



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



In the matter of: )  
)  
) ADP Case No. 11-09036  
)  
Applicant for Position of Trust )

**Appearances**

For Government: Eric Borgstrom, Esq., Department Counsel  
For Applicant: *Pro se*

02/19/2013

**Decision**

LOUGHRAN, Edward W., Administrative Judge:

Applicant has not mitigated financial considerations trustworthiness concerns. Eligibility for access to sensitive information is denied.

**Statement of the Case**

On August 22, 2012, the Department of Defense (DOD) issued a Statement of Reasons (SOR) detailing trustworthiness concerns under Guideline F, financial considerations. 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 Regulation 5200.2-R, *Personnel Security Program* (January 1987), as amended (Regulation); and the adjudicative guidelines (AG) implemented by the DOD on September 1, 2006.

Applicant answered the SOR on September 22, 2012, and requested a hearing before an administrative judge. The case was assigned to me on December 4, 2012. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on December 11, 2012, scheduling the hearing for January 7, 2013. The hearing was convened as scheduled. Government Exhibits (GE) 1 through 5 were admitted into evidence without objection. Applicant testified and submitted Applicant's Exhibits (AE) A

and B, which were admitted without objection. The record was held open for Applicant to submit additional information. He submitted four pages of documents that were collectively marked AE C and admitted without objection. Correspondence about the additional exhibit is marked Hearing Exhibit (HE) I. DOHA received the hearing transcript (Tr.) on January 15, 2013.

### **Findings of Fact**

Applicant is a 64-year-old employee of a defense contractor. He has worked for her current employer since 2005. He seeks to retain his eligibility for a public trust position. He served in the U.S. military from 1968 until he was honorably discharged in 1972. He is a high school graduate. He is married with two adult children.<sup>1</sup>

Between 2005 and 2006, Applicant purchased numerous cartons of cigarettes over the Internet. He admitted that he used the Internet to avoid paying state taxes on the cigarettes. On April 18, 2007, the state Department of Revenue sent him a Consumer Cigarette Use/Excise Tax Return, stating he purchased 212 cartons on May 2, 2005, and 40 cartons on June 7, 2006. He was to fill out the return, which stated that he was to pay \$13.50 per carton in cigarette excise tax; 6% of the purchase price of the cigarettes as a use tax; and penalties and interest. He was to complete the return with payment by June 4, 2007. He did not complete the return or make the payment when it was due.<sup>2</sup>

On October 31, 2007, the state Department of Revenue sent Applicant another Consumer Cigarette Use/Excise Tax Return, stating it was a Pre-Assessment Notice. The state completed this return, filling in all the required information. This return stated Applicant purchased 262 cartons on May 2, 2005, and 40 cartons on June 7, 2006. The return calculated the amount due as \$4,077 in cigarette excise tax; \$512 in use tax; and \$514 in penalties and interest; for a total amount due of \$5,107. He was to complete the return with payment by December 3, 2007. He did not complete the return or make the payment.<sup>3</sup>

On June 25, 2008, the state Department of Revenue sent Applicant a Cigarette and Use Tax Notice of Assessment. The calculation of the excise and use tax was the same as the Pre-Assessment Notice, but the state added \$5,222 in penalties and legal fees and \$723 in interest, for a total amount due of \$10,539. The completed form and payment was due by July 25, 2008. He did not complete the form or make the payment.<sup>4</sup>

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<sup>1</sup> Tr. at 24, 30; GE 1, 2.

<sup>2</sup> Tr. at 14-15, 25-26; GE 3; AE A.

<sup>3</sup> Tr. at 26; AE A.

<sup>4</sup> AE A.

In January 2009, the state filed a tax lien of \$11,047 against Applicant, which included \$10,539 as noted on the June 2008 Notice of Assessment, plus a \$14 filing fee and additional interest of \$493.<sup>5</sup>

Applicant was interviewed for his background investigation in April 2011. He acknowledged that he purchased cigarettes over the Internet with the intent to avoid state taxes. He stated that he received notices from the state that he owed about \$6,000 in taxes, and he received written notification of the tax lien of about \$11,000. He stated that he intended to obtain legal representation on the matter.<sup>6</sup>

Applicant responded to the SOR on September 22, 2012. He denied the allegation that he was indebted to his state for a tax lien filed against him in the approximate amount of \$11,047. He provided no explanation for his denial.

Applicant testified that he did not pay the taxes due on the cigarettes because the state “want[s] [him] to self-incriminate, they want [him] to supply them with the information about it.” He admitted that he bought the cigarettes without paying the taxes, but he “want[s] to see where they have the proof that [he] did do that.” He believes the state’s information “was illegally obtained,” but he did not state the basis of that belief. He also complained that the forms and notices he received were not signed. Applicant appeared to acknowledge by the end of the hearing that his position was untenable.<sup>7</sup>

In his post-hearing submissions, Applicant stated that he attempted to telephone the state Department of Revenue for several days, “with no luck talking to anyone.” On February 4, 2013, he signed and returned a Consumer Cigarette Use/Excise Tax Return, with a letter stating that he wanted “to clear [his] name of a cigarette tax debt and lien against [his] property.” He enclosed a check for \$500 and agreed to pay \$200 per month until the taxes were paid.<sup>8</sup>

## **Policies**

Positions designated as ADP I and ADP II are classified as “sensitive positions.” (See 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.” (See Regulation ¶ C6.1.1.1.) 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

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<sup>5</sup> Tr. at 26; GE 3-5; AE B.

<sup>6</sup> GE 3.

<sup>7</sup> Tr. at 15-31.

<sup>8</sup> AE C.

and Office of Personnel Management. DOD 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, the administrative judge must consider the disqualifying and mitigating conditions in the AG. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial and commonsense decision. According to AG ¶ 2(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.

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."

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel." The applicant has the ultimate burden of persuasion to obtain a favorable trustworthiness decision.

A person who seeks access to sensitive information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The government reposes a high degree of trust and confidence in individuals to whom it grants access to sensitive information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard sensitive information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of sensitive information.

## **Analysis**

### **Guideline F, Financial Considerations**

The security concern 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 classified 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 security concerns under AG ¶ 19. Two are potentially applicable in this case:

- (a) inability or unwillingness to satisfy debts; and
- (c) a history of not meeting financial obligations.

In 2005 and 2006, Applicant purchased 302 cartons of cigarettes over the Internet in order to avoid paying state taxes on the cigarettes. With penalties and interest, the amount owed was \$11,047 in January 2009. The evidence is sufficient to raise the above disqualifying conditions.

Conditions that could mitigate financial considerations security concerns are provided under AG ¶ 20. The following are potentially applicable:

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

Applicant bought the cigarettes over the Internet to avoid paying state taxes. He received several notices from the state of his legal obligation. In 2007, the state notified him that he owed \$5,107. In 2008, the state informed him that penalties and interest had been added, raising the total amount due to \$10,539. In January 2009, the state filed a tax lien of \$11,047 against Applicant, which included \$493 in additional interest. Applicant admitted that he received written notice of the lien. Applicant discussed the cigarette taxes and the tax lien during his background interview in April 2011. He stated that he intended to obtain legal representation on the matter. He continued to refuse to pay any of the cigarette taxes through his hearing. Only after the hearing, did he pay \$500 to the state and indicate that he was prepared to pay \$200 per month until the debt was paid.

I find that Applicant did not act responsibly under the circumstances. His \$500 payment after the hearing is insufficient to qualify as a good-faith effort to pay his

debts.<sup>9</sup> His finances are not under control. His financial issues are recent and ongoing. I am unable to determine that they are unlikely to recur. They continue to cast doubt on his current reliability, trustworthiness, and good judgment. There are no applicable mitigating conditions.

### **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 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.

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.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my comments under Guideline F in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

I considered Applicant's honorable military service and his long work record. However, Applicant is a tax scofflaw. He has avoided paying his legally-due cigarette taxes for more than six years. His \$500 payment after the hearing, under the threat of the loss of his eligibility for a public trust position, is insufficient to overcome his years of failing to fulfill his legal obligations.

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<sup>9</sup> The Appeal Board has explained what constitutes a "good-faith" effort to repay overdue creditors or otherwise resolve debts:

In order to qualify for application of [the good-faith mitigating condition], an applicant must present evidence showing either a good-faith effort to repay overdue creditors or some other good-faith action aimed at resolving the applicant's debts. The Directive does not define the term 'good-faith.' However, the Board has indicated that the concept of good-faith 'requires a showing that a person acts in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation.'

(internal citation and footnote omitted) ISCR Case No. 02-30304 at 3 (App. Bd. Apr. 20, 2004) (quoting ISCR Case No. 99-9020 at 5-6 (App. Bd. Jun. 4, 2001)).

