



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



In the matter of:)
)
) ADP Case No. 16-01389
)
Applicant for Public Trust Position)

Appearances

For Government: Adrienne Driskill, Esq., Department Counsel
For Applicant: Gary S. Barthel, Esq.

November 30, 2017

Decision

GOLDSTEIN, Jennifer I., Administrative Judge:

Applicant failed to mitigate the alleged financial trustworthiness concerns. Based on a review of the testimony, pleadings and exhibits, national security eligibility for a position of trust is denied.

Statement of the Case

On November 16, 2016, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued to Applicant a Statement of Reasons (SOR), detailing security concerns under Guideline F, Financial Considerations. The action was taken under Executive Order (EO) 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); the Adjudicative Guidelines (AG) effective within the DOD for SORs issued after September 1, 2006; and the AG effective within the DOD after June 8, 2017.¹

¹I considered the previous AG, effective September 1, 2006, as well as the new AG, effective June 8, 2017. My decision would be the same under either set of guidelines.

Applicant submitted an answer to the SOR (Answer) on December 16, 2016, and requested a hearing before an administrative judge. On April 10, 2017, the Defense Office of Hearings and Appeals (DOHA) assigned the case to me. On May 4, 2017, DOHA issued a Notice of Hearing setting the case for July 24, 2017. The case was heard as scheduled. Department Counsel offered Government Exhibits (GE) 1 through 4 into evidence without objection. Applicant testified, called three witnesses, and offered Applicant Exhibits (AE) A through G into evidence, without objection. All exhibits were admitted. The record was left open until November 3, 2017, for Applicant to present additional documentation. On July 25, 2017, and November 3, 2017, he presented AE H through AE N. Department Counsel had no objections to AE H through AE N and they are admitted. DOHA received the hearing transcript (Tr.) on August 1, 2017.

Findings of Fact

Applicant admitted the allegations in SOR ¶¶ 1.d through 1.i, with explanations. He denied SOR ¶¶ 1.a through 1.c. (Answer.)

Applicant is 46 years old. In 2007 he and his first wife divorced. Together, they had three children, only one of whom remains a minor. Applicant served on active duty in the Navy from 1990 to 1992 and from 1997 to 2000. He currently is a Navy Reservist. He is engaged to be married to his second wife. (Tr. 68, 73, 77, 80.)

Applicant acknowledged experiencing financial difficulties beginning in approximately 2007. He attributed his delinquent debts to his marital separation and subsequent divorce. (Tr. 52.) He used credit cards to pay his living expenses. (Tr. 52-53.) Further, he and his ex-wife were audited by the IRS in 2007, for tax years 2004 through 2006. The tax accountant, who prepared their Federal and state income tax filings during that period, “didn’t realize the limitations of how much in losses you can take is subject to how much equity you have in the business.” (Tr. 25.) As a result, they incurred additional tax liabilities from Applicant’s then-wife’s aesthetician business, which were disclosed during the IRS audit.

Applicant was alleged to be indebted on a charged-off debt in the amount of \$25,011 in SOR ¶ 1.a. Applicant produced an IRS Form 1099-C Cancellation of Debt showing that the debt was discharged by the creditor in December 2014. (AE H; Tr. 54-56.) It is resolved.

Applicant was alleged to be indebted on a charged-off debt in the amount of \$19,248 in SOR ¶ 1.b. Applicant produced an IRS Form 1099-C Cancellation of Debt showing that the debt was discharged by the creditor in December 2011. (AE I; Tr. 54-56.) It is resolved.

Applicant was alleged to be indebted on a charged-off debt in the amount of \$20,536 in SOR ¶ 1.c. This debt was for a credit card that Applicant’s ex-wife held. She listed Applicant as an authorized user on the account. His ex-wife filed bankruptcy and

discharged the debt, but Applicant was still liable as an authorized user. As a result, Applicant arranged a settlement agreement. He presented a letter from a collection agent showing that this debt was resolved for a \$3,000 payment in November 2011. (AE J; Tr. 56.)

Applicant was alleged to be delinquent on his alimony and child support obligations in the amount of \$39,800 in SOR ¶ 1.d. At the time of their divorce, Applicant and his ex-wife had a verbal agreement that he would pay her what support he could afford. He paid her various unstated amounts for several years, but she later filed a petition in court, requesting unpaid alimony and child support arrears. He was assessed in 2014 to owe \$39,800 in child support arrearage since 2007. Applicant documented that he has made regular monthly payments of \$600 on this delinquency since October 2014. Additionally, he pays \$850 per month in current court-ordered child support. He repaid \$22,400 on this delinquency, and the balance was reduced to \$17,400. Applicant is resolving this debt. (AE K; Tr. 56-57, 70-71.)

SOR ¶¶ 1.e through 1.i alleged that Applicant was indebted to the Internal Revenue Service (IRS) and his state taxation authority for tax years 2004, 2005, 2006, 2010, and 2011 in the total amount of \$67,575. This included \$11,830 owed for 2004; \$19,227 owed for 2005; \$18,053 owed for 2006; \$5,001 owed for 2010; and \$13,464 owed for 2011.

As noted above, his 2004 through 2006 tax debt resulted from the 2007 audit. In 2008, after the audit was complete, Applicant hired a representative to negotiate repayment of his tax debt with the IRS. (AE N.) An installment agreement was established in July 2009. From October 2009 to May 2012, Applicant made monthly payments of approximately \$150 to \$200 to the IRS in accordance with that agreement. He incurred additional tax debt in 2010 and 2011 as the result of the IRS Form 1099-C Cancellation of Debt (noted above in SOR ¶ 1.b). In July 2012 Applicant was “no longer in installment agreement status.” However in the fall of 2012, Applicant, through his representative, attempted to renegotiate an installment agreement to include his new Federal tax liability. During the negotiation period, Applicant made a total of \$1,150 in payments. In January 2013, he hired a new company to negotiate with the IRS on his behalf. (AE N; Tr. 66.) That new company was not effective in their representation and he was denied an offer in compromise in May 2014. His tax debts were placed in “not collectable” status in February 2015. He remained in a “not collectable” status until May 2017. (AE A; AE N; Tr. 23, 34.)

In May 2017, Applicant sought to further address his tax debts because he did not want his financial issues “to interfere with [his] background” or prevent him from going “back into drilling status.” (Tr. 67.) He made a payment of \$1,200, which was applied to his 2010 Federal tax debt. (Tr. 24.) He acknowledged that the debt was his responsibility and that having the debt in “not collectable” status was not the best solution to resolving this obligation. He hired a reputable “enrolled agent,” (Mr. A), to represent him with the IRS. Mr. A testified as to the actions he has taken on behalf of Applicant with the IRS, including filing amended returns for him and filing Freedom of Information requests on

Applicant's behalf. At the time of the hearing, Applicant's Federal tax liability was \$71,943. (Tr. 21-24.) As of November 1, 2017, his tax year balances have changed to \$8,533 for 2004; \$22,755 for 2005; \$19,912 for 2006; \$0 for 2010; and \$4,085 for 2011, bringing his total balance down to \$55,287.² (AE N.) Mr. A estimated that it will take six to nine months for him to establish a new payment plan with the IRS. (Tr. 25-34.) Applicant documented that he has timely filed all Federal and state tax returns for the tax years identified on the SOR. Further, he is not indebted to his state taxation authority. He intends to resolve his Federal tax debt utilizing his enrolled agent's guidance. (AE L; Tr. 57-58.)

Applicant's 2017 credit report reflected that he was current on all accounts. (AE G.) Applicant testified:

I think I'm a lot better now financially as far as making good, better decisions. As you can see from my IRS documentation there, that I have been paying since the last time I owed. So I've been filing and paying it off every year, bringing down credit card payments, making all the payments that I've been obligated to. So I haven't fallen behind, no late payments, no missing payments, as it shows on my credit reports as well. (Tr. 58.)

Applicant's direct supervisor testified that he is a trusted employee. (AE D; Tr. 40-42.) His friend and former fellow Navy Reservist testified that Applicant is trustworthy and has worked hard to recover financially after his divorce. (AE E; Tr. 45-47.) Applicant's annual performance review shows he regularly exceeds job requirements. (AE C.)

Policies

When evaluating an applicant's national security eligibility, the administrative judge must consider the adjudicative guidelines. 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.

² On May 1, 2015, Applicant's ex-wife was ordered by the Superior Court of their state to pay \$2,475 for tax year 2004; \$4,115 for tax year 2005; and \$5,125 for tax year 2006. (AE B.) She has not made any payments on her share of this debt. Applicant realizes that he is liable to the IRS for the whole amount and may seek judicial enforcement of the order against his ex-wife.

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.

Directive ¶ E3.1.14 requires the Government to present evidence to establish controverted facts alleged in the SOR. According to Directive ¶ E3.1.15, “[t]he 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 a position of trust 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 information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of sensitive information. Finally, as emphasized in Section 7 of EO 10865: “[a]ny determination under this order adverse to an applicant shall be a determination 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

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. Affluence that cannot be explained by known sources of income is also a

security concern insofar as it may result from criminal activity, including espionage.

The guideline notes several conditions that could raise trustworthiness concerns under AG ¶ 19. Three 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 was unable to satisfy three consumer debts, delinquent alimony and child support obligations, and unpaid Federal income taxes for 2004, 2005, 2006, 2010, and 2011. The evidence is sufficient to raise these disqualifying conditions.

AG ¶ 20 provides conditions that could mitigate trustworthiness concerns. I considered all of the mitigating conditions under AG ¶ 20, including the following four:

- (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;
- (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.

Applicant's three consumer debts are resolved. Two were discharged by the creditor (SOR ¶¶ 1.a and 1.b), and Applicant settled the third debt (SOR ¶ 1.c) at a substantially reduced rate. They were the result of his divorce, a circumstance beyond his control, and he acted reasonable under the circumstances. He is making payments on his alimony and child support arrearages (SOR ¶ 1.d) and has substantially reduced that balance. These debts were incurred between 2007 and 2011, and were largely

attributable to his divorce. There is some evidence of mitigation under AG ¶¶ 20(b) and 20(d), with respect to these debts.

Applicant's tax delinquencies are more concerning. After the audit, he took steps to address the Federal tax debt, by working with the IRS to set up an installment agreement. His IRS tax transcripts show he made payments from October 2009 to May 2012, when he ceased making payments under that agreement. He neglected to offer a clear explanation as to why he stopped making payments under the installment agreement. His efforts to resolve his Federal tax debts between May 2012 and April 2017 were minimal. He switched representatives, hoping to negotiate smaller payments and made a few payments to the IRS, but ultimately allowed his Federal tax debts to be placed in a "not collectible" status. In 2017, when he feared his tax debt would interfere with his background investigation and prevent him from moving back into drilling status, he again took action to address his Federal tax debt. The Appeal Board has noted the following in similar circumstances:

[T]he timing of resolution of the financial problems is relevant in determining the extent to which an applicant has demonstrated mitigation. See, e.g., ISCR Case No. 09-07551 at 4 (App. Bd. Mar. 1, 2011). In this case, Applicant did not resolve his tax filing delinquencies until after submission of his security clearance application and after undergoing his background interview. Taking action to resolve the delinquent tax filings well after the initiation of the security clearance process undercuts a determination that those actions constitute a good-faith effort to resolve the delinquencies. See, ISCR Case No. 15-03481 at 5-6 (App. Bd. Sept. 27, 2016.)

Although Applicant has resolved his 2010 Federal income tax debt, he did not provide proof that he has established a payment arrangement with the IRS to pay the remaining \$55,287 owed.³ Based on his earning statements, I am not confident he has sufficient funds available to make payments to the IRS and meet his current financial obligations. He has not demonstrated sufficient good-faith efforts to resolve his Federal tax debts to establish mitigation under AG ¶ 20 as to his unpaid Federal taxes

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

³ Whether Applicant owes the full debt or his wife is responsible for part of the tax debt is immaterial to the fact that he has no current payment arrangement to pay his outstanding Federal taxes.

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 guidelines and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all pertinent facts and circumstances surrounding this case. Some of Applicant's financial problems may have been caused by circumstances beyond his control, including his divorce and an improper tax deduction taken by his accountant. However, he had an obligation to address his financial delinquencies in a responsible and timely manner. At this time, Applicant has not established a track record of resolving delinquent debts and achieving financial solvency. Overall, the record evidence leaves me with doubt as to Applicant's judgment, reliability, eligibility, and suitability for a position of trust. He failed to meet his burden to mitigate the trustworthiness concerns raised under the guidelines for financial considerations.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline F:	AGAINST APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	For Applicant
Subparagraphs 1.e through 1.g:	Against Applicant
Subparagraph 1.h:	For Applicant
Subparagraph 1.i:	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. National security eligibility for access to sensitive information is denied.

Jennifer Goldstein
Administrative Judge