



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



In the matter of:)
)
) ADP Case No. 20-01592
)
Applicant for Public Trust Position)

Appearances

For Government: Jeff Kent, Esq., Department Counsel
For Applicant: *Pro se*

10/19/2022

Decision

MURPHY, Braden M., Administrative Judge:

Applicant failed to timely file three years of federal income tax returns, for tax years 2016-2018. She also has about \$40,000 in past-due federal income tax debt. Although she filed her tax returns in January 2021, and the tax debt is due to an isolated circumstance, her belated actions are not sufficient steps to address her tax debt. Applicant therefore did not provide sufficient evidence to mitigate financial trustworthiness concerns. Applicant’s eligibility for access to sensitive information is denied.

Statement of the Case

On March 21, 2020, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP) in connection with her employment in the defense industry. On November 28, 2020, the Defense Counterintelligence and Security Agency Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) to Applicant detailing trustworthiness concerns under Guideline F (financial considerations). The CAF issued the SOR under Department of Defense (DOD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as

amended (Directive); and the National Security Adjudicative Guidelines (AG), which became effective within the DOD on June 8, 2017.

Applicant answered the SOR on January 11, 2021, and requested a hearing before an administrative judge of the Defense Office of Hearings and Appeals (DOHA). She provided three documents, marked during her hearing as Applicant Exhibits (AE) A through C. Processing of this case was delayed significantly by the COVID-19 pandemic. The case was first assigned to another DOHA administrative judge on March 16, 2022. On April 21, 2022, DOHA issued a notice scheduling the hearing to be held in-person on May 18, 2022 at a location near where Applicant lives and works. The case was assigned to me on May 10, 2022, after the initial administrative judge became unavailable.

At the hearing, Department Counsel offered Government's Exhibits (GE) 1 through 9, which were all admitted without objection. Applicant Exhibits A through D were marked and admitted without objection. Applicant also testified. I held the record open to allow her the opportunity to submit additional documentation. She timely submitted 11 documents, which I have grouped into Post-Hearing (PH) exhibits 1 through 6. They are all admitted without objection. Those documents are described in the Facts section, below. DOHA received the hearing transcript on May 26, 2022. The record closed on June 8, 2022. (HE III)

In her post-hearing statement, Applicant requested to leave the record open for another three to six months so she could hear from the IRS. (PH 6) In a post-hearing e-mail to the parties on June 8, 2022, I informed Applicant that I would not hold the record open, though if she had additional documents to submit, she could do so, and then request that I reopen the record so they could be considered. (HE III) No such documents were provided, and the record remained closed.

SOR Amendment

On April 21, 2022, Department Counsel moved to amend the SOR on the basis of information received from Applicant. Applicant answered and admitted the new allegations on April 24, 2022. At the start of the hearing, the amendment was granted without objection. (Tr. 11-13)

First, Department Counsel moved to amend SOR ¶ 1.a so that it reads as follows:

1.a: You failed to file your federal income tax returns for tax years 2016-2018 on time. [The second sentence, alleging that the returns remained unfiled, was deleted.]

Second, Department Counsel moved to add a new allegation, as follows:

1.b: You are indebted to the Federal Government for delinquent taxes in the approximate amount of \$40,291.00 for tax year 2018.

Findings of Fact

Applicant admitted SOR ¶ 1.a, as amended, and the newly added SOR ¶ 1.b. Her admissions are incorporated into the findings of fact. After a thorough and careful review of the pleadings and exhibits submitted, I make the following additional findings of fact.

Applicant is 56 years old. She has a high school diploma and is trained as a licensed practical nurse (LPN). She was married twice, and has four grown children. She worked as an LPN from 2013 to 2019, and still does part-time work in that field. She also works in software. She has worked for a DOD contractor since 2017. (GE 1; Tr. 40)

On her e-QIP, Applicant disclosed unpaid taxes and unfiled tax returns for tax years 2016 and 2017, and an older tax debt, from about 2010. (GE 1 at 49-51)

Applicant testified that she has always been a salaried “W-2” employee. Her 2018 tax debt resulted from her status as an independent contractor, a “1099” employee, because she did not understand that as a “1099” independent contractor, she, rather than her employer, was responsible for withholding taxes from her pay. (Tr. 42-46) In 2018, she earned over \$163,000 in taxable income but had little withheld. (GE 7, AE C)

Applicant usually requests a filing extension for her federal tax returns. She said she started her job as a DOD contractor in September 2017. If she had filed for an extension, her 2016 federal taxes would have been due not in April 2017, but in October 2017. She said she did not have an excuse for not filing, just overwork and travel. Applicant explained that her DOD job involved work in states located away from her home, long days and working weekends.

Applicant received an interrogatory from DOHA about her taxes in March 2020. (GE 2) She said she prepared and filed her federal tax returns for tax years 2016, 2017, and 2018 some time afterwards, in 2020. She asserted that she did so while working on an assignment in another state, and that she returned home in fall 2020, after she was promoted. She said she prepares her tax forms herself, using well-known tax preparation software. (Tr. 47-48, 52-53, 68-70, 78-79)

With her answer, Applicant provided signed copies of her 2016, 2017, and 2018 federal tax returns. Those returns are signed on January 23, 2021. (AE A, AE B, AE C) Applicant’s federal account transcripts for those tax years reflect that she filed her 2016 return in October 2021, her 2017 return in November 2021, and her 2018 return in April 2022. (GE 5, GE 6, GE 7)

Applicant's 2016 federal account transcript reflects a \$1,335 credit that was transferred to address her 2018 tax debt. (Tr. 48-49; GE 5; AE A) For 2017, she paid \$103. (GE 6) Her 2018 account transcript reflects that she earned over \$163,000 but had little withheld. She now owes \$40,291 in taxes, penalties, and interest. (GE 7; AE C) (SOR ¶ 1.b)

Applicant does not have to pay state income taxes in her home state. She said she filed her 2019 and 2020 federal returns with extensions. (Tr. 54-55) She filed her 2021 tax returns the day before the hearing. She said she was due a refund of \$1,233, an amount that will likely be recaptured to address her 2018 tax debt. (Tr. 35, 54-56, 66)

Applicant's plan to address her \$40,000 tax debt from 2018 is to refinance her home and to use the equity in the home to address her taxes. She recently remodeled the home, where she lives with her mother. She said she bought the home from her mother, and it has a \$64,000 mortgage. (Tr. 86-88; AE D) At the time of the hearing, she had no plan in place to address the debt. She said she had received a letter from the IRS, but acknowledged that it was her responsibility to act on it. (Tr. 90-94)

Applicant is again a W-2 employee, and no longer an independent contractor. She earns \$47 an hour. She earned \$104,000 in 2021. She has an extra \$50 taken out weekly for her past-due taxes. (Tr. 63, PH 3 at 2) She said her income and expenses are "holding steady," although she has little to no current savings due to the home remodeling project. (Tr. 59-61) Her credit reports do not reflect any significant financial issues. (GE 3, GE 4)

Applicant also has a federal tax lien filed in 2004, for \$8,553. (GE 8) She testified that she went to her county courthouse to research the status of the 2004 federal tax lien. The clerk told her they had no record of it. (Tr. 33-34) The 2004 tax lien is not alleged in the SOR. She acknowledged prior tax debt (2004 lien) and prior filing issues (2010-2016). She offered no explanation for the tax debt and said she had no excuse for failing to file her tax returns, other than immaturity and the press of work and travel. (Tr. 40, 90)

After the hearing, Applicant submitted updated documentation about her recent tax filings. Her 2019 federal tax return, provided with extensive documentation, shows taxable income of \$57,493, and a \$1,268 refund. (PH 2 at 2)

Applicant's 2020 federal tax return shows taxable income of \$44,728, and a refund due of \$3,706. (PH 3) For tax year 2021, she earned a taxable income of \$104,336, and was to be refunded \$1,233, as noted above. (PH 4)

Applicant also provided a Form 9465 Installment Agreement Request. It covers tax years 2004, 2008-2011, 2014, and 2018. She reported that she owed \$69,560 in past-due taxes, and paid the first \$560. She reported that she could pay \$500 per month, and she provided the routing and account numbers for her bank so the money could be withdrawn automatically. (PH 5)

Applicant also provided a post-hearing statement. She acknowledged that she thought she had improved her standing by being honest about her past-due taxes but now realizes there is more work to do. Her tax problems began when she was a single mother, raising her children without financial support, while working three jobs to make ends meet. She had no excuse for failing to file her tax returns properly, but said she never owed taxes until 2014. (This could mean “2004,” the year of the tax lien). She is now in contact with the IRS to address her taxes. (PH 5, PH 6)

Applicant closed her statement by stressing that she loves her job working with the military, and feels rewarded by the work, as she does with nursing. She needs a “CAC” card to do her job. She offered to “keep someone updated” on her progress, and requested to leave the record open for another three to six months so she could hear from the IRS. She said she would resolve her taxes as soon as she could and will file her tax returns on time in the future. (PH 6)

Applicant also provided several references, all of whom said she does a good job and is a valued, sought-after team member due to her comprehensive knowledge, training expertise, and communication skills. (PH 1)

Policies

It is well established that no one has a right to a security clearance, or, as here, to a determination of public trust. As the Supreme Court held in *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988), “the clearly consistent standard indicates that [trustworthiness] determinations should err, if they must, on the side of denials.”

When evaluating an applicant’s eligibility for a public trust 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, which are used in evaluating an applicant’s eligibility for access to sensitive information.

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.

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. Likewise, I have not drawn inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an “applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel and has the ultimate burden of persuasion to obtain a favorable security 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 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. . . .

The financial considerations guideline sets forth several conditions that could raise trustworthiness concerns under AG ¶ 19. The following are potentially applicable:

- (a) inability to satisfy debts;
- (c) a history of not meeting financial obligations; and
- (f) failure to file . . . annual Federal, state, or local income tax returns or failure to pay annual Federal, state, or local income tax as required.

In ISCR Case No. 14-04437 at 3 (App. Bd. Apr. 15, 2016) (emphasis added), the DOHA appeal board detailed the concern about applicants who fail to file their tax returns as follows:

Failure to file tax returns suggests that an applicant has a problem with complying with well-established governmental rules and systems.

Voluntary compliance with such rules and systems is essential for protecting [sensitive] information. ISCR Case No. 01-05340 at 3 (App. Bd. Dec. 20, 2002). As we have noted in the past, a [trustworthiness] adjudication is not directed at collecting debts. See, e.g., ISCR Case No. 07-08049 at 5 (App. Bd. Jul. 22, 2008). By the same token, *neither is it directed towards inducing an applicant to file tax returns. Rather, it is a proceeding aimed at evaluating an applicant's judgment and reliability. Id.* 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 [sensitive] information. See, e.g., ISCR Case No. 14-01894 at 5 (App. Bd. Aug. 18, 2015); See *Cafeteria & Restaurant Workers Union Local 473 v. McElroy*, 284 F.2d 173, 183 (D.C. Cir. 1960), *aff'd*, 367 U.S. 886 (1961).

Applicant failed to timely file her federal income tax returns for three tax years, 2016, 2017, and 2018. (SOR ¶ 1.a). The IRS calculated that she owed \$40,291 in past-due taxes for tax year 2018. AG ¶¶ 19(a), 19(c), and 19(f) all apply.

Conditions that could mitigate 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;

(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.

Applicant has been a DOD contractor since 2017. She has spent much of her time traveling away from home. Her work involved long hours. For several years, she failed to prioritize her tax filings, and she did not file three years of tax returns (2016, 2017, and 2018) in a timely manner. She testified that she prepared and filed the returns in 2020 while working out of state. The documents she provided, including account transcripts from the IRS, show she filed her past-due returns in 2021 and 2022, which is after the SOR was issued. Regardless, she filed her past-due tax returns after

receiving an interrogatory from DOHA about them, in March 2020 (and also after declaring tax issues on her 2019 application).

Applicant has filed her past-due federal income tax returns, but she still owes over \$40,000 in past-due taxes, as alleged in SOR ¶ 1.b. Further, according to her proposed installment agreement, the true amount she owes is almost \$70,000. Her tax debt also remains outstanding and unresolved, and continues to cast doubt on her current judgment, reliability, and trustworthiness. AG ¶ 20(a) does not apply.

AG ¶ 20(b) does not apply. Applicant's repeated failures to timely file her tax returns and the resulting tax debt is her own responsibility, and she offered no excuse for her situation which might be attributable to a circumstance beyond her control.

Applicant has filed her overdue returns and has filed subsequent returns in timely manner. She has made an installment agreement request to the IRS, proposing \$500 monthly payments. AG ¶ 20(g) has some application, even though the IRS has not confirmed the agreement.

However, the fact that Applicant acted only when her public trust determination was imperiled raises questions about her willingness to follow the sometimes complex rules governing protection of sensitive information when her personal interests are not at stake. *See, e.g.*, ISCR Case No. 15-01070 at 4 (App. Bd. Mar. 9, 2016). Further, Applicant has not established a steady track record of payments to the IRS to resolve her significant tax debt. She needs to show such evidence in order to demonstrate ongoing good faith. AG ¶ 20(d) does not apply.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a position of public trust 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 position of public trust 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 Guideline F in my whole-person analysis. While I believe Applicant is sincere about her intentions to resolve her tax debts in the future, she needs to establish a track record of financial stability, good-faith steady payments towards her tax debts and tax filing requirements before she can be considered eligible for access to sensitive information. Over time, she may demonstrate that track record in the future, and may then be reconsidered for public trust access. But at this time, that determination is premature. Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility for a public trust position.

In PH 6, Applicant also offered to "keep someone updated" on her progress. I construe this as a request for a conditional clearance, under DOD Directive 5220.6, Enclosure 2, Appendix C. I have considered a conditional clearance, but I do not believe it is warranted in this case.

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:	AGAINST APPLICANT
Subparagraphs 1.a-1.b:	Against Applicant

Conclusion

In light of all of the circumstances presented, it is not clearly consistent with the interests of national security to grant Applicant access to sensitive information. Eligibility for a public trust position is denied.

Braden M. Murphy
Administrative Judge