



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



In the matter of:)
)
) ADP Case No. 12-11186
)
Applicant for Public Trust Position)

Appearances

For Government: Benjamin R. Dorsey, Esq., Department Counsel
For Applicant: *Pro se*

11/21/2015

Decision

DUFFY, James F., Administrative Judge:

Applicant failed to mitigate trustworthiness concerns under Guideline F (financial considerations). Eligibility to occupy a position of trust is denied.

Statement of the Case

On May 9, 2012, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP). Based on a review of Applicant's e-QIP and the ensuing background investigation, Department of Defense (DOD) adjudicators issued Applicant a Statement of Reasons (SOR) on March 14, 2015, under DOD 5200.2-R, *Personnel Security Program*, dated January 1987, as amended (Regulation); DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive); and the adjudicative guidelines (AG) implemented by DOD in September 1, 2006. The SOR alleged trustworthiness concerns under the financial considerations guideline.

On April 10, 2015, Applicant answered the SOR and elected to have her case decided on the written record in lieu of a hearing. On July 27, 2015, Department

Counsel prepared a File of Relevant Material (FORM) that contained documents marked as Items 1 through 6. On August 26, 2015, Applicant received a copy of the FORM and was given 30 days from its receipt to submit objections and supply additional information. Applicant did not submit a response to the FORM. The case was assigned to me on November 10, 2015.

Findings of Fact

The SOR alleged that Applicant failed to timely file her federal income tax returns for 2007 through 2011 (SOR ¶ 1.k) and that she had 11 delinquent debts totaling about \$17,000 (SOR ¶¶ 1.a through 1.j and 1.l). In her Answer to the SOR, Applicant denied the delinquent federal taxes alleged in SOR ¶ 1.l for 2007 (\$78) and 2011 (\$1,444) and “accepted” each of the remaining allegations. Credit reports dated May 1, 2012, and November 19, 2014, contain entries that substantiate the debts in SOR ¶¶ 1.a through 1.j.¹

Applicant is a 58-year-old employee of a defense contractor. She has been working for that contractor since June 2012. She earned an associate’s degree in 1994. She married in 1978 and divorced in 1985. She has two adult children. This is the first time that she is seeking to occupy a position of trust.²

From September 2004 to October 2011, Applicant worked as an executive assistant. She was laid off from that position during a downsizing and was unemployed for about nine months until she obtained her current job. She also attributed her financial problems to an Internal Revenue Service (IRS) error in garnishing her wages for many months only to refund the money after her income tax returns were filed. When her wages were being garnished, she claimed that she was unable to pay other debts and indicated the IRS error destroyed her credit. By the time the IRS corrected the error and returned the money, she was laid off from her job. She also indicated that she provides financial support to her daughter and an ill grandson, which has limited her ability to resolve the delinquent debts.³

In her e-QIP of May 2012, Applicant disclosed that she did not file her federal income tax returns for 2007 through 2011. She claimed she did not file those income tax returns because of “an IRS error” in garnishing her pay. In her e-QIP, she indicated the IRS error was corrected in early 2012, and she was in the process of filing those income tax returns. Her credit report dated May 19, 2012, reflected that a \$7,276 federal tax lien was released in January 2012. During an Office of Personnel Management (OPM)

¹ Items 1 and 2. In her Answer to the SOR, Applicant indicated that the SOR was “for the most part accurate to the best of my knowledge with the exception of item 1(l).”

² Item 3.

³ Items 2 and 3.

interview in July 2012, she showed the investigator documents that reflected she filed her federal income tax returns for the years in question.⁴

Applicant provided no proof of payments, repayment arrangements, or other actions taken to resolve her delinquent debts. No proof of financial counseling was provided.⁵

Policies

Positions designated as ADP I and ADP II are classified as “sensitive positions.” (See Regulation ¶¶ C3.1.2.1.1.7 and C3.1.2.1.2.3.) “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.” (See Regulation ¶ C6.1.1.1.) In a memorandum dated November 19, 2004, the Deputy Under Secretary of Defense (Counterintelligence and Security) indicated that trustworthiness adjudications will apply the procedures contained in the Directive before making a determination. (See Regulation ¶ C8.2.1.)

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(c), 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 access to [sensitive] information will be resolved in favor of 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.

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.

⁴ Items 2 and 3. Applicant’s 2011 federal income tax return was due less than a month before she filed her e-QIP. No evidence was provided that Applicant submitted a request for a filing extension for 2011.

⁵ Items 1-6.

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 under this guideline is set out in AG ¶ 18:

Failure or inability 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 [sensitive] information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

The record does not contain evidence that substantiates the delinquent federal taxes alleged in SOR ¶ 1.I. I find in favor of Applicant on SOR ¶ 1.I. Applicant's admissions and the record evidence established the remaining SOR allegations and three disqualifying conditions in AG ¶ 19:

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

Five mitigating conditions under AG ¶ 20 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, or a death, divorce or separation), and the individual acted responsibly under the circumstances;

(c) the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control;

(d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts; and

(e) the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue.

None of the mitigating conditions are fully established. Applicant claimed the IRS made an error by garnishing her wages to recoup a refund. Although she provided no documents substantiating that the IRS made an error, her explanation is plausible. I find the garnishment was a condition beyond her control under AG ¶ 20(b). Likewise, her unemployment as well as the need to provide support to her daughter and ill grandson were also conditions beyond her control.

Although Applicant has shown that conditions beyond her control contributed to her financial problems, she failed to show that she has acted responsibly under the circumstances. Even though the IRS may have committed an error in garnishing her pay, such an error did not justify her failure to file her federal income tax returns for 2007 through 2011 in a timely manner. She eventually filed those tax returns in 2012. Applicant has been employed since June 2012, but provided no proof that she made payments toward the delinquent debts. No evidence was presented that she received financial counseling or that she has taken any steps to resolve the debts. Her delinquent debts remain ongoing and significant. Insufficient evidence was presented to conclude her financial problems are being resolved, are under control, and are unlikely to recur. She provided no documentation showing she has a legitimate basis for disputing any debts. Her financial problems continue to cast doubt on her current reliability, trustworthiness, and good judgment. AG ¶ 20(b) partially applies. AG ¶¶ 20(a), 20(c), 20(d), and 20(e) do not apply.

Whole-Person Concept

In the adjudication process, an administrative judge must carefully weigh a number of variables known as the whole-person concept. Available information about the applicant as well as the factors listed in AG ¶ 2(a) should be considered in reaching a determination.⁶ In this case, I gave due consideration to the information about

⁶ The adjudicative process factors listed at AG ¶ 2(a) are as follows:

(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

Applicant in the record and concluded the favorable information, including the mitigating evidence, does not outweigh the trustworthiness concerns at issue. Applicant failed to meet her burden of persuasion to mitigate the trustworthiness concerns. Following the *Egan* decision and the “clearly consistent with the national interest” standard, doubts about granting Applicant eligibility to occupy a position of trust must be resolved in favor of national security.

Formal Findings

Formal findings as required by Section E3.1.25 of Enclosure 3 of the Directive are:

Paragraph 1, Guideline F:	Against Applicant
Subparagraphs 1.a – 1.j:	Against Applicant
Subparagraphs 1.k and 1.l:	For Applicant

Decision

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant eligibility to occupy position of trust. Eligibility to access sensitive information is denied.

James F. Duffy
Administrative Judge

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.