



**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. 16-00540

Appearances

For Government: Aubrey De Angelis, Esq., Department Counsel

For Applicant: *Pro se*

11/03/2017

Decision

WESLEY, Roger C., Administrative Judge:

Based upon a review of the pleadings, exhibits, and testimony. I conclude that Applicant mitigated trust concerns regarding her finances. Eligibility for holding a public trust position is granted.

History of the Case

On December 1, 2016, the Department of Defense (DOD) Consolidated Adjudication Facility (CAF) issued a Statement of Reasons (SOR) detailing reasons why DOD adjudicators could not make the preliminary affirmative determination of whether to grant eligibility for a public trust position, and recommended referral to an administrative judge to determine whether eligibility to hold a public trust position should be granted, continued, denied, or revoked. The action was taken under Executive Order (Exec. Or.) 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 (AGs).

Effective June 8, 2017, by Directive 4 of the Security Executive Agent Directive (SEAD 4), dated December 10, 2016, *National Security Adjudicative Guidelines* for all covered individuals who require initial or continued eligibility for access to classified information or eligibility to hold a sensitive position were established to supercede all previously issued national security adjudicative criteria or guidelines. Procedures for administrative due process for contractor personnel continue to be governed by DOD Directive 5220.6, subject to the updated substantive changes in the AGs, effective June 8, 2017. Application of the AGs that were in effect as of the issuance of the SOR would not change the decision in this case.

Applicant responded to the SOR on January 5, 2017, and requested a hearing. This case was assigned to me on March 14, 2017. The case was scheduled for hearing on April 4, 2017. A hearing was held on the scheduled date for the purpose of considering whether it would be clearly consistent with the national interest to grant, continue, deny, or revoke Applicant's application for eligibility to hold a public trust position. At the hearing, the Government's case consisted of four exhibits (GEs 1-4); Applicant relied on one witness (herself) and 34 exhibits. The transcript was received in May 2017 and followed with a replacement transcript on October 26, 2017.

Summary of Pleadings

Under Guideline F, Applicant allegedly (a) failed to timely file federal income tax returns for tax years 2007-2015, as required; (b) failed to file state income tax returns for tax years 2007-2015, as required; (c) incurred a federal tax lien in December 2014 covering delinquent taxes owed for \$409,070 and \$59,285, respectively; and (d) incurred three federal tax liens in December 2014 for \$2,287, in July 2013 for \$100,511, and in December 2012 for \$3,105, all of which have since been released by the Internal Revenue Service (IRS). Applicant's alleged untimely tax filings and delinquent federal tax debts allegedly have not been resolved.

In her response to the SOR, Applicant denied failing to file her 2007 federal tax return, claiming she filed the return in June 2008 with an extension. She admitted to failing to timely file her federal tax returns for tax years 2008-2015, as required. She claimed she and her husband filed her federal tax returns for these tax years late as follows: 2008 federal tax return in February 2011; 2009 federal tax return in June 2012; 2010 federal tax return in November 2011; 2011 federal tax return in July 2013; 2012 federal tax return in October 2013 with a timely extension; 2013 federal tax return in October 2014 with a timely extension; 2014 federal tax return in September 2015 with a timely extension; and 2015 federal tax return in September 2016 with a timely extension.

Addressing her state tax returns, Applicant denied failing to timely file her state income tax returns for tax years 2007-2015. Citing the lack of information from her husband (a practicing physician) to either affirm or deny of failures to file for the years in issue, she claimed she had \$5,097 in state income taxes withheld from her 2015 wages

and has no balance owed to her state taxing authority. Applicant also denied having any other unsatisfied federal tax liens. She claimed the IRS released these federal tax liens in January 2016 after Applicant and her husband paid the balances owed for the tax years in issue.

Findings of Fact

Applicant is a 63-year-old registered nurse for a defense health contractor who seeks eligibility to hold a public trust position. The allegations covered in the SOR and admitted by Applicant are adopted as relevant and material findings. Additional findings follow.

Background

Applicant married in April 1983 (GE 1; Tr. 74-76) and filed for divorce from her husband in January 2016 after 33 years of marriage, and still awaits a final divorce decree. (GE 1 AE DD; Tr. 97-99) Since 2007, Applicant and her husband (a practicing cardiologist) have lived apart and interacted infrequently. (Tr. 76, 96) Applicant has one daughter from her marriage who attends college in another state. (GEs 1-2)

Applicant earned a bachelor's degree in nursing in May 2016. (GEs 1-2) She reported no military service. Since July 2004 (a period of over 13 years), Applicant has worked for her current employer. (GEs 1-2) As a registered nurse, she maintains telephonic communications with TRICARE beneficiaries and their spouses concerning health care claims of active and non-active military service members. (Tr. 73)

Finances

While married and living separately between 2004 and 2007, Applicant and her husband timely filed joint federal and state tax returns and received refunds most of the time. (AE J; Tr. 77-79, 83-85, 130-131) However, between 2008 and 2012, she and her husband failed to file their federal and state returns in a timely manner, as required. (GEs 1-2; Tr. 85-91, 134-136) When she received notices from the IRS during these years, she faxed them to the IRS herself without informing them of either her ongoing contacts with her husband by phone and personal visits or her lack of tax information. (Tr. 78, 82-83)

Applicant attributed her federal and state filing delays to insufficient information furnished by her husband (who at the time was working in different communities as a practicing physician) to enable her to file accurate returns. (GE 2; Tr. 85-87) Residing in a community property state throughout the tax years in issue, Applicant's tax filings required the merger of her modest income and expenses with the more significant income of her husband for tax reporting purposes for both her federal and state tax returns. (AEs K-N; Tr. 139) Without tax information from her husband or tax accountant for tax years 2008-2011, she was ill-equipped to file accurate federal or state returns.

(AEs K-O, X-Y; Tr. 86-87, 93-94) Whether their tax accountant could have provided beneficial filing guidance to Applicant under these circumstances is unclear. Certainly, the absence of any paper trail of Applicant inquiries of the accountant creates considerable uncertainty as to what tax filing guidance was available to Applicant over the course of the tax-filing years in issue. (Tr. 125-127)

Between 2008 and 2015, Applicant and her husband lived essentially separate lives in different states. (Tr. 85) She traveled infrequently to other states to assist her husband and obtain needed financial tax information to enable her to file her tax returns for the years in issue. (Tr. 85, 94-95) During these years she and her husband were not legally separated despite their physical separation and infrequent communications. For the most part during this 2008-2011 time period, she received little or no cooperation from her husband in providing necessary tax information (to include income sharing of his income and expenses) and was unsuccessful in obtaining the information. (Tr. 86-87)

Community property publications issued by the IRS confirm Applicant's expressed good-faith belief that in her state of residence (a community property state) she cannot file a federal tax return separately from her spouse without reporting one-half of all community income and all of her separate income. (AE GG at 3) In Applicant's state, community income is defined as income generated from services performed by either or both spouses during their marriage. (AE GG) By virtue of the laws of Applicant's state of residency, Applicant's income for the tax years in issue constituted community income that required reporting income for herself and her husband. See IRS publication 555, at 3 (Feb. 2016). (AE GG)

Because of Applicant's good-faith belief that she could not legally file separate federal and state tax returns without information covering the included income and expenses of her husband, she never considered filing best-effort separate tax returns with the IRS and her state taxing authority accompanied by explanatory correspondence. Legally, of course, spouses living apart all year, and who meet the special rules applicable to spouses residing in community property states, must report individual income earned by the spouse who performed the services to earn the income. See IRS publication 555, *supra*, at 8.

Were Applicant aware of the IRS community-generated income reporting requirements, she would have been expected to file separate returns for the years in issue with the tax information and more than adequate tax withholding credits available and known to her. (AE J; Tr. 132) In turn, income generated from her husband solely from his medical practice and not known to her would have been exempted from tax liability. See IRS publication 555, *supra*, at 7. Applicant's accepted lack of understanding of these IRS filing requirements and exemptions are sufficient in these circumstances to justify her multiple failures to file timely separate federal and state tax returns for tax years 2008-2012.

With the additional tax information her husband provided her for tax years 2013-2015, Applicant and her husband were able to timely file their 2013-2015 federal and state tax returns timely with the aid of extensions. (AEs J-Q and R-Z; Tr. 90-96) And with the tax information supplied by her husband and accountant, she and her husband filed late federal and state tax returns for the back years of 2008-2011 with implicit IRS approvals. (AEs S-W; Tr. 95-96).

Asked about the status of her 2016 federal and state taxes, Applicant assured her 2016 federal taxes will be filed timely with no estimated taxes owed the IRS. (Tr. 81-82, 95-96) Applicant's assurances are credible and are accepted.

IRS tax records confirm that the IRS filed a tax lien against Applicant in December 2014 for \$409,000 and \$59,285, respectively, covering delinquent federal income taxes owed for tax years 2009-2013. (AEs AA-CC BB; Tr. 93-95) Broken down, the \$409,000 tax lien covered assessed taxes of \$189,409 for tax year 2010, \$132,983 for tax year 2011, \$84,389 for tax year 2012 and \$2,287 for tax year 2013. (AE BB) The \$59,285 tax lien filed by the IRS in December 2014 covered taxes owed for tax year 2009. (AE AA) Two other tax liens were filed against Applicant by the IRS: one for \$100,511 in July 2012 and another for \$3,105 in December 2012. State collection actions against Applicant covering the 2009-2014 tax periods were previously resolved and are not included in the SOR. (AE FF)

Since December 2014, Applicant and her husband have paid past-due tax debts owed the IRS for tax years 2008-2013 and secured releases of IRS-generated tax liens. (AEs AA-CC; Tr. 93-94, 107-108) In January 2015, the IRS released its tax liens filed in December 2014 (AEs AA-BB) The remaining two federal tax liens filed against Applicant and covered in the SOR were released by the IRS in December 2015. (AE CC) Federal and state tax records document that Applicant does not owe any federal or state taxes to either the Federal Government or her state's taxing authority for any of the covered tax years between 2007 and 2015. (AEs AA-CC and FF; Tr. 95, 114-116)

Character references

Applicant is highly-regarded by her supervisors and colleagues. (AE HH) They characterize her as trustworthy and reliable with good judgment. None of her supervisors or colleagues expressed any awareness of the financial issues covered in the SOR. (AE HH) Applicant's year-end performance evaluations for years 2009-2015 contain excellent assessments of Applicant's performance qualities in all evaluated rating categories. (AE EE)

Policies

The new AGs in SEAD 4 for use in contractor cases covered by the process provided by DOD 5220.6 list guidelines to be used by administrative judges in the decision-making process covering DOHA cases. These guidelines take into account

factors that could create a potential conflict of interest for the individual applicant, as well as considerations that could affect the individual's reliability, trustworthiness, and ability to protect classified [sensitive] information.

The guidelines include conditions that could raise a trustworthiness concern [public trust position] and may be disqualifying” (disqualifying conditions), if any, and many of the conditions that could mitigate [trustworthiness concerns].

The AGs must be considered before deciding whether or not eligibility to hold a public trust position should be granted, continued, or denied. The guidelines do not require administrative judges to place exclusive reliance on the enumerated disqualifying and mitigating conditions in the guidelines in arriving at a decision. Each of the guidelines is to be evaluated in the context of the whole person in accordance with AG ¶ 2(a).

In addition to the relevant AGs, administrative judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in AG ¶ 2(a) of the AGs, which are intended to assist the judges in reaching a fair and impartial commonsense decision based upon a careful consideration of the pertinent guidelines within the context of the whole person. The adjudicative process is designed to examine a sufficient period of an applicant's life to enable predictive judgments to be made about whether the applicant is an acceptable public trust risk.

When evaluating an applicant's conduct, the relevant AGs are to be considered together with whole-person factors. The following AG ¶ 2(d) factors are to be considered along with the guidelines: (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.

Viewing the issues raised and evidence as a whole, the following individual guideline is pertinent in this case:

Financial Considerations

The Concern: 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.

Burden of Proof

By virtue of the principles and policies framed by the AGs, a decision to grant or continue an applicant's eligibility to hold a public trust position may be made only upon a threshold finding that to do so is clearly consistent with the national security interest. Because the Directive requires administrative judges to make a commonsense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a public trust position depends, in large part, on the relevance and materiality of that evidence. See *United States, v. Gaudin*, 515 U.S. 506, 509-511 (1995). As with all adversarial proceedings, the judge may draw only those inferences which have a reasonable and logical basis from the evidence of record. Conversely, the judge cannot draw factual inferences that are grounded on speculation or conjecture.

The Government's initial burden is twofold: (1) it must prove by substantial evidence any controverted facts alleged in the SOR, and (2) it must demonstrate that the facts proven have a material bearing to the applicant's eligibility to obtain or maintain public trust position eligibility. The required materiality showing, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused privacy information before it can deny or revoke eligibility to hold a public trust position. Rather, the judge must consider and weigh the cognizable risks that an applicant may deliberately or inadvertently fail to protect privacy information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the evidentiary burden shifts to the applicant for the purpose of establishing his or her trustworthiness through evidence of refutation, extenuation, or mitigation. Based on the requirement of Exec. Or. 10865 that all [trustworthiness] determinations be clearly consistent with the national interest, the applicant has the ultimate burden of demonstrating his or her trust eligibility. "[T]rustworthiness determinations should err, if they must, on the side of denials." See *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

Analysis

Trustworthiness concerns are raised over Applicant's history of failing to timely file federal and state tax returns for tax years 2008-2012, and her incurring of federal tax liens, one in December 2014 covering delinquent federal taxes of \$409,000 and \$59,285, respectively, and three separate federal tax liens filed in 2012-2014 covering aggregate delinquent federal taxes exceeding \$105,000.

Jurisdictional Issues

Holding a public trust position involves the exercise of important fiducial responsibilities, among which is the expectancy of consistent trust and candor in

protecting and guarding personally identifiable information (PII). DOD Manual 5200.02, which incorporated and canceled DOD Regulation 5200.2-R, covers both critical-sensitive and non-critical sensitive national security positions for civilian personnel. See 5200.02, ¶ 4.1a(3)(c)3.

Definitions for critical-sensitive and non-critical sensitive positions provided in 5200.02, ¶ 4.1a (3)(c) contain descriptions similar to those used to define ADP I and II positions under DOD Regulation 5200.2-R. (32 C.F.R. § 154.13 and Part 154, App. J) ADP positions are broken down as follows in 32 C.F.R. § 154.13 and Part 154, App. J): ADP I (critical-sensitive positions covering the direction, design, and planning of computer systems) and ADP II (non-critical-sensitive positions covering the design, operation, and maintenance of computer systems). Considered together, the ADP I and II positions covered in DOD Regulation 5200.2-R refine and explain the same critical-sensitive and non-critical-sensitive positions covered in DOD Manual 5200.02, ¶ 4.1a (3)(c) and are reconcilable as included positions in 5200.02.

So, while ADP trustworthiness positions are not expressly identified in DOD Manual 5200.02, they are implicitly covered as non-critical sensitive positions that require “access to automated systems that contain active duty, guard, or personally identifiable information or information pertaining to Service members that is otherwise protected from disclosure by DOD 5400.11-R. . . “. DOD 5200.02, Sec. 4.1, ¶ 3(c). See DOD Directive 5220.6 ¶¶ D5(d) and D8. By virtue of the implied retention of ADP definitions in DOD Manual 5200.02, ADP cases continue to be covered by the process afforded by DOD 5220.6.

Financial Concerns

Applicant’s federal and state tax-filing lapses and incurred delinquent federal tax debts warrant the application of four of the disqualifying conditions (DC) of the AGs: DC ¶ 19(a), “inability to satisfy debts,” DC ¶ 19(b), “unwillingness to satisfy debts regardless of the ability to do so,” DC ¶ 19(c), “a history of not meeting financial obligations,” and DC ¶ 19(g), “failure to file Federal, state, or local income tax returns as required or the fraudulent filing of the same.”

Applicant’s pleading admissions with respect to her recurrent failures to timely file her federal tax returns over a number of years (2008-2012) and incurred federal tax liens covered in the SOR (SOR debts ¶¶ 1.u-1.w) negate the need for any independent proof (*see McCormick on Evidence*, § 262 (6th ed. 2006)). Each of Applicant’s filing lapses and incurred tax liens are fully documented in her response, credit reports, and her interrogatory responses. See ISCR Case 03-01059 at 3 (App. Bd. Sep. 24, 2004).

Financial stability in a person cleared to protect privacy information is required precisely to inspire trust and confidence in the holder of a non-critical sensitive position. While the principal concern of a non-critical sensitive position holder’s

demonstrated financial difficulties is vulnerability to coercion and influence, judgment and trust concerns are implicit in cases involving debt delinquencies.

Extenuating circumstances contributed significantly to Applicant's tax-filing problems and incurred tax liens. Applicant's financial problems have been marked by periods of cooperation problems with her estranged husband. and heightened financial burdens associated with the lack of financial information needed by Applicant to file separate federal and state tax returns in a community property state. And while IRS guidelines required her to file her separate returns with the best information available to her for the years in issue, her good-faith belief that she could not file her returns without including tax information from her spouse is enough to mitigate her failures to timely file her separate federal and state returns with the individual information available to her.

Considering the available testimonial and documented evidence, extenuating circumstances in this record account for most of Applicant's debt problems. Fully available to Applicant is MC ¶ 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, a death, divorce, or separation, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances."

Applicant's responsible efforts in addressing her late federal and state tax returns and delinquent federal taxes enable her to meet the acting responsibly under the circumstances prong of MC ¶ 20(b). See ISCR Case No. 05-11366 at 4 n.9 (App. Bd. Jan. 12, 2007) (citing ISCR Case No. 99-0462 at 4 (App. Bd. Nov. 29, 2005)). In the same vein, MC ¶ 20(d), "the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts," is available, too, to mitigate Applicant's untimely federal and state tax filings and delinquent federal tax debt accumulations. And by (a) filing her late federal and state tax returns for tax years 2008-2012 and timely for tax years 2007 and 2013-2015 and (b) paying all back taxes due for each of those years to the satisfaction of the IRS, Applicant is entitled to the mitigating benefits of MC ¶ 20(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."

In evaluating Guideline F cases, the Appeal Board has stressed the importance of a "meaningful track record" that includes evidence of actual debt reduction through voluntary payment of debts. ISCR Case No. 07-06482 at 2-3 (App. Bd. May 21, 2008) (internal citations omitted) Applicant's demonstrated debt payments are a significant indicator of a meaningful plan she has adopted to address her debts.

Whole-person assessment is favorable to Applicant. She has shown considerable progress in addressing her federal and state tax returns (buttressed by her good-faith belief that she could not file her separate returns without included tax information from her husband) since regaining her estranged husband's cooperation. In a community property state like Applicant's state of residence, both federal and state

tax filers filing separate tax returns are required to report one-half of all community income and all of each separate filer's income. This Applicant believed she could not due without her husband's full cooperation in providing necessary tax information. Once Applicant obtained her husband's cooperation in providing his considerable community income and expenses, she was able to work with her him in providing joint federal and state tax returns for the years in issue. For her corrective efforts, Applicant is to be commended in doing all she could do to restore her finances to stable levels consistent with meeting minimum requirements for holding a public trust position.

Important also to establishing her favorable whole-person status is the high regard in which she is held by her supervisors and colleagues. Overall, public trust eligibility assessment of Applicant based on the compiled documentation and her corroborating testimony enables her to establish judgment and reliability levels sufficient to overcome trust concerns associated with her late filing of her federal and state tax returns for the years in issue and accumulation of federal tax liens covering delinquent federal tax debts over a period of years (2008-2015).

Taking into account all of the documented facts and circumstances surrounding Applicant's federal and state-filing lapses and accumulation of federal tax debts and sufficient probative efforts to resolve her filing lapses and accumulated federal tax debts, conclusions are warranted that her finances are sufficiently stabilized at this time to grant her eligibility to hold a public trust position. Favorable conclusions are warranted with respect to the allegations covered by subparagraphs 1.a through 1.w of the SOR. Eligibility to hold a public trust position under the facts and circumstances is fully consistent with the national interest.

Formal Findings

In reviewing the allegations of the SOR and ensuing conclusions reached in the context of the findings of fact, conclusions, conditions, and the factors listed above, I make the following formal findings:

GUIDELINE F (FINANCIAL CONSIDERATIONS): FOR APPLICANT

Subparagraphs 1.a-1.w:

For Applicant

Conclusions

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue Applicant's eligibility to hold a public trust position. Eligibility to hold a public trust position is granted.

Roger C. Wesley
Administrative Judge

