



**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. 16-01055

Appearances

For Government: Benjamin R. Dorsey, Esq., Department Counsel
For Applicant: *Pro se*

05/29/2018

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant refuted the personal conduct trustworthiness concerns, but he did not mitigate the financial considerations trustworthiness concerns. Eligibility for access to sensitive information is denied.

Statement of the Case

On March 24, 2017, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing trustworthiness concerns under Guidelines E (personal conduct) and F (financial considerations). Applicant responded to the SOR on April 27, 2017, and June 30, 2017, and requested a hearing before an administrative judge.

The case was assigned to me on December 15, 2017. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on December 27, 2017, scheduling the hearing for February 14, 2018. Applicant's request for a continuance was granted on that date. The hearing was convened as rescheduled on March 20, 2018. Government Exhibits (GE) 1 through 5 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibit (AE) A, which was admitted without objection. Applicant submitted a document post-hearing that I have marked AE B and

admitted without objection. DOHA received the hearing transcript (Tr.) on March 29, 2018.

Findings of Fact

Applicant is a 50-year-old employee of a defense contractor. He has worked for his current employer or a predecessor contractor since 2007. He did not graduate from high school. He married in 2004 and divorced in 2010. He has three children.¹

Applicant has a history of not filing his state and federal tax returns and paying his taxes when they were due.² IRS tax transcripts from February 2017 show the following:

SOR	TAX YEAR	FILED	AMOUNT OWED
1.w (failure to pay)	2007	On time	\$468
1.v (failure to pay)	2008	November 2009	\$1,361
1.q (failure to file)	2009	March 2012	\$0
1.q and 1.u (failure to file and pay)	2010	March 2012	\$2,602
1.t (failure to pay)	2011	On time	\$5,912
1.q and 1.s (failure to file and pay)	2012	January 2014	\$6,368
1.q and 1.r (failure to file and pay)	2013	August 2016	\$4,612
Not alleged	2014	Not filed	Not calculated ³

Applicant's state filed the following tax liens against him: \$1,465 in 2007 (SOR ¶ 1.g); \$3,493 in 2013 (SOR ¶ 1.h); \$4,030 in 2013 (SOR ¶ 1.i); and \$4,306 in 2013 (SOR ¶ 1.j).⁴

Applicant stated that all of his tax returns have been filed. He further stated that he had a payment plan with the IRS, but he was unable to maintain the payments. He is

¹ Tr. at 26-27, 30-31; GE 1.

² Applicant's response to SOR; GE 2, 3.

³ GE 2. The SOR did not allege that Applicant did not file his 2014 tax return. Any matter that was not alleged in the SOR will not be used for disqualification purposes. It may be considered when assessing Applicant's overall financial situation, in the application of mitigating conditions, and during the whole-person analysis.

⁴ Applicant's response to SOR; GE 2, 3.

unable to enter into another plan until he files his 2017 tax returns. He stated that he owes the IRS for tax years 2015 and 2016, and he will likely owe for 2017 because he did not have enough taxes withheld from his pay.⁵

The SOR alleges the tax issues identified above and 12 delinquent debts. The debts are listed on one or more credit reports. Applicant stated that he was the victim of identity theft. He retained a credit repair company to dispute debts on his credit report. A number of accounts were removed from his credit report. Applicant was unable to identify any of the debts alleged in the SOR to have resulted from identity theft.⁶

Applicant was a pedestrian when he was hit by a car in November 2015. He stated that he was denied short-term disability and was unable to pay his bills. He received a \$9,000 settlement from the accident. He did not use any of the settlement money to pay his taxes or his delinquent debts. He stated that he used the money to help his family. His mother is a cancer survivor, and she also had heart surgery.⁷

SOR ¶ 1.a alleges a collection account of \$17,108. This reflects a lease of a car that Applicant was unable to pay after he was hit by a car. The car was repossessed. The March 2016 credit report lists the account as \$707 past due with a balance of \$17,108. The February 2018 credit report lists the account as a voluntary surrender with an \$8,487 balance.⁸

Applicant's child support payments are garnished from his pay. The January 2015 credit report lists the payments as \$1,284 past due with a balance of the same. The payments were not made while he was out of work after the car accident. The March 2016 credit report lists a balance of \$1,605 (SOR ¶ 1.b). The arrearages are being paid because the February 2018 credit report lists the balance as \$1,355.⁹

SOR ¶¶ 1.c and 1.n appear to be the same accounts to a cable television provider. The January 2015 credit report lists the debt as a collection account with a \$135 balance. The March 2016 credit report lists a balance of \$735, but the February 2018 credit report lists the balance as \$402.¹⁰

⁵ Tr. at 19, 28-29, 38-41; Applicant's response to SOR.

⁶ Tr. at 15-18; Applicant's response to SOR; GE 2-5; AE A.

⁷ Tr. at 37-38; AE B.

⁸ Tr. at 37; Applicant's response to SOR; GE 2-5.

⁹ Applicant's response to SOR; GE 2-5

¹⁰ Applicant's response to SOR; GE 2-5.

SOR ¶ 1.l alleges a charged-off debt without a balance. The January 2015 credit report lists the account as charged off and purchased by another lender, with a \$0 balance. The debt is not listed on the two most recent credit reports.¹¹

The SOR alleges five medical debts, but the debts alleged in SOR ¶¶ 1.d and 1.m appear to be to be duplicates. The four non-duplicate debts (SOR ¶¶ 1.d-1.f, 1.k, 1.p) total about \$830. The \$110 debt alleged in SOR ¶¶ 1.f is the only medical debt listed on the February 2018 credit report, but the creditor is not identified in the SOR or the credit report.¹²

Applicant denied owing the \$65 debt to a collection company on behalf of a city (SOR ¶ 1.o). The debt is reported by TransUnion on the January 2015 credit report. It is not listed on the two more recent Equifax credit reports.¹³

Applicant recently had another car repossessed. He stated that the car broke down, the brakes went out, and the alternator died. He retained a tax professional to help him resolve his tax problems. He needs his job to pay his bills and help his mother. He stated that it will take time, but he is committed to paying his taxes and other debts.¹⁴

Applicant submitted a Questionnaire for National Security Positions (SF 86) in December 2014. He reported that he was “currently utilizing, or seeking assistance from, a credit counseling service or other similar resource to resolve [his] financial problems.” He did not specifically report his failure to file his tax returns and pay his taxes and other debts. He denied intentionally falsifying the financial questions on the SF 86. He stated that he thought his tax returns had been filed.¹⁵

Policies

This case is adjudicated under DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG), which became effective on June 8, 2017.

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

¹¹ GE 3-5.

¹² GE 3-5.

¹³ GE 3-5.

¹⁴ Tr. at 34-35, 49; AE B

¹⁵ Tr. at 23-26; Applicant’s response to SOR; GE 1.

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.

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 trustworthiness concern for financial considerations 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. Financial distress can also be caused or exacerbated by, and thus can be a possible indicator of, other issues of personnel security concern such as excessive gambling, mental health conditions, substance misuse, or alcohol abuse or dependence. An individual who is financially overextended is at greater risk of having to engage in illegal or otherwise questionable acts to generate funds.

The guideline notes several conditions that could raise trustworthiness concerns under AG ¶ 19. The following are potentially applicable in this case:

- (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 has a history of financial problems, including delinquent debts, unpaid taxes, and tax returns that were not filed when they were due. The evidence is sufficient to raise the above disqualifying conditions.

Conditions that could mitigate the financial considerations trustworthiness 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, 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 finances were adversely affected when he was hit by a car. The non-tax debts are considered mitigated or not significant enough to be a trustworthiness concern. However, the crux of this case is Applicant's state and federal tax issues.

Applicant's tax issues go back a decade. The 2009 through 2013 federal returns have been filed, but the 2014 return had still not been filed as of February 2017. He owes a considerable amount to his state and the IRS, including for 2015, 2016, and

likely 2017. He had a payment plan with the IRS at one point, but it is of little use if every year he does not pay the taxes that are due for that year.

Applicant's repeated failure to fulfill his tax obligations suggests that he does not possess the high degree of good judgment and reliability required of persons granted access to sensitive information and that he has a problem with complying with well-established governmental rules and systems. Voluntary compliance with such rules and systems is essential for protecting sensitive information. See ISCR Case No. 14-04437 at 3 (App. Bd. Apr. 15, 2016). This is true even though the returns have been filed. See ISCR Case No. 15-03481 at 5 (App. Bd. Sep. 27, 2016).

Applicant retained a tax professional to help him resolve his tax problems. He needs his job to pay his bills and help his mother. He stated that it will take time, but he is committed to paying his taxes. Intentions to pay debts in the future are not a substitute for a track record of debt repayment or other responsible approaches. See ISCR Case No. 11-14570 at 3 (App. Bd. Oct. 23, 2013).

There is insufficient evidence for a determination that Applicant's financial problems will be resolved within a reasonable period. I am unable to find that he acted responsibly under the circumstances or that he made a good-faith effort to pay his taxes. His financial issues are recent and ongoing. They continue to cast doubt on his current reliability, trustworthiness, and good judgment. AG ¶ 20(g) is applicable to the extent that Applicant filed his tax returns from 2009 through 2013, but it is insufficient to mitigate the judgment issues raised by Applicant's years of shirking his responsibility to file his tax returns and pay his taxes. None of the other mitigating conditions are applicable.

Guideline E, Personal Conduct

The trustworthiness concern for personal conduct is set out in AG ¶ 15, as follows:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security clearance investigative or adjudicative processes.

AG ¶ 16 describes conditions that could raise a trustworthiness concern and may be disqualifying. The following disqualifying condition is potentially applicable:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine national security eligibility or trustworthiness, or award fiduciary responsibilities.

The SOR alleges that Applicant intentionally falsified a Questionnaire for National Security Positions in 2014. I have considered all the evidence, including Applicant's age, education, experience, demeanor, testimony, and that Applicant reported on the questionnaire that he had financial problems. There is insufficient evidence to conclude that he intentionally falsified the questionnaire. AG ¶ 16(a) is not applicable. Personal conduct trustworthiness concerns are concluded for Applicant.

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 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 Guidelines E and F in my whole-person analysis.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a public trust position. I conclude Applicant refuted the personal conduct trustworthiness concerns, but he did not mitigate the financial considerations trustworthiness concerns.

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.f:	For Applicant
Subparagraphs 1.g-1.j:	Against Applicant
Subparagraphs 1.k-1.p:	For Applicant
Subparagraphs 1.q-1.w:	Against Applicant

Paragraph 2, Guideline E:

For Applicant

Subparagraphs 2.a-2.b:

For Applicant

Conclusion

It is not clearly consistent with national security to grant Applicant eligibility for a public trust position. Eligibility for access to sensitive information is denied.

Edward W. Loughran
Administrative Judge