



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



In the matter of:

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ADP Case No. 15-07461

Applicant for Public Trust Position

Appearances

For Government: Andrea M. Corrales, Esq., Department Counsel

For Applicant: *Pro se*

08/17/2017

Decision

HARVEY, Mark, Administrative Judge:

Four state or federal tax liens totaling \$37,530 were filed against Applicant from 2008 to 2011, and she has not filed her state and federal income tax returns for tax years 2006 and 2007. She did not provide sufficient evidence of resolution of her financial issues. Financial considerations trustworthiness concerns are not mitigated. Eligibility for access to sensitive information is denied.

Statement of the Case

On April 21, 2015, Applicant signed an Electronic Questionnaire for National Security Positions (e-QIP) (SF-86). (Item 3) On June 9, 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 detailed reasons why the DOD CAF did not find under the Directive that it is clearly consistent with the interests of national security to grant or continue access to sensitive information for her, and recommended referral to an administrative judge to determine whether access to sensitive information should be granted, continued, denied,

or revoked. (Item 1) Specifically, the SOR set forth trustworthiness concerns arising under the financial considerations guideline. (Item 1)

In July 2016, Applicant provided a response to the SOR, and she did not request a hearing. (Item 2) On August 10, 2016, Department Counsel completed the File of Relevant Material (FORM). On September 16, 2016, Applicant received the FORM, and she did not respond to the FORM. On August 14, 2017, the case was assigned to me. The case file consists of four exhibits. (Items 1-4) Applicant did not object to any of the Government exhibits, and they were admitted into evidence.

The SOR in this case was issued under DoD 5200.2-R and the September 1, 2006 AGs. DoD Manual 5200.02, *Procedures for the DOD Personnel Security Program (PSP)* became effective on April 3, 2017, and it incorporates and replaces DoD 5200.2-R. While this case was pending a decision, the Director of National Intelligence issued Security Executive Agent Directive 4, establishing in Appendix A the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position (AG)*, which he made applicable to all covered individuals who require initial or continued eligibility for access to classified information or eligibility to hold a sensitive position. The new AGs supersede the September 1, 2006 AGs and are effective “for all covered individuals” on or after June 8, 2017. Accordingly, I have evaluated Applicant’s eligibility for access to sensitive information under DoD Manual 5200.02 and the new AGs.¹

Findings of Fact²

Applicant’s SOR response admitted the allegations in SOR ¶¶ 1.a through 1.e, and 1.o. (Item 2) She also admitted responsibility for the debts in SOR ¶¶ 1.i and 1.k; however, she disputed the amounts. (Item 2) Applicant’s admissions are accepted as findings of fact. Additional findings of fact follow.

Applicant is 41 years old.³ She was unemployed from February 2013 to present because she wanted to pursue floral design. From 2008 to February 2013, she was employed at a store in customer service. She has never served in the military. In 2012, she married, and she does not have any children. She disclosed her tax issues on her SF-86. There is no evidence of abuse of alcohol or use of illegal drugs.

¹ Application of DOD 5200.2-R and the September 1, 2006 AGs, which were in effect when the SOR was issued, would not change my decision in this case.

² Some details were excluded to protect Applicant’s right to privacy. Specific information is available in the cited exhibits.

³ The source of the information in this paragraph is Applicant’s April 21, 2015 Questionnaire for National Security Positions (SF-86). (Item 3)

Financial Considerations

Applicant admitted the four SOR allegations totaling \$37,530 relating to her delinquent taxes and three other SOR debts, and she explained as follows: ¶¶ 1.a and 1.c are state tax liens entered in 2011 and in 2009, for \$1,043 and \$3,693; ¶¶ 1.b and 1.d are federal tax liens entered in 2010 and 2008, for \$16,945 and \$15,849; ¶ 1.e is a debt for \$133; ¶ 1.i is an insurance debt for \$529; ¶ 1.k is a telecommunications debt for \$326; and ¶ 1.o states she failed to file her state and federal tax returns for tax years 2006 and 2007. (Item 2) She said she was working with a law firm to get her tax returns filed, and then she planned to make an offer to the Internal Revenue Service (IRS) and state tax authority to resolve the debts in SOR ¶¶ 1.a through 1.d. (Item 2) She planned to pay off the debt in SOR ¶ 1.e on September 3, 2016, and she disputed the amount of the debts in SOR ¶¶ 1.i and 1.k. (Item 2)

Applicant denied responsibility for the following SOR debts: ¶¶ 1.f, 1.h, and 1.j are medical debts for \$1,852, \$545, and \$368; ¶ 1.g is a debt for \$548; ¶ 1.l is a debt for \$219; ¶ 1.m is a telecommunications debt for \$144; and ¶ 1.n is a store debt for \$1,429. (Item 2) She said the debts in SOR ¶¶ 1.f, 1.g, 1.h, 1.j, and 1.l were removed from her credit report. (Item 2) She did not provide copies of the credit reports without the five delinquent debts. She disputed the debt in SOR ¶ 1.m because she did not recognize the account. (Item 2) She is working on a settlement for the debt in SOR ¶ 1.n, and she said she would pay the debt. (Item 2) She did not provide a copy of her correspondence to or from the creditors or credit reporting companies disputing any of the six debts.

In the FORM, Department Counsel informed Applicant that it was crucial for her to provide corroborating or supporting documentation of resolution of the debts on the SOR. (FORM at 2) Aside from Applicant's uncorroborated statements, there is no documentary evidence that Applicant paid, arranged to pay, settled, compromised, or otherwise resolved the SOR debts. She did not receive financial counseling. The record lacks corroborating or substantiating documentation and detailed explanations of the causes for her financial problems and other mitigating information. The FORM informed Applicant that she had 30 days from the receipt of the FORM "in which to submit a documentary response setting forth objections, rebuttal, extenuation, mitigation, or explanation, as appropriate. If you do not file any objections or submit any additional information . . . your case will be assigned to an Administrative Judge for a determination based solely" on the evidence set forth in this FORM. (FORM at 2)

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 formerly designated as ADP I and ADP II are classified as noncritical-sensitive positions and include those personnel “[w]ith access to automated systems that contain military active duty, guard, or reservists’ personally identifiable information or information pertaining to Service members that is otherwise protected from disclosure by DoD 5400.11-R where such access has the potential to cause serious damage to the national security.” DOD Manual 5200.02 ¶ 4.1a(3)(c).

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 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 or dependence. An individual who is financially overextended is at greater risk of having to engage in illegal or otherwise questionable acts to generate funds. . . .

AG ¶ 19 includes four disqualifying conditions that could raise a trustworthiness concern and may be disqualifying in this case: "(a) inability to satisfy debts;" "(b) unwillingness to satisfy debts regardless of the ability to do so;" "(c) a history of not meeting financial obligations;" and "(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." The evidence of record establishes AG ¶¶ 19(a), 19(b), 19(c), and 19(g). Further inquiry about the applicability of mitigating conditions is required.

Seven financial considerations 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, a death, divorce or separation, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances;

(c) the individual has received or is receiving financial counseling for the problem from a legitimate and credible source, such as a non-profit credit counseling service, and there are clear indications that the problem is being resolved or is under control;

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

(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;

(f) the affluence resulted from a legal source of income; and

(g) the individual has made arrangements with the appropriate tax authority to file or pay the amount owed and is in compliance with those arrangements.

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 positive financial information. Circumstances beyond her control adversely affected her finances. Applicant was unemployed from February 2013 to present. She has been in communication with the IRS and a tax attorney about her delinquent tax debt. She promised to work on resolving her delinquent debts.

The negative financial considerations concerns are more substantial. The SOR alleges, and the record establishes, that Applicant has four state or federal tax liens totaling \$37,530, which were filed against her from 2008 to 2011. She has not filed her state and federal income tax returns for tax years 2006 and 2007.

A willful failure to timely make (means complete and file with the IRS) a federal income tax return is a misdemeanor-level federal criminal offense.⁴ For purposes of this

⁴ Title 26 U.S.C, § 7203, willful failure to file return, supply information, or pay tax, reads:

Any person . . . 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 . . . 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

decision, I am not weighing Applicant's failure to timely file her federal income tax returns against her as a federal crime. She did not receive notice of a Guideline J or E trustworthiness concern in the SOR about her failure to file her tax returns.

The record establishes that Applicant failed to timely file several federal and state income tax returns. The DOHA Appeal Board has commented:

Failure to file tax returns suggests that an applicant has a problem with complying with well-established governmental rules and systems. Voluntary compliance with such rules and systems is essential for protecting classified [and sensitive] information. ISCR Case No. 01-05340 at 3 (App. Bd. Dec. 20, 2002). As we have noted in the past, a clearance adjudication is not directed at collecting debts. See, e.g., ISCR Case No. 07-08049 at 5 (App. Bd. Jul. 22, 2008). By the same token, neither is it directed toward *inducing an applicant to file tax returns*. Rather, it is a proceeding aimed at evaluating an applicant's judgment and reliability. *Id.* A person who fails repeatedly to fulfill his or her legal obligations does not demonstrate the high degree of good judgment and reliability required of those granted access to classified [and sensitive] information. See, e.g., ISCR Case No. 14-01894 at 5 (App. Bd. Aug. 18, 2015). See *Cafeteria & Restaurant Workers Union Local 473 v. McElroy*, 284 F.2d 173, 183 (D.C. Cir. 1960), *aff'd*, 367 U.S. 886 (1961).

ISCR Case No. 14-04437 at 3 (App. Bd. Apr. 15, 2016) (emphasis in original). See ISCR Case No. 14-05476 at 5 (App. Bd. Mar. 25, 2016) (citing ISCR Case No. 01-5340 at 3 (App. Bd. Dec. 20, 2002)); ISCR Case No. 14-01894 at 4-5 (App. Bd. Aug. 18, 2015). 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 [applicant's trustworthiness] in light of [applicant's] longstanding prior behavior evidencing irresponsibility" including a failure to timely file federal income tax returns. 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 ISCR Case No. 15-01031 at 2 (App. Bd. June 15, 2016), the Appeal Board reversed the grant of a security clearance and noted the following primary relevant disqualifying facts:

Applicant filed his 2011 Federal income tax return in December 2013 and received a \$2,074 tax refund. He filed his 2012 Federal tax return in September 2014 and his 2013 Federal tax return in October 2015. He received Federal tax refunds of \$3,664 for 2012 and \$1,013 for 2013.

A willful failure to make return, keep records, or supply information when required, is a misdemeanor without regard to existence of any tax liability. *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); *O'Brien v. United States*, 51 F.2d 193 (7th Cir. 1931).

Notwithstanding the lack of any tax debt owed when the tax returns were filed in ISCR Case No. 15-01031 (App. Bd. June 15, 2016), the Appeal Board provided the following principal rationale for reversing the grant of a security clearance, “By failing to file his 2011, 2012, and 2013 Federal income tax returns in a timely manner, Applicant did not demonstrate the high degree of good judgment and reliability required of persons granted access to classified information.” ISCR Case No. 15-01031 at 4 (App. Bd. June 15, 2016) (citations omitted).

Applicant did not provide enough details about what she did to address the debts alleged in the SOR. She did not provide sufficient documentation relating to the SOR debts such as: (1) proof of payments, such as checking account statements, photocopies of checks, or a letter from the creditor proving that she paid or made any payments to the creditors; (2) correspondence to or from the creditors to establish maintenance of contact;⁵ (3) copies of credible debt disputes sent to the creditor and/or credit reporting company indicating she did not believe she was responsible for the debts and why she held such a belief; (4) more evidence of attempts to negotiate payment plans, such as settlement offers or agreements to show that she was attempting to resolve these debts; or (5) other evidence of progress or resolution.

There is insufficient evidence about why Applicant was unable to make greater progress resolving her SOR debts. There is insufficient assurance that her financial problems are being resolved, are under control, and will not recur in the future. Under all the circumstances, she failed to establish that financial considerations trustworthiness concerns are mitigated.

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.

⁵ “Even if Applicant’s financial difficulties initially arose, in whole or in part, due to circumstances outside his [or her] control, the Judge could still consider whether Applicant has since acted in a reasonable manner when dealing with those financial difficulties.” ISCR Case No. 05-11366 at 4 n.9 (App. Bd. Jan. 12, 2007) (citing ISCR Case No. 99-0462 at 4 (App. Bd. May 25, 2000); ISCR Case No. 99-0012 at 4 (App. Bd. Dec. 1, 1999); ISCR Case No. 03-13096 at 4 (App. Bd. Nov. 29, 2005)). A component is whether he or she maintained contact with creditors and attempted to negotiate partial payments to keep debts current.

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 that guideline, but some warrant additional comment.

Applicant is 41 years old. From 2008 to February 2013, she was employed at a store in customer service. A circumstance beyond Applicant's control adversely affected her finances. She was unemployed from February 2013 to present. She said she took some actions to pay or resolve her delinquent debts; however, she did not provide corroborating documentation of her efforts to resolve her SOR debts. She disclosed her tax issues on her SF-86. There is no evidence of abuse of alcohol or use of illegal drugs.

Four state or federal tax liens totaling \$37,530 were filed against Applicant from 2008 to 2011, and she has not filed her state and federal income tax returns for tax years 2006 and 2007.⁸ She did not provide any evidence of progress addressing her federal and state SOR debts. Several other SOR debts totaling about \$5,000 are unresolved.

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 granting access to sensitive information. See *Dorfmont*, 913 F. 2d at 1401. Unmitigated financial considerations concerns lead me to conclude that granting 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

⁶ The 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.").

