



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



In the matter of:

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ISCR Case No. 15-07140

Applicant for Security Clearance

Appearances

For Government: Gina Marine, Esq., Department Counsel

For Applicant: Jason R. Perry, Esq.

10/04/2017

Decision

TUIDER, Robert, Administrative Judge:

Applicant mitigated security concerns pertaining to Guideline F (financial consideration). Clearance is granted.

Statement of the Case

On March 24, 2015, Applicant completed and signed a Questionnaire for National Security Positions (SF-86). On March 15, 2016, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) to Applicant under 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 for Determining Eligibility for Access to Classified Information*, which became effective on September 1, 2006 (Sept. 1, 2006 AGs).

The SOR detailed reasons why the DOD CAF did not find under the Directive that it is clearly consistent with the interests of national security 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 guideline.

On April 12, 2016, Applicant responded to the SOR and requested a hearing. On August 1, 2016, Department Counsel was prepared to proceed. On August 4, 2016, the Defense Office of Hearings and Appeals (DOHA) assigned the case to me. On September 28, 2016, DOHA issued a notice of the hearing, setting the hearing on October 25, 2016. The hearing was held as scheduled.

At the hearing, Department Counsel offered Government Exhibits (GE) 1 through 16, which were received into evidence without objection. Applicant testified and offered Applicant Exhibits (AE) A through H, which were received without objection. On November 2, 2016, DOHA received the hearing transcript (Tr.). I held the record open until December 30, 2016, to permit Applicant to submit additional evidence. Applicant timely submitted AE I through BB, which were received without objection.

While this case was pending a decision, the Director of National Intelligence issued Security Executive Agent Directive 4, establishing *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AGs) which he made applicable to all covered individuals who require initial or continued eligibility for access to classified information or eligibility to hold a sensitive position. The new AGs supersede the Sept. 1, 2006 AGs and are effective “for all covered individuals” on or after June 8, 2017. Accordingly, I have evaluated Applicant’s security clearance eligibility under the new AGs, as required.¹

Findings of Fact²

In Applicant’s SOR response, she denied all of the allegations (SOR ¶¶ 1.a -1.e), with explanations. Additional findings of fact follow. (Tr. 78-81)

Background Information

Applicant is a 57-year-old information technology office service delivery consultant employed by a defense contractor since August 2009. She seeks to retain her secret security clearance, which is a requirement of her continued employment. Applicant has successfully held a clearance since 2001. (Tr. 13-15)

Applicant graduated from high school in June 1978. She has been working on her bachelor’s degree since 2014 and has earned approximately 35 to 38 credit hours. Applicant was married from 1978 to 1995, and that marriage ended by divorce. She remarried in 1996. Her husband is employed full time as a service technician. Applicant has two adult children from her first marriage and one adult stepchild from her second marriage. She provides approximately \$1,500 in monthly support to her mother. Applicant did not serve in the U.S. armed forces. (Tr. 15-21, 38)

¹ The new AGs are available at http://ogc.osd.mil/doha/SEAD4_20170608.pdf.

² Some details were excluded to protect Applicant’s right to privacy. Specific information is available in the cited exhibits.

Financial Considerations

The SOR alleged that Applicant failed to file her Federal income tax returns for tax years 2004 through 2012, that she has a December 2012 \$92,800 federal tax lien; an April 2011 \$1,430 recreational vehicle (RV) resort judgment; a \$79 medical collection account; and a \$129 medical collection account. (SOR ¶¶ 1.a – 1.e) These allegations are established through the Government's exhibits. (GE 1 - 16)

Applicant first discovered that her tax returns had not been filed when she pulled her credit report before completing her March 2015 SF-86. Per the agreement between Applicant and her second husband, he was responsible for filing their tax returns. When Applicant queried her husband why their taxes had not been filed, he responded that since taxes were not owed, they were not required to file a tax return. Applicant's had no reason to believe that her husband's assessment of their tax filing requirements was incorrect. Her husband submitted a notarized statement corroborating her testimony. Applicant added during that timeframe, she never received any written notice from the IRS that their taxes had not been filed. (SOR answer; Tr. 22-26, 29-30, 52-58, 60-64, 83; AE E)

Furthermore, Applicant was not aware that a December 2012 \$92,800 IRS tax lien had been filed against her until she completed her March 2015 SF-86. To complicate matters even more, the IRS issued the lien using her former married name, and sent the lien to her former husband's address. Applicant's former husband never advised her of the lien. At the time of her hearing, Applicant estimated that the amount actually owed to the IRS was "less than \$10,000." In her testimony, Applicant was unsure what tax years gave rise to the lien, stating that the lien could have arisen while married to her previous husband. (SOR answer; Tr. 26-27, 30-33, 48-52, 58-60, 64, 67)

In March 2014, Applicant retained a tax preparer, who filed all required Federal tax returns. Her post-hearing evidence indicated that her husband's previous assessment of their tax liability was incorrect and they actually owed taxes to the IRS for most of the years in question. Her tax consultant also addressed the lien issue and back taxes and successfully finalized a settlement with the IRS in December 2016. Beginning in February 2017 after the record closed, Applicant began paying the IRS \$1,645 monthly payments by direct debit. Her tax consultant provided documentation that all of Applicant's required returns have been filed and that she is in an approved IRS payment plan. To ensure that they have no tax issues, Applicant and her husband will use a tax preparer to file all future Federal tax returns. **SOR ¶ 1.A RESOLVED. SOR ¶ 1.B BEING RESOLVED.** (SOR answer; Tr. 27-29, 47-48, 52-57, 65-67, 76-78; Counsel December 30, 2016 e-mail; AE F, AE G, AE I-AE Q, AE Z, AE AA)

The April 2011 \$1,430 RV resort judgment arose from a property owned by Applicant's mother and stepfather. Her stepfather added Applicant to the deed to allow her access to the facility. Applicant believed that being added to the deed did not result in incurring any financial liability on her part. After adding Applicant to the deed, her stepfather became ill and stopped paying yearly dues to the RV facility. When her stepfather passed away in February 2010, the RV facility sued Applicant for back dues

and obtained a default judgment against her. To resolve this, Applicant signed a quitclaim deed removing both her and mother from having any interest in the RV facility. Applicant also paid the judgment in full, and on October 13, 2016, the creditor filed a notice of satisfaction in the county courthouse. **SOR ¶ 1.C. RESOLVED.** (SOR answer; Tr. 33-36, 46-47; AE C)

The \$79 and \$129 medical collection accounts went into collections because the first bill had not been forwarded and the second bill had been miscoded when billed. Applicant became aware that these debts were outstanding because of these proceedings and paid both accounts in full on April 7, 2016. **SOR ¶¶ 1.D AND 1.E RESOLVED.** (SOR answer; Tr. 36-38, 41-46; AE B, AE D)

Department Counsel thoroughly questioned Applicant on the tax issues. Applicant never wavered in her responses nor did she give me any indication that she was being untruthful. Having had a chance to observe Applicant's demeanor and listen to her testimony, I found her to be credible, albeit mistaken, on the requirement to file federal income taxes.

Applicant and her husband divide their household finance responsibilities and maintain a budget. Applicant is also taking financial counseling courses through her employer. Applicant's recent credit reports, from August 2016 and October 2016, are favorable. Their budget reflects that she and her husband are leading a measured lifestyle and always have a net monthly remainder. (Tr. 68-75; AE A, AE B, AE BB)

Character Evidence

Applicant submitted performance evaluations covering the years 2011 to 2016 as well as two work-related reference letters. Her superiors view her as a valued employee. One of her references described her as a "highly-disciplined and ethical person . . . and "has gained a reputation for being a stickler for the rules." The other reference described her as having "demonstrated reliability, accountability, leadership and commitment to always deliver excellent service to our clients." (AE H, AE R – AE Y)

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 in this decision should be construed to suggest that it is based, 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 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 for financial problems:

Failure 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 or sensitive information. . . . An individual who is financially overextended is at greater risk of having to engage in illegal or otherwise questionable acts to generate funds. . . .

The Appeal Board explained the scope and rationale for the financial considerations security concern in ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012) (citation omitted) as follows:

This concern is broader than the possibility that an applicant might knowingly compromise classified information in order to raise money in satisfaction of his or her debts. Rather, it requires a Judge to examine the totality of an applicant's financial history and circumstances. The Judge must consider pertinent evidence regarding the applicant's self-control, judgment, and other qualities essential to protecting the national secrets as well as the vulnerabilities inherent in the circumstances. The Directive presumes a nexus between proven conduct under any of the Guidelines and an applicant's security eligibility.

AG ¶ 19 includes four disqualifying conditions that could raise a security concern and may be disqualifying in this case: "(a) inability to satisfy debts;" "(b) unwillingness to satisfy debts regardless of the inability to do so;" "(c) a history of not meeting financial obligations;" and "(f) failure to file . . . annual Federal . . . income tax returns or failure to pay annual Federal . . . income tax as required." The record establishes these disqualifying conditions, requiring additional inquiry about the possible applicability of mitigating conditions.

Applicant did not timely file her Federal income tax returns for tax years 2004 to 2012. A willful failure to timely make (means complete and file with the IRS) a federal income tax return is a misdemeanor-level federal criminal offense.³ For purposes of this decision, I am not weighing Applicant's failure to file timely her Federal income tax returns against her as a federal crime, since her actions were not alleged under the criminal conduct AG. Based on this and other information in the SOR, the record established the

³ Title 26 U.S.C., § 7203, willful failure to file return, supply information, or pay tax, reads:

Any person . . . required by this title or by regulations made under authority thereof to make a return, keep any records, or supply any information, who willfully fails to . . . make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor

A willful failure to make return, keep records, or supply information when required, is a misdemeanor without regard to existence of any tax liability. *Spies v. United States*, 317 U.S. 492 (1943); *United States v. Walker*, 479 F.2d 407 (9th Cir. 1973); *United States v. McCabe*, 416 F.2d 957 (7th Cir. 1969); *O'Brien v. United States*, 51 F.2d 193 (7th Cir. 1931).

disqualifying conditions in AG ¶¶ 19(a), 19(b), 19(c), and 19(f) requiring additional inquiry about the possible applicability of mitigating conditions.

AG ¶ 20 lists seven potential mitigating conditions:

(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, a death, divorce or separation, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances;

(c) the individual has received or is receiving financial counseling for the problem from a legitimate and credible source, such as a non-profit credit counseling service, and there are clear indications that the problem is being resolved or is under control;

(d) the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts;

(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;

(f) the affluence resulted from a legal source of income; and

(g) the individual has made arrangements with the appropriate tax authority to file or pay the amount owed and is in compliance with those arrangements.

Applicant has resolved or is resolving her SOR debts. AG ¶ 20(c) is applicable to all of the SOR allegations and ¶ 20(d) is applicable to the remaining SOR allegations except to SOR ¶ 1.a (failure to file Federal income tax returns).

The remainder of this analysis will primarily focus on Applicant's failure to timely file her Federal income tax returns from 2004 to 2012, the most significant security concern alleged. Under these facts, application of AG ¶ 20(a) initially appears limited because the multiple income tax returns at issue were for recent years and her other debts have been ongoing until recently. Now apprised of the importance of filing tax returns, even when a refund is expected, Applicant is aware of her obligations in that regard. She promised to seek professional guidance in the future and to file her Federal tax returns on time, as required. Consequently, I find AG ¶ 20(a) applies. Moreover, Applicant is genuinely contrite over her laxity and oversight. She has taken the

appropriate corrective action. Evidence of her Federal tax return filings was introduced. The situation is now under control and AG ¶ 20(g) applies.

Applicant believed she was due refunds for all of those tax years. The DOHA Appeal Board has commented:

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) (emphasis in original). 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. Jun. 15, 2016)

In ISCR Case No. 15-01031 at 2 (App. Bd. Jun. 15, 2016), the Appeal Board reversed the grant of a security clearance, and noted the following primary relevant disqualifying facts:

Applicant filed his 2011 Federal income tax return in December 2013 and received a \$2,074 tax refund. He filed his 2012 Federal tax return in September 2014 and his 2013 Federal tax return in October 2015. He received Federal tax refunds of \$3,664 for 2012 and \$1,013 for 2013.

Notwithstanding the lack of any tax debt owed when the tax returns were filed in ISCR Case No. 15-01031 (App. Bd. June 15, 2016), the Appeal Board provided the following principal rationale for reversing the grant of a security clearance, “By failing to file his 2011, 2012, and 2013 Federal income tax returns in a timely manner, Applicant did not demonstrate the high degree of good judgment and reliability required of persons granted access to classified information.” ISCR Case No. 15-01031 at 4 (App. Bd. Jun. 15, 2016) (citations omitted).

On June 8, 2017, the new AGs went into effect. In 2014, shortly after learning of the requirement to file tax returns, regardless of whether she was owed a refund, Applicant “made arrangements with the appropriate tax authority to file [all required federal income tax returns] . . . and is in compliance with those arrangements.” AG ¶ 20(g). Based on consideration of her credibility, contrition, and new understanding of her responsibilities, there is sufficient assurance that her financial problems are resolved, are under control, and will not recur in the future. Under all the circumstances, financial considerations security 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(d):

(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), “[t]he ultimate determination” of whether to grant a security clearance “must be an overall commonsense judgment based upon careful consideration” of the guidelines and the whole-person concept. My comments under Guideline F are incorporated in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under that guideline but some warrant additional comment.

Applicant is a 57-year-old information technology office service delivery consultant employed by a defense contractor since August 2009. She has worked the majority of her adult working life in the defense industry and has successfully held a security clearance since 2001. Her employer values her as an employee and supports her for a security clearance.

Once Applicant became aware that she was required to file Federal income tax returns, regardless of whether she was owed a refund, she took prompt corrective action. She is current on the filing of all of her income tax returns. I agree with Applicant’s admission of negligence. Applicant’s error in judgment is less serious because it was not motivated by a desire to withhold funds due to the IRS or having a *laissez faire* attitude. This process had a sobering effect on Applicant and I am confident that she will endeavor to timely file and her taxes in the future.

I have carefully applied the law, as set forth in *Egan*, Exec. Or. 10865, and the new AGs, to the facts and circumstances in the context of the whole person. I conclude that

financial consideration security concerns are mitigated. It is clearly consistent with the interests of national security to grant Applicant security clearance eligibility.

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
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Subparagraphs 1.a – 1.e:	For Applicant
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Conclusion

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

ROBERT TUIDER
Administrative Judge