DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ADP Case No. 14-03350
	)	
	)	
Applicant for Public Trust Position	)	

Appearances

For Government: Jeff A. Nagel, Esquire, Department Counsel
For Applicant: Susanna Farber, Esq.

09/04/2015

Decision

HENRY, Mary E., Administrative Judge:

Based upon a review of the pleadings, exhibits, and testimony, I conclude that Applicant's eligibility to occupy a public trust position is granted.

Statement of the Case

Applicant completed and signed a Electronic Questionnaires for Investigations Processing (e-QIP) on April 6, 2013. The Department of Defense (DOD) Consolidated Adjudications Facility, (CAF) issued a Statement of Reasons (SOR) detailing the trustworthiness concerns under Guideline F, financial considerations, on November 21, 2014. The action was taken under 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 (Directive); and the *Adjudicative Guidelines For Determining Eligibility for Access to Classified Information* (AG) implemented on September 1, 2006.

Applicant acknowledged receipt of the SOR. She answered the SOR in writing on December 17, 2015, and she requested a hearing before an administrative judge with the Defense Office of Hearings and Appeals (DOHA). Department Counsel was prepared to proceed on February 9, 2015, and I received the case assignment on March 2, 2015. DOHA issued a notice of hearing on April 20, 2015, and I convened the hearing as scheduled on May 14, 2015. The Government offered six exhibits (GE) 1 through 6, which were received, marked, and admitted into evidence without objection. Applicant testified. Applicant submitted 11 exhibits (AE) A through K, which were received, marked, and admitted into evidence without objection. DOHA received the transcript of the hearing (Tr.) on May 21, 2015. I held the record open until June 30, 2015, for the submission of additional matters. Through counsel, Applicant timely requested additional time to submit the requested post-hearing documentation. Applicant was given until July 24, 2015 to submit additional documentation. On July 24, 2015, Applicant timely submitted nine additional documents, which were received, marked as AE L - AE T,[1] and admitted without objection. The record closed on July 24, 2015.

Procedural Ruling

Motion

At the hearing, Department Counsel moved to amend the SOR to add allegation 1.h. Through counsel, Applicant objected to the amendment on the grounds of lack of notice. Applicant's objection was overruled. The SOR was amended as follows: "1.h. You are indebted to the Internal Revenue Service in the amount of $25,986 on a federal tax lien filed in November 2013." Applicant was advised that the record would be held open to allow the submission of evidence addressing the issue raised in the amendment.[2]

Findings of Fact

In her Answer to the SOR, Applicant admitted all the factual allegations in the SOR, with explanations. She also provided additional information to support her request for eligibility for a public trust position.

Applicant, who is 58 years old, works as a data entry operator and imaging technician for a DOD contractor. Applicant began working for her employer in October 1982 and has been in the federal services division since 1987. Applicant's most recent performance evaluation reflected a favorable performance and an employee with whom it is a pleasure to work. She has taken numerous training courses through her

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[1]In the email attached to the submissions, Applicant's counsel used the numbers 1 through 9 to reference the documents. On the first submission, counsel marked the pages as 1.A-1 to 1.A-8, 1.B-1 to 1.B-5, and 1.C-1 to 1.C-6. Submission 1 had been remarked as AE L-1 to AE L-19. The remaining submissions (2 - 9) have been marked as AE M - AE T.

[2]Tr. 13-15.

employer, including eight security courses. The Director of Human Resources, who has known Applicant for 15 years, praised Applicant. Applicant has proven herself to be a markably responsible and confident employee with a high level of skill and commitment to meeting the job standards and following company policy. The Director spoke about an incident which occurred 15 years ago and reflected Applicant's honest and integrity. A co-worker told Applicant that she [co-worker] stole someone's identity to pay her utility bills. Applicant immediately reported the incident to a company vice president and the Director, allowing the company to investigate the matter. The co-worker was discharged for dishonesty. From October 2007 until December 2009, Applicant also worked another job as a sales associate in the retail industry.[3]

Applicant is single. She has a 24-year-old daughter, who lives with her and will graduate from college this year. From June 2000 until December 2007, Applicant had financial responsibility for the care of her mother, who suffered from Parkinson disease, and her mother's partner, who suffered from Alzheimer's disease. Both resided in medical care centers, where Applicant regularly visited them.[4]

Applicant suffers from chronic asthma. In 2007, her asthma became more problematic and caused her to miss time from work. Since 2007, Applicant has provided medical documentation about her health to her employer, who has placed her under the Family and Medical Leave Act (FMLA) for leave purposes. Over the years, Applicant has missed varying amounts of time from work because of her asthma. Since she missed significant amount of time, she was often placed on unpaid, FMLA leave. In 2014, she had 206 hours of unpaid leave, and in 2015 she has already incurred 89 hours of unpaid leave.[5]

In 2005, Applicant earned $2,460 a month in gross income, and she received $1,788 in net income. Her necessary monthly expenses average approximately $2,000 a month.[6] Applicant currently earns $21 an hour for a gross weekly income of $841 and a gross monthly income of $3,364. Applicant receives $2,897 a month in net income when she does not miss time from work because of her asthma. Her submitted earnings statements for April and May 2015 reflect that she received less than full pay at least one pay cycle each month. She received $2,587 in net pay in April 2015 and $2,692 in net pay in May 2015. Her missed time from work causes Applicant to lose $200 to $300 a month in net income.[7]

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[3]GE 1; AE C; AE D; AE P; Tr. 25-26.

[4]GE 1; AE J; AE K; Tr. 29-31, 59-60.

[5]Response to SOR; AE I; AE R; Tr. 27, 39, 62-63.

[6]AE M.

[7]Response to SOR; AE I; AE O; AE R.

Applicant's monthly expenses include $975 for rent, $58 for water, $98 for electric, $88 for car insurance, $395 car payment, $500 for food, $80 for furniture, $23 for prescriptions, $150 to the IRS, $45 for state taxes, and $60 for credit cards. Her total monthly expenses are $2,472. She did not include the cost of gasoline which I estimate at $100, making her total monthly expenses $2,572.[8]

When her debts became unmanageable, Applicant filed a Chapter 13 bankruptcy petition, which is known as the wage earner's plan, January 13, 2004. She was advised that she did not qualify for this form of bankruptcy, and the court dismissed her case on February 28, 2005. In September 2005, Applicant filed a Chapter 7 bankruptcy petition. She claimed $24,466 in liabilities and listed $1,760 in assets. Her largest liability related to a car purchased in 2005. She also listed seven smaller debts, some of which she had been paying. The court discharged her debts on December 14, 2005.[9]

By 2014, Applicant was again unable to pay all her debts. She filed a Chapter 7 petition for bankruptcy on January 24, 2014. She listed $76,852 in assets. Her primary asset was her 401k account, which she valued at $64,000, followed by $10,000 for her 2013 car. Her 401k is a claimed exemption in her bankruptcy. She claimed liabilities of $53,578, including $20,000 on her car, $27,244 in federal taxes, and $1,058 in state taxes. Her bankruptcy indicates that her federal and state taxes are unsecured priority claims, and that $11,382 of the $27,244 owed federal taxes is entitled to priority.[10] Applicant listed her gross income as $3,100 a month and $2,654 as her net income. She listed her monthly expenses as $3,159. Applicant completed the credit counseling program required by the bankruptcy court on January 12, 2014.The court discharged her debts on June 17, 2014.[11]

Besides her three bankruptcy filings and the tax lien, the SOR lists four debts totaling $2,727. Applicant admitted the debts, and she advised that these debts were loans from a fast cash company. The $917 debt in SOR allegation 1.d was included in her 2014 bankruptcy as shown by the account numbers.[12]

The record contains four credit reports from the Government and three credit reports from Applicant plus a listing of creditors in Applicant's 2014 bankruptcy petition. The information in these credit reports about the three remaining SOR debts is less than clear. SOR allegation 1.a ($182) is a fast cash loan showing a date of last activity of March 2007, and an original creditor not listed on any credit reports. This debt is not

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[8]AE Q; AE S.

[9]GE 2; AE M; Tr. 36-38..

[10]I requested information from the parties about the meaning of priority and nonpriority claims. AE N; Tr. 79.

[11]GE 2; AE E; AE N.

[12]GE 3, p. 6; AE N, p. 19.

listed in her bankruptcy and may have dropped off the credit reports due to age. Applicant acknowledged that she needed to pay this debt.[13]

SOR allegation 1.b ($913) concerns a collection account for a bank credit card. The original creditor is not listed on the May 2013 credit report, the oldest credit report of record even though the credit report shows the date of last payment as March 2013. The $715 debt in SOR allegation 1.c is also a collection account for a bank credit card. As with allegation 1.b, the original creditor bank is not listed in the May 2013 credit report. The credit report shows a default date of March 2013. Neither of these debts are listed on the remaining six credit reports. These debts are not included in her bankruptcy petition for unknown reasons. She lacks funds to pay the debts.[14]

The largest debt relates to the $25,986 tax lien filed by the Internal Revenue Service (IRS) for past-due federal income taxes in November 2013. She filed her taxes each year, but some years she filed her returns late. Since 2010, Applicant has incurred a tax debt because insufficient money had been withheld from her pay for payment of federal taxes. Applicant provided a copy of her tax return transcript from the IRS for the tax years 2010 through 2013. These transcripts reveal the following information. For the tax year 2010, Applicant filed her return, which was due in April 2011, in August 2012. She had an income of $40,835 and a taxable income of $25,135. She owed $2,771 in taxes. The transcript reflected that she did not have any tax money withheld from her pay. For the tax year 2011, Applicant filed her return in August 2012. She had an income of $39,348 and a taxable income of $23,448. She had $143 withheld from her pay to pay her tax debt of $2,906. She owes $2,763 in taxes for this year. Applicant filed her income tax return for the tax year 2012 on time. She had an income of $37,101 and a taxable income of $27,351. She owed $3,671 and a tax penalty of $66. No money was withheld from her income to pay her federal taxes.[15] For the tax year 2013, Applicant filed her tax return in November 2014. She had $39,001 in income and $29,001 in taxable income. Her total tax debt was $3,901. She owed $3,572 after the $329 withheld from her pay was applied. Applicant advised that she timely filed her tax return for the tax year 2014. Applicant believes she owes about $3,000 in taxes for the tax year 2014. Based on this information, Applicant owes approximately $15,877 in taxes plus penalties and interest.[16]

Applicant advised that she has met with the IRS to complete her tax returns and to resolve her debt. She first contacted the IRS in April 2011 to discuss payment of her taxes due. She offered to pay $100 a month beginning in May 2011 and increasing to $467 a month in October 2012. The documentation does not reflect whether these

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[13]GE 3 - GE 6; AE F - AE H; Response to SOR; Tr. 27.

[14]GE 3 - GE 6; AE F - AE H; AE N; Response to SOR; Tr. 28, 32-33.

[15]Her current pay statement shows that money is being withheld for state taxes, but no money is being withheld for federal taxes. AE O.

[16]AE T; Tr. 47-48.

payments were made. The records from the IRS reflect that Applicant periodically contacted them about payment of her taxes and periodically offered a payment plan. The records show that in 2013, Applicant made seven payments of $150 each for a total payment of $1,050 on her tax debt. Applicant again met with the IRS in early 2015, after receiving the SOR, to discuss payment of her past-due taxes. She and the IRS agreed that she would pay $150 a month beginning in April 2015. Her payment plan covered the tax years 2010 through 2013. She asked the IRS to include the taxes owed for the tax year 2014 in her plan. Applicant made her first payment on April 20, 2015 and her second payment on May 20, 2015. Although not an issue in this case, I note that Applicant's documentation reflects that she pays $45 a month to the state for taxes owed.[17]

Applicant stated that her health is improving, both physically and mentally. She testified that her many health problems impacted her mind also. She did not provide any evidence of mental health treatment.[18]

Policies

Positions designated as ADP I and ADP II are classified as "sensitive positions." 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 national interests. 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 determina tion may be made.

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 over-arching 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. 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.

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[17]AE A; AE L; Tr. 33-34, 47-50.

[18]Tr. 62-63.

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 protect or 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.

Analysis

Guideline F, Financial Considerations

The trustworthiness concern relating to the guideline 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 [sensitive] 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(a), an "inability or unwillingness to satisfy debts" is potentially disqualifying. Similarly under AG ¶ 19(c), "a history of not meeting financial obligations" may raise security concerns. Applicant has a long history of an inability to pay all her debts. She has filed bankruptcy three times to eliminate her debt. She has unpaid federal taxes since 2010. The evidence is sufficient to raise these potentially disqualifying conditions, requiring a closer examination.

The Financial Considerations guideline also includes examples of conditions that can mitigate trustorthiness concerns. I have considered mitigating factors AG ¶ 20(a) through ¶ 20(f), and the following are potentially applicable:

> (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; and

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

Applicant's financial problems are due, in part, to limited income and living in an area where the cost of living continues to escalate much faster than her income increases. Her asthma condition exacerbated around 2007, causing loss of time from work and lost income. These are factors beyond her control. In 2005, Applicant filed for bankruptcy in an effort to gain control over her finances. Her choice is a legally acceptable method to resolve debt and to start over. In 2005, she acted reasonably in choosing bankruptcy as a way to resolve her debts. A second bankruptcy filing raises questions about her ability to manage her expenses and make appropriate choices in light of her fluctuating expenses and her tax debts. AG ¶ 20(b) is partially applicable.

Applicant received credit counseling as required for filing bankruptcy. She manages her current bills to the detriment of her income taxes. She has developed a second payment plan for her federal taxes. There is some question about her ability to remain compliant with the plan as she made seven payments on her first plan then stopped because of her health and lost time from work. AG 20(c) some applicability.

When the IRS filed a lien in November 2013, Applicant had filed all her tax returns, but she had not paid her past-due taxes in full. In the past, she worked with the IRS to develop a payment plan, which shows a good-faith effort on her part to reduce her tax debt when it first became a problem. After seven payments, she stopped paying. She did not develop a new plan until after receiving the SOR, which reflects a reluctance by her to resolve her increasing tax debt. While Applicant now has a payment plan with the IRS and the state to pay her past-due taxes, her late efforts to develop a payment plan for her taxes is not evidence of good-faith. AG ¶ 20(d) is partially 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 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) 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. The decision to grant or deny a trustworthiness determination requires a careful weighing of all relevant factors, both favorable and unfavorable. In so doing, an administrative judge must review all the evidence of record, not a single item in isolation, to determine if a trustworthiness concern is established and then whether it is mitigated. A determination of an applicant's eligibility for a public trust position should not be made as punishment for specific past conduct, but on a reasonable and careful evaluation of all the evidence of record to decide if a nexus exists between established facts and a legitimate trustworthiness concern.[19]

The evidence in support of granting a trustworthiness determination to Applicant under the whole-person concept is more substantial than the evidence in support of denial. In reaching a conclusion, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant has a long history of financial problems. She lives in a high cost metropolitan area, and her income makes it difficult for her to pay all her expenses. She needs a car to travel to and from work; yet, her car debts have caused her to file bankruptcy twice. She has chosen not to have money regularly withheld from her pay for her federal income taxes, creating a large tax liability for herself, which will continue to increase unless she

[19]In assessing whether an Applicant has established mitigation under Guideline F, the Appeal Board provided the following guidance in ISCR Case No. 07-06482 at 3 (App. Bd. May 21, 2008):

> In evaluating Guideline F cases, the Board has previously noted that the concept of "'meaningful track record' necessarily includes evidence of actual debt reduction through payment of debts." *See, e.g.*, ISCR Case No. 05-01920 at 5 (App. Bd. Mar. 1, 2007). However, an applicant is not required, as a matter of law, to establish that he has paid off each and every debt listed in the SOR. *See, e.g.*, ISCR Case No. 02-25499 at 2 (App. Bd. Jun. 5, 2006). All that is required is that an applicant demonstrate that he has ". . . established a plan to resolve his financial problems and taken significant actions to implement that plan." *See, e.g.*, ISCR Case No. 04-09684 at 2 (App. Bd. Jul. 6, 2006). The Judge can reasonably consider the entirety of an applicant's financial situation and his actions in evaluating the extent to which that applicant's plan for the reduction of his outstanding indebtedness is credible and realistic. *See* Directive ¶ E2.2(a) ("Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination.") There is no requirement that a plan provide for payments on all outstanding debts simultaneously. Rather, a reasonable plan (and concomitant conduct) may provide for the payment of such debts one at a time. *See, e.g.*, ISCR Case No. 06-25584 at 4 (App. Bd. Apr. 4, 2008). Likewise, there is no requirement that the first debts actually paid in furtherance of a reasonable debt plan be the ones listed in the SOR.

changes this decision. Her choice reflects poor money decisions. Although Applicant took a credit counseling course in January 2014, she needs some serious guidance from a financial counselor on how to approach her financial decisions. The $1,810 in unpaid debt is insufficient to raise a trustworthiness concern.

Applicant has worked for more than 32 years for the same employer, which is commendable. She performs her duties without difficulty and is an employee with whom it is a pleasure to work. Fifteen years ago, Applicant reported a co-worker for stealing information about a customer and using this information to create utility accounts in the customer's name for the co-worker's personal utility bills because Applicant knew that the conduct was wrong. Since then, Applicant has experienced financial problems. She made poor decisions on how to spend her limited income and to use fast cash loans, but she never considered stealing money or using another illegal means to obtain needed cash. Her actions in reporting her co-worker reflect her honesty, integrity and trustworthiness. Resorting to illegal methods to obtain money cuts against the person she is. She has always followed company policy and procedures in matters of customer privacy and company proprietary information. She raised a daughter on her own. She also assumed responsibility for her mother as she aged and her mother's partner, who suffered from Alzheimer's disease. In many aspects of her life, Applicant is highly responsible.

Applicant acts responsibly in most areas of her life. She has never been disciplined at work for violation of company policies or mishandling sensitive information. In managing her finances, Applicant has not shown the same level of responsibility. Her long-term, chronic illness and limited income are factors that influenced her financial decision-making. Neither impacted her work performance and her appropriate decision-making at work. In weighing Applicant's highly responsible actions for many years against her poor decisions about managing her finances and her taxes, I find that there is little likelihood Applicant will compromise sensitive information as she has demonstrated an ability to be trustworthy.

Overall, the record evidence leaves me without questions or doubts as to Applicant's eligibility and suitability for a trustworthiness determination. For all these reasons, I conclude Applicant mitigated the trustworthiness concerns arising from her finances under Guideline F.

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.h:	For Applicant

Conclusion

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

MARY E. HENRY
Administrative Judge