



**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. 15-07939

Appearances

For Government: Julie R. Mendez, Esq., Department Counsel

For Applicant: Alan V. Edmunds, Esq.

06/23/2017

Decision

RIVERA, Juan J., Administrative Judge:

Applicant has a track record of financial responsibility and her financial problem is being resolved. She mitigated the Guideline F (financial considerations) concerns. Applicant deliberately omitted material financial information from her trustworthiness position application and failed to mitigate the Guideline E (personal conduct) trustworthiness concerns. Eligibility to hold a position of public trust is denied.

Statement of the Case

Applicant submitted an electronic questionnaire (Application) requesting eligibility for a position of trust on October 10, 2014. After reviewing it and the information gathered during a background investigation, on May 6, 2016, the Department of Defense (DoD) issued Applicant a Statement of Reasons (SOR) listing trustworthiness concerns under Guidelines F and E.

Applicant answered the SOR on June 9, 2016, and requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA). The case was assigned to me on December 7, 2016. The DOHA issued a notice of hearing

on December 12, 2016, scheduling a hearing for January 18, 2017. At the hearing, the Government offered four exhibits (GE 1 through 4). Applicant testified, presented the testimony of one witness, and submitted exhibits (AE) A through L). AE L was received post-hearing. All exhibits were admitted without objection. DOHA received the hearing transcript (Tr.) on January 25, 2017.

Procedural Issue

The Government amended the SOR on January 17, 2017 (the day before the hearing), adding four financial allegations (SOR ¶¶ 1.m through 1.p). (Hearing Exhibit (HE) 1) Applicant objected to the amendment. I offered to reschedule the hearing at Applicant's convenience. She declined because it would create a financial hardship. The original SOR allegations made Applicant aware that her federal and state income tax problems were a concern. Notwithstanding, to mitigate any possible adverse effect caused by the amendment, I granted Applicant an extension until February 28, 2017, to submit additional matters for my consideration.

Findings of Fact

In her Answer, Applicant admitted the factual allegations in SOR ¶¶ 1.a through 1.h, 1.j, and 1.k. She denied SOR ¶¶ 1.i and 1.l, and both Guideline E allegations (SOR ¶¶ 2.a and 2.b). She did not admit or deny the amended SOR allegations and I considered them denied. Her admissions to the SOR and at hearing are incorporated herein as findings of fact. After a thorough review of the record evidence, I make the following additional findings of fact:

Applicant is a 50-year-old administrative assistant employed with a federal contractor since 2002. She graduated from high school in 1985, and completed about 30 college credits. Her employer recently merged with another federal contractor. After the merger, Applicant was required eligibility for a position of public trust to continue the work she has performed since she was hired in 2002. This is her first application for a position of public trust.

Applicant married in 1999 and separated in 2009. She has a son, age 25, from this marriage. Her husband abandoned Applicant and her son in 2009. He has paid no child support or alimony since he left the marriage. Applicant filed her own income tax returns before she married. After she married, her husband was in charge of the family finances and the filing of the income tax returns. Applicant testified that after her husband abandoned her, she had to learn to manage her finances and file income tax returns. She earns approximately \$35,000 a year. Her son was dependent on her until recently. While living with Applicant, her son contributed to the household expenses.

In Applicant's 2014 trustworthiness application, she indicated she has worked for her current employer since 2002, and reported no periods of unemployment or underemployment since then. In Section 26 (Financial Record) of her 2014 Application, Applicant stated that she had no delinquent accounts, no financial problems within the

prior seven years, that she had timely filed her income tax returns, and that she owed no taxes.

Applicant's background investigation disclosed the SOR debts which are established by Applicant's admissions and the documentary evidence (GE 2 through 4). The status of the SOR accounts is as follows:

Applicant filed her federal income tax returns for tax years 2009 through 2012 in October 2014. (SOR ¶ 1.a) In December 2014, Applicant entered into a repayment plan with the IRS. She is currently making \$100 monthly payments to satisfy her debt. Her IRS installment agreement statement shows consecutive payments from July 2015 through May 2016. (AE C, D) Applicant testified she had made payments up to December 2016, but submitted no documentary evidence to corroborate those payments. After the hearing, she submitted documentary evidence showing payments made in January and February 2017. (AE L)

Applicant's state filed tax liens against her in March 2006 (\$7,057); February 2011 (\$495.77); March 2008 (\$341.96); January 2008 (\$6,773); and November 2007 (\$7,638). (SOR ¶¶ 1.b, 1.m, 1.n, 1.o, and 1.p, respectively.) These liens are established by GE 4. Applicant has a payment agreement with her state for tax year 2012 (not alleged in the SOR). She presented documentary evidence of one payment made in February 17, 2017. She presented no other evidence of payments made or payment agreements established for any other delinquent tax years or liens filed by the state.

Applicant submitted a statement of intent promising to "never fail to file her federal and state income tax returns again" with an automatic revocation of her clearance for any failure to file. (AE A)

Applicant admitted SOR ¶ 1.b, and promised to make payment arrangements. SOR ¶¶ 1.f through 1.k allege delinquent traffic tickets in collection issued to Applicant's son, who testified the tickets were issued to him, and promised to pay them. He explained that because Applicant cosigned for his car, her name was in the title and, even though he committed the traffic violations, the tickets reflected back to her. Applicant's son averred he had to pay some of the tickets before he could register his new car (not cosigned by Applicant). He also averred that SOR ¶¶ 1.f and 1.i alleged the same ticket. (Tr. 30 – 43; AE E)

Concerning the accounts alleged in SOR ¶¶ 1.c, 1.d, and 1.g, Applicant testified she intends to place them in a debt consolidation program to be established in the near future. Applicant is disputing the debt alleged in SOR ¶ 1.i because it is for equipment that she already returned. As of the hearing date, she had not retained the services of a debt consolidation company. She presented no documentary evidence of any disputes filed with any creditors or with the credit bureaus.

Applicant claimed she recently established a payment agreement to pay \$106 monthly, starting in February 2017 (after the hearing), for the account alleged in SOR ¶ 1.e. Applicant presented no documentary evidence to support her claim.

Applicant testified that most of her debts were acquired during the marriage. When her husband abandoned Applicant, he took all the money. She became the only provider, and her income was not sufficient to pay her living expenses and accumulated debts. She became responsible for the household finances and filing her income tax returns. Applicant averred she was not financially sophisticated and had to learn about finances and to file her income tax returns. She received financial counseling in January 2017, and testified she learned to make monthly payment on her debts and to make and follow a budget. She averred she cut off two credit cards and has modified her behavior to save money. (AE F)

Applicant submitted favorable reference statements from her supervisors. They consider Applicant to be a hard worker, competent, dependable, reliable, honest, and trustworthy. She was recognized as employee of the quarter for her exceptional performance, and is considered to be a valuable and productive employee. She is considered to be the “go-to administrator” in her professional office. Her references endorse her eligibility for a public trust position.

SOR ¶ 2.a alleges that Applicant deliberately falsified her 2014 SCA when she answered “no” to Section 26 and failed to disclose that she failed to timely file her federal and state taxes between 2009 and 2012, and that she owed taxes to both. She also failed to disclose the tax liens the state filed against her, and 10 delinquent accounts she had within the prior seven years.

Applicant denied she deliberately falsified her application. She explained that this was her first application for a position of public trust and she did not know what she was doing. She claimed she did not understand the questions, had no help completing the application, and that she answered the questions to the best of her ability. At the time she completed her Application, she did not have a credit report with all of her financial information, and she was not aware of her delinquent accounts.

Applicant initially claimed she did not know her income tax returns had not been filed. However, her husband abandoned her in 2009 and they had no contact. Later, she stated that she knew she had to file separately from her estranged husband. Applicant filed her income tax returns for tax years 2009 through 2014 sometime prior to submitting her October 2014 Application. She also entered into a payment agreement with the IRS in December 2014. Later during her testimony, Applicant claimed she did not disclose her failure to timely file her taxes because she had just filed them.

Applicant also claimed she did not timely file her income tax returns because she had never filed income tax returns before, did not know how to file, and she needed someone to help her file. She stated she was scared of filing her income tax returns alone and procrastinated filing them. She also stated she needed some information

from her husband and waited for it, but never got it. (Tr. 67) Applicant testified that she has learned to file her income tax returns and will not have problems filing her taxes in the future. Applicant acknowledged that before she married, she filed her own income tax returns.

Concerning the state tax liens, Applicant testified she knew only about the tax lien alleged in SOR ¶ 1.b. When her husband left her in 2009, Applicant was aware that they owed state income taxes. She claimed her husband told her he was going to pay the state taxes and she believed he would. Shortly before her hearing, Applicant established a payment agreement with the state to pay \$50 monthly, starting on February 15, 2017, to pay the tax lien alleged in SOR ¶ 1.b. She claimed she did not know about the other tax liens until she was served with the amended SOR. In her SOR answer and at her hearing, she stated her intention to establish payment agreements with the state to pay her tax debt.

In February 2017, Applicant submitted to the state a request to participate in an “offer in compromise program” based on her financial hardship. She stated in the request that her gross annual salary is \$35,000, she could barely make ends meet, lives from paycheck to paycheck, and is only one paycheck away from being homeless. She asked to settle her personal taxes, which she estimated to be \$6,564, for a total of \$656. There is no response from the state attached to the document submitted. (AE L)

Policies

In issuing the SOR, DOD acted under DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); DOD Regulation 5200.2-R, *Personnel Security Program* (January 1987), as amended (Regulation);¹ and the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG) implemented by DOD on September 1, 2006. The case will be decided under Security Executive Agent Directive (SEAD) 4, National Security Adjudicative Guidelines (AG), effective June 8, 2017.

The DOD considers ADP positions to be sensitive positions. For a person to be eligible for sensitive duties, the person’s loyalty, reliability, and trustworthiness must be such that assigning the person to a sensitive position is clearly consistent with the national security interests of the United States. SEAD 4, E(4); SEAD 4, App. A ¶ 2.d. Applicants for ADP positions are entitled to the procedural protections in the Directive before any final unfavorable access determination is 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

¹ ADP cases are adjudicated under the provisions of the Directive. (Deputy Under Secretary of Defense’s Memorandum for the Director, Defense Office of Hearings and Appeals, dated November 19, 2004.)

human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. The 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 public trust position decision resolves whether it is clearly consistent with the interest of national security to grant or continue an applicant's access to sensitive information. The Government must prove, by substantial evidence, controverted facts alleged in the SOR. If it does, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. The applicant bears the heavy burden of demonstrating that it is clearly consistent with the national security interest of the United States to grant or continue his or her access to sensitive information.

Persons with access to sensitive information enter into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability, and trustworthiness of those who must protect national security as their own. The "clearly consistent with the national security interest of the United States" standard compels resolution of any reasonable doubt about an applicant's suitability for access in favor of the Government. Access to sensitive information determinations should err, if they must, on the side of denials. SEAD 4, ¶ E(4); SEAD 4, App. A, ¶¶ 1(d) and 2(b). Eligibility for a public trust position decisions are not a determination of the loyalty of the applicant concerned. They are merely an indication that the applicant has or has not met the strict guidelines the Government has established for issuing access to sensitive information.

Analysis

Guideline F, Financial Considerations

Under Guideline F, the trustworthiness concern is that 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. An individual who is financially overextended is at greater risk of having to engage in illegal or otherwise questionable acts to generate funds. (AG ¶ 18)

Applicant's history of financial problems is well documented in the file record. She acquired the tax liens and delinquent SOR accounts between 2007 and 2014. She presented some documentary evidence of payments made, efforts to contact creditors, and payment plans, but mostly after receipt of the SOR. Four of the financial considerations disqualifying conditions apply: AG ¶ 19(a): inability to satisfy debts; AG ¶ 19(b): unwillingness to satisfy debts regardless of the ability to do so; AG ¶ 19(c): a history of not meeting financial obligations; and AG ¶ 19(c): failure to file or fraudulently

filing federal, state, or local income tax returns or failure to pay annual federal, state, or local income tax as required.

AG ¶ 20 lists six conditions that could mitigate the financial considerations trustworthiness concerns:

(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, 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 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; and

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

Applicant filed her delinquent income tax returns and established a payment plan in 2014, before issuance of the SOR. She has been making her payments and is in compliance with her agreement. Concerning the state tax lien alleged in SOR ¶ 1.b, Applicant contacted the state in early 2017, established a payment plan, and made her first payment in February 2017. She also requested an offer in compromise to resolve the state tax liens alleged in SOR ¶¶ 1.m through 1.p, due to financial hardship in February 2017. Although the state has not responded, I find for Applicant on the state tax lien allegations. She does not have the financial resources to pay all her delinquent debts at the same time. She is paying her past-due federal taxes first. If the offer in compromise is denied, I believe Applicant will continue to make payment arrangements to address the remaining state tax liens (SOR ¶¶ 1.m through 1.p). (AE L)

Applicant paid or resolved the debts alleged in SOR ¶¶ 1.f through 1.k. Her son admitted these were his delinquent traffic tickets and promised to pay them. Her documentary evidence shows she paid SOR ¶¶ 1.f, 1.g, 1.h (paid by son), 1.j, and 1.k after the hearing. SOR ¶ 1.i is a duplicate of SOR ¶ 1.f, and is decided for Applicant.

Concerning the accounts alleged in SOR ¶¶ 1.c, 1.d, and 1.g, Applicant plans to place them in a debt consolidation program she intends to establish in the near future. She presented no evidence of a debt consolidation program.

I considered Applicant's 2009 separation a circumstance beyond her control that may have contributed or aggravated her financial problems. Applicant's evidence of financial responsibility is not strong; however, considering the totality of her circumstances, I find it is sufficient to establish her financial responsibility under her circumstances. Applicant's income is small, she raised her son without any financial assistance, and she filed her delinquent income tax returns and established a payment plan with the IRS before the SOR was issued. She has been making her IRS payments, and addressing her other delinquent accounts within her financial limitations. Her son has a job and appears to a productive member of society.

Applicant's references consider her to be a hard worker, competent, dependable, reliable, honest, and trustworthy. She was recognized for her exceptional performance, and is considered to be a valuable and productive employee. Applicant participated in financial counseling and testified that she follows a budget. In sum, the available information is sufficient to establish that her financial problem is being resolved. Applicant established that she has a track record of financial responsibility.

Guideline E, Personal Conduct

AG ¶ 15 articulates the trustworthiness concern for personal conduct:

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

Considering the evidence as a whole, Applicant had knowledge of her delinquent accounts, unfiled income tax returns, and that the state filed tax liens against her and her husband at the time she completed her 2014 Application. Applicant's omission of material financial information on her 2014 Application triggers the applicability the following disqualifying condition under AG ¶ 16:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment

qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities;

AG ¶ 17 lists six conditions that could potentially mitigate the personal conduct trustworthiness concerns:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by advice of legal counsel or of a person with professional responsibilities for advising or instructing the individual specifically concerning security processes. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress; and

(f) the information was unsubstantiated or from a source of questionable reliability.

None of the above mitigating conditions fully apply. In light of the evidence as a whole, Applicant's claims of innocent mistake are not sufficiently established by the evidence she submitted. Applicant made several contradictory explanations about her failure to disclose her financial information. Ultimately, her testimony and excuses for her failure to disclose the required financial information are not credible. I considered Applicant's age, education, experience working for a government contractor, her excellent reputation as a top performer, the number and value of the debts, unfiled income tax returns, and tax liens filed against her. On balance, Applicant had ample knowledge of her delinquent accounts, unfiled income tax returns, and filed tax liens at the time she completed her 2014 Application. Her evidence is insufficient to mitigate the Guideline E security concerns.

Whole-Person Concept

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, and under the whole-person concept. SEAD 4, App. A, ¶¶ 2(a), 2(d) and 2(f). I have incorporated my comments under Guidelines F and E in my whole-person analysis. Some of these factors were addressed under those guidelines, but some warrant additional comment.

Applicant has been in a difficult financial situation because of circumstances beyond her control and through no fault of her own. She provided sufficient documentary evidence to show she has been in contact with her creditors, and that she has made efforts to settle or pay her delinquent debts within her financial limitations. Her evidence is sufficient to show that she has a track record of financial responsibility and her financial problem is being resolved.

Notwithstanding, Applicant's evidence is not sufficient to mitigate the personal conduct concerns. Once a concern arises regarding an Applicant's eligibility for a position of trust, there is a strong presumption against the grant or renewal of eligibility for such position. Unmitigated concerns about Applicant's falsification of her 2014 Application lead me to conclude that grant of eligibility for a position of public trust to Applicant is not warranted at this time.

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.p:	For Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a and 1.b:	Against Applicant

Conclusion

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

JUAN J. RIVERA
Administrative Judge