



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



In the matter of:

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ISCR Case No. 15-03019

Applicant for Security Clearance

Appearances

For Government: Ray T. Blank, Esq., Department Counsel
For Applicant: *Pro se*

03/09/2017

Decision

HEINY, Claude, Administrative Judge:

Applicant's federal income tax returns were not timely filed for several years, a tax lien was filed against her in 2007, and she had several delinquent obligations. The financial considerations security concerns have been mitigated. Access to classified information is granted.

History of the Case

On November 12, 2015, the Department of Defense (DoD) Consolidated Adjudication Facility (CAF) issued a Statement of Reasons (SOR) to Applicant pursuant to Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry*, February 20, 1960; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), January 2, 1992; and the adjudicative guidelines (AG), which became effective on September 1, 2006.

The SOR detailed reasons why the DOD CAF did not find under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant, and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked. Specifically, the SOR set forth security concerns arising under the financial considerations guidelines.

On December 17, 2015, Applicant responded to the SOR, and she requested a hearing. On February 17, 2016, the Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing, setting the hearing for February 25, 2016. The hearing was held as scheduled.

Department Counsel offered five exhibits (Ex.) 1-5, and Applicant offered three exhibits, Ex. A-C. There were no objections to the proffered exhibits and all were admitted. On March 28, 2016, Applicant provided post-hearing exhibits, which were admitted without objection. (Ex. D, E, F, G) On March 4, 2016, DOHA received a copy of the transcript (Tr.) of the hearing.

Findings of Fact

In Applicant's SOR response, she was unsure about a \$16 debt (SOR 1.a) and admitted the remaining SOR allegations. Applicant's admissions are incorporated as facts. After a thorough review of the pleadings, exhibits, and submissions, I make the following additional findings of fact.

Applicant is 55 years old, and has been employed by a defense contractor as a systems analyst since July 2012. (Ex. 1, Tr. 25, 48) Her annual salary is approximately \$80,000. (Tr. 49) She has been separated from her husband since 2003. Her children, three of which are in college and one has graduated, no longer live in her home. She received sporadic child support from her spouse in the amount of \$300 to \$400 monthly. (Tr. 57) They no longer live in her home. (Tr. 33) Following her separation, Applicant moved in with her sister to save expenses. (Tr. 34) For ten years starting in 1994, she worked for a major airline. In 2004, she went to work for a video rental store chain, but was terminated in May 2007 for inappropriate conduct with another employee. She described the conduct as "horseplay." (Ex. 5) She then had sporadic employment, with periods of unemployment in 2009 and 2011. At times, she had two full-time jobs in order to provide for her family. (Tr. 32)

The SOR alleges an \$8,200 tax lien, a \$5,000 debt following a vehicle repossession, seven additional debts totaling \$1,146, and \$40,000 in unpaid taxes. Other than her tax debt, her total indebtedness listed in the SOR is \$14,328. Applicant acknowledged she had been financially irresponsible in the past. In September 2012, Applicant had a personal subject interview (PSI) and made an unsworn statement. (Ex. 5) Following her PSI, she hired a credit firm to help her address her credit issues. (Ex. 5) She paid the company \$600 and received very little assistance. (Tr. 37, 69)

On Applicant's July 2012 Electronic Questionnaires for Investigations Processing (e-QIP) she listed her failure to file her tax returns and pay the tax due. (Ex. 1) In her PSI, she indicated she had not filed her federal income tax returns for tax years 2006 through 2011. Her husband had previously decided not to have taxes withheld from his pay. They separated in 2003, and she failed to file her returns. As sole provider for herself and her children, she made the decision to retain as much income during the year to help her pay living expenses and support her three boys and one girl. (Tr. 17, 20) She had money withheld from her pay, but the amount withheld was insufficient to

pay her federal taxes when they were due. (Ex. 1, Tr. 38) Her state does not have personal income tax. She chose not to apply for food stamps or other forms of welfare. (Tr. 20)

Applicant contacted the Internal Revenue Service (IRS) on her own to determine what she owed. (Tr. 61) She asked what years were unfiled and what she had to do to become compliant. She did not know the full extent until she talked with the IRS. (Tr. 60) Her reason for filing was “[t]hat’s my duty as a citizen.” (Tr. 61) Following her separation from her husband, she failed to file her tax returns for year 2006, which was due in April 2007, onward.

In September 2010, three and a half years since she should have filed her tax year 2006 return, she hired a tax professional to file her past-due returns. He failed to get the returns filed and is no longer in business. (Ex. 5) He informed Applicant that he attempted to file her returns but they were rejected by the IRS because someone else had already filed. (Tr. 36, 38) An unauthorized person had received her \$3,000 tax refund. (Tr. 51) She questioned the IRS as to why a refund check had been issued when she was still indebted to the IRS. (Tr. 52) No satisfactory response was received. She hired a tax firm that frequently advertises tax assistance on late night television. (Tr. 39) She paid for their services and, again, received little of value.

In 2012, Applicant contacted another tax company to assist her in the filing of her returns. She paid them \$2,500 and the company contacted the Internal Revenue Service (IRS) on her behalf. The company filed her 2006 through 2011 tax returns in August 2012, a month after starting her job with her current employer. (Tr. 39, 64) She made an arrangement with the IRS by which she would pay \$800 monthly on her delinquent tax debt. (Tr. 53, 54) During her PSI, she stated she was unaware an \$8,208 tax lien (SOR 1.g) had been filed against her in 2007 for tax years 2002 and 2003. (Ex. 5) In December 2015, she paid the federal tax lien and it was released. (Ex. A) At one time, she was paying the IRS \$800 per month to address the debt.

In February 2016, Applicant entered into another installment agreement with the IRS, which automatically debits \$500 monthly from her account to pay her past-due taxes including tax years 2012, 2013, and 2014.¹ (Ex. E, Tr. 40, 53) This will address the approximate \$35,000² she owes in taxes. (Tr. 54) Her taxes for tax year 2015 were timely filed and paid. (Tr. 39)

On Applicant’s e-QIP and during her interview she indicated her vehicle had been repossessed when she lost her job at the video rental store. (Ex. 1, 5) This is the first car she ever purchased. (Tr. 34) The day she lost her job, she called the credit union and had them pick up the vehicle. (Tr. 34) She had purchased the vehicle in October 2004. (Ex. 2) She owes approximately \$5,000 (SOR 1.h) on the loan. As of March 28, 2016, she had not reached an agreement with the credit union as to a repayment plan. (Ex. G) When she contacted the credit union, the lender informed her

¹ The IRS informed Applicant she owed \$72 for tax year 2014. (Tr. 55)

² The \$40,000 listed in SOR 1.j included the \$8,208 owed for tax years 2002 and 2003. (Tr. 54)

that the debt was no longer enforceable. (Tr. 43) She was informed by an employee of the credit reporting agency not to restart payment on the debt because a payment could re-establish the debt and take it out of the protection of the statute of limitations. (Tr. 44) Knowing these facts, Applicant is still attempting to reach some sort of repayment arrangement concerning the debt. She has recently made a \$1,000 offer to settle the matter. (Ex. G)

In addition to the repossession, Applicant's April 2012 credit report lists five additional accounts with the same credit union that were all paid as agreed. (Ex.2) Her December 2014 credit report lists no derogatory information and her February 2016 credit report lists no repossessions or charged-off accounts. (Ex.3, 4) Her December 2015 credit reports do not list any derogatory account with the credit union listed in SOR 1.h. (Ex. B, C)

During Applicant's interview, she did not recognize a \$234 charged-off account (SOR 1.e) with the same credit union. (Ex. 5) During her interview, she had no knowledge about the following debts: SOR 1.a, \$57; SOR 1.c, \$42; SOR 1.d, \$180, and SOR 1.i, \$16. (Ex. 5) She acknowledged the \$207 (SOR 1.b) medical debt. (Ex. 5) The creditor offered to settle the \$207 debt for \$124, which she accepted and paid. (SOR Answer, Tr. 45) She is disputing the \$410 (SOR 1.e) charged-off account. She contacted the creditor and was informed the creditor was no longer reporting the debt to the credit reporting firms.

Two of Applicant's delinquent debts involve insufficient funds checks (SOR 1.d, \$180 and SOR 1.i, \$16). The state in which she lives has a very aggressive stance on insufficient fund checks. She received a letter from the district attorney's (DA) office concerning her bad checks. She went to the DA's office where she was photographed and fingerprinted, but not arrested. (Ex. 5) State law requires her to immediately redeem such checks or face criminal prosecution. (Tr. 46) She made good on the checks.

Applicant contacted every SOR creditor. (Tr. 21) The creditor in SOR 1.a (\$57) had no information concerning any delinquent obligation owed by her. (Tr. 21, 45) Applicant does not have credit cards and drives a 21-year-old car she purchased from her sister. (Tr. 33, 48) She asserts she lives simply and wants to address her delinquent debts. (Tr. 49) She is not receiving any calls or correspondence concerning delinquent accounts. (Tr. 50) There has been fraud on her accounts resulting in her having to open and later close five checking accounts. (Tr. 50) The last fraud occurred in January 2016 when someone spent \$300 from her account. (Tr. 51) She met with a financial advisor weekly for a couple of months learning about saving, budgets, not incurring new debt, and meeting her financial obligations. (Tr. 86)

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch 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). 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 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.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. 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 about potential, rather than actual, risk of compromise of classified information. Clearance decisions must be “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, nothing should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination about applicant’s allegiance, loyalty, or patriotism. 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 or her security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[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

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 disqualifying 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" She admitted that she failed to timely file her federal tax returns, that she had a vehicle repossessed in 2007, and had other delinquent debt totaling approximately \$1,100.

In ISCR Case No. 08-12184 at 7 (App. Bd. Jan. 7, 2010), the Appeal Board explained:

It is well-settled that adverse information from a credit report can normally meet the substantial evidence standard and the government's obligations under [Directive] ¶ E3.1.14 for pertinent allegations. At that point, the burden shifts to applicant to establish either that [he or] she is not responsible for the debt or that matters in mitigation apply.

The Government established the disqualifying conditions in AG ¶¶ 19(a), 19(c), and 19(g) requiring additional inquiry about the possible applicability of mitigating conditions.

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;³ 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.

The Appeal Board concisely explained an applicant's responsibility for proving the applicability of mitigating conditions as follows:

Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in security clearance decisions is that articulated in *Egan, supra*. "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." Directive, Enclosure 2 ¶ 2(b).

ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013).

Applicant failed to withhold sufficient funds from her salary to pay her share of her federal income taxes and she failed to timely file her federal tax returns for several years. She did so in order to provide for her four children. She contacted the IRS about her failure to file because, as she acknowledged, it was her duty as a citizen to file tax returns and pay taxes. The DOHA Appeal Board has commented about tax filing issues:

³The Appeal Board has previously explained what constitutes a "good faith" effort to repay overdue creditors or otherwise resolve debts:

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) 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)).

Failure to file tax returns suggests that an applicant has a problem with complying with well-established governmental rules and systems. Voluntary compliance with such rules and systems is essential for protecting classified information. ISCR Case No. 01-05340 at 3 (App. Bd. Dec. 20, 2002). As we have noted in the past, a clearance adjudication is not directed at collecting debts. See, e.g., ISCR Case No. 07-08049 at 5 (App. Bd. Jul. 22, 2008). By the same token, neither is it directed toward inducing an applicant to file tax returns. Rather, it is a proceeding aimed at evaluating an applicant's judgment and reliability. *Id.* A person who fails repeatedly to fulfill his or her legal obligations does not demonstrate the high degree of good judgment and reliability required of those granted access to classified information. See, e.g., ISCR Case No. 14-01894 at 5 (App. Bd. Aug. 18, 2015). See *Cafeteria & Restaurant Workers Union Local 473 v. McElroy*, 284 F.2d 173, 183 (D.C. Cir. 1960), *aff'd*, 367 U.S. 886 (1961).

ISCR Case No. 14-04437 at 3 (App. Bd. Apr. 15, 2016). See ISCR Case No. 14-05476 at 5 (App. Bd. Mar. 25, 2016) (citing ISCR Case No. 01-05340 at 3 (App. Bd. Dec. 20, 2002)); ISCR Case No. 14-01894 at 4-5 (App. Bd. Aug. 18, 2015).

The Appeal Board clarified that even in instances where an “[a]pplicant has purportedly corrected [the applicant’s] federal tax problem, and the fact that [applicant] is now motivated to prevent such problems in the future, does not preclude careful consideration of [a]pplicant’s security worthiness in light of [applicant’s] longstanding prior behavior evidencing irresponsibility” including a failure to timely file federal income tax returns. See ISCR Case No. 15-01031 at 3 and note 3 (App. Bd. June 15, 2016) (characterizing “no harm, no foul” approach to an applicant’s course of conduct and employed an “all’s well that ends well” analysis as inadequate to support approval of access to classified information with focus on timing of filing of tax returns after receipt of the SOR).

Applicant has initiated a good-faith effort to repay her delinquent taxes. In December 2015, she paid an \$8,200 tax lien (SOR 1.g) and it was withdrawn. The lien was for tax years 2002 and 2003. In February 2016, she entered into an installment agreement with the IRS to pay her remaining taxes (SOR 1.j) of approximately \$35,000. The agreement requires \$500 to be automatically debited from her account monthly. AG ¶ 20 (d) applies to her taxes.

AG ¶ 20 (d) also applies to SOR 1.b, and to the insufficient fund checks listed in SOR 1.a, 1.d, and 1.i. Had she not redeemed the checks she would have faced prosecution. She contacted all of her creditors. The creditor claiming a \$57 collection debt (SOR 1.a) informed Applicant that the creditor has no documentation showing a delinquent obligation. She is disputing the \$234 charged-off account (SOR 1.e) and \$410 charged-off account (SOR 1.f), which no longer appear on her credit report. The debts no longer appear on her credit reports. These two debts which total \$644 are not large enough to be of security significance.

The remaining debt results from the repossession of Applicant's vehicle in 2007. She acted responsibly when she lost her job at the video rental store by immediately calling the credit union to inform them she would not be able to continue her payments and they should come and get the vehicle. The repossession was over nine years ago and was due to losing her job. AG ¶ 20 (a) applies. Additionally, the creditor informed Applicant that the debt was no longer enforceable. An employee of a credit reporting agency informed her that to make payment might reinstate the debt. Even with this knowledge, Applicant has continued to pursue some type of settlement with the lender. She has not yet reached agreement, but has continued her attempt to reach an agreement. Financial considerations concerns are 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 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.

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 Guideline F, but some warrant additional comment.

In 2007, Applicant lost her job which resulted in the repossession of her vehicle. Even with the debt being unenforceable, Applicant is voluntarily attempting to reach some type of agreeable payment on the debt. She paid an \$8,200 tax lien and has an arrangement to repay her other past-due taxes. I believe that someone who pay a tax lien and enters into a repayment agreement is likely to meet that obligation. The tax debt is large and will take some time to satisfy, but the monthly amount is automatically deducted from her account. She received weekly financial counseling for a few months. She is not living beyond her means. She drives a vehicle more than twenty years old. She has no credit cards and is receiving no demand from creditors for payment. She indicates she lives simply and wants to address her past financial problems.

The issue is not simply whether all her debts are paid—it is whether her financial circumstances raise concerns about her fitness to hold a security clearance. (See AG ¶ 2(a)(1).) Overall, the record evidence leaves me without questions or doubts as to

Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the security concerns arising from her financial considerations.

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: FOR APPLICANT

Subparagraphs 1.a through 1.j: For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is granted.

Claude R. Heiny
Administrative Judge