



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



In the matter of: )  
)  
) ADP Case No. 15-05835  
)  
Applicant for Public Trust Position )

**Appearances**

For Government: Nicole A. Smith, Esq., Department Counsel  
For Applicant: *Pro se*

08/24/2017

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**Decision**

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HEINY, Claude R., Administrative Judge:

Applicant contests the Department of Defense's (DoD) intent to deny his eligibility for a public trust position to work in the defense industry. Applicant failed to timely file and pay his Federal and state income taxes for tax years 2007 through 2014. He failed to mitigate the trustworthiness concerns arising from his non-filing of income tax returns and non-payment of taxes. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to sensitive information is denied.

**Statement of the Case**

Acting under the relevant Executive Order and DoD Directive,<sup>1</sup> on June 15, 2016, the DoD issued a Statement of Reasons (SOR) detailing the trustworthiness concerns under financial considerations. DoD adjudicators could not find that it is clearly consistent

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<sup>1</sup> Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; 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 on September 1, 2006, and as amended on June 8, 2017.

with the national interest to grant or continue Applicant a public trust position. On July 11, 2016, Applicant answered the SOR and elected to have the matter decided without a hearing. Defense Office of Hearings and Appeals (DOHA) Department Counsel (DC) submitted the Government's case in a File of Relevant Material (FORM), dated August 1, 2016. The FORM contained four attachments (Items). On September 8, 2016, Applicant received a copy of the FORM, along with notice of his opportunity to object to the Government's evidence and submit material to refute, extenuate, or mitigate the potentially disqualifying conditions. He had 30 days from his receipt of the FORM to submit any additional information in response to the FORM. No additional information was received from Applicant. On August 8, 2017, I was assigned the case.

While this case was pending a decision, the Director of National Intelligence issued Security Executive Agent Directive 4, establishing *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AGs) which he made applicable to all covered individuals who require initial or continued eligibility for access to classified information or eligibility to hold a sensitive position. The new AGs supersede the Sept. 1, 2006 AGs and are effective "for all covered individuals" on or after June 8, 2017. Accordingly, I have evaluated Applicant's trustworthiness eligibility under the new AGs.<sup>2</sup>

### **Findings of Fact**

In Applicant's answer to the SOR, he indicated a computer crash caused the loss of all records. He asserted he had made unspecified payment on his taxes, but had not filed his Federal or state tax returns. He asserted he had now turned his records over to an accountant to file his tax returns for those tax years that were unfiled. I incorporate Applicant's admissions as facts. After a thorough review of the pleadings and exhibits, I make the following additional findings of fact.

Applicant is a 58-year-old consultant who has worked for a defense contractor since March 2015 and also a self-employed consultant dealing with HIPAA<sup>3</sup> matters.

In Applicant's April 2015 Electronic Questionnaires for Investigations Processing (e-QIP), he indicated:

Business accounting system experienced a system crash and I have had to recreate all financial records in order to accurately provide information on filing. This in turn had created a late filing for years after. All records are now in hand as best as I can get them and all substantiated material is being turned over to an accountant to make sure all filing is completed in an accurate manner to hold scrutiny to IRS audit. Tax payments have been submitted, have just not been able to file. (Item 3)

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<sup>2</sup> Application of the AGs that were in effect as of the issuance of the SOR would not change my decision in this case. The new AGs are available at [http://ogc.osd.mil/doha/5220-6\\_R20170608.pdf](http://ogc.osd.mil/doha/5220-6_R20170608.pdf).

<sup>3</sup> HIPAA is the Health Insurance Portability and Accountability Act of 1996 is legislation that provides data privacy and security provisions for safeguarding medical information.

In Applicant's e-QIP, he indicated he had not been in a position to "undertake the filing process until now." (Item 3) He estimated his federal taxes were: \$10,000 each year for tax years 2007 and 2008, zero for tax year 2009, \$25,000 each year for tax years 2010 through 2012, and \$50,000 for tax year 2013. He did not indicate how much state tax was owed.

In May 2015, Applicant had an enhanced subject interview during which his non-filing of Federal and state income tax returns was discussed for tax years 2007 through and including 2014. (Item 4) He explained the computer crash and that he had provided all the information to his accountant. He expressed hope that his tax returns would be filed by July 2015. (Item 4) He indicated that in 2013, the state had placed a tax lien of approximately \$35,000 on his home for failing to pay state income tax. (Item 4) He asserted he paid the full amount owed on the lien shortly after learning of the tax lien.

The FORM stated:

Directive 5220.6 Paragraph E3.1.7, provides that you be provided with a copy of all relevant and material information that could be adduced at hearing and that you shall have 30 days for the receipt of this information in which to submit a documentary response setting forth objections, rebuttal, extenuation, mitigation, or explanation, as appropriate. If you do not file any objections or submit any additional information within 30 days of receipt of his letter, your case will be assigned to an Administrative Judge for a determination based solely on this File of Relevant Material (FORM). Additional information concerning your rights and responsibilities is provided in Directive and in the cover letter accompanying this document.

The cover letter stated:

. . . , an attorney for the Department of Defense, has been assigned to present the Government's case and has prepared a file of what is considered the relevant material which will be submitted to an Administrative Judge to make the determination in your case.

Before that file is sent to the Administrative Judge, you have an opportunity to review the attached copy of that complete file and submit any material you wish the Administrative Judge to consider or to make any objections you may have as to the material in the file. You have **30 days** from receipt of this letter to submit your objections or any additional information you wish to be considered.

The FORM informed Applicant that he had failed to provide documentation corroborating his assertions that he had provided his records to an accountant. No response to the FORM was received from Applicant. He did not identify any actions taken to resolve his failure to file his tax returns or pay his taxes, other than his assertion that he turned all the information over to an accountant. He provided no copies of correspondence with the Internal Revenue Service or the State Department of Revenue

nor did he provide any documentation reflecting the current status of his taxes. He provided no information about his monthly income or expenses.

## **Policies**

Positions designated as ADP I and ADP II are classified as “sensitive positions.” “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.

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 over-arching adjudicative goal is a fair, impartial and commonsense decision. According to AG ¶ 2(a), 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 [national security eligibility] will be resolved in favor of the 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 applicant or proven by Department Counsel. . . .” The applicant has the ultimate burden of persuasion as to obtaining 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 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 (EO) 10865 provides that decisions shall be “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**

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

Adjudicative Guideline (AG) ¶ 18 articulates the security concerns relating to financial problems:

Failure 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 or sensitive information . . . An individual who is financially overextended is at greater risk of having to engage in illegal or other questionable acts to generate funds.

Additionally, an individual who is financially irresponsible may also be irresponsible, unconcerned, negligent, or careless in properly handling and safeguarding sensitive information. Behaving responsibly or irresponsibly in one aspect of life provides an indication of how a person may behave in other aspects of life.

A person's relationship with his creditors is a private matter until evidence is uncovered demonstrating an inability or unwillingness to repay debts under agreed upon terms. Absent evidence of strong extenuating or mitigating circumstances, an applicant with a history of serious or recurring financial difficulties is in a position of risk that is inconsistent with holding a position of trust. An applicant is not required to be debt free, but is required to manage his finances to meet his financial obligations.

Applicant's noncompliance with his tax filing and payment obligation for several years establishes the disqualifying condition under ¶ 19(g), “failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same,” and under the previous AGs “failure to file or fraudulently filing annual Federal, state, or local income tax returns or failure to pay annual Federal, state, or local income taxes as required.”

The Government's evidence and Applicant's own admissions raise security concerns under Guideline F. The burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the security concerns. (Directive ¶ E3.1.15) An applicant has the burden of proving a mitigating condition, and the burden of disproving

it never shifts to the Government. (See ISCR Case No. 02-31154 at 5 (App. Bd. September 22, 2005)).

Six of the seven Financial Considerations mitigating conditions under AG ¶¶ 20 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, a death, divorce or separation, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances;

(c) the person has received or is receiving financial counseling for the problem from a legitimate and credible source, such as a non-profit credit counseling service, and there are clear indications that the problem is being resolved or is under control;

(d) the individual initiated and is adhering to 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

(g) the individual has made arrangements with the appropriate tax authority to file or pay the amount owed and is in compliance with those arrangements.

During Applicant's interview in May 2015, he stated he had turned his information over to an accountant and hoped to have all his tax returns filed by July 2015. In his July 2016 SOR response, he again stated he had turned all records over to an accountant to file his tax returns. There is no documentation corroborating he had turned the material over to an accountant or that his delinquent income tax returns have been filed. He provided no correspondence with the Internal Revenue Service or the State Department of Revenue nor did he provide any documentation reflecting the current status of his taxes.

Under AG ¶ 20(a), the behavior did not happen in the long ago past and it occurred for eight successive tax years. There is no documentation that his tax returns have been filed and his taxes paid. His failure to timely file his tax returns and pay his taxes casts

doubt on his current reliability, trustworthiness, and good judgment. AG ¶ 20(a) does not apply.

The crash of Applicant's computer was a factor beyond his control, although his failure to maintain backup records was not explained. However, it has been more than nine years since his 2007 tax returns were due and there is no showing the returns have been filed. He has not acted responsibly under the circumstances. AG ¶ 20(b) does not apply.

AG ¶ 20(c) does not apply because there is no clear indication the financial problems are being resolved or are under control. AG ¶ 20(d) does not apply because the taxes remain unpaid. AG ¶ 20(e) does not apply because Applicant is not disputing his failure to file his income tax returns. There is no showing of an arrangement with the appropriate tax authority to file and pay his taxes. AG ¶ 20(g) does not apply.

### **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(d):

- (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 trustworthiness position must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept.

Applicant has been aware of the Government's concern about his unfiled tax returns since his April 2015 e-QIP and his May 2015 interview when he was specifically questioned about his failure to timely file tax returns. Additionally, the June 2016 SOR put him on notice of the Government's concern about his delinquent taxes as did the August 2016 FORM. The FORM specifically informed him that he had failed to provide documentation showing the payment of his delinquent tax obligations.

In requesting an administrative determination, Applicant chose to rely on the written record. In so doing, however, he failed to submit sufficient information or evidence to supplement the record with relevant and material facts regarding his circumstances, articulate his position, and mitigate the financial security concerns. He failed to offer

evidence of financial counseling or provide documentation regarding any past efforts to address his noncompliance with his income tax filing obligation for several years. By failing to provide such information, and by relying solely on his scant explanation in his SOR response, he failed to mitigate the trustworthiness concerns arising from his financial considerations.

The issue is not simply whether all the delinquent obligations have been paid—it is whether his financial circumstances raise concerns about his eligibility and suitability for a public trust position. (See AG ¶ 2(b)) This decision should not be construed as a determination that Applicant cannot or will not attain the state of true reform and rehabilitation necessary to be eligible for a public trust position. The determination of an individual's eligibility and suitability for a public trust position is not a once in a lifetime occurrence, but is based on applying the factors, both disqualifying and mitigating, to the evidence presented. Under Applicant's current circumstances, I cannot find him eligible for a public trust position. In the future if Applicant files his tax returns and paid his tax obligations, established compliance with a repayment plan, or otherwise substantially addressed his past-due obligations, he may well demonstrate persuasive evidence of his trustworthiness.

Overall, the record evidence leaves me with questions or doubts about Applicant's eligibility and suitability for a public trust position. For all these reasons, I conclude Applicant failed to mitigate the trustworthiness concerns arising from his non-filing of income tax returns and nonpayment of taxes.

### **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, Financial Considerations: AGAINST APPLICANT

Subparagraphs 1.a and 1.b: 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 information is denied.

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CLAUDE R. HEINY II  
Administrative Judge