



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



In the matter of:)
)
) ADP Case No. 14-02490
)
Applicant for Public Trust Position)

Appearances

For Government: Robert J. Kilmartin, Esq., Department Counsel
For Applicant: *Pro se*

12/23/2014

Decision

LOUGHRAN, Edward W., Administrative Judge:

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

Statement of the Case

On July 18, 2014, 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 DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); DOD Regulation 5200.2-R, *Personnel Security Program* (January 1987), as amended (Regulation); and the adjudicative guidelines (AG) implemented by the DOD on September 1, 2006.

Applicant answered the SOR on August 18, 2014, and elected to have the case decided on the written record in lieu of a hearing. The Government's written case was submitted on October 2, 2014. A complete copy of the file of relevant material (FORM) was provided to Applicant, who was afforded an opportunity to file objections and submit material to refute, extenuate, or mitigate the trustworthiness concerns. Applicant received the FORM on October 23, 2014. She responded with a memorandum and

documents that I have marked Applicant's exhibits (AE) 1 and 2. The case was assigned to me on December 15, 2014. The Government exhibits included in the FORM (Items 4-6) and AE 1 and 2 are admitted without objection.

Findings of Fact

Applicant is a 43-year-old employee of a defense contractor. She is seeking eligibility to hold a public trust position. She is a high school graduate. She is married with an eight-year-old child.¹

Applicant worked for a company from 1992 to 2005. She became pregnant after she left the company, and she did not return to full-time employment until she started with her current employer in April 2013. Applicant's husband was self-employed in a business he started in 2007. Applicant worked on a part-time basis for her husband's company. On her 2013 Questionnaire for National Security Positions (SF 86), she listed her work at her husband's company as "[s]elf-employment," and her title as vice president. She indicated that she "work[ed] out of the home." Applicant was not paid by the company, but she was supported by the profits from the company, which she described as meager. It is unclear whether Applicant was part owner of the company.²

Applicant and her husband did not file federal and state income tax returns for tax years 2009 through 2012 until 2014. Applicant stated that she and her husband did not have the money to have their joint tax returns prepared, and she did not have any separate income so it was unnecessary for her to file individual returns. She did not believe they had to file the returns because their income was below the filing requirements.³ However, self-employed individuals are required to file returns even if their income is below the filing requirements of an employee.⁴

Applicant and her husband hired a certified public accountant who prepared and filed their joint state and federal income tax return for the 2012 tax year in May 2014. Their combined adjusted gross income was \$9,748. On IRS Form 1040, Schedule C, Profit or Loss from Business (Sole Proprietorship), they reported Applicant's husband as the owner of the business. The return showed their refund as \$2,881.⁵

Applicant and her husband used TurboTax to prepare and file a joint federal income tax return for 2011 in August 2014. Their adjusted gross income was \$13,669, which included their net business income and \$4,000 that Applicant's husband won in a casino. The return showed their refund as \$2,816. Applicant stated that they paid for the

¹ Item 4.

² Items 3-5.

³ Items 3-5.

⁴ See <http://www.irs.gov/Individuals/Self-Employed>.

⁵ Items 3-5.

state return, but she could not complete the form online. She indicated they would complete and file the 2011 state return as soon as possible.⁶

Applicant hired a tax professional who prepared and filed her individual state and federal income tax returns for tax years 2009 and 2010 in August 2014. The returns showed no income and no taxes owed.⁷

In her response to the FORM, Applicant stated that she had no personal income from 2009 to 2012. She argued that her husband was required to file tax returns, but she did not have to file individual returns because her personal income was zero, which was well below the filing requirements. Under most circumstances that would be true. However, Applicant may be a part owner of her husband's business.⁸ She may have been required to file returns even if she did not have personal income.

Applicant has been employed since April 2013. Her husband sold most of the equipment for his business when they moved to a different state in 2011. It is unclear whether her husband still has his own business.⁹

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.) The Deputy Under Secretary of Defense (Counterintelligence and Security) Memorandum, dated November 19, 2004, indicates trustworthiness adjudications will apply to cases forwarded to DOHA by the Defense Security Service and Office of Personnel Management. 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. (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."

⁶ Items 3-5.

⁷ Item 3.

⁸ AE 1, 2.

⁹ Items 3-4; AE 1.

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.”

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.

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 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 several conditions that could raise trustworthiness concerns under AG ¶ 19. One is potentially applicable in this case:

(g) failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same.

Applicant did not file her individual tax returns for tax years 2009 and 2010 until 2014. She and her husband did not file joint returns for tax years 2011 and 2012 until 2014. Applicant may not have been required to file individual tax returns if she did not own part of the company. However, if she was self-employed within the IRS's definition, she had to file income tax returns. The IRS has detailed elections, definitions, and

requirements for husband and wife businesses.¹⁰ I find by substantial evidence¹¹ that the evidence is sufficient to raise AG ¶ 19(g).

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; and

(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.

Applicant argued that she was not required to file income tax returns for 2009 through 2012. She may be correct, but I did not have sufficient information to make that determination. In either event, the tax returns have been filed. Refunds were due for the two years that joint returns were filed. Applicant is now an employee, and there is no question that returns will have to be filed. I am satisfied that she will comply with all her tax-filing duties in the future.

I find that Applicant's financial issues have been resolved and are under control. They occurred under circumstances that are unlikely to recur and do not cast doubt on her current reliability, trustworthiness, and good judgment. AG ¶¶ 20(a) and 20(c) are applicable.

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(a):

(1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable

¹⁰ See <http://www.irs.gov/Businesses/Small-Businesses-&Self-Employed/Husband-and-Wife-Business> and <http://www.irs.gov/Businesses/Small-Businesses-&Self-Employed/Election-for-Husband-and-Wife-Unincorporated-Businesses>.

¹¹ Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record." ISCR Case No. 10-09035 at 5 (App. Bd. Jun. 13, 2014) (citing Directive ¶¶ E3.1.14; E3.1.32.1). "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent [a Judge's] finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966). "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); ISCR Case No. 04-07187 at 5 (App. Bd. Nov. 17, 2006).

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 Guideline F in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

I considered the circumstances surrounding Applicant's tax issues, and that they have been resolved. I am also convinced that she will comply with all tax-filing requirements in the future.

Overall, the record evidence leaves me without questions or doubts about Applicant's eligibility and suitability for a public trust position. For all these reasons, I conclude Applicant has 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 national security to grant Applicant eligibility for a public trust position. Eligibility for access to sensitive information is granted.

Edward W. Loughran
Administrative Judge