



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



In the matter of:)
)
) ISCR Case No. 14-05130
)
Applicant for Security Clearance)

Appearances

For Government: Alison O’Connell, Esquire, Department Counsel
For Applicant: Bradley P. Moss, Esquire

04/11/2016

Decision

METZ, John Grattan, Jr., Administrative Judge:

Based on the record in this case,¹ I deny Applicant’s clearance.

On 22 December 2014, the Department of Defense (DoD) sent Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline F, Financial Considerations.² Applicant timely answered the SOR, requesting a hearing before the Defense Office of Hearings and Appeals (DOHA). DOHA assigned the case to me 18 July 2015 and I convened a hearing 27 August 2015. DOHA received the transcript 9 September 2015.

¹Consisting of the transcript (Tr.), Government exhibits (GE) 1-6, hearing exhibits (HE) I-II, and Applicant exhibits (AE) A-O. AE O was timely received post hearing. The record in this case closed 14 September 2015, when Department Counsel stated no objection to the exhibit.

²DoD acted 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 (AG) effective within the DoD on 1 September 2006.

Findings of Fact

Applicant admitted the SOR allegations. She is a 51-year-old systems configuration manager employed by a U.S. defense contractor since October 2014. She has been employed in similar positions with several other companies since November 2002. She was unemployed from April to May and July to August 2009, March to October 2013, and January to October 2014. Applicant and her husband have been married for 21 years and have 13-year-old twins. Applicant's husband was unemployed from sometime in 2005 to April 2006. He currently earns about \$73,000 annually in his full-time job, another \$30,000 in a part-time job, plus another \$15,000 annually in overtime from his full-time job (Tr. 27-28, 41).

Applicant previously had background investigations in October 1998, December 2003 and May 2004, and obtained appropriate clearances with each investigation (GE 1). In August-September 2008, Applicant began a new background investigation, one which required a polygraph examination for special access with another Government agency (AGA). A January 2009 polygraph report (GE 3) revealed that Applicant had falsified a significant and recent drug abuse history. In February 2009, AGA denied Applicant's request for access. Applicant appealed that decision in April 2009, but the decision was upheld in May 2009 and again in August 2009. With the loss of her clearance, Applicant's company terminated her in April 2009. She has not held a clearance since. She now seeks to have it reinstated. Her current job does not require a clearance, but having a clearance would open up new jobs to her within the company (Tr. 50). Except as noted above, Applicant had no security violations or disciplinary issues with any of her previous employments.

The SOR alleges, Government exhibits (GE 2, 4-6) substantiate, and Applicant admits, three delinquent debts totaling over \$22,000. Over \$22,000 of the debt is for delinquent Federal income taxes. Applicant documented that she began to address SOR debt 1.c around August 2014 and paid the debt completely by February 2015 [Answer; AE O(6)]. She also documented that she had reduced SOR debt 1.b [homeowner's association (HOA)] fees to less than \$100 by June 2015 [AE D, O(7)-O(8)].³ However, her HOA fees were sufficiently delinquent that the HOA obtained a

³However, Applicant has not been completely forthcoming in her description of her HOA debt. Applicant's Answer provided a copy of a 30 September 2014 order of satisfaction for the judgment at SOR 1.b, and stated that "this judgment has been satisfied with the courts." What she neglected to say was that the creditor on the June 2014 judgment had filed to garnish Applicant's husband's wages in July 2014 (GE 2), and in September 2014, Applicant still owed the creditor nearly \$900 (AE D). Moreover, there appears to have been an earlier judgment that the creditor had dismissed pursuant to a settlement agreement. The settlement provided that Applicant would pay \$3,323.36 to settle the case in full: \$1,500 by 15 November 2013, then \$364.26 monthly beginning 28 November 2013 through 28 March 2014, with any remaining balance due 28 April 2014. Applicant's payment records for this account show that she did not meet this payment schedule, possibly leading the creditor to seek a judgment in June 2014. Furthermore, her payment records show that she has been regularly delinquent on this account since January 2000 [AE O(7)]. Although the account was only payable quarterly, Applicant failed to make any payments for over 18 months from June 2001 to January 2003. Through larger catch-up payments, she brought the balance down, and remained more-or-less current to June 2007, when the balances once again began to grow. Between 1 July 2007 and 20 December 2013, Applicant

judgment against her, and pursued that judgment through garnishment of her husband's wages.

Applicant owes the Internal Revenue Service (IRS) substantial delinquent income taxes, alleged to be over \$20,000 based on Applicant's August 2014 response to DOHA interrogatories (GE 2). Her tax problems began with her failure to timely file her 2005-2007 Federal income tax returns. Applicant has never stated a reason for her failure to file her 2005 return. During her polygraph examination (GE 3), Applicant stated that the IRS initially contacted her in August 2008 about her failure to file her 2006 and 2007 taxes, but she did not get around to following up with the IRS until December 2008, when she learned that she owed about \$7,500 in delinquent taxes for the two years. She told the examiner that she would file the returns "this week," but offered "no reason" for her failure to file.

Applicant filed her 2005 income tax return on 23 March 2009; and her 2006 and 2007 returns on 5 May 2009 [AE A, O(1)-O(3)]. She had applied for extensions to file for these years, but did not meet even the extended filing deadlines. The tax returns showed a debt to the IRS of \$9,295, to which has been added additional taxes, penalties, and interest totaling over \$10,500. On 24 August 2009, Applicant established an installment agreement with the IRS for these three years. It appears Applicant got off to a slow start in 2009, but by 2010, she was making regular payments on the plan. On balance, Applicant has made her plan payments as required since 2010.⁴ The payment amount has been reduced over the years to accommodate Applicant's financial circumstances, most recently in July 2014, when the monthly payment was reduced to \$150 beginning 13 August 2014. The monthly payment was to increase to \$250 on 13 August 2015, and \$350 on 13 August 2016 (GE 2).⁵

Although Applicant did not seek automatic extensions for tax years 2008, 2009, and 2011,⁶ these tax returns were also filed late, albeit within a month of their April due

made only two payments on the account: a 30 March 2010 check for \$420 that was returned for non-sufficient funds, and a 6 July 2011 check for \$525. Between that payment and 20 December 2013—another gap of more than 18 months—she made no payments on the account. This contrasts sharply with her statement that she went a year without paying from 2009 to 2010 (Tr. 79-81). Between December 2013 and June 2015, she made larger, but irregular, payments to reduce the balance to less than \$100 (AE D).

⁴The IRS tax transcripts [AE B, O(1)-O(5)] are not models of clarity or accuracy. For example, the tax transcript for 2008 [AE O(4)] reports a credit of \$2,505 transferred out to 2005, yet the tax transcript for 2005 [AE O(1)] does not show receipt of the credit. The tax transcript for 2009 (AE B) shows no taxes owed after a \$2,862 credit transfer to 2006 [AE O(2)], which was received, but later-added tax, penalties, and interest shows there should be a remaining balance of over \$6,000. It appears that the IRS seized any claimed refund for a given tax year and applied it to other year balances owed, while not performing additional tax, penalties, and interest calculations until later.

⁵The plan agreement notes that the plan is for tax years 2005, 2007, and 2009-2011, apparently reflecting addition of subsequent tax years as necessary and removal of tax years as they are paid.

⁶Applicant provided a tax return for 2010, timely dated, but did not provide a tax transcript for tax year 2010.

dates. Nevertheless, the IRS imposed additional tax, penalties, and interest totaling nearly \$13,000. Each of these returns had a refund balance that was seized and credited elsewhere, although as noted, the \$2,505 credit for 2008 has not been accounted for. Applicant's 2010 and 2012-2014 income tax returns were timely filed. Tax refunds for 2012 and 2013 were seized and credited elsewhere. Applicant always used professional tax preparers to file her tax returns (Tr. 25; AE A).

Applicant's 2006 taxes were removed from her installment plan on 8 April 2013. Her 2007 taxes were removed on 8 September 2014. Applicant's 2008 taxes were added to her installment agreement on 19 February 2011, and removed from the agreement as paid on 30 April 2012; her 2009 taxes were added to the agreement on 3 January 2012 and have not been removed as of June 2015; and Applicant's 2011 taxes were added to the agreement on 18 January 2014 and have not been removed as of 14 September 2015. Applicant claims to owe the IRS \$15,299 currently (Tr. 72; AE N), but could not corroborate that total.⁷

Applicant's October 2012 clearance application (GE 1) stated no tax problems, even though she had failed to timely file her Federal income tax returns for 2005-2009 and 2011, and was on an installment plan for tax years 2005-2008.⁸ Her tax situation was apparently not discussed during her December 2012 subject interview with a Government investigator.

She also always files her Federal tax returns by the deadline after which she would forfeit any Federal tax refund due. The IRS has taken neither civil nor criminal enforcement action against Applicant.

Applicant traces her tax problems to her periods of unemployment since April 2009. She provided several personal financial statements (AE F-L) showing her before-and-after financial position for her 2009, 2013, and 2014 unemployments, as well as her current financial situation. She also had a high mortgage payment until she refinanced (Tr. 39-41), and she was sending her children to private school (Tr. 64). Yet, her two 2009 unemployments were about a month each, and her adjusted gross income (AGI) on her tax return for that year was \$184,000. Her longer unemployments in 2013 and 2014 still resulted in AGI of \$146,566 and 157,048. From 2005 to 2014, her AGI ranged from \$146,566 in 2013 to \$228,022 in 2012. Her average AGI for those years was over \$185,000. Yet, during those years, she was consistently behind on her payments on SOR debt 1.b, her HOA fees, apparently resulting in being taken to court twice, and resorted to reduced payments to the IRS.

⁷The taxes reflected in the IRS records total about \$13,000, and Applicant cannot explain the discrepancy (Tr. 105-106).

⁸The Government did not allege falsification in this case, and I will not consider it as such in this case. However, I will consider it on the issue of Applicant's general credibility as a witness, in conjunction with other evidence casting doubt on her credibility.

Applicant provided no work references. She provided one character reference (AE M) from a business associate of Applicant's new catering business, who has known her two years and recommends her for her clearance. Applicant provided no evidence of financial or credit counseling.

Policies

The adjudicative guidelines (AG) list factors for evaluating a person's suitability for access to classified information. Administrative judges must assess disqualifying and mitigating conditions under each issue fairly raised by the facts and situation presented. Each decision must also reflect a fair, impartial, and commonsense consideration of the factors listed in AG ¶ 2(a). Any one disqualifying or mitigating condition is not, by itself, conclusive. However, specific adjudicative guidelines should be followed where a case can be measured against them, as they represent policy guidance governing access to classified information. Considering the SOR allegations and the evidence as a whole, the relevant adjudicative guideline is Guideline F (Financial Considerations).

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 applicant to refute, extenuate, or mitigate the Government's case. Because no one has a right to a security clearance, the applicant bears a heavy burden of persuasion.

Persons with access to classified information enter into a fiduciary relationship with the Government based on trust and confidence. Therefore, the Government has a compelling interest in ensuring each applicant possesses the requisite judgement, reliability, and trustworthiness of those who must protect national interests 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.⁹

Analysis

The Government established a case for disqualification under Guideline F, and Applicant failed to mitigate the security concerns. Applicant failed to timely file her Federal income tax returns from 2005 to 2009 and for 2011, a total of six years, resulting in total delinquent tax debt of over \$20,000.¹⁰ In addition, Applicant has been consistently delinquent on her HOA fees since January 2000, including two separate 18-month periods where she made no payments.

⁹See, *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

¹⁰¶19(a) inability or unwillingness to satisfy debts; (c) a history of not meeting financial obligations; (g) failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same;

The Appeal Board has long held that failure to timely file required tax returns may demonstrate a lack of judgment inconsistent with access to classified information.

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 persons granted access to classified information. Indeed, the Board has previously noted that a person who has a history of not fulfilling their legal obligation to file income tax returns may be said not to have demonstrated the high degree of judgment and reliability required for access to classified information.”¹¹

This is true whether the failure to file is willful¹² or attributed to the press of family circumstances.¹³ As recently as December 2015, the Appeal Board upheld a denial of clearance, in a case notably similar to this, of an applicant who had failed to file Federal or state income tax returns for 10 years.

The filing of tax returns is both a financial and a legal obligation. Applicant’s . . . failure to have done so for many years is sufficient to raise a concern that he may be unwilling to follow other rules and regulations, such as those that govern the handling of classified information. See, e.g., ISCR Case No. 14-01894 at 5 (App. Bd. Aug. 18, 2015) (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 also *Cafeteria & Restaurant Workers Union Local 473 v. McElroy*, 284 F.2d 173, 183 (D.C. Cir. 1960), *aff’d*, 367 U.S. 886 (1961). Indeed, as the Judge noted, Directive, Enclosure 2 ¶ 19(g) explicitly provides that failure to file tax returns is a circumstance that can raise a security concern. Moreover, the Directive presumes a nexus between admitted or proven conduct under any of the Guidelines and an applicant’s eligibility for a clearance. See, e.g., ISCR Case No. 14-04648 at 3 (App. Bd. Sep. 9, 2015). ISCR Case No. 14-02930 at 3 (App. Bd. Dec. 9, 2015)¹⁴

¹¹ISCR Case No. 12-05053 at 4 (App. Bd. Oct. 30, 2014), reversing Administrative Judge’s favorable decision. See, e.g., ISCR Case No. 98-0608 at 2 (App. Bd. Jun. 27, 2000)(failure to file for five years).

¹²See, ISCR Case No. 98-0801 (App. Bd. Jun. 8, 2000)(tax protester).

¹³See, ISCR Case No. 98-0761 (App. Bd. Dec. 27, 1999)(routine failure to file).

¹⁴The cases cited by Applicant’s post-hearing brief all involve cases where the failures to timely file occurred over three-four years, and none of them has been identified as an Appeal Board case.

Security concerns under Guideline F are not limited to cases in which an Applicant is financially insolvent or is experiencing difficulty in paying debts. Applicant's regular mortgage payments and her timeliness in paying other bills demonstrates her financial management skills, and shows that she is able to comply with rules and regulations when she perceives it to be in her interest to do so. Applicant offered no clear explanation for her failure to timely file her 2005-2007 tax returns, which were substantially late, or for her failure to timely file her 2008, 2009, and 2011 tax returns, which were only slightly late, but which cost Applicant significant additional tax, penalties, and interest.

Applicant reported no tax issues on her October 2012 clearance application even though she knew that her taxes were a security concern based on her 2008 polygraph examination. Moreover, although she had assured the examiner that she would file her 2006 and 2007 tax returns soon, the three returns were not filed until March and May 2009. In each instance, filing her Federal tax returns before she lost her refund seemed more of a motivating factor than any concern over her financial and legal obligation to do so. Her filing pattern began to improve in tax year 2008, but not enough to avoid additional financial obligations to the IRS. However, she has been timely with her 2012-2014 filings.

Finally, the fact that Applicant was initially due refunds for 2008, 2009, and 2011, and received refunds for 2012 and 2013, or the fact that she does not appear to owe any taxes for the tax years in question beyond her underpayments in 2005-2007 or additional obligations for 2008, 2009, and 2011, does not mitigate the judgment concerns raised by her pattern of failing to file in a timely fashion. Nor does the fact that the IRS has not undertaken any enforcement action against Applicant. Further, the absence of security violations or other disciplinary action beyond her 2009 denial and revocation of clearance are undercut by at least five years of security-significant conduct regarding her taxes coincident with that performance.

None of the mitigating conditions for financial considerations apply. Her failures to timely file her Federal taxes are both recent and multiple; to the extent that she provided no explanation for her failures to file, the immediate causes of her problems are not necessarily unlikely to recur.¹⁵ Moreover, while she may have dealt with her delinquent taxes reasonably responsibly once they arose, the conditions which resulted in her delinquent taxes were entirely within her control. Furthermore, even with the unemployments that were beyond her control, Applicant has not demonstrated how her decreased income caused her to be unable to pay her HOA fees, which were \$105 quarterly. Her fees were sufficiently in arrearage that the HOA obtained a judgment against her. Finally, Applicant always used a professional tax preparer to prepare her

¹⁵ ¶20(a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur . . .

tax returns. Applicant offered no explanation how she failed to timely file her tax returns when the preparer most assuredly solicited her business every tax season.¹⁶

The circumstances of this case do not suggest that Applicant would necessarily benefit from credit or financial counseling, but her taxes have been partially resolved to date.¹⁷ Applicant has been substantially compliant with her IRS-required payments, and appears to be able to meet the escalating payment schedule over the next two years. And I consider her regular payments to the IRS a good-faith effort to address her taxes,¹⁸ although the IRS seizure intercepting her tax refunds cannot be considered so. However, her failure to timely file her tax returns over many years, the fact that she may yet owe additional money to the IRS for her most recent untimely returns, her consistent failure to remain current on her HOA fees, and her failure to provide any significant work or character references to support a whole-person assessment overcomes any benefit engendered by her progress in bringing her HOA fees current and keeping up her IRS payments, and cannot overcome my conclusion that Applicant's track record of at least six years untimely filing makes it too soon to conclude that her security-significant conduct is behind her. I conclude Guideline F against Applicant.

Formal Findings

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|---------------------------|-------------------|
| Paragraph 1. Guideline F: | AGAINST APPLICANT |
| Subparagraphs a-b: | Against Applicant |
| Subparagraph c: | For Applicant |

Conclusion

Under the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance denied.

JOHN GRATTAN METZ, JR
Administrative Judge

¹⁶ ¶20(b) the conditions that resulted in the financial problem were largely beyond the person's control . . . and the individual acted responsibly under the circumstances;

¹⁷ ¶20(c) the person has received or is receiving counseling for the problem and there are clear indications that the problem is being resolved or is under control;

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