



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



In the matter of:)	
)	
XXXXXXXXXX, XXXXX)	ISCR Case No. 09-03992
SSN: XXX-XX-XXXX)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Braden Murphy, Esq., Department Counsel
For Applicant: *Pro se*

September 14, 2010

Decision

TUIDER, Robert J., Administrative Judge:

Applicant failed to mitigate security concerns pertaining to Guideline F (financial considerations). Clearance is denied.

Statement of the Case

On March 13, 2009, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-Qip). On January 13, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under Guideline F (financial considerations) for Applicant. 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 adjudicative guidelines (AG) effective within the Department of Defense for SORs after September 1, 2006.

Applicant answered the SOR on February 1, 2010, without specifying whether she desired to have her case heard before an administrative judge. On February 24,

2010, she submitted a letter to DOHA, "I am writing this letter to request that Case # 09-03992 be converted to a hearing case and I am requesting a hearing so this matter can be settled." Department Counsel was prepared to proceed on April 21, 2010, and I received the case assignment on April 27, 2010. DOHA issued a notice of hearing on May 6, 2010, scheduling the hearing for May 20, 2010. The hearing was held as scheduled.

The Government offered Government Exhibits (GE) 1 through 9, which were received without objection. Applicant offered Applicant Exhibit (AE) A, which was received without objection, and she testified on her own behalf. DOHA received the hearing transcript (Tr.) on May 27, 2010.

Findings of Fact

Applicant admitted SOR ¶ 1.a. with explanations, and denied SOR ¶¶ 1.b. and 1.c. with explanations. Her admission and explanations are incorporated as findings of fact. After a thorough review of the evidence, I make the following additional findings of fact.

Background Information

Applicant is a 59-year-old multi-media specialist, who has worked for a defense contractor since February 2009. She has held an interim secret security clearance since she began her current employment. Successfully vetting for a clearance is a condition of her continued employment. (GE 1, Tr. 16-18.)

Applicant graduated from high school in May 1969. She was awarded a Bachelor of Arts degree in art in May 1975. (GE 1, Tr. 19.) She married in February 1975. Applicant and her husband have two children, a 31-year-old son, and a 28-year-old daughter. (Tr. 20-21.) Applicant was formerly employed as a high school teacher for ten years before beginning her current job. Her husband is a college-educated speech therapist. (Response to SOR, GE 1, Tr. 22, 62.)

Financial Considerations

Applicant's background investigation addressed her financial situation and included the review of her March 2009 e-QIP; her September 2009 Responses to Interrogatories (two separate sets); records of 1995 and 2009 Federal Tax Liens; as well as her March 2009, September 2009, and May 2010 credit bureau reports. (GE 1 – 9.)

Applicant's SOR lists three separate allegations consisting of a (1) a Federal Tax Lien filed in April 2009 by the Internal Revenue Service (IRS) in the amount of \$23,617.58 for tax years 2004, 2005, 2006, and 2007; (2) a Federal Tax Lien filed in October 1995 by the IRS in the amount of \$10,353.78; and (3) a charged-off credit card account in the amount of \$755. (SOR ¶¶ 1.a. – 1.c.)

Applicant explained the federal tax liens:

It seems to be an accumulation from over the years. My husband was self-employed when we moved from [State A] to [State B], and he had never – we didn't have any tax help, and we were unknown to the fact that he had to pay his personal tax on his being self-employed. That started it, and then we had a small business that – we had taxes on that business that we got behind on. And it seems like over the years it has just added up from self-employment taxes that were not paid. (Tr. 22.)

Applicant testified she was unsure how the IRS became aware of the tax arrearages, and added that her husband was responsible for preparing their tax returns. (Tr. 23-24.) On April 27, 2010, Applicant's husband contacted the IRS by telephone regarding the \$23,617.58 tax lien to explore the possibility of working out a payment plan. The IRS acknowledged this contact by letter dated April 29, 2010, and indicated that they would provide a response within 45 days. As of the hearing date, Applicant had not received a response from the IRS regarding this outstanding tax lien. (SOR ¶ 1.a., AE A, Tr. 24-25, 49.)

Regarding the \$10,353.78 tax lien, Applicant submitted a Release of Federal Tax Lien dated December 7, 2009. The statute of limitations' period for enforcement had elapsed, rendering the debt legally unenforceable since the original filing of tax lien in October 1995. Applicant contends that this debt is no longer legally enforceable. (SOR ¶ 1.b., Response to SOR, Tr. 26.) The \$755 charged off credit card debt has been paid. (SOR ¶ 1.c., Response to SOR, Tr. 26-27.)

Applicant was interviewed by an Office of Personnel Management (OPM) investigator on May 11, 2009. During that interview, she stated that she would contact the IRS to negotiate a payment plan for the \$23,617.58 tax lien to begin in July 2009. Additionally, she informed the investigator that the \$10,353.78 was no longer owed because the statute of limitations' period for enforcement had elapsed, rendering the debt legally unenforceable. (GE 4.) Applicant's annual salary is \$57,000, and her husband's annual salary is \$55,000, for a total of \$102,000. She and her husband's monthly rent is \$800, and she described their lifestyle as living "paycheck to paycheck." (Tr. 40-42. 50.)

Applicant's husband testified on her behalf. He attributed their income tax problems to, "[j]ust a series of poor decisions, poor advice." (Tr. 45.) He stated that he learned of their tax problems with the IRS during their 2006 audit. (Tr. 48-49.)

Character Evidence

Applicant's 31-year-old son testified on her behalf. He is employed as a senior software architect. He described his mother, the Applicant, as "an extremely hard worker." She was working too hard when she was a high school teacher and "running the print shop." Working two jobs was "affecting her, especially as she was getting

older.” Her current job is less demanding and she is able “to do photography and more crafts, art, that’s something she’s been doing all my life. It’s neat to see that.” He added that it has been hard to see his mother experiencing stress over the potential loss of her security clearance and job. (Tr. 63-66.)

Policies

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the AG. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are used 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.

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 in seeking 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 the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of 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

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, I conclude the relevant security concerns are under Guideline F (Financial Considerations).

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 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 or the fraudulent filing of the same.” Applicant’s history of delinquent debt is documented in her credit reports, records of tax liens, OPM interview, responses to DOHA interrogatories, SOR response, and oral statement at her hearing. She failed to file complete and accurate federal tax returns for a number of years and to ensure one of her credit cards accounts was paid as agreed. The Government established the disqualifying conditions in AG ¶¶ 19(a) and 19(c). Further inquiry about the applicability of mitigating conditions is required.

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; 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.

None of the mitigating conditions apply. Applicant's conduct does not warrant application of AG ¶ 20(a) because she did not act more aggressively and responsibly to resolve her delinquent debts. Her delinquent debts are "a continuing course of conduct" under the Appeal Board's jurisprudence. See ISCR Case No. 07-11814 at 3 (App. Bd. Aug. 29, 2008) (citing ISCR Case No. 01-03695 (App. Bd. Oct. 16, 2002)). She did not resolve her delinquent tax debt through payment, established payment plans or disputes.

AG ¶ 20(b) does not apply. Applicant produced no evidence that her financial problems were largely beyond her control and that she acted responsibly under the circumstances. Applicant's husband underreported their income for years to the IRS. Applicant and her husband are college-educated professionals. Her explanation that she and her husband did not have "any tax help" or her husband's explanation that their tax problems stemmed from "a series of poor decisions, poor advice" for the numerous tax years involved rings hollow.

According to the testimony of Applicant's husband, they became aware of their tax problems from their 2006 audit. During Applicant's May 2009 OPM interview, she stated she would contact the IRS to negotiate a payment plan for the \$23,617.78 tax lien. However, it was not until April 27, 2010 that her husband contacted the IRS to set up a payment plan, eleven months after her May 2009 OPM interview, three months after her January 2010 SOR was issued, and approximately one month before her scheduled May 20, 2010 hearing. As noted, a response from the IRS was pending as of Applicant's hearing date. Applicant's unfulfilled promises or inaction to address or repay her debts to the IRS offer little reassurance of future repayment. In short, there is no evidence the Applicant has acted responsibly under the circumstances. There are no clear indications that her financial problem is resolved or is under control. She has not established financial responsibility.

AG ¶¶ 20(c), (d), and (e) do not apply. Applicant has not sought counseling nor has she indicated that she has a good-faith¹ basis to dispute the legitimacy of past-due

¹The Appeal Board has previously explained what constitutes a "good faith" effort to repay overdue creditors or otherwise resolve debts:

debts. She did not establish good faith in the resolution of her SOR debts because she did not adequately demonstrate her efforts to pay any of her debts when she became aware of them. It was not until the eve of her scheduled hearing date that her husband contacted the IRS to make payment arrangements on the \$23,617.58 IRS lien. The \$10,353.78 IRS lien was released by the IRS on December 7, 2009 after the statute of limitations' period for enforcement had elapsed, rendering the debt legally unenforceable.² Applicant has not disputed the legitimacy of the debts alleged.

In sum, Applicant should have been more diligent with regard to her obligation to accurately file and pay her federal income taxes. Her husband's repeated failure to fully report income for years is disappointing. Applicant's response in rectifying her tax liability when the IRS brought it to her attention is equally disappointing. Based on her track record, particularly as it pertains to her federal income tax obligations, I have doubts about her willingness or ability to adequately address this situation.

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.

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 [or statute of limitations]) 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)).

²The Appeal Board recently reemphasized its long-held view that reliance on the statute of limitations as a defense is not normally a substitute for good-faith efforts to pay off debt. ISCR Case No. 07-16427 at 3-4 (App. Bd. Feb. 4, 2010.)

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. AG ¶ 2(c). 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.

I note Applicant is presently employed full-time as a multi-media specialist and her husband is employed as speech therapist. Together they earn a gross annual salary of \$102,000. They live in a low-cost area and their monthly rent is \$800. Nevertheless, Applicant described their lifestyle as living “paycheck to paycheck.” Apart from the SOR debts, she appears current on her day-to-day expenses.

The whole-person factors against reinstatement of Applicant’s clearance are significant. Applicant’s failure to pay or resolve her federal tax debt over the years was not prudent or responsible. Her debts are significant and ongoing. In short, Applicant has not demonstrated a meaningful track record of repayment or a good-faith effort to resolve her delinquent tax debt. While Applicant’s circumstances deserve consideration, the record is devoid of sufficient meaningful action on her part to mitigate these debts.

I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my careful consideration of the whole person factors and supporting evidence, my application of the pertinent factors under the adjudicative process, and my interpretation of my responsibilities under the adjudicative guidelines. Applicant has not fully mitigated or overcome the Government’s case. For the reasons stated, I conclude she is not eligible for access to classified information.

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 – 1.b.: Against Applicant

Subparagraph 1.c.: For Applicant

Conclusion

In light of all 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 a security clearance is denied.

ROBERT J. TUIDER
Administrative Judge

