



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



In the matter of:

Applicant for Public Trust Position

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ADP Case No. 12-11373

Appearances

For Government: Richard Stevens, Esquire, Department Counsel
For Applicant: *Pro se*

02/01/2016

Decision

GALES, Robert Robinson, Administrative Judge:

Applicant has mitigated the trustworthiness concerns regarding financial considerations. Eligibility to occupy a public trust position is granted.

Statement of the Case

On June 15, 2012, Applicant applied for a public trust position and submitted an Electronic Questionnaire for Investigations Processing (e-QIP).¹ On April 27, 2015, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) to her, pursuant to DOD Regulation 5200.2-R, *Personnel Security Program*, dated January 1987, as amended and modified (Regulation); DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended and modified (Directive); and *Adjudicative Guidelines for Determining Eligibility For Access to Classified Information* (effective within the DOD on September 1, 2006) (AG) for all adjudications and other determinations made under the Directive. The SOR alleged trustworthiness concerns under Guideline F (Financial Considerations), and detailed reasons why the DOD adjudicators were unable to make

¹ GE 1 (e-QIP, dated June 15, 2012).

an affirmative finding under the Directive that it is clearly consistent with the interests of national security to grant or continue Applicant's eligibility for occupying a public trust position to support a contract with the DOD. The SOR recommended referral to an administrative judge to determine whether such eligibility should be granted, continued, denied, or revoked.

Applicant acknowledged receipt of the SOR on May 20, 2015. In a sworn statement, dated June 4, 2015, Applicant responded to the SOR allegations and requested a hearing before an administrative judge. On September 9, 2015, Department Counsel indicated the Government was prepared to proceed. The case was assigned to me on September 18, 2015. A Notice of Hearing was issued on September 29, 2015. I convened the hearing, as scheduled, on October 28, 2015.

During the hearing, 4 Government exhibits (GE 1 through GE 4) and 11 Applicant exhibits (AE A through AE K) were admitted into evidence without objection. Applicant testified. The transcript (Tr.) was received on November 5, 2015. I kept the record open to enable Applicant to supplement it. Applicant took advantage of that opportunity. She timely submitted a number of additional documents, which were marked as AE L through AE Z, and admitted into evidence without objection. The record closed on November 12, 2015.

Findings of Fact

In her Answer to the SOR, Applicant admitted both of the factual allegations pertaining to financial considerations (¶¶ 1.a. and 1.b.) of the SOR. Applicant's admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact:

Applicant is a 42-year-old employee of a defense contractor. She has been a full-time technical analyst, working from her home office, for one company (from 8 am to 4 pm) since September 2005, and for a defense contractor (from 4 pm to 2 am) since February 2012. She is seeking to retain her eligibility for occupying a public trust position to support a contract with the DOD which was initially granted to her in February 2012.² She has never served in the U.S. military.³ She is a 1990 high school graduate with substantial college credits, but no degree.⁴ Applicant was married the first time in August 1995, and they were divorced in December 1997.⁵ She married her second husband in October 2000, and they were divorced in July 2008.⁶ She married

² GE 1, *supra* note 1, at 13-14; Tr. at 6; GE 2 (Personal Subject Interview, dated July 25, 2012), at 2.

³ GE 1, *supra* note 1, at 20.

⁴ GE 1, *supra* note 1, at 12; Tr. at 5, 27-28.

⁵ GE 1, *supra* note 1, at 23-24.

⁶ GE 1, *supra* note 1, at 24.

her current husband in November 2008.⁷ She has two daughters, born in 2002 and 2003, and a son, born in 2010.⁸

Financial Considerations

There was nothing unusual about Applicant's finances until about July 2008 when she and her second husband divorced. A Mediation Agreement⁹ was signed by both parties and their respective attorneys, and incorporated into the Final Judgment of Dissolution of Marriage.¹⁰ It included the requirements that (1) the marital home be awarded to Applicant, and (2) her husband sign a quit claim deed for the residence and power of attorney for a vehicle, within ten days of the date of the agreement to effectuate the provisions therein.¹¹ It also included the provision that each party would claim one child as a dependent, and they would sign the necessary Internal Revenue Service (IRS) forms annually to affirm the other parent's right to take such dependency allowance.¹² Because of the disparity in annual income, Applicant was ordered to pay annual child support of \$5,611.¹³

The actual financial problems commenced when her second husband refused to sign required documentation to enable Applicant to sell the residence or eventually prevent its foreclosure. The house had been purchased for approximately \$174,000 in 2004, and refinanced for approximately \$236,000 in 2005.¹⁴ The adjustable rate mortgage (ARM) saw her monthly mortgage payments soar from \$1,500 to \$3,100, and, when her current husband lost his job, she did not have sufficient funds to maintain the increased level. The foreclosure process commenced in January 2009, and the house was sold at auction in June 2010.¹⁵

Her second husband also refused to sign the power of attorney to enable her to sell her vehicle when retaining it became too costly as well. In September 2010, the remaining balance on the vehicle was \$5,000, but she needed \$4,000 to repair it. Because she could not repair the vehicle, afford to keep it, or sell it, she voluntarily relinquished it as a repossession.¹⁶

⁷ GE 1, *supra* note 1, at 22-23.

⁸ GE 1, *supra* note 1, at 27-28.

⁹ AE O (Mediation Agreement, dated July 14, 2008).

¹⁰ AE N (Final Judgment of Dissolution of Marriage, dated July 24, 2008).

¹¹ AE O, *supra* note 9, at 4-5.

¹² AE O, *supra* note 9, at 3.

¹³ AE M (Child Support Worksheet, undated); AE O, *supra* note 9, at 3; GE 2, *supra* note 2, at 3.

¹⁴ GE 3 (Combined Experian, TransUnion, and Equifax Credit Report, dated July 13, 2012), at 8-9; Tr. at 32.

¹⁵ GE 2, *supra* note 2, at 4; Tr. at 32-37.

¹⁶ GE 2, *supra* note 2, at 4-5.

A variety of other accounts also became delinquent, and they were placed for collection, charged off, or went to judgment. Applicant reported a significant number of her delinquencies in her e-QIP.¹⁷ For reasons discussed below, Applicant failed to timely file her federal income tax returns for two tax years.

On the advice of her real estate agent, Applicant engaged the professional services of a financial counseling service in July 2012, to contact her creditors; explore repayment arrangements; settle debts for lesser amounts; work with the IRS; assist her in obtaining documentation regarding her foreclosed residence; ensure that information in credit reports is accurate; dispute erroneous items with the credit reporting agencies; and provide educational material.¹⁸

The SOR identified two allegations that Applicant had failed to timely file her federal income tax returns for the tax years 2010 and 2013. She admitted the allegations and offered explanations for her inaction.¹⁹

SOR ¶ 1.a.: Applicant noted in her e-QIP that she had issues with her ex-spouse over her real estate loss and dependent claims, and she was attempting to resolve those issues before filing her federal income tax return for 2010.²⁰ During her interview with a representative from the U.S. Office of Personnel Management (OPM), she added that she estimated that she owed about \$3,000 and could not file for a deduction related to the foreclosure of her residence because her ex-husband had refused to sign the necessary documentation.²¹

In her Answer to the SOR, Applicant was slightly more specific when she stated that she had requested copies of a Form 1099-A, *Acquisition or Abandonment of Secured Property*, or to determine if her ex-husband had received one and completed it in his own name. All her efforts failed.²² During the hearing, Applicant noted that her financial counselor had advised her to “hold off” on the filing of her 2010 federal income tax return until she had a better picture of her finances.²³ The financial counselor’s statement was “if you haven’t gotten a letter yet, don’t worry about it until we get to the other side of this process.”²⁴ The guidance furnished was wrong, for it was, in essence, a recommendation to violate the law. Applicant learned the truth when she spoke with

¹⁷ GE 1, *supra* note 1, at 40-46.

¹⁸ GE 2, *supra* note 2, at 5; AE L (E-mail Stream, various dates); Tr. at 41.

¹⁹ Applicant’s Answer to the SOR, dated June 4, 2015.

²⁰ GE 1, *supra* note 1, at 40.

²¹ GE 2, *supra* note 2, at 3-4.

²² Applicant’s Answer to the SOR, *supra* note 19.

²³ Tr. at 39.

²⁴ Tr. at 40.

the IRS representative who told her “you should just file and whatever comes after that you can deal with it at that point in time.”²⁵ Applicant finally filed her Form 1040A, *U.S. Individual Income Tax Return* for 2010 in May 2015.²⁶

SOR ¶ 1.b.: During the first quarter of 2014, Applicant and her husband were in the midst of closing on their new residence. Because of the issues they encountered in two previous attempts to obtain a mortgage, they filed for an extension for the 2013 income tax return with the IRS in order to retain more liquid funds available in the event they might be needed at closing. Unfortunately, they failed to file the income tax return before the expiration of the extension.²⁷ Applicant finally filed her Form 1040, *U.S. Individual Income Tax Return* for 2013 in May 2015.²⁸

On May 22, 2015, Applicant and her husband entered into an Installment Agreement covering the tax periods 2010 and 2013. Based on a total liability of \$4,383 for both periods, Applicant agreed to pay a one-time \$120 user fee plus \$500 each month.²⁹ She has continued making her monthly payments since May 2015.³⁰ Applicant and her husband timely filed their federal income tax return for 2014.³¹

Although Applicant did not submit a Personal Financial Statement to describe her overall financial status, it appears that her combined monthly income from her two jobs is an estimated \$11,946, derived from adding her salary deposits each month over the span of July through October 2015.³² It is difficult to assess the remaining features of her financial record, including normal monthly expenses or debt payments, or to determine if she has any remainder available for discretionary savings or spending. Nevertheless, in the absence of any other delinquencies, it appears that Applicant's financial problems are now under control. Applicant has never received any other financial counseling.³³

²⁵ Tr. at 56.

²⁶ AE A (Form 1040A, received by the IRS May 21, 2015).

²⁷ Tr. at 42; Applicant's Answer to the SOR, *supra* note 19.

²⁸ AE B (Form 1040, received by the IRS May 22, 2015).

²⁹ AE E (IRS Letter, dated June 3, 2015); AE C (Installment Agreement Request, dated May 22, 2015); AE D (Check, dated May 22, 2015).

³⁰ Tr. at 44; AE G (Checking Summary, dated June 12, 2015), at 2; AE H (Checking Summary, dated July 14, 2015), at 2; AE I (Checking Summary, dated August 14, 2015), at 2; AE J (Checking Summary), dated September 15, 2015), at 2; AE K (Checking Summary, dated October 15, 2015), at 3.

³¹ Tr. at 44-45.

³² AE H, *supra* note 30, at 2; AE I, *supra* note 30 at 2; AE J, *supra* note 30, at 2; AE K, *supra* note 30, at 1.

³³ Tr. at 57-58.

Work Performance and Character References

Applicant's team leader and two coworkers have known her for different periods of time, between four years and ten years. Their assessments of her professional knowledge and abilities, as well as her character, are all positive. Applicant is described as extremely knowledgeable in diverse areas of information technology, thorough and timely in expediting assigned tasks, an excellent trouble shooter, hardworking, flexible, dedicated, reliable, trustworthy, and honest.³⁴ Several long-term friends also focus on her reputation for reliability, personal integrity, honesty, and trustworthiness.³⁵ Family members are also very supportive of her.³⁶

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 security clearance."³⁷ As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information. Positions designated as ADP I/II/III are classified as "sensitive positions."³⁸ "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."³⁹ Department of Defense contractor personnel are afforded the right to the procedures contained in the Directive before any final unfavorable access determination may be made.⁴⁰

When evaluating an applicant's suitability for a public trust position, the administrative judge must consider the AG. In addition to brief introductory explanations for each guideline, the AG list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant's eligibility for a public trust position.

³⁴ AE Z (Character Reference, undated); AE X (Character Reference, undated); AE V (Character Reference, undated).

³⁵ AE Q (Character Reference, undated); AE T (Character Reference, undated); AE W (Character Reference, dated November 11, 2015).

³⁶ AE Y (Character Reference, undated); AE U (Character Reference, dated November 6, 2015); AE P (Character Reference, dated November 4, 2015); AE S (Character Reference, dated November 4, 2015); AE R (Character Reference, dated November 4, 2015).

³⁷ *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

³⁸ Regulation ¶¶ C3.1.2.1.1.7 and C3.1.2.1.2.3.

³⁹ Regulation ¶ C6.1.1.1.

⁴⁰ Regulation ¶ C8.2.1.

An administrative judge need not view the guidelines as inflexible, ironclad rules of law. Instead, acknowledging 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 common sense decision. 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 meaningful decision.

In the decision-making process, facts must be established by "substantial evidence."⁴¹ The Government initially has the burden of producing evidence to establish a potentially disqualifying condition under the Directive, and has the burden of establishing controverted facts alleged in the SOR. Once the Government has produced substantial evidence of a disqualifying condition, under Directive ¶ E3.1.15, the applicant has the burden of persuasion to present evidence in refutation, explanation, extenuation or mitigation, sufficient to overcome the doubts raised by the Government's case. The burden of disproving a mitigating condition never shifts to the Government.⁴²

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 as well. It is because of this special relationship that the Government must be able to repose a high degree of trust and confidence in those 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 as to potential, rather than actual, risk of compromise of sensitive information. Furthermore, security clearance determinations, and by inference, public trust determinations, should err, if they must, on the side of denials.⁴³ 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 avoided drawing inferences grounded on mere speculation or conjecture.

Analysis

Guideline F, Financial Considerations

The trustworthiness concern relating to the guideline for Financial Considerations is set out in AG ¶ 18:

⁴¹ "Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all contrary evidence in the record." ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). "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).

⁴² See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

⁴³ *Egan*, 484 U.S. at 531.

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 classified information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds. . . .

The guideline notes a specific condition that could raise security concerns. Under AG ¶ 19(g), "a failure to file annual Federal, state, or local income tax returns as required. . ." may raise security concerns. Applicant failed to timely file her federal income tax returns for 2010 and 2013. AG ¶ 19(g) has been established.

The guideline also includes examples of conditions that could mitigate security concerns arising from financial difficulties. Under AG ¶ 20(a), the disqualifying condition may be mitigated where "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." Also, under AG ¶ 20(b), financial security concerns may be mitigated where "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." Evidence that "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" is potentially mitigating under AG ¶ 20(c).

AG ¶ 20(c) applies. AG ¶¶ 20(a) and 20(b) partially apply. Applicant's financial problems were not caused by frivolous or irresponsible spending. The nature, frequency, and recency of Applicant's isolated financial difficulties related to her failure to timely file her income tax returns facilitate the conclusion that those financial issues were relatively recent and they were infrequent. Her initial failure to file her federal income tax return for 2010 arose because of her misunderstanding of her responsibilities under the law as misrepresented to her by a financial counselor, as well as her ex-husband's refusal to comply with the court order by failing to furnish Applicant with the required documentation to obtain clear title to her vehicle and residence. His inaction prevented her from either refinancing or selling them. The combination of her divorce and her ex-husband's actions contributed to some accounts becoming delinquent. But Applicant's initial mistaken inaction was the sole factor leading to her failure to timely file the income tax return for 2010. Applicant could have filed her return and eventually filed an amended return, as she subsequently learned upon speaking with the IRS representative. Applicant finally filed her federal income tax return for 2010 in May 2015.

Applicant's failure to timely file her federal income tax return for 2013 is a separate issue. She and her husband filed for an extension for the 2013 income tax return with the IRS in order to retain more liquid funds available in the event they might be needed at closing. Unfortunately, they failed to file the income tax return before the

expiration of the extension. Applicant finally filed her federal income tax return for 2013 in May 2015.

In May 2015, Applicant and her husband entered into an Installment Agreement covering both tax periods. With a total liability of \$4,383 for the combined periods, Applicant agreed to pay a one-time \$120 user fee plus \$500 each month. She has been making her monthly payments since May 2015. Applicant and her husband timely filed their federal income tax return for 2014.

Applicant's combined monthly income from her two jobs is an estimated \$11,946. While it is difficult to assess the remaining features of her financial record, in the absence of any other delinquencies, it appears that Applicant's financial problems are now under control. Her actions no longer cast doubt on her current reliability, trustworthiness, or good judgment.⁴⁴

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 the circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

- (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. Moreover, I have evaluated this case in light of the totality of the record evidence and have not merely performed a piecemeal analysis.⁴⁵

There is some evidence against mitigating Applicant's conduct. She failed to timely file her federal income tax returns for 2010 and 2013.

The mitigating evidence is more substantial and compelling. There is no evidence of misuse of information technology systems, mishandling protected

⁴⁴ See ISCR Case No. 09-08533 at 3-4 (App. Bd. Oct. 6, 2010).

⁴⁵ See *U.S. v. Bottone*, 365 F.2d 389, 392 (2d Cir. 1966); See also ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006).

information, or substance abuse. According to her supervisor, coworkers, friends, and family, she is a highly respected, reliable, honest, and trustworthy individual. Confronted with financial issues following her divorce from her second husband, and his refusal to comply with the court order to furnish Applicant documentation to clear title to her vehicle and residence, Applicant turned to a financial counselor for guidance. That guidance was incorrect, and it led to Applicant withholding the filing of her federal income tax return for 2010. She was wrong, and has acknowledged making a mistake in not timely filing that return. Although she filed for an extension for the 2013 income tax return, in the midst of obtaining a home mortgage, the actual final filing was overlooked. She entered into an Installment Agreement with the IRS. The income tax returns for both years were finally filed in May 2015. While a variety of accounts also became delinquent, and they were placed for collection, charged off, or went to judgment, and she reported a significant number of them in her e-QIP, they have all been resolved, and they were not alleged in the SOR. There are clear indications that Applicant's financial problems are under control.

Applicant's two federal income tax issues were finally resolved one month after the SOR was issued. This decision should serve as a warning that Applicant's failure to continue her agreed income tax payments, or her failure to continue timely filing future federal income tax returns, will adversely affect her future eligibility for a public trust position.⁴⁶ Overall, the evidence leaves me without questions and doubts as to Applicant's eligibility and suitability for such a position. For all of these reasons, I conclude Applicant has mitigated the trustworthiness concerns arising from her financial considerations. See AG ¶ 2(a)(1) through AG ¶ 2(a)(9).

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
Subparagraph 1.b:	For Applicant

⁴⁶ While this decision should serve as a warning to Applicant as security officials may continue to monitor her finances, this decision, including the warning, should not be interpreted as a conditional eligibility to occupy a public trust position to support a contract with DOD. The Defense Office of Hearings and Appeals (DOHA) has no authority to attach limiting conditions to an applicant's public trust position. See, e.g., ISCR Case No. 10-06943 at 4 (App. Bd. Feb. 17, 2012) (citing ISCR Case No. 10-03646 at 2 (App. Bd. Dec. 28, 2011)). See also ISCR Case No. 06-26686 at 2 (App. Bd. Mar. 21, 2008); ISCR Case No. 04-03907 at 2 (App. Bd. Sep. 18, 2006); ISCR Case No. 04-04302 at 5 (App. Bd. Jun. 30, 2005); ISCR Case No. 03-17410 at 4 (App. Bd. Apr. 12, 2005); ISCR Case No. 99-0109 at 2 (App. Bd. Mar. 1, 2000).

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the interests of national security to grant Applicant eligibility to occupy a public trust position to support a contract with DOD. Eligibility is granted.

ROBERT ROBINSON GALES
Administrative Judge