



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No: 15-04255

For Government: Andre Gregorian, Esq., Department Counsel
For Applicant: *Pro se*

04/24/2017

Decision

DAM, Shari, Administrative Judge:

Applicant did not mitigate financial security concerns related to her failure to file state income tax returns. Eligibility for access to classified information is denied.

Statement of the Case

On June 6, 2016, the Department of Defense (DOD) issued to Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline F, Financial Considerations. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* effective within the DOD on September 1, 2006.

Applicant answered the SOR in writing (Answer) on July 8, 2016, and requested a hearing before an administrative judge. On September 8, 2016, the Defense Office of

Hearings and Appeals (DOHA) assigned the case to me. On November 23, 2016, DOHA issued a Notice of Hearing setting the case for December 8, 2016. The case was heard as scheduled. Department Counsel offered Government Exhibits (GE) 1 and 2 into evidence. Applicant testified and offered Applicant Exhibits (AE) A through L into evidence. All exhibits were admitted without objections. DOHA received the hearing transcript (Tr.) on December 19, 2016. The record remained open until January 20, 2017, to give Applicant an opportunity to submit additional evidence pertinent to the filing of state taxes for 2007, 2010, 2011, and 2012. (Tr. 45.) On January 23, 2017, she submitted another document that I marked as AE M. Department Counsel had no objection to the late filing, and AE M is admitted into evidence.

Findings of Fact

Applicant admitted the sole allegation in the SOR. Her admission is incorporated into these findings of fact.

Applicant is 36 years old and divorced since 2011. She was married for nine years and has one child, eight-years old, from the marriage. She served in the Navy from 1998 until her honorable discharge in 2009 as an E-5. She deployed to the Middle East and other locations. While serving, she received two Navy Achievement Medals, a Good Conduct Medal, and other ribbons and awards. (Tr. 19-22; GE 1.)

After leaving the Navy, Applicant attended college full-time from 2010 until 2013, when she earned a bachelor's degree. Between 2009 and 2013, she was unemployed and received unemployment compensation for two separate six-month periods. She then worked part-time until October 2013, when she obtained her current position with a defense contractor. (Tr. 22-23, 28, 34; GE 1.) She submitted a salary notification letter from 2015, noting her successful performance and a compensation bonus. (GE C.)

On April 8, 2014, Applicant submitted a security clearance application (SF-86). In it, she disclosed that she had not filed her state income taxes for 2012, the reason being that she had been unemployed during that year. During a background interview in May 2014, Applicant told the investigator that the Internal Revenue Service (IRS) notified her in 2011 that she owed about \$2,900 for unpaid 2010 federal taxes.¹ She also mentioned that she had not filed her 2013 state tax return at this time. In her May 2016 response to the Government's interrogatories, Applicant admitted that she had not timely filed state income tax returns for tax years 2007, 2010, 2011, 2012, and 2013. In June 2016, DOD issued the SOR alleging that Applicant failed to file state income tax returns for years 2007, 2010, 2011, 2012, and 2013. (GE 1, 2.)

In response to a question about her answer to the Government's interrogatories, in which Applicant admitted that she failed to file state returns for 2007, 2010, 2011,

¹ The SOR does not contain an allegation related to an outstanding state tax debt of \$2,900 for the tax year of 2010. Hence, this fact will not be considered in an analysis of disqualifying conditions. It may be considered in the analysis of mitigating conditions, the whole-person concept, and Applicant's credibility.

2012, and 2013, she testified, "I didn't fail to file. I filed them. I just don't have any documentation." (Tr. 29.) She explained she had filed all of them, except 2007, of which she remained uncertain of the status. She then clarified that she did not file a state return for 2011 or 2012 because she thought, at the time, she did not have taxable income for those years, though she received unemployment benefits. Sometime in 2011, she learned that those benefits were taxable. (Tr. 29-30, 34.)

Applicant attributed some tax filing problems to her former husband, who handled their finances until they separated in 2010. During 2007, she was deployed and she relied on him to file their taxes. After submitting her SF-86 in 2014, she learned that he had not filed the 2007 state tax return. She was now trying to determine how or whether she needed to file that state return because she was in the military in 2007 and a resident of another state. (Tr. 25, 31-32.)

Three weeks before this hearing, Applicant submitted a written request to the state for copies of all tax transcripts from 2007 to 2012. (Tr. 40.) She was also waiting for a response from the state about whether she was required to file a 2007 state return, because she was in the military and residing in another state in 2007. On or about January 20, 2017, she received a letter from the state indicating that her account for tax year 2007 was closed. (AE M.)

That letter also noted that on January 17, 2017, Applicant paid an outstanding 2011 state tax bill for \$589 and an outstanding 2014 state tax bill for \$617.² According to the state, those tax year accounts are now closed. (AE M.) The letter does not reference the status of 2010 and 2012 tax filings.

In summary, Applicant documented that she filed state tax returns for years 2007, 2011, and 2013, as noted in the letter from the state and her tax preparer. The date on which she filed the 2007 and 2011 returns is unknown. She filed her 2013 state returns in April 2015. (Tr. 37, 43; AE H, M.) She did not submit documentation confirming that she filed or resolved state tax returns for 2010 and 2012.

Applicant's annual salary is \$68,000. She said her finances are stable. She submitted a credit report that indicates that she is resolving debts listed on it. (Tr. 46; AE K.) For the past six months, she has been working with a financial counselor to help her budget and pay expenses. (Tr. 27, 44-45.)

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines (AG) list

² Neither of these facts regarding delinquent tax debts was alleged as a security concern in the SOR. Hence, they will not be considered in an analysis of disqualifying conditions. They may be considered in the analysis of mitigating conditions, the whole-person concept, and Applicant's credibility.

potentially disqualifying and mitigating conditions, which are useful 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 AG ¶ 2(a), describing 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.

According to Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an "applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance 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 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 EO 10865 provides that an adverse decision shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned."

Analysis

Guideline F, Financial Considerations

The security concerns relating to the guideline for financial considerations are 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.

This concern is broader than the possibility that an individual might knowingly compromise classified information in order to raise money. It encompasses concerns about an individual's self-control, judgment, and other qualities essential to protecting classified information. An individual who is financially irresponsible may also be irresponsible, unconcerned, or negligent in handling and safeguarding classified information.³

AG ¶ 19 notes one disqualifying condition that could potentially raise security concerns in this case:

(g) failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same.

Applicant failed to file her state income tax returns on a timely basis for tax years 2007 through 2013 as required. This conduct raises security concerns under this guideline, and shifts the burden to Applicant to rebut, extenuate, or mitigate those concerns.

The DOHA Appeal Board has held that:

Failure to file tax returns suggests that an applicant has a problem with complying with well-established government rules and systems. Voluntary compliance with these things is essential for protecting classified information. ISCR Case No. 14-04437 at 3 (App. Bd. Apr. 15, 2016). Someone 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).⁴

After the Government produced substantial evidence of the disqualifying condition, the burden shifted to Applicant to produce evidence and prove mitigation of the security concerns. AG ¶ 20 sets out four conditions that could potentially mitigate financial security concerns under this guideline:

³ ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012).

⁴ ISCR Case No. 12-10933 at 3 (App. Bd. June 29, 2016).

(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; and

(d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

Applicant's conduct of security concern involved five years of disregard for her lawful income tax obligations to the state government. Except for 2007, her failure to timely file state tax returns for 2010, 2011, 2012, and 2013 did not occur under unusual circumstances, and was relatively recent. She provided insufficient evidence that her disregard of state tax filing obligations was largely beyond her control. Additionally, she has not provided evidence that she filed or was excused from filing state returns for 2010 or 2012. That omission continues to raise questions about her reliability, trustworthiness. AG ¶¶ 20(a) and (b) do not provide mitigation of the security concerns.

There is evidence that Applicant participated in financial and budgetary counseling. However, it is not clear whether that counseling included information regarding compliance with tax obligations. Her willful disregard of those obligations was lengthy, recent, and continues to date. The evidence does not support a determination that her financial problems are under control. Thus, she failed to establish mitigation under AG ¶ 20(c). Applicant did not present sufficient evidence that she made a good-faith effort to timely file or resolve any of the alleged tax years. AG ¶ 20(d) does not apply.

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). They include the following:

(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) 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 include 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 facts and circumstances surrounding this case. Applicant is an intelligent and educated 36-year-old woman, who honorably served in the military from 1998 to 2009. She documented that she is successful in her employment. These are positive factors in this case.

However, Applicant's history of failing to timely file state tax returns precludes her from present eligibility for a security clearance. She acknowledged that she failed to timely file her 2007, 2010, 2011, and 2013, in her SF-86, response to interrogatories, and Answer to the SOR. In a May 2014 interview, she discussed the unfiled tax returns for 2010 and 2013. During her testimony, she modified her admissions and said she filed all of the returns, except possibly 2007, but did not have documentation to prove it. The record remained open to give her an opportunity to submit that documentation. She subsequently demonstrated that she resolved three of the five alleged years: 2007, 2011, and 2013. There is no evidence that she filed state tax returns for 2010 and 2012, or that she was not required to do so. At this time, she has not established a record of complying with state tax laws. Her actions to date are not sufficient to outweigh a history of non-compliance with a fundamental legal obligation to file state tax returns.

The record evidence leaves me with questions as to Applicant's eligibility and suitability for a security clearance. Applicant failed to mitigate the security concerns arising under the financial considerations guideline.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ 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 or continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

SHARI DAM
Administrative Judge