



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



In the matter of:)
)
) ADP Case No. 17-00731
)
Applicant for Public Trust Position)

Appearances

For Government: Nicole Smith, Esq., Department Counsel
For Applicant: *Pro se*

06/15/2018

Decision

RIVERA, Juan J., Administrative Judge:

Applicant's evidence is insufficient to show that she has a track record of financial responsibility concerning her legal obligation to file income tax returns and to pay her taxes, and that her financial problem is being resolved or is under control. She failed to mitigate the Guideline F (financial considerations) trustworthiness concerns. Eligibility to hold a position of trust is denied.

Statement of the Case

Applicant submitted an electronic questionnaire (Application) requesting eligibility for a position of trust on February 10, 2016. After reviewing it and the information gathered during a background investigation, on June 15, 2017, the Department of Defense (DoD) issued Applicant a Statement of Reasons (SOR) listing trustworthiness concerns under Guideline F.

Applicant answered the SOR on July 17, 2017, and requested a hearing before an administrative judge. The case was assigned to me on January 17, 2018. The Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing on March

16, 2018, scheduling a hearing for April 9, 2018. Applicant requested a postponement, which was granted, and the hearing was re-scheduled for April 16, 2018.

At the hearing, the Government offered three exhibits (GE 1 through 3). Applicant testified, and submitted two exhibits (AE 1 and 2). AE 2 was received post-hearing. All exhibits were admitted into the record. DOHA received the hearing transcript (Tr.) on April 24, 2018.

Findings of Fact

In her Answer, Applicant denied, in part, the factual allegations in SOR ¶ 1.a, which alleged she failed to file federal income tax returns for tax years 2013 and 2014. She claimed that she timely filed for tax year 2014. She also denied the judgment debt alleged in SOR ¶ 1.b. Applicant's documentary evidence (attached to her SOR answer) shows that she disputed this debt and it was resolved in her favor. She denied the charged-off debt alleged in SOR ¶ 1.d, and presented documentary evidence that it was settled and paid. (AE 1) She also denied the charged-off debt alleged in SOR ¶ 1.e, alleging it was settled and paid. She failed to present documentary evidence to support her claim.

Applicant did not admit or deny SOR ¶ 1.c. She claims that her attempts to contact the creditor (a large wireless service provider with whom she continues to have service) were unsuccessful. After a thorough review of the record evidence, I make the following additional findings of fact:

Applicant is a 63-year-old computer operator. She earned a General Development Education (GED) certificate in 1976. She married in 1973 and became a widow in 2017. She has two adult children. Applicant has worked for different federal contractors since 1995, and she has held a secret clearance for most of that period. Applicant reported no periods of unemployment or underemployment. Her current employer, a federal contractor, hired Applicant in May 2017.

Applicant submitted a request of eligibility for a position of trust in February 2016. (Application) In Section 26 (Financial Record) of her 2016 Application, Applicant stated that she had failed to timely file or pay federal and state taxes as required by law. She "estimated" that she failed to pay about \$1,400 in federal taxes in 2013, because she did not have the money. Applicant also indicated that she had failed to timely file her 2014 income tax return. She claimed she had filed for an extension of time to file, but failed to do so. She estimated owing \$1,000 in taxes. She promised to have her tax debt paid by late May 2016. She failed to present evidence that she filed her late tax returns or that she paid her due taxes.

At the hearing, Applicant initially testified that her 2014 income tax return had been filed. She later qualified her statement by saying that it was her understanding that the 2014 tax return had been filed. (Tr. 18) She had not paid the tax debt. (Tr. 28). Concerning tax year 2013 income tax return, Applicant initially testified that she filed it

electronically. She later stated that “there were some years we filed really, really late or we did the paperwork and probably did not file them. I just don’t know right now what years.” (Tr. 20)

When asked whether she had filed her 2015 and 2016 income tax returns, Applicant stated: “I’m going to say yes. They should have been. I don’t know.” (Tr. 29) Applicant testified she filed the 2017 income tax return Saturday, April 14, 2018, just before her hearing.

Applicant apologized for not having filed her income tax returns. She acknowledged she has no excuse of her failure to file her tax returns. She expressed her willingness to contact the IRS to find out what returns needed to be filed, how much she owed, and to establish a payment plan. She promised to correct her mistakes.

Applicant explained that her husband was diagnosed with ALS at about the same time she received the SOR. After his diagnosis, she was unable to think about her debts, taxes, or income tax returns. She was unable to address any of the accounts alleged in the SOR because she was working and taking care of her sick husband. Applicant noted that since her husband’s passing, she has been in a better financial posture. She now has the financial means to pay whatever she needs to pay. (Tr. 28) She believes she has about \$8,000 in savings.

Applicant provided little information about her current earnings and financial position. She provided little information about her monthly income, monthly expenses, and whether her current income is sufficient to pay her current day-to-day living expenses and debts. There is no information to indicate whether she participated in financial counseling or whether she follows a budget.

After the hearing, I left the record open for Applicant to supplement the record with documentary evidence showing when she filed her income tax returns for tax years 2013 through 2016, whether she owed any money to the IRS, the efforts she took to resolve SOR ¶ 1.c, and evidence that she settled and paid SOR ¶ 1.e. On April 30, 2018, Applicant submitted the second page of two IRS Form 1040s that were unsigned and undated. Without the first page of the IRS 1040 Forms, and because the enclosed pages are unsigned and undated, it is impossible to determine the year for which the forms were filed and when they were filed.

Applicant averred that the IRS 1040 Form pages correspond to her 2014 and 2016 income tax returns. She stated in her April 30, 2018 email that the attached forms and payment were mailed to the IRS on Saturday, April 28, 2018. Applicant also indicated that she was working on 2013 and 2015. Based on her email statements, I find that Applicant filed her 2014 and 2016 income tax returns on April 28, 2018. I also find that Applicant has not filed her 2013 and 2015 income tax returns. She is in the process of filing her income tax returns for those years.

Policies

In issuing the SOR, DOD acted under DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); DOD Regulation 5200.2-R, *Personnel Security Program* (January 1987), as amended (Regulation);¹ and the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG) implemented by DOD on September 1, 2006. The case will be decided under Security Executive Agent Directive (SEAD) 4, which promulgated revised *National Security Adjudicative Guidelines* (AG), effective June 8, 2017.

The DOD considers ADP positions to be sensitive positions. For a person to be eligible for sensitive duties, the person's loyalty, reliability, and trustworthiness must be such that assigning the person to a sensitive position is clearly consistent with the national security interests of the United States. SEAD 4, E(4); SEAD 4, App. A ¶ 2.d. Applicants for ADP positions are entitled to the procedural protections in the Directive before any final unfavorable access determination is made.

When evaluating an applicant's suitability for a public trust position, the administrative judge must consider the disqualifying and mitigating conditions in the AG. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. The administrative judge's overarching adjudicative goal is a fair, impartial and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

A public trust position decision resolves whether it is clearly consistent with the interest of national security to grant or continue an applicant's access to sensitive information. The Government must prove, by substantial evidence, controverted facts alleged in the SOR. If it does, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. The applicant bears the heavy burden of demonstrating that it is clearly consistent with the national security interest of the United States to grant or continue his or her access to sensitive information.

Persons with access to sensitive information enter into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability, and trustworthiness of those who must protect national security as their own. The "clearly consistent with the national security interest of the United States" standard compels resolution of any reasonable doubt about an applicant's suitability for access in favor of the Government. Access to sensitive information determinations should err, if

¹ ADP cases are adjudicated under the provisions of the Directive. (Deputy Under Secretary of Defense's Memorandum for the Director, Defense Office of Hearings and Appeals, dated November 19, 2004.)

they must, on the side of denials. SEAD 4, ¶ E(4); SEAD 4, App. A, ¶¶ 1(d) and 2(b). Eligibility for a public trust position decisions are not a determination of the loyalty of the applicant concerned. They are merely an indication that the applicant has or has not met the strict guidelines the Government has established for issuing access to sensitive information.

Analysis

Guideline F, Financial Considerations

Under Guideline F, the trustworthiness concern is that 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)

Applicant's history of financial problems is documented in the file record. She failed to timely file her income tax returns for tax years 2013 and 2014, and acquired an undetermined tax debt. Additionally, she acquired three delinquent accounts. Applicant's documentary evidence is insufficient to establish that she timely filed her 2013 and 2014 income tax returns. She presented no evidence of any payments made to the IRS, or of efforts to contact the IRS to resolve her tax problems before April 2018. The following financial considerations disqualifying conditions apply: AG ¶ 19(a): inability to satisfy debts; AG ¶ 19(b): unwillingness to satisfy debts regardless of the ability to do so; AG ¶ 19(c): a history of not meeting financial obligations; AG ¶ 19(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.

AG ¶ 20 lists five conditions that could mitigate the financial considerations trustworthiness concerns:

(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, 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

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

(e) the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue.

None of the financial considerations mitigating conditions fully apply. Applicant has a history of financial problems, dating back to 2013 that are recent and ongoing.

Applicant claimed in her SOR Answer and at her hearing that she had filed her income tax returns for tax years 2013 and 2014. However, in her last post-hearing correspondence she stated: "Forms and payment was mailed to the IRS for 2014 and 2016 taxes on Saturday, 28 April. I'm working on 2013 and 2015." (AE 2) Based on her email statements, I conclude that Applicant filed her 2014 and 2016 income tax returns on April 28, 2018. I also conclude that Applicant has not filed her 2013 and 2015 income tax returns. She is in the process of filing her income tax returns for those years.

Considering the record as a whole, Applicant's evidence failed to establish that she has been in contact with the IRS to resolve her tax problems, establish a payment plan, or that she has made any payments on her delinquent taxes.

I considered that Applicant's husband was diagnosed with a terminal disease in 2017, and that he passed away shortly thereafter. These facts may excuse, to some extent, her failure to address her tax situation after she received the SOR. Notwithstanding, it does not satisfactorily explain her failure to timely file her 2013 and 2014 income tax returns.

I considered that Applicant disputed the debt alleged in SOR ¶ 1.b, and the debt was resolved in her favor. She also presented documentary evidence that she settled and paid the debt alleged in SOR ¶ 1.d. Applicant claimed she attempted to resolve the debt alleged in SOR ¶ 1.c, but she has been unsuccessful in contacting the creditor (a large wireless services provider). I find for Applicant concerning this debt because she is still a customer of the same creditor. She also claimed she settled and paid the debt alleged in SOR ¶ 1.e, at about the same time she resolved SOR ¶ 1.d. I find for Applicant on this account.

Applicant's husband's disease and death are circumstances beyond her control that may have contributed or aggravated her financial problems. Notwithstanding, Applicant's evidence is insufficient to show she acted responsibly under the circumstances to warrant applicability of AG ¶ 20(b).

Applicant testified that her financial situation improved after the passing of her husband and that she now has the financial means to pay any delinquent debts. Notwithstanding, she provided little information about her current earnings and financial position, except to say that she has \$8,000 in savings. She did not provide any information about her monthly income and expenses, and whether her current income is sufficient to pay her current day-to-day living expenses and debts. There is no information to show that she participated in financial counseling or that she follows a budget. The available information is insufficient to establish clear indications that she does not have a current financial problem, or that her financial problem is being resolved, or is under control. Applicant failed to establish that she has a track record of financial responsibility.

Whole-Person Concept

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, and under the whole-person concept. SEAD 4, ¶¶ 2(a) and 2(d). I have incorporated my comments under Guideline F in my whole-person analysis. Some of these factors were addressed under those guidelines, but some warrant additional comment.

Applicant, 63, has five years of experience as an assistant facility security manager and has held a clearance intermittently since 1995. Because of her experiences, she was aware that failing to timely file income tax returns and pay debts may raise trustworthiness concerns.

Applicant failed to provide sufficient, reliable evidence to show she has been in contact with the IRS, filed her late income tax returns, or that she attempted to settle or pay her delinquent taxes. Her evidence is insufficient to show that she has a track record of financial responsibility, or that her financial problem is being resolved or is under control.

Once a concern arises regarding an Applicant's eligibility for a position of trust, there is a strong presumption against the grant or renewal of eligibility for such position. Unmitigated concerns about Applicant's financial situation lead me to conclude that grant of eligibility for a position of trust to Applicant is not warranted at this time. This decision should not be construed as a determination that Applicant cannot or will not attain the state of reform necessary for award of eligibility for a position of trust in the future. With more effort towards documented resolution of her tax problems, a healthy financial picture, and a track record of behavior consistent with her obligations, she may well be able to demonstrate persuasive evidence of her trustworthiness.

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
Subparagraph 1.a:	Against Applicant
Subparagraphs 1.b – 1.e:	For Applicant

Conclusion

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

JUAN J. RIVERA
Administrative Judge