



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



In the matter of:)	
)	
[NAME REDACTED])	ADP Case No. 19-01232
)	
Applicant for Public Trust Position)	

Appearances

For Government: Adrienne M. Driskill, Esq., Department Counsel
For Applicant: *Pro se*

12/05/2019

Decision

MALONE, Matthew E., Administrative Judge:

Applicant’s response to the Government’s adverse information about his finances was not sufficient to overcome the trustworthiness concerns raised by his failure to timely file his federal income tax returns and to timely pay his federal income taxes. Applicant’s request for eligibility for a position of public trust is denied.

Statement of the Case

On October 23, 2017, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) to obtain eligibility for a public trust position required for his job with a defense contractor. After reviewing the results of the ensuing background investigation, adjudicators at the Department of Defense Consolidated Adjudications Facility (DOD CAF) were unable to determine, as required by DOD Directive 5220.6, as amended (Directive), that it is clearly consistent with the interests of national security to grant Applicant’s request for a position of public trust.

On June 21, 2019, the DOD CAF issued Applicant a Statement of Reasons (SOR) alleging facts raising trustworthiness concerns addressed through the adjudicative guideline (AG) for financial considerations (Guideline F). The adjudicative guidelines applied by adjudicators were issued by the Director of National Intelligence on December 10, 2016, to be effective for all adjudications on or after June 8, 2017.

Applicant timely responded to the SOR and requested a decision without a hearing. On August 29, 2019, as provided for by paragraph E3.1.7 of the Directive, Department Counsel for the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a File of Relevant Material (FORM). The FORM contained seven documents (Items 1 – 7) on which the Government relies to support the factual allegations in the SOR. Applicant received the FORM on September 30, 2019. He was informed he had 30 days from the date of receipt to object to the use of the information included in the FORM and to submit additional information in response to the FORM.

On November 4, 2019, Applicant submitted two documents in response to the FORM. They are identified as Applicant's Exhibit (AX) A (IRS Transcript, dated October 30, 2019, two pages) and AX B (Capital One Bank letter to Applicant, dated October 27, 2015, one page). Applicant did not object to the admissibility of any of the Government's exhibits. The record closed the same day when Department Counsel waived objection to the admissibility of both exhibits. I received this case for decision on November 21, 2019.

Findings of Fact

Under Guideline F, the Government alleged that Applicant did not file as required his federal income tax returns for the 2011 – 2014 and 2016 tax years (SOR 1.a); that he did not file his state income tax returns for the same years (SOR 1.b); that he owes unpaid federal taxes totaling \$68,702, a debt that is being enforced by a tax lien filed against him in 2017 (SOR 1.c); and that he owes \$2,174 for a delinquent or past-due credit card account (SOR 1.d). Applicant admitted without explanation all four allegations. (FORM, Item 1)

In response to the FORM, Applicant successfully refuted the allegation at SOR 1.d. On October 27, 2015, the creditor resolved that debt in Applicant's favor as a fraudulent use of his personal information. Applicant initially made that claim when he was interviewed by a government investigator in December 2018. In addition to the facts established by Applicant's admissions, I make the following findings of fact. (Response to FORM; FORM, Items 3 and 7)

Applicant is a 60-year-old employee of a defense contractor, for whom he has worked since October 1991. Applicant and his wife have been married since April 2008, and he has lived in the same home since August 1998. (FORM, Item 2)

In Section 26 (Financial Record) of his e-QIP, Applicant disclosed that he did not file his federal income tax returns on time for the tax years 2011 – 2014. He further stated that he filed those returns in 2016. In his e-QIP responses, Applicant also estimated that he owed about \$20,000 in unpaid federal income taxes for those years, and that he was

“working with Tax Relief Agency and the IRS to pay off Federal tax debt.” (FORM, Item 2)

In response to interrogatories sent to Applicant by Department Counsel, Applicant provided information showing that in December 2017, the IRS filed a substitute return for Applicant for the 2011 tax year; and that in January 2017, a substitute return was filed for his 2012 income taxes. In response to the FORM, Applicant provided information showing that he also did not file or pay his 2007 federal income taxes, with the IRS having filed a substitute return in October 2009. As of October 30, 2019, Applicant still owed the IRS \$8,360 for the 2007 tax year. Applicant filed his federal returns for 2013 – 2015 in December 2016. He filed his 2016 and 2017 returns in October 2018, and his 2018 return in June 2019. Applicant’s state income tax returns were filed at or near the same time as his federal returns. He could not file his state returns until his federal returns were filed because the federal information (e.g., adjusted gross income, tax deductions and credits, etc.) were required as input to his state returns. As to all of his income tax returns, Applicant did not claim, and the record does not show, that he requested extensions for the filing deadline in any of the tax years at issue here. (Response to FORM; FORM, Items 2 and 3)

Applicant explained his failure to file his income tax returns as resulting from an inability to pay the additional taxes that were required when his returns were calculated. With each passing year, he avoided filing his returns because he knew he still could not pay, especially as the past-due amounts were adding up. Applicant has estimated he owes as much as \$90,000 in unpaid federal taxes, penalties and interest. The record does not show that Applicant owes any unpaid state taxes. On June 30, 2017 the IRS obtained a federal tax lien against Applicant to enforce a \$68,702 tax debt. As of June 2019, Applicant was working with a tax consulting agency to address his past-due filings and his tax debts. On June 17, 2019, Applicant requested from the IRS transcripts of his federal income tax accounts for the 2011 – 2018 tax years. The same day, he proposed a tax repayment agreement with the IRS whereby he would pay \$990 monthly for 28 months to satisfy a \$49,938.53 tax debt for the 2007 – 2014 tax years. In July and August 2019, Applicant made the first two of those payments. He did not submit any information that addresses repayment of unpaid taxes for 2015 – 2018 or of the \$18,764 difference between his repayment plan and the federal tax lien against him. Additionally, the June 2019 repayment agreement would repay only \$27,720 of the \$49,938 owed for 2007 – 2014. (FORM, Items 3 and 6)

According to the IRS transcript produced with Applicant’s response to the FORM, he earned \$88,534 in 2007. The other IRS transcripts provided in response to interrogatories show his average income between 2011 and 2018 was \$115,828. Applicant did not present any additional information about his monthly finances, his management of his personal finances, or any financial counseling aside from the tax consulting services he obtained. (FORM, Item 3)

Policies

Eligibility for a position of public trust must be based on a determination that it is “clearly consistent with the interests of national security” to do grant such access. Each decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information, and consideration of the pertinent criteria and adjudication policy in the adjudicative guidelines. (See Directive, 6.3) Decisions must also reflect consideration of the factors listed in ¶ 2(d) of the guidelines. Commonly referred to as the “whole-person” concept, those factors are:

- (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.

The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an applicant. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information. This decision is intended only to resolve whether it is clearly consistent with the national interest for an applicant to either receive or continue to have access to sensitive information. (Department of the Navy v. Egan, 484 U.S. 518 (1988))

The Government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke an applicant’s eligibility. Additionally, the Government must be able to prove controverted facts alleged in the SOR. If the Government meets its burden, it then falls to the applicant to refute, extenuate or mitigate the Government’s case. Because no one has a “right” to a position of public trust, an applicant bears a heavy burden of persuasion. (See Egan, 484 U.S. at 528, 531) A person who has access to sensitive or protected information enters into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability and trustworthiness of one who will protect the national interests as his or her own. The “clearly consistent with the national interest” standard compels resolution of any unresolved doubt about an applicant’s suitability for eligibility in favor of the Government. (See Egan; AG ¶ 2(b))

Analysis

Financial Considerations

The Government’s information supports the allegations that Appellant did not file his federal and state income tax returns as required for the 2011 – 2014 and 2016 tax

years. It also showed that Applicant owes at least \$68,702 in unpaid federal income taxes for those years. Although not alleged, Applicant's responsive information also shows that he did not file his 2007 federal income tax return as required and that he still owes \$8,360 in taxes for that year. The federal returns for the tax years at issue have been filed; however, some of those returns were filed as substitutes by the IRS, and none of his returns were filed after approved filing extensions. His federal tax debt remains unresolved, and his failure to file as required appears deliberate and not the result of unforeseen circumstances. These facts reasonably raised some of the trustworthiness concerns stated at 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 . . . 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 [trustworthiness] concern insofar as it may result from criminal activity, including espionage.

More specifically, available information requires application of the following AG ¶ 19 disqualifying conditions:

- (a) inability to satisfy debts;
- (b) unwillingness to satisfy debts regardless of the ability to do so;
- (b) a history of not meeting financial obligations; and
- (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.

Of the mitigating conditions listed under AG ¶ 20, I considered the following as pertinent to these facts and circumstances:

- (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;

(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;

(d) the individual initiated and is adhering to 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.

Only AG ¶ 20(g) applies here. Applicant's financial problems are otherwise ongoing, multiple, and have been a problematic aspect of his background since about 2008, when first failed to file his federal income tax return as required. Applicant knew he was required to file federal and state returns each year. By his own admission, he made a decision in 2012 not to file his 2011 return because he could not afford the extra taxes he would have to pay. He repeated that decision every year thereafter until finally engaging a tax consulting firm in June 2019. A recent debt repayment plan with the IRS does not address all of his unpaid taxes, and he has only made two of the 28 monthly payments required by the plan. Applicant also did not present any information about his current finances or any financial counseling that would show that he will be able to avoid financial problems in the future. Applicant did not establish that his financial problems and noncompliance with basic tax reporting and payment obligations arose from uncontrollable or unforeseen circumstances. Even in the alternative, his actions to resolve his past-due filings and to pay his past-due taxes do not reflect responsible action under the circumstances. For all of the foregoing reasons, application of AG ¶ 20(g) is not sufficient to mitigate the reasonable trustworthiness concerns raised by the Government's information. On balance, Appellant has not presented sufficient information to mitigate the trustworthiness concerns about his finances.

In addition to my evaluation of the facts and application of the appropriate adjudicative factors under Guideline F, I have reviewed the record before me in the context of the whole-person factors listed in AG ¶ 2(d). Applicant is a mature adult who has worked for the same company for 28 years. He is reasonably presumed to understand his income tax reporting obligations, and he did not provide any information that shows his conduct in this regard is not an accurate reflection of his judgement and reliability. My review of all of the available information leaves unanswered the doubts about Applicant's suitability for access to sensitive information that were raised by the adverse financial information examined in his background investigation. Because protection of the national interest is the principal focus of these adjudications, any remaining doubts must be resolved against the individual.

Formal Findings

Formal findings 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
Subparagraph 1.d:	For Applicant

Conclusion

In light of all available information, it is not clearly consistent with the interests of national security for Applicant to have access to sensitive information. Applicant's request for eligibility for a public trust position is denied.

MATTHEW E. MALONE
Administrative Judge