



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



In the matter of:)
)
) ADP Case No. 18-02263
)
Applicant for Public Trust Position)

Appearances

For Government: Andrew H. Henderson, Esq., Department Counsel
For Applicant: *Pro se*

08/23/2019

Decision

COACHER, Robert E., Administrative Judge:

Applicant has not mitigated the financial considerations trustworthiness concerns. Personal conduct and criminal conduct concerns were mitigated. Eligibility for access to sensitive information is denied.

Statement of the Case

On November 23, 2018, the Department of Defense (DOD) issued Applicant a statement of reasons (SOR) detailing trustworthiness concerns under Guideline F, financial considerations, Guideline E, personal conduct, and Guideline J, criminal conduct. DOD acted under DOD Directive 5220.6, Defense Industrial Personnel Security Clearance Review Program (January 2, 1992), as amended (Directive); and the adjudicative guidelines implemented on June 8, 2017 (AG).

Applicant answered (Ans.) the SOR on March 14, 2019, and requested a hearing before an administrative judge. The case was assigned to me on April 24, 2019. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on May 23, 2019, and the hearing was convened as scheduled on July 23, 2019. The Government offered exhibits (GE) 1 through 8, which were admitted into evidence without objection.

The Government's exhibit list was marked as hearing exhibit (HE) I. Applicant testified and offered exhibits (AE) A through G, which were admitted into evidence without objection. The record remained open to allow both sides to produce additional evidence. Post-hearing, the Government offered GE 9 and Applicant offered AE H through L. All were admitted without objection. DOHA received the hearing transcript (Tr.) on August 7, 2019.

Findings of Fact

Applicant admitted some of the SOR allegations, with explanations and denied others. His admissions are incorporated as findings of fact. After a review of the pleadings and evidence, I make the following additional findings of fact.

Applicant is a 53-year-old employee of a federal contractor. He has worked for this employer since August 2016. He was unemployed from November 2015 to June 2016 and from April to July 2015. He is a high school graduate. He is twice divorced. His first marriage was from 1988 to 1993 and his second marriage was from 1994 to 2008. He has three children from each marriage. (Tr. 7, 27-30; GE1)

The SOR alleged Applicant failed to timely file his 2013-2015 federal income tax returns; that he owes approximately \$9,725 for delinquent federal taxes for tax years 2014-2017; that he failed to file state income tax returns for tax years 2012-2015; that he is indebted to the state in the amount of \$840, for which four state tax liens were entered; that he has five delinquent debts, including past-due mortgage payments, an auto repossession account, and three collection accounts totaling \$11,023. The SOR also alleged, as both personal and criminal conduct concerns, that Applicant was charged in 2012 with assault of a family member; in 2004 he was arrested and charged with lewdness involving a child; in August 2003, he was cited for having an open container; in November 1986, he was convicted of shoplifting; and in July 1985 he was charged with being a minor in possession of alcohol. Applicant's admissions in his answer, credit reports, and court and police documents establish the allegations. (Ans., GE 3-8)

Financial

Applicant has a history of financial difficulties. He has two earlier bankruptcy discharges, a Chapter 7 discharge in 1993 and a Chapter 13 discharge in 2000. (These bankruptcies were not alleged in the SOR, so I will not use them as a basis for disqualification, but I will use them to assess Applicant's credibility, the potential application of mitigating conditions, and in my whole-person analysis) Applicant experienced periods of unemployment in 2015 and 2016. Applicant owns a home, which he leases out, and some undeveloped property (about 40 acres), which he owns free and clear. He pays \$900 monthly for a well that is on the land. His take-home monthly pay is approximately \$5,000. (Tr. 46-48, 51-52, 61, 63; GE 1, 2, 9) The status of the SOR-related debts is as follows:

SOR ¶ 1.a (failure to file 2013-2015 federal tax returns):

Applicant admitted not timely filing his federal tax returns and testified that because of his periods of unemployment he could not afford to pay what he owed in taxes and therefore he did not file his returns for those years, except for tax year 2013. Applicant provided documentation showing his 2013 federal tax return was timely filed. He claims that his 2014 and 2015 returns were filed in March 2017, but he failed to provide supporting documentation. He also claims that his 2016-2018 federal returns were timely filed. (Tr. 31-35; GE 2: AE A)

SOR ¶ 1.b (delinquent federal taxes for 2014-2017 in the amount of \$9,725):

Applicant admitted owing federal taxes for those years. He provided documentation showing that he entered into a payment agreement with the IRS in July 2018 to make monthly payments of \$130 on his approximately \$10,000 delinquent tax debt. He also documented regular payments from his bank account to the IRS from November 2018 to May 2019 of \$130. (Tr. 35-38; AE A, G, K)

SOR ¶ 1.c -¶ 1.g (failure to file 2009, 2012-2015 state tax returns and amount owed to the state documented by four tax liens in 2009, 2013-2015):

Applicant admitted not timely filing his state tax returns for the same reason he did not file his federal returns—because he did not have the money to pay them at the time. He provided documentation showing that he had a zero balance on his state tax debt as of January 2019, and that all the liens against him were released because all the underlying tax debt was paid. Several of these debts were due to Applicant's property taxes on the land that he owns not for state income tax debt. (Tr. 20-41; AE B)

SOR ¶ 1.h (auto repossession debt-\$6,233):

Applicant explained this debt arose when he co-signed on an automobile lease agreement for his son in approximately 2008. His son lost his job and was unable to continue making the monthly lease payments. In 2009, he turned in the car to the leasing company. This was earlier than the contract allowed for. Applicant's son failed to make payments on the remaining lease term and the debt accrued to Applicant. Applicant's son provided a letter acknowledging his responsibility for the debt. (Tr. 53; AE I)

SOR ¶ 1.i (past-due mortgage payment-\$2,322):

Applicant had become past due on his mortgage payments in the past. He provided documentation showing that as of February 2019, he was current on those payments with no indication of any past-due amount. (Tr. 55; GE 2; AE C)

SOR ¶ 1.j (collection debt-\$1,472):

Applicant claims he settled this debt in January 2019 with a collection company representing the creditor. This debt does not appear on his March 2019 credit report. (Tr. 56; GE 5; AE D)

SOR ¶ 1.k (collection debt-\$636):

Applicant claims this debt was for internet equipment that was returned but never taken off his account. This debt does not appear on his March 2019 credit report. (Tr. 56-57; GE 5; AE H)

SOR ¶ 1.l (collection debt-\$360):

Applicant claims this debt was for a school fee attributed to his daughter. This debt does not appear on his March 2019 credit report. (Tr. 58; GE 5; AE H)

Personal and Criminal Conduct

In March 2012, Applicant and his stepdaughter got into a dispute at their home. Each one stuck the other party. The police arrived and cited both parties for disorderly conduct. No prosecution resulted but Applicant attended an anger management class. No further incidents have occurred between the two of them. (Tr. 45-46; GE 2, 8)

In January 2004, Applicant was home with his two stepdaughters (S1 (13 or 14 years old) and S2 (7 or 8 years old)) who were asleep on the couch in the living room. Applicant tried to wake up the girls and have them move into the bedroom. S1 would not wake up and remained on the couch. Thereafter, both S1 and S2 told their mother that Applicant touched them inappropriately. The girls were interviewed by child protective services. S2 recanted her allegations against Applicant and further stated that S1 had told her to say that she had been inappropriately touched by Applicant even though she had not been touched. Applicant denied any inappropriate touching of the girls. Applicant was initially charged with lewd behavior involving a child, a misdemeanor in March 2004. The charge was dismissed without prejudice in June 2004. Applicant was never recharged with this offense. This incident was investigated by the DOD in 2009 during an earlier investigation. Applicant was not denied trustworthiness determination because of that incident. (Tr. 44; GE 1-2; AE F)

In August 2003, Applicant was cited for possessing an open alcoholic container. While driving home from work, Applicant had an open can of beer in his car. He was stopped by a law enforcement officer and cited for the open container violation. He went to court and paid a fine for the infraction. This incident was investigated by the DOD in 2009 during an earlier investigation. Applicant was not denied trustworthiness determination because of that incident. (GE 2; AE F)

Applicant admitted shoplifting four cassette tapes from a local retail store in 1986. He was charged, pleaded guilty, was fined, and placed on probation for one year. This incident was investigated by the DOD in 2009 during an earlier investigation. Applicant was not denied trustworthiness determination because of that incident. (GE 2; AE F)

In July 1985, Applicant was arrested at a party for being a minor in possession of alcohol and misrepresenting his age. He pleaded guilty and received a fine. This incident was investigated by the DOD in 2009 during an earlier investigation. Applicant was not denied trustworthiness determination because of that incident. (GE 2, 6; AE F)

Character Evidence

Applicant provided four letters of support from his work supervisors. All attest that he is a dedicated and reliable employee who performs hazardous duties on a daily basis. He follows the company's rules and procedures. His operations manager noted that Applicant does community volunteer work and is respected for doing so. (AE L)

Policies

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(a), 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 the national security is the paramount consideration. AG 2(b) requires that "[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the 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.

Section 7 of EO 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See also EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline F, Financial Considerations

The trustworthiness concern for financial considerations is set out in AG ¶ 18 as follows:

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.

The guideline notes several conditions that could raise trustworthiness concerns under AG ¶ 19. Three are potentially applicable in this case:

- (a) inability or unwillingness to satisfy debts;
- (c) a history of not meeting financial obligations; and
- (g) failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same.

Applicant had delinquent debts. He also failed to timely file his 2014 and 2015 federal income tax returns; his 2009 and 2012 through 2015 state income tax returns; he owed approximately \$9,700 in federal taxes for years 2014 through 2017; and he owed state taxes for years 2009 and 2013 through 2015. The evidence is sufficient to raise the above disqualifying conditions.

Several 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

(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.

Applicant's debts are recent, multiple, and cast doubt on his reliability, trustworthiness, and good judgment. Although he has filed all his federal and state tax returns, paid all his state tax obligations, and established a payment plan with the IRS for his unresolved federal tax debt, he only recently took these actions. His remaining non-federal tax debt appears resolved. AG ¶ 20(a) is partially applicable.

Applicant was unemployed for periods of time. This is a condition beyond his control. He eventually resolved his state tax debt and consumer debts, but failed to respond to his federal tax obligations in a timely manner. AG ¶ 20(b) partially applies.

There is no evidence of financial counselling. Given the unpaid status of his federal tax debt and his history of financial troubles, including two previous bankruptcies, there are not clear indications that Applicant's financial problems are under control. Although Applicant filed his federal and state tax returns before the issuance of the SOR, he did not pay his state tax debt until after the issuance of the SOR and his payment plan with the IRS is ongoing. AG ¶ 20(c) and ¶ 20(d) partially apply. Applicant also receives credit under AG ¶ 20(g) for establishing a payment plan with the IRS.

Guideline E, Personal Conduct

AG ¶ 15 expresses the personal conduct trustworthiness concern:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified or sensitive information. Of special interest is any failure to

cooperate or provide truthful and candid answers during national security investigative or adjudicative processes. . . .

AG ¶ 16 describes conditions that could raise a trustworthiness concern and may be disqualifying in this case. The following disqualifying condition is potentially applicable:

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information

Appellant was involved with five criminal incidents in the timeframe from 1985 through 2012. While they may or may not arise to the level of criminal activity sufficient to cause concern under the criminal conduct guideline, they do raise the issue of Applicant's judgment. AG ¶¶ 16(c) applies.

I have also considered all of the mitigating conditions for personal conduct under AG ¶ 17 and considered the following relevant:

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur.

Appellant was last involved in a law enforcement matter in 2012 and the charges were dropped. He has not had any further disputes with his stepdaughter, which led to the 2012 incident. The remaining incidents were not repeated and are mitigated by age. It is unlikely this behavior will recur and Appellant's reliability and trustworthiness have not been impacted. AG ¶¶ 17(c) and 17(d) apply.

Guideline J, Criminal Conduct

The trustworthiness concern relating to the guideline for criminal conduct is set out in AG ¶ 30:

Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations.

AG ¶ 31 describes conditions that could raise a trustworthiness concern and may be disqualifying in this case. The following is potentially applicable:

(b) evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

Appellant was arrested or cited on criminal charges on two occasions in 2004 and 2012. AG ¶ 31(b) applies.

I have also considered all of the mitigating conditions for criminal conduct under AG ¶ 32 and considered the following relevant:

(a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(c) no reliable evidence to support that the individual committed the offense; and

(d) there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

The most recent criminal charge against Appellant occurred in 2012 and involved an altercation with his stepdaughter. A police report describes culpability by both parties. The charge was dropped and Applicant completed an anger management course. No repeat incidents have occurred since that time. The alleged lewdness charge was dismissed when one of the witnesses recanted. That charge was never resurrected. AG ¶¶ 32(a), 32(c), and 32(d) apply.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for access to sensitive information by considering the totality of the applicant's conduct and all relevant 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 access to sensitive information must be an overall commonsense assessment based upon careful consideration of the guidelines and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all relevant facts and circumstances surrounding this case. I have incorporated my comments under Guidelines F, E, and J in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

I considered Applicant's letters of support; the circumstances by which he became indebted; and that he resolved his state tax debt, paid his consumer debt, and set up a payment plan with the IRS. However, I also considered that he failed to timely file his federal and state tax returns and the length of time he took to act on his federal and state tax obligations. He has not established a meaningful track record of financial responsibility, which causes me to question his ability to resolve his future debts. The Guideline E and J concerns were mitigated, mostly by the passage of time.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for access to sensitive information. For all these reasons, I conclude that although Applicant mitigated the Guideline E and J concerns, he has not mitigated the financial considerations trustworthiness concerns.

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.c:	Against Applicant
Subparagraphs: 1.d – 1.i:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraphs: 2.a – 2.e:	For Applicant

Paragraph 3, Guideline J:
Subparagraph: 3.a:

FOR APPLICANT
For Applicant

Conclusion

In light of all of the circumstances, it is not clearly consistent with national security to grant Applicant eligibility for access to sensitive information. Eligibility for access to sensitive information is denied.

Robert E. Coacher
Administrative Judge