

KEYWORD: Financial

DIGEST: Applicant is 60 years old and has worked for a federal contractor as a business manager since 2005. He owes more than \$169,000 in delinquent tax debts from 2001. He failed to provide substantive mitigating information as to why he failed to deal with his tax problems in a timely manner. He failed to provide a plan on how he will repay the debts. Applicant failed to mitigate the trustworthiness concerns. Eligibility is denied.

CASENO: 06-25545.h1

DATE: 05/31/2007

DATE: May 31, 2007

In re:)	
)	
-----)	
SSN: -----)	ADP Case No. 06-25545
)	
Applicant for Public Trust Position)	
)	

**DECISION OF ADMINISTRATIVE JUDGE
CAROL G. RICCIARDELLO**

APPEARANCES

FOR GOVERNMENT

Candace L. Le'i, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is 60 years old and has worked for a federal contractor as a business manager since 2005. He owes more than \$169,000 in delinquent tax debts from 2001. He failed to provide substantive mitigating information as to why he failed to deal with his tax problems in a timely

manner. He failed to provide a plan on how he will repay the debts. Applicant failed to mitigate the trustworthiness concerns. Eligibility is denied.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue an ADP I/II/III position for Applicant. As required by the Department of Defense Regulation 5200.2-R (Jan. 1987), as amended (Regulation) and Department of Defense Directive 5220.6 ¶ E3.1.2 (Jan. 2, 1992), as amended (Directive), DOHA issued a Statement of Reasons (SOR) on February 1, 2007, detailing the basis for its decision—concerns raised under Guideline F (Financial Considerations) of the revised Adjudicative Guidelines issued on December 29, 2005, and implemented by the Department of Defense effective September 1, 2006.¹ In a sworn statement dated February 16, 2007, Applicant responded to the SOR allegations. Applicant elected to have his case decided on the written record. Department Counsel submitted the government’s file of relevant material (FORM) on March 23, 2007. The FORM was mailed to Applicant on March 28, 2007, and received on April 10, 2007. Applicant was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant provided additional information and it was received on April 25, 2007. Department Counsel had no objections. The case was assigned to me on May 23, 2007.

FINDINGS OF FACT

Applicant is 60 years old and has been employed by a federal contractor as a business manager since 2005. He is a college graduate with a master’s in business administration. Applicant was unemployed from January 2005 to July 2005. He is divorced and has two children.

Applicant admitted the delinquent debts alleged in SOR 1.a. and 1.b. The debt in SOR 1.a is a state tax lien in the approximate amount of \$69,541 for tax year 2001. The tax lien was filed in February 2004. Applicant has a second state tax lien in the amount of approximately \$39,905, which was filed in November 2006. This tax lien was not alleged in the SOR and will not be considered for disqualifying purposes. However, it will be considered when accessing Applicant’s ability to repay his debts and when analyzing the “whole person.”² The debt in SOR 1.b. is a debt to the Internal Revenue Service in the approximate amount of \$100,000 for tax year 2001. Applicant does not dispute the debts in SOR 1.a and 1.b.

Applicant’s sworn statement attributes these debts to the following factors: (1) a business he owned and was trying to keep solvent so he used funds from his personal accounts; (2) his wife’s

¹See Memorandum from the Under secretary of Defense for Intelligence, Dated August 30, 2006, subject: Implementation of the Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (December 29, 2005).

²Conduct not alleged in the SOR may be considered: “(a) to assess an applicant’s credibility; (b) to evaluate an applicant’s evidence of extenuation, mitigation, or changed circumstances; (c) to consider whether an applicant has demonstrated successful rehabilitation; (d) to decide whether a particular provision of the Adjudicative Guidelines is applicable; or (e) to provide evidence for whole person analysis under Directive Section 6.3.” ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006) (citations omitted). Additionally, the Appeal Board has determined that even though crucial security concerns are not alleged in the SOR, the Judge may consider those security concerns when they are relevant and factually related to a disqualifying condition that was alleged in the SOR. ISCR 05-01820 at 3 n.4 (App. Bd. Dec. 14, 2006) (citing ISCR Case No. 01-18860 at 8 (App. Bd. Mar. 17, 2003) and ISCR Case No. 02-00305 at 4 (App. Bd. Feb. 12, 2003)).

increased spending in 1998 for three years; (3) the stock market and margin calls, which created taxable events; (4) he had “nearly” no income until he obtained his present job in August 2006.³

Applicant did not provide any amplifying information as to the causes of his financial difficulties. He listed in his trustworthiness application that he started work for his present employer in July 2005.⁴ He lists he was unemployed for a period in 2005, but also lists he was employed from December 2003 to December 2004, as a vice president of operations for a company, and was employed as the owner of his own business from 1998 to 2003. However he also states he closed the business in 2001.⁵ Without amplification, his information is conflicting.

Applicant stated he contacted his state tax office and the IRS several times since 2002, but did not elaborate as when he did this and what transpired, if anything. He stated he recently contacted them both, but claimed they did not reply. He spoke with an accountant the day before he provided his answer to the SOR. He stated he presented an offer to compromise, but did not state whether the offer was to the state or the IRS. He stated he had presented an offer to compromise to the IRS 18 months ago and it was rejected for procedural reasons. He failed to explain what he did in response to that rejection. In his answer to the FORM, he stated both his state and federal tax liens were still outstanding, but he is current on his personal and his business taxes for 2003-2006. He stated this was a prerequisite for filing an offer to compromise. He further stated: “I still have a couple of non-monetary prerequisites to satisfy before I can file a [state] or federal [offer to compromise] for 2001 and 2002.”⁶ He did not explain what those prerequisites were and when and if he was going to satisfy them. Applicant did not provide any documentation as to his efforts to resolve these tax debts. He also did not provide any information to show what caused his financial problems and what actions he took to minimize or mitigate the problems. He did not provide any information as to why it has taken more than six years for him to take more than nominal action on his tax debts.

Applicant denied the debt in SOR 1.c, however he did admit that he is indebted to the creditor’s affiliate and was making payments.⁷ In his answer to the FORM he stated he has now satisfied the debt, but failed to provide any documentation to support the payment.

In addition to the second state tax lien not alleged Applicant states in his answer to the FORM that he has two credit card debts totaling \$20,000. He paid off one and owes \$10,000 on the remaining credit card.⁸ This debt will only be considered for purposes of analyzing Applicant’s ability to repay his delinquent debts and in a whole person analysis.

³Answer.

⁴GE 4.

⁵Answer.

⁶Response to Form.

⁷Answer.

⁸See FN 2.

POLICIES

The revised adjudicative guidelines are used to make ADP trustworthiness determinations. 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.⁹

An individual may not be assigned to perform sensitive duties unless a competent security authority determines it is clearly consistent with the interests of national security to do so.¹⁰ Positions designated as ADP I or ADP II are classified as sensitive positions.¹¹ ADP III positions are “nonsensitive positions.”¹² However, DOHA has been directed to apply the due process provisions of the Directive for all trustworthiness determinations under ADP I, II, and including ADP III positions by a memorandum from the Deputy Undersecretary of Defense (Counterintelligence and Security) dated November 19, 2004. Thus, even though ADP III positions are nonsensitive, they are treated in the same way and adjudicated under the same guidelines and procedures as ADP I and II cases.

“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.”¹³ The revised adjudicative guidelines set for potentially disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. Department of Defense contractor personnel are afforded the adjudicative procedures contained in the Directive.¹⁴

“The adjudicative process is an examination of a sufficient period of a person’s life to make an affirmative determination that the person is an acceptable security risk.”¹⁵ Each eligibility determination must be a fair and impartial commonsense decision based on the relevant and material facts and circumstances, the whole-person concept, along with the factors listed in the Directive. Specifically these are: the nature, extent, and seriousness of the conduct; the circumstances surrounding the conduct, to include knowledgeable participation; the frequency and recency of the conduct; the individual’s age and maturity at the time of the conduct; the voluntariness of participation; the presence or absence of rehabilitation and other pertinent behavioral changes; the motivation for the conduct; the potential for pressure, coercion, exploitation, or duress; and the likelihood of continuation or recurrence. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance.

⁹Regulation ¶ C8.2.1.

¹⁰Regulation ¶ C2.1.2.

¹¹Regulation ¶¶ C3.1.2.1.1.7 and C3.1.2.1.2.3.

¹²Regulation ¶ C3.1.2.2.

¹³Regulation ¶C6.1.1.1.

¹⁴Regulation ¶ C8.2.1.

¹⁵Revised Adjudicative Guidelines 2(a).

The sole purpose of a security clearance determination is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.¹⁶ The government has the burden of proving controverted facts.¹⁷ The burden of proof is something less than a preponderance of evidence.¹⁸ Once the government has met its burden, the burden shifts to an applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him.¹⁹ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.²⁰ These same burdens of proof apply to trustworthiness determinations for ADP positions.

No one has a right to a security clearance²¹ and “the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”²² Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.²³ The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of an applicant.²⁴ It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Conditions that could raise a security concern and may be disqualifying, as well as those which would mitigate security concerns, pertaining to the adjudicative guideline are set forth and discussed in the conclusions below.

CONCLUSIONS

I have carefully considered all the facts in evidence and the legal standards discussed above. I reach the following conclusions regarding the allegations in the SOR.

Based upon consideration of the evidence, I find the following adjudicative guidelines most pertinent to the evaluation of the facts in this case:

¹⁶ISCR Case No. 96-0277 at 2 (App. Bd. Jul. 11, 1997).

¹⁷ISCR Case No. 97-0016 at 3 (App. Bd. Dec. 31, 1997); Directive, Enclosure 3, ¶ E3.1.14.

¹⁸*Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

¹⁹ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug. 10, 1995); Directive, Enclosure 3, ¶ E3.1.15.

²⁰ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995); Directive, Enclosure 3, ¶ E3.1.15.

²¹*Egan*, 484 U.S. at 531.

²²*Id.*

²³*Id.*; Directive, Enclosure 2, ¶ E2.2.2.

²⁴Executive Order 10865 § 7.

Financial Considerations are a security concern because 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 classified information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

Based on all the evidence, Financial Considerations Disqualifying Condition (FC DC) 19(a) (*inability or unwillingness to satisfy debts*) and FC DC 19(c) (*a history of not meeting financial obligations*), apply in this case. Applicant has more than \$169,000 in delinquent tax debts from 2001. He did not provide any information as to why he did not address the debts sooner or how he is going to pay them. He did not provide any information of his financial resources or specifically how he got into deep financial trouble.

I have considered all the Financial Considerations Mitigating Conditions (FC MC), and especially considered FC MC 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*), FC MC 20(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 FC MC.20(d) (*the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts*). Applicant's delinquent debts are recent and remain unpaid. Applicant failed to provide any mitigating evidence as to how he was going to pay the debts and assurances that it is unlikely to recur. The tax debts are years old and no substantive proof was provided to show what Applicant has done in the past or how he intends on resolving the debts. Therefore, FC MC 20(a) does not apply.

Applicant alludes to problems he encountered that may have been beyond his control, but failed to elaborate or provide any substantiating documentation. He alludes to the stock market and margin calls as being a problem, but failed to provide how his finances were affected. Both of these financial endeavors are fraught with risk and those involved with them take on the risks with the hope of financial reward, but also the risk of serious financial loss. Although the result of what happens in the stock market and margin calls are beyond an investor's control, the willingness to take the risk is totally within their control. I do not find that condition is beyond a person's control. Applicant also alluded to being unemployed and underemployed, but again failed to elaborate. Applicant has had a significant number of years to address his financial problems and failed to offer any substantiation for his failure to address them. The debt he claimed he paid, he failed to provide documentation that it is satisfied. He apparently has remaining prerequisites to abide by in order to make an offer to compromise, but again he did not elaborate as to what they were. He simply failed to provide substantive mitigating evidence. I find FC MC 20(b) and (d) do not apply.

Whole Person Analysis

In all adjudications, the protection of our national security is the paramount concern. The objective of the security-clearance process is the fair-minded, commonsense assessment of a person's life to make an affirmative determination that the person is eligible for a security clearance. Indeed, the adjudicative process is a careful weighing of a number of variables in considering the "whole person" concept. It recognizes that we should view a person by the totality of their acts, omissions,

motivations and other variables. Each case must be adjudged on its own merits, taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis.

In addition to considering the specific disqualifying and mitigating conditions under each guideline, I have also considered the adjudicative process factors listed in ¶ 2a (1)-(9) of the Directive to be considered in evaluating a person’s eligibility to hold a security clearance. Specifically these are: (1) the nature and seriousness of the conduct and surrounding circumstances; (2) the frequency and recency of the conduct; (3) the age of the applicant; (4) the motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequences; (5) the absence or presence of rehabilitation; and (6) the probability that the circumstances or conduct will continue or recur in the future. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the Guidelines should be followed whenever a case can be measured against this policy guidance.

I considered the whole person in evaluating the case. Applicant has more than \$169,000 in delinquent tax debts as listed in the SOR. He has an additional \$39,000 in tax debts and \$10,000 in credit card debts he owes. These additional debts affect his ability to pay those listed in the SOR. He has not provided documentation on his efforts to repay, an explanation as to specifically how he got into financial problems, or a plan for how he will repay his delinquent debts. After weighing the disqualifying and mitigating conditions under Guideline F and evaluating all the evidence in the context of the whole person, I conclude Applicant has failed to meet his burden and mitigate the security concerns based on financial considerations.

FORMAL FINDINGS

The following are my conclusions as to each allegation in the SOR:

Paragraph 1. Guideline F:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant

DECISION

In light of all of the circumstances in this case, it is not clearly consistent with the interests of national security to grant or continue Applicant’s eligibility for a public trust position. Eligibility is denied.

Carol G. Ricciardello
Administrative Judge