, 17, and 14. She obtained an associate's degree in business management from a community college in May 2002.

Applicant's spouse has owned and operated an electrical contracting company since 1986. The company is organized as a Subchapter S corporation, in which the company profits flow directly to him and are taxed as personal income. Applicant assists with the company payroll, bookkeeping, and work scheduling. (Tr. 125.) They do not use a computer to manage their business. Instead, they do everything "long-hand." (Tr. 79-81.) Applicant and her spouse file joint federal and state income tax returns. To determine their personal income, they need to file the company return first. (Tr. 34-35.)

In October 2003, Applicant's mother was diagnosed with a brain tumor and lung cancer. She underwent brain surgery followed by chemotherapy. Applicant's father suffered from severe back problems, had difficulty walking, and was unable to care for his wife. Applicant visited her mother twice daily and was primarily responsible for her care until she passed away in September 2004. (AX L; Tr. 120.)

Three months after Applicant's mother passed away, her father underwent the back surgery he had postponed. Unfortunately, complications during the surgery left him unconscious for six days, followed by paralysis from the neck down. After about a month of physical therapy, he regained the use of his legs, but his arms remained paralyzed. He is diabetic and required insulin injections four times a day. During the day, a certified nursing assistant cared for Applicant's father, but she went to his house

every morning and evening to care for him. He was disabled for about a year. (Answer to SOR; Tr. 121-24; GX 2 at 5.) He continued to receive physical therapy until 2008. (Tr. 44.)

During this same period, Applicant's spouse suffered a ruptured disc in his back and underwent surgery. He recovered from the back surgery, but now suffers from a kidney disease that will require removing both kidneys. Applicant has volunteered to provide a replacement kidney for him. (Answer to SOR; AX I; Tr. 72, 125.)

Applicant continued to work full-time, help run the family business, and care for her children at the same time she was caring for her parents. The combination of all the medical problems suffered by Applicant's family and her spouse overwhelmed her, and she failed to timely file their corporate and personal tax returns. In 2005, they began working with their certified public accountant (CPA) to file the overdue tax returns. Filing the overdue returns was delayed by the difficulty of tracking down old records of business expenses. (GX 2 at 3, 5.) Even though their CPA was a long-time friend, Applicant and her spouse became frustrated with his lack of progress on the overdue returns, and they hired another CPA in late 2007 (Tr. 77-78.)

In October 2008, Applicant and her spouse filed their corporate and personal income tax returns for tax year 2004. (AX A; AX B; Tr. 46-48.) In July 2009, they filed their corporate and personal tax returns for tax years 2005 through 2007. (AX N through S.) In September 2009, they filed their returns for tax year 2008. (AX T.) They received a refund for tax year 2008, which was applied to the taxes they owed for previous years. (Tr. 140.) As of the date of the hearing, their new CPA was preparing their returns for 2009. (Tr. 59.)

Although they were late in filing the corporate and personal tax returns, they remained current on withholding federal and state income taxes, Social Security taxes, and Medicare taxes from their employees. They had about five employees for most of the period from 2003-2007 (Tr. 142-43.) The company now consists of Applicant's spouse and their oldest son. Applicant testified that she realized in hindsight that they should have hired someone to assist her with the business during the time she was caring for her mother and father. (Tr. 163.)

In October 2009, Applicant and her spouse retained a tax attorney, and he negotiated a settlement of their unpaid 2004 federal taxes for \$37,389, which they paid in full on April 15, 2009, using funds from Applicant's spouse's retirement annuity. (AX C; AX D; AX M; Tr. 50, 61.) They took advantage of a tax amnesty program and settled the 2004 state taxes for \$11,709. (AX D.)

In February 2010, Applicant and her spouse submitted offers in compromise for the state and federal taxes due for 2005 through 2008. (AX E; AX F; AX G.) They borrowed money from Applicant's mother-in-law to tender the required 20% of the estimated taxes due for their federal and state taxes. Applicant's mother-in-law has agreed to loan them a total of about \$50,000, and they have agreed to repay her at the

rate of \$500 per month (AX H.) As of the date of the hearing, they had not received responses to their offers in compromise.

A coworker and close friend for more than 35 years testified that Applicant is trustworthy and honest. (Tr. 84-87.) Several life-long friends provided letters attesting to her integrity, compassion, dedication, and moral values. (AX Z at 1-3, 5, 7.) Present and former coworkers were impressed by her dedication, trustworthiness, and meticulous performance of duty. (AX Z at 4, 6.) The facility security officer (FSO) at Applicant's work site testified Applicant informed him of her tax problems when he became FSO about two years ago, and she provided him with regular updates on her tax situation. He considers her honest and trustworthy. (AX K; Tr. 97-98.)

Policies

"[N]o 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 applicants 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 and modified.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the revised adjudicative guidelines (AG). 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 as to potential, rather than actual, risk of compromise of classified information.

Clearance decisions must be made "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, a decision to deny a security clearance is not necessarily a determination as to the loyalty of the applicant. 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 security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). “[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

Guideline F, Financial Considerations

The SOR alleges Applicant failed to file her state and federal income tax returns for 2005, 2006, and 2007 (SOR ¶¶ 1.a-1.f), and that she owes the Internal Revenue Service about \$37,389 for tax year 2004 (SOR ¶ 1.g).

The concern under this guideline is set out in AG ¶ 18 as follows:

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.

Three potentially disqualifying conditions are relevant: AG ¶ 19(a) is raised by an “inability or unwillingness to satisfy debts.” AG ¶ 19(c) is raised by “a history of not meeting financial obligations.” AG ¶ 19(g) is raised by “failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same.”

The evidence shows that Applicant eventually paid her federal income taxes for 2004, but that her tax liability for tax years 2005, 2006, 2007, and 2008 is not yet fully resolved. Although she failed to timely file her returns, there is no evidence of any fraudulent returns. I conclude that AG ¶¶ 19(a), (c), and (g) are raised, shifting the burden to Applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶

E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

Security concerns based on financial problems can be mitigated by showing that “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.” AG ¶ 20(a). Applicant’s tax delinquencies were recent and numerous, but the circumstances that caused her to neglect her responsibilities were unusual and not likely to recur. Her failure to get help running the business and her failure to file her tax returns are a serious cause of concern. However, after overcoming multiple and simultaneous family crises, she and her spouse have embarked on a realistic and responsible solution. Her past derelictions do not cast doubt on her current reliability, trustworthiness, and good judgment. I conclude AG ¶ 20(a) is established.

Security concerns under this guideline also can be mitigated by showing that “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.” AG ¶ 20(b). Both prongs, i.e., conditions beyond the person’s control and responsible conduct, must be established. The multiple medical disasters that befell Applicant were beyond her control. In most cases, there is not a direct cause-and-effect relationship between family illness and failure to file tax returns, but in this case the family illnesses and Applicant’s multiple family responsibilities were overwhelming, causing her to neglect other obligations. Once her family situation stabilized, she was dilatory in resolving her tax delinquencies, in part because of her reluctance to break her relationship with their CPA, a family friend. In October 2008, however, she and her spouse started taking decisive and responsible measures to rectify the situation. I conclude AG ¶ 20(b) is established.

Security concerns under this guideline also can be mitigated by showing that “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.” AG ¶ 20(c). This mitigating condition is established, because Applicant and her spouse hired a new CPA, hired a tax lawyer, followed their advice, and are on the way toward resolving their tax problems.

Security concerns under this guideline also can be mitigated by showing that “the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.” AG ¶ 20(d). Good faith means acting in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation. ISCR Case No. 99-0201, 1999 WL 1442346 at *4 (App. Bd. Oct. 12, 1999). An applicant need not establish that every delinquent debt has been paid in full. An applicant must, however, establish a plan to resolve financial problems and take significant actions to implement the plan. ISCR Case No. 07-06482 at 2-3 (App. Bd. May 21, 2008). Applicant and her spouse have a

realistic plan to resolve their tax delinquencies and have taken significant steps to implement it. They have filled all their returns. They cashed in a substantial retirement annuity to pay delinquent taxes. They paid their 2004 taxes, submitted offers in compromise, arranged to borrow the funds they estimate will be necessary to resolve their tax problems, and paid 20% of their estimated taxes for 2005 through 2008. I conclude AG ¶ 20(d) is established.

Whole-Person Concept

Under the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all the relevant circumstances. An 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 grant 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 that guideline, but some warrant additional comment.

Applicant is a mature woman who has worked as a federal contractor and held a clearance since 1997. She is highly respected in her community and among her coworkers. She was candid, sincere, and credible at the hearing. She is deeply devoted to her family and has a reputation for dedication and attention to duty at work. Her husband's business is a family operation, dependent on Applicant to handle the bookkeeping and administration. Applicant realizes in hindsight that she and her husband should have hired someone to help her with the bookkeeping and taxes when she was overwhelmed by a confluence of family emergencies. Applicant and her husband asked their CPA, a long-time family friend, to take care of the overdue tax returns in 2005. When the CPA was dilatory, they were reluctant to terminate their relationship with a long-time friend. They finally hired a new CPA and a tax attorney, and their tax problems are now under control.

After weighing the disqualifying and mitigating conditions under Guideline F, evaluating all the evidence in the context of the whole person, and mindful of my obligation to resolve close cases in favor of national security, I conclude Applicant has mitigated the security concerns based on financial considerations. Accordingly, I

conclude she has carried her burden of showing that it is clearly consistent with the national interest to continue her eligibility for access to classified information.

Formal Findings

I make the following formal findings on the allegations in the SOR, as required by Directive ¶ E3.1.25:

Paragraph 1, Guideline F (Financial Considerations): FOR APPLICANT

Subparagraphs 1.a-1.g:

For Applicant

Conclusion

In light of all of the circumstances, it is clearly consistent with the national interest to continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is granted.

LeRoy F. Foreman
Administrative Judge