



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



In the matter of:)
)
[Name Redacted]) ADP Case No. 20-02375
)
Applicant for Public Trust Position)

Appearances

For Government: Cynthia Ruckno, Esq., Department Counsel
John Lynch, Esq., Department Counsel
For Applicant: Melissa L. Watkins, Esq.

02/23/2024

Decision

HOGAN, Erin C., Administrative Judge:

Trustworthiness concerns raised because of Applicant’s failure to timely file state and federal income tax returns and delinquent federal and state tax debt are not mitigated. Eligibility for a position of trust is denied.

Statement of the Case

On October 5, 2018, Applicant completed and signed his Electronic Questionnaires for Investigations Processing (e-QIP). (Government Exhibit (GE) 1) On December 15, 2021, the Department of Defense Consolidated Adjudication Facility (DOD CAF) issued a statement of reasons (SOR) to Applicant raising trustworthiness concerns under Guideline F, Financial Considerations. On June 17, 2022, the DOD CAF changed its name to the Defense Counterintelligence and Security Agency Consolidated Adjudication Services (DCSA CAS). This case is adjudicated under DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG), which became effective on June 8, 2017.

The SOR detailed reasons why the DCSA CAS did not find under the Directive that it is clearly consistent with the interests of national security to grant or continue a position of trust for Applicant and recommended referral to an administrative judge to determine whether a position of trust should be granted, continued, denied, or revoked. On December 7, 2021, Applicant responded to the SOR and requested a hearing before

an administrative judge. The case was assigned to me on August 8, 2023. On August 16, 2023, DOHA issued a notice of hearing, setting the hearing for October 25, 2023. The hearing was held as scheduled.

During the hearing, Department Counsel offered six exhibits, Government Exhibits (GE) 1 - 6, which were admitted without objection. Applicant offered four exhibits which was admitted as Applicant Exhibit (AE) A - D, without objection. AE D contains 16 enclosures and consists of 269 pages. Applicant testified and called three witnesses. On November 6, 2023, DOHA received a transcript (Tr.) of the hearing. The record closed on that date.

Some details were excluded to protect Applicant's right to privacy. Specific information is available in the cited exhibits and transcript.

Findings of Fact

In Applicant's SOR response, he admitted the allegations in the SOR. His admissions are accepted as findings of fact. Additional findings follow.

Applicant is a 75-year-old contractor for a DOD agency seeking to obtain or maintain a trustworthiness position. He has owned his current company since 2016. He has owned a contracting business since 1995. He served on active duty in the United States Air Force from 1970 to 1973, separating with an honorable discharge. He held a security clearance in the past without incident. His highest level of education is a bachelor's degree. He is married but lives separately from his wife. He has adult children. (Tr.44-46, 87; GE 1; AE D, enclosures 5-6)

Financial Considerations

The SOR alleges Applicant failed to file his federal income tax returns for tax years 2010 through 2018. (SOR ¶ 1.a: GE 1 at 3 - 4; GE 2 at 4, 11); is indebted to the federal Government for delinquent taxes in the approximate amount of \$223,723 for tax years 2010 through 2016. (SOR ¶ 1.b: GE 2 at 4, 11-12, 19-37); failed to file his State A income tax returns for tax years 2010, 2011, 2015, 2016, and 2017 (SOR ¶ 1.c: GE 2 at 38); and is indebted to State A for delinquent taxes in the amount of \$38,595 for tax years 2010, 2011, and 2016. (SOR ¶ 1.d: GE 2 at 2, 4, 13, 38-40).

Additional allegations consist of a \$4,094 delinquent medical account (SOR ¶ 1.e: GE 2 at 5; GE 3 at 1; GE 4 at 2; GE 5 at 2; GE 6 at 8); a \$192 delinquent medical account (SOR ¶ 1.f: GE 2 at 5; GE 3 at 2; GE 4 at 2; GE 5 at 2; GE 6 at 9); and a \$206 delinquent medical account. (SOR ¶ 1.g: GE 2 at 6; GE 3 at 2; GE 4 at 2; GE 5 at 2; GE 6 at 8)

Applicant and his business partner started a consulting business in 1995 (consulting firm #1). His business partner was responsible for the overall management of the business. In other words, he did the payroll, accounting and state and federal tax returns. The business partner died unexpectedly in 1997. Applicant continued to operate consulting firm #1 but was not experienced with running the business operations,

including preparing and filing the state and federal tax returns for the business. As a result, he neglected to file and pay the business's federal and state tax returns as well as his personal federal and state tax returns beginning in 1998. (Tr. 44-49, 89-92)

In 2001, Applicant attended a meeting at State A, regarding filing an application for a tax forgiveness/amnesty. He met CPA #1 at this meeting. She agreed to help him with filing and paying his state and federal income tax returns. She also advised him on the structure of his business. She also brought in a law firm and another accountant who were more experienced in dealing with Applicant's issues. Applicant believes CPA #1 over-charged him. Over a two-year period, he paid her approximately \$38,000. CPA #1 only prepared two years of federal and state income tax returns as of 2003. (Tr. 49-51, 92, 101-102; AE D. enclosure 10 at 245)

CPA #1 advised him to take out a second mortgage on his home in order to resolve his tax debt. In 2003, Applicant saved \$44,000 which he intended to pay off his tax debts. However, he lost a contract unexpectedly and needed the money to pay living expenses. He was unemployed for approximately six months. He rehired CPA #1 around 2004. She filed his several years of taxes. (Tr. 50-51, 101)

Between 2003 and 2011, Applicant's consulting business had several contracts to work on, yet he did not file and pay federal and state taxes for the business or his personal income taxes. He hired CPA #2 in 2011, who helped him, but referred him to CPA #3 who was more familiar with business taxes. CPA #3 referred him to a company who would do his withholding, 401(k), and quarterly filings for him. Between 2001 to 2014, Applicant experienced eight months without a contract and without income. This delayed his attempts to resolve his income taxes. (Tr. 51-52, 97, 103; AE D at 1-19)

In 2016, Applicant's son referred him to CPA #4. He prepared all of Applicant's outstanding state and federal tax returns. He remains his CPA and wrote a letter indicating all tax returns are now filed and they are in the process of negotiating an OIC with the Internal Revenue Service (IRS) with the federal tax debt. Applicant also hired a business to help him prepare his payroll, withholdings, and to prepare his quarterly business and personal income tax returns. (Tr. 52, 98, 104; AE D, enclosure 11 at 247)

Between 2016 and 2019, Applicant had several serious health issues which delayed his ability to file his income tax returns. In 2016, Applicant had what he thought was to be routine outpatient surgery, but it became complicated when it was discovered he had other issues. In 2018, he was diagnosed with cancer and received radiation and therapy over the next two years. (Tr. 52, 105)

In 2016, Applicant shut down consulting firm #1, and started consulting firm #2. CPA #3 helped him file his late federal and state personal and business income tax returns. He and his business, consulting firm #2, have timely filed and paid federal and state income taxes for the past four years. He currently serves as a subcontractor to a prime contractor on a DOD contract. His contract expires in August 2024. He hopes to receive a new contract when his contract expires. He claims that if he does not receive another contract, he may have difficulty paying off the IRS. (Tr. 62, 80, 106-107)

The status of the SOR allegations is as follows:

SOR ¶ 1.a: Failed to timely file, as required, federal income tax returns for at least tax years 2010 through 2018. All Federal income tax returns are filed. The following indicates the dates each tax return was filed:

Tax year 2010: Return filed on September 9, 2019. (Tr. 63; GE 2 at 17-18)

Tax year 2011: Return filed on September 16, 2019. (Tr. 63; GE 2 at 19-20)

Tax year 2012: Return filed on September 16, 2019. (Tr. 63; GE 2 at 21-22)

Tax year 2013: Return filed on September 16, 2019. (Tr. 63; GE 2 at 23-24)

Tax year 2014: Return filed on November 23, 2015. (Tr. 64; GE 2 at 25-27)

Tax year 2015: Return filed on September 16, 2019. (Tr. 63; GE 2 at 28-29)

Tax year 2016: Return filed on January 6, 2020. (Tr. 64; GE 2 at 30-31)

Tax year 2017: Return filed on January 6, 2020. (Tr. 64; GE 2 at 32-33)

Tax year 2018: Return filed on January 6, 2020. (Tr. 64; GE 2 at 34-35)

Tax year 2019: Return filed on August 17, 2020. (Tr. 65; GE 2 at 36-37)

SOR ¶ 1.b: Applicant is indebted to the federal government for delinquent taxes in the approximate amount of \$223,723 for tax years 2010 through 2016: He submitted an OIC for his federal tax debt on July 7, 2022. He offered to pay \$16,000 to resolve his federal tax debt. (AE D, enclosure 10 at 177-245) On August 14, 2023, the IRS rejected the OIC because they believed the amount offered was less than Applicant's reasonable collection potential. The IRS determined he has \$94,058 in net equity in assets. His net monthly income is \$3,973. They also estimated Applicant has a total future income of \$353,671. As of the date of the IRS letter, the total amount of the delinquent tax debt is \$326,872. (AE A at 1-7) Applicant is appealing the denial of the OIC because he contends his future income will not be \$353,671. This future income is apparently assessed at working 89 months. Applicant claims this is impossible because he is 75, in poor health, and the unreliability of competing for and being awarded contracts. The appeal is pending. (Tr. – 65-72; AE B)

SOR ¶ 1.c: Applicant failed to timely file State A's tax returns for tax years 2010, 2011, 2015, 2016, and 2017: He filed State A's tax returns for tax years 2010, 2011 and 2016. (GE 2 at 38-40; AE D at 226).

SOR ¶ 1.d: Applicant was indebted to State A for delinquent taxes in the amount of \$38,595 for tax years 2010, 2011 and 2016: On November 30, 2021, he entered into a payment plan with State A for his outstanding taxes for tax years 2010, 2011, 2016 and 2017. He agreed to pay monthly payments of \$1,324. His first installment was due on

January 1, 2022. He consistently made these monthly payments. (AE D at 260-261) At some point, Applicant submitted an OIC to State A. On June 1, 2023, State A accepted the offer. State A forgave the remaining balance due towards his state income taxes. His delinquent taxes owed to State A are resolved. (AE D at 256)

SOR ¶ 1.e: \$4,094 delinquent medical account: A March 27, 2022, credit report indicates the account is paid. The debt is resolved. (Tr. 77; AE D at 268)

SOR ¶ 1.f: \$192 delinquent medical account: Applicant attempted to resolve this account. He was unable to locate the holder of the account despite several attempts to locate the current creditor. I find for Applicant on this account. It is a medical bill and the amount of the account is de minimis. It does not raise a security concern. (Tr. 78)

SOR ¶ 1.g: \$206 delinquent medical account: Applicant provided proof he resolved this account. (Tr. 79; AE D, Enclosure 16 at 265-267)

Unalleged Tax Debts

During the hearing, Applicant admitted he had not filed or paid federal taxes since 1998. CPA # 1 helped him file his federal income tax returns for 1999 and 2000. CPA # 2 helped him file his federal tax returns for tax years 2008, 2009, and 2014. (Tr. 117) His current accountant, CPA #3, advised him that the IRS did not have his federal income tax records before 2008. In other words, they would not pursue his federal income tax issues between 1998 and 2007 because of the passage of time. (Tr. 112)

Applicant also disclosed that he owed State B income taxes for tax years 2011, 2012, 2013, and 2015. The total amount owed was approximately \$30,000. State B agreed to an OIC for \$17,000. In October 2022, Applicant paid \$17,000 to State B. The state tax debt owed to State B is resolved. (Tr. 75-77, 100, 112; AE D, enclosure 15 at 263)

The failure to timely file and pay federal income taxes from 1998 to 2007 and failure to timely file and pay state income taxes to State B were not alleged in the SOR. In ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006) the Appeal Board listed five circumstances in which conduct not alleged in an SOR may be considered stating:

- (a) to assess an applicant's credibility;
- (b) to evaluate an applicant's evidence of extenuation, mitigation, or changed circumstances;
- (c) to consider whether an applicant has demonstrated successful rehabilitation;
- (d) to decide whether a particular provision of the Adjudicative Guidelines is applicable; or
- (e) to provide evidence for whole-person analysis under Directive Section 6.3.

Applicant's non-SOR conduct will not be considered for disqualification purposes, and consideration will be limited to the five circumstances outlined by the appeal board.

Applicant's gross annual income is \$180,000. His net annual income is \$130,000. He lives separate from his wife but pays her expenses. He will likely move back in with her when he retires to save on expenses. He pays \$1,250 a month for the condominium he rents in State B. His wife lives in the residence that they both own in State A. The monthly mortgage payment is \$1,150. Between 2013 – 2023, his gross income was approximately \$150,000. During this time, Applicant was out of work for a total of two years when he was without a contract, so his gross annual income was more like \$130,000. His wife is a retired school teacher. Her retirement pay is \$250 a month and with her social security, she earns approximately \$1,150 a month. (Tr. 111-112)

Applicant has not made payments towards his federal back taxes. He is waiting for the outcome of his appeal regarding the denial of his OIC to settle. He states that CPA #4 advised him to not make payments towards his back taxes because the payments would not count as part of the OIC. Applicant was making double payments towards his mortgage in hopes of paying off his mortgage before he retires. (Tr. 112 -114)

Whole-person Evidence

Mr. Z is a senior official of a DOD Agency. He has held a security clearance for over 20 years. He has known and worked with Applicant over 20 years. Applicant currently works as a contractor for his agency. He describes his duty performance as outstanding. He ranks him in the top 1% of all analysts he has worked with. He is aware of the issues in the SOR. He believes Applicant has good judgment. He has a unique skillset. He believes it would be a loss if he were not able to work. He recommends him for a position of trustworthiness. (Tr. 19-25; AE 2, Enclosure 9, at 173-174)

Colonel (Retired) P served 30 years on active duty in the U.S. Army. Applicant worked with him as a contractor on several projects in 2003 while Colonel P was still on active duty. Applicant secured millions of dollars in funding for several projects. He worked hard behind the scenes to resolve the project's problems. He is aware of the issues related to Applicant's trustworthiness investigation. He is confident the issues with the IRS will be resolved soon. He believes Applicant's long tenure as a DOD contractor should be considered. (AE D, Enclosure 9 at 175-176)

Two of Applicant's sons testified on his behalf. His oldest son testified that Applicant is a good father who always provided for his family. Applicant reached out to him around 2010 - 2011 regarding his tax issues and asked him for advice. He told his father to hire a tax attorney and a CPA. They have discussed his father's tax problems for several years. He referred his father to his personal CPA, CPA #4, who helped his father with filing his delinquent tax returns. His father resolved the state tax issues and is working diligently to resolve the federal tax issues through an OIC. He believes after his father's business partner died, his father did not know what needed to be done on the business side of the firm. He was also unemployed on an intermittent basis, so he struggled with getting things on track. His father lives within his means. He drives a car that is 20 years-old and has rented an affordable condominium over the past 12 years. Aside from the tax issues, his father has no other issues. He is a forthright person who is dedicated to his career. He has always supported him. (Tr. 27-34)

His youngest son is an active-duty Air Force major who has served in the military for 14 years. He is aware of his father's tax issues. His father resolved the state tax issues through approved OICs and is still negotiating the resolution of the federal tax issues with the IRS. His father is good with money and is not an extravagant spender. He has always been a good father. He describes his father as trustworthy and reliable. He possesses the characteristics of a security clearance holder. (Tr. 36-42)

Policies

This case is adjudicated under DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG), which became effective on June 8, 2017.

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.

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 to obtain 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 safeguard sensitive information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of sensitive information.

Analysis

Guideline F, Financial Considerations

AG ¶ 18 expresses the security 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 security concern insofar as it may result from criminal activity, including espionage.

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

(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 has a history of financial problems and delinquent debts primarily related to his state and federal taxes. He also had several delinquent medical accounts. AG ¶19(c) is applicable. AG ¶ 19(f) applies regarding Applicant's failure to file federal tax returns in a timely manner for tax years 2010 through 2016; his delinquent federal tax debt for tax years 2010 through 2016, an approximate total of \$223,723; his failure to timely file State A income tax returns for tax years 2010, 2011, 2015, 2017; and his delinquent tax debt owed to State A in the approximate amount \$38,595 for tax years 2010, 2011, and 2016.

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:

(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;

(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.

AG ¶ 20(b) partially applies. Applicant had several periods of unemployment as a result of not having a contract as well as some serious medical issues between 2016 to 2019. While these circumstances affected Applicant's ability to resolve his tax debts, it is given less weight because I cannot conclude Applicant acted responsibly under the circumstances, because he failed to timely file his state and federal tax returns on multiple occasions beginning in 1998. While the loss of his business partner was a tragedy on both a personal-level and business-level, Applicant should have been more proactive in learning how to run the day-to-day business operations of consulting firm #1. Instead, he neglected to timely file federal and state tax returns from 1998 to 2018. As a result, he incurred large tax debts to the IRS and to States A and B. While he occasionally hired CPAs to help him resolve his tax issues, he did not follow through to insure his federal and state tax issues were resolved in a timely manner. He did not act responsibly under the circumstances.

AG ¶ 20(d) applies with respect to Applicant's resolution of the medical accounts alleged in SOR ¶¶ 1.e and 1.g.

AG ¶ 20(g) applies with respect to Applicant filing his federal and state tax returns as well as the resolution of his tax debts to State A and State B through OICs. It does not apply with respect to his federal income tax debt. The IRS indicated in their August 2023 letter rejecting Applicant's OIC that the total amount of delinquent federal taxes owed was \$326,872. He appealed the IRS decision, however, the federal tax debt was incurred over a period of more than 20 years. It is unlikely to be resolved anytime soon.

The DOHA Appeal Board has commented:

Failure to file tax returns suggests that an applicant has a problem with complying with well-established governmental rules and systems. Voluntary compliance with such rules and systems is essential for protecting classified information. ISCR Case No. 01-05340 at 3 (App. Bd. Dec. 20, 2002). As we have noted in the past, a clearance adjudication is not directed at collecting debts. See, e.g., ISCR Case No. 07-08049 at 5 (App. Bd. Jul. 22, 2008). By the same token, neither is it directed toward *inducing an applicant to file tax returns. Rather, it is a proceeding aimed at evaluating an applicant's judgment and reliability. Id.* A person who fails repeatedly to fulfill his or her legal obligations does not demonstrate the high degree of good judgment and reliability required of those granted access to classified information. See, e.g., ISCR Case No. 14-01894 at 5 (App. Bd. Aug. 18, 2015).

The Appeal Board clarified that even in instances where an "[a]pplicant has purportedly corrected [his or her] federal tax problem, and the fact that [applicant] is now motivated to prevent such problems in the future, does not preclude careful consideration of [a]pplicant's security worthiness in light of [his or her] longstanding prior behavior evidencing irresponsibility" including a failure to timely file federal income tax returns. See ISCR Case No. 15-01031.

While Applicant took to steps to file all of his untimely state and federal tax returns, he has a lengthy history of not timely filing his federal and state income tax returns and of not paying his federal and state tax debts. At the close of the record, his federal tax debt remains unresolved in the amount of \$326,000. Overall, his past conduct raises questions about his trustworthiness, judgment, and reliability. Applicant did not meet his burden of proof to mitigate the concerns raised under financial considerations.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an Applicant's eligibility for a security clearance by considering the totality of the Applicant's conduct and all the 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), "[t]he ultimate determination" of whether to grant a security clearance "must be an overall commonsense judgment based upon careful consideration of the guidelines" and the whole-person concept. My comments under Guideline F are incorporated in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under those guidelines but some warrant additional comment.

I considered Applicant's honorable service in the United States Air Force, as well as the favorable recommendations from people whom he worked with on past and current contracts. I considered the favorable testimony of his two sons as well as the support he provided to his wife and children. I considered his health issues in 2016 to 2019. I considered Applicant's inaction towards his state and federal income taxes since 1998. His federal tax issues are unlikely to be resolved in the near future.

The trustworthiness concerns raised under Financial Considerations are not mitigated.

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
Subparagraph 1.a:	For Applicant

Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	For Applicant
Subparagraphs 1.e – 1.g:	For Applicant

Conclusion

In light of all of the circumstances in this case, it is not clearly consistent with the interests of national security to grant or continue Applicant's eligibility for a trustworthiness position. Eligibility for a position of public trust is denied.

Erin C. Hogan
Administrative Judge