



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



In the matter of:)
)
) ADP Case No. 15-08323
)
Applicant for Public Trust Position)

Appearances

For Government: Aubrey M. DeAngelis, Esq., Department Counsel
For Applicant: Pro se

06/28/2017

Decision

CERVI, Gregg A., Administrative Judge

This case involves trustworthiness concerns raised under Guideline F (Financial Considerations). Eligibility for access to sensitive information is denied.

Statement of the Case

Applicant completed a Questionnaire for National Security Positions (SF 86) on November 24, 2014.¹ On March 25, 2016, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guideline F.²

¹ Applicant is requesting a trustworthiness determination for access to sensitive information, also known as a “public trust” determination, to occupy an automated data processing (ADP) position.

² The Department of Defense acted under DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); DOD Regulation 5200.2-R, *Personnel Security Program* (January 1987), as amended (Regulation); and the adjudicative guidelines (AG) implemented by DOD on September 1, 2006. The Regulation has been replaced by DOD Manual 5200.02, *Procedures for the DOD Personnel Security Program*, effective April 3, 2017, which makes the Directive applicable to ADP cases. Security Executive Agent Directive 4 (SEAD 4), was issued on December 10, 2016, revising the 2006 adjudicative guidelines. The SEAD 4 guidelines apply to all

Applicant answered the SOR on May 11, 2016, and elected to have the case decided on the written record in lieu of a hearing. The Government's written brief with supporting documents, known as the File of Relevant Material (FORM), was submitted by Department Counsel on August 25, 2016.

A complete copy of the FORM was provided to Applicant, who was afforded an opportunity to file objections and submit material to refute, extenuate, or mitigate the security concerns. Applicant received the FORM on August 29, 2016. He did not submit material in response to the FORM. The Government's exhibits included in the FORM (Items 1 to 8) are admitted into evidence. The case was assigned to me on June 2, 2017.

Findings of Fact

Applicant is a 41-year-old personal computer specialist employed by a defense contractor since October 2014. He was unemployed for seven months in 2014. Previously, he held a job from 2006 to 2014, but was discharged by his employer over a dispute with his manager. He graduated from high school in 1994 and attended some college. He is unmarried but has been living with a person since 2011. He served in the U.S Air Force from 2001 to 2005, where he last held a security clearance.

The SOR alleges six collection accounts totaling approximately \$3,404, and failure to file and pay federal and state tax returns for tax years 2009 to 2013. He listed his financial delinquencies on his SF 86. Applicant admitted the SOR allegations in his answer to the SOR, except he denied SOR ¶ 1(g) and (h), alleging he failed to file and pay his state tax returns. He provided a narrative explaining his answers, an IRS letter, and an IRS installment agreement request.

Applicant admitted SOR allegations ¶ 1(a) – (f), but contended that one or two of the debts may have been settled since he believes he could not have renewed his driver's license unless the debts were paid. He did not identify which SOR debts would have been settled. He also stated that he intended to resolve his tax obligations before addressing his other debts.

Applicant stated in his SF 86 that he was irresponsible about his taxes and that he contacted the IRS and other creditors to arrange payments. In his answer, Applicant claimed that he filed his tax returns for tax years 2010 to 2013 in September 2015, and that he had previously filed his 2009 return but did not know when. He stated that he included an initial payment of \$241 with an installment agreement request to the IRS with his returns. In May 2016, Applicant's request to the IRS to apply a credit for his 2010 tax refund to other tax obligations was denied. There was no documentary evidence presented to show that tax returns were filed, other than for tax year 2010, or that an installment agreement was approved or any delinquent tax payments were made.

adjudicative decisions issued on or after June 8, 2017. My decision is based on the guidelines in SEAD 4, referred to in this decision as "AG." The changes resulting from issuance of SEAD 4 did not affect my decision in this case.

Applicant asserted his intent to pursue a resolution with the IRS. He noted that he is from a U.S. territory that does not require residents to file a tax return to the IRS, therefore he did not think about doing so during the years alleged.³ He denied failing to pay or owing state taxes. No evidence was produced by the Government to support this allegation in SOR ¶1(h).

Since Applicant elected to have this case decided on the written record in lieu of a hearing, I was unable to further inquire into these allegations, or evaluate his demeanor or credibility in response to questions. There was no evidence presented to show Applicant's current financial condition or whether he ever consulted a financial counselor.

Policies

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(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.

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. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard sensitive information.

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 an evaluation of the whole person. The administrative judge's overarching 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.

The protection of the national security is the paramount consideration. Under AG ¶ 2(b), "[a]ny doubt concerning personnel being considered [for access to sensitive information] will be resolved in favor of the national security." The Government must present substantial evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.14. Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the

³ Residents of U.S. territories generally file tax returns to their respective local governments, rather than the IRS. See, <https://www.irs.gov/individuals/international-taxpayers/individuals-living-or-working-in-us-posessions>.

facts. 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. Sep. 22, 2005). An applicant has the ultimate burden of demonstrating that it is clearly consistent with national security to grant or continue eligibility for access to sensitive information.

Analysis

Financial Considerations

The security concern under this guideline is set out in AG ¶ 18:

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. . . .

The relevant disqualifying conditions under AG ¶ 19 include:

- (a) inability to satisfy debts;
- (c) a history of not meeting financial obligations; and
- (f) failure to file or fraudulently filing annual federal, state, or local income tax returns or failure to pay annual federal, state, or local income tax as required.

Applicant's admissions and the documentary evidence are sufficient to establish the disqualifying conditions for SOR ¶ 1(a) – (g). There was insufficient evidence showing Applicant failed to file or pay state income taxes when due. SOR ¶ 1(h) is resolved in Applicant's favor.

The following mitigating conditions under AG ¶ 20 are potentially relevant:

- (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 individual 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.

Applicant's delinquent debts are recent, numerous, and there is insufficient evidence to determine that they were incurred under circumstances making them unlikely to recur. He provided no reasonable explanation for his delinquent debts. He asserted that he filed his delinquent returns in 2015 (and the 2009 return at another time), but he failed to provide evidence to show the returns were filed, except for tax year 2010, and has not shown that delinquent taxes are paid. Applicant's explanation for failing to file and pay federal tax returns does not mitigate his actions. His willful disregard of his federal tax obligations and other delinquent debts, raise questions about his judgment and willingness to comply with rules and regulations.

The DOHA Appeal Board has commented:⁴

Failure to file tax returns suggests that an applicant has a problem with complying with well-established governmental rules and systems. Voluntary compliance with such rules and systems is essential for protecting classified information.⁵ As we have noted in the past, a clearance adjudication is not directed at collecting debts. By the same token, neither is it directed toward *inducing an applicant to file tax returns. Rather, it is a proceeding aimed at evaluating an applicant's judgment and reliability.* A person who fails repeatedly to fulfill his or her legal obligations does not demonstrate the high

⁴ ISCR Case No. 14-04437 at 3 (App. Bd. Apr. 15, 2016). See ISCR Case No. 14-05476 at 5 (App. Bd. Mar. 25, 2016) (citing ISCR Case No. 01-05340 at 3 (App. Bd. Dec. 20, 2002)). ISCR Case No. 14-01894 at 4-5 (App. Bd. Aug. 18, 2015).

⁵ ISCR Case No. 01-05340 at 3 (App. Bd. Dec. 20, 2002).

degree of good judgment and reliability required of those granted access to classified information.⁶

The Appeal Board clarified that even in instances where an “[a]pplicant has purportedly corrected [the applicant’s] federal tax problem, and the fact that [applicant] is now motivated to prevent such problems in the future, does not preclude careful consideration of [a]pplicant’s security worthiness in light of [applicant’s] longstanding prior behavior evidencing irresponsibility” including a failure to timely file federal income tax returns.⁷

In this case, the negative financial and judgment information is significant. Applicant did not take appropriate, responsible, and timely action to resolve his tax and other financial obligations. Although he requested an installment agreement with the IRS, he did not show he has made any payments. The remaining debts have also not been resolved. He presented no evidence showing his current financial condition or that he sought financial counseling. There is insufficient evidence to show his financial situation is under control. Overall, no mitigating conditions fully apply.

Whole-Person Concept

Under AG ¶¶ 2(a), 2(c), and 2(d), the ultimate determination of whether to grant national security eligibility must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. Under the whole-person concept, the administrative judge must evaluate an applicant’s eligibility for a [trustworthiness determination] 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). Although adverse information concerning a single criterion may not be sufficient for an unfavorable eligibility determination, the individual may be found ineligible if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility, or unstable behavior. AG ¶ 2(e).

I considered all of the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my findings of fact and comments under Guideline F in my whole-person analysis.

⁶ See, e.g., ISCR Case No. 07-08049 at 5 (App. Bd. Jul. 22, 2008). See, e.g., ISCR Case No. 14-01894 at 5 (App. Bd. Aug. 18, 2015). See *Cafeteria & Restaurant Workers Union Local 473 v. McElroy*, 284 F.2d 173, 183 (D.C. Cir. 1960), *aff’d*, 367 U.S. 886 (1961).

⁷ See ISCR Case No. 15-01031 at 3 and note 3 (App. Bd. June 15, 2016) (characterizing “no harm, no foul” approach to an Applicant’s course of conduct and employed an “all’s well that ends well” analysis as inadequate to support approval of access to classified information with focus on timing of filing of tax returns after receipt of the SOR).

Insufficient evidence has been submitted to show that Applicant's delinquent financial obligations are being resolved and that his financial situation is under control. Applicant has lived outside of his home territory since at least 2001. He is expected to comply with federal tax laws despite the customary practice in his former residence. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the national security interests of the United States to grant him eligibility for access to sensitive information.

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 – 1.g:	Against Applicant
Subparagraph 1.h:	For Applicant

Conclusion

I conclude that it is not clearly consistent with the national security interests of the United States to grant Applicant's eligibility for a public trust position. Eligibility for a public trust position is denied.

Gregg A. Cervi
Administrative Judge