



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



In the matter of:)	
)	
)	ISCR Case No. 14-06754
)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Rhett E. Petcher, Esq., Department Counsel
For Applicant: Alan V. Edmunds, Esq.

03/15/2016

Decision

LYNCH, Noreen A., Administrative Judge:

On May 20, 2015, the Department of Defense (DOD) issued a Statement of Reasons (SOR) listing security concerns arising under Guideline F (Financial Considerations). The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense (DoD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG), implemented in September 2006.

Applicant timely answered the SOR and requested a hearing before an administrative judge. The case was assigned to me on October 28, 2015. A notice of hearing was issued on December 8, 2015, scheduling the case for January 14, 2016. Government Exhibits (GX) 1-3 were admitted into evidence without objection. Applicant testified, and presented documents (AX A-H) for the record. The transcript was received on January 19, 2016. Based on a review of the pleadings, testimony, and exhibits, eligibility for access to classified information is granted.

Findings of Fact

In her answer to the SOR, Applicant admitted the factual allegation of the SOR under Guideline F, and provided additional explanations.

Applicant is 38 years old. She is married and has two children. She is the managing director of a company that is seeking to do business as a federal contractor. (Tr. 17) She received her undergraduate degree in 1999, and obtained a Master of Business Administration in 2008. (AX E and F) Applicant has been with her current employer since 2008. This is her first request for a security clearance. (GX 1) However, Applicant stated that she was granted a public trust position. (Tr. 31)

The SOR contains one allegation for failing to file federal and state tax returns for tax years 2010, 2011, and 2012, as required. Applicant disclosed this information on her security clearance application. (GX 1)

Applicant explained that she had requested extensions for the tax returns each year, but a complication arose as the tax filings were joint with her husband. The personal and business tax returns were joint due to the structure of their company as an LLC. She and her husband paid an estimated balance due before the tax deadline. She and her husband notified the IRS each year of the filing status. They sought assistance for the completion of the Federal and state forms.

As to the allegation in SOR 1.a, Applicant and her husband filed the federal and state tax returns in 2014. (AX A-A1) The taxes have been paid. A delay occurred due to the accountant not providing certain business documents in a timely manner. Although the accountant had worked for the company for about two years in 2010, they did not advise Applicant or her husband that the structure of the company should not be an LLC, but rather an S corporation so that the personal tax returns could be filed separately from the business tax returns. Applicant and her husband kept the IRS aware of the issue that they were having with the accountant. The tax returns for the years in question were filed in 2014.

Applicant's husband, who is the owner of the company, testified at the hearing that he chose this accounting company believing that they were accurate and reliable. However, he learned that they were not providing the best advice. The personal tax returns could not be separated from the business tax returns due to the structure of the company. Due to the complexity of the business tax returns, it took a period of time for a new accountant to analyze the files and prepare the returns. They did not file quarterly payments because they were advised that the business income was below the threshold income. (Tr. 55)

Applicant's husband changed accounting firms in 2012, and had the company restructured so that the personal and business tax returns no longer have to be consolidated. (Tr. 53) Applicant took a course in budgeting and financial issues.

Policies

When evaluating an applicant's suitability for a security clearance, an administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, they are applied in conjunction with the factors listed in the adjudicative process. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. Under AG ¶ 2(c), this process is a conscientious scrutiny of a number of variables known as the "whole-person concept." An 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.

The U.S. Government must present evidence to establish controverted facts alleged in the SOR. An applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." ¹ The burden of proof is something less than a preponderance of evidence. ² The ultimate burden of persuasion is on the applicant. ³

A person seeking access to classified information enters into a fiduciary relationship with the Government based on 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 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 Executive Order 10865 provides that decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the

¹ See also ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug. 10, 1995).

² *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

³ ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

applicant concerned.”⁴ “The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”⁵ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such information.⁶ The decision to deny an individual a security clearance does not necessarily reflect badly on an applicant’s character. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense established for issuing a clearance.

Analysis

Guideline F, Financial Considerations

The security concern for financial considerations is set out in AG ¶ 18:

Failure or an 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.” It also states that “an individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

Applicant failed to timely file her federal and state tax returns for tax years 2010, 2011, and 2012. Consequently, Financial Considerations Disqualifying Conditions (FC DC) AG ¶ 19(a) (inability or unwillingness to satisfy debts), FC DC AG ¶ 19(c) (a history of not meeting financial obligations), and FC DC AG ¶ 19(g) (failure to file annual Federal, state, or local income tax returns as required or fraudulent filing of the same) apply. With such conditions raised, it is left to Applicant to overcome the case against her and mitigate security concerns.

Applicant cites to a problem with the first accountant who was preparing the returns. Upon his advice they were structured as an LLC and the personal tax returns could not be filed until the business tax returns were completed. They had to be consolidated. In 2010, the accountant did not have the returns ready despite the time extension. Applicant and her husband notified the IRS and paid the tax. They changed accountants so that the problem would not recur. Consequently, Financial Considerations Mitigating Condition (FC MC) AG ¶ 20(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) applies.

⁴ See also EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information), and EO 10865 § 7.

⁵ ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

⁶ *Id.*

Financial Considerations Mitigating Condition (FC MC) AG ¶ 20(b) (the conditions that resulted in the behavior 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) applies. As noted above, Applicant could not file the joint personal tax returns until the business returns for her husband's company were completed. She filed for an extension of time, but the preparer still did not have the business return complete. She notified the IRS and paid the tax. She could not do anything else at that point. Her husband fired the accountant and hired a new company to do the taxes, but it took time for them to review files from the previous accountant. She acted responsibly by maintaining contact with the IRS. The tax returns were filed by 2014.

FC MC AG ¶ 20(d), (the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts) has application. Applicant has filed the returns and paid taxes each year. The company has a new accountant and a restructured company that shall help her avoid the filing complications of prior years. FC MC AG ¶ 20(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) applies.

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 an applicant's conduct and all the circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

- (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), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. As noted above, the ultimate burden of persuasion is on the applicant seeking a security clearance.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, as well as the whole-person factors. Applicant is 38 years old. She is an educated woman who works as a managing director for her husband's company. She has two children. She has worked for the company since about 2008. She has held a public trust position. This is her first request for a security clearance.

She did not timely file federal and state tax returns for tax years 2010, 2011 and 2012, as required. Her personal tax return was a joint one with her husband. It could not be filed separately from the business tax return. Each year she filed for an extension. Applicant had no control over the accountant. She paid taxes each year. Her husband had difficulty with the accountant and hired a new firm to restructure the company so that the personal taxes could be filed separate from the business tax return.

Applicant met her burden of proof in this case. I have no doubts about her judgment or reliability. Applicant has mitigated the security concerns under the financial considerations guideline.

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:	For Applicant

Conclusion

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

NOREEN A. LYNCH.
Administrative Judge