



**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. 15-02445

Appearances

For Government: Aubrey De Angelis, Esq., Department Counsel

For Applicant: *Pro se*

10/12/2017

Decision

WESLEY, Roger C., Administrative Judge:

Based upon a review of the pleadings and exhibits, I conclude that Applicant did not mitigate the trustworthiness concerns regarding her financial considerations. Eligibility for a public trust position is denied.

Statement of Case

On March 25, 2016, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) detailing reasons why DOD adjudicators could not make the affirmative determination of eligibility to hold a public trust position, and recommended referral to an administrative judge to determine whether eligibility to hold a public trust position should be granted, continued, denied, or revoked. The action was taken under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), as amended; DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the Adjudicative Guidelines (AGs) implemented by DOD on September 1, 2006.

Effective June 8, 2017, by Directive 4 of the Security Executive Agent Directive (SEAD 4), dated December 10, 2016, *National Security Adjudicative Guidelines* for all covered individuals who require initial or continued eligibility for access to classified information or eligibility to hold a sensitive position were established to supercede all previously issued national security adjudicative criteria or guidelines. Procedures for administrative due process for contractor personnel continue to be governed by DOD Directive 5220.6, subject to the updated substantive changes in the AGs, effective June 8, 2017. Application of the AGs that were in effect as of the issuance of the SOR would not change the decision in this case.

Applicant responded to the SOR on April 27, 2016, and elected to have her case decided on the basis of the written record. Applicant received the File of Relevant Material (FORM) on July 29, 2016. She did not supplement the record with objections to any of the exhibit items in the FORM. Nor did she provide supplemental information pertaining to her responses.

Summary of Pleadings

Under AG Financial Considerations, Applicant allegedly (a) failed to timely file her federal and state income tax returns for tax years 2009-2011; (b) is indebted to the Federal Government for delinquent taxes of \$6,673 for tax year 2009; (c) is indebted to her state for delinquent income taxes of \$4,495 for tax year 2010; and (d) is indebted to two consumer creditors for delinquent debts totaling \$942. Allegedly, these debts remain outstanding.

In her response to the SOR, Applicant admitted the allegations covered by SOR ¶ 1.a, but denied the remaining allegations. She claimed she is working with tax professionals to resolve her outstanding federal tax issues and has paid all of her state tax debts in 2015. Further, she claimed she has been in contact with her listed consumer creditors.

Findings of Fact

Applicant is a 35-year-old senior voice/data network analyst for a defense contractor who seeks eligibility for a public trust position. The allegations covered in the SOR and admitted by Applicant are incorporated and adopted as relevant and material findings. Additional findings follow.

Background

Applicant married in December 1980 and divorced in October 1993. (Item 4) She has one adult child from this marriage. She earned an associate's degree in June 1980. She has never served in the military.

Since September 2012, Applicant has worked for her current employer. (Item 4) Between March 1999 and September 2012, she worked for a number of non-DOD contractor employers in various assignments. (Item 4)

Applicant's finances

Applicant failed to timely file her federal and state income tax returns for tax years 2009-2011, as required by law. Because she did not provide reasons or explanations for not filing her federal and state returns in a timely manner, it is unclear why she failed to file them timely as required. As an attachment to her answer, she included a letter from the tax preparer she retained in April 2016. (Item 3) The retainer letter makes no mention of engaging her preparer to file her 2009-2011 federal and state tax returns, and no presumptions are warranted that her retained tax preparer filed returns for these tax years on her behalf. (Item 3) Whether Applicant's retained tax preparer ever filed her late 2009-2011 federal and state tax returns is unclear and remains an open question.

In her interview with an investigator of the Office of Personnel Management (OPM) in January 2013, she told the investigator that she planned to contact a tax advisor to help her with the filing of her federal and estate tax returns for tax years 2000-2011 and to contact federal and state tax authorities to establish payment plans for back taxes owed for those years. (Item 6) To date, Applicant has provided no documentary evidence of filing her federal and state returns for the tax years in issue, or paying or otherwise resolving her listed delinquent federal tax debt (allegedly \$6,673) for tax year 2009, and her listed delinquent state taxes (allegedly \$4,495) for tax year 2010. (Items 3-6) Based on the documentary evidence compiled in the exhibit file, Applicant's federal and state tax returns for tax years 2009-2011 remain unfiled, and her owed federal taxes remain unpaid and unresolved.

Further, Applicant has not furnished any documentary evidence of her paying or resolving her two delinquent consumer debts totaling \$753. (Items 3-6) By all evidentiary accounts, these listed consumer debts remain unpaid and unresolved.

Policies

The SEAD 4, App. A, lists guidelines to be used by administrative judges in the decision-making process covering trustworthiness cases. These guidelines take into account factors that could create a potential conflict of interest for the individual applicant, as well as considerations that could affect the individual's reliability, trustworthiness, and ability to protect privacy information. These guidelines include conditions that could raise a concern about trustworthiness access and may be disqualifying (disqualifying conditions), if any, and many of the conditions that could mitigate trustworthiness concerns.

These guidelines must be considered before deciding whether or not eligibility to hold a public trust decision should be granted, continued, or denied. The guidelines do not require administrative judges to place exclusive reliance on the enumerated disqualifying and mitigating conditions in the guidelines in arriving at a decision. Each of the guidelines is to be evaluated in the context of the whole person in accordance with App. A, ¶ 2(c).

In addition to the relevant AGs, administrative judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in App. A, ¶ 2(d) of the AGs, which are intended to assist the judges in reaching a fair and impartial commonsense decision based upon a careful consideration of the pertinent guidelines within the context of the whole person.

The adjudicative process is designed to examine a sufficient period of an applicant's life to enable predictive judgments to be made about whether the applicant is an acceptable trustworthiness risk. The following App A, ¶ 2(d) factors are pertinent: (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.

Viewing the issues raised and evidence as a whole, the following individual guidelines are pertinent in this case:

Financial Considerations

The Concern: 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 or sensitive information. Financial distress can also be caused or exacerbated by, and thus can be a possible indicator of, other issues of personnel security concern such as excessive gambling, mental health conditions, substance misuse, or alcohol abuse of dependence. An individual who is financially overextended is at greater risk of having to engage in illegal acts or otherwise questionable acts to generate funds. . . . AG ¶ 18.

Burden of Proof

By virtue of the principles and policies framed by the AGs, a decision to grant or continue an applicant's eligibility to hold a sensitive position may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires administrative judges to make a commonsense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a sensitive position depends, in large part, on the relevance and materiality of that evidence. See *United States, v. Gaudin*, 515 U.S. 506, 509-511 (1995).

As with all adversarial proceedings, the judge may draw only those inferences which have a reasonable and logical basis from the evidence of record. Conversely, the judge cannot draw factual inferences that are grounded on speculation or conjecture.

The Government's initial burden is twofold: (1) it must prove by substantial evidence any controverted facts alleged in the SOR, and (2) it must demonstrate that the facts proven have a material bearing to the applicant's eligibility to obtain or maintain eligibility to hold a public trust position. The required materiality showing, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused privacy information before it can deny or revoke a security clearance. Rather, the judge must consider and weigh the cognizable risks that an applicant may deliberately or inadvertently fail to safeguard privacy information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the evidentiary burden shifts to the applicant for the purpose of establishing his or her trustworthiness through evidence of refutation, extenuation, or mitigation. Based on the requirement of Exec. Or. 10865 that all security clearances and related eligibility to hold sensitive positions be clearly consistent with the national interest, the applicant has the ultimate burden of demonstrating his or her clearance eligibility. "[Trustworthiness] determinations should err, if they must, on the side of denials." See *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

Analysis

Trustworthiness concerns are raised over Applicant's failing to timely file federal and state tax returns for tax years 2009-2011. Additional trustworthiness concerns are raised over her (a) accrual of delinquent federal taxes for tax year 2009; (b) accrual of delinquent state taxes for tax year 2010; and (c) accumulation of two delinquent consumer accounts.

Jurisdictional issues

Holding a public trust position involves the exercise of important fiducial responsibilities, among which is the expectancy of consistent trust and candor in protecting and guarding personally identifiable information (PII). DOD Manual 5200.02, which incorporated and canceled DOD Regulation 5200.2-R, covers both critical-sensitive and non-critical sensitive national security positions for civilian personnel. See 5200.02, ¶ 4.1a(3)(c)3. Positions designated as Category I and Category II automated data processing positions (ADP) were previously classified as critical-sensitive and non-critical sensitive positions under DOD Regulation 5200.2-R, *Personnel Security Program*, (Jan. 1987, as amended) (the Regulation), ¶¶ C3.1.2. 1.1.7. Other positions that did not meet ADP criteria were classified as non-sensitive positions under the Regulation.

A memorandum from the Deputy Under Secretary of Defense for Counterintelligence and Security, titled "Adjudication of Trustworthiness Cases,"

covering the handling of trustworthiness cases under the Directive was issued on November 19, 2004. This memorandum directed DOHA to continue to utilize DOD Directive 5220.6 in ADP contractor cases for trustworthiness determinations for persons holding sensitive positions (to include those involving ADP I and II positions). However, these Directive Type Memorandums (DTMs) are issued only for time-sensitive policy actions that cannot wait for a Directive of Instruction to be coordinated and published. While DTMs move through the issuance process faster than other types of issuances, they are effective for only 180 days from the date signed, while the other issuances are valid for five years. See DOD Issuances Updated July 2017), www.esd.whs.mil. There are no indications that the November 2004 memorandum covering adjudication of trustworthiness cases was ever extended or renewed.

Definitions for critical-sensitive and non-critical sensitive positions provided in 5200.02, ¶ 4.1a (3)(c) contain descriptions similar to those used to define ADP I and II positions under DOD Regulation 5200.2-R. (32 C.F.R. § 154.13 and Part 154, App. J) ADP positions are broken down as follows in 32 C.F.R. § 154.13 and Part 154, App. J): ADP I (critical-sensitive positions covering the direction, design, and planning of computer systems) and ADP II (non-critical-sensitive positions covering the design, operation, and maintenance of computer systems). Considered together, the ADP I and II positions covered in DOD Regulation 5200.2-R refine and explain the same critical-sensitive and non-critical-sensitive positions covered in DOD Manual 5200.02, ¶ 4.1a (3)(c) and are reconcilable as included positions in 5200.02.

So, while ADP trustworthiness positions are not expressly identified in DOD Manual 5200.02, they are implicitly covered as non-critical sensitive positions that require “access to automated systems that contain active duty, guard, or personally identifiable information or information pertaining to Service members that is otherwise protected from disclosure by DOD 5400.11-R. . . .” DOD 5200.02, Sec. 4.1, ¶ 3(c). See DOD Directive 5220.6 ¶¶ D5(d) and D8. By virtue of the implied retention of ADP definitions in DOD Manual 5200.02, ADP cases continue to be covered by the process afforded by DOD 5220.6.

Financial concerns

Applicant’s failure to timely file her federal and state income taxes for tax years 2009-2011; her accumulation of delinquent federal taxes for tax year 2009 and delinquent state taxes for tax year 2010; and her accumulated delinquent consumer debts collectively warrant the application of four of the disqualifying conditions (DC) of the Guidelines: DC ¶¶ 19(a), “inability to satisfy debts;” 19 (b), “unwillingness to satisfy debts regardless of the ability to do so,” 19(c), “a history of not meeting financial obligations,” and 19(f), “failure to file or fraudulently filing annual Federal, state, or local income tax returns or failure to pay annual Federal, state, or local income tax as required.”

Applicant’s pleading admission with respect to her failure to timely file her federal tax returns for tax years 2009-2011 negate the need for any independent proof (see

McCormick on Evidence, § 262 (6th ed. 2006)). Each of Applicant's delinquent federal tax return filings are fully documented in her OPM summary of interview and create some judgment issues. See ISCR Case 03-01059 at 3 (App. Bd. Sep. 24, 2004).

Financial stability in a person cleared to protect privacy information is required precisely to inspire trust and confidence in the holder of a non-critical sensitive position. While the principal concern of a non-critical sensitive position holder's demonstrated financial difficulties is vulnerability to coercion and influence, judgment and trust concerns are implicit in cases involving debt delinquencies.

Historically, the timing of filing of federal and state tax returns in DOHA proceedings is critical to an assessment of an applicant's trustworthiness, reliability, and good judgment in following rules and guidelines necessary for those seeking access to classified information or to holding a sensitive position. See ISCR Case No. 14-06808 at 3 (App. Bd. Nov. 23, 2016); ISCR Case No. 14-01894 at 5 (App. Bd. Aug. 18, 2015)

With respect to Applicant, it is still unclear whether Applicant and her tax preparer ever filed federal and state income tax returns for tax years 2009-2011. A wilful failure to timely file a federal income tax return, supply information, or pay the taxes due is a misdemeanor-level federal criminal offense without regard to the existence of any tax liability and reflects a serious lack of judgment. 26 U.S.C. § 7203. See *Spies v. United States*, 317 U.S. 492 (1943); *United States v. Walker*, 479 F.2d 407 (9th Cir. 1973); *United States v. McCabe*, 416 F.2d 957 (7th Cir. 1969). Addressing tax filing lapses, the Appeal Board has characterized such filing failures to represent applicant problems with complying with government rules and systems essential to protecting classified and sensitive information. See ISCR Case No. 14-04437 at 3 (App. Bd. Apr. 15, 2016); ISCR Case No. 14-05476 at 5 (App. Bd. Mar. 25, 2016) (citing ISCR Case No. 01-05340 at 3 (App. Bd. Dec. 20, 2002); ISCR Case No. 14-01894 at 4-5 (App. Bd. Aug. 18, 2015).

Applicant provided no documentary evidence of her filing either her federal or state tax returns despite afforded opportunities to do so, both before and after the issuance of the FORM. Without substantiating evidence of her filing her federal and state tax returns for the 2009-2011 years in issue, and paying or otherwise resolving her owed federal tax and consumer debts covered in the SOR, conclusions must be drawn that she has not completed her tax filing and payment obligations of the listed debts in the SOR.

In evaluating Guideline F cases, the Appeal Board has stressed the importance of a "meaningful track record" that includes evidence of actual debt reduction through voluntary payment of debts. ISCR Case No. 07-06482 at 2-3 (App. Bd. May 21, 2008) (internal citations omitted) In Applicant's case, her lack of demonstrated responsible efforts in addressing her tax returns for the 2009-2011 years covered in the SOR and her failure to pay or otherwise resolve her delinquent tax and consumer debts with the income resources available to her (after promising to do so in her 2013 OPM interview) preclude her from meeting public trust position eligibility criteria at this time. See ISCR

Case No. 05-11366 at 4 n.9 (App. Bd. Jan. 12, 2007) (citing ISCR Case No. 99-0462 at 4 (App. Bd. Nov. 29, 2005)).

Based on a review of compiled exhibit file, whole-person assessment is unfavorable to Applicant. She has shown no progress to date in filing her federal and state tax returns or in addressing her delinquent federal tax and consumer debts covered in the SOR. Her actions reflect a lack of financial responsibility and judgment and raise unmitigated questions about her trustworthiness, reliability, and ability to protect privacy information. See AG ¶ 18. More documented information about her (a) inability to file her federal and state tax returns for the covered years and pay her delinquent debts, (b) financial history, and (c) financial progress is necessary to mitigate financial concerns under the financial guideline and consideration of the whole-person to mitigate trustworthiness concerns.

Taking into account all of the documented facts and circumstances surrounding Applicant's federal and state tax filing lapses and debt accruals that she has failed to pay or resolve to date, Applicant fails to demonstrate enough probative efforts to mitigate financial concerns. Conclusions are warranted that her finances are insufficiently stabilized at this time to grant her eligibility to hold a public trust position.

Unfavorable conclusions are entered with respect to the allegations covered by subparagraphs 1.a through 1.f of the SOR. Eligibility to hold a public trust position under the facts and circumstances of this case is not consistent with the national interest.

Formal Findings

In reviewing the allegations of the SOR and ensuing conclusions reached in the context of the findings of fact, conclusions, conditions, and the factors listed above, I make the following formal findings:

GUIDELINE F (FINANCIAL CONSIDERATIONS): AGAINST APPLICANT

Subparagraphs 1.a-1.f:

Against Applicant

Conclusions

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue Applicant's eligibility to hold a public trust position. Eligibility to hold a public trust position is denied.

Roger C. Wesley
Administrative Judge

