



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
) ADP Case No. 19-03620
)
Applicant for Public Trust Position)

Appearances

For Government: Aubrey M. De Angelis, Esq., Department Counsel
For Applicant: *Pro Se*

06/23/2021

Decision

CERVI, Gregg A., Administrative Judge

This case involves trustworthiness concerns raised under Guideline J (Criminal Conduct), and Guideline F (Financial Considerations). Eligibility for access to sensitive information is denied.

Statement of the Case

Applicant submitted a questionnaire for national security positions (SF-86) on February 26, 2019. Applicant is requesting a trustworthiness determination for access to sensitive information, also known as a “public trust” determination, to occupy an automated data processing (ADP) position. On January 3, 2020, the Defense Counterintelligence and Security Agency Consolidated Adjudications Facility (DCSA CAF) sent him a Statement of Reasons (SOR) alleging trustworthiness concerns under Guidelines J and F. The DOD CAF acted under DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective on June 8, 2017.

Applicant answered the SOR on June 22, 2020 (Ans.) with documents, and requested a decision based on the written record without a hearing. The Government’s

written brief with supporting documents, known as the file of relevant material (FORM), was submitted by Department Counsel and provided to Applicant on November 30, 2020. Applicant was afforded an opportunity to file objections and submit material to refute, rebut, or mitigate the trustworthiness concerns. Applicant received the FORM on January 30, 2021. Applicant submitted a reply email dated February 1, 2021, with supporting documents. Applicant's exhibits are collectively marked as Applicant Exhibit (AE) A, and admitted without objection. The case was assigned to me on February 25, 2021. Government Exhibits (GE) 1 through 7 are admitted into evidence without objection.

Findings of Fact

Applicant is a 49-year-old training content developer for a defense contractor, employed since January 2019. He was unemployed from December 2017 to February 2018; May 2018 to June 2018; and November 2018 until January 2019. (GE 5) Applicant received an associate's degree in 1993 and a bachelor's degree in 1997. He is unmarried, but he has been living with a cohabitant since 2018. (GE 4)

The SOR alleges under Guideline J that Applicant pleaded guilty in January 2002 to two counts of felony grand theft. He was sentenced to 270 days' confinement, five years' probation, and ordered to pay \$142,868 in restitution in monthly payments of \$400 until paid in full. Under Guideline F, the SOR alleges Applicant still owes \$91,155 in restitution after failing to pay monthly payments as required. He is also alleged to have failed to file his Federal and state income tax returns for tax years 2015, 2016, 2017, and 2018 when due. Additionally, Applicant owes \$16,129 in unpaid taxes for tax year 2018. The status of his 2016 income tax returns is unknown. Applicant admitted the Guideline J allegation and denied the Guideline F allegations, with explanations. (Ans., GE 3)

Applicant and a partner operated a finance company that provided business loans. Applicant claimed in his SF 86 that his business partner committed fraudulent activities, and that Applicant was "coerced and ended up being responsible for his [partner's] actions, as a partner of the business." (GE 4) In 2001, Applicant and his partner were charged in a felony complaint with five counts of grand theft, and two special charges alleging Applicant and his partner intended to take over \$250,000 in property. Applicant was convicted of two counts of felony grand theft and, *inter alia*, confinement, probation, and fined \$142,868 to be paid to the court as restitution. He completed probation and the sentence to confinement. As of January 2020, Applicant paid only \$24,029 toward this debt with a balance due of \$91,155. He failed to make any voluntary payments between 2007 and January 2020. As of January 2020, the court forwarded the balance due to an external collection agency. (GE 7)

In response to an interview by a government investigator in April 2019, Applicant claimed that his business partner asked him to write a check for \$100,000. The check was not backed with sufficient funds. Applicant could not recall to whom the check was written or for what purpose, and why he was asked to write it. He was unable to explain his business and the circumstances that led to him writing the bad check. He claimed that he did not know the check would bounce, and that he felt pressured by his partner to write

the check. He incorrectly asserted that he was charged with one count of felony fraud. In response to a series of questions from the investigator regarding the incident, Applicant stated:

Q. You don't know whom the restitution was paid to?

A. I don't.

Q. Was restitution paid in full?

A. I don't think so.

Q. Do you still owe restitution?

A. Yes, I am not sure how much.

Q. Are you actively paying restitution?

A. No.

Q. So you have stopped?

A. Right.

Q. Why have you stopped?

A. I don't know.

Q. Was it a court order to stop?

A. Can't recall.

Q. Were you making payments?

A. Yes.

Q. How much?

A. \$300 or \$400 a month.

Q. You don't know why you stopped paying restitution?

A. I don't know.

Q. When did you make your last payments?

A. I don't remember.

Q. Did your business partner threaten you to write the check?

A. Not sure about threatened, but pressured me a lot, tell me to write it, write it.

Q. How long has it been since your last payment?

A. I know it was back in California but I don't remember.

(GE 5)

In his response to the FORM, Applicant noted that he restarted restitution payments in January 2020, and has been paying \$300 per month through January 2021. (AE A)

During the interview, Applicant also admitted to failing to file or pay Federal and state income taxes when required, including for tax years 2015, 2016, 2017, and he had not begun his 2018 tax returns. Applicant noted that he was unable to file because he could not locate documents after a move, but that he was seeking the documents and attempting to retain a new accountant to assist him. (GE 5)

In response to Government interrogatories, Applicant stated that he filed his 2016 and 2017 Federal and state tax returns but not his 2015 return. (GE 5) According to his Answer to the SOR, Applicant filed his 2015 Federal tax return in June 2020, and his 2016 Federal tax return in January 2020. (Ans., GE 3)

Applicant entered into an installment agreement with the IRS to resolve a delinquent tax account from tax year 2018. He agreed to pay \$250 per month beginning in September 2020. He provided a document showing his payments beginning in September 2020 through January 2021. (AE A) No documentary evidence showing filing or payment of delinquent state income taxes was provided.

Applicant traveled on personal vacations to the Philippines and Peru in 2012, the Czech Republic, Germany, and Austria in 2013; Colombia in 2014; Sweden, Denmark, the Netherlands, Belgium, and France in 2017; Philippines, Canada, and South Africa in 2018; and Finland in 2019. (GE 4) Although Applicant claims to be a good and valued employee in his current position, he did not provide independent evidence of his current financial status, employment performance, or character references.

Policies

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 access to sensitive information.

Analysis

Guideline J, Criminal Conduct

The Security concern under this guideline 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 security concern and may be disqualifying in this case. The following are 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 individual was formally charged, prosecuted, or convicted.

Applicant’s admissions, testimony, and the documentary evidence in the record concerning his criminal conduct and failure to pay restitution as required by the court are sufficient to establish the disqualifying conditions above.

Conditions that could mitigate criminal conduct security concerns are provided under AG ¶ 32. The following are potentially applicable:

(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;

(b) the individual was pressured or coerced into committing the act and those pressures are no longer present in the person’s life; 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.

Applicant's criminal conviction occurred in 2002, he successfully completed probation, and the fraudulent conduct has not been repeated. However, Applicant has not clearly acknowledged the wrongfulness of his conduct, and was vague and less than forthcoming in providing full and complete information regarding his offenses in his SF 86 and to a Government investigator. Applicant also failed to complete his restitution payments when required, and was unaware of specific information as to those payments when questioned by the investigator. Although he resumed restitution payments in January 2020, it is too little, too late. Applicant claimed that his spotty employment from December 2017 to January 2019 inhibited him from paying restitution on time, but the record shows Applicant was able to travel extensively overseas on vacations from 2012 to 2019. His explanations are unsubstantiated and carry little weight. Although the business which led to his criminal conduct has apparently subsided, Applicant has not completed court-ordered restitution and intentionally failed to pay restitution when required. There is no convincing evidence that Applicant was pressured or coerced, and his explanation of coercion raises questions as to his willingness to admit culpability for his crimes. Likewise, little evidence was submitted showing a good employment record or constructive community involvement.

I find that no mitigating condition fully applies. His criminal conduct continues to impugn his status in the community, and shows a serious lapse in judgment and trust that has not yet been mitigated with time or treatment.

Guideline F: Financial Considerations

The trustworthiness 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. . . .

The relevant disqualifying conditions under AG ¶ 19 include:

- (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's admissions and the documentary evidence in the record are sufficient to establish the disqualifying conditions above.

The following 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;

(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.

The DOHA Appeal Board has long held that trustworthiness requirements generally include consideration of a person's judgment, reliability, and a sense of his or her legal obligations. Failure to comply with Federal tax laws suggests that an applicant has a problem with abiding by well-established government rules and regulations. Voluntary compliance with rules and regulations is essential for protecting sensitive information.

Applicant's failure to file his tax returns when required raises questions about his judgment and willingness to abide by rules and regulations. Although Applicant has filed his Federal tax returns late, and is in an IRS tax repayment installment plan. AG ¶ 20 (g) applies. Nonetheless, Applicant showed a serious lapse in judgment and an unwillingness to comply with laws, rules and regulations leading up to his recent repayment arrangements. Applicant's explanations for failing to file tax returns or pay taxes when owed are insufficient to award mitigation credit. His newfound intentions to enter into a payment plan, and to file past-due returns appears motivated by his desire to obtain trustworthiness determination from the Government. Also, there is no evidence that his state income tax obligations have been resolved. Like his restitution payments as noted above, his efforts to resolve his tax delinquencies amounts to too little, too late.

Overall, Applicant has shown insufficient efforts to resolve debts, despite employment since April 2019. No other mitigating condition fully applies.

Whole-Person Concept

Under AG ¶¶ 2(a), 2(c), and 2(d), the ultimate determination of whether to grant national security eligibility must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a position of trust 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).

I considered all of the potentially disqualifying and mitigating conditions in light of the facts and circumstances surrounding this case. I have incorporated my findings of fact and comments under Guidelines J and F, in my whole-person analysis. I considered Applicant's current employment status, and past periods of unemployment.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a public trust position. For these reasons, I conclude Applicant has not mitigated the criminal conduct and 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 J:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Paragraph 2, Guideline F:	AGAINST APPLICANT
Subparagraph 2.a and 2.b:	Against 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 for access to sensitive information is denied.

Gregg A. Cervi
Administrative Judge