



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



In the matter of:

ADP Case No. 17-00260

Applicant for Public Trust Position

Appearances

For Government: Bryan Olmos, Esq., Department Counsel
For Applicant: *Pro se*

01/11/2018

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant failed to mitigate the financial considerations trustworthiness concerns. Eligibility for access to sensitive information is denied.

Statement of the Case

On July 13, 2017, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) to Applicant detailing trustworthiness concerns under Guideline F, financial considerations. The action was taken under 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 June 8, 2017.

On August 4, 2017, Applicant submitted an answer to the SOR, and he elected to have his case decided on the written record. Department Counsel submitted the Government's file of relevant material (FORM). The FORM was mailed to Applicant, and it was received on September 13, 2017. Applicant was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation within 30 days of receipt of the FORM. Applicant did not object to the Government's evidence, identified

as Items 1 through 7. Applicant submitted documents that were marked Applicant's Exhibits (AE) A through J. There were no objections and the exhibits were admitted into evidence. The case was assigned to me on December 20, 2017.

Findings of Fact

Applicant admitted the SOR allegations in ¶¶ 1.a, 1.c, 1.d, 1.e, 1.f, 1.g, 1.h and 1.k. He denied the SOR allegations in ¶¶ 1.b, 1.i, and 1.j. His admissions are incorporated into the findings of fact. After a thorough and careful review of the pleadings and exhibits, I make the following findings of fact.

Applicant is 57 years old. He earned an associate's degree in 2009. He served in the National Guard from 1988 to 1996 and received an honorable discharge. He has children ages 33, 32, and 13 years old. He married in 2007 and has two stepchildren ages 30 and 27 years old. Applicant was laid off in June 2008 and was unemployed until November 2009. During this time, he was a full-time student and supported himself with his wife's income, unemployment benefits, and his savings. He did not disclose other periods of unemployment. He has worked for a federal contractor since February 2013.¹

The SOR alleges 10 delinquent debts totaling approximately \$112,479, including two federal tax liens. The tax lien in SOR ¶ 1.a for \$26,869 was filed in August 2016 and the one in SOR ¶ 1.b for \$78,935 was filed in June 2010. Applicant's admissions in his Electronic Questionnaire for Investigations Processing (e-QIP), statements made to a government investigator in March 2016, public records, credit reports from November 2015 and November 2016, and his response to the FORM corroborate the debts alleged in the SOR.²

Applicant disclosed in his August 2015 e-QIP that he failed to pay his 2009, 2010 and 2013 federal income taxes. He listed the amount owed for each year as \$1,000. His explanation was "problems with IRS, matter being handled by tax attorney."³ During his March 2016 background interview with a government investigator, he explained that he put the \$1,000 amount on his e-QIP because he did not know how much he owed separately for each year. He acknowledged he had a \$78,000 federal tax lien, and he was working with a tax professional. He indicated he had paid the tax professional approximately \$8,000. He further indicated that once an amount was determined, he would make payment arrangements to resolve the tax lien. He anticipated it would be resolved by October 2016. He explained his tax problems were because of an incorrect tax-filing status. No further explanation was provided to the investigator. In August 2016, the second tax lien was filed.⁴

¹ Items 3 and 4. Applicant listed incorrect dates for his period of unemployment that he corrected during his background interview.

² Items 2, 3, 4, 5, 6, 7; AE A through J.

³ Item 3.

⁴ Items 3, 4.

In his August 2016 answer to the SOR, Applicant admitted ¶ 1.k, which alleged he failed to timely file his 2009, 2010, and 2013 federal income tax returns. In response to SOR ¶ 1.a, he stated:

I had a tax situation that got out of hand due to my frustration in dealing with the IRS. I sought [t]he assistance of tax lawyers in 2014 and was able to reach a settlement agreement with the IRS in 2016. I am now in good standing with the IRS, my taxes are up to date and current. Any remaining balances have been deferred and will drop off fiscally (10 years from the date of filing). No collection activity will occur as long as my taxes are filed and paid on time. The lien is in place so that in case of a dramatic financial windfall (such as the lottery or large inheritance) the IRS will have the right to seize it.⁵

In response to SOR ¶ 1.b, Applicant stated, “This tax lien should be removed from my records since the IRS has filed an updated lien after our resolution.”⁶

Applicant provided a letter from his tax professional from July 2016. The letter stated:

Our team worked together to ensure the agreement was the best possible resolution based on your circumstances. I am certain that the Currently Non-Collectible Status is the best outcome for you. The total balance as of today is \$71,755.59 for tax years 1999, 2002, 2005, 2010-2012 and 2015.

Under this agreement, the IRS acknowledges your inability to pay - placing you in what could be described as an installment agreement without payments. The IRS will send you a letter notifying you of this status, as well as regular reminder letters. Although you still owe the debt, the IRS is prohibited from collecting it from you. You may make voluntary payments toward your debt at any time. Penalties and interest will continue to accrue. The IRS will send you yearly notifications to inform you that you are in the currently non-collectible status. They will keep you in this agreement until they receive notification that your income has changed or until a programmed timeframe expires.

The only thing you need to worry about are to file your tax returns on time, and not owe future debt. Remember to stay compliant! Make sure you keep your W4 withholdings at a reasonable level and keep up with estimated tax payments when required. File all tax returns timely. Remember that [tax professional] has an in-house Tax Preparation Department that can help you stay compliant at a return customer price.

⁵ Item 2.

⁶ Item 2.

Please remember the IRS will file a Federal Tax Lien due to your Currently Non-Collectible Status. The Federal Tax Lien is a way the IRS attempts to secure your debt.

. . .

You will continue to receive some letters from the IRS. You will receive regular reminder notices. These notices are intended to remind you of the balance and are required by law.⁷

No official documents from the IRS were provided to corroborate the tax professional's comments in her letter to Applicant. In Applicant's response to the FORM regarding the tax lien in SOR ¶ 1.a, he stated, "I have already provided a letter from my attorney who handled my issues with the IRS. I also provided a document showing my 2016 taxes were paid on time and am currently in compliance with our agreement."⁸ Applicant's tax document for tax year 2016 shows his federal tax return was timely filed. It also shows that he received a "penalty for not pre-paying tax."⁹ As stated in the letter from his tax professional, the tax years that are in a non-collectible status are 1999, 2002, 2005, 2010, 2011, 2012, and 2015. Applicant offered no explanation for his failure to pay his federal taxes for these years, which caused the filing of a tax lien by the IRS.¹⁰

With regard to SOR ¶ 1.b, Applicant stated in his FORM response, "I have enclosed a copy of the release of lien from the IRS for the lien filed in [location]."¹¹ The document provided is IRS Form 668(z) Certificate of Release of Federal Tax Lien and is dated August 15, 2017. It reflects unpaid balances for tax years 1999 (\$10,567); 2000 (\$32,535); 2001 (\$18,397) and 2002 (\$17,436) for a total of \$78,935.¹² Applicant did not

⁷ Item 2 at pages 4-5.

⁸ AE A at page 1.

⁹ Item 2 at page 6.

¹⁰ In ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006), the Appeal Board listed five circumstances in which conduct not alleged in an SOR may be considered stating:

(a) to assess an applicant's credibility; (b) to evaluate an applicant's evidence of extenuation, mitigation, or changed circumstances; (c) to consider whether an applicant has demonstrated successful rehabilitation; (d) to decide whether a particular provision of the Adjudicative Guidelines is applicable; or (e) to provide evidence for whole person analysis under Directive Section 6.3.

I have not considered Applicant's failure to disclose on his e-QIP that he had unpaid taxes for 1999, 2000, 2001, 2002, 2005, 2011, 2012, and 2015. Any derogatory information that was not alleged, will not be considered for disqualifying purposes, but may be considered for the five purposes listed above.

¹¹ AE A at page 1.

¹² AE B.

provide explanations for his failure to pay his tax debts that resulted in the 2010 federal tax lien.¹³

Applicant did not provide evidence of any payments he may have made towards either his 2010 or 2016 federal tax liens.

During Applicant's background interview, he disclosed the debt alleged in SOR ¶ 1.c (\$3,286). He explained he had to break his lease due to doctor's orders after he had his knee replaced because he needed to live on the ground floor. The landlord was unable to accommodate Applicant's request to move into a ground floor apartment, so Applicant moved with one month left on his lease. Applicant received a letter from a collection company six months after he moved, which stated he owed \$3,200. He did not receive direct correspondence from the landlord. He told the investigator that about two years earlier he contacted the collection company so he could dispute the debt, and he had not received a reply. He stated in his answer that the "company" has been unwilling to provide him with an itemized bill or explanation. In his SOR response, Applicant stated, "This account is still being disputed. I have been in contact with Equifax and am attempting to get documentation of the amount owed. I am going to continue to follow up and hopefully an equitable resolution can be reached."¹⁴ No documents were provide to corroborate Applicant's dispute or resolution of the debt. The debt is unresolved.

Applicant acknowledged he owed the debt in SOR ¶ 1.d. Applicant's November 2016 credit report shows the account was opened in January 2016 and was first reported past due in August 2016. He stated he was out of work for six months due to an operation.¹⁵ He further stated in his answer that he had made a payment toward the debt. In his FORM response, he provided a copy of an August 2017 settlement offer from the creditor for \$1,455 to be paid in four monthly installments, with the last due on November 4, 2017. In his September 28, 2017 FORM response, Applicant stated he was to make the payments on the 4th of each month. He provided proof of the August 2017 payment. He did not provide proof of his second payment, which would have been due on September 4, 2017.¹⁶ The debt is unresolved.

Applicant was confronted during his background interview with the debt in SOR ¶ 1.e (\$1,771). He was unfamiliar with the debt, but intended to check his credit report after his interview and pay the debt if it was determined to be valid. He admitted the debt in his SOR answer. He stated that he had a settlement agreement to resolve the debt with two monthly payments of \$350. He did not provide a copy of settlement agreement. He provided a copy of his monthly bank statement and handwritten in the

¹³ AE A.

¹⁴ Items 2, 4; AE A.

¹⁵ Item 7.

¹⁶ Items 2, 4, 7; AE C, D. Applicant stated that the payments would be paid automatically through his bank account. However, his bank statement for September 2017 does not reflect the monthly payment.

margin he noted two payments, each for \$350, that are presumably for this debt and were made in August 2017 and September 2017. He stated the account was closed. He did not provide documentary proof the debt is resolved. The debt has been delinquent since 2010.¹⁷ It is unresolved.

The account in SOR ¶ 1.f (past-due balance-\$345) was opened in December 2015 and became delinquent in August 2016. Applicant stated in his FORM response that he reached a settlement agreement to make nine payments of \$93. The delinquent balance is now \$1,105. Applicant provided proof he made payments in August and September 2017.¹⁸

Applicant was confronted with the debt in SOR ¶ 1.g (\$805) during his background interview. He was unfamiliar with the debt, but intended to check his credit report after his interview and pay the debt if it was determined to be valid. In his answer, he confirmed the validity of the debt. In his FORM response, he provided a letter from September 2017 confirming that the debt is satisfied.¹⁹

Applicant provided a copy of a settlement agreement for the debt in SOR ¶ 1.h (past-due balance was \$154). The current balance is \$679. The account was opened in May 2015 and became delinquent in August 2016. Applicant was to make \$111 payments beginning on September 2017. He provided proof of his first payment.²⁰

Applicant provided proof that the debt in SOR ¶ 1.i is current. He stated that the debt in SOR ¶ 1.j was paid in full, but he was unable to obtain a copy of his last bill and he no longer had online access.²¹

Applicant did not provide information about his current finances, income, budget, expenses or explanations for failing to pay his debts, failing to file his federal income tax returns, and failing to pay his taxes.

Policies

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.

¹⁷ Item 4, 7; AE A, E.

¹⁸ AE D, G. Applicant stated that the payments would be paid automatically through his bank account.

¹⁹ AE H.

²⁰ AE F, I. Applicant stated that the payments would be paid automatically through his bank account.

²¹ Item 2; AE A, J.

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(c), 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."

Directive ¶ E3.1.14, states that the Government must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.15 states that 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 relating to the guideline 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.

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.

AG ¶ 19 provides conditions that could raise trustworthiness concerns. The following are potentially applicable:

- (a) inability to satisfy debts;
- (b) unwillingness to satisfy debts regardless of the ability to do so;
- (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 delinquent debts that began accumulating in at least 2010 that he is unable or unwilling to pay. He failed to timely file his 2009, 2010 and 2013 federal income tax returns. He has unpaid federal tax liens filed in 2010 and 2016. There is sufficient evidence to support the application of the above disqualifying conditions.

The guideline also includes conditions that could mitigate trustworthiness concerns arising from financial difficulties. The following 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 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.

Federal tax liens were filed against Applicant in 2010 and 2016 totaling approximately \$105,804. He was made aware of security concerns regarding his delinquent debts during his March 2016 background interview. He did not begin to resolve them until after he received the SOR. Some debts became past due or delinquent after his interview. His financial issues are ongoing. There is insufficient evidence to conclude they are unlikely to recur. AG ¶ 20(a) does not apply.

Applicant did not provide an explanation for his failure to file his 2009, 2010 and 2013 federal tax returns. Applicant stated, "I had a tax situation that got out of hand due to my frustration of dealing with the IRS." Applicant did not provide an explanation for the 2010 tax lien for \$78,935 for his failure to pay his 1999, 2000, 2001, and 2002 taxes or the \$26,869 tax lien filed in 2016. The fact that the IRS may not be collecting the taxes owed by Applicant does not equate to him being absolved of his duty to pay them. No explanation was provided regarding why he failed to pay his other delinquent debts. Insufficient evidence was provided to conclude Applicant's financial problems were beyond his control. He provided some evidence that he is addressing some of his other delinquent debts. However, the payments made on those debts all occurred after he received the SOR. AG ¶ 20(b) does not apply.

Applicant provided a letter from a tax professional. The tax professional helped Applicant with his tax problems. The letter and an IRS cancelation of lien form show that the 2010 federal tax lien was canceled in August 2017. This was not due to Applicant paying his delinquent taxes, but rather as explained by the tax professional, the IRS concluded it was uncollectable and after a period, it was canceled. The 2016 Federal tax lien has not been released. The tax letter is clear that Applicant still owes the IRS even though it is not collecting the debt. The financial counseling provided to Applicant by the tax professional has helped him resolve the enforcement issues with the IRS. As far as financial counseling to show clear indications that all of his financial problem are being resolved, there is insufficient evidence. I find AG ¶ 20(c) has minimal application.

AG ¶ 20(d) applies to SOR ¶¶ 1.i and 1.j. Applicant has made payment arrangements with other creditors, but failed to do anything until after he received the SOR. He provided proof of some payments. For the full application of AG ¶ 20(d), Applicant must show he initiated and is adhering to a good-faith effort to repay his delinquent accounts. He began making payments in August or September 2017 and has not yet established a track record for making consistent payments towards his delinquent debts.²² AG ¶ 20(d) does not apply to the remaining debts.

²² The Appeal Board has previously explained what constitutes a "good faith" effort to repay overdue creditors or otherwise resolve debts:

Applicant disputed debts, but did not provide documented proof to substantiate the basis of the dispute or evidence of his actions to resolve the issue. AG ¶ 20(e) does not apply.

Applicant provided a letter from his tax professional indicating that the IRS would not collect the tax debts. He provided a tax form showing that the 2010 tax lien was released. No evidence was provided to show it was released because he paid it. The 2016 tax lien has not been paid. AG ¶ 20(g) requires that Applicant has made arrangements with the appropriate tax authority to file or pay the amount owed and is in compliance with those arrangements. Based on the letter from the tax professional, it is presumed Applicant's delinquent tax returns have been filed for 2009, 2010, and 2013. No IRS documents were provided to corroborate the filing. He has not provided evidence that he made any payments toward the 2010 tax lien before it was released seven years later. He has not provided evidence that he is paying or intends to pay the 2016 tax lien for his unpaid taxes. The fact that the IRS is not collecting the taxes does not absolve Applicant of his duty to 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 public trust position must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept.

In order to qualify for application of [the "good faith" mitigating condition], an applicant must present evidence showing either a good-faith effort to repay overdue creditors or some other good-faith action aimed at resolving the applicant's debts. The Directive does not define the term "good-faith." However, the Board has indicated that the concept of good-faith "requires a showing that a person acts in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation." Accordingly, an applicant must do more than merely show that he or she relied on a legally available option (such as bankruptcy) in order to claim the benefit of [the "good faith" mitigating condition].

(internal citation and footnote omitted) ISCR Case No. 02-30304 at 3 (App. Bd. Apr. 20, 2004) (quoting ISCR Case No. 99-9020 at 5-6 (App. Bd. June 4, 2001)).

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 Guideline F in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

Applicant is 57 years old. He has been steadily employed since 2009. He has two significant federal tax liens for unpaid taxes that began in 1999 and extended to 2015. He failed to timely file his 2009, 2010, and 2013 federal income tax returns. He failed to provide explanations for why he failed to pay his federal income taxes or timely file his returns. Applicant is relying on the IRS placing his liens in an uncollectable status. The IRS may not be actively pursuing collection of Applicant's delinquent taxes, but it does not absolve him of his responsibility to pay his delinquent taxes. His repeated failure to pay his federal income taxes is troubling. The IRS released the 2010 tax lien. The 2016 tax lien is not paid. His history of failing to file and pay his federal income taxes raises serious security concerns.

In ISCR Case No. 15-01031 at 4 (App. Bd. June 15, 2016), the Appeal Board stated the following principal:

Failure to comply with Federal and/or state tax laws suggests that an applicant has a problem with abiding by well-established Government rules and regulations. Voluntary compliance with rules and regulations is essential for protecting classified information. . . . By failing to file his 2011, 2012, and 2013 Federal income tax returns in a timely manner, Applicant did not demonstrate the high degree of good judgment and reliability required of persons granted access to classified information.

Applicant did not take action to resolve his other delinquent debts until after he received the SOR. Although he made some payments and arranged settlements or payment plans with some creditors, he has not established a reliable financial track record of consistent payments. Some of his debts became delinquent after he applied for a public trust position and after his background interview. Applicant has an unreliable financial track record of complying with his legal obligation to file and pay his federal income taxes, and to pay his debts, which raises questions and doubts about his eligibility and suitability for a public trust position. For all these reasons, I conclude Applicant failed to mitigate the Guideline F, 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:	Against Applicant
Subparagraph 1.g:	For Applicant

Subparagraph 1.h:
Subparagraphs 1.i-1.j:

Against Applicant
For Applicant

Conclusion

In light of all of the circumstances, 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.

Carol G. Ricciardello
Administrative Judge