



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



In the matter of:

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ADP Case No. 17-01590

Applicant for Public Trust Position

Appearances

For Government: Allison Marie, Esq., Department Counsel

For Applicant: *Pro se*

05/14/2018

Decision

Curry, Marc E., Administrative Judge:

Applicant failed to mitigate the concerns posed by his troubled finances. Eligibility to continue working in a public trust position is denied.

Statement of the Case

On May 26, 2017, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) to Applicant, detailing the trustworthiness concerns under Guideline F, financial considerations, explaining why it was unable to find it clearly consistent with the national interest to grant him a position of trust. The DOD CAF took the action 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); and the adjudicative guidelines effective within the DOD on December 1, 2006.

On July 20, 2017, Applicant answered the SOR allegations, admitting all of them, and requesting a decision based on the administrative record instead of a hearing. On August 16, 2017, Department Counsel prepared a File of Relevant Material (FORM).

Applicant filed a response on October 9, 2017. The case was assigned to me on December 18, 2017.

After the SOR was issued, Security Executive Agent Directive 4 was issued establishing National Security Adjudicative Guidelines (AG) applicable to all covered individuals who require initial or continued eligibility for access to classified information or eligibility to hold a sensitive position. The AG supersede the adjudicative guidelines implemented in September 2006 and are effective for any adjudication made on or after June 8, 2017. Accordingly, I have adjudicated Applicant's eligibility to work in an automated data processing position under the new AG.¹

Findings of Fact

Applicant is a 67-year-old married man with two adult children. He served in the United States Navy from 1968 to 1972. His discharge was honorable. (Item 4 at 19) Shortly after leaving the military, he earned a vocational degree in computer programming. (Item 4 at 11) Since 2016, he has worked in the field of production support for a health insurance company. (Item 4 at 12)

Applicant owes approximately \$28,000 in delinquent Federal income taxes, as alleged in SOR subparagraphs 1.b and 1.c. His financial trouble began in 2003 after he was laid off from his job and subsequently unemployed for the next nine months. In order to help make ends meet, he withdrew \$70,000 from his 401k retirement savings without planning for the income tax consequences. (Item 4 at 50) Subsequently, he was unable to pay his tax bill, leading to a lien entered against his property in June 2007 for \$25,844.

In 2009, the U.S. Internal Revenue Service (IRS) began garnishing his pay. (Item 3 at 3) Shortly after the pay garnishment began, Applicant stopped making his monthly car payments. (Item 5 at 3) Consequently, his automobile was repossessed. The deficiency from the repossession totals approximately \$7,900, as alleged in subparagraph 1.a. It remains outstanding.

In May 2016, Applicant retained a tax consultant to help him develop an installment agreement to address his delinquent income taxes. (Item 3 at 12) As of December 2016, Applicant's tax liability was \$22,176, for tax years 2004 through 2006, and 2009. (Item 3 at 13-14) After calculating Applicant's delinquency, the tax consultant submitted the installment agreement request. (Item 3 at 14) There is no record evidence of whether the IRS granted the request, or if so, whether Applicant has been making any payments toward its satisfaction.

Policies

When evaluating an applicant's suitability for a trustworthiness position, the administrative judge must consider the adjudicative guidelines. In addition to brief

¹ Application of the AGs that were in effect as of the issuance of the SOR would not change my decision in this case.

introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions. 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 overall adjudicative goal is a fair, impartial, and commonsense decision. 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 determination.

Under the whole-person concept, the administrative judge must consider the totality of an applicant's conduct and all relevant circumstances in light of the nine adjudicative process factors in AG ¶ 2(d).²

Analysis

Guideline F, Financial Considerations

The trustworthiness concerns about financial considerations are set forth in AG ¶ 18:

Failure or inability 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 information. . . .

Applicant's delinquencies trigger the application of disqualifying conditions AG ¶ 19(a), "inability to satisfy debts," AG ¶ 19(c), "a history of not meeting financial obligations," and AG ¶ 19(f), "failure . . . to pay Federal, state or local income taxes, as required."

The following mitigating conditions are potentially applicable:

² The factors under AG ¶ 2(d) are as follows:

(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.

AG ¶ 20(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;

AG ¶ 20(c) the person has received or is receiving 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;

AG ¶ 20(d) the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts; and

AG ¶ 20(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.

Although Applicant's financial problems stemmed from a layoff in 2003, his decision to withdraw money from his 401k account to help make ends meet, without planning for the resulting income tax liability, and not paying it, was not responsible. Similarly, it was not responsible to stop paying his car note after the IRS garnished his pay. AG ¶ 20(b) does not apply

Through a counselor that Applicant retained, he has developed a tax payment installment plan. This is sufficient to trigger the application of AG ¶ 20(d). Conversely, there is no record evidence that the IRS has accepted the plan, or any evidence that Applicant has begun making payments. Moreover, the deficiency stemming from the car repossession remains outstanding with no documented plan to satisfy it. Consequently, it is too soon to conclude that the problem is clearly being resolved or is under control. AG ¶ 20(c) is only partially applicable, and it is premature to apply AG ¶ 20(g).

Whole-Person Concept

Given the nature and seriousness of Applicant's debts, the length of time they have been delinquent, and the minimal steps he has taken, thus far, to resolve them, I conclude that he has not mitigated the trustworthiness concern.

Formal Findings

Formal findings for 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.c:

Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the interests of the United States to grant Applicant eligibility for a position of trust. Eligibility for a position of trust is denied.

Marc E. Curry
Administrative Judge