



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



In the matter of:

ADP Case No. 15-08391

Applicant for Public Trust Position

Appearances

For Government: Chris Morin, Esq., Department Counsel

For Applicant: *Pro se*

02/16/2017

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant has not mitigated the financial considerations trustworthiness concerns. Eligibility for access to sensitive information is denied.

Statement of the Case

On May 4, 2016, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) detailing trustworthiness concerns under Guideline F, financial considerations. The action was taken 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 the DOD on September 1, 2006.

On June 8, 2016, Applicant submitted an answer to the SOR and requested a hearing before an administrative judge. The case was assigned to me on October 5, 2016. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on December 19, 2016, and the hearing was convened as scheduled on January 25, 2016. Government Exhibits (GE) 1 through 4 and Applicant Exhibit (AE) A were

admitted into evidence without objection.¹ Applicant testified, and the record was held open until February 8, 2016, to allow Applicant to submit additional documents. She submitted AE B though O. They were admitted into evidence without objection. DOHA received the hearing transcript (Tr.) on February 2, 2016.

Findings of Fact

Applicant admitted all of the allegations in SOR, except ¶¶ 1.g and 1.h, which she denied. Her admissions are incorporated into the findings of fact. After a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is 42 years old. She attended college at various times from 1995 to 2005, but did not earn a degree. She has never been married and has no children. She has been employed since April 2015 with a federal contractor. She had periods of unemployment from March 2014 to April 2014 and November 2008 to January 2009. Her current gross salary is \$108,000, which she has earned since April 2015. She estimated she earned approximately \$101,000 in 2014. Before then she estimated her income for 2013 to be about \$80,000, 2012 about \$50,000, and in 2011 about \$45,000. Applicant does not provide financial support to anyone. Applicant's disclosures, admissions, and credit reports from April 2015 or August 2016 document the debts alleged.²

Applicant secured student loans to fund her college education. She has not attended school since approximately 2005. The debts alleged in SOR ¶¶ 1.d (\$50,088), 1.e (\$10,199), and 1.f (\$9,090) are her delinquent student loans. She testified that from 1995 to 2005 she made some payments toward the loans. In 2000, she paid \$35 a month for one year, and then had employment issues and did not pay them for a couple of years. She did not contract the creditors. They contacted her and advised her of the delinquent status of the loans.³

Applicant testified that from 2015 through 2016 she has been making consistent monthly payments of \$358 on a new installment agreement. She stated that from 2005 to 2015 she had two different installment agreements. She attempted to comply with the plans, but due to unstable employment she was unable. She testified she has been making consistent monthly payments for two years.⁴ Applicant provided documents that indicate she made five payments toward her student loans in 2015 (amounts are: \$100; \$600; \$462; and two payments of \$469). She made six payments in 2016 (amounts are:

¹ Hearing Exhibit (HE) I is the Government's Exhibit list. HE II is the discovery letter. HE III and IV are email correspondence. HE V is Department Counsel's email that he did not object to Applicant's exhibits.

² Tr. 16-19, 87-90; GE 2, 3. Applicant had a period of employment where she was working for a couple months for two employers. The annual salaries are based on the approximate total earned for each year.

³ Tr. 66-70, 75-77.

⁴ Tr. 70-75.

two payments of \$469; and four payments of \$308).⁵ She did not provide a copy of the terms of her installment agreement. A document she provided shows student loans from 2003 and 1994 were consolidated and are in forbearance. There is no evidence verifying that these loans are the same loans alleged in the SOR. It is unclear how they can be in forbearance while Applicant is employed. She stated that she could not pay her student loans because she had delinquent taxes.⁶

Applicant failed to timely file federal income tax returns from 2004 through 2011. She failed to pay her federal income taxes as required from 2004 through 2013.⁷ Her explanation for failing to file federal income tax returns beginning in 2004 was because she was given advice from a friend to not file. She testified: "Well, when I hit a certain tax bracket and I was - - when I filed and I got to the point where I was paying back money instead of getting money back, the advice was to more along the lines of not filing and I didn't." She further clarified her reason: "Due to the fact that I had gotten to a certain tax bracket where I was no longer eligible to receive any refund."⁸ She confirmed that when she believed she owed taxes, she did not file.⁹

Applicant testified that "so I just wasn't aware of the ramifications of not filing. I know it was something that I [was] required to do, but not that it would result in legal action if I didn't file."¹⁰ When questioned about whether she was aware she was required to file her tax returns, she stated "I at the time I wasn't aware that it was an absolute mandatory things, no, I wasn't. Not at the time."¹¹ When asked if the reason she did not file her tax returns was because she thought she would have to pay, she stated: "Well, that was the situation that lead to our conversation and then in conversation we talked about there's a certain status too that you can qualify for. I don't recall what the term is right now, but I was advised that, oh, sovereignty."¹² She explained: "I mean I was aware that it's a procedural thing that we do but I wasn't aware that it was mandatory and there would be legal ramifications for not doing it."¹³

⁵ Answer to SOR; AE D.

⁶ Tr. 75; GE 2; Answer to SOR.

⁷ The SOR alleged Applicant failed to timely file her 2007 through 2009 federal income tax returns. It also alleged that she failed to pay her income taxes as required for tax years 2007 through 2013. I will not consider for disqualifying purposes, the additional years she failed to timely file tax returns and failed to pay her federal income taxes, but will consider them when accessing Applicant's credibility, and in my mitigation and whole person analysis.

⁸ Tr. 27.

⁹ Tr. 27.

¹⁰ TR. 28.

¹¹ Tr. 29.

¹² TR. 30.

¹³ Tr. 30.

Applicant's statements and testimony were confusing and contradictory. I did not find her explanations credible.

Applicant did not receive a letter from the Internal Revenue Service because she had no permanent residence for an extended period. She did have a post office box, but never provided the IRS her address. She testified that she had periods of unemployment, but at some point, she did reach a tax bracket where she was aware she owed taxes. When she did, she did not have the money to pay her taxes. She stated that prior to 2004, when she filed her tax returns, she received a refund.¹⁴

From 2004 to 2010, Applicant was aware she would have to pay federal taxes beyond the amount withheld from her pay, so she decided not to file and not to pay. She stated that after 2004 when she knew she would have to pay, she never checked to see how much she might owe the following years. In 2010, the IRS contacted Applicant's employer, and indicated its intent to garnish her wages and file a tax lien. She testified that in 2011, she entered into an installment agreement with the IRS, so her wages would not be garnished. She stated the agreement required her to pay \$500 a month. She testified she consistently paid this amount until 2013 when the amount was adjusted to \$100 a month. She stated that she continued to pay \$500 a month for another year even though the agreement reduced her payment. During Applicant's interview with a government investigator in June 2015, she stated she was unaware that she had to pay taxes and believed her tax withholding covered her income taxes.¹⁵ After 2010 when Applicant stated she filed her tax returns, she did not pay the balance owed. She testified that the IRS added the amount of tax she owed for subsequent years to her installment agreement. She stated that she was unable to pay the tax owed, so this was her method of paying.¹⁶

Applicant testified that she filed her 2004 through 2014 federal income tax returns without assistance.¹⁷ Applicant did not provide documents to show when she filed the 2004 or 2005 federal tax returns or if the IRS filed them for her. Applicant provided documents that show her 2006 federal income taxes were filed in April 2012.¹⁸ She did not provide documents to show when she filed the 2007 federal income tax return or if the IRS filed it for her. She provided a copy of an undated 2008 IRS 1040EZ form with her name on it. It is unknown when or if it was filed.¹⁹ She provided an IRS transcript for tax year 2009 that indicates she filed for that tax year in December 2011.²⁰

¹⁴ Tr. 26, 29, 32-37.

¹⁵ Tr. 34-43.

¹⁶ Tr. 48-60.

¹⁷ Tr. 61.

¹⁸ AE F.

¹⁹ AE G.

²⁰ AE H.

A 2010 IRS transcript indicates she filed her return for that tax year in December 2011. She testified that the IRS contacted her and advised her to file for the other delinquent tax years. She did not pay her 2010 federal income taxes because she did not have enough money withheld from her pay.²¹ The IRS transcript for tax year 2011 shows she filed her tax return in July 2012.²² A June 2016 letter from the IRS lists the individual amounts owed for tax years 2004 through 2013, which totals \$69,830.²³ She did not provide documentation of the date on which she filed her 2012 or 2013 federal tax returns. She testified that she filed her 2015 federal income tax returns with the assistance of a tax service.²⁴

Federal tax liens were entered against Applicant in February 2015 (SOR ¶ 1.a - \$19,600), May 2013 (SOR ¶ 1.b - \$9,899); and February 2012 (SOR ¶ 1.c - \$50,961). Applicant provided documents to show that from July 2011 to July 2012, she made one \$495 payment to the IRS that was applied to her 2004 tax debt.²⁵ Applicant provided a document, presumably from the IRS that shows from July 2013 to July 2014, she made eight payments ranging from \$437 to \$450 that were applied to 2004 and 2005 tax years. From July 2014 to July 2015, she made 11 payments, ranging from \$120 to \$500 that were applied to tax years 2004 and 2005. From July 2015 to July 2016, she made 14 payments ranging from \$100 to \$500 that were applied to tax years 2004 and 2005.²⁶ She also provided a receipt to show she made a \$100 payment to the IRS in August 2016.²⁷ She did not provide any documents for payments made in 2012. She stated that her 2015 federal income tax refund was applied to the 2004 tax debt. Applicant did not provide a copy of the terms of the installment agreement with the IRS, so there is no evidence that she is in compliance with that agreement. She provided a June 2016 IRS statement that shows she made a payment of \$100 toward the tax debt in May 2016.²⁸

After her hearing, Applicant provided a written statement indicating that although her current salary is \$108,000, her actual bi-weekly take home pay is \$2,200, because she elects to have “the most taxes out, so much so that I am now getting refunded each year, instead of owing.”²⁹ She also stated: “I contributed the max amount for company

²¹ Tr. 47-48; AE I.

²² AE J.

²³ Tr. 46; AE A.

²⁴ Tr. 38, 52-56, 61.

²⁵ Answer to SOR.

²⁶ AE O.

²⁷ AE N.

²⁸ AE A.

²⁹ AE C.

matching to my 401K retirement savings plan and also contribute to the company Stock Purchase Plan. For year 2017, I increased my contributing amounts to both the 401K and the stock purchase program.”³⁰

The debt in SOR ¶ 1.i (\$14,500) is a loan for a repossessed vehicle. Applicant purchased the car in 2008 and then was unemployed. It was sold at auction. She stated that she spoke with someone in 2011 about the debt, but has not followed up on it. She disclosed the delinquent debt in her security clearance application. She indicated it is no longer on her credit report.³¹ In a post-hearing statement she said: “I do have a prior repossession in my history, but that happened during a time of unemployment. One year later, I purchased another vehicle. I paid that vehicle off, with no late payments. I am in the same car to this day.”³² She has not resolved the debt owed for the repossessed vehicle.

In October 2015, Applicant settled in full a credit card debt (SOR ¶ 1.g - \$432) that was delinquent since 2010. She stated she paid other bills with the credit card. Also in October 2015, she settled the debt in SOR ¶ 1.h (\$5,416) for \$3,491. She provided documentation for both debts.³³

Applicant has six credit cards that she obtained so she can reestablish credit. She owes \$3,780 for a loan that she took out in October 2015 and used to pay other debts and reestablish credit. These debts are being paid. She had financial counseling in 2009 when her car was repossessed. She has not had any since then. Her savings and checking accounts have zero balances.³⁴

Policies

Positions designated as ADP I and ADP II are classified as “sensitive positions.” (See 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, 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.” (See Regulation ¶ C6.1.1.1.) The Deputy Under Secretary of Defense (Counterintelligence and Security) Memorandum, dated November 19, 2004, indicates trustworthiness adjudications will apply to cases forwarded to DOHA by the Defense Security Service and Office of Personnel Management. 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.)

³⁰ AE C.

³¹ Tr. 83-87; GE 1.

³² AE C.

³³ Tr. 77-83; GE 3; Answer to the SOR.

³⁴ Tr. 92-98, 101.

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 the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. 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."

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel." The applicant has the ultimate burden of persuasion to obtain a favorable trustworthiness decision.

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 safeguard sensitive information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of sensitive information.

Analysis

Guideline F, Financial Considerations

The trustworthiness concern for financial considerations 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 classified 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 an individual might knowingly compromise classified information in order to raise money. It encompasses concerns about an individual's self-control, judgment, and other qualities essential to protecting classified information. An individual who is financially irresponsible may also be

irresponsible, unconcerned, or negligent in handing and safeguarding classified information.³⁵

The guideline notes several conditions that could raise trustworthiness concerns under AG ¶ 19. Three are potentially applicable in this case:

- (a) inability or unwillingness to satisfy debts;
- (c) a history of not meeting financial obligations; and
- (g) failure to file annual Federal, state, or local income tax returns as required.

Applicant intentionally failed to file and pay federal income taxes for several years, resulting in federal tax liens. She has delinquent debts and student loans. The evidence is sufficient to raise the above disqualifying conditions.

Conditions that could mitigate financial considerations trustworthiness concerns are provided under AG ¶ 20. The following 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; and
- (d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

AG ¶ 20(a) does not apply because Applicant has numerous debts that are not resolved. She has outstanding federal tax liens. Her deliberate and repeated failure to file federal income tax returns and pay taxes when required casts doubt on her current reliability, trustworthiness, and good judgment.

Applicant attributed her financial problems to unemployment, which was a circumstance beyond her control. She stated that she was advised by a friend that she did not have to file her tax returns if she owed money beyond what was withheld. From

³⁵ See ISCR Case No. 11-05365 at 3 (App.Bd. May 1, 2012).

2004 to 2010, Applicant was aware she would have to pay federal taxes beyond what money was withheld from her pay, so she decided not to file and not to pay. This was within her control. Her inability to pay student loans because of her current tax burden was caused by her own actions. To fully apply AG ¶ 20(b), Applicant must have acted responsibly under the circumstances. Applicant has made some payments toward delinquent tax debt and student loans, but failed to provide the terms of her agreement and proof of compliance. She paid two delinquent debts, but has not addressed the debt for a repossessed vehicle. Her post-hearing letter indicated she is investing in her retirement, which indicates she has the funds to resolve her delinquent accounts. Although she indicated unemployment was a factor in her financial problems, she disclosed one month of unemployment in 2014 and two months in 2008 to 2009. AG ¶ 20(b) has minimal application.

Applicant received some financial counseling in 2009 when her car was repossessed. She has made payments to the IRS, but it is unknown when she entered into an installment agreement, its terms, and whether she is in compliance. She testified she was making \$500 monthly payments from 2011 until 2013 when the payment requirement was reduced to \$100, but she continued to make \$500 payments for another year. Her evidence does not corroborate her testimony. She stated she was making consistent monthly payments for her student loans. She provided documents to show some payments were made, but she did not provide proof of an agreement, its terms, and compliance with the agreement. There are indications that Applicant has attempted to resolve her tax debt and delinquent student loans. She did resolve two other delinquent debts, but failed to address a defaulted car loan. AG ¶ 20(c) has some application.

Applicant paid the delinquent debts in SOR ¶¶ 1.g and 1.h. AG ¶ 20(d) applies to these debts. She has not attempted to resolve the debt owed for her repossessed vehicle, instead stating it is no longer on her credit report so it is likely unenforceable. Applicant intentionally failed to file and pay taxes for many years. She did not begin to pay them until the IRS contacted her employer to garnish her wages. The current status of her student loans is unclear. She last attended school in 2005 and has been employed steadily, except for two short periods since 2004. She provided proof of some payments toward her student loans in 2015 and 2016, but failed to provide a copy of an agreement and her compliance record. AG ¶ 20(d) has some application.

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 relevant 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.

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.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. 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 has been steadily employed, except for two short periods, since 2004. She filed federal income tax returns prior to 2004 because she was entitled to a refund. She was aware she would owe taxes in 2004 and deliberately failed to file or pay until the IRS contacted her employer in 2010 and indicated its intent to garnish her wages. Although she stated she has an installment agreement with the IRS, she failed to provide a copy of it. She has made payments to the IRS, but it is unknown the terms of the agreement and if she is in compliance. She failed to provide proof of any payments made in 2012. The balance owed to the IRS as of June 2016 was more than \$69,000. She has three outstanding federal tax liens. 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 system. Voluntary compliance with such rules and systems is essential for protecting [sensitive] information. ISCR Case No. 01-0534 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 obligation does not demonstrate the high degree of good judgment and reliability required of those granted access to [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.2nd 173, 183 (D.C. Cir. 1960), *aff'd* 367 U.S. 886 (1961).³⁶

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

³⁶ ISCR Case No. 14-04437 at 3 (App. Bd. Apr. 15, 2016). See ISCR Case No. 14-05476 at 5 (App. Bd. Mar. 25, 2016) (citing ISCR Case No. 01-05340 at 3 (App. Bd. Dec. 20, 2002)). ISCR Case No. 14-01894 at 4-5 (App. Bd. Aug. 18, 2015).

motivated to prevent such problems in the future, does not preclude careful consideration of [a]pplicant's [trustworthiness] in light of [applicant's] longstanding prior behavior evidencing irresponsibility" including a failure to timely file federal income tax returns.³⁷

The status of Applicant's student loans is unclear. She made some payments in 2015 and 2016. Her failure to repay these loans due to tax problems is not mitigating. Although the debt owed for the loan on her repossessed vehicle may be unenforceable it does not negate her obligation to repay a just debt.

Applicant's long-term irresponsible conduct and failure to comply with laws and regulations raises serious questions about her reliability, trustworthiness, and judgment. Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a public trust position. For all these reasons, I conclude Applicant has not mitigated the financial considerations trustworthiness concerns.

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
Subparagraphs 1.a-1.f:	Against Applicant
Subparagraphs 1.g-1.h:	For Applicant
Subparagraphs 1.i-1.k:	Against Applicant

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.

Carol G. Ricciardello
Administrative Judge

³⁷ 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).