



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



In the matter of:

Applicant for Public Trust Position

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ADP Case No. 15-00859

Appearances

For Government: Braden M. Murphy, Esquire, Department Counsel

For Applicant: *Pro se*

May 23, 2017

Decision

ROSS, Wilford H., Administrative Judge:

On May 29, 2014, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP). (Item 4.) On August 15, 2015, the Department of Defense (DoD) issued Applicant a Statement of Reasons (SOR) detailing trustworthiness concerns under Guideline F, Financial Considerations. The action was taken under DoD Regulation 5200.2-R, *Personnel Security Program*, dated January 1987, as amended (Regulation); DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the DoD for SORs issued after September 1, 2006.

On October 13, 2015, Applicant answered the SOR in writing and elected to have the case decided on the written record in lieu of a hearing. (Item 3.) On March 7, 2016, Department Counsel prepared a File of Relevant Material (FORM). Applicant received the FORM on March 11, 2016, and had 30 days from its receipt to file objections and

submit additional information.¹ Applicant elected not to submit additional information. On November 1, 2016, the Defense Office of Hearings and Appeals (DOHA) assigned the case to me.

Findings of Fact

Applicant is 43 years old and married. In July 2013 he began working for a defense contractor. (Item 4.)

The SOR contained eleven allegations under Guideline F, Financial Considerations. The allegations relate to a court-martial in 1989, his failure to file or pay Federal taxes, and eight delinquent debts. In his Answer, Applicant admitted all of the allegations. (Item 3.)

1.a. Applicant admitted that he was tried by a Special Court-Martial in 1989 for the offense of Uttering Worthless Checks under Article 123A of the Uniform Code of Military Justice while in the Marine Corps. His adjudged sentence included six months confinement, reduction to the lowest enlisted pay grade (E-1), and a Bad Conduct Discharge. (Item 4 at Section 15.)

1.b. Applicant admitted that he failed to file his Federal income tax returns for tax years 2003, 2004, 2005, 2006, and 2007. He stated on his e-QIP, "Behind on filing, all taxes filed as of August 2013." No other information was provided. (Item 4 at Section 26.)

1.c. Applicant admitted that he owed the Federal government at least \$70,650 in back taxes, due to a tax lien filed in 2012. In his e-QIP Applicant stated, "Tax filings brought current," and that the tax lien may be \$80,000. Applicant did not provide any documentation from the IRS setting forth with particularity the amount he owes in back taxes.

1.d through 1.k. These eight allegations concern alleged delinquent debts of Applicant. He admitted each of these allegations. The total amount of the delinquent debt is \$5,096. Support for the existence and amounts of these debts can be found in credit reports of the Applicant dated June 6, 2013; and January 12, 2015. (Items 5 and 7.) These debts consist of bank and other commercial accounts, with past-due amounts ranging from \$74 to \$1,404.

¹ Department Counsel submitted seven Items in support of the SOR allegations. Item 6 is inadmissible. It will not be considered or cited as evidence in this case. It is the summary of an unsworn interview of Applicant conducted by an interviewer from the Office of Personnel Management on July 16, 2014. Applicant did not adopt the summary as his own statement, or otherwise certify it to be accurate. Under Directive ¶ E3.1.20, this Report of Investigation summary is inadmissible in the absence of an authenticating witness. In light of Applicant's admissions and other admissible evidence in the record, it is also cumulative.

Applicant did not provide a workable plan or budget from which his ability to resolve the tax delinquencies, pay his other delinquent debts, or avoid additional debt problems can be predicted with any certainty. He submitted no evidence concerning the quality of his professional performance, or the level of responsibility his duties entail. He provided no character references describing his judgment, trustworthiness, integrity, or reliability.

Policies

Positions designated as ADP I/II/III 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 the DoD and DOHA by the Defense Security Service 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 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.

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 the applicant or proven by Department Counsel. . . .” The applicant 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.

Analysis

Guideline F, Financial Considerations

The trustworthiness concerns relating to the guideline for financial considerations are set out in AG ¶ 18, which reads in pertinent part:

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.

AG ¶ 19 describes four conditions that could raise trustworthiness concerns and may be disqualifying in this case:

- (a) inability or unwillingness to satisfy debts;
- (c) a history of not meeting financial obligations;
- (d) deceptive or illegal financial practices such as embezzlement, employee theft, check fraud, income tax evasion, expense account fraud, filing deceptive loan statements, and other intentional financial breaches of trust; and
- (g) failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same.

Applicant has a history of being unable or unwilling to fully satisfy his Federal tax obligations. Applicant admits failing to file his Federal income tax returns for at least five years, and having a tax lien since 2012. He states that the tax returns have all been filed, but supplied no evidence to support that statement. The amount of taxes he currently owes is unknown, but he admits it to be between approximately \$70,000 and

\$80,000. In addition, Applicant owes eight other creditors at least \$5,000 for past-due debts. Finally, he admitted to committing earlier financial crimes, which resulted in Applicant being court-martialed while on active duty with the Marine Corps. The evidence raises all four security concerns, thereby shifting the burden to Applicant to rebut, extenuate, or mitigate those concerns.

The guideline includes five conditions in AG ¶ 20 that could mitigate trustworthiness concerns arising from Applicant's financial difficulties:

- (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 submitted no information that would show what his current indebtedness is to the Federal government, how much he has paid, or how he intends to finally resolve his tax issues. In addition, he supplied no information about how he intended to resolve his other debt issues. Finally, though it is in the past, the background of his court-martial offense makes it of continuing security concern. There is insufficient information to demonstrate that his financial problems are unlikely to continue or recur, calling into question his reliability and trustworthiness. The evidence does not support the application of any of the mitigating conditions in this case.

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.

According to AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a trustworthiness determination 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 the facts and circumstances surrounding this case. Applicant is a 43-year-old man, who started working for a national company that handles defense contracts in 2013. He has a long history of tax problems, which evidently began in about 2003, and may continue to date. Applicant failed to submit sufficient information from which to conclude that his financial obligations are being responsibly managed and that similar problems are unlikely to recur. Overall, the record evidence leaves me with questions as to Applicant's eligibility and suitability for a public trust position. For these reasons, I conclude Applicant did not meet his burden to mitigate the trustworthiness concerns arising from his financial problems.

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.k:	Against Applicant

Conclusion

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

WILFORD H. ROSS
Administrative Judge