



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



In the matter of:)	
)	
)	ISCR Case No. 09-04370
)	
)	
Applicant for Security Clearance)	

Appearances

For Government: James F. Duffy, Esquire, Department Counsel
For Applicant: *Pro se*

May 25, 2010

Decision

ANTHONY, Joan Caton, Administrative Judge:

After a thorough review of the pleadings, exhibits, and testimony, I conclude that Applicant failed to rebut or mitigate the Government's security concerns under Guideline F, Financial Considerations. Her eligibility for a security clearance is denied.

Applicant completed and signed an Electronic Questionnaire for Investigations Processing (e-QIP) on April 16, 2009. On January 29, 2010, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing the security concerns under Guideline F, Financial Considerations. 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) effective within the Department of Defense for SORs issued after September 1, 2006.

On February 17, 2010, Applicant answered the SOR in writing and elected to have a hearing before an administrative judge. The case was assigned to me on March 12, 2010. Applicant, Department Counsel, and I agreed to a hearing date of April 19,

2010. DOHA issued a Notice of Hearing on March 25, 2010, and I convened Applicant's hearing as scheduled to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.

The Government called no witnesses and introduced nine exhibits, which were marked Ex. 1 through 9 and admitted to the record without objection. Applicant testified on her own behalf and called two witnesses. She introduced seven exhibits, which were marked as Ex. A through Ex. G and admitted to the record without objection. DOHA received the transcript (Tr.) of the hearing on April 27, 2010.

Findings of Fact

The SOR contains one allegation of disqualifying conduct under AG F, Financial Considerations (SOR ¶ 1.a.) In her Answer to the SOR, Applicant admitted the allegation. Applicant's admission is included as a finding of fact.

Applicant seeks a security clearance as an employee of a government contractor. She is 33 years old, single, and has no children. She has been employed full time for the past five years. (Ex. 1; Tr. 41-43.)

When she was in high school, Applicant had part-time jobs, and she filed federal tax returns on her earnings as an hourly employee. When she reached 18, and after graduating from high school, Applicant acquired her own apartment and worked as a waitress and bartender. She filed federal tax returns on her wages and tips. (Tr. 64-66.)

In the late 1990s, Applicant met a man and entered a spouse-like relationship with him which lasted about seven years. During that time, she worked part-time as a waitress but was primarily supported by her partner. In 2005, when the relationship ended, she moved to a major metropolitan area and again sought work as a waitress and bartender. In the metropolitan area, she was able to earn over \$60,000 a year in tips. In 2005, she purchased a 2003 Cadillac CTS, with monthly payments of \$519.¹ (Tr. 59-66.)

Applicant explained that as a restaurant worker, waitress, and bartender, her salary was minimal. She received most of her income from tips, which her employers reported to the Internal Revenue Service (IRS). Applicant knew it was her responsibility to pay federal income taxes on her income from tips. (Tr. 63-66.)

Applicant also became a licensed real estate agent and worked for a real estate company. She received commissions for the real estate sales she made, and she knew she was responsible for paying federal and state income taxes on her real estate commissions. (Ex. 1; Tr. 65-70.)

¹ Applicant's credit reports show that the purchase price of the automobile was \$23,086. (Ex. 8 at 2; Ex. 9 at 6.)

During tax years 2003, 2004, 2005, 2006, 2007 and 2008, Applicant failed to timely file and pay federal income taxes on her tip and real estate commission incomes. She provided no evidence that she had requested filing extensions between 2003 and 2008. She stated that there was no situation beyond her control that caused her to fail to pay her federal income taxes for the years 2003 through 2008. She filed her 2005 federal income tax return in May 2006. In 2007, the IRS confiscated \$1,600 from her checking account to satisfy a tax delinquency. In January 2008, she filed her 2003 federal income tax return. She filed her 2004, 2006, and 2007 federal income tax returns in February 2008.² The IRS informed Applicant that, as of December 16, 2009, she owed \$36,133.23 in unpaid taxes, interest, and penalties. The IRS also informed Applicant that it would continue to charge penalties and interest until she paid the amount she owed in full. (Ex. 4; Ex. 5 at 3; Ex. E; Tr. 44-49.)

In April 2009, after beginning her work as an employee of a federal contractor, Applicant contacted the IRS to discuss her delinquent tax debt. The IRS determined that Applicant has insufficient income to pay the total balance due or to make installment payments. Therefore, the IRS has advised Applicant to make payments as she is able. Applicant provided documentation to establish that she made three payments of \$100 to the IRS on the \$36,133 debt in January, February, and March 2010. She plans to increase her payments in six months, after she has paid off her car note. (Ex. E; Ex. F; Ex. 5; Tr. 54-59.)

Applicant's current annual income from her job as a federal contractor is \$40,456. Her gross monthly income is \$3,024. She shares living expenses with a friend, and she identifies her monthly living expenses as follows: food, clothing, miscellaneous: \$340; housing and utilities: \$950; vehicle ownership costs: \$519.67; vehicle operating costs: \$400; public transportation: \$10; health insurance: \$49.30; cell phone: \$150; taxes: \$366.04; and IRS debt payment: \$100. She provided documentation to corroborate her statement that she had filed and presented payment to satisfy her 2009 federal income tax obligation. (Ex. D; Ex. G; Tr. 35-36, 61.)

In addition to her work as a federal contractor, Applicant continues to work as a waitress and bartender two to three nights a month. She estimates that she earns between \$100 and \$300 a month from this work. (Tr. 43-44.)

Applicant's current supervisor appeared as a witness on her behalf. He praised Applicant's dependability and reliability and stated that, in his opinion, she is an excellent employee. Applicant's girlhood friend, with whom she shares a house, also testified on her behalf. The friend stated that Applicant pays her rent on time each month. (Tr. 73-74, 81-82.)

Applicant has sought assistance from tax preparers, but she has not had consumer credit counseling regarding her tax debt to the IRS. (Tr. 51-52.)

² Applicant acknowledged that she failed to timely file and pay her 2008 federal income tax, but she did not specify when she filed her 2008 tax return. (Tr. 46.)

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, and it has emphasized that “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 an 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, *Safeguarding Classified Information Within Industry* § 2 (Feb. 20, 1960), as amended and modified.

When evaluating an applicant’s suitability for a security clearance, an administrative judge must consider the revised adjudicative guidelines (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, the administrative judge applies these guidelines 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 to obtain 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 about 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* Executive Order 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline F, Financial Considerations

The security concern relating to the guideline for Financial Considerations 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.

The guideline notes several conditions that could raise security concerns. Under AG ¶ 19(a), an “inability or unwillingness to satisfy debts” is potentially disqualifying. Similarly under AG ¶ 19(c), “a history of not meeting financial obligations” may raise security concerns. Additionally, under AG ¶ 19(g), “failure to file annual Federal, state, or local income tax returns as required . . .” can raise a security concern that may be disqualifying.

For several years, Applicant received tip and commission income. Since she had worked as a waitress for many years, she was familiar with the requirements for reporting and paying taxes on tip income. As a real estate agent, she was also familiar with her obligation to pay taxes on income earned through commissions. No circumstances beyond her control prevented her from filing her federal tax returns and paying the taxes required of her. However, she elected not to report and pay the taxes. This evidence is sufficient to raise these potentially disqualifying conditions.

The guideline includes examples of conditions that could mitigate security concerns arising from financial difficulties. Several Guideline F mitigating conditions could apply to the security concerns raised by Applicant's tax delinquencies. If the financially delinquent 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,” then AG ¶ 20(a) might

apply. If “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,” then AG ¶ 20(b) might be applicable. Moreover, if “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,” then AG ¶ 20(c) might apply. Additionally, if “the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts,” then AG ¶ 20(d) might apply. Finally, if “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,” then AG ¶ 20(e) might apply.

The record shows that Applicant’s tax delinquencies began several years ago and continue to this day. Applicant’s current federal tax delinquencies involve substantial sums of money in proportion to her income and resources, occurred under circumstances that are likely to continue, and cast doubt on her current reliability, trustworthiness, and good judgment.

The record does not include facts that suggest protracted conditions beyond Applicant’s control that would explain her failure over a period of years to meet her federal tax obligations. She has been employed full time for the past five years, and she has not experienced personal or financial hardship. While she has not enrolled in consumer credit counseling, she has, to her credit, filed her delinquent federal income tax returns and worked cooperatively with the IRS to address her considerable tax indebtedness. It would appear that Applicant’s current payments of \$100 a month will not reduce her debt, which continues to grow in response to interest and penalties imposed upon the principal debt. While Applicant’s intention to satisfy her delinquent federal tax debt is laudable, she has failed to demonstrate a track record of financial responsibility. She has not yet demonstrated that she can repay her \$36,000 federal tax debt and avoid financial delinquencies in the future. I conclude AG ¶¶ 20(a), 20(b), and 20(c) are not applicable. I also conclude that AG ¶ 20(d) applies in part and that AG ¶ 20(e) is not raised by the facts in this case.

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 relevant 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 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 considered the potentially disqualifying and mitigating conditions in light of all the relevant facts and circumstances surrounding this case. Applicant's supervisor and her girlhood friend respect and appreciate her dependability. Her supervisor judges her to be an excellent employee.

However, Applicant failed to file her federal income tax returns for six years, from 2003 until 2008. Her failure to so do was not based on ignorance: she was fully aware of her responsibility to pay federal income taxes on tips and commissions. She elected not to follow established rules for paying her taxes and, instead, used her income for other purposes.

A security clearance applicant's failure to file tax returns can suggest that he or she has a problem in complying with well-established governmental rules and systems. It is well established that "[v]oluntary compliance with such rules and systems is essential for protecting classified information." See ISCR Case No. 97-0744 (November 6, 1998) at 3.

Applicant's failure to pay her federal taxes began when she was a mature adult, and she failed to address her tax obligations for a significant period of time, a decision that raises concerns about her judgment and reliability. Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For these reasons, I conclude Applicant failed to mitigate the security concerns arising from her tax delinquencies.

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
Subparagraph 1.a.:	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 Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Joan Caton Anthony
Administrative Judge