



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



In the matter of:)
)
) ADP Case No. 14-06878
)
)
Applicant for Public Trust Position)

Appearances

For Government: Ray T. Blank, Jr., Department Counsel
For Applicant: *Pro se*

03/31/2016

Decision

HEINY, Claude R., Administrative Judge:

Applicant contests the Department of Defense’s (DoD) intent to deny her eligibility for a public trust position to work in the defense industry. Applicant failed to file tax returns and pay her state and federal income tax for tax years 2009 and 2010. She owed less than \$400 for the two years. Based upon a review of the case file, pleadings, testimony, and exhibits, eligibility for access to sensitive information and eligibility for a public trust position is granted.

Statement of the Case

Applicant contests the Defense Department’s intent to deny or revoke her eligibility for a public trust position. Acting under the relevant DoD Directive,¹ the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) on July 30, 2015, detailing financial considerations trustworthiness concerns. On August 31, 2015, Applicant answered the SOR and

¹ Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive), and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

requested a hearing. On February 17, 2015, the Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing for the hearing convened on February 29, 2015.²

At the hearing, Government's Exhibits (Ex) 1 through 5 were admitted without objection. Applicant testified at the hearing. The record was held open to allow Applicant to submit additional information. One additional document, Ex. A, was admitted without objection. On October 14, 2015, DOHA received the hearing transcript (Tr.).

Findings of Fact

In her Answer to the SOR, Applicant admitted failing to file tax returns and paying state and federal income tax for tax years 2009 and 2010. She denied owing the \$428 telephone bill. I incorporate Applicant's admissions as facts. After a thorough review of the pleadings, exhibits, and testimony, I make the following additional findings of fact.

Applicant is a 49-year-old senior customer service representative who has worked for a defense contractor since October 2003, and seeks to obtain a public trust position. (Ex. 1) From November 2002 through January 2003, she was unemployed before obtaining a temporary job which lasted until she obtained her current job. (Ex. 1, Tr. 20)

In Applicant's April 4, 2012 Electronic Questionnaires for Investigations Processing (e-QIP), she indicated she had not filed tax returns or paid her 2009 and 2010 state and federal income taxes. (Ex. 1) She indicated she completed the tax returns, but did not file because she did not have the funds to pay her taxes. She estimated owing \$100 in federal tax and \$45 in state tax. She did the same thing for 2010 when she estimated owing \$150 federal tax and \$45 state tax. (Ex. 1) She provided copies of her federal returns showing \$155 was owed for tax year 2009 and \$143 for tax year 2010. (Ex. A) Once Applicant failed to file her returns for these two years, she let time pass and did not revisit her failure to file the returns. She stated it was "out of sight, out of mind." (Tr. 26, 27) She also stated she felt a bit overwhelmed or intimidated because her non-filing hung over her. (Tr. 41)

For all tax years except these two years, Applicant received a tax refund. (Tr. 20) She asserted she had previously asked her employer to withhold more tax from her wages, but her employer failed to do so. (Tr. 26)

On March 2, 2016, Applicant went to a tax preparation service and paid them \$120 to assist her in filing her delinquent taxes. (Tr. 16) For tax year 2009, her adjusted gross income (AGI) was \$30,386, resulting in federal tax of \$2,736. She had \$2,581 withheld from her wages, which left \$155 owing. For tax year 2010, her AGI was \$29,063, with \$2,397 withheld from her wages. Her federal taxes were \$2,540, which left her owing \$143. Because she did not make a timely filing there will be some amount of penalty and interest added to her tax liability for these two years.

² Applicant had no issue with the 15-day rule from notice to hearing. She was ready to proceed and did not need any additional time to prepare for the hearing. (Tr. 11)

Now that Applicant has filed her returns, she is waiting for the Internal Revenue Service (IRS) to send her a letter informing her exactly how much she owes. (Tr. 30) Then, she will return to the tax preparation service to make final payment on her taxes. She has also filed her state returns. (Tr. 31) She has filed all tax returns for tax years 2011 through 2015. (Tr. 37) In 2012, she received a refund of \$400 to \$500 for tax year 2011. (Tr. 40) She could have used this refund to pay the two previous years taxes, but did not. (Tr. 40)

When Applicant's two-year telephone service contract ended she was paying month-to-month. She then transferred to a new carrier and was charged \$428 (SOR 1.e), which represented four months of telephone service. Applicant believes that she only owes for two months. She does not dispute the obligation, only the amount owed. She asserts her previous company knew she was switching provider, but still charged her for four months. (Tr. 22) She had not addressed this debt because she is attempting to address her past-due tax obligations first. (Tr. 23)

In 2008, Applicant got behind on her car payments for her 2004 Saturn automobile.³ The vehicle was repossessed and sold leaving a balance owed of \$5,257. She made a repayment arrangement and, in May 2008, started making monthly payments of more than \$200 each. (Ex. 1) As of July 2012, she was still making her monthly payments. (Ex. 5) The amount of money she paid through the repayment agreement would have more than paid the balance due on the vehicle. The obligation does not appear on her August 2014, June 2015, or November 2015 credit reports. (Ex. 2, 3, 4)

Applicant's annual income is approximately \$32,000. (Tr. 24) She is current on her \$450 monthly rent, does not own a vehicle and therefore has no car payments, and is also current on her utility bills and cell phone account. (Tr. 24, 25) She does have a department store credit card, but does not use it. (Tr. 25) She has obtained books, reading material, workbooks, cassettes, and went online to learn more about money management. (Tr.44)

Policies

Positions designated as ADP I and ADP II are classified as "sensitive positions." (See Regulation ¶¶ C3.1.2.1.1.7 and C3.1.2.1.2.3.) "The standard that must be met for . . . 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 the interests of national security." (See Regulation ¶ C6.1.1.1.) 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

³ The information concerning the repossession and repayment of the debt is included to show Applicant's history of honoring repayment agreement.

afforded the right to the procedures contained in the Directive before any final unfavorable access determination may be made. (See Regulation ¶ C8.2.1.)

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 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 sensitive information 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 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

Guideline F, Financial Considerations

Adjudicative Guideline (AG) ¶ 18 articulates the trustworthiness concerns relating to financial problems:

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.

Additionally, an individual who is financially irresponsible may also be irresponsible, unconcerned, negligent, or careless in properly handling and safeguarding 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.

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 upon terms. Absent evidence of strong extenuating or mitigating circumstances, an applicant with a history of serious or recurring financial difficulties is in a position of risk that is inconsistent with holding a public trust position. An applicant is not required to be debt free, but is required to manage her finances so as to meet her financial obligations.

Applicant failed to file her state and federal tax returns for tax years 2009 and 2010. She owes less than \$400 in past due taxes. She also has a \$428 delinquent telephone service obligation. Disqualifying Conditions AG ¶ 19(a), "inability or unwillingness to satisfy debts," AG ¶ 19(c), "a history of not meeting financial obligations," and AG ¶ 19(g), "failure to file annual Federal, state, or local income tax returns as required" apply.

Five Financial Considerations 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, or a death, divorce or separation), and the individual acted responsibly under the circumstances;

(c) the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control;

(d) the individual initiated 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.

Applicant's delinquent financial obligations total less than \$1,000. She owes approximately \$300 in delinquent federal income tax and approximately \$100 in state tax, plus additional amounts for interest and penalty. She also has a \$428 telephone bill.

AG ¶ 20(a) does not apply because the delinquent debts remain unpaid, and because they remain unpaid, they are considered recent. There is nothing in the record supporting that conditions under which the debts were incurred were unusual. Applicant provided no information concerning factors beyond her control. She has been employed by her current employer for more than ten years. AG ¶ 20(b) does not apply.

The mitigating condition listed in AG ¶ 20(c) has some applicability. She has obtained books, reading material, and cassettes to assist her in with financial management. Except for the taxes and telephone bill, she is current on all other financial obligations. She has taken steps to address her delinquent tax obligations. She employed a tax preparation service, filed her state and federal returns for the two years in question, and is awaiting a response from the IRS so she can pay her taxes. The mitigating condition listed in AG ¶ 20(d) has limited applicability because she has taken steps to address her financial obligations even though she is waiting to make payment on her taxes.

The mitigating condition listed in AG ¶ 20(e) does not apply. Although she disputed the \$423 amount owed on the telephone service bill, she acknowledged she owes some amount on this debt. However, she has not provided any documented proof to substantiate the basis of the dispute or provided evidence of actions to resolve the issue. She is attempting to address her past-due tax obligations before addressing this debt.

An applicant is not required to establish that she has paid off each and every debt listed in the SOR. All that is required is for her to demonstrate she has established a plan to resolve her delinquent debt and has taken significant action to implement that plan. I must reasonably consider the entirety of Applicant's financial situation and her actions in evaluating the extent to which that plan is credible and realistic. There is no requirement that a plan provide for payments on all outstanding debts simultaneously. Rather, a reasonable plan may provide for payment on such debts one at a time. 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.

In this case, Applicant's annual income is approximately \$32,000. She is meeting her monthly financial obligations. She has a plan to address her back tax and contacted a service to help her. I consider the filing of her returns to be a significant initial step. She is addressing her taxes first and will then address the telephone bill. There is no requirement that she address both obligations simultaneously.

Once Applicant establishes a repayment agreement, her prior history indicates she honors the agreement. Following the repossession of her vehicle, she was able to arrange a repayment plan to pay the \$5,000 debt. With her history of honoring that repayment agreement, I have confidence she will be able to address her current

delinquent obligations of less than \$1,000. Additionally, her debts are of insufficient magnitude to raise concerns about her current reliability, trustworthiness, or good judgment.

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) 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 public trust position 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. The debts incurred were not the type that indicates poor self-control or lack of judgment, but does show an unwillingness to abide by rules and regulations requiring a person to timely file tax returns. Money was not spent frivolously. The debts set forth in the SOR were not incurred on luxuries. She should have timely filed her tax returns and paid her federal and state taxes for 2009 and 2010. She let five and six years pass before finally filing her returns. Her tax obligation is not large, but neither is her income. There is no evidence she is living beyond her means. Additionally, except for these debts totaling less than \$1,000, she is current on all her other financial obligation.

The issue is not simply whether all her debts are paid—it is whether her financial circumstances raise concerns about her fitness to hold a public trust position. (See AG ¶ 2(a)(1).) Overall, the record evidence leaves me without questions or doubts as to Applicant's eligibility and suitability for a position of public trust. For all these reasons, I conclude Applicant mitigated the trustworthiness concerns arising from her 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, Financial Considerations: FOR APPLICANT

Subparagraphs 1.a –1.e: For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the interest of national security to grant Applicant eligibility for access to sensitive information and eligibility for a public trust position is granted.

CLAUDE R. HEINY II
Administrative Judge