

DATE: January 31, 2007

In re:

SSN: -----

Applicant for Trustworthiness Determination

ADP Case No. 05-05374

DECISION OF ADMINISTRATIVE JUDGE

PAUL J. MASON

APPEARANCES

FOR GOVERNMENT

Ray T. Blank, Jr., Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant's history of not meeting financial obligations has not been mitigated by his character evidence or his unpersuasive claim of being unaware he could negotiate a resolution to the delinquent student loans. Applicant's omission of federal and state taxes from question 22.b. of the Questionnaire for Public Trust Positions (SF-85P) in April 2004 was based on his good faith, though misplaced belief, that federal taxes are not federal obligations. While his belief was unreasonable given Applicant's age (51 years old) at the time he filled out the questionnaire, I find he did not deliberately omit material information. Clearance is denied.

STATEMENT OF CASE

On February 3, 2006, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, stating that based on financial considerations and personal conduct, DOHA could not make the preliminary affirmative finding that it is clearly consistent with the national interest to make or continue a determination of trustworthiness, suitability, and eligibility for Applicant to hold a sensitive position. On March 28, 2006, Applicant submitted his answer to the SOR.

The case was transferred to me on June 20, 2006. On July 24, 2006, DOHA issued a Notice of Hearing for August 9, 2006. At the hearing, the Government's five exhibits (GE 1 through GE 5) were admitted in evidence. Applicant testified; his 24 exhibits (AE A through AE X) were admitted in evidence. Following the hearing, he submitted one additional exhibit that has been admitted in evidence as AE Y (17 character statements). The transcript was received on August 18, 2006. References to the transcript will appear as (Tr.) followed by the page number.

RULINGS ON PROCEDURE

At the hearing, Applicant moved to postpone the hearing until a later date to allow him to continue negotiations with one or more of the alleged creditors identified in the SOR. Applicant's motion was denied (Tr. 10) because of the five-month period that has elapsed since Applicant received the SOR. In that period--February to August 9, 2006, Applicant

clearly had sufficient notice to make the appropriate decisions on how he wanted to prepare for the hearing.

FINDINGS OF FACT

The SOR alleges financial considerations under Guideline F, and personal conduct under Guideline E. Applicant denied all the allegations under the financial guideline. Applicant claims he did not falsify his trustworthiness questionnaire in April 2004 as alleged under subparagraph 2.a. of the SOR. Applicant asserts he answered financial question 22.b. to the best of his knowledge by listing the debts he knew he owed. Applicant is 53 years old and employed as a medical records custodian for a defense contractor. He seeks assignment to a public trust position.

Financial Considerations. Applicant financed his chiropractic education (1982 to 1985) with a health education assistance loan (subparagraph 1.k.) and a conventional student loan (subparagraph 1.l.) he obtained in 1982. In July 1992, Applicant sold his chiropractic practice in State X because of a bad economy and a dwindling number of insurers willing to pay the prevailing rate for chiropractic services. Applicant contends the last time he made payments on either loan was in 1992, resulting in the default of both loans. Applicant currently owes approximately \$170,000.00 for the health loan and about \$18,000.00 for the student loan. Though Applicant claimed he had correspondence from the education loan officials verifying their unsuccessful attempts to settle the loan accounts over the intervening years, ⁽¹⁾ no documentation was presented. He claimed he did not try to negotiate a settlement on either loan because he was unaware the loans were negotiable (Tr. 73).

After selling his practice in July 1992, Applicant became homeless for an undetermined amount of time before working approximately 11 years as a foreman in carpentry for his father in State Y. *See*, AE Y. Applicant's permanent address has always been in State Y. In April 2004, he filled out a Questionnaire for Public Trust Positions (SF-85P) (Public Trust Questionnaire), and was hired by a computer firm. However, he was laid-off due to contract problems. In June 2004, after returning to his carpentry job, he sustained a terrible ankle injury caused by a 30-foot fall. Applicant was placed on disability leave under workmen's compensation while receiving three surgeries and six months of rehabilitation. In about December 2004, Applicant resumed working for his current employer and, according to his character references, was assigned to the medical records department on a military facility.

The federal tax liens are listed in subparagraphs 1b., 1.c., and 1.j. of the SOR, and total about \$41,000.00. The state tax liens (State Y) are found in subparagraphs 1.a., 1.d., 1.e., 1.f., 1.g., 1.h., and 1.i. of the SOR, and total approximately \$56,000.00. The government's evidence in support of the federal and state tax liens consists of two credit bureau reports (GE 4 and GE 5) that list the federal and state tax liens.

Applicant's federal income tax records (AE B through AE U) display a track record of actions taken by the Internal Revenue Service (IRS) and Applicant for tax years 1990 through 2004. For example, each year shows when Applicant filed his return and paid his taxes; the returns also track additional action taken by the federal government relative to a specific tax year. All the exhibits show that Applicant filed his tax returns as required for every year except 1990, 1991, and 1992. For the tax year 1990 (AE U), Applicant filed his return in September 1991 and received penalties for failure to pay his taxes. AE U shows that on April 16, 1993, a federal tax lien was entered, but the entry does not show the amount of the lien. Subparagraph 1.b. of the SOR reflects a federal tax lien was filed in April 1993 in the amount of \$11,6240.00. AE U also reflects that on September 17, 2001, the 1990 tax deficiency of \$2,029.00 was extinguished by the statute of limitations and deemed uncollectible.

According to AE G, Applicant did not file his 1991 tax return until 1995. Page 2 of AE G shows that additional penalties/interest and other fees were levied in subsequent years for failure to pay taxes for 1991. As with AE U, a federal tax lien was filed in April 1996, but the exhibit does not show the amount. Subparagraph 1.j. of the SOR reflects a federal tax lien in the amount of \$23,803.00 was filed in May 1996. According to the last entry of page 2 of AE G, the amount of tax owed was eliminated in April 2005 by the expiration of the statute of limitations, and deemed uncollectible.

AE H (one page in length) is Applicant's tax record for tax year 1992. The exhibit indicates "No record of return filed."

Regarding the state tax lien allegations from State X, Applicant recalled receiving notices accusing him of owing state

income taxes but believed he did the right thing by apparently doing nothing. He stated, "I did the right thing because we couldn't pay them anyway." (Tr. 65) When asked why he did not provide the similar tax information from State X as he had from the IRS, Applicant testified that State X was slow to respond to his credit counselor's request for information (Tr. 79). *See*, AE A.

Applicant's denial of all the SOR tax allegations is based on the credit counselor's representation to him (AE A, April 2006) that there were no outstanding federal or state tax obligations. The counselor's conclusion of no federal tax obligations appears to be verified by AE B through AE U. The credit counselor provided no documentation to substantiate his representation that Applicant had no state tax obligations.

On August 4, 2006, Applicant paid approximately \$1,100.00 to two government entities in State Y for two debts he owed since about 1992. One debt was unidentified, and the other was for equipment Applicant leased while he was in practice (Tr. 49-50). Neither bill is listed in the SOR.

Personal Conduct. The SOR alleges Applicant owes money to the IRS, State X, the health assistance loan creditor, and the student loan creditor. On April 1, 2004, Applicant certified and signed a Questionnaire for Public Trust Positions (SF-85P). Applicant answered "yes" to question 22.b. (Are you now delinquent on any loan or financial obligation? Include loans or obligations funded or guaranteed by the Federal Government) He furnished only information about the health assistance loan. When asked his reasons for not supplying the tax liability information in the space provided, he replied, "I didn't believe State Y, and I didn't think that the bills that I had to the government would fit in that block. That they weren't the same stuff. I didn't consider it a delinquent financial obligation. I just thought it was taxes, as if it were something different." (Tr. 70) He realizes he probably made a mistake, but he did not think he owed any state taxes anyway (Tr. *Id.*). Applicant's erroneous belief he had no tax obligations was not motivated by a desire to mislead. I find Applicant did not deliberately omitted material information from his questionnaire in April 2004.

Character References. Seventeen character statements were submitted on Applicant's behalf. In their 26 years of marriage, his wife has found Applicant to be very responsible because: (1) instead of going on permanent disability as a treating doctor recommended, he elected to keep working, even with the impediments to his mobility; and, (2) instead of placing the family on welfare, he discovered different ways to resolve family issues. Applicant's father considers Applicant to be an excellent foreman based on 11 years of work in the carpentry field.

Fifteen other coworkers who have known Applicant for up to two years, consider him trustworthy, dedicated, dependable, and a good teacher of computer skills and controlling and tracking medical record systems.

POLICIES

On April 9, 1993, the Composite Health Care Program Office (CHCSPO), the Defense Office of Hearings and Appeals (DOHA), and the Assistant Secretary of Defense for Command, Control, Communications and Intelligence (ASDC3I), entered into a Memorandum of Agreement (MOA) which gave DOHA the responsibility to provide trustworthiness determinations for contractor personnel working on unclassified Information Systems Positions as defined in DOD Regulation 5200.2-R, *Personnel Security Program*, dated January 1987.

To be eligible for assignment to sensitive duties, an applicant must meet the security guidelines contained in DoD 5200.2-R. "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." The Regulation sets forth personnel security guidelines, disqualifying and mitigating conditions under each guideline. In determining whether the applicant qualifies a sensitive position under the trustworthiness standard, the applicant must be provided the due process procedures contained in DoD Directive 5220.6.

In addition to the disqualifying and mitigating conditions of each security guideline, the general factors of the whole person concept⁽²⁾ should be applied in deciding whether it is clearly consistent with the national interest to grant an applicant eligibility for assignment to sensitive duties.

Financial Considerations (Guideline F)

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

Personal Conduct (Guideline E)

This guideline addresses questionable judgment and/or dishonesty demonstrated during the course of the investigation.

CONCLUSIONS

Financial Considerations (FC). The government's case for disqualification under the FC guideline is based on federal tax liens, state tax liens, and student loans totaling approximately \$285,000.00. The defaulted student loans fall within the scope of disqualifying condition DC 1. (*a history of not meeting financial obligations*) and DC 3 (*inability or unwillingness to satisfy debts*), but the liens do not. Regarding the student loans, the government provided sufficient evidence to prove that Applicant received the health assistance loan. GE 3 identifies Applicant, the health assistance loan amount owed, Applicant's permanent city of residence, the school he attended and degree, and date of graduation. That information matches the information he provided in his Public Trust Questionnaire in April 2004. Finally, Applicant admitted the health assistance debt inferentially in his answer to the SOR, and directly at the hearing (Tr. 67). Applicant also admitted the second student loan in his affidavit and at the hearing (Tr. 57). The passage of six years between 1986 and 1992 (during Applicant's practice) and an additional 12 to 14 years (between 1992 or 1993 and August 2006) without any documentation that shows an attempt to contact the student loan creditors, demonstrates an inability or unwillingness to meet financial obligations.

There are five mitigating conditions that potentially apply to the circumstances of this case. However, neither Mitigating condition (MC) 1. (*the behavior was not recent*) nor MC 2. (*it was an isolated incident*) apply in this case due to the amount of the delinquent student loans, an Applicant's failure to satisfy both loans.

MC 3. (*the conditions that resulted in the behavior were largely beyond the individual's control*) applies where some circumstance or event, e.g., business downturn, medical emergency, unexpectedly occurs to interfere with the payment of bills. A poor economy in 1992, reducing Applicant's earnings and causing him to sell his business at a loss, typifies circumstances that entitle him to some extenuation under MC 3. Applicant's awful fall in June 2004 and subsequent surgeries, followed by six months of rehabilitation, has also been noted. However, the injury provides very little probative weight for the period between 1992 and June 2004, and 2005 to August 2006 showing no action by Applicant to address the student loans.

Neither MC 4. (*the person has received counseling for the problem and there are clear indications that the problem is being resolved or is under control*) nor MC 6. (*the individual initiate a good-faith effort to repay overdue creditors or otherwise resolve debts*) is helpful in the evaluation of this case. MC 4. is inapplicable as Applicant has never had financial counseling.

MC 6 cannot be considered due to the absence of evidence of repayment or settlement of either student loan since 1992. I cannot assign much weight to the negotiator's letter dated August 2006 (AE X) indicating his hope to reach an agreement with both creditors in six months. First, Applicant did not hire the negotiator until after he received the SOR. Second, the letter discloses nothing more than the intentions of the negotiator. Applicant's creditable character evidence from his father, his wife and 15 other individuals weigh in his favor. However, neither the character evidence nor his extenuating evidence under MC 3. is sufficient to overcome the adverse evidence under the FC guideline. Accordingly, I find against Applicant under subparagraphs 1.k. and 1.l.

Regarding the federal tax liens, the SOR allegations provide the lien amount, the year the lien was imposed, and reason the lien was filed. Missing from the government's quantum of proof is information that explains the underlying tax deficiency, penalty and interest that comprise the tax lien, (3) and, does the lien apply to one violation or does it apply to several violations. In sum, even though the credit bureau reports were admitted in evidence without objection (Tr. 20-21), I conclude the exhibits (for both federal and state) are insufficient to establish any of the tax lien allegations under the FC guideline.

Assuming it is concluded the credit bureau reports are found to be sufficient to establish the government's case

concerning the liens, I find Applicant's evidence in mitigation is sufficient to overcome the adverse evidence. There are only two federal lien entries in AE B through AE U, but three federal liens are alleged in the SOR. There are no federal lien amounts appearing in AE B through AE U. There is no specific information that explains which years the liens apply to. Even though state tax returns were not furnished by Applicant, I accept the findings made by the credit counseling firm in AE A that there is no state tax liability. Having weighed the totality of the record evidence relevant to the lien allegations, there is no question that Applicant's experienced federal (and probably state) tax problems in 1990, 1991, and 1992 because of his failure to file returns and/or pay taxes. However, the government has failed to present relevant information that sufficiently explains the subject matter of each of the liens. Subparagraphs 1.a., 1.b., 1.c., 1.d., 1.e., 1.f., 1.g., 1.h., 1.i., and 1.j. are found in Applicant's favor.

Personal Conduct (PC). The most important element of DC 2. (*the deliberate omission of relevant and material facts from a questionnaire to determine trustworthiness*) is whether the conduct was deliberate. Question 22.b. is fairly straightforward in its meaning. Not considering them to be federal obligations, Applicant did not put the federal liens in his answer. While Applicant's interpretation of the delinquent debts question does not seem reasonable, and could not have been reached based on the chronology of record evidence events, ⁽⁴⁾ he has convinced me that he understands federal taxes are federal obligations within the meaning of question 22.b. Though he did not list the second student loan under question 22.b., he forthrightly disclosed the second loan three months later in his affidavit (GE 2). Based on my findings that Applicant did not deliberately omit the federal and state liens, and the student loan (subparagraph l) in the space provided under question 22.b., I conclude the government failed to make a case under the PC guideline. Considering the evidence as a whole, I find for Applicant under subparagraph 2.a. of the SOR.

Having found against Applicant under the FC guideline and for him under the PC guideline, I evaluate this case in the context of the whole person model of Appendix 8 of the Regulation. The ultimate decision in all trustworthiness cases must include a commonsense evaluation of all past and present information about the person, regardless of whether the information is favorable or unfavorable.

AE B through AE U reflect that Applicant owed federal taxes at different times between 1990 and 2004. The exhibits show that during the period he paid varying monetary amounts to quash/extinguish some of the penalties. Even though I have determined he owes no federal or state taxes presently, it is not because he paid the taxes and other deficiencies for 1990, 1991, and 1992. Rather, IRS was prevented by a limitations statute to pursue these deficiencies that were not paid. In Applicant's interview in July 2004, he was put on notice the government was concerned about his delinquent student loans. The interview, combined with the earlier periodic notices from all Applicant's creditors, and more recent notice from the SOR in February 2006 should have provided the necessary impetus for Applicant to address the loans. Applicant's lack of any kind of documented response to the student loans until August 2006 strongly suggests that he is not sincere about resolving the delinquent loans, believing they may be extinguished in the same manner as the federal tax deficiencies.

The favorable evidence that rests on the observations of Applicant's wife, his father, and 15 other persons provide insight into Applicant's character in familial responsibilities and at work. However, the only insight into Applicant's financial habits and practices over the years are revealed in his tax and loan histories. Even the two bills (not listed in the SOR) Applicant paid in August 2006 stood delinquent for about 14 years without any effort by Applicant to pay them. After weighing and balancing the evidence as a whole and from a commonsense viewpoint, I am unable to find Applicant eligible for a public trust position.

FORMAL FINDINGS

Paragraph 1 (Financial Considerations, Guideline F): AGAINST THE APPLICANT

Subparagraph 1.a. For the Applicant.

Subparagraph 1.b. For the Applicant.

Subparagraph 1.c. For the Applicant.

Subparagraph 1.d. For the Applicant.

Subparagraph 1.e. For the Applicant.

Subparagraph 1.f. For the Applicant.

Subparagraph 1g. For the Applicant.

Subparagraph 1.h. For the Applicant.

Subparagraph 1.i. For the Applicant.

Subparagraph 1.j. For the Applicant.

Subparagraph 1.k. Against the Applicant.

Subparagraph 1.l. Against the Applicant.

Paragraph 2 (Personal Conduct, Guideline E): FOR THE APPLICANT.

Subparagraph 2.a. For the Applicant.

DECISION

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant eligibility for assignment to a sensitive Information Systems Position. Eligibility for assignment to a Public Trust Position is denied.

Paul J. Mason

Administrative Judge

1. Applicant testified that In the documents, the loan officials quoted a settlement figure to him, and he responded he could not pay; they then sent him paperwork indicating that he could not afford the proposed settlement (Tr. 73).
- 2.
3. For example, what is the genesis of the tax deficiency, penalty and interest that is included in the lien filed in April 1993. *See*, subparagraph 1.b. of the SOR.
4. Applicant furnished the questionnaire in April 2004. He was not informed he had no tax liability until April 2006.