



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 17-02119

Appearances

For Government: Nicole A. Smith, Esq., Department Counsel
For Applicant: James Porter Spencer, Personal Representative

07/17/2018

Decision

RIVERA, Juan J., Administrative Judge:

Applicant established that circumstances beyond her control contributed to her financial problems and that she has been acting responsibly under the circumstances. With her and her spouse's combined earnings, she should be able to pay for her family's living expenses and current tax debts. Her financial problems are being resolved. Clearance granted.

Statement of the Case

Applicant submitted a security clearance application (SCA) on February 3, 2016, seeking to continue the clearance required for her position with a federal contractor. She was interviewed by a government background investigator in October and November 2016. After reviewing the information gathered during the background investigation, the Department of Defense (DOD) issued her a Statement of Reasons (SOR) on June 28, 2017, alleging security concerns under Guideline F (financial considerations). Applicant answered the SOR on July 27, 2017, and requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA).

DOHA assigned the case to me on January 17, 2018, and issued a notice of hearing on March 16, 2018, setting the hearing for April 10, 2018. At the hearing, the Government offered five exhibits (GE 1 through 5). Applicant objected to the admissibility of AE 2 (unauthenticated summaries of her interviews conducted by a government investigator). Department counsel withdrew GE 2 and it was not admitted as evidence, but it was marked and made part of the record. Applicant testified and submitted five exhibits. (AE 1 through 5) AE 5 was received post-hearing. It is comprised of account transcripts for tax years 2008 through 2013, and a 2004 IRS letter for payments made for tax year 2001. All exhibits were admitted without objection, except of GE 2. DOHA received the hearing transcript (Tr.) on April 17, 2018.

Findings of Fact

In her Answer, Applicant admitted that she is indebted to the federal government for tax liens filed against her in 2008, 2011, 2012, and 2014. (SOR ¶¶ 1.a through 1.e) She denied the consumer debt alleged in SOR ¶ 1.f. Her documentary evidence shows that it was paid in full. She also denied SOR ¶ 1.g, stating that she paid the principal of the tax debt and that penalties and interest were forgiven because of the statute of limitations. Her admissions to the SOR and at her hearing are incorporated herein as findings of fact. After a thorough review of the record evidence, including her testimony and demeanor while testifying, I make the following additional findings of fact:

Applicant is a 51-year-old employee of a federal contractor. She received a general education development (GED) diploma and has completed some college and technical courses. She married her husband in 1992, and they have three adult children, ages 34, 32, and 31.

Applicant started working for federal contractors in 2004. Except for a three-month period of unemployment between November 2011 and January 2012, she has been consistently employed by federal contractors. In July 2016, Applicant's current employer, a federal contractor, hired her. She has held a secret clearance continuously since February 2006 to present. There is no evidence showing that her clearance was ever suspended, or of any security concerns, except for those in the current SOR.

In her February 2016 SCA, Applicant disclosed that she owed the IRS taxes for tax years 2009 through 2012, because she withheld insufficient funds from her earnings to pay her taxes. She also disclosed a foreclosed home in 2010 and a delinquent credit account. Applicant noted that she and her spouse had established an installment payment agreement with the IRS, and a payment plan with the creditor of the credit card account. The background investigation addressed her financial problems and revealed the six federal tax liens alleged in the SOR and a judgment filed in March 2015. All of the SOR allegations are established by Applicant's admissions and the record evidence.

Applicant explained that her tax problems started in 2005 and continued until about 2012. Both she and her spouse were working as independent contractors and both failed to withhold sufficient income from their salaries to pay taxes. In 2007, the

IRS notified them of a tax lien. Applicant communicated with the IRS and became aware of her inadequate withholdings. She and her spouse set money aside to pay the back taxes and increased their withholdings. In 2008, Applicant and her spouse hired a tax accountant to help them resolve their tax problems. The accountant helped Applicant set up a payment plan with the IRS and to make quarterly estimated tax payments.

Applicant testified that she was unable to pay their back taxes any sooner because of several circumstances beyond her control. First, Applicant's spouse was laid off in 2006. His only income was his military retired pay and his disability pay. Applicant became the main breadwinner of the family and her income was insufficient to pay all of their financial obligations at the same time. After that, Applicant's spouse was employed intermittently, and he stopped working in 2012. He underwent an operation in 2017, and was still going through the recovery process. Applicant continues to be the main breadwinner for the family.

Second, between 2008 and 2010, Applicant's company moved her to work in another state. Her husband and three children remained in their state of domicile. She had to maintain two residences with the resulting increased financial expenses. Third, at about the same period, Applicant had three children attending college. She and her spouse elected to forego taking student loans for their children. Instead, they provided financial assistance to them throughout college. Fourth, Applicant and her spouse had their mortgage, other loans, and living expenses. They believe that "all those expenses combined didn't leave us enough to pay the taxes." (Tr. 57)

Applicant and her husband timely filed their income tax returns. Her spouse was in charge of the household finances, including filing the tax returns. She claimed to have little knowledge of their financial situation because he was the financial manager. Applicant highlighted that she and her spouse gradually increased their withholdings, and by 2012, they had corrected that problem. IRS account transcripts confirmed their substantial increase of their withholdings. Her withholdings for tax year 2008 were \$3,557; for tax year 2009 - \$3,437; for tax year 2010 - \$23,723; for tax year 2011 - \$28,634; and for tax year 2012 - \$10,411. (AE 5) IRS records also confirmed that Applicant and her spouse have paid their taxes in full since 2013, including tax years 2014, 2015, and 2016. Applicant's spouse testified that based on his calculations, they did not owe taxes for tax year 2017.

Applicant's financial situation improved substantially after she moved back with her family in 2011. She eliminated the additional expenses associated with the second residence. Additionally, their children graduated from college and they no longer have to pay for college expenses. Applicant estimated she has about \$1,000 left over at the end of the month that she uses to pay credit cards or other debts. She has a 401(k) retirement plan with about \$10,000, and savings and checking accounts. Applicant documentary evidence show her salary was \$85,000 in 2016; \$95,000 in 2017; and \$100,000 in 2018.

Applicant and her spouse were paying their back taxes through the Electronic Federal Tax Payment System (EFTPS) as early as 2004. In July and August 2004 they paid \$1,500 toward their back taxes for another tax year. (AE 5) In July 2015, Applicant and her spouse entered into an annual installment agreement with the IRS. They paid \$10,000 in \$1,000 installments between July 2015 and July 2016. (SOR answer, Enclosure 1) Applicant's September 2016 IRS agreement summary (SOR answer, Enclosure 4), and the 2017 "billing details" statement (SOR answer, Enclosure 5) show that she owed no taxes for tax year 2005, but had penalties and interest charges of \$34,850. Applicant's spouse testified that they paid the 2005 tax owed, but the penalties and interest charges were "forgiven" by the IRS because the statute of limitations lapsed.

Applicant's spouse testified that he contacted the IRS to negotiate a compromise or to establish another installment agreement. He averred that the IRS agent suggested that he pay the taxes owed for the oldest years in arrears, and let the statute of limitations erase the debts for penalties and interests.

The SOR alleged six unpaid federal tax liens filed against Applicant in March 2007, for \$54,312; January 2008, for \$36,920; July 2008, for \$12,892; February 2011, for \$24,958; February 2012, for \$15,045; and September 2014, for \$15,785.

Applicant's IRS account transcripts show that for tax year 2006, Applicant owes \$61,873, and for tax year 2007, they owe \$21,084. (The evidence provided has no additional information for tax years 2006 and 2007.) For tax year 2008, Applicant had withholdings of \$3,557; made estimated tax payments of \$4,960; made a \$2,000 payment in April 2009; and as of April 2018, they owe \$32,953. For tax year 2009, she had withholdings of \$3,437; made estimated tax payments of \$6,040; made a \$2,500 payment in April 2010; and they owe \$35,714. For tax year 2010, she had withholdings of \$23,723; made estimated tax payments of \$6,040; transferred into her account \$18,120 in estimated tax payments; and they owe \$20,817. For tax year 2011, Applicant had withholdings of \$28,634; made no other payments; and they owe \$15,533. For tax year 2012, they had withholdings of \$10,411, made no other payments, and they owe \$5,552. (See SOR answer Enclosures 4 and 5.)

Applicant owes no back taxes for tax years 2013 through 2016. (See tax year 2013 account transcript and the "billings details" document, dated March 2017; AE 5) Applicant and her spouse testified that in May 2010, the IRS obtained an "account match for federal levy payment program" and the IRS levied the spouse's military pension for payment of back taxes. Applicant claimed that this levy is still active, and they consider the levy as an installment agreement for the payment of back taxes.

Concerning the judgment alleged in SOR ¶ 1.f, filed in March 2015, Applicant credibly testified that she and her husband attempted to negotiate a payment agreement or a settlement with the creditor, who refused to do so. After the judgment was filed, Applicant negotiated a payment plan with the attorney, and paid the judgment

in full in February 2017. Applicant's documentary evidence shows the judgment was released.

Applicant's documentary evidence also show that in November 2017, she paid in full one student loan, and that she has been repaying a second student loan that will be paid in full in 2018. (AE 1-3) Applicant's March 2017 credit report shows 17 accounts (trades) in good standing. The credit report has no negative entries (no delinquent or charged-off debts), except for the account alleged in SOR ¶ 1.f, which was paid in February 2017.

Applicant acknowledged that they should have been more diligent paying their taxes. However, she believes they were doing the best they could do under their circumstances. She paid as much of her taxes as she could to balance the payments of her other debts. She understands the seriousness of the security concerns raised by her tax problems. She promised to timely pay her taxes in the future. Applicant highlighted her 14 years of employment with federal contractors while holding a clearance without any issues or concerns, except for his financial problems. Applicant credibly promised to continue paying her legal debts and to resolve her tax problems. She believes that her financial situation is now stable, and she will be able to fully address her back taxes.

Policies

The SOR was issued under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive) (January 2, 1992), as amended; and the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AG), implemented by the DOD on June 8, 2017.

Eligibility for access to classified information may be granted "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, § 2. The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

The AG list disqualifying and mitigating conditions for evaluating a person's suitability for access to classified information. Any one disqualifying or mitigating condition is not, by itself, conclusive. However, the AG should be followed where a case can be measured against them, as they represent policy guidance governing access to classified information. Each decision must reflect a fair, impartial, and commonsense consideration of the whole person and the factors listed in SEAD 4, App. A ¶¶ 2(d) and 2(f). All available, reliable information about the person, past and present, favorable and unfavorable, must be considered.

Security clearance decisions resolve whether it is clearly consistent with the national interest to grant or continue an applicant's security clearance. The Government must prove, by substantial evidence, controverted facts alleged in the SOR. If it does, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. The applicant bears the heavy burden of demonstrating that it is clearly consistent with the national interest to grant or continue his or her security clearance.

Persons with access to classified information enter into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability, and trustworthiness of those who must protect national interest as their own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access in favor of the Government. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; SEAD 4, ¶ E(4); SEAD 4, App. A, ¶¶ 1(d) and 2(b). Clearance decisions are not a determination of the loyalty of the applicant concerned. They are merely an indication that the applicant has or has not met the strict guidelines the Government has established for issuing a clearance.

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. Financial distress can also be caused or exacerbated by, and thus can be a possible indicator of, other issues of personnel security concern such as excessive gambling, mental health conditions, substance misuse, or alcohol abuse or dependence. An individual who is financially overextended is at greater risk of having to engage in illegal or otherwise questionable acts to generate funds.

Applicant's history of financial problems is documented in the record. She and her husband developed financial (tax) problems around 2005, because of their insufficient income withholdings. They failed to pay their taxes for tax years 2006 through 2012, and acquired a substantial tax debt of over \$200,000. She also had one judgment filed against her that she has since paid. AG ¶ 19 provides three disqualifying conditions that could raise a security concern and may be disqualifying in this case: "(a) inability to satisfy debts"; "(c) a history of not meeting financial obligations"; and "(f) (failure to file or fraudulently filing annual Federal, state, or local income tax returns or failure to pay . . . income tax as required." The record established the disqualifying

conditions, requiring additional inquiry about the possible applicability of mitigating conditions.

The following 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, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances;

(c) the person has received or is receiving 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;¹

(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; 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.

¹ The 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)).

The Appeal Board concisely explained 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).

All of the above financial considerations mitigating conditions are raised by the facts in this case and mitigate the security concerns. Applicant's financial problems are ongoing and recent because she is still paying her back taxes. However, her financial problems occurred under circumstances unlikely to recur and they do not cast doubt on her current reliability, trustworthiness, or judgment.

Applicant's financial problems could be attributed to, or were aggravated by, circumstances beyond her control, specifically, Applicant's and her spouse's periods of unemployment or underemployment with the subsequent decrease in family earnings, and the financial hardship resulting from maintaining two households. I find these circumstances to be beyond her control. Applicant also identified as factors that prevented her from paying her back taxes more diligently her mortgage payments, her financial support for three children attending college, and her inability to pay other debts and living expenses. I find these normal circumstances that were within Applicant's control.

Applicant acknowledged she made a mistake with her insufficient withholdings, and that she should have been more diligent paying her back taxes. Notwithstanding, Applicant established that as far back as 2004, she was making arrangements with the IRS to pay her back taxes. When notified by the IRS of her withholdings problem in 2007, she substantially increased her withholdings for tax years 2010 and thereafter, thereby reducing, and ultimately eliminating the tax payment shortfall after tax year 2012.

In 2010, the IRS levied Applicant's spouse's retired pay, and has been levying his retired pay since. Applicant established an installment payment agreement with the IRS between 2015 and 2016, paying \$10,000 in back taxes, and their tax returns are being applied to their back taxes. I note that Applicant has paid all her taxes for tax years 2013 through 2017. She owes no taxes for those years.

Applicant's efforts to pay her tax debt are not ideal, but I find she is making a good-faith effort to resolve her tax debt. Applicant filed her income tax returns on time, she had withholdings in place (although insufficient for certain years), made estimated tax payments, and then made some additional tax payments for most of the years in question. She has a history of contacting the IRS and making payment arrangements since at least 2004. She is paying her tax debt through the levy on her husband's retired pay, applying her tax returns to the tax debt, and by establishing payment installment agreements, as she did in 2015. Her actions show diligence and responsibility in the handling of her tax obligations.

Applicant paid the judgment alleged in the SOR, she paid one student loan, and will finish paying the second student loan in 2018. She received financial counseling through a tax professional she retained in about 2010 to help her resolve her tax problems. With the tax professional help, she established a plan to timely pay her income taxes. It is commendable that she has no taxes due for any tax year after 2012 through 2017. Clearly she resolved the withholdings problem. She is in the process of addressing her back taxes in a manner consistent with her financial resources.

I note that her 2017 credit report shows 17 accounts, with no delinquent or charged-off accounts (except for the paid judgment). Considering the evidence as a whole, I find that the evidence does not support a finding that she was negligent paying her back taxes. She simply was not able to pay all her debts at the same time. She divided her financial resources between her tax obligations and her living expenses in order to provide for her children's education.

Applicant's evidence is sufficient to establish that her financial problems were caused or aggravated, to some extent, by circumstances beyond her control. Considering the evidence as a whole, and including her recent actions, Applicant has been financially responsible under the circumstances. She disclosed her financial problems in her 2016 SCA. Her financial situation is improving and there are clear indications that her financial problems are being resolved or under control. She has been paying her back taxes and promised to continue to do so. With her job earnings and her spouse's income, their earnings should be sufficient to pay for her family's living expenses and current debts.

Whole-Person Concept

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, and under the whole-person concept. SEAD 4, App. A, ¶¶ 2(a) and 2(d). I have incorporated my comments under Guideline F in my whole-person analysis. Some of these factors were addressed under that guideline, but some warrant additional comment.

Applicant is a 51-year-old employee of a federal contractor. She has worked for federal contractors since 2004. She has held a clearance during most of her employment without any issues or concerns, except for her financial problems.

Circumstances beyond her control contributed to or aggravated her recent financial problems. The record evidence is sufficient to establish that her financial problems are being resolved or are under control.

The AGs do not require an Applicant to immediately resolve or pay each and every debt alleged in the SOR, to be debt free, or to resolve first the debts alleged in the SOR. An applicant needs only to establish a plan to resolve financial problems and take significant actions to implement the plan. Applicant has implemented a plan to resolve her financial problems and she has made significant progress implementing her plan.

Considering the evidence as a whole, Applicant demonstrated a track record of paying her financial obligations. Applicant is now fully aware of the security concerns raised by her failure to timely pay her taxes. She promised to maintain financial responsibility to be eligible for a clearance. The financial considerations security concerns are mitigated.

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 - 1.g:	For Applicant

Conclusion

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest of the United States to grant eligibility for a security clearance to Applicant. Clearance is granted.

JUAN J. RIVERA
Administrative Judge