



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



In the matter of:)
)
) ISCR Case No. 16-02584
)
Applicant for Security Clearance)

Appearances

For Government: Michelle Tilford, Esq., Department Counsel
For Applicant: Daneen Banks, Esq.

05/02/2018

Decision

NOEL, Nichole L., Administrative Judge:

Applicant contests the Department of Defense's (DOD) intent to revoke her eligibility for a security clearance to work in the defense industry. Although Applicant has taken some steps to resolve her outstanding tax debt, she has failed to address the underlying problem, and establish that her tax problems are under control. Clearance is denied.

Statement of the Case

On October 3, 2016, the DOD issued a Statement of Reasons (SOR) detailing security concerns under the financial considerations guideline.¹ DOD adjudicators were unable to find that it is clearly consistent with the national interest to continue Applicant's security clearance and recommended that the case be submitted to an administrative judge for a determination whether to revoke her security clearance.

¹ The DOD CAF acted under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry*, signed by President Eisenhower on February 20, 1960, as amended; as well as DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive), and the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information*, implemented on September 1, 2006.

Applicant timely answered the SOR and requested a hearing.² Initially, this case was scheduled for September 27, 2017. On September 20, 2017, the Government gave notice of its intention to amend the SOR.³ In response, Applicant requested a continuance, which I granted without objection from Department Counsel. On September 29, 2017, I issued a prehearing order to the parties regarding the exchange and submission of discovery, the filing of motions, and the disclosure of any witnesses, and the parties complied.⁴ At the hearing, which proceeded as rescheduled on November 15, 2017, I admitted Government's Exhibits (GE) 1 through 8 and Applicant's Exhibits (AE) A, over Department Counsel's objection, and B through N, without objection. After the hearing, Applicant timely submitted AE O through R, which were also admitted without objection. DOHA received the transcript (Tr.) on December 1, 2017.⁵

Procedural Matters

Application of the Revised Adjudicative Guidelines

While the case was pending decision, the Director of National Intelligence (DNI) issued Security Executive Agent Directive 4, establishing the National Security Adjudicative Guidelines (AG) applicable to all covered individuals who require initial or continued eligibility for access to classified information or eligibility to hold a sensitive position. The 2017 AG superseded the AG implemented in September 2006, and they are effective for any adjudication made on or after June 8, 2017. Accordingly, I have applied them in this case.

Motion to Amend the SOR

Department Counsel moved to amend the SOR to correct a clerical error in SOR ¶ 1.e, and to add allegations ¶¶ 1.h – 1.j. Applicant answered the amended SOR allegations and did not object. The motion is granted, the SOR is amended, and Applicant's answers are entered into the record.⁶

Findings of Fact

Applicant is a systems engineer. She has worked for her current employer, a federal contractor, since August 2012. Applicant completed a security clearance application in August 2014, reporting federal and state income tax issues for 2009 through 2011. The ensuing investigation revealed additional federal and state income tax issues for 2013 and 2016. The SOR alleges five state tax liens, covering 2006 to

² Answer.

³ HE V.

⁴ HE III.

⁵ HE VI.

⁶ HE IV.

2011, filed in in September 2013 (§§1.a), November 2013 (§§ 1.b), February 2014 (§§ 1.c), October 2015 (§§ 1.d), and April 2016 (§§ 1.e); and one federal tax lien for 2010 and 2011, filed by the IRS in October 2011 (§§ 1.f). The SOR also alleges that Applicant failed to timely file her 2011 federal income tax returns (§§ 1.h), and that she failed to timely failed to pay her 2011, 2013, and 2016 federal income tax liabilities (§§§ 1.h – 1.j). The SOR also alleges an \$822 delinquent debt for a timeshare (§§ 1.g), which was paid in full in October 2017.⁷

Applicant, who files taxes jointly with her husband, began experiencing tax problems in 2006, when they could not afford to pay their state tax liability. In 2009, they owed federal and state income taxes that they could not afford to pay. In 2010, Applicant incurred federal and state income tax liabilities because she did not have any income taxes withheld from her pay, which she blames on an oversight. She did not notice that income taxes were not deducted from her pay. In 2011, the IRS assessed additional taxes against Applicant for failure to report a \$40,000 withdrawal from her retirement account during that year. Applicant claims that they did not learn until 2013, that their tax preparer did not file the couple's 2011 federal income tax return or file an extension. Despite incurring penalties for their tax preparer's failure to timely file their tax return, the couple did not file a complaint against the preparer with the IRS. The couple filed the missing return in March 2013. The tax transcripts show that Applicant and her husband also filed their 2009 and 2015 federal income tax returns late. The returns were filed in 2011 and late 2016, respectively.⁸

The couple has taken steps to resolve their outstanding state and federal tax liabilities. The state tax authority confirmed that liens alleged in SOR §§ 1.b (\$1,378) and 1.d (\$7,309) were mistakenly attributed to Applicant and she does not owe them.⁹ The liens alleged in SOR §§ 1.a (\$12,255) and 1.c (\$1,980) have been paid in full and released.¹⁰ Applicant has been in a payment plan of \$266 per month since August 2016 for the state tax lien alleged in SOR § 1.e (\$5,731) and the account is in good standing. Applicant has also entered into an installment agreement to resolve \$48,575 in outstanding federal taxes for 2009, 2010, 2011, 2013, and 2016. The Applicant is in compliance with the agreement, which requires her to pay \$608 each month. Under the agreement, the payment which will increase to \$700 in August 2018 and to \$810 in August 2019. Although the 2013 (\$91) and 2016 (\$1,700) balances were included in the IRS installment agreement, the couple paid the balances separately in August 2017. Applicant's husband indicated that the failure to pay these smaller balances on time was an oversight.¹¹

⁷ Tr. 52-53; GE 1, 2-5; AE M; SOR; HE IV.

⁸ Tr. 42-48, 123-124, 126, 133, 141; AE L, S.

⁹ AE C.

¹⁰ AE B; O.

¹¹ Tr. 48-52, 118, 121-133, 138, 142-144; AE B – C, F, J-O.

At the hearing, Applicant and her husband testified about their roles in managing the household finances. Applicant's husband handles all the couple's financial matters. She does not ask for the details and he does not volunteer them. She does not know who prepares the couple's taxes, but assumes her husband hires someone because she has never seen him complete the forms. Applicant's husband retains their tax preparer, though at the hearing, he was unable to provide their preparer's name, credentials, or qualifications. The preparer Applicant's husband used for a number of years, including 2011, was convicted on federal charges of preparing fraudulent income tax returns for at least 11 taxpayers between 2008 and 2011. Applicant and her husband were not named as victims in the indictment. Applicant's husband also communicates with the IRS and state tax authority to establish and maintain payment plans. Applicant's involvement in the couple's tax preparation is limited to providing her husband any documentation he may need. Although Applicant was aware they owed taxes, she was not aware of the extent of tax issues until her subject interview.¹²

Applicant's husband admits that they have been in tax payment plans off-and-on since 2006. He could not identify specific circumstances that prevented them from being able to timely pay their federal and state tax liabilities or adhering to their payment plans. He also admits that he did not pay close attention to their tax obligations before the present case made it an issue. Applicant claims that she has a better understanding of the family finances and discusses them with her husband weekly. While she was able to discuss the status of the SOR debts, she could not provide details about the circumstances causing the state and federal tax liabilities. The Applicant and her husband have not attended financial counseling. They have not hired a qualified tax professional.¹³

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 list potentially disqualifying conditions and mitigating conditions, which are to be 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, administrative judges apply the 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(a), 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.

¹² Tr. 39-41, 81-82, 126-127, 144-145; AE S.

¹³ Tr. 54-55, 120-121, 134-136, 145-147, 151-154.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that “[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the 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 the applicant or proven by Department Counsel.” The applicant has the ultimate burden of persuasion 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 of potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that adverse 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

Failure to live within one’s means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgement, or willingness 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.¹⁴

The record establishes the Government’s *prima facie* case, that Applicant has a has failed to timely file and pay annual federal and state taxes as required.¹⁵ Applicant’s failure to timely pay her state and federal income tax obligations also demonstrates a history of not meeting financial obligations as well as an inability to satisfy debts.¹⁶ Applicant did present some mitigating evidence. Applicant successfully disputed two of the alleged state tax liens.¹⁷ She has paid two of the state tax liens and has made

¹⁴ AG ¶ 18.

¹⁵ AG ¶ 19(f).

¹⁶ AG ¶¶ 19(a) and (c).

¹⁷ AG ¶ 20(e).

arrangements with the appropriate tax authorities to pay the amounts owed and is compliance with those arrangements.¹⁸ However, this is not enough to mitigate the underlying concern.

Applicant and her husband have a 12-year history of tax problems largely of their own making. They failed to manage their tax obligations properly. While they are taking steps to pay their outstanding state and federal tax balances, they did not provide any evidence to show that they will not encounter similar problems in the future. They have no tax management strategy. They have neither hired a reputable tax professional, nor attended any financial counseling. Given their history of sporadic repayment efforts, they have not provided any indication of their ability to adhere to the plans of their state and federal tax repayment plans. Ultimately, Applicant failed to present sufficient evidence that her tax problem is under control.

After a review of the record and a consideration of the whole-person factors at AG ¶ 2(d), I conclude that Applicant's history of tax problems render her unsuitable for continued access to classified information at this time. Her status as a long-time clearance holder is not enough to outweigh the security concerns raised by her history of tax problems.

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, Financial Considerations: | AGAINST APPLICANT |
| Subparagraphs 1.a, 1.c, 1.g - 1.h: | For Applicant |
| Subparagraphs 1.b, 1.d - 1.f, 1.i – 1.j: | Against Applicant |

Conclusion

In light of all of the circumstances presented, it is not clearly consistent with the national interest to grant Applicant a security clearance. Eligibility for access to classified information is denied.

Nichole L. Noel
Administrative Judge

¹⁸ AG ¶¶ 20(d) and (g).