



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



In the matter of:)
)
) ADP Case No. 19-01095
)
Applicant for Public Trust Position)

Appearances

For Government: Adrienne Driskill, Esq., Department Counsel
For Applicant: *Pro se*

08/30/2021

Decision

Benson, Pamela, Administrative Judge:

Applicant effectively addressed her federal income tax filing issues in light of her history of medical problems. She acted responsibly by meeting with the Internal Revenue Service to resolve her tax difficulties well before the issuance of the SOR. She has filed all federal tax returns to date and does not owe any back taxes. Guideline F (financial considerations) trustworthiness concerns are mitigated. Eligibility for access to sensitive information is granted.

Statement of the Case

On May 25, 2018, Applicant completed and signed an application for a position of public trust. On August 19, 2020, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a statement of reasons (SOR) to Applicant under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry*, February 20, 1960; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), January 2, 1992; and Security Executive Agent Directive 4, establishing in Appendix A the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AGs), effective June 8, 2017.

The SOR detailed reasons why the DOD CAF did not find under the Directive that it is clearly consistent with the interests of national security to grant or continue eligibility

for Applicant's public trust position. Specifically, the SOR set forth trustworthiness concerns arising under Guideline F.

Applicant provided a response to the SOR in April 2021 and requested a decision by an Administrative Judge based on the administrative (written) record. In May 2021, Department Counsel requested a hearing pursuant to Paragraph E3.1.7. of the Additional Procedural Guidance at Enclosure 3 of DOD Directive 5220.6. On June 11, 2021, the case was assigned to me. On July 1, 2021, the Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing, setting the hearing for July 22, 2021 using the U.S. Cyber Command video teleconference system. The hearing was held as scheduled.

During the hearing, Department Counsel offered two Government exhibits (GE) 1 and 2; Applicant offered eight documents labeled as Applicant Exhibit (AE) A through H; and all proffered exhibits were admitted into evidence without objection. On August 3, 2021, DOHA received a copy of the hearing transcript (Tr.). On August 4, 2021, Applicant submitted seven documents, (AE I through O); which were admitted into evidence without objection. The record closed on August 11, 2021. (Tr. 15, 37, 48)

Findings of Fact

In Applicant's SOR response, she admitted her failure to file federal income tax returns for tax years 2013 through 2018. (SOR ¶ 1.a.) Applicant's admission is accepted as a finding of fact. After a complete and thorough review of the evidence of record, I make the following additional findings of fact.

Applicant is a 64-year-old inbound contact representative employed by the same defense contractor since about June 2018. She received professional certifications as a medical coordinator and pharmacy technician in 1978 and 1980. Applicant has never been married, and she does not have any children. (Tr. 17-18, 20, 28; GE 1)

Financial Considerations

Applicant experienced tax issues with the Internal Revenue Service (IRS) beginning in 2013 while employed in a position that required extensive travel. During this time she was often away from home, and she was not sleeping well. She misplaced some of the tax documents she needed to file her 2013 federal income tax return. She mistakenly believed she would be unable to file the following year as she was required to report the previous year's tax information. This belief persisted and she did not file her federal income tax returns for the next five years. During this time she also suffered from depression and anxiety, and after January 2015 the stress of being unemployed made her health issues worse. She did not have any medical insurance coverage, and she was unable to obtain treatment for her depression and anxiety. (Tr. 18-19; GE 1)

Applicant has a history of intermittent unemployment. She was unemployed from January 2015 to March 2016. In March 2016, she found new employment in a seasonal position that did not offer medical insurance. This seasonal employment ended in October 2016, and she remained unemployed until May 2017 when she was hired by a nursing

care facility. Her position with this employer ended in December 2017. She remained unemployed and uninsured until she was hired by her current employer in June 2018. (Tr. 19-21; GE 1)

In approximately September 2018, Applicant suffered from a medical neurological condition, somewhat similar to a stroke. She experienced problems with comprehension and retention of information for the following six-to-eight month period. She continued her employment duties despite encountering these difficulties, which required her to take extensive notes to successfully complete her job tasks. During her recovery, she began to receive communications from the Government concerning her unfiled federal tax returns. She realized it was an important issue she needed to address and fully resolve. (Tr. 21-22)

In January 2020, Applicant visited the Internal Revenue Service (IRS) office in an effort to determine how she could file all of her unfiled federal income tax returns. She was told by an IRS representative that she did not owe any back taxes since she had sufficient taxes withheld from her income, and Applicant would most likely receive tax refunds for certain tax years after the tax returns were filed. The IRS representative also stated that there were other refunds Applicant would not be entitled to receive since the statute of limitations for refunds for those tax years had run. (Tr. 18-19, 21-23)

After the tax meeting Applicant started the arduous process of obtaining tax records from her past employers' human resources offices. The process became even more difficult with the outbreak of the Covid-19 pandemic and trying to obtain past payroll records and W-2 forms with employees working from their home offices, or in one instance, a complete change in the payroll database. Eventually all of the documentation was provided, and in April 2021, Applicant filed her 2013 through 2018 federal income tax returns. (Tr. 23-24; AE A, AE B, AE C, AE D, AE E, AE F, AE O)

Applicant testified that she will always timely file her federal income tax returns in the future. She provided documentation that she filed her 2019 and 2020 federal income tax returns and received tax refunds for both years. There is no requirement in her state of residence to file state income tax returns. She also initiated a new filing system to store all of her pertinent tax documents. Since her employment in June 2018, she has a medical provider she regularly visits to treat her depression and anxiety, which played a major role in her inability to file income tax returns over a long period of time. (Tr. 24-25, 27; AE G, AE H)

Character Evidence

Applicant provided post-hearing documentation from her current employer regarding an evaluation of her employment duties. In January 2019, January 2020, and January 2021, she received "exceptional" employee performance ratings. Her most recent work evaluation dated June 2021 showed that Applicant continued her job performance in an outstanding manner. (AE I, AE J, AE K, AE L)

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, “no one has a ‘right’ to a [public trust position].” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). The Government’s authority to restrict access to classified information applies similarly in the protection of sensitive, unclassified information. As Commander in Chief, the President has the authority to control access to information bearing on national security or other sensitive information and to determine whether an individual is sufficiently trustworthy to have access to such information. See *Id.* at 527.

The standard that must be met for assignment to sensitive duties is that, based on all available information, 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. DOD contractor personnel are afforded the right to the procedures contained in the Directive before any final unfavorable access determination may be made.

When evaluating an applicant’s suitability for a public trust position, an 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 an evaluation of the whole person. An 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.

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 protect or safeguard sensitive information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of sensitive information.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant which may disqualify the applicant from being eligible for access to sensitive information. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s suitability for a public trust position. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his or her [access to sensitive information].”

ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[S]ecurity clearance [or trustworthiness] determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

The protection of the national security and sensitive records is of paramount consideration. AG ¶ 2(b) requires that “[a]ny doubt concerning personnel being considered for access to [sensitive] information will be resolved in favor of national security.” Section 7 of Executive Order (EO) 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 applicant concerned.”

Analysis

Financial Considerations

AG ¶ 18 articulates the trustworthiness concern for financial problems:

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. . . .

The Appeal Board explained the scope and rationale for the financial considerations trustworthiness concern in ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012) (citation omitted) as follows:

This concern is broader than the possibility that an applicant might knowingly compromise [sensitive] information in order to raise money in satisfaction of his or her debts. Rather, it requires a Judge to examine the totality of an applicant’s financial history and circumstances. The Judge must consider pertinent evidence regarding the applicant’s self-control, judgment, and other qualities essential to protecting the national secrets as well as the vulnerabilities inherent in the circumstances. The Directive presumes a nexus between proven conduct under any of the Guidelines and an applicant’s [eligibility for a public trust position].

AG ¶ 19 includes a disqualifying condition that could raise a trustworthiness concern and may be disqualifying in this case: “(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’s history of not timely filing her federal income taxes when due establishes AG ¶ 19(f).

AG ¶ 20 lists two financial considerations mitigating conditions which may be applicable in this case:

(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; 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 presented some important mitigating information concerning her history of not timely filing federal tax returns. Her past employer required her to travel frequently, and in 2013 she was unable to file her federal tax return due to misplacement of pertinent tax documents. She also suffered from anxiety and depression, which surfaced from being away from home extensively and not sleeping well while traveling. In January 2015, she became unemployed and her health conditions worsened since she did not have medical insurance to obtain treatment. These are circumstances beyond her control that adversely affected Applicant's ability to timely file federal income tax returns.

Applicant's tax situation was compromised by circumstances beyond her control. She used good judgment by having sufficient taxes withheld from her income so that she did not develop significant tax debt. In addition, she acted responsibly by attending a January 2020 tax meeting with the IRS to resolve her tax issues, which was well before the issuance of the SOR in August 2020. Her filing of all federal tax returns, to include tax years 2019 and 2020, shows her overall sensible conduct and trustworthiness. AG ¶¶ 20(b), and 20(g) apply. I find that Applicant resolved all tax issues and is committed to filing all future tax returns in a timely manner. She also provided convincing employment character evidence that showed she is reliable and steadfast in the performance of her job duties. Her efforts are sufficient to mitigate financial considerations trustworthiness concerns.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an Applicant's eligibility for access to sensitive information by considering the totality of the Applicant's conduct and all the 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), “[t]he ultimate determination” of whether to grant access to a public trust position and access to sensitive information “must be an overall commonsense judgment based upon careful consideration of the guidelines” and the whole-person concept. My comments under Guideline F are incorporated in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under that guideline but some warrant additional comment.

Applicant is a 64-year-old inbound contact representative employed by the same defense contractor since about June 2018. Due to circumstances beyond her control, she failed to timely file federal income tax returns for 2013-2018. She took responsible action by visiting the IRS to resolve her unfiled taxes well before she received the SOR in August 2020. She is receiving on-going treatment for her health issues and she now has a system in place to maintain all of her pertinent tax documentation. She has filed all of her federal tax returns to date, she does not owe any back taxes, and it is her intention to timely file all federal tax returns in the future.

I have carefully applied the law, as set forth in *Egan*, Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. Applicant mitigated the trustworthiness concerns under Guideline F.

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
Subparagraph 1.a:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with national security to grant or continue Applicant’s eligibility for a public trust position. Eligibility for a public trust position is granted.

Pamela Benson
Administrative Judge