



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



In the matter of:)
)
) ADP Case No. 15-06762
)
Applicant for Public Trust Position)

Appearances

For Government: Aubrey M. DeAngelis, Esq., Department Counsel
For Applicant: *Pro se*

10/24/2017

Decision

DAM, Shari, Administrative Judge:

Applicant failed to file and pay Federal and state income taxes for multiple years between 2006 and 2012. She also accumulated debts during that time, which remain delinquent. Resulting trustworthiness concerns were not mitigated. National security eligibility for a position of trust is denied.

Statement of the Case

On April 29, 2016, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued to Applicant a Statement of Reasons (SOR), detailing security concerns under Guideline F, Financial Considerations. The action was taken under Executive Order (EO) 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information*,

(AG) effective within the DOD for SORs issued after September 1, 2006; and the AG effective within the DOD for SORs issued after June 8, 2017.¹

On June 2, 2016, Applicant answered the SOR, and elected to have her case decided on the written record in lieu of a hearing. (Item 3.) A complete copy of the Government's File of Relevant Material (FORM), containing seven Items, was mailed to Applicant on August 17, 2016, and was received by her on August 25, 2016. The FORM notified Applicant that she had an opportunity to file objections and submit material in refutation, extenuation, or mitigation within 30 days of receipt of the FORM. Applicant timely submitted nine documents that she labeled as Items 1 through 9. For purposes of clarity, I have re-labeled them as Applicant Items (AI) 1 through 9. Applicant did not file objections to the Government's Items. Department Counsel did not have objections to Applicant's Items. All Items are admitted into evidence. On May 22, 2017, the Defense Office of Hearings and Appeals (DOHA) assigned the case to me.

Findings of Fact

Applicant did not admit or deny the allegations in the SOR in her initial answer, but submitted exhibits in response. (Item 3.) In her reply to the FORM, she admitted the allegations in SOR ¶¶ 1.a, 1.d, 1.f, 1.h, 1.k, and 1.l. She denied the other allegations. (AI 1 through 8.)

Applicant is 66 years old and married for over 45 years. She has two adult children. She has worked for her employer since 2004. In February 2015, she submitted an Electronic Questionnaire for Investigations Processing (e-QIP) for re-investigation. In it, she disclosed delinquent debts and back taxes that she attributed to personal and financial costs related to the death of family members. (Item 4.)

During an interview, Applicant explained to an investigator the main factors that caused her inability to pay taxes and delinquent bills. In 2006, her husband's employment hours were reduced and remained that way until he retired in 2009 or 2010. In 2007, she paid her mother's burial costs; in 2008, she paid her brother's burial costs; and in 2009 or 2010, she paid another brother's burial costs. (Item 7.)

Based on Applicant's admissions and credit bureau reports (CBR) from March 2015 and August 2016, the SOR contained 10 allegations related to timely filing and paying Federal and state income taxes and 3 delinquent debts. These allegations arose between 2006 and 2015. (GE 5, GE 6.)

In her June 2016 answer to the SOR, Applicant submitted a letter from the Internal Revenue Service (IRS), dated June 27, 2014. The letter referenced Applicant's phone call on June 14, 2014, and her request for an installment payment agreement to resolve

¹I considered the previous AG, effective September 1, 2006, as well as the new AG, effective June 8, 2017. My decision would be the same under either set of guidelines.

unpaid taxes for the following tax years: 2006, 2008, 2011, 2012, and 2013.² The IRS agreed to automatically deduct monthly payments of \$275 from her bank account. The letter did not mention the total amount of unpaid taxes owed at this time. Applicant stated in her answer that she continued to make payments to the IRS and that her account was reviewed every eight months. (Item 3.)

In reply to the FORM, Applicant submitted another letter from the IRS, dated September 8, 2016. It referenced her inquiry of August 29, 2016, and proposal to establish an installment agreement for monthly payments of \$380. This letter listed the following years: 2006, 2008, 2011, 2012, 2013, and 2014.³ The letter did not state the total amount of unpaid taxes as of that date. (AI 4c.) She submitted a copy of her installment agreement activity from July 2014 to July 2015 that indicated she owed a total of \$23,902 for those years. (AI 4b.)

(SOR ¶ 1.a) Applicant did not timely file her 2006 Federal income tax return. In January 2009, the IRS filed a substitute 2006 Federal tax return for her. She had received an extension for filing to October 2007. (AI 1.)

(SOR ¶ 1.b) As of September 2016, Applicant owed the IRS \$435 for unpaid 2006 Federal taxes. In March 2009, she established a repayment plan with the IRS to resolve an additional assessed tax of \$17,659 for that year. She did not make consistent payments on that plan or subsequent plans, as noted in the IRS transcript that reported in 2012, 2013, and 2014 she was removed from payment plans for non-compliance and assessed additional penalties. (AI 1.)

(SOR ¶ 1.c) Applicant did not timely file her 2008 Federal income tax return. It was filed on June 1, 2009. (AI 2.)

(SOR ¶ 1.d) As of September 2016, Applicant owed the IRS \$9,051 for unpaid taxes for 2008. According to that IRS transcript, she established payment plans in June 2009, August 2012, December 2013, and August 2016, but made no payments on the plans. (AI 2.)

(SOR ¶ 1.e) Applicant did not timely file a 2011 Federal income tax return. She filed it in April 2013. (AI 3.)

(SOR ¶ 1.f) As of September 2016, Applicant owed the IRS \$5,954 for unpaid taxes for 2011. In exhibit AI 3, she stated she was on a payment plan for that year, but there is no evidence of that in the record.⁴

² The SOR did not allege unpaid taxes for 2013. Derogatory facts not alleged will not be considered in an analysis of disqualifying conditions, but may be considered in evaluating Applicant's credibility and analyzing mitigating conditions and the whole-person concept.

³The SOR did not allege unpaid taxes for 2014. (See above.)

⁴ AI 3 references a 2-page transcript from the IRS; only page 1 is attached.

(SOR ¶ 1.g) Applicant did not timely file her 2012 Federal income tax return. She filed it on January 13, 2014. (AI 4a.)

(SOR ¶ 1.h) As of September 2016, Applicant owe the IRS \$5,676 for unpaid taxes for 2012. She established a payment plan in January 2014, but has not made any payments on it or a subsequent plan established in August 2016. (AE 4a.)

(SOR ¶ 1.i) Applicant owed her state \$5,680 for unpaid income taxes for 2011. Those taxes were resolved in 2015 through a payment plan. (AI 5.)

(SOR ¶ 1.j) Applicant owed a state \$2,735 for unpaid income taxes for 2012. Those taxes were resolved in 2015 through a payment plan. (AI 5.)

(SOR ¶ 1.k) Applicant made \$25 monthly payments in June, July, and August 2016 on the \$403 delinquent retail debt. It is being resolved. (AI 7.)

(SOR ¶ 1.l) The alleged \$22,294 delinquent debt referenced an individual account opened in March 2014. Applicant submitted an exhibit referencing a mortgage jointly- held with her husband and in a current status. There is no evidence confirming that the alleged SOR debt is her mortgage. The account numbers do not match. (GE 5; AI 9.) This is unresolved.

(SOR ¶ 1.m) The \$315 delinquent debt was paid in May 2016. (AI 8.)

Applicant did not provide evidence of financial or credit counseling. According to the IRS, Applicant and her husband reported an adjusted gross income of \$131,562 for 2006; \$126,461 for 2008; \$157,570 for 2011; and \$90,103 for 2012. She did not submit budget information from which to predict responsible management of her finances or continued payment of her taxes and the large outstanding debt.

Policies

When evaluating an applicant's suitability for national security eligibility, the administrative judge must consider the AG. In addition to brief introductory explanations for each guideline, the AG list potentially disqualifying conditions and mitigating conditions, which are to be used in determining an applicant's eligibility for a position of trust.

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 AG ¶ 2 describing the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. The entire process is a conscientious scrutiny of applicable guidelines in the context 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 national security eligibility will be resolved in favor of the national security.” In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Directive ¶ E3.1.14 requires the Government to present evidence to establish controverted facts alleged in the SOR. According to Directive ¶ E3.1.15, “[t]he applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable [trustworthiness] decision.”

A person applying for a position of trust seeks to enter 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 national security eligibility. 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.

Analysis

Guideline F: Financial Considerations

The trustworthiness concerns relating to the guideline for financial considerations are set out in AG ¶ 18, which reads in pertinent part:

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. Affluence that cannot be explained by known sources of income is also a security concern insofar as it may result from criminal activity, including espionage.

AG ¶ 19 describes three conditions that could raise trustworthiness concerns and may be disqualifying in this case:

- (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.

Applicant failed to timely file Federal income tax returns for 2006, 2008, 2011, and 2013. She failed to timely pay Federal income taxes for those years. She failed to timely pay state income taxes for 2011 and 2012. She also accumulated delinquent debts that she had been unwilling to resolve. The evidence raises the above trustworthiness concerns, thereby shifting the burden to Applicant to rebut, extenuate, or mitigate those concerns.

The guideline includes five conditions in AG ¶ 20 that could mitigate trustworthiness concerns arising from financial problems:

- (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; 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.

Applicant owes unpaid Federal taxes for six years: 2006, 2008, 2011, 2012, 2013, and 2014. Her tax problems have been ongoing since 2006 and continue to cast doubt

on her reliability. Based on the extent of the problem, there is insufficient evidence to conclude that such problems will not recur or establish mitigation under AG ¶ 20(a).

Applicant asserted that her unpaid debts and taxes arose after three family members died between 2007 and 2009 or 2010, and she paid for their funerals. In addition, she stated that her husband's salary decreased beginning in 2006 and continued into his retirement. Applicant's family funerals may have contributed to her financial delinquencies and been beyond her control. However, her assertion that a decrease in her husband's salary contributed to her financial delinquencies lacks merit, considering their joint income in 2006, 2008, 2011, and 2012. There is insufficient evidence to establish full mitigation under AG ¶ 20(b) because she did not present sufficient evidence to conclude that she acted responsibly under the circumstances.

Applicant did not submit evidence that she participated in credit or financial counseling. She has not demonstrated that a large debt and her federal taxes are resolved, or that there are clear indications they are under control. The evidence does not establish mitigation under AG ¶ 20(c). Applicant paid and resolved two debts. She demonstrated a partial good-faith effort to resolve the debts alleged in SOR ¶¶ 1.k and 1.m. AG ¶ 20(d) applies to those debts. She resolved her 2011 and 2012 state tax debts in 2015 through a payment plan. She established mitigation under AG ¶ 20(g) for those debts.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's national security eligibility 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(d):

- (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.

According to AG ¶ 2(c), the ultimate determination of whether to grant national security eligibility 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 pertinent facts and circumstances surrounding this case. Applicant is a 66-year-old woman, who has worked for her employer since 2004. From 2006 to 2014, she failed to

timely file some Federal income tax returns and pay taxes owed. In 2009, she began making payments to the IRS on an installment plan for unpaid 2006 taxes. She did not make those or subsequent payments on additional tax year plans consistently as she agreed to do. The amount of total federal taxes owed as of September 2016 for tax years 2006, 2008, 2011, 2012, 2013, and 2014 is unknown, as is a chronology of her payments. Her actions to date are not sufficient to outweigh a history of non-compliance with a fundamental legal obligation to file and pay taxes. The DOHA Appeal Board has held that:

Failure to file tax returns suggests that an applicant has a problem with complying with well-established government rules and systems. Voluntary compliance with these things is essential for protecting classified information. ISCR Case No. 14-04437 at 3 (App. Bd. Apr. 15, 2016). Someone 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 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).⁵

The record evidence leaves me with questions as to Applicant's eligibility and suitability for a position of trust. Applicant failed to mitigate the trustworthiness concerns arising under the financial considerations guideline.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline F:	AGAINST APPLICANT
Subparagraphs: 1.a through 1.h:	Against Applicant
Subparagraphs 1.i through 1.k:	For Applicant
Subparagraph 1.l:	Against Applicant
Subparagraph 1.m:	For Applicant

⁵ ISCR Case No. 12-10933 at 3 (App. Bd. June 29, 2016).

Conclusion

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

SHARI DAM
Administrative Judge