



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



In the matter of:

ADP Case No. 16-01214

Applicant for Public Trust Position

Appearances

For Government: Caroline E. Heintzelman, Esq., Department Counsel
For Applicant: *Pro se*

05/17/2018

Decision

DAM, Shari, Administrative Judge:

Applicant did not mitigate the financial considerations' trustworthiness concerns related to his unfiled Federal and state income tax returns, and failure to make timely payments of his state income taxes, resulting in tax liens. National security eligibility for a position of public trust is denied.

History of Case

On August 18, 2016, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued Applicant a Statement of Reasons (SOR), detailing trustworthiness concerns under Guideline F (Financial Considerations). Applicant answered the SOR on September 6, 2016, and requested a hearing (Answer).

The Defense Office of Hearings and Appeals (DOHA) assigned the case to me on January 11, 2018. DOHA issued a Notice of Hearing on January 12, 2018, setting the hearing for January 31, 2018. At the hearing, Department Counsel offered Government Exhibits (GE) 1 through 5 into evidence. Applicant testified and offered Applicant Exhibits (AE) A-1 through A-10, B-1 through B-3, and C-1, D-1 and D-2. All exhibits were admitted without objections. DOHA received the hearing transcript (Tr.) on February 7, 2018. The

record remained open until February 23, 2018, for the submission of additional exhibits. That date was extended for 30 days. Applicant timely submitted AE E, consisting of six pages, which I admitted without objection.

Procedural Ruling

Based on the evidence presented during the hearing, Department Counsel moved to amend the SOR at the end of the hearing, prior to closing arguments.¹ The amendments are as follows:

1. To add the year 2014 to SOR ¶ 1.a, such that the allegation will read as follows:

You failed to file your Federal tax returns for tax years 2009, 2010, 2011, 2012, 2013, and 2014 as required by law. As of the date of this Statement of Reasons, your tax returns remain unfiled.

2. To add additional language to SOR ¶ 1.c, such that the allegation will read as follows:

You failed to file your Pennsylvania tax returns for tax years 2009 through 2014, and Wisconsin state tax return for tax year 2014, as required by law. As of the date of this Statement of Reasons, your tax returns remain unfiled.

Applicant did not object and the motion was granted. (Tr. 53)

Findings of Fact

Applicant is 61 years old. He became licensed as a dentist in 1982. He and his wife separated in 2011, filed for divorce in 2012, and were divorced in October 2016. They had been married for 30 years. From 1982 to 1996, he owned a private practice. He then taught dentistry at a university and started a company that provided services to military members through a defense contractor. While working for that company, he provided services in several states. In December 2014, he sold that business to the contractor and became an employee. (Tr. 26-31, 37; GE 2) He has held an interim position of public trust since April 2015. (Tr. 31)

On December 23, 2014, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP). In it, he disclosed that he had not filed Federal income tax returns for years 2009, 2010, 2011, 2012, and 2013. He noted that the returns were being prepared and unpaid taxes would be paid within 90 days. (GE 1). On February 9, 2015, a government investigator interviewed him about information in his e-QIP, including

¹ DOD Directive 5220.6 ¶ E3.1.17 permits Department Counsel to file a motion to amend the SOR at a hearing, in order to have it conform to the evidence admitted. Applicant did not object to the amendments or request additional time to prepare a response to the amendments. However, he was given over 50 days to submit post-hearing documents relative to all issues in the case.

his unfiled Federal and state tax returns for years 2009 through 2013. Applicant stated that he was waiting for his wife to sign the returns in order to file them. He again indicated that he would resolve the problems in 90 days, when the divorce proceeding was to be finalized. (GE 1, GE 2)

At this hearing, Applicant confirmed that he had not filed his amended 2007 and 2008 Federal tax returns and he did not intend to file them because his former wife would not sign them. He decided to forfeit any refund. He filed his state taxes for those years. (Tr. 40-41) In a post-hearing submission, he stated that he was not required to file an amended return for those two years because he was entitled to a refund. (AE E)

Applicant testified that he had not filed his 2009, 2010, 2011, 2012, 2013, and 2014 Federal or state income tax returns. He estimated that he owed \$116,000 to the Internal Revenue Service (IRS) for tax years 2009 through 2013. (Tr. 41-43; GE 1)

Applicant asserted that he has been unable to file the above listed returns because his former wife has refused to sign them, some of which had been prepared by his son, an accountant, before they separated or divorced. (Tr. 31-32, 35) After he moved out of the marital home, he no longer had access to tax documents or his computer. (Tr. 38) In hindsight, he admitted he should have filed separately for those years. (Tr. 32)

Post-hearing, Applicant submitted three cover sheets from Intuit TurboTax, dated April 12, 2016, February 21, 2017, and February 5, 2018, indicating that he filed Federal tax returns on those dates. None of the cover sheets reference a specific tax year; however, Applicant stated that they confirm he filed for 2015, 2016, and 2017, which are years not alleged in the SOR. (AE C, AE D, AE E)

In 2015, Applicant resolved the \$950 corporate state tax lien filed in 2009 (SOR ¶ 1.e). This lien was filed against his prior business for not timely filing all payroll forms for 2007. (Tr. 32; AE E) In 2015, Applicant resolved the state tax liens filed in 2010 and 2011, in the amount of \$2,104 and \$1,941 (SOR ¶ 1.f and ¶ 1.g). (AE E-5) Both of those liens have the same court number. They do not appear on Applicant's June 2016 or January 2018 credit bureau reports. (GE 3, GE 4, and GE 5)

Applicant submitted a budget. His net monthly income is \$9,540, and expenses, investments, and savings are about \$8,870. (AE A-3) He has not participated in credit or budgetary counseling. He has discussed his finances with his son, an accountant. (Tr. 35; AE A-2)

Applicant's employer provided a letter of recommendation. He praised Applicant for his innovation in delivering dental services to members of the military. He considers Applicant to be a valued member of the company's management team. (AE A-1)

Policies

The action in this case was taken under 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 for Determining Eligibility for Access to Classified Information* (AG), which became effective within the DOD on June 8, 2017.²

When evaluating an applicant's suitability for national security eligibility, the administrative judge must consider the AG. In addition to brief introductory explanations for each guideline, the AG list potentially disqualifying conditions and mitigating conditions, which are to be used in evaluating an applicant's eligibility for a position of trust.

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 describing the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. The entire process is a conscientious scrutiny of applicable guidelines in the context 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. I have not drawn inferences based on mere speculation or conjecture.

Directive ¶ E3.1.14 requires the Government to present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.15 says that an "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 applying for national security eligibility 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 national security eligibility. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to protect or safeguard sensitive

² I considered the previous AG, effective September 1, 2006, as well as the new AG, effective June 8, 2017. My decision would be the same if the case was considered under the previous AG.

information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified or 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 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.

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

(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 failing to timely file Federal and state income tax returns beginning with year 2009 through 2014, as required by law. He failed to timely file an amended Federal tax return for 2007 or 2008. Three state liens were filed against him for non-payment of taxes. These facts establish prima facie support for the foregoing disqualifying conditions, and shift the burden to Applicant to mitigate those concerns.

AG ¶ 20 describes conditions that could mitigate the trustworthiness concerns arising from Applicant's alleged financial difficulties. Five may be 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, or 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; 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.

To date, Applicant has not filed Federal or state income tax returns for years 2009 through 2014. He asserted that he is not legally required to file Federal amended returns for 2007 and 2008, but did not provide a legal basis for that assertion. He resolved three tax liens. Applicant's continued delay in complying with his legal duty to file six years of tax returns casts doubt on his current trustworthiness. The evidence establishes minimal mitigation under AG ¶ 20(a)

Applicant testified that he was unable to file the required tax returns because his former wife refused to sign them or provide him with necessary information. While that may have been a valid reason for not filing returns for a year or two, it is not a valid excuse for failing to file for six years. AG ¶ 20(b) does not apply.

Applicant has not participated in financial or credit counseling, and there are no indications that his financial legal obligations are control. AG ¶ 20(c) does not apply. Applicant paid and resolved the three liens listed in the SOR, demonstrating some good-faith effort to resolve those debts, under AG ¶ 20(d). He has not made arrangements with the IRS or state taxing agencies to file outstanding tax returns for years 2009 through 2014, or his amended returns for 2007 or 2008. Nor has he established a payment plan for outstanding taxes for those years. The evidence does not establish mitigation under AG ¶ 20(g).

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's national security eligibility 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.

According to AG ¶ 2(c), the ultimate determination of whether to grant national security eligibility must be an overall commonsense judgment based upon careful consideration of the applicable guidelines and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all facts and circumstances surrounding this case. I have incorporated my comments under Guideline F in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under that guideline, but some warrant additional comment.

Applicant is an educated and articulate individual, who has successfully provided dental services to military members since 1996, in both a private capacity and as an employee of a defense contractor. He was candid and forthright during his testimony. He expressed remorse over his failure to responsibly manage his legal obligations to file and pay taxes. These are positive factors in this case.

However, several facts remain concerning. Applicant is an intelligent and mature man, who is aware of his legal obligation to timely file tax returns and pay outstanding taxes. In response to an inquiry in his December 2014 e-QIP about the status of his tax returns, he truthfully disclosed unfiled returns and outstanding taxes. He attributed the problem to issues with his soon-to-be former wife. He indicated he intended to address the problems within 90 days. Two months later, in February 2015, he discussed the problem with a government investigator and anticipated resolving the problems in 90 days. That did not happen. In August 2016, he received the SOR that placed Applicant on notice that his unfiled tax returns and unpaid tax liens raised concerns regarding his application for a public trust position. In his September 2016 Answer, he acknowledged his unfiled returns. At the hearing, a year and a half later, and over one year after his divorce was finalized, he still has not filed six years of tax returns, nor resolved outstanding taxes pertinent to those years. His ongoing mismanagement of taxes is alarming. He has not established a solid record of compliance with a fundamental legal obligation to file taxes. The DOHA Appeal Board has held that:

Failure to file tax returns suggests that an applicant has a problem with complying with well-established government rules and systems. Voluntary compliance with these things is essential for protecting classified information. ISCR Case No. 14-04437 at 3 (App. Bd. Apr. 15, 2016). Someone who fails repeatedly to fulfill his or her legal obligations does not demonstrate the high degree of good judgment and reliability required of those granted access to classified information. 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).³

Overall, Applicant has not met his burden to mitigate the trustworthiness concerns arising under the guideline for financial considerations. The evidence raises significant doubts as to Applicant's present eligibility and suitability for a public trust position.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of the Directive, are:

Paragraph 1, Guideline F:	AGAINST APPLICANT
Subparagraphs 1.a through 1.d:	Against Applicant
Subparagraphs 1.e through 1.g:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly not consistent with the interests of national security to grant Applicant a position of public trust. National security eligibility is denied.

SHARI DAM
Administrative Judge

³ ISCR Case No. 12-10933 at 3 (App. Bd. June 29, 2016).