



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



In the matter of:)	
)	
)	ADP Case No. 20-00934
)	
Applicant for Public Trust Position)	

Appearances

For Government: Raashid Williams, Esq., Department Counsel
For Applicant: Lance Renfro, Esq.

06/24/2022

Decision

GARCIA, Candace Le'i, Administrative Judge:

Applicant mitigated the financial considerations trustworthiness concerns. Eligibility for access to sensitive information is granted.

Statement of the Case

On November 2, 2020, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing trustworthiness concerns under Guideline F (financial considerations). The action was taken under Executive Order (Exec. Or.) 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 adjudicative guidelines (AG) implemented by DOD on June 8, 2017.

Applicant responded to the SOR on December 18, 2020 (Answer), and requested a hearing before an administrative judge. The case was assigned to me on May 7, 2021. On July 29, 2021, DOHA issued a notice of Defense Collaboration Services (DCS) video teleconference (VTC) hearing, scheduling the hearing for August 27, 2021. I convened the DCS VTC hearing as scheduled.

Government Exhibits (GE) 1 and 2 and Applicant's Exhibits (AE) A through M were admitted in evidence without objection. Applicant testified. At Applicant's request, I kept the record open until September 24, 2021, to allow her to submit additional evidence. By that date, Applicant submitted additional documentation, which I marked collectively as AE N and admitted in evidence without objection. DOHA received the DCS VTC hearing transcript (Tr.) on September 8, 2021. (Tr. at 28-13, 52-53)

Findings of Fact

Applicant admitted both of the SOR allegations in her Answer. She is 40 years old, single, and has a minor child. As of the date of the DCS VTC hearing, she cohabitated with her fiancé of three years since 2010. (Answer; Tr. at 13-15, 23; GE 1; AE L)

Applicant graduated from high school in 1999. She earned an associate's degree in 2001, a bachelor's degree in 2003, and a master's degree in 2008. As of the date of the hearing, she worked as an engineer for her employer, a DOD contractor, since 2010. She was first granted access to sensitive information in 2009. (Tr. at 5-6, 15-16, 51-52; GE 1; AE D, E, F)

The SOR alleges that Applicant failed to pay her federal income taxes, as required, for tax years (TY) 2012 through 2018, and she owed the U.S. Government approximately \$17,685 in unpaid taxes for those tax years (SOR ¶¶ 1.a - 1.b). The SOR allegations are established by Applicant's admissions in her Answer, her December 2018 security clearance application (SCA), her adopted 2019 background interviews, and her July 2020 response to interrogatories. (Tr. at 16-19; GE 1, 2)

Applicant attributed her failure to pay her federal income taxes for TY 2012 through 2018 to her inability to pay due to minimal income. After she and her fiancé relocated in 2010, her fiancé had difficulty finding employment, and she was the primary breadwinner. She prioritized their basic living expenses, to include child care. Her fiancé worked for many years in a part time or temporary capacity, and he obtained full-time employment in approximately 2017. (Tr. at 16-32, 45-46; GE 1, 2)

Applicant indicated in her April 2019 background interview that she established an installment agreement with the Internal Revenue Service (IRS) in 2013 of \$190 monthly, to resolve her outstanding taxes. In her July 2020 response to interrogatories, she provided documentation reflecting that she made the following payments to the IRS for her outstanding taxes: (1) four payments totaling \$546 between May 2018 and July 2020 for TY 2012; (2) a payment of \$149 in May 2018 for TY 2018; and (3) a payment of \$149 in June 2020 for TY 2020. In 2020, the IRS revised her installment agreement to \$262 monthly. Due to financial assistance from her mother, in part, she made additional payments to the IRS of approximately \$3,612 and \$1,296 toward TY 2012 and 2013 in November 2020, respectively, and \$1,000 and \$764 in March 2021 toward TY 2013 and 2018, respectively. (Tr. at 16-32, 38-44, 48, 51-52; GE 1, 2; AE A, B, C, G, H, M, N)

IRS tax account transcripts from December 2020 and August 2021 reflect that Applicant paid her outstanding taxes for TY 2012 and 2013, and she paid down her outstanding taxes for TY 2018 from \$837 to \$754. She testified that all of her federal and state income taxes had been filed as of the date of the hearing; she owed an unrecalled amount in taxes for TY 2019, which was included in her monthly installment agreement with the IRS; and she intends to continue paying her outstanding taxes through that agreement. She provided documentation reflecting that as of September 2021, she owed the IRS a total of \$11,537, and she was current on her monthly payments. (Tr. at 16-32, 38-44, 48, 51-52; GE 1, 2; AE A, B, C, G, H, M, N)

Applicant testified that she received financial counseling online in approximately 2020. She also intends to consult with a tax advisor. She provided a copy of her budget, reflecting a total monthly household income of \$6,700 and a monthly net remainder of approximately \$1,481, which provides her with sufficient disposable income to meet her financial obligations. Her annual performance reviews reflect that her employer rated her performance as “[c]onsistently meets expectations” from 2017 to 2019 and “strong performance” in 2020, and her employer gave her a star award in appreciation of her efforts on a project in April 2021. A co-worker of over 10 years described Applicant as reliable, professional, and trustworthy. (Tr. at 23, 32-38, 41, 46-51; GE 2; AE D, I, J, K, N)

Policies

The Under Secretary of Defense’s Memorandum of November 19, 2004, treats ADP positions as sensitive positions, and it entitles applicants for ADP positions to the procedural protections in the Directive before any final unfavorable access determination may be made. 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. AG ¶ 2.b.

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 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. 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), “[a]ny doubt concerning personnel being considered for access to [sensitive] information 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 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 failed to pay her federal income taxes from TY 2012 through 2018. The evidence is sufficient to raise AG ¶¶ 19(a), 19(c), and 19(f) as 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;
- (d) the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts; 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.

Conditions beyond Applicant's control, as previously discussed, contributed to her financial problems. Thus, the first prong of AG ¶ 20(b) applies. For the full application of AG ¶ 20(b), she must provide evidence that she acted responsibly under the circumstances. Before she received the SOR, she established an installment agreement with the IRS in approximately 2013, and she made payments totaling \$844 toward her outstanding taxes for TY 2012, 2018, and 2020 between May 2018 and June 2020. Since the IRS revised her installment agreement in 2020, Applicant has kept current on her monthly payments of \$262, and she has also made several additional payments toward her outstanding taxes. She has paid her outstanding taxes for TY 2012 and 2013. As of September 2021, she owed the IRS a total of \$11,537. She received financial counseling in 2020, and intends to consult with a tax advisor. Her monthly household net remainder provides her with sufficient disposable income to continue to resolve her outstanding taxes and meet her financial obligations. I find that AG ¶¶ 20(a), 20(b), 20(c), 20(d) and 20(g) apply.

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 F in my whole-person analysis. Overall, the record evidence leaves me without questions or doubts as to Applicant's eligibility for access to sensitive information. I conclude Applicant mitigated 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 F:	FOR APPLICANT
Subparagraphs 1.a - 1.b:	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's eligibility for a public trust position. Eligibility for access to sensitive information is granted.

Candace Le'i Garcia
Administrative Judge