



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



In the matter of:)	
)	
)	ADP Case No. 19-02043
)	
Applicant for Public Trust Position)	

Appearances

For Government: Daniel F. Crowley, Esq., Department Counsel
For Applicant: *Pro se*

05/18/2020

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant mitigated the personal conduct trustworthiness concerns, but she did not mitigate the financial considerations trustworthiness concerns. Eligibility for access to sensitive information is denied.

Statement of the Case

On July 26, 2019, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing trustworthiness concerns under Guidelines E (personal conduct) and F (financial considerations). Applicant responded to the SOR on August 27, 2019, and requested a hearing before an administrative judge.

The case was assigned to another administrative judge on December 10, 2019, and reassigned to me on January 8, 2020. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on December 23, 2019, scheduling the hearing for January 15, 2020. The hearing was convened as scheduled.

Procedural and Evidentiary Rulings

Evidence

Government Exhibits (GE) 1 through 5 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibits (AE) A through D, which were admitted without objection. The record was held open for Applicant to submit additional information. She submitted documents that I have marked AE E through O and admitted without objection. Several of Applicant's exhibits were duplicates. I have included the duplicate copies for completeness.

Motion to Amend SOR

Department Counsel's motion to amend SOR ¶ 2.e by adding the words "federal and," and by changing the year "2017" to "2018" was granted without objection. SOR ¶ 2.e now reads as follows:

You failed to file, as required, federal and [state] income tax returns for tax years 2011 through 2018.

Findings of Fact

Applicant is a 59-year-old employee of a defense contractor. She has worked for her current employer since October 2018. She has a bachelor's degree that she earned in 2017. She married in 1980 and divorced in 1983. She does not have children. (Transcript (Tr.) at 12, 36, 56; GE 1, 5; AE D)

Applicant worked in human resources for a county government from 2006 to 2018. She received written disciplinary action in February 2015 for "unacceptable personal conduct." The county determined that she engaged in conduct that could be perceived as a conflict of interest. (Tr. at 46; GE 1, 2; AE A, D, E, G, I-L)

Applicant was terminated from her county position in July 2018 for "grossly inefficient job performance and unacceptable personal conduct." She filed for unemployment insurance benefits, which were initially denied. An employee in her state can be denied unemployment benefits if the employee is unemployed because she was discharged for misconduct connected with her work. Applicant appealed, and a hearing was held with Applicant and two county employees as witnesses. Applicant won her appeal. The Appeals Referee determined that the allegations were not supported by the weight of the evidence, and that Applicant "was not discharged for misconduct connected with the work." (Tr. at 27-34, 37; GE 1, 3, 5; AE B, C, E, F, H)

Applicant has a history of financial problems, including delinquent debts and unfiled federal and state income tax returns. The SOR alleges the unfiled tax returns and four delinquent debts totaling about \$16,400. The debts are for clothing (\$885), a timeshare (\$10,966), medical expenses (\$4,013), and a bank credit card (\$585). The

allegations are established through Applicant's admissions and a November 2018 credit report. (Applicant's response to SOR; GE 1, 4, 5; AE N)

Applicant successfully worked in a metropolitan area until her fiancé passed away in about 2000. She attributed her financial problems to moving to an economically depressed rural area in about 2000 to care for her mother. She experienced unemployment and underemployment. She lost work while caring for ill relatives, and she incurred expenses for their funerals after they passed away, including her mother who passed away shortly before Applicant's hearing. She also had educational expenses and her own medical issues. (Tr. at 35-38, 43, 58; GE 1, 5)

Applicant did not file her federal and state income tax returns when they were due for tax years 2011 through 2018. She stated that she was informed by a friend that she was exempt from filing tax returns if she completed a certain form. She was unable to identify what form, and she admitted that she never filed any such form with the IRS. She also stated that she thought the exemption might have been based on working for a non-profit organization, but she admitted that she worked for a county government. She had not filed any of her returns as of the date of her hearing. She stated that her state garnished her wages, and that she owed the state about \$10,000. (Tr. at 39-48; Applicant's response to SOR; GE 1, 5)

Applicant stated that she is now able to address her financial issues, and she plans to do so. She received financial counseling in about 2018. She submitted copies of her federal income tax returns for 2017 and 2018. They were signed on April 21, 2020. The returns do not indicate that Applicant owes any federal taxes for those years. She did not submit any information about the other unfiled federal and state income tax returns. She indicated that she was waiting for an offer-in-compromise from her state to settle her delinquent state taxes. She did not provide information about what, if anything, is owed to the IRS. She did not pay any of the debts alleged in the SOR. (Tr. at 43, 56-57; GE 1; AE I, M)

Applicant provided copies of her performance appraisals from the county government. She was regarded as a trusted and valuable employee. (AE F, O)

Policies

This case is adjudicated under DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG), which became effective on June 8, 2017.

When evaluating an applicant's suitability for a public trust position, the administrative judge must consider the disqualifying and mitigating conditions in the AG. 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 overarching adjudicative goal is a fair, impartial and commonsense decision. According to AG ¶ 2(a), the entire process is a

conscientious scrutiny of a number of variables known as the “whole-person concept.” The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

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 decision.

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. The government reposes a high degree of trust and confidence in individuals to whom it grants access to sensitive information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard sensitive information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of sensitive information.

Analysis

Guideline E, Personal Conduct

The trustworthiness concern for personal conduct is set out in AG ¶ 15, as follows:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual’s reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

AG ¶ 16 describes conditions that could raise a trustworthiness concern and may be disqualifying. AG ¶ 17 provides conditions that could mitigate those concerns. The following disqualifying and mitigating conditions are potentially applicable:

16(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information. This includes, but is not limited to, consideration of:

(1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or government protected information;

(2) any disruptive, violent, or other inappropriate behavior;

(3) a pattern of dishonesty or rule violations; and

(4) evidence of significant misuse of Government or other employer's time or resources;

16(f) violation of a written or recorded commitment made by the individual to the employer as a condition of employment;

17(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

17(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;

17(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress; and

17(f) the information was unsubstantiated or from a source of questionable reliability.

The SOR alleges two instances of personal conduct in one allegation: the 2015 counseling and the 2018 termination. The 2015 counseling is sufficient to raise the above disqualifying conditions. However, that was a single incident five years ago, for which Applicant was not terminated. That conduct is mitigated. After a full hearing by her state, Applicant was determined to have not committed the misconduct that resulted in her 2018 termination. That part of the allegation is unsubstantiated.

Guideline F, Financial Considerations

The trustworthiness concern for financial considerations 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. 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.

The guideline notes several conditions that could raise trustworthiness concerns under AG ¶ 19. The following are potentially applicable 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 annual Federal, state, or local income tax as required.

Applicant has a history of financial problems. She did not file her 2011 through 2018 federal and state income tax returns when they were due, and she has several delinquent debts. The evidence is sufficient to raise the above disqualifying conditions.

Conditions that could mitigate the financial considerations trustworthiness concerns are provided under AG ¶ 20. The following 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, a death, divorce or separation, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances;
- (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
- (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 life changed drastically after her fiancé passed away in about 2000. She moved to an economically depressed rural area to care for her mother. She experienced unemployment and underemployment. She lost work while caring for ill

relatives, and she incurred expenses for their funerals after they passed away. Applicant is in many respects an admirable woman. It is completely understandable that she has experienced financial difficulties. It is not understandable that she has done almost nothing about her finances. Her shirking of her tax responsibilities is particularly egregious.

Failure to comply with tax laws suggests that an applicant has a problem with abiding by well-established government rules and systems. Voluntary compliance with rules and systems is essential for protecting classified information. See, e.g., ISCR Case No. 16-01726 at 5 (App. Bd. Feb. 28, 2018). A person who fails repeatedly to fulfill his or her legal obligations, such as filing tax returns and paying taxes when due, does not demonstrate the high degree of good judgment and reliability required of those granted access to classified information. See, e.g., ISCR Case No. 17-01382 at 4 (App. Bd. May 16, 2018).

Applicant stated that she intends to file her tax returns and pay her debts and taxes. Intentions to pay debts in the future are not a substitute for a track record of debt repayment or other responsible approaches. See ISCR Case No. 11-14570 at 3 (App. Bd. Oct. 23, 2013). There is insufficient evidence for a determination that Applicant's financial problems will be resolved within a reasonable period. Her financial issues are recent and ongoing. They continue to cast doubt on her current reliability, trustworthiness, and good judgment. I find that the trustworthiness concerns arising out of Applicant's unfiled tax returns and delinquent debts are not mitigated.

Whole-Person Concept

Under the whole-person concept, the 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. The 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.

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.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my comments

under Guidelines E and F in my whole-person analysis. I also considered Applicant's favorable work record and the personal sacrifices she endured to help her family.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a public trust position. I conclude Applicant mitigated the personal conduct trustworthiness concerns, but she did not mitigate the financial considerations trustworthiness concerns.

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 E:	For Applicant
Subparagraph 1.a:	For Applicant
Paragraph 2, Guideline F:	Against Applicant
Subparagraphs 2.a-2.e:	Against Applicant

Conclusion

It is not clearly consistent with national security to grant Applicant eligibility for a public trust position. Eligibility for access to sensitive information is denied.

Edward W. Loughran
Administrative Judge