



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



In the matter of:)
)
) ADP Case No. 14-04285
)
)
Applicant for Public Trust Position)

Appearances

For Government: Caroline Heintzelman, Esquire, Department Counsel
For Applicant: *Pro se*

10/09/2015

Decision

HENRY, Mary E., Administrative Judge:

Based upon a review of the pleadings, exhibits, and testimony, I conclude that Applicant's eligibility to occupy a public trust position is denied.

Statement of the Case

Applicant completed an Electronic Questionnaires for Investigations Processing (e-QIP) on March 4, 2013, which she signed on March 6, 2013. The Department of Defense (DOD) Consolidated Adjudications Facility, (CAF) issued a Statement of Reasons (SOR) detailing the trustworthiness concerns under Guideline F, financial considerations on December 22, 2014. The action was taken under DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the *Adjudicative Guidelines For Determining Eligibility for Access to Classified Information* (AG) implemented on September 1, 2006.

Applicant acknowledged receipt of the SOR on January 23, 2015. She answered the SOR in writing on February 20, 2015, and she requested a hearing before an administrative judge with the Defense Office of Hearings and Appeals (DOHA). Department Counsel was prepared to proceed on May 27, 2015, and I received the case assignment on June 8, 2015. DOHA issued a notice of hearing on June 24, 2015, and I convened the hearing as scheduled on July 14, 2015. The Government offered five exhibits (GE) 1 through 5, which were received, marked, and admitted into evidence without objection. Applicant testified. Applicant did not submit any exhibits at the hearing. DOHA received the transcript of the hearing (Tr.) on July 21, 2015. I held the record open until August 14, 2015, for the submission of additional matters. Applicant timely requested an extension of time to submit post-hearing documentation. Her request was granted, and she was given until August 30, 2015 to submit additional documentation. She timely submitted nine exhibits (AE) A through I, which were received, marked, and admitted without objection. The record closed on August 31, 2015.

Findings of Fact

In her Answer to the SOR, Applicant admitted the factual allegations in ¶¶ 1.a, 1.c - 1.s, 1.w, and 1.x of the SOR, with explanations. She denied the factual allegations in ¶¶ 1.b, 1.t - 1.v, and 1.y of the SOR.¹ She also provided additional information to support her request for eligibility for a public trust position.

The SOR lists 25 separate debts, including 18 collection debts totaling \$13,972, a judgment for \$28,189, two tax liens from State A totaling \$36,433, three tax liens from State B totaling \$62,064, and a lien from the Internal Revenue Service (IRS) for \$312,000. The tax liens and judgments relate to her closed small business or the sale of rental property. The SOR debts total approximately \$452,608.

Applicant, who is 59 years old, works as an associate enrollment and eligibility representative for a DOD contractor. She began her current employment in February 2013. Applicant operated a small business from July 2004 until October 2006, when she closed the business. She was unemployed from October 2006 until June 2007. Beginning in June 2007, she worked full time until October 2008, when health issues

¹When SOR allegations are controverted, the Government bears the burden of producing evidence sufficient to prove controverted allegations. Directive, ¶ E3.1.14. "That burden has two components. First, the Government must establish by substantial evidence that the facts and events alleged in the SOR indeed took place. Second, the Government must establish a nexus between the existence of the established facts and events and a legitimate security concern." See ISCR Case No. 07-18525 at 4 (App. Bd. Feb. 18, 2009), (concurring and dissenting, in part) (citations omitted). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability. See ISCR Case No. 08-06605 at 3 (App. Bd. Feb. 4, 2010); ISCR Case No. 08-07290 at 2 (App. Bd. Nov. 17, 2009).

prevented her from working full time. From October 2008 until she began her current position, she worked part-time jobs and experienced short periods of unemployment.²

Applicant graduated from high school. She married in October 1979 and divorced in January 1980. She married a second time in 1982 and divorced in 1985. She married again in 1987 and divorced in 1988. She has no children. Applicant received an associate's degree in nursing and her license as a registered nurse (RN) in 1984. She attended college part time between 2008 and 2010. Applicant allowed her nursing license to expire in 2000 as she was not working in the health care industry.³

On average, Applicant earns \$2,160 a month in gross income, and she receives \$1,641 a month in net pay. Occasionally, she may work overtime, but she cannot depend upon overtime pay as part of her income. Her current monthly expenses include \$485 for rent, \$220 for utilities, \$306 for a car payment, \$135 for car insurance, \$80 on credit card, \$25 for prepaid cell phone, \$35 on student loans, \$32 for storage unit, \$70 for gasoline, \$50 to attorney, \$30 to the State A revenue office, and \$172 for food. Her monthly expenses total \$1,640, leaving \$1 to pay her debts.⁴

Applicant's mother died around 2000. Applicant inherited some money from her mother and decided to stop working. Applicant used her inheritance to purchase three homes. She rented two homes and lived in the third home in State B. The rental income paid the mortgages on the homes. In 2003, Applicant sold one of the rental homes for \$780,000. She purchased this home for \$310,000, giving her a profit of \$470,000. Applicant's financial problems began with the sale of this house. She later sold the other homes for unknown amounts and indicated that she did not have any financial problems related to these homes.⁵

Applicant prepared her 2003 tax return. The return showed that she owed \$912 in income tax. She gave her then boyfriend \$1,000 to purchase a cashier's check to send with her tax return. She thought that he had filed the return, and she did not learn that the return had not been filed until 2010. The \$312,000 federal tax lien for the tax year 2003 relates to the sale of the above rental property. Applicant believed that all taxes related to the sale of her property had been resolved at settlement. She later learned that her belief had been incorrect.⁶

In addition to the above IRS tax lien, State B filed three tax liens against Applicant. The first lien was filed in September 2004 for \$3,370. The second lien was

²GE 1; GE 5; Tr. 17.

³GE 1; GE 5; Tr. 16, 18-19.

⁴AE H; AE I; Tr. 39-42.

⁵Tr. 19-24.

⁶Tr. 21-22, 26.

filed in February 2006 for \$53,550, and she believes this relates to the property sold in 2003. The third lien was filed in December 2006 for \$5,224. Applicant does not know the basis for the two smaller liens because her monthly mortgage payments on her property included money for property taxes.⁷

In February 2015, Applicant hired a tax accountant to help her resolve her tax issues with the IRS and State B. Before Applicant could proceed with any resolution of her taxes, she had to file her 2005 income tax return with the IRS and State B, and she had to submit a power of attorney to each tax entity. It took three months to get the power of attorney approved by both entities. Applicant advised that she did not file an income tax return in 2005 because she did not earn any money that year. Her accountant later prepared her 2005 tax return, and it has been filed. With the assistance of her accountant, Applicant plans to make an offer in compromise to the IRS and State B to settle her tax debts after the actual amount of taxes owed is determined. She believes that the amount of taxes sought for the sale of her property in 2003 are incorrect. She agrees that she incurred a capital gains tax after the sale of the house, but the amount sought is incorrect as the IRS did not calculate the costs related to the house she sold. She is not ready to proceed with the offer in compromise.⁸

Applicant moved to State C in 2003. She opened a small business in 2004. When she opened the store, she signed a five-year rental lease for space in a strip mall. She paid \$5,500 a month for rent and she paid this amount every month the store operated. She closed the store in October 2006 because her store did not earn any income due to market changes in the surrounding area. When she closed the store, she stopped paying the rent. The landlord rented the property three months later, but sued her for unpaid rent. The \$28,189 judgment concerns the unpaid rent.⁹

As a business owner in State C, Applicant paid a yearly fee of \$100 for a business license, and she paid sales taxes on all her business sales each month. State C filed a tax lien in August 2006 for \$11,541 and a second tax lien in May 2011 for \$24,892. Applicant believes these liens are related to her business sales. After the hearing, Applicant submitted a document from State C about her sales tax debt. From this document, she appears to owe State C about \$20,000. The document does not clearly show what she owes and what she paid in the past on her sales taxes. Applicant threw away all her documentation related to her business when she moved to State A, where she currently lives. She has no money at the present time, but she plans to resolve this debt with an offer in compromise in the future. She currently is not receiving notices from State C.¹⁰

⁷Tr. 28-29.

⁸AE B; AE C; Tr. 24-29.

⁹Tr. 29-30, 33.

¹⁰AE E; Tr. 29-31.

Concerning the remaining SOR debts, Applicant provided documentation showing that she does not owe the debt in SOR allegation 1.y (\$2,403). Her former landlord sued her for nonpayment of rent in 2011. Applicant appeared in court to defend the action because she had paid her rent. She provided sufficient information to support her position, and the court dismissed the case.¹¹ As to her remaining debts, Applicant contacted a bankruptcy attorney in February 2013. She began making payments of \$50 a month to the attorney in June 2013 and continues to make her payments, which are part of her budget. She anticipates completing her payments shortly. Once she has paid the money necessary to initiate a bankruptcy, she will file for a Chapter 7 bankruptcy on the advice of her attorney. She expects to include most of her debts except the tax matters.¹²

Applicant has routinely filed her federal and state income taxes since 2005. For the tax year 2014, she owed State A about \$350 on her income taxes. She developed a payment plan with State A. She made her first payment of \$30 in late July 2015, and she made her second payment on August 29, 2015. This payment is included in her budget.¹³

Applicant advised that she did not work to resolve her tax issues when she first learned about them in 2010 because she did not have any money, as she was working part time. She did not believe she had the means to resolve the problem or to hire someone to help her solve her tax issues.¹⁴

Policies

Positions designated as ADP I and ADP II are classified as “sensitive positions.” Assignment to sensitive duties is that, based on all available information, the person’s loyalty, reliability, and trustworthiness are such that . . . assigning the person to sensitive duties is clearly consistent with national interests. The Deputy Under Secretary of Defense (Counterintelligence and Security) Memorandum, dated November 19, 2004, indicates trustworthiness adjudications will apply to cases forwarded to DOHA by the Defense Security Service and Office of Personnel Management. Department of Defense contractor personnel are afforded the right to the procedures contained in the Directive before any final unfavorable access determination may be 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 the factors listed in the

¹¹AE F; Tr. 36-37.

¹²AE A; AE G; Tr. 37-38.

¹³AE D; Tr. 44-45.

¹⁴Tr. 53-54.

adjudicative process. The administrative judge's over-arching 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. 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 to obtain 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

Guideline F, Financial Considerations

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

Failure or inability 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 [sensitive] information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

The guideline notes several conditions that could raise trustworthiness concerns. Under AG ¶ 19(a), an "inability or unwillingness to satisfy debts" is potentially disqualifying. Similarly under AG ¶ 19(c), "a history of not meeting financial obligations" may raise security concerns, Applicant accumulated significant delinquent debt and has unable to pay her obligations. She has filed her 2005 income tax return, which is not an

issue in the SOR. The evidence is sufficient to raise AG ¶¶ 19(a) and 19(c) disqualifying conditions, requiring a closer examination.

The Financial Considerations guideline also includes examples of conditions that can mitigate trustworthiness concerns. I have considered mitigating factors AG ¶ 20(a) through ¶ 20(f), and the following are potentially applicable:

(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), and the individual acted responsibly under the circumstances; 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.

Applicant's financial problems arose, in part, when she closed her business and because she worked only part-time for nearly five years due to health issues. AG ¶ 20(b) is only partially applicable because she has not resolved her debts.

Applicant disputed the debt in SOR allegation 1.y in court, arguing that she had paid her rent. The court dismissed the case when she showed that she had paid her rent. She had a reasonable basis to deny this debt. While she has not disputed it on her credit report, AG ¶ 20(e) is applied to this allegation.

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(a):

(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) 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 public trust position must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. The decision to grant or

deny a trustworthiness determination requires a careful weighing of all relevant factors, both favorable and unfavorable. In so doing, an administrative judge must review all the evidence of record, not a single item in isolation, to determine if a trustworthiness concern is established and then whether it is mitigated. A determination of an applicant's eligibility for a public trust position should not be made as punishment for specific past conduct, but on a reasonable and careful evaluation of all the evidence of record to decide if a nexus exists between established facts and a legitimate trustworthiness concern.¹⁵

In reaching a conclusion, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant's financial problems arose from her poor decision making about her finances when she inherited money from her mother. When she sold one of her rental houses, she understood that she sold the house for a significantly higher price than she paid, creating a capital gains tax issue. Applicant failed to inquire into her tax liabilities for the profit from the sale of this property, creating a significant tax issue for herself. She has not explained what happened to the \$470,000 profit, which was sufficient to pay any incurred tax debt had she taken the steps to learn what her liability would be. The largest tax liens related to the sale of this house. When she closed her business, she still had the responsibility to pay any taxes due and has yet to do so. While she did not work for many months after the close of her business, a factor which would negatively impact her monthly finances, it is unclear if she had savings on which she lived. At this time, Applicant is working steadily, but her current income pays her monthly expenses, leaving her with no funds to pay her debts. She has not shown a track record for debt payment. She has begun the long process for resolving her debts, but it is too soon to know whether she will complete what she has begun. She needs additional time to gain control of her debts before she can be granted a trustworthiness determination.

¹⁵In assessing whether an Applicant has established mitigation under Guideline F, the Appeal Board provided the following guidance in ISCR Case No. 07-06482 at 3 (App. Bd. May 21, 2008):

In evaluating Guideline F cases, the Board has previously noted that the concept of "meaningful track record" necessarily includes evidence of actual debt reduction through payment of debts." See, e.g., ISCR Case No. 05-01920 at 5 (App. Bd. Mar. 1, 2007). However, an applicant is not required, as a matter of law, to establish that he has paid off each and every debt listed in the SOR. See, e.g., ISCR Case No. 02-25499 at 2 (App. Bd. Jun. 5, 2006). All that is required is that an applicant demonstrate that he has "... established a plan to resolve his financial problems and taken significant actions to implement that plan." See, e.g., ISCR Case No. 04-09684 at 2 (App. Bd. Jul. 6, 2006). The Judge can reasonably consider the entirety of an applicant's financial situation and his actions in evaluating the extent to which that applicant's plan for the reduction of his outstanding indebtedness is credible and realistic. See Directive ¶ E2.2(a) ("Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination.") There is no requirement that a plan provide for payments on all outstanding debts simultaneously. Rather, a reasonable plan (and concomitant conduct) may provide for the payment of such debts one at a time. See, e.g., ISCR Case No. 06-25584 at 4 (App. Bd. Apr. 4, 2008). Likewise, there is no requirement that the first debts actually paid in furtherance of a reasonable debt plan be the ones listed in the SOR.

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a trustworthiness determination. For all these reasons, I conclude Applicant has not mitigated the trustworthiness concerns arising from her finances under Guideline F.

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.x:	Against Applicant
Subparagraph 1.y:	For Applicant

Conclusion

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

MARY E. HENRY
Administrative Judge