



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



In the matter of:)
)
 ----) ADP Case No. 14-02604
)
 Applicant for Public Trust Position)

Appearances

For Government: Ray T. Blank, Jr., Esquire, Department Counsel
For Applicant: *Pro se*

11/15/2015

Decision

GALES, Robert Robinson, Administrative Judge:

Applicant has failed to mitigate the trustworthiness concerns regarding personal conduct. Eligibility to occupy a public trust position is denied.

Statement of the Case

On February 28, 2013, Applicant applied for a public trust position and submitted an Electronic Questionnaire for Investigations Processing (e-QIP).¹ On March 18, 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* (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 the *Adjudicative Guidelines for Determining Eligibility For Access to Classified Information* (December 29, 2005) (AG) applicable to all adjudications and other determinations made under the Directive, effective September 1, 2006. The SOR alleged trustworthiness concerns under Guideline E (Personal Conduct), and detailed reasons why the DOD CAF was

¹ Item 4 (e-QIP, dated February 28, 2013).

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

It is unclear when Applicant received the SOR as there is no receipt in the case file. In a notarized statement, inadvertently dated April 12, 2014,² Applicant responded to the SOR allegations, but she neglected to make her selection as to the process desired.³ She was subsequently requested to make a selection, and on May 19, 2015, she elected to have her case decided on the written record in lieu of a hearing.⁴ A complete copy of the Government's file of relevant material (FORM) was mailed to Applicant on August 14, 2015, and she was afforded an opportunity, within a period of 30 days after receipt of the FORM, to file objections and submit material in refutation, extenuation, or mitigation. In addition to the FORM, Applicant was furnished a copy of the Directive, as well as the Guidelines applicable to her case. Applicant received the FORM on September 9, 2015. The response was due on October 9, 2015. On an unspecified date before the due date, Applicant submitted her response to the FORM along with several documents which were accepted without objection and marked as Applicant Items (AI) A through AI E. For clarity purposes, the documents attached to Applicant's Answer to the SOR were marked as AI F through AI L. The case was assigned to me on October 27, 2015.

Findings of Fact

In her Answer to the SOR, Applicant admitted both of the factual allegations pertaining to personal conduct in the SOR (¶¶ 1.a. and 1.b.).⁵ 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 57-year-old employee of a defense contractor. She has been serving as a referral specialist with her current employer since February 2013.⁶ She was previously employed in various positions by a medical provider from February 2008 until

² It should be noted that the affidavit form upon which Applicant was to choose either a hearing or a decision based upon the administrative record, and list her contact information, and which the notary public was to sign, was a boilerplate preprinted form with "2014" furnished by the DOD CAF. The correct date should be "2015."

³ Item 2 (Applicant's Answer to the SOR, dated April 12, 2015).

⁴ Item 2 (Supplement to Applicant's Answer to the SOR, dated May 19, 2015).

⁵ It should be noted that the SOR was drafted in such a manner that there were two allegations in Paragraph 1 and one allegation in Paragraph 2 that were essentially identical in that they identified the same Guideline and facts. While Department Counsel noted that Applicant had neither admitted nor denied the allegation in Paragraph 2, he failed to address the obvious duplication in the allegations.

⁶ Item 5 (Personal Subject Interview, dated March 19, 2013), at 1.

she was laid off in December 2012.⁷ She was unemployed from mid-December 2012 until she assumed her current position.⁸ Applicant graduated from high school in June 1976, and she attended community colleges over a multi-year period, but did not receive a degree.⁹ She has never served with the U.S. military.¹⁰ She was never granted a security clearance,¹¹ and it is unclear if she ever held a public trust position. Applicant has never been married.¹²

Personal Conduct

Applicant acknowledged in her e-QIP that in 2011 she had two accounts placed for collection.¹³ During her OPM interview, she discussed additional delinquent accounts.¹⁴ She indicated that all of the delinquent accounts were either being paid or had already been satisfied.¹⁵ Applicant's most significant problem, however, as reported in her e-QIP, discussed by her during her interview, and alleged in the SOR, related to her failure to timely file several state and federal income tax returns.

Applicant failed to timely file her state and federal income tax returns for the tax years 2009, 2010, and 2011.¹⁶ Her initial reasons for not doing so for 2009 were: "I did

⁷ Item 4, *supra* note 1, at 10-12.

⁸ Item 4, *supra* note 1, at 10.

⁹ Item 4, *supra* note 1, at 8-9.

¹⁰ Item 4, *supra* note 1, at 16.

¹¹ Item 4, *supra* note 1, at 27.

¹² Item 4, *supra* note 1, at 18.

¹³ Item 4, *supra* note 1, at 30-31.

¹⁴ Item 5, *supra* note 6, at 1.

¹⁵ Item 4, *supra* note 1, at 30-31; Item 5, *supra* note 6, at 1.

¹⁶ Item 2, *supra* note 3, at 1. The legal requirement to file a federal income tax return is based upon certain conditions, including an individual's gross income and other enumerated conditions. Once it is determined that there is an obligation to so file, the following applies:

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return, keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than \$25,000 (\$100,000 in the case of a corporation), or imprisoned not more than 1 year, or both, together with the costs of prosecution. In the case of any person with respect to whom there is a failure to pay any estimated tax, this section shall not apply to such person with respect to such failure if there is no addition to tax under section 6654 or 6655 with respect to such failure. In the case of a willful violation of any provision of section 60501, the first sentence of this section shall be applied by substituting "felony" for "misdemeanor" and "5 years" for "1 year".

26 U.S.C. § 7203, *Willful failure to file return, supply information, or pay tax.*

not have all the information needed at the time. . . I requested an extension but never filed.”¹⁷ Her initial comments pertaining to 2010 were somewhat inconsistent. She said she had filed her federal return but not her state return, adding “I am in the process of getting information gathered in order to file for state for this year. Fed have been filed.”¹⁸ Applicant’s initial comment pertaining to 2011 was “I did not file. . . in 2011 because I needed help in filing.”¹⁹ One month later, during her OPM interview, Applicant stated that her only explanation was “that she just let things go and did not file her taxes, or pay her listed debts. She will file all her delinquent tax returns by April 15, 2013.”²⁰

By the time Applicant filed her Answer to the SOR, her explanations took on more substance. She added:²¹

Life circumstances seem to choke out the best of intentions. Originally the return for 2009 was not filed just because time [and] lack of the proper paperwork prevented me from filing. After a 4 month hospital stay my father passed away in Oct. 2007. My sister [and] I had cared for him for a few years prior [and] his death left us both in depression [and] things just got left by the wayside. The following years did not get better [and] unfortunately my taxes were one of the things that got left undone. Life circumstances [and] the urgency of the immediate take their toll.

Health issues in my family have also played a part. I had a growth in my neck which required a partial removal of my thyroid with an effect of fatigue. A heart attack just after obtaining my current position has left me tired [and] stressed.

Family matters include a veteran brother both sick [and] homeless [and] unwilling to get help. My sister has various health issues [and] has been out of work for over 2 years. We get by but the stress of these matters leaves me feeling weary [and] exhausted. Good intentions fall by the wayside unfortunately.

When she submitted her Response to the FORM, Applicant included additional information in her explanations for her failures to timely file her income tax returns. She added some controversy by contending that she had filed her income tax returns for 2010 before she commenced her current position in February 2013.²² She also included

¹⁷ Item 4, *supra* note 1, at 28.

¹⁸ Item 4, *supra* note 1, at 28.

¹⁹ Item 4, *supra* note 1, at 28.

²⁰ Item 5, *supra* note 6, at 1.

²¹ Item 2, *supra* note 3, at 3-4.

²² AI A (Applicant’s Response to the FORM, undated), at 2.

a timeline from 2007 through 2013 in which she described the various family physical and mental health issues related to her father, sister, brother, and herself.²³

Applicant filed her federal income tax returns for 2009 on April 12, 2015;²⁴ for 2010, on some date shortly before December 31, 2012;²⁵ and for 2011, on April 1, 2015.²⁶ None of the income tax returns were filed timely. She filed her state income tax returns for 2009 on either April 12, 2015 or June 24, 2015;²⁷ for 2010, on either April 12, 2015 or May 19, 2015;²⁸ and for 2011, on either April 1, 2015 or April 30, 2015.²⁹ There is no evidence that Applicant has received counseling related to the filing of her income tax returns.

Work Performance

Since assuming her current position, Applicant has received a number of certificates attesting to her outstanding performance throughout the period October 2013 through August 2015.³⁰

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.”³¹ 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

²³ AI A, *supra* note 22, at 1-2.

²⁴ AI F (U.S. Individual Income Tax Return (Form 1040) 2009, dated April 12, 2015); AI C (Internal Revenue Service (IRS) Account Transcript, dated September 14, 2015). The Account Transcript indicates the income tax return was received on April 17, 2015, and processed on June 29, 2015.

²⁵ AI H (Duplicate Form 1040 - 2010, undated); AI D (IRS Account Transcript, dated September 14, 2015). The Account Transcript indicates the income tax return was received on December 31, 2012, and processed on February 18, 2013.

²⁶ AI J (Duplicate Form 1040 - 2011, dated April 1, 2015); AI E (IRS Account Transcript, dated September 14, 2015). The Account Transcript indicates the income tax return was received on April 14, 2015, and processed on June 22, 2015.

²⁷ AI G (Resident Personal Income Tax Return 2009, dated April 12, 2015); AI B (Letter, dated October 2, 2015). The State Department of Revenue stated the return was filed on June 24, 2015.

²⁸ AI I (Resident Personal Income Tax Return 2010, dated April 12, 2015); AI B, *supra* note 27. The State Department of Revenue stated the return was filed on May 19, 2015.

²⁹ AI I (Resident Personal Income Tax Return 2011, dated April 12, 2015); AI B, *supra* note 27. The State Department of Revenue stated the return was filed on April 30, 2015.

³⁰ AI L (Certificates and e-mails, various dates).

³¹ *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

positions.”³² “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.”³³ 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.³⁴

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.

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.”³⁵ 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.³⁶

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

³² Regulation ¶¶ C3.1.2.1.1.7 and C3.1.2.1.2.3.

³³ Regulation ¶ C6.1.1.1.

³⁴ Regulation ¶ C8.2.1.

³⁵ “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).

³⁶ See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

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.³⁷ 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 E, Personal Conduct

The trustworthiness concern relating to the guideline for Personal Conduct is set out in AG ¶ 15:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

The guideline notes several conditions that could raise trustworthiness concerns. Under AG ¶ 16(d), it is potentially disqualifying if there is

credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of: . . . (3) a pattern of dishonesty or rule violations. . . .

Under AG ¶ 16(e), it is also potentially disqualifying if there is

personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as . . . engaging in activities which, if known, may affect the person's personal, professional, or community standing. . . .

Applicant failed to timely file her federal and state income tax returns for 2009, 2010, and 2011. AG ¶¶ 16(d) and 16(e) have been established.

³⁷ *Egan*, 484 U.S. at 531.

The guideline also includes examples of conditions that could mitigate trustworthiness concerns arising from personal conduct. AG ¶ 17(c) may apply if “the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual’s reliability, trustworthiness, or good judgment.” Also, AG ¶ 17(e) may apply if “the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.”

AG ¶¶ 17(c) and 17(e) do not apply. As noted above, Applicant’s failures to timely file her state and federal income tax returns were neither infrequent nor under unusual circumstances; they constituted a routine practice that continued to occur over a multi-year period. Applicant simply failed to determine the urgency, or generate the motivation, to comply with the law in a timely manner, explaining that she just let things go because of a variety of family physical and mental health issues that arose in 2007 and continued until 2015. Life experiences such as unemployment, illness, or death are recognized as potential short-term impediments to meeting deadlines, but they are not a blank check for such a multi-year period of inaction. Moreover, at the same time she was unable to comply with the filing mandates, Applicant was performing her employment duties in an exceptional manner, resulting in accolades from her employer. Applicant’s actions, or chronic inaction, reflect a somewhat cavalier attitude towards her legal responsibilities for timely filing income tax returns, as well as her questionable judgment, unreliability, and unwillingness to comply with established rules and regulations.

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 the various aspects of this case in light of the totality of the record evidence and have not merely performed a piecemeal analysis.³⁸

³⁸ 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).

There is some evidence in favor of mitigating Applicant's conduct. She has been with her current employer since February 2013, and has received accolades over the ensuing years for outstanding performance. There is no evidence of misuse of information technology systems, mishandling protected information, or substance abuse. She is a caring individual who remains concerned for the welfare of her siblings. In 2015, after lengthy delays, Applicant finally filed her state and federal income tax returns for the tax years 2009 through 2011.

The disqualifying evidence under the whole-person concept is more substantial than the mitigating evidence. There is no evidence from third-parties as to her current reputation for reliability, trustworthiness, and good judgment. Applicant routinely failed to timely file her federal and state income tax returns over a multi-year period. Although Applicant was aware of her failures, and the government's interest in them, she failed to make timely efforts to address her taxes after being interviewed by OPM. She promised to have her income tax returns filed by April 15, 2013, but except for the federal income tax return for the tax year 2010, they were not. The SOR was issued on March 18, 2015. She responded to the SOR on April 12, 2015. Yet, despite the repeated warnings of the significance of her issue, Applicant generally failed to generate the motivation to comply with the law related to the remaining state and federal income tax returns until April 2015.

Applicant has demonstrated a very poor track record of timely filing federal and state income tax returns. While they may be understandable over the short-term, her explanations for those failures over the long-term are simply not credible. Overall, the record evidence leaves me with substantial questions and doubts as to Applicant's eligibility and suitability for a public trust position. For all these reasons, I conclude Applicant has failed to mitigate the trustworthiness concerns arising from her personal conduct. 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 E:	AGAINST APPLICANT
Subparagraph 1.a.:	Against Applicant
Subparagraph 1.b.:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a.:	Against Applicant ³⁹

³⁹ As noted above, the one allegation in Paragraph 2 is essentially identical to the two allegations in Paragraph 1.

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the interests of national security to grant Applicant eligibility to occupy a public trust position to support a contract with the Department of Defense. Eligibility is denied.

ROBERT ROBINSON GALES
Administrative Judge