



**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. 15-05603

Appearances

For Government: Benjamin R. Dorsey, Esq., Department Counsel
For Applicant: *Pro se*

02/06/2017

Decision

Harvey, Mark, Administrative Judge:

Applicant did not make sufficient progress addressing her state and federal tax debts from tax year 2010. Financial considerations trustworthiness concerns are not mitigated. Eligibility for a public trust position is denied.

Statement of the Case

On August 20, 2014, Applicant signed an Electronic Questionnaire for National Security Positions (SF 86) or security clearance application (SCA). (Government Exhibit (GE) 1) On February 12, 2016, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a statement of reasons (SOR) to Applicant, pursuant to DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended, and modified; DOD Regulation 5200.2-R, *Personnel Security Program*, dated January 1987, as amended (Regulation); and the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), which became effective on September 1, 2006.

The SOR alleges trustworthiness concerns under Guideline F (financial considerations). (HE 2) The SOR detailed reasons why the DOD CAF was unable to find that it is clearly consistent with the interests of national security to grant or continue

Applicant's eligibility to occupy a public trust position, which entails access to sensitive information. (HE 2)

On March 8, 2016, Applicant responded to the SOR allegations, and she requested a hearing. (HE 3) On July 18, 2016, Department Counsel indicated he was ready to proceed. On August 8, 2016, the case was assigned to me. On September 6, 2016, the Defense Office of Hearings and Appeals issued a hearing notice setting the hearing for October 5, 2016. (HE 1) The hearing was held as scheduled. At the hearing, the Government provided 7 exhibits; Applicant offered 13 exhibits; and all exhibits, were admitted into evidence without objection. (Tr. 14-20; GE 1-7; Applicant Exhibits (AE) A-M)

On October 12, 2016, I received a transcript of the hearing (Tr.). On November 9, 2016, Applicant submitted eight documents, which were admitted into evidence without objection. (AE N-AE U) On November 9, 2016, the record closed.

Findings of Fact¹

In her Answer to the SOR, Applicant admitted the allegations in SOR ¶¶ 1.a, 1.b, and 1.c. She denied the allegations in SOR ¶¶ 1.d and 1.e. She also provided extenuating and mitigating information. (HE 3) Her admissions are accepted as findings of fact.

Applicant is a 59-year-old administrative coordinator providing services to patients, and she has been employed by the same DOD contractor since February 2011. (Tr. 6-7, 24-; GE 1; HE 3; AE U) In 1975, she graduated from high school, and she has not attended college. (Tr. 6) In 1975, she married, and her children are ages 36 and 42. (GE 1; AE N) She has not served in the military. (GE 1) She has six grandchildren. (Tr. 7-8, 21; AE N) Her children and grandchildren do not live in her home. (Tr. 8)

Financial Considerations

In 2005, Applicant's spouse fell 15 feet and broke his back and three ribs. (Tr. 21; SOR response; AE N) Her husband was unable to work. (Tr. 22, 27; AE N) In January 2012, Applicant's basement was flooded, and a lot of paperwork relating to her business was damaged. (Tr. 52-53)

In 2005, Applicant stated a construction company. (Tr. 22, 27) She was the president of the company. (Tr. 54) Her construction company employed her son and her nephew. (Tr. 22) For the first three years, her construction company made money, and in 2008, business declined, and the company started losing business and income. (Tr. 22, 30) Her company at one point had 13 employees. (Tr. 29) Several customers failed

¹Some details have been excluded in order to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

to pay Applicant's company, and her construction company became insolvent. (Tr. 22) In 2010, Applicant closed her company. (Tr. 35, 39-40) Applicant also worked as a realtor. (Tr. 28; AE N)

In August 2011, Applicant filed for bankruptcy under Chapter 7 of the Bankruptcy Code, and in November 2011, her nonpriority unsecured debts were discharged. (SOR ¶ 1.a response) Her bankruptcy listed \$982,000 in unsecured nonpriority debts and \$85,000 in federal income taxes as a priority debt. (Tr. 38-39; GE 7) Applicant was able to retain her home and vehicle. (Tr. 22)

In September 2012, a state filed a tax lien seeking \$29,725 from Applicant for taxes owed for the 2010 tax year. (Tr. 41; SOR ¶ 1.b response; GE 6) She said some payments to the state were made and her tax refunds were intercepted. (Tr. 41) She said she would provide copies of her tax returns to show the payments to the state from other tax years. (Tr. 41) She said she made an initial payment of \$1,500, and she paid at least \$200 monthly. (Tr. 42; AE N) She said the balance was reduced to \$25,000. (Tr. 43) The documentation she provides shows a \$225 payment on December 7, 2014, and 12 \$200 payments from June 2015 to June 2016. (AE G; AE H) The balance owed as of February 2016, was \$32,136. (AE H; AE I; AE J; AE K)

SOR ¶ 1.c alleges Applicant has a student loan for \$25,646 that is \$2,659 past due. From 1997 to 2014, Applicant received repeated forbearances and deferments on her student loans. (AE T) In July 2016, she began a loan rehabilitation program for a student loan, and she is supposed to pay \$122 monthly. (AE L) From August 2014 to November 2016, Applicant made 17 payments on a student loan account totaling \$4,961. (AE T) She is now making monthly payments of \$200 to address her student loan account. (Tr. 31, 43-45; AE T) She believes the balance owed on her student loan is now \$23,000. (Tr. 46) Applicant is credited with mitigating her student loan debt.

Applicant has two medical debts for \$1,320 and \$80 alleged as delinquent on her 2015 credit report. (SOR ¶¶ 1.d and 1.e) On September 29, 2016, she paid the debts in SOR ¶¶ 1.d and 1.e. (Tr. 47-49; AE A; AE B) She made three \$440 payments for medical debts from September 30, 2016, to October 29, 2016. (AE Q) Applicant is credited with mitigating the two medical debts.

In 2009 and 2010, Applicant decided not to pay the employee portion of her company's Social Security and Medicare taxes, and she said she used the funds to pay her employees' salaries. (Tr. 35)² She and her husband owed about \$85,000 to the Internal Revenue Service (IRS) for federal business taxes. (Tr. 31, 35; GE 7) In 2012, Applicant made an offer in compromise to the IRS to pay \$2,795 as an initial payment and \$11,180 within five months of acceptance of the offer. (Tr. 31, 36; AE M) In February 2013, the IRS wrote Applicant indicating her offer in compromise was

²Applicant said she failed to pay taxes owed under an IRS Form 941. This document is used to show and provide the employer's quarterly portion of employees' Social Security and Medicare taxes. See IRS website, <https://www.irs.gov/pub/irs-pdf/f941.pdf>. Her Schedule E, Creditors Holding Unsecured Priority Claims, for her bankruptcy indicates a "Disputed" \$85,000 "Business Income Tax." (GE 7)

accepted. (AE M) Applicant said she paid \$13,975 from her retirement account to resolve the IRS debt. (Tr. 32, 54) She said she would provide proof of payment to the IRS after her hearing. (Tr. 32-34) She did not provide proof of payment. Her husband still owes his share of this tax debt. (Tr. 54) She has timely filed all of her federal tax returns. (Tr. 50) She believes her federal income tax debts are current. (Tr. 33)

After her hearing, she provided three IRS tax transcripts. (AE R-AE T) For federal income tax year 2012, Applicant and her spouse had \$100,240 of adjusted gross income, \$8,141 of income tax, federal tax withheld of \$11,227, and refund of \$3,086. (AE R) For federal income tax year 2013, Applicant and her spouse had \$138,407 of income, \$13,601 of income tax, federal tax withheld of \$12,921, and amount owed of \$680. (AE S) For federal income tax year 2014, Applicant and her spouse had \$156,573 of adjusted gross income, \$18,188 of income tax, federal tax withheld of \$16,738, and amount owed of \$1,450. (AE T)

Applicant and her spouse have about \$29,000 in their retirement accounts. (Tr. 26) They purchased a new truck in 2013, and their payments on it are current. (Tr. 27) She received financial counseling as part of her bankruptcy. (Tr. 50-51)

Applicant provided a budget. (AE P) Applicant and her husband have \$6,900 of net monthly income, monthly expenses and debt payments of \$6,516, and a net monthly remainder of \$384. (AE P) Her budget includes \$2,600 monthly mortgage payments, \$200 monthly student loan payments, and \$200 monthly state tax payments. (AE P) No payments were included in their budget to address their federal tax debt for tax year 2009 and 2010.

Character Evidence

Five of Applicant's supervisors provided character statements on Applicant's behalf. They have worked closely with her for periods ranging from 18 months to several years. They described her as compassionate, dedicated, diligent, trustworthy, professional, responsible, loyal, and empathetic to patients. She is respectful of patient privacy and conscientious about compliance with rules. (AE C; AE D; AE E; AE F; AE U)

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 [public trust position]." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). The Government's authority to restrict access to classified information applies similarly in the protection of sensitive, unclassified information. As Commander in Chief, the President has the authority to control access to information bearing on national security or other sensitive information and to determine whether an individual is sufficiently trustworthy to have access to such information. See *Id.* at 527.

Positions designated as ADP I and ADP II are classified as “sensitive positions.” Regulation ¶¶ C3.1.2.1.1.7, C3.1.2.2, 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.” Regulation ¶ C6.1.1.1. 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, an 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 an evaluation of the whole person. An administrative judge’s overarching adjudicative goal is a fair, impartial and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

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.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant which may disqualify the applicant from being eligible for access to sensitive information. See *Egan*, 484 U.S. at 531. “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). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s suitability for a public trust position. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his or her access to sensitive information[.]” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

The protection of national security and sensitive records is paramount. 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.”

Analysis

Financial Considerations

AG ¶ 18 articulates the trustworthiness concern for financial problems:

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 Appeal Board, in ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012) (citation omitted), explained the scope and rationale for the financial considerations trustworthiness concern as follows:

This concern is broader than the possibility that an applicant might knowingly compromise classified information in order to raise money in satisfaction of his or her debts. Rather, it requires a Judge to examine the totality of an applicant's financial history and circumstances. The Judge must consider pertinent evidence regarding the applicant's self-control, judgment, and other qualities essential to protecting the national secrets as well as the vulnerabilities inherent in the circumstances. The Directive presumes a nexus between proven conduct under any of the Guidelines and an applicant's security eligibility.

AG ¶ 19 provides two disqualifying conditions that raise a trustworthiness concern and may be disqualifying in this case: "(a) inability or unwillingness to satisfy debts;" and "(c) a history of not meeting financial obligations." Applicant's SOR response, credit reports, bankruptcy filings, and hearing record establish the disqualifying conditions in AG ¶¶ 19(a) and 19(c) requiring additional inquiry about the possible applicability of mitigating conditions.

Five mitigating conditions under AG ¶ 20 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;

(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;

(d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts;³ and

(e) the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue.

The Appeal Board concisely explained Applicant's responsibility for proving the applicability of mitigating conditions as follows:

Once a concern arises regarding an Applicant's eligibility [for a public trust position], there is a strong presumption against the grant or maintenance of a [public trust position]. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising [trustworthiness] concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in [public trust position] decisions is that articulated in *Egan, supra*. "Any doubt concerning personnel being considered for access to [sensitive] information will be resolved in favor of the national security." Directive, Enclosure 2 ¶ 2(b).

ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013).

No mitigating conditions fully apply; however, Applicant presented some important mitigating information. Four circumstances beyond Applicant's control adversely affected her finances: (1) her husband was injured and unable to work; (2) during the recession, her business declined and became insolvent; (3) her child did not pay her student loans; and (4) she was unemployed before finding her current employment. After 2010, Applicant timely filed all required state and federal tax returns.

³The Appeal Board has previously explained what constitutes a "good faith" effort to repay overdue creditors or otherwise resolve debts:

In order to qualify for application of [the "good faith" mitigating condition], an applicant must present evidence showing either a good-faith effort to repay overdue creditors or some other good-faith action aimed at resolving the applicant's debts. The Directive does not define the term "good-faith." However, the Board has indicated that the concept of good-faith "requires a showing that a person acts in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation." Accordingly, an applicant must do more than merely show that he or she relied on a legally available option (such as bankruptcy) in order to claim the benefit of [the "good faith" mitigating condition].

(internal citation and footnote omitted) ISCR Case No. 02-30304 at 3 (App. Bd. Apr. 20, 2004) (quoting ISCR Case No. 99-9020 at 5-6 (App. Bd. June 4, 2001)).

She made some payments to address her delinquent debts. She received financial counseling as part of the bankruptcy process.

The negative financial considerations concerns are more substantial. The SOR alleges, and the record establishes that Applicant has owed federal and state income taxes since tax year 2009. Applicant said she paid \$13,975 from her retirement account to resolve her share of the IRS debt for tax years 2009 and 2010, and she said she would provide proof of her payment to the IRS. She did not provide proof of payment, and her federal tax debt is unresolved. She failed to prove that she was unable to make greater progress paying her state tax debt for tax years 2009 and 2010.

The Appeal Board clarified that even in instances where an “[a]pplicant has purportedly corrected [the applicant’s] federal tax problem, and the fact that [applicant] is now motivated to prevent such problems in the future, does not preclude careful consideration of [a]pplicant’s [trust]worthiness in light of [applicant’s] longstanding prior behavior evidencing irresponsibility.” See ISCR Case No. 15-01031 at 3 and note 3 (App. Bd. June 15, 2016) (characterizing “no harm, no foul” approach to an applicant’s course of conduct and employed an “all’s well that ends well” analysis as inadequate to support approval of access to classified information with focus on timing of filing of tax returns after receipt of the SOR).

In sum, Applicant has owed federal and state income taxes since tax years 2009 and 2010. Her explanations do not fully mitigate financial considerations trustworthiness concerns.

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.

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

Applicant is a 59-year-old administrative coordinator employed by the same DOD contractor since February 2011. In 1975, she married, and her children are ages 36 and 42. Five of Applicant's supervisors described her as compassionate, dedicated, diligent, trustworthy, professional, responsible, loyal, and empathetic to patients. She is respectful of patient privacy and conscientious about compliance with rules. Her character statement support approval of her access to sensitive information.

Four circumstances beyond Applicant's control adversely affected her finances. She received financial counseling, and most of her delinquent debt was resolved in 2011 through her bankruptcy. She is credited with paying her medical debts and making payments to address her student loan debt.

When a tax issue is involved, an administrative judge is required to consider how long an applicant waits to file their tax returns, whether the IRS generates the tax returns, and how long the applicant waits after a tax debt arises to begin and complete making payments.⁴ In this instance, there is no evidence that Applicant failed to timely file her tax returns. The primary problem here is that Applicant has owed delinquent taxes since tax years 2009 and 2010, and she failed to establish her federal tax problems are being resolved. She said she settled her federal tax debt from 2009 and 2010 in 2013; however, she did not provide proof that she paid the settlement to the IRS. She did not establish that she was unable to make greater payments to resolve her state tax debt from tax years 2009 and 2010.

⁴The recent emphasis of the Appeal Board on security and trustworthiness concerns arising from tax cases is instructive. See ISCR Case No. 14-05794 at 7 (App. Bd. July 7, 2016) (reversing grant of security clearance and stating, "His delay in taking action to resolve his tax deficiency for years and then taking action only after his security clearance was in jeopardy undercuts a determination that Applicant has rehabilitated himself and does not reflect the voluntary compliance of rules and regulations expected of someone entrusted with the nation's secrets."); ISCR Case No. 14-01894 at 2-6 (App. Bd. Aug. 18, 2015) (reversing grant of a security clearance, discussing lack of detailed corroboration of circumstances beyond applicant's control adversely affecting finances, noting two tax liens totaling \$175,000 and garnishment of Applicant's wages, and emphasizing the applicant's failure to timely file and pay taxes); ISCR Case No. 12-05053 at 4 (App. Bd. Oct. 30, 2014) (reversing grant of a security clearance, noting not all tax returns filed, and insufficient discussion of Applicant's efforts to resolve tax liens). More recently, in ISCR Case No. 14-05476 (App. Bd. Mar. 25, 2016) the Appeal Board reversed a grant of a security clearance for a retired E-9 and cited applicant's failure to timely file state tax returns for tax years 2010 through 2013 and federal returns for tax years 2010 through 2012. Before his hearing, he filed his tax returns and paid his tax debts except for \$13,000, which was in an established payment plan. The Appeal Board highlighted his annual income of over \$200,000 and discounted his non-tax expenses, contributions to DOD, and spouse's medical problems. The Appeal Board emphasized "the allegations regarding his failure to file tax returns in the first place stating, it is well settled that failure to file tax returns suggest that an applicant has a problem with complying with well-established government rules and systems. Voluntary compliance with such rules and systems is essential for protecting classified information." *Id.* at 5 (citing ISCR Case No. 01-05340 at 3 (App. Bd. Dec. 20, 2002) (internal quotation marks and brackets omitted). See also ISCR Case No. 14-03358 at 3, 5 (App. Bd. Oct. 9, 2015) (reversing grant of a security clearance, noting \$150,000 owed to the federal government, and stating "A security clearance represents an obligation to the Federal Government for the protection of national secrets. Accordingly failure to honor other obligations to the Government has a direct bearing on an applicant's reliability, trustworthiness, and ability to protect classified information.").

It is well settled that once a concern arises regarding an applicant's eligibility for a public trust position, there is a strong presumption against the grant or renewal of access to sensitive information. See *Dorfmont*, 913 F. 2d at 1401. Unmitigated financial considerations concerns lead me to conclude that grant of access to sensitive information to Applicant is not warranted at this time. This decision should not be construed as a determination that Applicant cannot or will not attain the state of reform necessary for award of a public trust position in the future. With a track record of behavior consistent with her obligations, she may well be able to demonstrate persuasive evidence of her worthiness for a public trust position.

I have carefully applied the law, as set forth in *Egan*, Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. Financial considerations trustworthiness concerns are not mitigated.

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:	AGAINST APPLICANT
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Subparagraphs 1.a and 1.b:	Against Applicant
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Subparagraphs 1.c through 1.e:	For Applicant
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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 for a public trust position. Eligibility for access to sensitive information is denied.

Mark Harvey
Administrative Judge