



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



In the matter of:)
)
) ADP Case No. 23-01901
)
Applicant for Public Trust Position)

Appearances

For Government: Brittany White, Esq., Department Counsel
For Applicant: *Pro se*

08/07/2024

Decision

Benson, Pamela, Administrative Judge:

Applicant failed to file 2021 federal and state income tax returns, as required. Despite being placed on notice of this concern, he failed to take responsible action to resolve his unfiled taxes. Guideline F (financial considerations) trustworthiness concerns are not mitigated. Eligibility for access to sensitive information is denied.

Statement of the Case

On October 3, 2022, Applicant completed and signed an application for a position of public trust. On February 21, 2024, the Defense Counterintelligence and Security Agency (DCSA) Consolidated Adjudication Services (CAS) issued a statement of reasons (SOR) to Applicant under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry*, February 20, 1960; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), January 2, 1992; and Security Executive Agent Directive 4, establishing in Appendix A the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AGs), effective 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 eligibility for Applicant’s public trust position. Specifically, the SOR set forth trustworthiness concerns arising under Guideline F.

Applicant provided a response to the SOR in April 2024 and admitted SOR ¶¶ 1.a and 1.b. He did not provide any documentation with his response. (Answer) He requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA).

On May 16, 2024, DOHA issued a notice setting the hearing for June 6, 2024. The hearing proceeded as scheduled. During the hearing, Department Counsel offered Government exhibits (GE) 1 through 3, which were admitted into evidence without objection. Applicant did not offer any documents. I held the record open for three weeks in the event Applicant wanted to submit documentation to supplement the record. On June 17, 2024, DOHA received a copy of the hearing transcript (Tr.). No documents were submitted by Applicant and the record closed on June 28, 2024.

Findings of Fact

In Applicant's SOR response, he admitted his failure to file federal income tax return for tax year 2021. (SOR ¶ 1.a.) He also admitted he failed to file his state income tax return for the same tax year. (SOR ¶ 1.b.) Applicant's admissions are accepted as a finding of fact. After a complete and thorough review of the evidence of record, I make the following additional findings of fact.

Applicant is 33 years old. He has never been married and does not have any children. In 2018 he earned two associate degrees from a technical college. He began employment with a government contractor in August 2022 as a system support specialist. This is his first application for a position of trust with the government. (Tr. 15-16; GE 1)

Financial Considerations

Applicant disclosed on his October 2022 application for a position of public trust that he had not filed his federal income tax return for 2021. He listed that he needed to contact his previous employer to get his form W-2 so he could file this tax return. He did not believe he owed any taxes, but he "would still like to file these taxes for documentation purposes." (GE 1 page 31-32; Tr. 25)

Applicant testified that in 2021, he had worked the majority of that year for one employer, and then he worked for approximately one month for another employer. He had difficulty getting his W-2 from the second employer. He said he procrastinated and eventually forgot that he had not filed his 2021 federal and state income tax returns.

In January 2023, Applicant participated in a background interview with an investigator. He acknowledged that he still had not filed his 2021 federal tax return. He kept forgetting to contact his previous employer to obtain a form W-2 from them, but he said he would do so in the near future. He was aware that he is required to file annual income tax returns. (GE 3; Tr. 25)

DCSA CAS sent Applicant interrogatories requesting, in part, that he send federal and state tax transcripts for tax years 2019, 2020, and 2021. In May 2023, Applicant responded and sent his federal transcripts for tax years 2020 and 2021. The 2021 federal tax transcript reflected that he had not filed his income tax return. Applicant also admitted that his state did not have any tax transcripts. He listed, "If I owe any tax money feel free to inform [them] and I will gladly pay it." (GE 2; Tr. 22, 26)

During the hearing, Applicant stated that he had just mailed his 2021 income tax returns on June 3, 2024, three days prior. He acknowledged that he had "a little bit of a serial procrastination issue." He stated that prior to 2021, he had timely filed all of his income tax returns, and he thought he had filed his 2022 tax returns timely as well. He stated he was willing to provide documentation to verify his testimony. He claimed to have filed his 2023 income tax returns on time, and he also believed he owed federal taxes for tax years 2022 and 2023, but he did not owe any state taxes. (Tr. 18-20)

I asked Applicant why it took him so long to file his 2021 federal and state income tax returns after he was placed on notice multiple times in the last year-and-a-half that filing his 2021 income tax returns was a concern to the government. He said,

Honestly, I guess in the back of my mind, I felt like it wasn't that big of a deal, but clearly, it's a bigger deal than I realized. I mean, not that paying your taxes isn't a big deal, but I guess in my mind I was like, well, they granted me clearance. That's what I need to do my job. That's fine with me. And then I kind of stopped worrying about it. So I did not take any action to actually go in and make sure I got that W-2 and probably until I heard I had to have a hearing, so I was like, oh, okay. I need to make sure I get to -- get -- need to get this stuff done. So, it was just procrastination on my part. (Tr. 26-27)

During the hearing Applicant stated that he would submit tax transcripts for tax years 2019, 2021, 2022, and 2023, while the record was held open. I told him that if he needed additional time, I usually granted that request once. Applicant failed to submit additional documentation or request additional time while the record was held open. (Tr. 29-30)

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, "no one has a 'right' to a [public trust position]." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). The Government's authority to restrict access to classified information applies similarly in the protection of sensitive, unclassified information. As Commander in Chief, the President has the authority to control access to information bearing on national security or other sensitive information and to determine whether an individual is sufficiently trustworthy to have access to such information. See *Id.* at 527.

The standard that must be met for assignment to sensitive duties is that, based on all available information, the person's loyalty, reliability, and trustworthiness are such that assigning the person to sensitive duties is clearly consistent with the interests of national security. DOD contractor personnel are afforded the right to the procedures contained in the Directive before any final unfavorable access determination may be made.

When evaluating an applicant's suitability for a public trust position, an 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. An 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.

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.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant which may disqualify the applicant from being eligible for access to sensitive information. See *Egan*, 484 U.S. at 531. "Substantial evidence" is "more than a scintilla but less than a preponderance." See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's suitability for a public trust position. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his or her [access to sensitive information]." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). "[S]ecurity clearance [or trustworthiness] determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

The protection of the national security and sensitive records is of paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to [sensitive] information will be resolved in favor of national security." Section 7 of Executive Order (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."

Analysis

Financial Considerations

AG ¶ 18 articulates the trustworthiness concern for financial problems:

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. . . . An individual who is financially overextended is at greater risk of having to engage in illegal or otherwise questionable acts to generate funds. . . .

The Appeal Board explained the scope and rationale for the financial considerations trustworthiness concern in ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012) (citation omitted) as follows:

This concern is broader than the possibility that an applicant might knowingly compromise [sensitive] information in order to raise money in satisfaction of his or her debts. Rather, it requires a Judge to examine the totality of an applicant's financial history and circumstances. The Judge must consider pertinent evidence regarding the applicant's self-control, judgment, and other qualities essential to protecting the national secrets as well as the vulnerabilities inherent in the circumstances. The Directive presumes a nexus between proven conduct under any of the Guidelines and an applicant's [eligibility for a public trust position].

AG ¶ 19 includes a disqualifying condition that could raise a trustworthiness concern and may be disqualifying in this case: "(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 did not provide sufficient information to show that he filed his 2021 federal and state income tax returns, which establishes AG ¶ 19(f).

AG ¶ 20 lists two financial considerations mitigating conditions which may be applicable in this case:

(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; 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.

None of the mitigating conditions apply. Applicant was unable to provide any extenuating information concerning his failure to timely file his 2021 federal and state income tax returns, other than to admit he is a procrastinator. He failed to act responsibly, even after he was placed on notice on multiple occasions, that his 2021 unfiled tax returns continued to be a concern to the government. It is still unclear whether he has filed these tax returns to date. His procrastination, poor judgment, and poor planning demonstrate that he is not currently ready to be placed in a position of trust with the government. Applicant failed to mitigate the financial considerations trustworthiness concerns.

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 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 access to a public trust position and access to sensitive information "must be an overall commonsense judgment based upon careful consideration of the guidelines" and the whole-person concept. My comments under Guideline F is incorporated in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under that guideline but some warrant additional comment.

Applicant failed to take prompt and responsible action to file his 2021 federal and state income tax returns. He stated that he mailed in the 2021 federal and state income tax returns three days before his hearing, which shows this was not a priority for him until his trustworthiness determination was in jeopardy. In addition, he failed to provide sufficient documentation to mitigate his case.

I have carefully applied the law, as set forth in *Egan*, Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. Applicant did not mitigate the trustworthiness concerns under Guideline F.

