



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



In the matter of:)
)
) ADP Case No. 09-00385
)
)
Applicant for Public Trust Position)

Appearances

For Government: John Bayard Glendon, Esquire, Department Counsel
For Applicant: *Pro Se*

January 12, 2010

Decision

RIVERA, Juan J., Administrative Judge:

Applicant failed to mitigate the trustworthiness concerns arising from his falsification of his public trust position application and his failure to timely file federal income tax forms and to pay his taxes. Applicant's eligibility to occupy an ADP I/II/III position is denied.

Statement of the Case

On October 30, 2007, Applicant submitted a Public Trust Position Application (SF 85P). On April 24, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to him, detailing the basis for its preliminary decision to deny Applicant eligibility for a public trust position, citing trustworthiness concerns under Guideline F (Financial Considerations) and Guideline E (Personal Conduct). The action was taken under Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); Department of Defense (DoD) Regulation 5200.2-R, *Personnel Security Program*, dated

Jan. 1987, as amended (Regulation); and the revised adjudicative guidelines (AG) effective within the Department of Defense for SORs issued after September 1, 2006.

The SOR detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with national security to grant Applicant eligibility to occupy an automated data processing (ADP) position, and it recommended referral to an administrative judge to determine Applicant's eligibility for an ADP position.

On May 18, 2009, Applicant responded to the SOR allegations and requested a hearing before an administrative judge. The case was assigned to me on August 12, 2009. DOHA issued a notice of hearing on August 26, 2009. The hearing was convened as scheduled on September 15, 2009. The government offered Government Exhibits (GE) 1 through 11. GEs 1 through 9 were admitted without objection. GEs 10 and 11 were considered for administrative notice purposes only. Applicant testified and submitted Applicant Exhibits (AE) 1 through 4, which were admitted without objection. DOHA received the transcript of the hearing (Tr.) on September 21, 2009.

Findings of Fact

Applicant admitted the two allegations under ¶ 1 of the SOR. He denied the allegation under ¶ 2 of the SOR. His admissions are incorporated herein as findings of fact. After a thorough review of the evidence of record, and having considered Applicant's demeanor and testimony, I make the following additional findings of fact.

Applicant is 52 years old. He has worked in an ADP position for a defense contractor since November 2007 with some periods of unemployment between jobs. He attended college in the late 1980s for approximately two years, but did not complete a degree. He married his first wife in 1977, and they were divorced in 1993. Because of his divorce, Applicant was overwhelmed by his financial problems and filed for Chapter 7 bankruptcy protection in 1992. He married his current wife in 1997. He has two adult children of this marriage.

Applicant served in the U.S. Air Force from 1976 to 1985. He achieved the rank of staff sergeant (E-5), and was honorably discharged in 1985. Because of his military occupational specialty, he had access to classified information at the top secret level during most of his 10 years of service. Applicant left the service because of the great job offers he received from government contractors. He worked for government contractors from 1985 to 1995. He held access to classified information, at the secret level or higher, from 1985 to approximately 1993. From 1993 to 1995, he was granted eligibility for a public trust position. From 1995 to November 2007, Applicant did not require access to any classified information.

Applicant has worked the same ADP job, albeit under different government contractors, since 2000. He started working for his current employer in March 2009. His current employer is sponsoring Applicant for a public trust position.

In 1990, Applicant failed to file his federal income tax return and did not pay his taxes. In 1992, the Internal Revenue Service (IRS) filed a tax lien against him. Applicant paid his 1990 taxes in 1994, and the lien was released.¹

Applicant also failed to file his federal income tax returns and did not pay his taxes for tax years 1992 through 1997. Applicant testified he had no good reason or explanation for his failure to file his tax returns or to pay his taxes (Tr. 83). In 1997, Applicant hired an accounting firm to assist him with filing his back tax returns and dealing with the IRS. From 1997 to January 2003, he made payroll deduction payments on his debt to the IRS. He stopped making payments in 2003 after he lost his job. He was unemployed from January to July 2003. He also testified he was unemployed from October 2005 to October 2006.²

Applicant made no more payments to the IRS after January 2003. In December 2006, the IRS filed a \$23,504 tax lien against Applicant. In 2007, Applicant attempted to settle his debt with the IRS, but was not able to reach an agreement because the IRS wanted a large lump sum down payment that he could not afford. As of his hearing day, Applicant had made no payments towards his \$23,504 debt to the IRS. At his hearing, Applicant claimed he is no longer legally responsible for his debt to the IRS because the debt is barred by the statute of limitations.

In his October 2007 public trust position application, Applicant answered “No,” to question 22 (a) (asking whether in the last seven years he had been subject to a tax lien), and question 22 (b) (asking whether he was currently over 180 days delinquent on any financial obligation). He answered “No” and deliberately failed to disclose that he currently had a \$23,504 debt to the IRS, and that the IRS had filed a lien against him in December 2006.

At his hearing, Applicant claimed that when he submitted his public trust position application he had no knowledge of the IRS tax lien filed against him in December 2006 (Tr. 92). He also claimed that when he submitted his public trust position application there was no valid federal tax lien pending against him (Tr. 24). He admitted, however, he knew he was indebted to the IRS. In his May 2009 answer to the SOR, Applicant also admitted knowing about his \$23,504 debt to the IRS. He claimed; however, that he was the one that provided the IRS tax lien information to the government in an attachment he included with his public trust position application.

¹ SOR ¶ 1.b mistakenly alleged that a state filed a \$4,493 tax lien against Applicant in April 1992, which was still outstanding. Applicant established the tax lien was filed by the federal government because of Applicant’s failure to file his 1990 income tax return and to pay his 1990 income taxes. Applicant established that the debt was satisfied in 1994 and the lien was released. The government withdrew the allegation in SOR ¶ 1.b (Tr. 46).

² This statement is inconsistent with information Applicant submitted with his public trust position application.

Applicant claimed that AE 1 (Applicant's letter to DOHA, dated October 15, 2008), is similar to a copy of the letter he submitted as an attachment with his public trust position application. I note that Applicant's public trust position application contains a one page "Addendum to SF85P," in which Applicant disclosed he was self-employed during the period of October 2005 to October 2006.³ There are no other addenda attached to his public trust position application. Applicant provided no copies of the actual addendum he claimed he submitted with his application.

The IRS "Notice of the Tax Lien" (GE 9), indicates that 1997 was the year of assessment for the tax period ending in December 1993. The year of assessment for tax years 1992, 1994, 1995, 1996, and 1997 was 1998. The \$23,504 federal tax lien filed against Applicant in December 2006 has not been officially released by the IRS (GE 7).

In his response to DOHA interrogatories, his answer to the SOR, and at his hearing, Applicant claimed that his \$23,504 debt to the IRS is not collectable because of Internal Revenue Code Sections 6501 (limitations on assessment and collections), 6502 (collection after assessment), and 6511. He further claimed that when he invoked such provisions to IRS personnel, he was informed by IRS personnel that there would be no further claims or attempts to collect his tax debt. Applicant provided no documentary evidence of such conversations with IRS personnel.

Applicant expressed remorse and regret for his failure to file his tax returns, to pay his taxes, and to disclose his tax liens in his public trust position application. He claimed he has learned from his mistakes, and that he has matured. Applicant testified several times that his failure to disclose his tax liens in his public trust position application was an inadvertent error that he tried to correct during his follow-up interview with government investigators. He wants to continue working for the government, and believes that because of his years of experience working for the government and government contractors, he has a lot to offer. Applicant averred he is well aware of the importance of a public trust position and claimed he has never violated the trust placed on him during his 30 years working for the military, government contractors, and the government. He considers himself to be trustworthy and reliable.

At his hearing, Applicant introduced two character reference letters. One of his references has known Applicant during 14 years and the other has known Applicant for over 23 years. Both references consider Applicant to have outstanding personal and professional integrity and a strong work ethic. He is also a good father and a family-oriented man. Both references trust Applicant and endorsed his eligibility for a public trust position.

³ This statement is contrary to Applicant's testimony indicating he was unemployed during the same period (Tr. 84-85).

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 that “no one has a ‘right’ to a security clearance.” *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.

Positions designated as ADP I and ADP II are classified as “sensitive positions.” Regulation ¶¶ C3.1.2.1.1.7 and C3.1.2.1.2.3. “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.” Regulation ¶ C6.1.1.1. 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. See Regulation ¶ C8.2.1.

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 controlling 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 classified 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 security and trustworthiness suitability. 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. Directive ¶ E3.1.15. An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance [or 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 is the 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.”

Analysis

Guideline F, Financial Considerations

Under Guideline F, the trustworthiness concern is that 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 classified information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds. AG ¶ 18.

Applicant failed to timely file his federal income tax returns for tax years 1990 and 1992 through 1997. The IRS filed a tax lien against him in 1992, which was released in 1994 after he paid his 1990 taxes. The IRS filed a tax lien against him in 2006, for tax years 1992 through 1997, which has not been paid. Applicant had no good excuse or reason for his failure to timely file his income tax returns or to pay his taxes. AG ¶ 19(a): “inability or unwillingness to satisfy debts;” and AG ¶ 19(g): “failure to file annual Federal, state, or local income tax returns as required,” apply.

AG ¶ 20 lists six conditions that could mitigate the financial considerations trustworthiness concerns:

- (a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual’s current reliability, trustworthiness, or good judgment;
- (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;

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

(e) the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue; and

(f) the affluence resulted from a legal source of income.

Applicant established some circumstances beyond his control contributing to his inability to pay his taxes, i.e., his periods of unemployment from January to July 2003 and from October 2005 to October 2006. Notwithstanding, none of the mitigating conditions apply to Applicant's failure to timely file annual federal income tax returns as required by law or his failure to pay his taxes. Applicant claimed he made some payments to the IRS from 1997 to 2003, but he failed to provide documentary evidence to support his claims. He also failed to continue making payments after he regained employment. After 2003, Applicant made no further effort to pay his back due taxes until 2007.

Even if Applicant's debt to the IRS is not collectable because of the passing of the statute of limitations that does not automatically mitigate the financial considerations concerns.⁴ His behavior is recent and cast doubt on Applicant's current reliability, trustworthiness, and judgment.

Personal Conduct

AG ¶ 15 explains why personal conduct is a security/trustworthiness concern stating:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

⁴ In a series of decisions, the Appeal Board has clearly stated that the applicability of the statute of limitations does not automatically mitigate financial considerations concerns under AG ¶ 20(d). See ISCR Case No. 08-01122 at 4 (App. Bd. Feb. 9, 2009); ADP Case No. 06-14616 at 3 (App. Bd. Oct. 18, 2007); ISCR Case No. 07-08049 at 5 (App. Bd. Jul 22, 2008); ADP Case No. 07-13041 at 5 (App. Bd. Sep. 19, 2008); ISCR Case No. 07-11814 at 2 (App. Bd. Dec. 29, 2008).

Applicant deliberately falsified material facts on his 2007 public trust position application when he failed to disclose that in 2006, the IRS filed a \$23,504 federal tax lien against him for his failure to pay taxes for tax years 1992 through 1997. He also failed to disclose his debt to the IRS on his application. I do not find his statement at the hearing about his lack of knowledge of the IRS lien to be credible. Applicant's 2007 public trust position application indicated he has been living at his current residence since September 2006 (GE 1). The federal tax lien was filed in December 2006, and it correctly reflects Applicant's current residence address (GE 7 and 9). More likely than not, Applicant was mailed and received the notice of the federal tax lien.

Applicant's actions create trustworthiness concerns under two disqualifying conditions. Her behavior triggers the applicability of disqualifying conditions AG ¶¶ 16(a) "deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities," and 16(e) "personal conduct or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing."

AG ¶ 17 lists seven conditions that could mitigate the personal conduct security concerns:

- (a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;
- (b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;
- (c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;
- (d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress;

(f) the information was unsubstantiated or from a source of questionable reliability; and

(g) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

After considering the above mitigating conditions, I find none apply. Applicant falsified his SF 85P. I do not find his explanations for his failure to disclose the IRS debt and lien to be credible. At his hearing, Applicant claimed that, at the time he submitted his application in October 2007, he did not know the IRS filed a tax lien against him in December 2006. However, in his answer to the SOR, Applicant claimed he disclosed the tax debt and the lien to the government via an attachment to his application.

Furthermore, Applicant's claims of lack of knowledge are not credible because in 2004, he was in communication with the IRS and paid off a 2002 IRS lien against him. In 1997, he retained the services of an accounting firm to help him file his back due income tax forms and to deal with the IRS. With their assistance, he made payments to the IRS towards resolution of the IRS debt generated from 1997 to 2003. He stopped making payments to the IRS because he was laid off for several months. After resuming his employment in July 2003, he never made any more payments to the IRS. I find it is likely that Applicant and/or his accounting firm were notified by the IRS of the impending lien if the debt was not resolved, and later of the filing of the tax lien.

Applicant's falsification is a serious offense (felony), it is recent, and casts doubt on his reliability, trustworthiness, and judgment. Moreover, I find Applicant minimized his behavior and lied at his hearing.

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 relevant 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) 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.

The ultimate determination of whether to grant eligibility for a security clearance or public trust position must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole person concept. AG ¶ 2(c).

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant is a mature, trained man, and a good father. He has been successful working for the Air Force, government contractors, and the government for close to 30 years during most of which he had access to classified information. There is no evidence of any security violation, or that he is not a competent worker. These factors show some responsibility and mitigation.

On the other hand, there are more substantial circumstances that weigh against Applicant in the whole person analysis. He had no good reason to explain his failure to timely file and to pay his federal taxes. Outside of his testimony, he presented little documentary evidence of efforts to resolve his IRS debt.

Moreover, he deliberately falsified her public trust position application when he failed to disclose his IRS tax lien. Considering her 2004 tax lien release, his contacts with the IRS through his accounting firm, and the period over which the debts have been delinquent, Applicant knew or should have known of his debt to the IRS and was notified of the 2006 tax lien.

Considering the record as a whole, Applicant's financial behavior and personal conduct raise doubt about his ability to have access to sensitive information and his trustworthiness. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising from her financial considerations and personal conduct.

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
Subparagraphs 1.a:	Against Applicant
Subparagraph 1.b:	For Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant

Conclusion

In light of all the circumstances presented by the record in this case, it is not clearly consistent with national security to grant or continue Applicant's eligibility to occupy an ADP I/II/III position. Applicant's eligibility to occupy an ADP I/II/III position is denied.

JUAN J. RIVERA
Administrative Judge