



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



In the matter of:)	
)	
[Redacted])	ADP Case No. 15-08071
)	
Applicant for Public Trust Position)	

Appearances

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

03/08/2017

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves trustworthiness concerns raised under Guideline F (Financial Considerations). Eligibility for a public trust position is denied.

Statement of the Case

Applicant submitted an Electronic Questionnaires for Investigation Processing (e-QIP) on January 30, 2015, seeking to continue her eligibility for a public trust position. On April 20, 2016, the Department of Defense (DOD) sent her a Statement of Reasons (SOR), citing trustworthiness concerns under Guideline F. 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); and the adjudicative guidelines (AG) implemented by DOD on September 1, 2006. The guidelines are codified in 32 C.F.R. § 154, Appendix H (2006), and they replace the guidelines in Appendix 8 of the Regulation.

Applicant answered the SOR on September 14, 2016, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on October 20, 2016, and the case was assigned to me on November 10, 2016. The Defense Office of Hearings and Appeals (DOHA) sent Applicant a notice of hearing on November 15,

2016, scheduling the hearing for December 8, 2016. On December 2, 2016, DOHA sent her an amended notice of hearing, changing the hearing date to December 6, 2016. I convened the hearing as rescheduled. She waived the 15-day notice requirement in Directive ¶ E3.1.8 for the amended hearing date. (Tr. 17-18.) Government Exhibits (GX) 1 through 6 were admitted in evidence without objection. Applicant testified, presented the testimony of one witness, and submitted Applicant's Exhibits (AX) A and B, which were admitted without objection. I kept the record open until January 6, 2017, to enable her to submit additional documentary evidence. She timely submitted AX C through H.¹ DOHA received the transcript (Tr.) on December 15, 2016.

Findings of Fact²

In her response to the SOR, Applicant did not admit or deny the allegations in SOR ¶¶ 1.a-1.d and 1.f, but she stated that the debts were being paid or were resolved. She admitted the allegations in SOR ¶¶ 1.g and 1.k. She denied the allegations in SOR ¶¶ 1.h-1.j and 1.l-1.p. Her admissions in her answer to the SOR and at the hearing have been incorporated in my findings of fact.

Applicant is a 41-year-old call center quality auditor employed by a federal contractor since December 2004. She had been holding a public trust position for about ten years when she submitted her e-QIP. (Tr. 7-8.)

Applicant married in February 1994 and divorced in October 2004. She married her current spouse in August 2007. She has two children, ages 23 and 20, from her first marriage, and a 3-year-old child and three stepchildren, ages 22, 19, and 15, from her second marriage. Her 20-year-old and 3-year-old children live with her.

When Applicant submitted her e-QIP, she disclosed that she failed to timely file her federal income tax returns for 2005 through 2007 and failed to pay the taxes due, estimated at about \$7,000. In a response to DOHA financial interrogatories in June 2016, She admitted that she failed to timely file her federal income tax returns for 2006 through 2009. She stated that she had recently filed the past-due returns and owed about \$7,636 for those four years. She also admitted that she failed to timely file her state income tax returns for 2007 through 2014, that she had filed her state returns for 2013 and 2014, and that she had received refunds of \$9 and \$5 from the state. (GX 3 at 2-6.) She provided no documentation that any of the past-due federal and state returns had been filed. At the hearing, she admitted that she did not have a good reason for her failure to timely file her tax returns. (Tr. 39.) Her failures to timely file her federal and state returns are alleged in SOR ¶¶ 1.a and 1.b.

¹ At the hearing, Applicant indicated that she wanted an opportunity to submit a more recent credit bureau report (CBR). (Tr. 24.) After the hearing, she submitted AX F, the first page of a December 2016 CBR, which reflected her current credit score, but it does not reflect the status of any debts.

² Applicant's personal information is extracted from her e-QIP (GX 1) unless otherwise indicated by a parenthetical citation to the record.

The SOR also alleges 14 delinquent debts reflected in Applicant's credit bureau reports (CBRs) from February 2015 and May 2016. (GX 4; GX 5.) The evidence concerning these debts is summarized below.

SOR ¶ 1.b: federal tax debt (\$7,637). Applicant responded to DOHA interrogatories by stating that this debt was paid, but she submitted no documentation of payment. After the hearing, she submitted evidence that she had a payment agreement with the IRS in 2012. (AX E.) In her interrogatory responses, she stated that she was unable to make the payments to the IRS after 2012 because her pay was garnished for delinquent student loans. She testified at the hearing that she was paying \$220 per month under a new payment agreement with the IRS. (Tr. 30.) She submitted no documentation of payments or a new agreement. (AX C.)

SOR ¶ 1.d: state tax debt (\$2,126). Applicant responded to DOHA interrogatories about this debt and stated that the debt was paid. (GX 3 at 3.) She provided no documentation of payment. At the hearing, she testified that she was still negotiating with the state about her tax debt, and she believed that she will eventually receive a refund. (Tr. 38.) The debt is not resolved.

SOR ¶¶ 1.e and 1.f: delinquent student loans referred for collection of \$2,853 and \$2,773. In August 2015, Applicant's pay was garnished to pay these debts, at the rate of about \$418 per two-week pay period. (AX A; AX B; AX G; AX H.) The May 2016 CBR reflected that the balances had been reduced but the debts were still delinquent. (GX 5 at 3.) In August 2016, she was notified by the creditor that the debts were paid in full. (Answer to SOR, attachment 1.)

SOR ¶ 1.g: telecommunications bill referred for collection of \$917. Applicant testified that this debt became delinquent around 2012. She contacted the creditor in July or August 2016. She disagrees with the amount due, but she has not disputed the debt with the credit reporting bureau and has not reached an agreement with the creditor (Tr. 54-56.) The debt is not resolved.

SOR ¶ 1.h: medical bill referred for collection of \$1,063; SOR ¶¶ 1.i-1.p: medical bills referred for collection of various amount from \$100 to \$204. Applicant denied these debts in her answer to the SOR and asserted that they were covered by her insurance. She believes that the debts were incurred in connection with the birth of her three-year-old child in February 2014. (Tr. 62.) She testified that she contacted the creditor in September 2016, but the debts are not resolved. (Tr. 57-58.)

SOR ¶ 1.i: personal loan referred for collection of \$1,025. Applicant testified that she incurred this debt in 2012, when she borrowed money to travel to her grandmother's funeral. She believed the debt was paid, but she was unable to produce any documentation of payment. (Tr. 58-59.)

SOR ¶ 1.j: car title loan referred for collection of \$331. Applicant testified that she co-signed a title loan for her son. (Tr. 59-60.) As of the date the record closed, she had not resolved this debt.

SOR ¶ 1.k: utility bill referred for collection of \$257. Applicant admitted this debt, which was a utility bill for a previous residence. She contacted the creditor in September 2016, but she has not resolved the debt. (Tr. 61.)

In her answer to the SOR, Applicant submitted a financial statement reflecting monthly household income of \$3,795 and expenses of \$3,483 (including payments to the IRS), leaving a net monthly remainder of about \$312. At the hearing, she testified that she expected her medical insurance premiums to decline by about \$200 per month, which will increase the net monthly remainder. (Tr. 36.) She is the primary bread-winner for the family. Her husband is employed, but most of his earnings are used to pay child support for his children. (Tr. 35.) She testified that she expected to receive about \$2,000 for “paid time off” from her employer in late January 2017, which she intends to use to pay off her debts. (Tr. 56-57.)

Applicant testified that she received credit counseling in 2010 or 2011. The counseling appears to have been limited to resolving issues regarding the accuracy of her CBRs. (Tr. 65.) She provided no documentation of any counseling. She does not have a written budget. Instead, she simply lists her bills on her cell phone. (Tr. 66.)

Applicant and a co-worker have been friends for about 11 years. Applicant has rented her home from her co-worker for about five years and is regarded as a good and reliable tenant. Even when she had financial difficulties, she always paid her rent on time. Applicant has always been honest with her friend. Applicant’s friend was not aware that she did not file her income tax returns for several years. (Tr. 71-77.)

Applicant’s current supervisor submitted a letter attesting to her trustworthiness, dependability, and resourcefulness. The supervisor stated that Applicant has a positive attitude and is passionate about her work. She described Applicant as an excellent team leader, trainer, auditor and mentor for her co-workers. (AX D.)

Policies

Positions designated as ADP I and ADP II are classified as “sensitive positions.” Regulation ¶¶ C3.1.2.1.1.7 and C3.1.2.1.2.3. The standard that must be met for assignment to sensitive duties is that 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. DOD contractor personnel are entitled to the procedural protections in the Directive before any final unfavorable access determination may be made. Regulation ¶ C8.2.1.

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. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard sensitive information.

When evaluating an applicant's suitability for a public trust position, the administrative judge must consider the disqualifying and mitigating conditions in the AG. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with 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.

The protection of the national security is the paramount consideration. Under AG ¶ 2(b), "[a]ny doubt concerning personnel being considered for access to [sensitive] information will be resolved in favor of national security." The Government must present substantial evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.14. 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 burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). An applicant has the ultimate burden of demonstrating that it is clearly consistent with national security to grant or continue eligibility for access to sensitive information.

Analysis

Guideline F, Financial Considerations

The concern under this guideline is set out in AG ¶ 18:

Failure or inability to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness and ability to protect [sensitive] information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

This concern is broader than the possibility that a person might knowingly compromise sensitive information to raise money. It encompasses concerns about a person's self-control, judgment, and other qualities essential to protecting sensitive information. A person who is financially irresponsible may also be irresponsible, unconcerned, or negligent in handling and safeguarding sensitive information. See ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012).

Applicant's admissions, her CBRs, her testimony at the hearing, and the documentary evidence submitted at the hearing establish three disqualifying conditions under this guideline: AG ¶ 19(a) ("inability or unwillingness to satisfy debts"), AG ¶ 19(c) ("a history of not meeting financial obligations"), and AG ¶ 19(g) ("failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same"). The following mitigating conditions under this guideline are potentially applicable:

AG ¶ 20(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;

AG ¶ 20(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;

AG ¶ 20(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;

AG ¶ 20(d): the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts; and

AG ¶ 20(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.

AG ¶ 20(a) is not established. Applicant's delinquent debts are numerous, recent, and were not incurred under circumstances making them unlikely to recur.

AG ¶ 20(b) is not fully established. Applicant's divorce and childbirth-related medical expenses were conditions beyond her control, but she has not acted responsibly. She offered no reasonable explanation for failing to file her federal and state income tax returns. She had a payment agreement with the IRS in 2012, but was unable to comply with it because her pay was garnished for delinquent student loans. The medical bills have been pending since 2014 without being resolved. She did not contact the telecommunications company alleged in SOR ¶ 1.g until mid-2016. She did not contact the utility company alleged in SOR ¶ 1.k until September 2016, after she received the SOR.

AG ¶ 20(c) is not established. Applicant testified that she hired a credit-repair company around 2010, but she has not received financial counseling within the meaning of the mitigating condition, and her financial situation is not yet under control.

AG ¶ 20(d) is not established. Applicant claimed at the hearing that she had filed all her federal and state income tax returns, but she provided no documentation to support her claim. She receives some credit for making a payment agreement with the IRS, but it ended in 2012 when she could no longer make the agreed payments. She testified that she has negotiated a new agreement with the IRS, but she provided no documentary evidence to support her testimony. Her state tax debt is not resolved. She has taken no significant steps to resolve the telecommunication debt, utility debt, personal loan, car title loan, and her medical debts. Her delinquent student loans have been satisfied by

garnishment, but payment by involuntary garnishment, “is not the same as, or similar to, a good-faith initiation of repayment by the debtor.” ISCR Case No. 09-5700 (App. Bd. Feb. 24, 2011).

Applicant’s limited efforts to resolve her debts occurred only recently, indicating that she was motivated more by concern about protecting her public trust position than a sense of obligation. Evidence of past irresponsibility is not mitigated by payment of debts only under pressure of qualifying for a public trust position. She promised to resolve her debts when she receives the \$2,000 payment for paid time off. However, a promise to pay a delinquent debt in the future is not a substitute for a track record of paying debts in a timely manner. ISCR Case No. 07-13041 at 4 (App. Bd. Sep. 19, 2008).

AG ¶ 20(e) is not established. Although Applicant disputed the medical debts and several others, she provided no documentation of the disputes or the basis for them.

Whole-Person Concept

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a public trust position must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. In applying the whole-person concept, an administrative judge must evaluate an applicant’s eligibility for a public trust position by considering the totality of the applicant’s conduct and all relevant circumstances. An 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.

I have incorporated my comments under Guideline F in my whole-person analysis, and I have considered the factors in AG ¶ 2(a). At the hearing, Applicant testified that she had resolved or was in the process of resolving some of her debts, and she promised to provide documentation to support her testimony. However, most of her testimony remains unsupported by documentary evidence. Applicants who testify that debts have been resolved are expected to present documentary evidence supporting their testimony. See ISCR Case No. 15-03363 at 2 (App. Bd. Oct. 19, 2016).

Applicant’s failure to file tax returns suggests that she has difficulty complying with well-established governmental rules and systems. Voluntary compliance with such rules and systems is essential for protecting sensitive information. ISCR Case No. 01-05340 at 3 (App. Bd. Dec. 20, 2002). A trustworthiness adjudication is not directed at collecting debts or inducing an applicant to file past-due tax returns. Rather, it is a proceeding

aimed at evaluating an applicant's judgment and reliability. Applicant's repeated failures to fulfill her legal obligations indicate that she lacks the high degree of good judgment and reliability required of those entrusted with sensitive information. See ISCR Case No. 14-04159 (App. Bd. Aug. 1, 2016).

After weighing the disqualifying and mitigating conditions under Guideline F and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the trustworthiness concerns raised by her delinquent debts and failures to timely file her federal and state income tax returns. Accordingly, I conclude she has not carried her burden of showing that it is clearly consistent with national security to continue her eligibility for a public trust position.

Formal Findings

Paragraph 1, Guideline F (Financial Considerations): AGAINST APPLICANT

Subparagraphs 1a-1.d:	Against Applicant
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Subparagraphs 1.e-1.f:	For Applicant
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Subparagraphs 1.g-1.p:	Against Applicant
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Conclusion

I conclude that it is not clearly consistent with national security to continue Applicant's eligibility for a public trust position. Eligibility for a public trust position is denied.

LeRoy F. Foreman
Administrative Judge