



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



In the matter of:	)	
	)	
	)	ADP Case No. 17-03967
	)	
Applicant for Public Trust Position	)	

**Appearances**

For Government: Kelly Folks, Esq., Department Counsel  
For Applicant: I. Charles McCullough, III, Esq.

03/05/2019

\_\_\_\_\_

**Decision**

\_\_\_\_\_

Curry, Marc E., Administrative Judge:

Applicant has filed her delinquent income tax returns, obtained a Chapter 7 bankruptcy discharge of approximately 90 percent of the outstanding balance due, and has organized a payment plan for the remaining balance. These facts, when considered together with the cause of her income tax problems, compel me to conclude she has mitigated the trustworthiness concerns. Eligibility to continue working in a public trust position is granted.

**Statement of the Case**

On December 4, 2017, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) to Applicant, detailing the trustworthiness concerns under Guideline F, financial considerations, explaining why it was unable to find it clearly consistent with the national interest to grant her a position of trust. The DOD CAF took the action under Executive Order (EO) 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 Security Executive Agent Directive 4, effective June 8, 2017.

On December 22, 2017, Applicant answered the SOR allegations, admitting all of the allegations, and requesting a hearing, whereupon the case was assigned to me on July 20, 2018. On September 13, 2018, the hearing was scheduled for October 31, 2018. The hearing was held as scheduled. I received eight Government exhibits (GE 1 – 8) and 12 Applicant exhibits (AE A – AE L). In addition, I considered the testimony of Applicant and two character witnesses. At the close of the hearing, I left the record open at Applicant's counsel's request, to allow him to submit additional exhibits. Within the time allotted, Applicant's counsel submitted two additional exhibits that I incorporated into the record as AE M and AE N. The transcript (Tr.) was received on November 9, 2018.

### **Procedural Ruling**

While reviewing the case file, I discovered an additional exhibit that Applicant's counsel submitted, which was unmarked and unidentified. After informing both parties of the oversight, I marked it as AE O, and provided a copy of the document to Department Counsel, who had no objection to its admission.

### **Findings of Fact**

Applicant is a 45-year-old single woman with two children. She has been married previously, from 2000 to 2014. The marriage ended in divorce. (Tr. 74) She earned a bachelor's degree in 1995. Applicant is an information technology professional who oversees the processing of military health data. (AE J at 5) She has been employed in this line of work since 1995. (Tr. 42)

Applicant is highly respected on the job. Her supervisor characterized her work as stellar. (Tr. 17) Per a team member from another company, Applicant has in-depth knowledge of data processing and is a critical member of the team. (AE J at 4)

Applicant failed to file her federal and state income tax returns timely for tax years 2009 to 2013. (Answer at 1) She attributes her failure to file income tax returns to her troubled marriage, which by 2009 had begun to deteriorate. Specifically, her husband whose \$140,000 salary exceeded hers by \$40,000, "wasn't pulling his weight" with the filing of tax returns and the corresponding tax bills, leaving her solely responsible for their filing and payment each year. (Tr. 50) By 2009, she "had had it." (Tr. 50) Consequently, she told him that she was no longer going to file the tax returns and pay the tax debts, and that he had to do it. (Tr. 51)

Applicant's husband did not file the federal and state tax returns either for 2009 or 2010. (Tr. 53) Periodically, Applicant would ask him if he had filed them, and he would reassure her that he was working on them. (Tr. 81-83) Unbeknownst to Applicant, her husband filed his income tax returns individually. Ultimately, she did not discover that he was not filing the income tax returns jointly until 2011, when he moved from the family home. (Tr. 83)

After Applicant's husband left her, her financial problems snowballed. (Tr. 53) Despite earning a higher salary, he paid less than half of the children's expenses. Moreover, although they shared joint custody, the children stayed with Applicant approximately 75 percent of the time. (Tr. 80)

Applicant remained hopeful that she and her husband would reconcile and that he would help her with her financial problems. Although they made some attempts at reconciliation, he never moved back into the home. In 2015, he told her that he was in love with someone else, was filing for divorce, and getting remarried. (Tr. 44) Preoccupied and emotionally devastated by her failing marriage,<sup>1</sup> Applicant had failed to file her state and federal income tax returns for 2011 to 2013, in addition to 2009 and 2010, by the time her divorce was finalized. (Tr. 57)

As part of the divorce settlement, Applicant's ex-husband was supposed to pay part of the tax delinquency. (Tr. 55) He did not do so. After the divorce was finalized, Applicant retained an attorney to help her file her delinquent income tax returns. (GE 7) By this time, the federal government had entered a lien against her property for \$214,039 in federal income taxes, and she owed approximately \$15,000 in delinquent state income taxes for tax years 2009 through 2014. (GE 7 at 1; Item 2 at 3-4; Answer at 1) With the help of her attorney, she filed her state income tax returns, and negotiated a payment plan with the state tax authority. (Item 2 at 4) Beginning in September 2015, she began making \$950 monthly payments consistent with the plan. By September 2017, she had satisfied her state income tax delinquency. (GE 3 at 20)

Applicant's attorney attempted to negotiate an offer-in-compromise (OIC) with the Internal Revenue Service (IRS). Through her attorney, Applicant proposed to make monthly payments for the part of the delinquency from 2009 through 2013 that remained legally collectible, totaling 24 months. (GE 7 at 2) OIC negotiations lasted approximately a year between 2016 and 2017. While negotiations were pending, Applicant paid \$675 per month towards the delinquency. (Tr. 120)

The IRS rejected the proposed OIC. (GE 7 at 2) Applicant's attorney then referred her to a bankruptcy attorney. On August 14, 2017, Applicant filed for Chapter 13 bankruptcy protection (AE D at 1) The case was later converted to a Chapter 7 bankruptcy. Under the plan, she sought a discharge of her tax debts from 2009 to 2014. On September 12, 2018, the court discharged all of the debt for tax years 2009 through 2013. (AE B, AE C) It denied her request to discharge the 2014 bankruptcy, reasoning that it remained a priority debt because of its recency. (AE D at 1)

Applicant then contacted the IRS and entered into an installment agreement to pay the remaining 2014 income tax balance, totaling \$26,868. (AE D at 1; AE E) Monthly payments of \$430 were scheduled to begin in November 2018. (AE N) The lien remains outstanding.

---

<sup>1</sup> Applicant's emotional distress from the marital separation was so acute that it prompted her doctor to prescribe her anti-depressants. (Tr. 122)

Applicant has been filing her taxes timely since 2015. Her federal tax payments from 2015 through 2017 are all up-to-date and no balance is owed. (AE M) She has been making payments on her 2018 tax returns on a quarterly basis. Payments are current. (Tr. 57)

Applicant currently earns between \$100,000 and \$110,000. She maintains a budget and has between \$200 and \$300 of monthly discretionary income. (Tr. 117) She credits the financial management course she took as part of the bankruptcy proceedings with improving her financial management skills. (Tr. 114)

### **Policies**

When evaluating an applicant's suitability for a trustworthiness position, 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. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overall adjudicative goal is a fair, impartial, and commonsense decision. The 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 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 applicant or proven by Department Counsel. . . ." The applicant has the ultimate burden of persuasion to obtain a favorable trustworthiness determination.

Under the whole-person concept, the administrative judge must consider the totality of an applicant's conduct and all relevant circumstances in light of the nine adjudicative process factors in AG ¶ 2(d).<sup>2</sup>

---

<sup>2</sup> The factors under AG ¶ 2(d) are as follows:

- (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.

## Analysis

### Guideline F, Financial Considerations

The trustworthiness concerns about financial considerations are set forth in AG ¶ 18:

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 [or sensitive] information. . . .

Applicant failed to file or pay her federal and state income tax delinquencies on time between 2009 and 2013. As of 2017, a lien was entered against her property for outstanding delinquent income taxes, including for tax year 2014. The following disqualifying conditions apply under AG ¶ 19:

(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 annual federal state, or local income taxes, as required.

The following mitigating conditions are potentially applicable:

AG ¶ 20(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;

AG ¶ 20(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;

AG ¶ 20(d) the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts; and

AG ¶ 20(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's failure to file and pay her federal and state income taxes coincided with her emotional trauma resulting from the deterioration of her marriage. Conversely, her failure to file her income tax returns began two years before her marital separation and lasted for two additional years through 2013. Ultimately, however, after Applicant finally accepted that she and her husband were not reconciling, she began actively attempting to resolve her income tax debts. She retained an attorney, filed her returns, satisfied her state delinquency through a negotiated payment arrangement, and attempted to negotiate a payment arrangement with the IRS. After her attempts at executing an OIC with the IRS failed, she consulted a bankruptcy attorney upon the advice of her tax attorney, and filed for bankruptcy protection. She obtained a discharge of all of her federal income tax debt except \$25,000 owed for tax year 2014, which she has arranged to pay through an installment plan. Consequently, although Applicant did not initially act responsibly with respect to her financial problems when her marriage first began to deteriorate, she has been acting responsibly since 2015 after the divorce was finalized. On balance, I conclude that AG ¶ 20(b) applies.

Applicant has filed all her delinquent federal and state income tax returns. She has satisfied the state income tax delinquency in its entirety, attended financial counseling, and developed an installment plan to pay the remaining federal tax delinquency. She maintains a budget and has enough money to pay the anticipated \$430 monthly tax payment. Under these circumstances, AG ¶¶ 20(c), 20(d), and 20(g), apply. In sum, Applicant has mitigated the financial considerations security concern.

### **Whole-Person Concept**

Failure to file one's income tax returns is a serious transgression. Applicant's judgment, however, was clouded by the emotional trauma she experienced related to the deterioration of her marriage. Once she accepted that her marriage was over, she began taking prudent steps to resolve her delinquent income tax debts. Currently, all but approximately ten percent of her federal and state income taxes have been either discharged, or satisfied, and she has developed a plan to pay the remainder. Under these circumstances, I conclude that Applicant has mitigated the trustworthiness concerns.

### **Formal Findings**

Formal findings for 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.i:	For Applicant

## **Conclusion**

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the interests of the United States to grant Applicant eligibility for a position of trust. Eligibility for a position of trust is denied.

---

Marc E. Curry  
Administrative Judge