



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



In the matter of:)
)
) ADP Case No. 11-13161
)
Applicant for Public Trust Position)

Appearances

For Government: Caroline Jeffreys, Esquire, Department Counsel
For Applicant: *Pro se*

06/27/2013

Decision

DAM, Shari, Administrative Judge:

Applicant accumulated delinquent debts since 2006, including unpaid Federal and state taxes. He offered some evidence of conditions beyond his control that caused this debt, and submitted evidence that he paid or is resolving numerous debts and the 2006 unpaid taxes. Recently he filed Federal and state income tax returns for 2007, 2008, and 2009. His Federal tax liabilities for those years remain unresolved. Resulting trustworthiness concerns were not mitigated. Based upon the record evidence, eligibility for access to sensitive information is denied.

Statement of the Case

On March 16, 2011, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) version of his public trust position application (SF-85P). On January 15, 2013, the Department of Defense (DoD) issued Applicant a Statement of Reasons (SOR), pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security*

Clearance Review Program (Directive), dated January 2, 1992, as amended; and the adjudicative guidelines (AG) effective in DoD on September 1, 2006.

The SOR alleged security concerns under Guideline F (Financial Considerations). The SOR detailed reasons why DoD adjudicators could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue eligibility for a public trust position for Applicant. The SOR recommended referral to an administrative judge to determine whether Applicant's eligibility should be granted.

Applicant responded to the SOR and requested a hearing (Answer). On April 29, 2013, the Defense Office of Hearings and Appeals (DOHA) assigned Applicant's case to me. On May 2, 2013, DOHA issued a hearing notice, scheduling the case for May 21, 2013. The hearing was held as scheduled. At the hearing, Department Counsel offered six exhibits (GE 1-6) and Applicant offered 11 exhibits (AE A-K). There were no objections, and I admitted all exhibits. Applicant testified. The record remained open until June 7, 2013, to give Applicant additional time to submit documents. On June 3, 2013, I received the hearing transcript (Tr.). On June 12, 2013, Department Counsel forwarded additional exhibits that she received from Applicant on June 6, 2013. Those exhibits were marked as: AE A1, B1, C1, D1, E1, L1, L2, M, N, O, P, Q, R and S. All were admitted without objection.

Findings of Fact

Applicant's Answer admitted responsibility for the debts in SOR ¶¶ 1.b, 1.f, 1.i, 1.m, 1.p, and 1.q. He denied all other debts. His admissions are accepted as factual findings.

Applicant is a 52-year-old employee of a defense contractor. He is divorced. He has a 25-year-old daughter from his marriage. After finishing high school, he enlisted in the Navy. He served from November 1978 to 1988. He received an Honorable Discharge. He was an E-6, working as an instructor for cryptologic maintenance. He held a Top Secret SCI clearance during his service. (Tr. 8-19.) After leaving the Navy, he worked in sales for a private company and eventually became a purchasing and sales manager. He worked for the company until 1997, when he left because of a change in management. (Tr. 20.) He then worked for another company for a couple years. He started a consulting company in October 2002 and closed it in April 2009. (Tr. 22.) He was unemployed from May 2010 to February 2011, at which time he started his current position. His SF-85P did not include any reportable involvement with illegal drugs, excessive alcohol consumption, or criminal offenses. (GE 1.)

On August 19, 2011, a Government investigator interviewed Applicant regarding his debts. Applicant attributed his overall financial problems to the loss of his largest customer in 2008. That contract represented 75% of his annual income. (GE E at 14.) While testifying, he said that some of his financial difficulties are attributable to other factors. In 2005 he broke up with his girlfriend, with whom he lived for several years and shared expenses. While living together, he helped her financially during a custody case

involving her son. In 2006 his daughter suffered an emotional breakdown. After he lost the large business contract, he missed four mortgage payments in 2008, which led to a foreclosure in December 2010. He was depressed during these years and, as a result of these factors, he procrastinated managing his finances and debts. (Tr. 27-29, 36.) In December 2012, Applicant completed a set of DOHA Interrogatories regarding the status of many debts.

The SOR listed debts owed to 14 commercial creditors, one debt owed for unpaid Federal taxes, and one debt owed for unpaid state taxes. Two of the debts are listed twice. The status of each SOR-listed debt is as follows:

1. (1.a & 1.j) The \$3,082 judgment owed to a credit card company is being paid through a garnishment. As of May 20, 2013, the balance was \$63. (AE H.) It is being resolved.

2. (1.b & 1.m) The \$545 judgment filed in 2010 is owed to a bank. On June 2, 2013, Applicant paid \$250 on the account. (Tr. 45; Ex. O.) It is being resolved.

3. (1.d) The \$539 debt owed to a satellite television company is unresolved. Applicant has an ongoing dispute regarding this debt. (Tr. 55-56; AE G.) It is unresolved.

4. (1.e) The \$355 debt owed to gas company has a balance of \$180. Applicant made a \$175 payment on June 3, 2013. (AE R.) It is being resolved.

5. (1.f) The \$51 debt owed to a garbage disposal company was paid on June 3, 2013. (AE P.)

6. (1.g) The \$76 debt owed for a returned check is unresolved. (AE S.)

7. (1.h) The \$60 debt owed for a returned check is unresolved. (AE S.)

8. (1.i) The \$234 debt owed to a company was paid on June 3, 2013. (AE Q.)

9. (1.k) The \$454 debt owed for an unpaid credit card balance is unresolved.

10. (1.l) The \$27,136 past-due mortgage debt on a loan with a total balance of \$103,000 was resolved through a foreclosure in January 2010. The house sold for \$135,000. (Tr. 37.) He never received notice of a deficiency and does not anticipate one based on the foreclosure pleadings. (Tr. 37- 38; AE M.)

11. (1.n) The \$621 debt owed to a utility was paid on June 5, 2013. (AE N.)

12. (1.o) The \$190 debt owed for a medical account is unresolved. Applicant was unable to locate the creditor. (AE S.)

13. (1.p) The \$63 debt owed to a communications company is unresolved. Applicant discussed this debt during his August 2011 interview. (GE 5; AE S.)

14. (1.q) The \$155 debt is owed to a telephone company. He did not recall being late with any payment. He said he would pay it. (Tr. 69; AE S.) It is unresolved.

15. (1.c) The \$8,664 tax lien owed to the Federal government for unpaid employment taxes for 2006 has an unpaid balance of \$648 as of May 27, 2013. Applicant has been making monthly payments of \$350 since 2011. (AE E, E1.) It is being resolved.

16. (1.r) For the past 20 months, Applicant has been paying \$200 a month to his state for unpaid 2006 taxes. (Tr. 71; AE B, C, D.) The balance owed is not documented in this record. These taxes are being resolved.

In addition to having unpaid taxes for 2006, Applicant has unresolved income tax issues for 2007, 2008, and 2009. He filed his 2006 Federal and state tax returns in 2007, but did not pay the taxes owed. (Tr. 71.) He began making payments on 2006 Federal and state unpaid taxes in 2011 after the Government filed a lien. (Tr. 47.) He filed his 2007, 2008, and 2009 Federal and state tax returns on May 20, 2013.¹ (Tr. 72; AE B, C, D, I, J, K.) He wanted to file them sooner but was unable to locate old business records to support numerous deductions. (Tr. 87.) According to his recently filed returns and calculations, Applicant owes the Federal government \$14,113 for 2007 and \$2,141 for 2008. He is owed a \$2,070 refund for 2009, which he will apply to unpaid taxes. (AE I, J, K.) The state owes him refunds of \$226 for 2007; \$2,509 for 2008; and \$584 for 2009. Those state refunds total \$3,319, and will be transferred to the Federal government for unpaid taxes for 2007 and 2008. (Tr. 92; AE B1, C1, D1.)

Applicant submitted a personal financial statement as of December 2012. His monthly income is approximately \$3,427. His monthly expenses are \$1,710, and his payments on state and Federal tax liability, a credit card, and a personal loan totaled \$1,050, leaving him with \$66 remaining. As he completes payments on the 2006 taxes, he will use that \$350 per month for other debts. (Tr. 93; GE 5.)

Applicant testified candidly. When asked why he had not been more aggressive in resolving his debts, knowing this hearing was approaching at some point, he admitted that it was probably "procrastination." (Tr. 81.) In regard to his failure to timely file his 2007, 2008, and 2009 returns, he said it was "frustration, depression." (Tr. 88.) He said he was not being treated for depression. (Tr. 54, 88.)

¹ Applicant's failure to file income tax returns for 2007, 2008, and 2009 was not alleged in the SOR and will not be considered as a disqualifying condition. However, said facts may be considered in determining the applicability of mitigating conditions and the whole-person analysis.

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 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. (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 AGs. 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 AG ¶ 2(a) describing 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.” 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.

According to Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, “[t]he applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable [trustworthiness] decision.”

A person who applies for access to sensitive information seeks to enter 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.

Section 7 of Executive Order 10865 provides that “[a]ny determination under this order adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Financial Considerations

AG ¶ 18 articulates the trustworthiness concerns relating to financial problems:

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 ¶ 19 provides two disqualifying conditions that could raise trustworthiness concerns and may be disqualifying in this case:

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

Applicant has been unable or unwilling to satisfy numerous debts since 2006, including income taxes. The evidence raises trustworthiness concerns under both disqualifying conditions, and shifts the burden to Applicant to rebut, extenuate, or mitigate those concerns.

The guideline includes five mitigating conditions under AG ¶ 20 that could mitigate trustworthiness concerns arising from Applicant’s financial problems:

- (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; and

(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.

Applicant's delinquent debts and unpaid taxes began accumulating in 2006. Some debts and income taxes have remained unaddressed or unresolved as of 2013. Applicant failed to adequately demonstrate that such problems are unlikely to continue or recur, or that his reliability and trustworthiness have improved over the course of years. The evidence does not support the application of AG ¶ 20(a).

AG ¶ 20(b) has limited application. Applicant presented evidence that a portion of his delinquent debt is attributable to the loss of a business contract and personal problems. Those were circumstances largely beyond his control. He acknowledged that he failed to properly monitor and manage his finances while the debts were accumulating and ignored his certain tax obligations until May 20, 2013, when he filed 2007, 2008, and 2009 Federal and state annual income tax returns. Substantial tax debt remains unpaid.

AG ¶ 20(c) has partial application. Applicant did not provide proof that he completed or enrolled in financial counseling for his financial problems that began in 2006. Based on his budget and payments to date, there are indications that a significant portion of the SOR-listed debts are being resolved and are coming under control. However, he has several commercial debts and outstanding Federal tax debts for 2007 and 2008, and possibly 2009, which have not been resolved.

AG ¶ 20(d) has some application. Applicant paid or resolved four debts, totaling \$28,042 and demonstrating a good-faith effort to resolve delinquent debts. He is resolving four other debts through payments. Those debts totaled \$12,646 and now have a cumulative balance of \$1,186.

AG ¶ 20(e) does not apply. Although Applicant said that he has an ongoing dispute with a television company concerning the debt alleged in SOR ¶ 1.d, he did not present sufficient evidence to document the validity of the dispute or actions taken to resolve it.

At this time Applicant has paid four creditors and owes \$1,186 to four other creditors. He has not paid or resolved delinquent debts owed to seven creditors that total \$1,537. These 11 delinquent debts total \$2,723. That amount does not include the

balance owed on his 2006 state income taxes, or any additional Federal income taxes that may be assessed as a consequence of his recent late filing of three tax returns.

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 must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. AG ¶ 2(c).

Applicant is 52 years old. He successfully and honorably served in the Navy for ten years. Between 2005 and 2009, he experienced personal and professional problems that affected his finances. However, he is sufficiently mature to understand and comply with his trustworthiness responsibilities, which include reliably managing his financial obligations. Despite receiving repeated notice of potential trustworthiness concerns from the Government, which included an interview in August 2011 and completion of interrogatories in December 2012, he failed to aggressively pursue the resolution of several debts or file outstanding tax returns.

On January 15, 2013, Applicant received the SOR, which included allegations pertaining to unpaid Federal and state tax liabilities for 2006. On May 20, 2013, he filed Federal and state income tax returns for 2007, 2008, and 2009. At the hearing on May 21, 2013, he submitted those returns as exhibits. At this time, Applicant does not know how much money he owes the Federal government for those tax years. That amount could be \$16,000. He presented evidence pertinent to the state returns, which indicated that he will receive refunds. Nonetheless, those state returns were delinquent. While he has recently been more active in addressing delinquent debts, he has not established a sufficient track record of exercising good judgment or responsible financial management. Applicant had many years to file three years of tax returns, yet he waited until the day before his hearing to do so.

Overall, the record evidence leaves me with sufficient doubts as to Applicant's present eligibility for a public trust position. He did not meet his burden to mitigate the trustworthiness concerns arising from his financial considerations.

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 to 1.c:	For Applicant
Subparagraph 1.d:	Against Applicant
Subparagraphs 1.e and 1.f:	For Applicant
Subparagraphs 1.g and 1.h:	Against Applicant
Subparagraphs 1.i and 1.j:	For Applicant
Subparagraph 1.k:	Against Applicant
Subparagraphs 1.l to 1.n:	For Applicant
Subparagraphs 1.o to 1.q:	Against Applicant
Subparagraph 1.r:	For Applicant

Conclusion

In light of all circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue Applicant's eligibility for a public trust position. Eligibility for access to sensitive information is denied.

SHARI DAM
Administrative Judge