



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



In the matter of:)	
)	
[Redacted])	ADP Case No. 19-01392
)	
Applicant for Public Trust Position)	

Appearances

For Government: Brian Farrell, Esq., Department Counsel
For Applicant: *Pro se*

02/26/2020

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves trustworthiness concerns raised under Guideline F (Financial Considerations) by Applicant’s repeated failures to timely file her federal and state income tax returns. Eligibility for a public trust position is denied.

Statement of the Case

Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) on August 23, 2018, seeking eligibility for a public trust position. On June 10, 2019, the Department of Defense (DOD) sent her a Statement of Reasons (SOR), citing trustworthiness concerns under Guideline F. DOD acted under DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) promulgated in Security Executive Agent Directive 4 (SEAD 4), *National Security Adjudicative Guidelines* (December 10, 2016), for all adjudicative decisions on or after June 8, 2017.

Applicant answered the SOR on June 25, 2019, admitted the two allegations, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on August 1, 2019, and the case was assigned to me on January 9, 2020. The Defense Office of Hearings and Appeals (DOHA) sent her a notice of hearing on January 14, 2020, scheduling the hearing for February 4, 2020. I convened the

hearing as scheduled. Government Exhibits (GX) 1 through 4 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibits (AX) A through I, which were admitted without objection. DOHA received the transcript (Tr.) on February 13, 2020.

Amendment of SOR

The SOR alleged that Applicant failed to timely file her federal and state income tax returns for tax years 2014, 2015, and 2016. At the end of the hearing, I granted Department Counsel's motion to amend the SOR to allege that she failed to timely file federal and state income tax returns for 2014, 2015, 2016, and 2017. I kept the record open until February 19, 2020, to enable Applicant to respond to the amendment. She timely submitted AX J, which was admitted without objection. Department Counsel submitted comments concerning AX J, which are included in the record as GX 5.

Findings of Fact

Applicant is a 46-year-old site manager employed by a defense contractor since January 2014. She served on active duty in the U.S. Army from January 1992 to September 1994 and received an honorable discharge. She has worked for defense contractors since March 2004. She received eligibility for a public trust position in November 2010.

Applicant married in August 1994 and has two daughters, ages 19 and 23. Her older daughter is in college and lives away from home, and her younger daughter lives with her. (Tr. 31.)

Applicant earned a bachelor's degree in May 1996, and she is currently enrolled in graduate school, working toward a master's degree in information systems management. (Tr. 32.) She also completed training as a massage therapist in 2011 and incurred significant student loans for her training, but she has never earned any income as a massage therapist. (Tr. 33, 45.) Credit reports from September 2018 and June 2019 reflected six delinquent student loans totaling \$21,247. Three of the past-due loans totaling \$8,747 were reflected as paid collections, having been paid in December 2016. The remaining student loans were reflected as assigned to the government. (GX 2 at 3-4; GX 3 at 5-6.) She increased her income tax liability by filing separately so that her husband's tax refunds would not be seized to pay her delinquent student loans. (Tr. 61-62.) In 2014, she received a pay raise from \$75,000 per year to \$95,000, but she did not increase the amount of tax withholding until 2015. The combination of her pay raise and the decision to file separately increased the amount of taxes due. She testified that she did not timely file her federal and state income tax return for 2014 because she knew she owed income taxes for that year. (Tr. 36-38.)

When Applicant was interviewed by a security investigator in September 2018, she told the investigator that she did not file her returns for 2014, 2015, and 2016 because she could not afford to pay the taxes due. She also told the investigator that she thought she had a three-year grace period to file her returns. (GX 4 at 1.) In her

response to the SOR, she stated that she was advised about the three-year grace period by a “tax professional.” At the hearing, she did not repeat her claim of relying on a three-year grace period. When asked who told her about a three-year grace period, she responded that she did not remember who it was. (Tr. 62.)

Applicant did not rely on a three-year grace period. She had not filed the past-due returns when she answered the SOR in June 2019. She filed her 2014 federal and state income tax returns in August 2019, after she received the SOR, and she filed her 2015 returns in September 2019. As of the date of the hearing, she had not filed her returns for 2016 and 2017. (Tr. 40, 42-43; AX B with note attached.) She testified that she did not have a reason for not having filed her 2016 returns, except that she was “preparing them [herself] and just fine-tuning – you know, refining it and making sure that everything was correct.” (Tr. 41.) She offered the same explanation for not filing her 2017 returns. (Tr. 43.) She timely filed her federal income tax return for 2018 and received a refund. (Tr. 44.)

After Applicant filed her federal returns for 2014 and 2015, she received a bill from the IRS. She made an installment agreement with the IRS to pay the taxes due for 2014 and 2015, totaling about \$20,610. The agreement provides for monthly \$292 payments. She made the first monthly payment on December 13, 2019. (AX E at 2; Tr. 27-28.)

Applicant’s current annual salary is about \$101,000. Her husband is a police officer and earns about \$64,000 per year. (Tr. 48.) She has worked for her current employer for about 15 years. She provided no evidence of the quality of her performance, but her substantial pay raise in 2014 indicates high-quality performance. Her February 2020 credit report reflects that she has resolved the delinquent student loans that made her unable to pay her taxes. (AX I.)

Policies

The standard set out in the adjudicative guidelines for assignment to sensitive duties is that the person’s loyalty, reliability, and trustworthiness are such that assigning the person to sensitive duties is clearly consistent with the interests of national security. SEAD 4, ¶ E.4. A person who seeks access to sensitive 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. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard sensitive information.

When evaluating an applicant’s suitability for a public trust position, the administrative judge must consider the disqualifying and mitigating conditions in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. The administrative judge’s overarching adjudicative goal is a fair, impartial and commonsense decision. An

administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The protection of the national security is the paramount consideration. Under AG ¶ 2(b), any doubt will be resolved in favor of national security. The Government must present substantial evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.14. Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). An applicant has the ultimate burden of demonstrating that it is clearly consistent with national security to grant or continue eligibility for access to sensitive information.

Analysis

Guideline F, Financial Considerations

The SOR as amended alleges that Applicant failed to timely file federal and state income tax returns for tax years 2014, 2015, 2016, and 2017. The past-due federal returns are alleged in SOR ¶ 1.a and past-due state returns are alleged in SOR ¶ 1.b. She admitted both allegations in her answer to the SOR.

Applicant's failure to timely pay the taxes due is not alleged. Conduct not alleged in the SOR may be considered to assess an applicant's credibility; to decide whether a particular adjudicative guideline is applicable; to evaluate evidence of extenuation, mitigation, or changed circumstances; to consider whether an applicant has demonstrated successful rehabilitation; or as part of a whole-person analysis. ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006). I have considered the evidence of Applicant's federal tax debts for these limited purposes.

The trustworthiness concern under this guideline is set out in AG ¶ 18:

Failure 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. . . . An individual who is financially overextended is at greater risk of having to engage in illegal or otherwise questionable acts to generate funds. . . .

This concern is broader than the possibility that a person might knowingly compromise classified or sensitive information to raise money. It encompasses concerns about a person's self-control, judgment, and other qualities essential to protecting classified or sensitive information. A person who is financially irresponsible may also be irresponsible, unconcerned, or negligent in handling and safeguarding

classified or sensitive information. See ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012).

Applicant's admissions and the documentary evidence in the record establish the following disqualifying conditions under this guideline:

AG ¶ 19(c): a history of not meeting financial obligations; and

AG ¶ 19(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 tax as required.

The following mitigating conditions are potentially applicable:

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;

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 individual has received or is receiving financial 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; 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.

AG ¶ 20(a) is not established. Applicant's failures to timely file federal and state income tax returns were recent, frequent, and did not occur under circumstances making recurrent unlikely.

AG ¶ 20(b) is not established. Applicant's financial problems were largely due to her financial mismanagement, and they did not prevent her from timely filing her returns or requesting extensions of time to file. She did not begin to file her past-due tax returns until tax year 2018, when she was entitled to a refund of federal taxes.

AG ¶ 20(c) is not established. Applicant claimed that she was advised by a "tax professional" that she had three years to file her tax returns without penalty, but she was unable to identify that person at the hearing. She submitted no documentary evidence of financial or tax advice. Furthermore, her tax problems are not yet under

control, because she had not yet filed her federal tax returns for 2016 and 2017 as of the date of the hearing.

AG ¶ 20(g) is established for 2014 and 2015, for which she has filed her returns and is making payments pursuant to a payment agreement with the IRS. It is not established for 2016 and 2017, for which she had not filed her returns as of the date the record closed.

Applicant's eventual compliance with her tax obligations for 2014 and 2015 does not end the inquiry. A public trust adjudication is not a tax-enforcement procedure. It is an evaluation of an individual's judgment, reliability, and trustworthiness. The fact that Applicant has filed some of her past-due returns "does not preclude careful consideration of her trustworthiness based on longstanding prior behavior evidencing irresponsibility." ISCR Case No. 12-05053 (App. Bd. Oct. 30, 2014). She did not begin filing her past-due returns until she received the SOR. An applicant who begins to address trustworthiness concerns only after having been placed on notice that his or her eligibility for a public trust position is in jeopardy may lack the willingness to follow rules and regulations when his or her personal interests are not at stake. ADP Case No. 15-03696 (App. Bd. Apr. 5, 2019). 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 or sensitive information. ISCR Case No. 15-00216 at 4 (App. Bd. Oct. 24, 2016), *citing Cafeteria & Restaurant Workers Union Local 473 v. McElroy*, 284 F.2d 173, 183 (D.C. Cir. 1960), *aff'd*, 367 U.S. 886 (1961)

Whole-Person Concept

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a public trust position must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. In applying the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a public trust position by considering the totality of the applicant's conduct and all relevant circumstances. An administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d):

- (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.

I have incorporated my comments under Guideline F in my whole-person analysis and I have applied the factors in AG ¶ 2(d) After weighing the disqualifying and mitigating conditions under Guideline F, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the trustworthiness concerns

based on her repeated failure to timely file her federal and state income tax returns. Accordingly, I conclude she has not carried her burden of showing that it is clearly consistent with national security to continue her eligibility for a public trust position.

Formal Findings

Paragraph 1, Guideline F (Financial Considerations): AGAINST APPLICANT

Subparagraphs 1.a and 1.b: Against Applicant

Conclusion

I conclude that it is not clearly consistent with the interests of national security to continue Applicant's eligibility for a public trust position. Eligibility for a public trust position is denied.

LeRoy F. Foreman
Administrative Judge