



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



In the matter of:

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ADP Case No. 19-03594

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Applicant for Public Trust Position

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Appearances

For Government: John Lynch, Esquire, Department Counsel

For Applicant: *Pro se*

09/22/2021

Decision

GALES, Robert Robinson, Administrative Judge:

Applicant failed to mitigate the trustworthiness concerns regarding financial considerations. Eligibility for a public trust position to support a contract with the DOD is denied.

Statement of the Case

On May 16, 2018, Applicant applied for a public trust position and submitted an Electronic Questionnaire for Investigations Processing (SF 86). On an unspecified date, the Defense Office of Hearings and Appeals (DOHA) issued her a set of interrogatories. On February 11, 2020, Applicant responded to those interrogatories. On April 24, 2020, the Defense Counterintelligence and Security Agency (DCSA) Consolidated Adjudications Facility (CAF) issued her a Statement of Reasons (SOR) under DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended and modified (Directive); and Directive 4 of the Security Executive Agent (SEAD 4), *National Security Adjudicative Guidelines* (December 10, 2016) (AG), effective June 8, 2017.

The SOR alleged trustworthiness concerns under Guideline F (Financial Considerations) and detailed reasons why the DCSA adjudicators were unable to find that it is clearly consistent with the national interest to grant or continue Applicant's eligibility for occupying a public trust position to support a contract with the DOD. The SOR recommended referral to an administrative judge to determine whether such eligibility should be granted, continued, denied, or revoked.

In a sworn but undated statement, Applicant responded to the SOR, and she requested a hearing before an administrative judge. Department Counsel indicated the Government was prepared to proceed on June 29, 2020. Because of the COVID-19 Pandemic protocols, further processing of the matter was suspended until such time that it could resume. The case was assigned to me on July 2, 2021. A Notice of Defense Collaboration Services (DCS) Video Teleconference Hearing was issued on August 17, 2021. I convened the hearing as scheduled on August 27, 2021.

During the hearing, Government Exhibits (GE) 1 and 2 were admitted into evidence without objection. Applicant testified. The transcript (Tr.) was received on September 3, 2021. Because Applicant had failed to submit her documents to Department Counsel before the hearing commenced, they were marked, but not admitted, until Department Counsel had the opportunity to review them. Applicant Exhibits (AE) A through AE E were subsequently admitted without objection. I kept the record open until September 8, 2021, to enable her to supplement it. Applicant chose not to submit any further documents. The record closed on September 8, 2021.

Findings of Fact

In her Answer to the SOR, Applicant denied, with brief comments, all of the factual allegations pertaining to financial considerations (SOR ¶¶ 1.a. and 1.b.). Applicant's comments are incorporated herein to compare with my findings of fact. After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following findings of fact:

Background

Applicant is a 51-year-old employee of a defense contractor. She has been serving with her current employer as a claims customer services advocate or claims associate since December 2006. At times, she has also been a part-time employee of other commercial stores. The recipient of a General Educational Development (GED) diploma in 1989, she received an associate's degree in 2003 and a bachelor's degree in 2005. She has never served with the U.S. military. She was married in 1994 and divorced in 2000. She remarried in 2000 and divorced in 2006. She remarried in 2009 and separated in 2009. The actual legal status of her most recent marital relationship is not known to her. She has two children, born in 1989 and 1991.

Financial Considerations

Applicant failed to timely file her federal and state income tax returns for the tax years 2017 and 2018. On June 25, 2018, she was interviewed by an investigator with the U.S. Office of Personnel Management (OPM). During that interview, she admitted that she failed to timely file her 2017 income tax returns, essentially claiming that she was unable to do so because she could not find the paperwork to enable her to itemize her medical bills and student loans. She added that her employer was laying off employees and because of the uncertainty of her own job, she simply set her taxes aside. After missing the filing deadline for the 2017 income tax returns, she became nervous about filing the 2018 income tax returns. She subsequently learned that her failure to file the income tax returns for an earlier year did not prevent her from filing the tax returns for later years. She planned on completing her trustworthiness eligibility process before taking on her income tax issues, but intended to file her income tax returns within 90 days. (GE 2, at 5, 10) As of February 11, 2020, she had still not filed her delinquent income tax returns. (GE 2, at 10)

Using the professional services of a tax return preparation service, Applicant electronically filed her federal and state income tax returns for 2018 on April 27, 2020, three days after the SOR was issued. (AE A; AE B) Her federal income tax return for 2017 was electronically filed the following day, four days after the SOR was issued; and the state income tax return was electronically filed on April 29, 2020, five days after the SOR was issued. (AE A; AE B)

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, “no one has a ‘right’ to a [position of public trust].” (*Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988)) As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information. The President has authorized the Secretary of Defense or his designee to grant an applicant eligibility for access to such information “only upon a finding that it is clearly consistent with the national interest to do so.” The Deputy Under Secretary of Defense (Counterintelligence and Security) Memorandum, dated November 14, 2004, indicates trustworthiness adjudications will apply to cases forwarded to DOHA. ADP I (critical-sensitive positions) and ADP II (non-critical sensitive positions) constitute such cases.

When evaluating an applicant’s suitability for a public trust position, the administrative judge must consider the guidelines in SEAD 4. In addition to brief introductory explanations for each guideline, the guidelines list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant’s eligibility for a public trust position.

An administrative judge need not view the guidelines as inflexible, ironclad rules of law. Instead, acknowledging 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. 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 meaningful decision.

In the decision-making process, facts must be established by "substantial evidence." "Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all contrary evidence in the record." (ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1)) "Substantial evidence" is "more than a scintilla but less than a preponderance." (See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994))

The Government initially has the burden of producing evidence to establish a potentially disqualifying condition under the Directive, and has the burden of establishing controverted facts alleged in the SOR. Once the Government has produced substantial evidence of a disqualifying condition, under Directive ¶ E3.1.15, the applicant has the burden of persuasion to present evidence in refutation, explanation, extenuation or mitigation, sufficient to overcome the doubts raised by the Government's case. The burden of disproving a mitigating condition never shifts to the Government. (See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005))

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 as well. It is because of this special relationship that the Government must be able to repose a high degree of trust and confidence in those 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 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. Furthermore, "security clearance determinations, and by inference, public trust determinations, should err, if they must, on the side of denials." (*Egan*, 484 U.S. at 531) 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.

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.

The guideline notes a condition that could raise trustworthiness concerns under 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.

Applicant failed to file her federal and state income tax returns for the tax years 2017 and 2018. As of April 24, 2020, the date the SOR was issued, none of those income tax returns had been filed. In fact, Applicant has conceded that they were not filed until April 27th, April 28th, or April 29th, 2020, several days after the SOR was issued, and nearly two years after she was interviewed by the OPM investigator. AG ¶ 19(f) has been established.

The guideline also includes examples of conditions that could mitigate security concerns arising from financial difficulties 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 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; 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.

AG ¶ 20(g) applies, but none of the other mitigating conditions apply. The nature, frequency, and recency of Applicant's failure to voluntarily and timely resolve those delinquent federal and state income tax issues for several years, despite her promises to do so within 90 days after her June 2018 OPM interview, make it rather easy to conclude

that those issues were not infrequent. Applicant attributed her failure to timely file her income tax returns to being unable to find necessary paperwork to enable her to itemize her medical bills and student loans; the fact that her employer was laying off employees and she was uncertain of her own job, so she simply set her taxes aside; and after missing the filing deadline for the 2017 income tax returns, she became nervous about filing the 2018 income tax returns. Those factors were not beyond her control, and she failed to act responsibly under the circumstances.

An applicant who begins to resolve his or her financial problems only after being placed on notice that his or her public trust position is in jeopardy may be lacking in the judgment and self-discipline to follow rules and regulations over time or when there is no immediate threat to his or her own interests. (See, e.g., ISCR Case No. 17-01213 at 5 (App. Bd. Jun. 29, 2018); ISCR Case No. 17-00569 at 3-4 (App. Bd. Sept. 18, 2018).

Applicant completed her SF 86 in May 2018; underwent her OPM interview in June 2018; completed her responses to the interrogatories in February 2020; and the SOR was issued in April 2020. Each step of the trustworthiness review process placed her on notice of the significance of the financial issues confronting her. With respect to her unfiled federal and state income tax returns, there is evidence that Applicant took no action to resolve any of those issues for nearly two years after her OPM interview. She finally filed those delinquent income tax returns within days of the SOR being issued, but it remains unclear if she did so before or after the SOR was received by her. By failing to timely file her income tax returns, she did not demonstrate the high degree of good judgment and reliability required of those granted eligibility to a public trust position.

The DOHA Appeal Board has observed:

Failure to file tax returns suggests that an applicant has a problem with complying with well-established governmental rules and systems. Voluntary compliance with such rules and systems is essential for protecting [sensitive] information. ISCR Case No. 01-05340 at 3 (App. Bd. Dec. 20, 2002). As we have noted in the past, a [public trust] adjudication is not directed at collecting debts. See, e.g., ISCR Case No. 07-08049 at 5 (App. Bd. Jul. 22, 2008). By the same token, neither is it directed toward inducing an applicant to file tax returns. Rather, it is a proceeding aimed at evaluating an applicant's judgment and reliability. *Id.* A person who fails repeatedly to fulfill his or her legal obligations does not demonstrate the high degree of good judgment and reliability required of those granted access to [sensitive] information. See, e.g., ISCR Case No. 14-01894 at 5 (App. Bd. Aug. 18, 2015). See *Cafeteria & Restaurant Workers Union Local 473 v. McElroy*, 284 F.2d 173, 183 (D.C. Cir. 1960), *aff'd*, 367 U.S. 886 (1961).

ISCR Case No. 14-04437 at 3 (App. Bd. Apr. 15, 2016). See ISCR Case No. 14-05476 at 5 (App. Bd. Mar. 25, 2016) (citing ISCR Case No. 01-05340 at 3 (App. Bd. Dec. 20, 2002)); ISCR Case No. 14-01894 at 4-5 (App. Bd. Aug. 18, 2015).

The Appeal Board clarified that even in instances where an applicant has purportedly corrected his or her federal tax problem, and the fact that the applicant is now motivated to prevent such problems in the future, does not preclude careful consideration of an applicant's [trust]worthiness in light of his or her longstanding prior behavior evidencing irresponsibility including a failure to timely file federal income tax returns. (See ISCR Case No. 15-01031 at 3 and note 3 (App. Bd. June 15, 2016) (characterizing "no harm, no foul" approach to an Applicant's course of conduct and employment of an "all's well that ends well" analysis as inadequate to support approval of access to [a public trust position] with focus on the timing of filing tax returns).

Applicant's actions, or inaction, under the circumstances cast doubt on her current reliability, trustworthiness, and good judgment. (See ISCR Case No. 09-08533 at 3-4 (App. Bd. Oct. 6, 2010).)

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a position of public trust 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 SEAD 4, App. A, ¶ 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 SEAD 4, App. A, ¶ 2(c), the ultimate determination of whether to grant eligibility for a position of public trust must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. Moreover, I have evaluated the various aspects of this case in light of the totality of the record evidence and have not merely performed a piecemeal analysis. (See *U.S. v. Bottone*, 365 F.2d 389, 392 (2d Cir. 1966); See also ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006))

There is some evidence in favor of mitigating Applicant's trustworthiness concerns. Applicant is a 51-year old employee of a defense contractor. She has been serving with her current employer as a claims customer services advocate or claims associate since December 2006. At times, she has also been a part-time employee of other commercial stores. The recipient of a GED diploma in 1989, she received an associate's degree in 2003 and a bachelor's degree in 2005. She finally filed her delinquent income tax returns for the tax years 2017 and 2018 in late April 2020.

The disqualifying evidence under the whole-person concept is simply more substantial. Applicant failed to timely file federal and state income tax returns for the tax years 2017 and 2018. Despite her promises to do so within 90 days after her June 2018 OPM interview, as of the date the SOR was issued on April 24 2020, none of those income tax returns had actually been filed.

Overall, the evidence leaves me with substantial questions and doubts as to Applicant's eligibility and suitability for a position of public trust. For all of these reasons, I conclude Applicant has failed to mitigate the trustworthiness concerns arising from her financial considerations. See SEAD 4, App. A, ¶¶ 2(d) (1) through AG 2(d) (9).

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. and 1.b.: Against Applicant

Conclusion

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

ROBERT ROBINSON GALES
Administrative Judge