



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



In the matter of:

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ADP Case No. 14-04498

Applicant for Public Trust Position

Appearances

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

08/14/2015

Decision

HENRY, Mary E., Administrative Judge:

Based upon a review of the pleadings, exhibits, and testimony, I conclude that Applicant's eligibility to occupy a public trust position is granted.

Statement of the Case

Applicant completed and signed a Questionnaire for Public Trust Position (SF 85P) on January 9, 2014. The Department of Defense (DOD) Consolidated Adjudications Facility, (CAF) issued a Statement of Reasons (SOR) detailing the trustworthiness concerns under Guideline F, financial considerations on September 24, 2014. The action was taken under DOD Regulation 5200.2-R, Personnel Security Program, dated January 1987, as amended and modified (regulation); DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the *Adjudicative Guidelines For Determining Eligibility for Access to Classified Information* (AG) implemented on September 1, 2006.

Applicant acknowledged receipt of the SOR on October 1, 2014. He answered the SOR in writing on October 29, 2014, and he requested a hearing before an administrative judge with the Defense Office of Hearings and Appeals (DOHA). Department Counsel was prepared to proceed on February 9, 2015, and I received the case assignment on March 2, 2015. DOHA issued a notice of hearing on April 16, 2015, and I convened the hearing as scheduled on May 12, 2015. The Government offered five exhibits (GE.) 1 through 5, which were received, marked, and admitted into evidence without objection. Applicant and one witness testified. Applicant did not submit any exhibits at the hearing. DOHA received the transcript of the hearing (Tr.) on May 19, 2015. I held the record open until June 12, 2015, for the submission of additional matters. Applicant timely submitted nine exhibits (AE) A through I, which were received, marked, and admitted without objection. The record closed on June 12, 2015.

Findings of Fact

In his Answer to the SOR, Applicant admitted the factual allegations in ¶¶ 1.a - 1.c of the SOR, with explanations. He denied the factual allegations in ¶ 1.d of the SOR. He also provided additional information to support his request for eligibility for a public trust position.

Applicant, who is 35 years old, works as an enrollment specialist for a DOD contractor. He began his current job in January 2014. Before accepting this position, Applicant worked as an account services representative and customer service representative in the telecommunications industry. He also worked as a telemarketer, dispatcher, and sales representative. He was unemployed from August 2011 until September 2012.¹

Applicant graduated from high school. He attended college, but he has not received a degree. Applicant is single, and he does not have any children. He is active in his church.²

Applicant earns about \$3,660 a month in gross income, and after deductions for taxes, health insurance, dental insurance, vision insurance, 401(k) contributions, and a small 401(k) loan, he receives \$2,001 a month in net income. His monthly expenses include \$500 for rent, \$100 for utilities, \$300 for his car loan, \$200 for his cell phone, \$80 for garage, \$50 on ticket debts,³ \$100 to the Internal Revenue Service (IRS), \$80 for gasoline, \$100 for food, and \$50 to the state revenue department for total monthly expenses of \$1,560. He has a remainder of \$440 for all other expenses such as laundry, car repairs, haircuts, and tags for his vehicle. He has sufficient income to meet

¹GE 1; Tr. 22.

²GE 1; Tr. 21.

³On his trustworthiness application and at the hearing, Applicant advised that he owed about \$2,000 for traffic tickets. He is paying the city \$50 a month on this debt. GE 1; Tr. 35.

his customary expenses. He does not use credit cards. The credit reports of record also reflect that he does not have or use credit card, and that he pays his debts. If his expenses increase more than his income, Applicant indicated he would get a second job to pay his bills.⁴

Around 2006, Applicant and three friends formed a corporation for the purposes of buying houses. He invested \$300 in the business. Applicant advised that he and his friends were trying to “get into the real estate business” with little knowledge of this business. The corporation purchased seven or eight houses. He purchased one house from one of his friends in 2006. The house was tenant occupied. When the tenant moved out of the house, Applicant was unable to rent the house, and he was unable to pay the mortgage. He sold the house for less than the amount owed in 2008, leaving him with an unpaid balance of an unknown amount.⁵

Applicant filed a Chapter 7 bankruptcy petition in August 2013. He estimated that his total debt in bankruptcy was \$130,000. Most of this debt related to the house. Applicant denied that his petition included credit card debts. The January 2014 credit report indicates that three medical bills of an unknown amount were included in the bankruptcy petition. The court entered a discharge order in November 2013.⁶

Applicant failed to timely file his federal and state income tax returns for the tax years 2008 and 2009. Since he received limited income in 2012, Applicant did not believe he needed to file a tax return for the tax year 2012. Thus, he filed his federal income tax return for the tax year 2012 late. He also indicated that he did not timely file his 2007 federal income return because he owed additional money. He explained that money for payment of his taxes was not withheld from his pay because he had pressed the “exempt” button when completing the tax withholding documentation. His current earnings statements reflect that he claims zero exemptions for state and federal withholding purposes.⁷

The credit reports of record indicate that a tax lien for \$27,070 was filed in February 2013. After the hearing, Applicant obtained information from the IRS and the state revenue agency to help clarify his confusing testimony on the actions taken by him and each agency in regards to his past-due taxes. He timely filed his 2013 and 2014 federal and state income tax returns.⁸

⁴AE A; AE F; Tr. 32-35, 52, 55.

⁵Tr. 30-32, 45-48.

⁶GE 1 - GE 5; Tr. 30-32, 48-51.

⁷AE A; Tr. 3

⁸GE 2 - GE 5; Tr. 26-30, 37-43.

The IRS provided Applicant with a summary of his federal tax debt on May 27, 2015. The summary covered the tax years 2008 through 2012. Applicant owed no additional taxes for the tax years 2010 and 2011, but he still owes taxes for the years 2008, 2009, and 2012. The summary indicates that his current total debt owed is \$10,810. The IRS tax transcripts for the tax years 2008, 2009, and 2012 provide specific information about the tax filings for these years.⁹

According to the IRS account transcript for the tax year 2008, the IRS considered Applicant's 2008 income tax return filed on December 8, 2011 and processed on January 9, 2012. The IRS computed his taxes, subtracted the amount of money withheld from his pay, then added penalties and interest for late filing, reaching a balance owed of approximately \$5,066. In October 2012, the IRS issued a notice of intent to levy. In February 2013, the IRS determined that the debt was uncollectible and placed a lien on his assets. At a later date, the IRS reversed the interest and penalty assessments, noted a bankruptcy filing, and indicated that his account was blocked from the automated levy program. On April 15, 2014, funds in the amount of \$1,671 were transferred to this account from Applicant's 2013 tax return, presumably refund money due Applicant.¹⁰

According to the IRS account transcript for the tax year 2009, the IRS considered Applicant's 2009 income tax return filed on April 19, 2012 and processed on June 4, 2012. The IRS computed his taxes, subtracted the amount of money withheld from his pay and a \$400 credit, then added penalties and interest for late filing, reaching a balance owed of approximately \$9,118. In October 2012, the IRS issued a notice of intent to levy. In February 2013, the IRS determined that the debt was uncollectible and placed a lien on his assets. At a later date, the IRS reversed the interest and penalty assessments, noted a bankruptcy filing, and indicated that his account was blocked from the automated levy program.¹¹

According to the IRS account transcript for the tax year 2012, the IRS considered Applicant's 2012 income tax return filed on December 17, 2014 and processed on February 16, 2015. The IRS computed his taxes, subtracted the amount of money withheld from his pay and a \$130 credit, then added penalties and interest for late filing, reaching a balance owed of approximately \$1,143. The IRS has not issued a notice of intent to levy or placed a lien on his assets for this tax year.¹²

Applicant met with the IRS in late 2014 to review his income tax accounts and develop a payment plan. The 2008 and 2009 account transcripts show that Applicant established an installment agreement on December 29, 2014, and the 2012 tax account

⁹AE B - AE E.

¹⁰AE C.

¹¹AE D.

¹²AE E.

indicates that Applicant established an installment agreement on January 31, 2015. All three tax accounts are dated May 27, 2015 and show a balance due for each tax year in question. Applicant owes \$2,333 on his 2008 income taxes, \$7,289 on his 2009 income taxes, and \$1,168 on his 2012 taxes. Under the installment agreement, Applicant paid the IRS \$50 a month until June 2015, when he started paying \$100 a month. In June 2016, his payment to the IRS increases to \$150. The 2008 tax year account shows several \$50 payments.¹³

The state revenue agency (agency) filed a tax lien for \$5,546 in January 2013. Applicant provided documentation from agency that showed he owed taxes for the tax years 2009 and 2011 only. These records reflect that in May 2013, a payment of \$233 was applied to a 2007 tax debt, and that from July 11, 2013 through August 23, 2013 five payments ranging between \$217 and \$295 were applied to Applicant's 2011 tax debt. The total amount applied was \$1,229. Applicant met with the state revenue agency in June 2014. The agency decided that he did not qualify for an installment agreement, but agreed that he qualified to participate in a provisional payment plan. The agency required Applicant to pay \$50 a month beginning July 28, 2014, maintain adequate funds in his account to make the payment, file his 2009 and 2011 income tax returns within 30 days, file all his future tax returns, and pay his future tax liabilities when due. Applicant complied with these terms, and the agency notified him on April 21, 2015 that his provisional plan had been converted to an installment agreement. The agency computed Applicant's taxes due for 2009 at \$2,331 then added penalties, fees and interest for his late filing for a total debt of \$2,833. The agency applied \$1,670 of taxes withheld from his pay, \$250 in payments, a \$15 refund, and a bankruptcy adjustment of \$391 to this debt, leaving a balance owed of \$506. For the tax year 2011, the agency computed Applicant's tax debt at \$1,810 then added \$929 for interest, fees, and penalties for a total debt of \$2,739. The agency applied \$694 withheld from his pay, the \$1,229 mentioned above plus \$434 from tax refunds, an \$82 bankruptcy adjustment, and \$300 from payments to this debt. Applicant has fully resolved this tax debt.¹⁴

When he completed his e-QIP, Applicant acknowledged his bankruptcy and his tax debts. He also indicated that his tax debts had been resolved in his bankruptcy. At the hearing, Applicant stated that the IRS garnished his wages at a job he held in 2013. The garnishment lead to his bankruptcy filing, which stopped the garnishment. The record evidence reflects that the IRS never garnished his wages, but the payments applied to his state tax debt in 2013 most likely resulted from the garnishment of his wages in 2013 by the state. Applicant also advised that he decided to resolve his state tax debts first because he owed a significantly larger amount to the IRS. Applicant

¹³AE B - AE E; Tr. 24-25. I note that the IRS summary sheet indicates a slightly higher amount due each year. The difference of \$20 is not explained, but could relate to additional interest.

¹⁴AE G - AE I.

indicated that he would not ignore his obligation to file his income tax returns in the future as he had “learned” from the problems created by his past conduct.¹⁵

A co-worker and friend testified on Applicant’s behalf. She described him as good working and morally ethical. She believed him to be trustworthy, dependable, reliable, and very honest. She understood that the hearing was about his financial issues.¹⁶

Policies

Positions designated as ADP I and ADP II are classified as “sensitive positions.” 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 national interests. The Deputy Under Secretary of Defense (Counterintelligence and Security) Memorandum, dated November 19, 2004, indicates trustworthiness adjudications will apply to cases forwarded to DOHA by the Defense Security Service and Office of Personnel Management. Department of Defense 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, 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 over-arching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), 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. 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 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

¹⁵AE C - AE E; AE H; AE I; Tr. 27.

¹⁶Tr. 18-20.

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

The trustworthiness concern relating to the guideline for Financial Considerations is set out in AG ¶ 18:

Failure or inability 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 [sensitive] information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

The guideline notes several conditions that could raise trustworthiness concerns. Under AG ¶ 19(a), an "inability or unwillingness to satisfy debts" is potentially disqualifying. Similarly, his Chapter 7 bankruptcy filing may raise security concerns under AG ¶ 19(c), "a history of not meeting financial obligations". Finally, AG ¶ 19(g) failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same can raise a security concern. Applicant failed to timely file his federal and state income taxes for the tax year 2009. He failed to timely file his federal income tax returns for the tax years 2008 and 2012, and he failed to timely file his state income tax return for the tax year 2011. He owes money to the IRS and the state revenue agency. The evidence is sufficient to raise these potentially disqualifying conditions, requiring a closer examination.

The Financial Considerations guideline also includes examples of conditions that can mitigate trustworthiness concerns. I have considered mitigating factors AG ¶ 20(a) through ¶ 20(f), and the following are potentially applicable:

(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, or a death, divorce or separation), and the individual acted responsibly under the circumstances;

(c) the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control; and

(d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

Applicant's failure to file his federal and state income tax returns each year as required by law reflects a lack of good judgment. In the instant case, Applicant timely filed his income tax returns in some years and not in other years. Although he did not timely file his federal income tax returns for the tax year 2008, 2009, and 2012, the IRS tax transcripts reflect that he did file his 2008 and 2009 income tax returns before the IRS issued a notice of intent to levy. The IRS has not taken any action against him for his late filing of the 2012 income tax return.

When Applicant filed his 2008 and 2009 income tax returns in 2011 and 2012, he was unemployed, making it difficult for him to pay any taxes owed. In early 2013, the IRS determined that his tax debt was uncollectable and filed a lien to protect its rights to collect the past-due taxes in the future should Applicant be able to pay the taxes. The IRS never started garnishment proceedings against Applicant. In August 2013, Applicant filed for bankruptcy, and he erroneously believed that he resolved his tax debts through this action. When he received the SOR in October 2014, he contacted the IRS to make arrangements to resolve his tax issues, which he had delayed while he resolved his state tax debt. By late December 2014, Applicant and the IRS reached an agreement on the amount of taxes owed and agreed to the terms of an installment agreement to resolve his debts. Through this meeting with the IRS, Applicant clarified the actual amount of taxes owed, which is significantly less than the amount of the lien filed in February 2013. The IRS has not provided him with any documentation explaining the discrepancy in the amount owed and the amount of the lien. Applicant is able to and has complied with the terms of his repayment agreement.

Applicant failed to timely file his state income tax returns in 2009 and 2011. He took no action to file the returns or contact the state revenue agency to resolve this matter until sometime after a lien was filed and his wages garnished. His first action in response to the garnishment was to file for bankruptcy, which stopped the garnishment of his wages. Although he thought all his tax debts were resolved in bankruptcy, he was mistaken. He eventually filed the state income tax returns for 2009 and 2011 and developed a payment plan to resolve his debts. He has consistently made his plan payments to the agency and currently owes less than \$500 on his state tax lien of \$5,546. Applicant's bankruptcy filing does not constitute a good-faith effort to resolve his tax debt. Likewise, his lengthy delay in establishing payment plans with the IRS and the state do not reflect a good-faith effort to resolve his tax debts. AG ¶ 20(d) is not applicable.

Applicant's inability to pay his taxes at the time he filed his 2008 and 2009 relates to his lack of employment between August 2011 and September 2012, a factor beyond his control. To some degree, the amount of taxes owed also relate to the loss of the tenant in the house he owned and the inability to rent the house again. By selling the house, Applicant acted reasonably in trying to manage this debt. However, AG ¶ 20(b) is not fully applicable because Applicant significantly delayed his efforts to repay his tax

debts instead of contacting the IRS and the state to work out a payment plan when he returned to full-time work.

As prerequisite to a bankruptcy discharge, a petitioner must take a financial counseling. AG ¶ 20(c) is also applicable because Applicant has filed his past-due tax returns and has developed payment plans to resolve his unpaid taxes.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a public trust position 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(a):

“(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) 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 a public trust position must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. The decision to grant or deny a trustworthiness determination requires a careful weighing of all relevant factors, both favorable and unfavorable. In so doing, an administrative judge must review all the evidence of record, not a single item in isolation, to determine if a trustworthiness concern is established and then whether it is mitigated. A determination of an applicant's eligibility for a public trust position should not be made as punishment for specific past conduct, but on a reasonable and careful evaluation of all the evidence of record to decide if a nexus exists between established facts and a legitimate trustworthiness concern.

In assessing whether an Applicant has established mitigation under Guideline F, the Appeal Board provided the following guidance in ISCR Case No. 07-06482 at 3 (App. Bd. May 21, 2008):

In evaluating Guideline F cases, the Board has previously noted that the concept of “meaningful track record” necessarily includes evidence of actual debt reduction through payment of debts.” See, e.g., ISCR Case No. 05-01920 at 5 (App. Bd. Mar. 1, 2007). However, an applicant is not required, as a matter of law, to establish that he has paid off each and every debt listed in the SOR. See, e.g., ISCR Case No. 02-25499 at 2 (App. Bd. Jun. 5, 2006). All that is required is that an applicant

demonstrate that he has “. . . established a plan to resolve his financial problems and taken significant actions to implement that plan.” See, e.g., ISCR Case No. 04-09684 at 2 (App. Bd. Jul. 6, 2006). The Judge can reasonably consider the entirety of an applicant’s financial situation and his actions in evaluating the extent to which that applicant’s plan for the reduction of his outstanding indebtedness is credible and realistic. See Directive ¶ E2.2(a) (“Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination.”) There is no requirement that a plan provide for payments on all outstanding debts simultaneously. Rather, a reasonable plan (and concomitant conduct) may provide for the payment of such debts one at a time. See, e.g., ISCR Case No. 06-25584 at 4 (App. Bd. Apr. 4, 2008). Likewise, there is no requirement that the first debts actually paid in furtherance of a reasonable debt plan be the ones listed in the SOR.

The evidence in support of granting a trustworthiness determination to Applicant under the whole-person concept is more substantial than the evidence in support of denial. In reaching a conclusion, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. The credit reports of record show that Applicant has a long track record of paying his customary bills and expenses and that he does not use credit as a way to finance a life-style. Applicant’s problems began when he purchased a rental house from a friend. When the tenant moved out of the house, Applicant could not afford the house and sold it, which created tax issues for him. He chose to ignore his tax issues in 2008 and 2009 by not filing his income tax returns. This decision showed serious lack of judgment. Although unemployed in late 2011 and early 2012, Applicant proceeded to file his past-due federal income tax returns for the tax years 2008 and 2009 before the IRS took action to collect his taxes. He was unable to pay the taxes owed, which the IRS realized. To preserve its right to collect these unpaid taxes, the IRS filed a lien against Applicant’s assets. The lien remains in place, but it is substantially lower than initially filed. Applicant has worked with the IRS to make sure all his tax returns are up to date and to pay his taxes, showing an improvement in his decision making and judgment.

Applicant generally filed his income taxes returns in a timely manner. His failure to file his income tax returns was not an ongoing course of conduct occurring for many years. He missed several years by choice, which he recognized was not appropriate. He took steps on his own to file his federal tax returns. He did not do the same with his state returns. He acted only after the state filed a lien and garnished his wages. The garnishment created financial pressures. He chose bankruptcy as a way to stop the garnishment and reduce his financial pressures. This action did not eliminate his tax issues, but did reduce some of his state tax debt. Once he resolved the bankruptcy, he worked with the state on his tax debt, which is nearly paid.

In weighing all the evidence of record, I have considered Applicant's poor decision-making and judgment related to his tax return filings and his effort to resolve his tax issues. He resolved all his federal tax issues before any garnishment occurred. The tax lien is a legal mechanism which preserves the right of the IRS and the state to collect unpaid taxes. Applicant has worked with the IRS and the state revenue agency to resolve his tax issues. He has nearly paid all of his state taxes. He now claims no exemptions from his pay, which results in a high level of money being withheld, assuring sufficient money to pay his yearly taxes. He otherwise has a long history of consistently paying his customary living expenses and living within his income. Furthermore, he has a history of paying his state tax debt. For these reasons, he can be relied upon to continue compliance with his IRS payment plan.

Overall, the record evidence leaves me without questions or doubts as to Applicant's eligibility and suitability for a trustworthiness determination. For all these reasons, I conclude Applicant mitigated the trustworthiness concerns arising from his finances under Guideline F.

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:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the interest of national security to grant Applicant eligibility for a public trust position. Eligibility for access to sensitive information is granted.

MARY E. HENRY
Administrative Judge