



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



In the matter of:)
)
) ADP Case No. 17-00577
)
Applicant for Public Trust Position)

Appearances

For Government: Bryan Olmos, Esq., Department Counsel
For Applicant: *Pro se*

03/13/2018

Decision

CREAN, THOMAS M., Administrative Judge:

Based on a review of the evidence, eligibility for a public trust position is denied. Applicant did not present sufficient credible information to mitigate financial trustworthiness concerns.

Statement of the Case

On July 23, 2016, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP) to obtain eligibility for a public trust position to work in support of a defense agency. (Item 3) Applicant was interviewed by an agent from the Office of Personnel Management on October 18, 2016. (Item 4, Personal Subject Interview (PSI)). After reviewing the results of the background investigation, the Department of Defense (DOD) could not make the affirmative findings required to grant Applicant access to sensitive information.

On April 28, 2017, DOD issued Applicant a Statement of Reasons (SOR) for financial trustworthiness concerns under Guideline F. DOD took the action under DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented by DOD on September 1, 2006.

The SOR in this case was issued under DoD Manual 5200.02, *Procedures for the DOD Personnel Security Program (PSP)* that became effective on April 3, 2017, and it incorporates and replaces DoD 5200.2-R. While this case was pending a decision, the Director of National Intelligence issued Security Executive Agent Directive 4, establishing in Appendix A the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AG), which he made applicable to all covered individuals who require initial or continued eligibility for access to classified information or eligibility to hold a sensitive position. The new AGs supersede the September 1, 2006 AGs and are effective “for all covered individuals” on or after June 8, 2017. Accordingly, I have evaluated Applicant’s eligibility for access to sensitive information under DoD Manual 5200.02 and the new AGs.

Applicant answered the SOR on May 16, 2017. (Item 2). She admitted the 15 allegations of delinquent debt and the 2 allegations of filing bankruptcy. She requested a decision on the record. Department Counsel submitted the Government’s written case on July 28, 2017. (Item 9). Applicant received a complete file of relevant material (FORM) on August 7, 2017. In the FORM, Department Counsel amended the SOR to add an additional financial allegation, SOR 1.r, noting that the Applicant is indebted to the Federal government for delinquent taxes of approximately \$19,355.00 for tax years 2009 through 2015. Applicant was requested to provide an answer to the allegation. If Applicant did not respond to the FORM, Department Counsel requested the Administrative Judge to regard her silence as a denial. Applicant was provided the opportunity to file objections and submit material to refute, extenuate, or mitigate the disqualifying conditions. Applicant did not respond or provide additional information to the FORM. I find that Applicant denied SOR allegation 1.r. I was assigned the case on December 12, 2017.

Procedural Issues

Applicant was advised in the FORM that the summary of the PSI (Item 4) was not authenticated and could not be considered over her objection. She was further advised that she could make any corrections, additions, or deletions to the summary to make it clear and accurate, and could object to the admission of the summary as not authenticated by a Government witness. She was additionally advised that if no objection was raised to the summary, the Administrative Judge could determine that she waived any objection to the admissibility of the PSI summary. Applicant did not raise any objection to consideration of the PSI when she responded to the FORM. Since there is no objection by Applicant, I will consider information in the PSI in my decision.

Findings of Fact

After a thorough review of the evidence, I make the following findings of fact. Applicant is 53 year old. She graduated from high school in June 1982. While working for her employer, Applicant attend a technical school and received a certified nursing assistance (CNA) certificate in May 2001. She has been employed as a claims

processor for her sponsor and present employer since August 2000. She married in April 1983 and has four children. (Item 3, e-QIP, dated July 23, 2016)

In her response to the SOR, Applicant listed her present monthly salary as \$1,638, and her husband's monthly salary as \$1,517, for a combined total of \$3,156. She listed monthly expenses of \$1,944, leaving a monthly discretionary balance of \$1,212. Applicant reported that she had a background investigation in 2004 for a public trust position. She did not know if she was granted a public trust eligibility clearance. (Response to SOR, dated May 16, 2017)

The SOR alleges, and credit reports (Item 7, dated August 23, 2016; Item 8, dated February 22, 2017) confirm the following delinquent debts for Applicant: state tax liens for the same state of \$2,968 for tax year 2009 (SOR 1.a); \$2,506 for tax year 2014 (SOR 1.b); \$2,021 for tax year 2012 (SOR 1.c); \$968 for tax year 2014 (SOR 1.i); and \$2,356 for tax year 2011 (SOR 1.j); medical accounts in collection for \$92 (SOR 1.d); \$111 (SOR 1.e); \$133 (SOR 1.g); \$131 (SOR 1.h); and \$404 (SOR 1.l); a credit card debt charged off for \$164 (SOR 1.m); student loans in collection for \$4,885 (SOR 1.f); \$4,039 (SOR 1.k); \$4,321 (SOR 1.n); and \$3,928 (SOR 1.o). The FORM amended the SOR and alleged a federal tax debt of \$19,355 for tax years 2009 through 2015 (SOR 1.r). Since she did not respond to the FORM, I find that Applicant denied the federal tax debt of \$19,355. She reported that she received financial counseling and advice from her pastor. (Item 4, PSI, dated October 18, 2016)

The SOR also alleges that Applicant filed a Chapter 13 bankruptcy in August 2013 that was dismissed in November 2014 (SOR 1.p); and another Chapter 13 bankruptcy that was filed in May 2008 and dismissed in March 2009 (SOR 1.q). The bankruptcies are established by the Bankruptcy Court documents at Items 5 and 6, and Applicant admits that she filed the bankruptcies. Bankruptcy Court records show that Applicant defaulted on her payment plan for the May 2008 Chapter 13 bankruptcy, and it was dismissed on March 11, 2009. (Item 5, Bankruptcy Court documents) Applicant reported on her e-QIP that she and her husband decided to have the Chapter 13 bankruptcy they filed in August 2013 dismissed in November 2014. They would make payment arrangements themselves with most of their creditors. The bankruptcy action was dismissed on February 13, 2015. (Item 6, Bankruptcy Court documents).

Applicant on her e-QIP noted that she did not have sufficient funds withheld from her pay for federal taxes for tax years 2009 to 2015, and for state taxes for 2014. She incurred both federal and state income tax debts. She reported that her past due federal and state income taxes were under payment plans. Most of her earlier payments were made through wage garnishment. In her August 2013 bankruptcy filing, Applicant reported over \$20,000 in federal and state income tax debt. She described a payment plan of \$212 monthly for federal taxes and \$75 for state taxes. She did not report any other consumer or medical delinquent debts. (Item 3, e-QIP)

In her October 18, 2016 PSI, Applicant reported that she and her husband filed the Chapter 13 bankruptcy in August 2013 because they were financially helping their children and were behind on their mortgage payments and wanted to save their house.

She and her husband had not budgeted correctly and became overextended and overwhelmed with financial issues. While helping their children, they struggled to pay their own debts. The August 2013 bankruptcy listed a vehicle loan, their home mortgage, a private student loan, and five medical debts. The student loans became delinquent because Applicant did not establish payment plans believing she was returning to school and the loans would be deferred. When she decided not to return to school, she was just “lazy and did not set-up payment plans”. Applicant claims her salary was garnished to help pay the student loans, but she did not provide adequate documentation of the garnishment or the status of payments of the student loans. The debts were not resolved because the bankruptcy was dismissed.

Applicant reported that she was paying \$1,700 monthly on the Chapter 13 bankruptcy as well as her mortgage. She requested that the bankruptcy be dismissed because her payments were so high she was struggling financially. Her attorney told her the only way to resolve her financial crisis was to have the bankruptcy dismissed. (Response to SOR, dated May 16, 2017, at 24 and 25)

Applicant also reported in the PSI that she incurred delinquent federal income taxes starting in tax year 2009. She did not have the funds to pay the taxes. Since her salary was being garnished, Applicant did not have sufficient funds to pay her federal taxes for years 2012, 2013, and 2014, as well as her Chapter 13 bankruptcy payment. These delinquent tax payments were added to her federal tax debt. Starting in 2011, her pay was garnished \$150 every two weeks to pay federal taxes. Her husband’s pay was also garnished. The garnishment stopped when she filed the Chapter 13 bankruptcy in August 2013, and the bankruptcy included the federal tax debt. After the bankruptcy was dismissed, she contacted the Internal Revenue Service (IRS) and established a payment plan since her past-due federal taxes were no longer being paid after the dismissal. Since July 2015, she claims to have \$212 garnished monthly from her salary to pay federal taxes. The documents provided by Applicant shows that her payments stopped in June 2016. The documents also list federal taxes still due of approximately \$19,355. The information and evidence provided by Applicant does not make clear what, if any, federal taxes were paid either by garnishment or by direct payment to the IRS. Applicant provided insufficient information or evidence to show that her federal tax debt is being paid or has been resolved. SOR 1.r lists her tax liability as \$19,355. I find that this is an accurate assessment of her present federal tax debt. (Item 2, Attachments to Applicant’s response to SOR)

Applicant was also unable to pay all of her state income tax. She provided documents to show that she was offered a monthly payment plan of \$75 to resolve her delinquent state taxes. Applicant did not provide sufficient information to show payments under the plan and the status of her state tax debt.

In her response to the SOR, Applicant noted that the federal and state tax debts at SOR 1.a, 1.b, 1.c, 1.i, and 1.j are being paid under a payment plan. Applicant did not provide sufficient documentations to establish that she is making payments under the payment plan.

Applicant provided a letter from the student loan creditor indicating that her initial student loan payments were received, and the student loan had been rehabilitated. Applicant also reported that the student loans at SOR 1.k, 1.n, and 1.o had been rehabilitated, and the loans were now on a payment plan. Applicant reported in the PSI that she pays her student loans through payment plans and she has no outstanding student loans. Applicant did not provide any documents to verify that she made payments on her rehabilitated student loans. Her student loans have not been resolved. (Response to SOR, dated May 16, 2017)

Applicant agreed with the listed delinquent medical debts. She did not provide sufficient documents to verify payments made on the medical debts. (Item 4, Summary of PSI, dated October 18, 201, at 4-5)

Policies

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 over-arching adjudicative goal is a fair, impartial and common sense decision. According to AG ¶ 2(a), 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 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. 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 as to obtaining 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 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

Financial Considerations

There is a trustworthiness concern for a failure or inability to live within one's means, satisfy debts, and meet financial obligations, because such behavior may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulation, and raise questions about an individual's reliability, trustworthiness, and ability to protect sensitive information. An individual who is financially irresponsible may also be irresponsible, unconcerned, or careless in their obligation to protect sensitive information. Behaving responsibly or irresponsibly in one aspect of life provides an indication of how a person may behave in other aspects of life. (AG ¶ 18).

A person's relationship with her creditors is a private matter until evidence is uncovered demonstrating an inability or unwillingness to repay debts under agreed terms. Absent evidence of strong extenuating or mitigating circumstances, an applicant with a history of serious or recurring financial difficulties is in a situation of risk inconsistent with the holding of a position of trust. An applicant is not required to be debt free, but is required to manage her finances in such a way as to meet her financial obligations.

Adverse information in credit reports can normally meet the substantial evidence standard to establish financial delinquency. Applicant's debt listed in the SOR are established by credit reports, her admission in the e-QIP, and her response to the SOR. The debts poses a trustworthiness concern raising Financial Consideration Disqualifying Conditions under AG ¶ 19:

- (a) inability to satisfy debts;
- (b) unwillingness to satisfy debts regardless of the ability to do so; and
- (c) a history of not meeting financial obligation.

Applicant incurred delinquent debt because she stated she did not budget correctly and became overextended and overwhelmed by her debts. However, the information she provided on her income and expenses indicates that she had adequate funds remaining each month to make substantial payments on her debts. Some of the debts, particularly the medical debts, were small and could have been resolved. She did not provide adequate documents to show she made payments on the debts under payment plans. Some of her debts were paid by garnishment.

I considered the following Financial Considerations Mitigating Conditions under 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;

(b) the conditions that resulted in the financial problems 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 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; and

(d) the individual initiated and is adhering to a good-faith effort to repay the overdue creditors or otherwise resolve debts.

The mitigating conditions do not apply. Applicant's debts are numerous, recent, and were not incurred under circumstances making recurrence unlikely. The debts are normal medical, student loan, and delinquent tax debts. She provided information concerning financial counseling by her pastor. Bankruptcy is a legal and permissible means of resolving delinquent debt. Applicant filed a bankruptcy in 2008 that was dismissed March 2009 for failure to payments under the wage-earners plan. She filed another bankruptcy in 2013 that was dismissed in November 2014 because the wage-earner's payments were too large for her income. Under these circumstances, she does not receive credit for attempting to resolve her debts by bankruptcy.

Applicant knew when she submitted her e-QIP in July 2016 that she had financial issues that were of trustworthiness concern. She indicated then that she would work to resolve the debts. She stated again at the October 2016 PSI that she was working to resolve the delinquent debts. In April 2017 when she was provided the SOR, she was again told of the debts of trustworthiness concern. In July 2017, she was reminded of the debts when she received the FORM. In spite of all of these reminders, Applicant has not provided adequate information on the actions she has taken to pay or resolve the debts.

Applicant and her husband have been gainfully employed with adequate salaries since 2000. Applicant has not provided sufficient documents to verify her payment of her debts. She has made some payments on some debts by garnishment. There is no indication that she has made any payments on her medical debts. Her student loans have been in rehabilitation but Applicant did not present information to confirm that she continued to make payments on the student loans after rehabilitation. Accordingly, she has not established a good-faith effort to pay her debts. There is no clear evidence that her debt problems have been resolved, and her finances are under control.

Applicant did not have sufficient funds withheld from her pay from tax years 2009 until 2015 to pay her federal income taxes. She did not pay her state income taxes for tax years 2011 and 2014. It is well recognized that paying taxes is a necessary

requirement of being a citizen. The available evidence shows that Applicant willingly and deliberately did not pay federal and state taxes for many years. Her failure to pay taxes results in her financial problems being ongoing and recent, and not incurred under circumstances making recurrence unlikely.

Failure to pay taxes suggests that an applicant has a problem complying with well-established governmental rules and systems. Voluntary compliance with such rules and systems is essential for protecting sensitive information. A person who fails repeatedly to fulfill his or her legal obligation to pay taxes does not demonstrate the high degree of good judgment and reliability required for a grant of access to sensitive information. Where an applicant may have attempted to correct the tax return problem, there must still be careful consideration of the applicant's trustworthiness in view of her longstanding prior behavior evidencing irresponsibility by failing to timely pay taxes. By failing to pay six years of federal and two years of state taxes, Applicant did not demonstrate the high degree of good judgment and reliability required of persons granted access to classified or sensitive information.

Good faith means acting in a way that shows reasonableness, prudence, honesty, and adherence to duty and obligation. All that is required is that Applicant act responsibly given her circumstances. Applicant must establish that she has a reasonable plan to resolve financial problems, and that she has taken significant action to implement that plan. Applicant's plan must show a systematic method of handling debts, and Applicant must establish a meaningful track record of tax or debt payment. A meaningful track record of tax payment can be established by evidence of actual filing and payments. A promise to pay taxes or debts is not a substitute for a track record of paying taxes in a timely and responsible manner. Applicant did not present sufficient documents to establish the status of any plans or arrangements made with the IRS or state tax office to resolve the federal and state tax issues.

Applicant did not provide sufficient documentation to show that she is working diligently to resolve the issues that have been ongoing for over four years. There is insufficient evidence to establish why Applicant was unable to make greater progress resolving her debt and tax problems. There is insufficient assurance that her tax problems are being resolved, are under control, and will not recur in the future. In short, the information provided by Applicant does not contain sufficient evidence to determine that Applicant either paid, arranged to pay, settled, compromised, or otherwise resolved her debts. Her debt management decisions under the circumstances cast doubt on her current reliability, trustworthiness, and good judgment. The information in the case file is sufficient to establish that she did not act responsibly under the circumstances. In sum, Applicant did not present sufficient information to mitigate financial trustworthiness concerns.

Whole-Person Analysis

Under the whole-person concept, the administrative judge must evaluate an applicant's trustworthiness eligibility 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(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.

Under AG ¶ 2(c), the ultimate determination of whether to grant a trustworthiness clearance 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. Applicant has the ability to pay her debts. She has the financial resources to pay and manage her financial obligations within her resources. However, she has not established that she can properly manage her finances because of her failure to resolve her debts and pay past-due taxes. Her failure to properly manage her finances indicates that she may not properly manage sensitive information. Overall, the record evidence leaves me with questions and doubts pertaining to Applicant's judgment, reliability, trustworthiness, and her eligibility and suitability for a position of trust. Applicant's eligibility for a public trust position is denied.

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 - r: Against Applicant

Conclusion

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

THOMAS M. CREAN
Administrative Judge