



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



In the matter of:)	
)	
[Redacted])	ADP Case No. 18-01676
)	
Applicant for Public Trust Position)	

Appearances

For Government: Andrea Corrales, Esq., Department Counsel
For Applicant: *Pro se*

07/25/2019

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves trustworthiness concerns raised under Guideline F (Financial Considerations). Eligibility for a public trust position is denied.

Statement of the Case

Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) on April 4, 2017. On November 26, 2018, the Department of Defense (DOD) sent him a Statement of Reasons (SOR), citing trustworthiness concerns under Guideline F. DOD acted under DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); DOD Manual 5200.02, *Procedures for the DoD Personnel Security Program (PSP)*, (April 3, 2017) (Manual), and the adjudicative guidelines (AG) promulgated in Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (December 10, 2016), for all adjudicative decisions on or after June 8, 2017.

The Manual cancelled and incorporated DOD Regulation 5200.2-R, *Personnel Security Program* (January 1987) (Regulation). The Manual covers sensitive positions, but it does not include the specific provisions for ADP cases that were set out in the Regulation. ADP cases continue to be adjudicated in accordance with the Deputy Under

Secretary of Defense's Memorandum for the Director, Defense Office of Hearings and Appeals (DOHA), dated November 19, 2004.

Applicant answered the SOR on December 24, 2018, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on January 30, 2019, and the case was assigned to me on April 23, 2019. DOHA sent Applicant a notice of hearing on May 8, 2019, scheduling the hearing for June 11, 2019. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 4 were admitted in evidence without objection. Applicant testified but did not present the testimony of any other witnesses or submit any documentary evidence. At the end of the hearing, Department Counsel moved to amend the SOR by adding SOR ¶ 1.q, alleging multiple failures to timely file federal and state income tax returns. I granted the motion, without objection from Applicant, and I kept the record open until July 17, 2019, to enable him to submit documentary evidence regarding SOR ¶ 1.q as well as the other allegations. He did not submit anything further. DOHA received the transcript (Tr.) on June 20, 2019.

Findings of Fact

Applicant is a 49-year-old customer-service supervisor employed by a federal contractor since May 2017. He was employed in the private sector until he quit his job in December 2016. He was unemployed until he was hired by his current employer. He has never held a security clearance or eligibility for a public trust position.

Applicant married in December 1994 and divorced in March 2002. He married his current spouse in October 2012. He has three children, ages 24, 14, and 11. The two older children live with him. He pays child support for the 11-year-old, who is from another relationship and lives with her mother. (Tr. 21.) He attended college from May 2013 to August 2016 but did not receive a degree.

Applicant earns about \$59,000 per year. His wife is a corporate vice-president and earns about \$175,000 per year. (Tr. 22-23.) Applicant has a retirement account of about \$50,000 and his wife has a retirement account of about \$100,000.

Applicant disclosed in his e-QIP that a federal tax lien was imposed against him in January 2004, and that he had retained a lawyer to resolve it. (GX 1 at 35.) When he was interviewed by a security investigator in December 2017, he told the investigator that he was notified in 2010 that a federal tax lien had been filed against him for about \$130,000 and that the lien had not been satisfied. (GX 3 at 10.)

When Applicant responded to DOHA financial interrogatories in September 2018, he disclosed that he had failed to file his federal and state income tax returns on time for tax years 2002, 2003, 2004, 2013, 2015, 2016, and 2017. He repeated this disclosure at the hearing. (Tr. 43.) He testified that he believed he was not required to file returns for years when he did not owe any taxes. (Tr. 45-47.)

In his September 2018 responses to DOHA interrogatories, Applicant also disclosed that he owed federal and state taxes for 2000 through 2004 and 2010. (GX 2

at 2.) He testified that he owes about \$40,000 in “real money,” but that the amount of the debt has increased because of penalties and interest. (Tr. 28.) Because he moved frequently, he was not aware of his tax debt until 2010. (Tr. 29.) He testified that he hired a tax preparer to file his tax returns for 2000 through 2004, but the returns were never filed. When he found out about his tax debt in 2010, he encountered difficulty obtaining the documentation he needed to file the returns for 2000-2004 because of the lapse of time. (Tr. 34.)

When Applicant responded to DOHA interrogatories in September 2018, he included an IRS account transcript reflecting that he owed \$761.76 for tax year 2010. (GX 2 at 9.) This tax debt was alleged in SOR ¶ 1.c, which he denied in his answer to the SOR. At the hearing, he was unsure whether the debt had been paid. (Tr. 50.) Although I kept the record open to enable him to provide documentary evidence, he did not provide any further information about this debt.

Applicant testified that he entered into a payment agreement with the IRS around 2011 and was making monthly \$300 payments until he hired a tax-relief company in 2013, and the company advised him to stop making payments so that they could negotiate a settlement with the IRS. He testified that he paid the tax-relief company \$2,500. He provided no documentary evidence of his contract with the tax-relief company. As of the date of the hearing, he had made no payments to the IRS and the tax debt was not resolved. He testified that he received a letter from the IRS in 2018 stating that the balance due was about \$42,000. (Tr. 35-87.) He did not submit a copy of the letter.

When Applicant responded to DOHA interrogatories in September and November 2018, he stated that he had obtained extensions of time to file his federal returns for 2015, 2016, and 2017, and that all returns had been filed. (GX 2 at 2; GX 3 at 3.) He submitted IRS account transcripts for tax years 2008 through 2014. The transcripts reflect that the return for 2008 was filed in July 2011, the returns for 2009 and 2010 were filed in May 2011, the return for 2011 was filed in May 2012, the return for 2013 was filed in March 2015 (after he received an extension until October 2014), and the return for 2014 was filed in August 2015. (GX 2 at 5-12.)

A credit report from October 2018 reflected 12 delinquent medical debts, alleged in SOR ¶¶ 1.d-1.o. All the debts were related to a period of hospitalization when Applicant did not have medical insurance. He submitted an application for relief from the out-of-pocket expenses, but it was denied because his and his wife’s income were too high to qualify for relief. (Tr. 55.)

Four debts, alleged in SOR ¶¶ 1.d-1.g, are for the same amount (\$259) and reflected in the same credit report. The specific creditor is not alleged. In Applicant’s answer to the SOR and at the hearing, he asserted that the four are duplicates of the same debt. He testified that he contacted the hospital in early 2018 and was informed that the four debts were duplicates. (Tr. 54.) He testified that the hospital sent him an updated bill in October 2018, removing the duplicate debts. (Tr. 56.) He did not submit a copy of the updated bill.

Applicant denied the \$70 medical debt alleged in SOR ¶ 1.j, which is reflected in the October 2018 credit report. (GX 4 at 2.) He submitted no evidence showing the basis for his denial and no evidence that he disputed the debt with the creditor, the collection agency, or the credit bureau. He admitted all the other medical debts and stated that he was working with the creditors to resolve them. He testified that he began making monthly \$25 payments to the hospital in April 2018 and had continued making payments up to the date of the hearing. (Tr. 58.) He did not submit any documentary evidence of payments.

The October 2018 credit report also reflects a child-support arrearage of \$273, alleged in SOR ¶ 1.p. Applicant testified that the arrearage arose when he initially denied that he was the father of a child but was later determined to be the father. By the time that paternity was determined, his liability for six or seven months of child-support had accrued. (GX 3 at 11.) He testified that he had paid the arrearage and is currently paying \$495 per month by automatic deduction from his pay. (Tr. 62-63.) The October 2018 credit report reflects that his scheduled payments are \$495 per month, that his last payment was in September 2018, that the balance due was \$768, and that the account was past due for \$273. (GX 4 at 3.) Applicant did not submit any documentation showing that the arrearage was satisfied or that payments were being made by automatic payroll deduction.

Applicant testified that he and his wife have been working with an accountant for seven or eight months to improve their financial management. (Tr. 67-68.) He provided no evidence of specific steps he had taken to improve his financial management.

Policies

The Under Secretary of Defense's Memorandum of November 19, 2004, treats ADP positions as sensitive positions, and it entitles applicants for ADP positions to the procedural protections in the Directive before any final unfavorable access determination may be made. The standard set out in the Manual and the adjudicative guidelines for assignment to sensitive duties is that 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. AG ¶ 2.b.

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. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard sensitive information.

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 an evaluation of the whole person. The administrative judge's overarching adjudicative goal is a fair, impartial and commonsense decision. An administrative judge must consider all

available, reliable information about the person, past and present, favorable and unfavorable.

The protection of the national security is the paramount consideration. Under AG ¶ 2(b), “[a]ny doubt concerning personnel being considered for access to [sensitive] information will be resolved in favor of national security.” The Government must present substantial evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.14. Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). An applicant has the ultimate burden of demonstrating that it is clearly consistent with national security to grant or continue eligibility for a public trust position.

Analysis

Guideline F, Financial Considerations

The SOR alleges an unsatisfied federal tax lien entered in June 2012 for \$484 (SOR ¶ 1.a), an unsatisfied federal tax lien entered in May 2010 for \$132,736 (SOR ¶ 1.b), and a federal tax debt for \$761.76 for tax year 2010 (SOR ¶ 1.c). It also alleges 12 medical debts totaling about \$24,639 (SOR ¶¶ 1.d-1.o) and a delinquent child-support debt for \$273 (SOR ¶ 1.p). Finally, the SOR as amended alleges failure to timely file federal and state income tax returns for tax years 2002 through 2004, 2013, and 2017 (SOR ¶ 1.q).

Applicant asserted that the debts alleged in SOR ¶¶ 1.d-1.g were duplicates, but he did not submit any documentary evidence reflecting that they were duplicates or that the hospital readjusted his bill to reflect the duplication. However, the fact that all four debts are for the identical amount to an unidentified medical provider during the same period of hospitalization lends credence to his claim that the debts are duplicative. When the same conduct is alleged more than once in the SOR under the same guideline, one of the duplicative allegations should be resolved in Applicant’s favor. See ISCR Case No. 03-04704 at 3 (App. Bd. Sep. 21, 2005) (same debt alleged twice). Accordingly, I have resolved SOR ¶¶ 1.e, 1.f, and 1.g in Applicant’s favor on that basis.

The security concern under this guideline 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. . . . An individual who is financially overextended is at greater risk of having to engage in illegal or otherwise questionable acts to generate funds. . . .

This concern is broader than the possibility that a person might knowingly compromise classified or sensitive information to raise money. It encompasses concerns about a person's self-control, judgment, and other qualities essential to protecting classified or sensitive information. A person who is financially irresponsible may also be irresponsible, unconcerned, or negligent in handling and safeguarding classified or sensitive information. See ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012).

Applicant's admissions and the documentary evidence submitted at the hearing establish the delinquent debts alleged in SOR ¶¶ 1.a-1.e and 1.i through 1.p and the failures to timely file federal and state tax returns alleged in SOR ¶ 1.q. The following disqualifying conditions under this guideline are raised by the evidence:

AG ¶ 19(a): inability to satisfy debts;

AG ¶ 19(b): unwillingness to satisfy debts regardless of the ability to do so;

AG ¶ 19(c): a history of not meeting financial obligations; and

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.

The following mitigating conditions are potentially applicable:

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;

AG ¶ 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, a death, divorce or separation, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances;

AG ¶ 20(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;

AG ¶ 20(d): the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts; and

AG ¶ 20(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(a) is not established. Applicant's delinquent debts are numerous, recent, and were not incurred under circumstances making them unlikely to recur.

AG ¶ 20(b) is not fully established. The failure of Applicant's tax preparer to file his federal and state income tax returns for 2000 through 2004 and Applicant's uninsured medical expenses were conditions largely beyond his control. However, he has not acted responsibly. He failed to monitor the performance of his tax preparer for the 2000-2004 returns, and he is unfamiliar with the plan and performance of his tax-relief company regarding his current tax debt. He presented no evidence of any actions by his tax-relief company to resolve his tax debt since he hired it in 2013. He provided no evidence to support his assertion that he is making regular payments on his medical debts.

AG ¶ 20(c) is not established. Applicant's tax-relief company does not provide the type of financial counseling contemplated by this mitigating condition. It is not clear what assistance Applicant is receiving from his accountant, and he has not yet developed a financial plan. He has not provided evidence that his tax debt, medical debts, and child-support obligations are under control.

AG ¶ 20(d) is not established. Applicant provided no documentary evidence to support his assertions that his child-support obligations are current and that he is making regular payments on his medical debts. He admitted at the hearing that he has not made any payments on his tax debt since 2013.

AG ¶ 20(g) is not fully established. Applicant has filed his past-due income tax returns, but he has not made any payments or negotiated any payment agreement for his tax debt. His eventual compliance with his obligation to file tax returns does not end the inquiry. A security clearance adjudication is not a tax-enforcement procedure. It is an evaluation of an individual's judgment, reliability, and trustworthiness. The fact that Applicant has filed his past-due returns "does not preclude careful consideration of Applicant's security worthiness based on longstanding prior behavior evidencing irresponsibility." ISCR Case No. 12-05053 (App. Bd. Oct. 30, 2014). He has known about his tax debt since 2010. He has passively relied on a tax-relief company to resolve it, and he has made no progress in resolving it since he stopped making payments in 2013.

Whole-Person Concept

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. In applying the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a public trust position by considering the totality of the applicant's conduct and all relevant circumstances. An 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.

I have incorporated my comments under Guideline F in my whole-person analysis and I have considered the factors in AG ¶ 2(d) 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 not mitigated the trustworthiness concerns raised by his failures to timely file and pay his federal and state tax returns and his failures to act responsibly regarding the other debts alleged in the SOR. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with national security to grant him eligibility for a public trust position.

Formal Findings

Paragraph 1, Guideline F (Financial Considerations): AGAINST APPLICANT

Subparagraphs 1.a-1.e and 1.i-1.q: Against Applicant

Subparagraphs 1.f, 1.g, and 1.h: For Applicant

Conclusion

I conclude that it is not clearly consistent with the interests of national security to grant Applicant eligibility for a public trust position. Eligibility is denied.

LeRoy F. Foreman
Administrative Judge