



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



In the matter of: )  
)  
) ADP Case No. 17-02454  
)  
Applicant for Public Trust Position )

**Appearances**

For Government: Allison Marie, Esq., Department Counsel  
For Applicant: *Pro se*

05/16/2018  
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**Decision**  
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RICCIARDELLO, Carol G., Administrative Judge:

Applicant failed to mitigate the trustworthiness concerns under Guideline F, financial considerations. National security eligibility for a position of trust is denied.

**Statement of the Case**

On July 26, 2017, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued to Applicant a Statement of Reasons (SOR) detailing trustworthiness 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 (AG) effective within the DOD on June 8, 2017.

Applicant answered the SOR on August 19, 2017, and requested a hearing before an administrative judge. The case was assigned to me on December 14, 2017. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on January 24, 2018. I convened the hearing as scheduled on March 20, 2018. The Government

offered exhibits (GE) 1 through 7. Applicant objected to GE 7, which was overruled. Applicant testified and offered Applicant Exhibits (AE) A through F. There were no other objections to any exhibits, and all were admitted into evidence. DOHA received the hearing transcript on March 28, 2018.

### **Findings of Fact**

Applicant admitted the SOR allegations in ¶¶ 1.a through 1.e, and denied 1.f through 1.i. After a thorough and careful review of the pleadings, testimony, and exhibits submitted, I make the following findings of fact.

Applicant is 46 years old. She earned a bachelor's degree in 1994. She was married from 1996 to 1998. She remarried in 2003. She has two grown stepchildren from this marriage. She has been employed by federal contractors since 2003. Applicant's husband works as an independent contractor.<sup>1</sup>

The SOR alleges that Applicant owes Federal income taxes for tax years 2009 (\$80,468); 2010 (\$85,621); 2011 (\$31,410); and 2012 (\$18,286). The SOR also alleges she is indebted to her state for income taxes for tax years 2008 (\$645); 2009 (\$2,499); 2010 (\$8,610); and 2011 (\$1,461). Applicant testified that the amounts owed are for personal income taxes.

Applicant explained that in 2006 she and her husband started a small business. It was successful, and they opened a second location in 2007, which was larger and more costly. They received requests to franchise their business, so they engaged attorneys, accountants, and a franchise consultant. They franchised their business in 2009. During the first year they sold two franchises. The economy struggled. Applicant's husband was working as a 1099 independent contractor from 2009 to 2012. They invested a large portion of their joint income into the business. Applicant's husband did not pay the quarterly income taxes on his income and instead invested the money into the business. Applicant testified that they failed to put money aside to pay the Federal and state taxes from 2008 to 2012. She testified that they were aware at the time they were not paying their taxes, and would have to pay these taxes.<sup>2</sup>

Applicant testified that she was aware of their 2008 tax problems in 2009, but chose to put all of their money into the business. They owed approximately \$40,000 for 2008 Federal income taxes. Applicant received a notice of deficiency from the IRS in November 2009 for the 2008 tax year. An installment agreement was initiated in March 2010 to address her 2008 taxes. This all occurred prior to the deadline to file 2009 Federal tax returns.<sup>3</sup>

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<sup>1</sup> Tr. 26.

<sup>2</sup> Tr. 31, 36-40, 46, 50-51, 67, 84, 90.

<sup>3</sup> Tr. 36-40, 84-89.

Applicant did not disclose any tax issues on her February 2014 public trust application. She stated her failure to disclose this information was unintentional.<sup>4</sup>

Applicant provided a document, dated April 2010, from the person who was managing their finances at the time. It showed their two businesses had financial shortfalls at that time.<sup>5</sup>

Applicant attributed the tax issues to her accountant at the time. She testified that she was ignorant of the significance of penalties and interest that were accruing. She testified that her accountant was not filing their personal income tax returns timely and she thought that the same accountant that handled their business affairs was required to file their personal income tax returns. Her income tax returns were not filed timely.<sup>6</sup>

Applicant provided emails sent to her accountant in April 2012 asking about the status of their 2010 personal income tax returns. She also inquired about filing an extension for their 2011 income tax returns. She inquired about the amount they would owe on their 2011 returns because she was “going to try and get an offer in compromise asap.”<sup>7</sup> She also inquired about their business taxes. Applicant provided an email sent to the accountant from May 2012 inquiring about their 2009 personal and business tax returns. She provided another email from June 2012 inquiring about their 2010 and 2011 tax returns and advising her accountant that their personal bankruptcy was discharged the prior week. She testified that she repeatedly was asking her accountant about their taxes. She stated in an email to him that the IRS “is going to start banging on my door. Just yesterday I received a letter from them asking for my 2010 return.”<sup>8</sup> She told her accountant she would like to file all past due taxes “to get my total due to them to try to do a[n] offer in compromise.”<sup>9</sup>

Applicant testified that she and her husband fired this accountant in 2012, but were unable to retrieve their documents from him. They hired a new accountant who filed their 2009 through 2012 tax returns, but he was unable to review pertinent documents for their

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<sup>4</sup> Tr. 36-40; GE 1. Applicant’s failure to disclose her tax issues on her public trust application will not be considered as a disqualifying condition, but may be considered when making a credibility determination, in the application of mitigating conditions, and a whole-personal analysis.

<sup>5</sup> Tr. 34; AE D.

<sup>6</sup> Tr. 40-42, 45-46. Any derogatory matters not alleged will not be considered for disqualifying purposes, but may be considered when making a credibility determination, in the application of mitigating conditions, and in a whole-person analysis.

<sup>7</sup> AE D.

<sup>8</sup> AE D.

<sup>9</sup> Tr. 40-48; AE D.

returns because the previous accountant would not release them to him. Applicant admitted the previous accountant was not paid.<sup>10</sup>

Applicant and her husband closed one business location in 2011 and the other in 2012, as well as their franchise. They owed significant debt. They filed Chapter 7 bankruptcy in February 2012. The bankruptcy documents indicate they had owed approximately \$421,837 in total liabilities, specifically secured debts (\$19,410), unsecured priority (Federal and state income tax debts, \$120,954), and unsecured nonpriority claims (\$253,473). They listed their income for 2012 as of February 2012 as \$18,000; 2011 income was \$238; 2010 income was \$234,000; and 2009 income as \$205,328. Applicant stated that her husband was unemployed when they filed bankruptcy. He began working after they filed.<sup>11</sup>

Tax documents show that Applicant's combined adjusted gross income for the entire year of 2012 was \$223,000.<sup>12</sup> Their adjusted gross income for 2013 was \$209,226. She testified that her husband was unemployed again in 2014. Their adjusted gross income in 2014 was \$183,000. In 2015, their adjusted gross income was \$221,773, and in 2016 it was \$328,811.<sup>13</sup> A copy of Applicant's husband's LinkedIn resume that was printed in September 2017 shows that he has been employed by the same company since September 2012. It also lists that he was employed for ten months from March 2012 to December 2012, for another company.<sup>14</sup> Applicant testified that she did not think the information on LinkedIn was accurate. Applicant testified that she did not know whether her husband reported to the bankruptcy trustee about his reemployment after the 2012 filing and his additional income.<sup>15</sup>

Applicant testified that she went to a lawyer in November 2012 to arrange payments or an offer in compromise to the IRS. She stated that she arranged to pay \$1,440 a month for the delinquent 2008 through 2012 Federal income taxes. She started to make payments in March 2013 until her husband was laid off, and then stopped. Tax documents show that Applicant made payments of \$720 in March 2013, \$1,440 from April 2013 through September 2013, in November 2013, and from January 2014 through October 2014. She testified that she contacted the IRS to tell them she was unable to make payments because her husband was laid off. Tax documents show the installment

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<sup>10</sup> Tr. 47-50, 68-69.

<sup>11</sup> Tr. 48, 73-78; GE 2, 4.

<sup>12</sup> GE 2 at page 20.

<sup>13</sup> Tr. 81; GE 2 at pages 20-28.

<sup>14</sup> GE 7.

<sup>15</sup> Tr. 73-78, 83.

agreement stopped in February 2015. Tax refunds for 2014 and 2015 were applied to the delinquent balance owed.<sup>16</sup>

Applicant testified that she also owed state income taxes for 2008 through 2012. A state lien was filed in November 2011. She said she was making voluntary payments, but stopped because her husband was laid off, and she could not afford them. Applicant and her husband's adjusted gross income (AGI) for 2015 was approximately \$221,000 and \$328,000 for 2016. In March 2015 her wages were garnished by the state. She said she did not make larger payments to the state because she and her husband had two households for six months, and she was contributing \$600 a month to her mother. Her mother passed away two years ago. She does not provide financial support to anyone at this time. The state lien was released in October 2017.<sup>17</sup>

Applicant was interviewed by a government investigator in April 2014 and July 2016. During her interview, she disclosed she had taken seven-to eight-day cruises in May 2016, November 2015, November 2013, October 2012, and September 2011, and July 2010. She told the investigator that she and her husband purchased and began living in a home in October 2014. She testified that they purchased the home in August 2015. They did not make a down payment because they had a VA loan. She told the investigator she worked part time for a cruise line in October 2014 to November 2014, to earn additional money to purchase their new home.<sup>18</sup>

Applicant hired another attorney in March 2015. She was advised by her attorney to not make payments to the IRS. An offer in compromise was sent to the IRS and it was denied in July 2015. The appeal was also denied. Another offer in compromise was submitted in December 2015. It was rejected in July 2016. It appears that decision was also appealed and rejected by the IRS in February 2017. The letter advised Applicant to pay the account in full as soon as possible.<sup>19</sup>

Applicant does not have an approved installment agreement with the IRS. She provided documents showing a \$2,285 payment to the IRS in March 2017, which was applied to her 2008 Federal tax debt. She made payments of \$1,000 in May 2017; \$1,500 in June 2017, \$1,000 in July 2017; \$800 in August 2017; and \$1,500 in September 2017 through December 2017. She made two payments of \$1,500 in January 2018 and February 2018, and one payment of \$1,500 in March 2018. All of these amounts were applied to the delinquent 2009 taxes owed. The current cumulative balance owed to the IRS is unknown. She testified that she has timely filed and paid their taxes since 2013.<sup>20</sup>

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<sup>16</sup> Tr. 56-61, 64-65, 78-80; GE 2; AE E, F.

<sup>17</sup> Tr. 30, 51-56, 72, 91-98; GE 2, 3, 5, 6.

<sup>18</sup> Tr. 69-70; GE 3.

<sup>19</sup> Tr. 60-62, 82; AE E, F.

<sup>20</sup> Tr. 62- 67, 99-101; GE 2 at pages 7-10; AE E, F.

Applicant provided a personal financial statement from May 2017. She and her husband's net monthly income is \$12,530 and their net remainder after expenses is \$4,101. They have a monthly mortgage payment of \$1,800, and three cars that are financed for a cumulative payment of \$1,500. The statement does not include payments to the IRS.<sup>21</sup>

Applicant stated that she made a dumb mistake and trusted people to do their taxes, which is what caused her financial issues. She provided her performance evaluations for 2016 and 2017, which reflect she is an excellent performer.<sup>22</sup>

## **Policies**

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

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.15 states an "applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and 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

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<sup>21</sup> Tr. 71, 99; GE 2.

<sup>22</sup> AE C.

classified information. Decisions include, by necessity, consideration of the possible risk that an applicant may deliberately or inadvertently fail to safeguard classified or sensitive information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of sensitive information.

Section 7 of EO 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to sensitive information).

## **Analysis**

### **Guideline F: Financial Considerations**

The trustworthiness concern relating to the guideline for financial considerations is set out in AG ¶ 18:

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 provides conditions that could raise trustworthiness concerns. The following are potentially applicable:

- (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 knowingly failed to pay 2009 through 2012 Federal income taxes and 2008 through 2011 state income taxes so she and her husband could use the money to invest in their business. She and her husband filed Chapter 7 bankruptcy and their debts were discharged in September 2012. Despite having personal debts discharged, their

taxes were not paid. There is sufficient evidence to support the application of the above disqualifying conditions.

The guideline also includes conditions that could mitigate trustworthiness concerns arising from financial difficulties. The following mitigating conditions under AG ¶ 20 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, 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;

(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; 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 testified they did not pay their Federal income taxes for 2009 through 2012 and state income taxes for 2008 through 2011 because they were using the money to invest in their business. She attributed her tax problems to her accountant, who did not file their taxes timely and accrued penalties and interest. However, Applicant was aware of her tax deficiencies when she received notice from the IRS in November 2009 when she was arranging an installment agreement for her 2008 Federal income taxes. In her April 2012 email to her accountant, she inquired about the amount of tax they would owe on their 2011 returns because she was "going to try and get an offer in compromise." Applicant intentionally did not pay her taxes and used that money to invest in her business, hoping to negotiate a lower tax payment to the IRS for the delinquent 2011 taxes. The following year, she did not timely pay her 2012 income taxes. She and her husband had a significant amount of debt discharged in bankruptcy in September 2012.

Their adjusted gross income from 2009 through 2016 was over \$200,000 each year, except for 2014 when it was \$183,000, and for 2016 when it was \$328,000. The IRS denied her latest offer in compromise, and she has made payments toward the tax debts. Applicant's Federal tax debt is over \$200,000. Her state tax debt was resolved through a garnishment of her wages. Applicant's deliberate mismanagement of her legal obligations to pay Federal and state income taxes casts doubt on her current reliability, trustworthiness, and good judgment. AG ¶ 20(a) does not apply.

Applicant attributed her financial problems to her accountant's failure to file her tax returns timely. Although there may have been a delay in filing, she testified that taxes were not being paid quarterly on her husband's income. The evidence is sufficient to conclude she was aware that she owed income taxes each year, which she did not timely pay. Instead, she and her husband were investing their tax monies into their business. I find this was within her control. Applicant's debts were discharged in bankruptcy in 2012. There is insufficient evidence to conclude she acted responsibly in paying her taxes. AG ¶ 20(b) does not apply.

Applicant made payments to the IRS for different periods and in different amounts. She sought offers in compromise, which were denied as were her appeals. The IRS demanded full payment in February 2017. Since then she has made payments, but does not have an approved installment agreement. Although the current balance owed to the IRS is unknown, it is likely significant as interest continues to accrue. Based on Applicant's and her husband's income and the modest payments that have been made, I cannot find that there are clear indications the problem is under control. Applicant's state tax debt was paid through a garnishment, and the tax lien was released in October 2017. I cannot find that the garnishment payments for the delinquent state tax debts or the modest payments for the Federal income tax debts constitute a good-faith effort to pay the tax debts. AG ¶¶ 20(c) and 20(d) do not apply.

There is evidence Applicant has been working with an attorney to resolve her remaining Federal income tax debts. Despite her attempts to negotiate offers in compromise with the IRS, they were rejected and a demand was made to pay the amount in full. Since then, despite Applicant's and her husband's income, they have made modest payments. There is no agreement with the IRS in place, other than to pay the amount in full, which has not occurred. Applicant has not completely ignored her responsibility and AG ¶ 20(g) 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 the 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.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a position of trust 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(d) were addressed under those guideline, but some warrant additional comment.

Applicant is a 46-year-old college graduate. She and her husband earn a significant combined income. Quarterly taxes were not paid on her husband's independent contractor income and Federal income taxes were owed for 2009 through 2012, and state taxes for 2008 through 2011. Through difficulties with their accountant, their taxes were not filed timely; however, Applicant was aware they owed income taxes each year, and chose not to pay them. She has made payments of differing amounts and attempted to negotiate offers in compromise with the IRS, but was unsuccessful. Despite being cleared of personal debt through their September 2012 Chapter 7 bankruptcy discharge, she and her husband's significant combined income, annual cruise vacations, and the purchase of a house, she has made a modest effort to pay her tax debts, which raises questions about her good judgment, trustworthiness and reliability.

Although there is some mitigation, it is insufficient to overcome the trustworthiness concerns. The record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a position of trust. For all these reasons, I conclude Applicant failed to mitigate the trustworthiness concerns arising under Guideline F, financial considerations.

### **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.e:	Against Applicant
Subparagraphs 1.f-1.i:	For Applicant

## **Conclusion**

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

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Carol G. Ricciardello  
Administrative Judge