



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



In the matter of: )  
)  
) ADP Case No. 19-01102  
)  
Applicant for Public Trust Position )

**Appearances**

For Government: Jeff Nagel, Esq., Department Counsel  
For Applicant: *Pro se*

01/22/2020

**Decision**

COACHER, Robert E., Administrative Judge:

Applicant has not mitigated the financial considerations trustworthiness concerns. Eligibility for access to sensitive information is denied.

**Statement of the Case**

On June 26, 2019, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing trustworthiness concerns under Guideline F, financial considerations. DOD acted under Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines effective June 8, 2017 (AG).

Applicant answered (Ans.) the SOR on August 22, 2019, and requested an administrative determination. On October 21, 2019, Department Counsel requested that this case be converted into a hearing case before an administrative judge. The case was assigned to me on November 6, 2019. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on November 21, 2019, and the hearing was convened as scheduled on December 17, 2019. The Government offered exhibits (GE) 1 through 4, which were admitted into evidence without objection. The

Government's exhibit list was marked as hearing exhibit (HE) I. Applicant testified, called one witness, and offered one exhibit (AE A), which was admitted without objection. The record remained open until January 10, 2020, and Applicant submitted AE B-C, which were admitted without objection. DOHA received the hearing transcript (Tr.) on December 30, 2019.

### **Findings of Fact**

Applicant admitted all the SOR allegations, with explanations. 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 56-year-old employee of a federal contractor. He has worked for this employer for approximately two years. He is a high school graduate and has completed two years of college. He has been married for 39 years. He has three adult children. He served on active duty in the Air Force from 1982 to 1987 and was honorably discharged. (Tr. 6, 16-18; GE 1)

The SOR alleged Applicant failed to timely file his federal tax returns for tax years 2010, 2011, and 2012, and that he owes the IRS for unpaid taxes in the approximate amount of \$24,712 for tax years 2013, 2014, 2015, 2016, and 2017 (SOR ¶¶ 1.a-1.h). The allegations are supported by admissions in his trustworthiness application, his answers to interrogatives, his federal tax transcripts from 2010 to 2017, and admissions in his SOR answer. (GE 1-3; Ans.)

Applicant attributed his tax problems to the time when he owned his own business. He testified that he owned and operated an auto body repair business from 2006 or 2007 until 2009 when he reported on his trustworthiness application (TA) and in January 2018, during his background interview (BI) that his business operated from April 2009 to February 2011. When he owned his business, he claimed that he hired an accountant to prepare his taxes. He did not remember the name of the accountant. He claims he provided the accountant the necessary documents to file his tax returns and also gave him money to pay the taxes. Applicant believes that the accountant absconded with the funds. He went to the accountant's office in 2010 and found it empty with the telephone disconnected. His 2010 federal tax return was not filed by the accountant. He knows he owes on his federal taxes, but he does not know the amount. (Tr. 19-20, 23-24; GE 1-2)

After Applicant closed his business in 2011, he worked as a truck driver for various companies until beginning his current employment in November 2017. Applicant does not know why he did not timely file his 2011 and 2012 federal returns. In October 2018, Applicant hired an accountant who is a licensed IRS enrolled agent (Agent) to resolve his tax issues. The Agent testified that Applicant owed the IRS approximately \$176,000 for unpaid back federal taxes. He further testified that 90 percent of the tax debt was attributed to Applicant's business in 2009. The Agent filed Applicant's federal returns for years 2010 through 2012 sometime in 2019 (IRS tax transcripts for years 2010 and 2011 indicate that as of June 2019, no returns were filed. The transcript for

year 2012 indicates the return was filed in February 2019). Tax transcripts for years 2013-2017 show that Applicant owes unpaid taxes for each of those years. The Agent testified that all Applicant's federal returns have now been filed. (Tr. 23, 28, 30-31, 33-36, 38; GE 3)

The Agent testified that he has been negotiating with the IRS since December 2018, to reach an offer-in-compromise to enable Applicant to begin paying his tax debt. The current offer would reduce Applicant's tax debt to approximately \$25,000. This amount could be paid over 24 months. Applicant submitted a post-hearing document showing that the IRS agreed to further reduce the offer-in-compromise amount to \$10,486. Applicant and his wife agreed to the new terms on January 8, 2020. The payment terms were as follows: \$152 already paid; \$1,944 payable with the sending of the signed offer-in-compromise addendum form (no payment documentation was provided); \$1,677 due one month after acceptance of the addendum; \$6,711 due five months after acceptance of the addendum. Applicant currently lives paycheck to paycheck and is having his wages garnished to pay for delinquent student loans. If Applicant misses a payment under the offer-in-compromise, the agreement can be voided. (Tr. 38-41, 45; AE A-B; Ans.)

Applicant offered five personal reference letters from coworkers, supervisors, and personal friends. His coworkers and supervisors described him as highly professional, a strong team leader, and trustworthy. His personal references noted his loyalty, dedication, helpfulness, and trustworthiness. (AE C)

Other than seeking assistance with his tax problem, Applicant has not sought financial counseling and did not present evidence of a budget. (Tr. 29)

### **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.

### **Analysis**

#### **Guideline F, Financial Considerations**

AG ¶ 18 expresses the trustworthiness concern for financial considerations:

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 trustworthiness concern insofar as it may result from criminal activity, including espionage.

The guideline notes several conditions that could raise trustworthiness concerns. I have considered all of them under AG ¶ 19 and the following potentially apply:

- (a) inability to satisfy debts;
- (c) 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.

Applicant failed to file his federal income tax returns for years 2010-2012 until sometime in 2019. He owes federal taxes for years 2013-2017, which have not been paid. I find all disqualifying conditions are raised.

The guideline also includes conditions that could mitigate trustworthiness concerns arising from financial difficulties. I have considered all of the mitigating conditions under AG ¶ 20 and the following potentially apply:

- (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.

Applicant's debts are recent, multiple, and cast doubt on his reliability, trustworthiness, and good judgment. His 2010-2012 federal tax returns were recently filed in 2019. He did not pay his taxes owed for years 2013-2017. AG ¶ 20(a) is not applicable. Although Applicant's accountant's negligence or criminal actions in 2009 or 2010, may have contributed to his delayed tax return filing in 2010, they do not justify his delayed return filings for 2011 and 2012. They also do not justify his failure to pay his taxes owed for years 2013-2017. AG ¶ 20(b) does not apply.

Other than his hiring of a tax professional in October 2018, there is no evidence of financial counseling. Applicant recently filed all of his required federal tax returns and has an offer-in-compromise agreement pending with the IRS, but no proof of payment under the offer is in the record, only a promise to do so. While there are some indicators showing that Applicant's financial problems are under control, it is too early to say whether those indicators will endure. AG ¶ 20(c) does not fully apply. His delayed response to dealing with both his tax-filing problem and his delinquent taxes demonstrates something less than a good-faith effort to resolve his tax issues. AG ¶

20(d) does not fully apply. Through the efforts of his Agent, he was able to negotiate a reduction in his overall tax liability from approximately \$176,000 to approximately \$10,400. However, he has not shown any payment under this compromise plan and he is admittedly living paycheck to paycheck. A promise to pay is not equivalent to an established track record of payment. AG ¶ 20(g) does not fully apply because although his returns have now been filed, they were filed late and he has yet to make any payments under the negotiated offer-in-compromise.

### **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(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 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 Guideline F in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under that guideline, but some warrant additional comment.

I considered the circumstances by which Applicant's taxes became an issue. I also considered his military service and the recommendations from his coworkers and friends. However, Applicant's actions to resolve his tax issues can be characterized as, too little too late. He has not established a meaningful track record of financial responsibility, which causes me to question his ability to resolve his taxes.

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 Applicant 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.h:               Against 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.

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Robert E. Coacher  
Administrative Judge