



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



In the matter of:)	
)	
)	ADP Case No. 17-03316
)	
Applicant for Public Trust Position)	

Appearances

For Government: Aubrey De Angelis, Esq., Department Counsel
For Applicant: *Pro se*

08/29/2018

Decision

HEINTZELMAN, Caroline E., Administrative Judge:

Applicant failed to file state and federal income tax returns for tax years 2009 through 2015. Eligibility for access to sensitive information is denied.

History of the Case

Applicant submitted an electronic questionnaire for investigations processing (e-QIP) on June 29, 2016. On December 20, 2017, the Department of Defense (DOD) sent him a Statement of Reasons (SOR) alleging trustworthiness concerns under Guideline F, financial considerations. Applicant answered the SOR on January 29, 2018, and on February 7, 2018. He requested a hearing before an administrative judge. I was assigned to the case on May 2, 2018. On May 16, 2018, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for June 15, 2018, and I issued an order to both parties to produce their documentary evidence by June 1, 2018. Department Counsel submitted her documentation as requested, and Applicant did not submit documentation. I convened the hearing as scheduled.

Government's Exhibits (GE) 1 and 2 were admitted, without objection. Applicant testified. I held the record open until June 22, 2018, to allow Applicant to submit documentation. He timely submitted Applicant Exhibits (AE) A through F, which are admitted without objection. I received the completed transcript (Tr.) on June 25, 2018.

Findings of Fact

Applicant is 48 years old. Since December 2015, he has worked as an associate network engineer for a defense contractor. He requires a public trust position for this employment. He married his wife in 2016, and adopted her adult daughter. He also has a minor stepchild. Applicant graduated from high school in 1987, and then served on active duty in the U.S. Army until 1990. After leaving active duty, Applicant enrolled in school full time and served in the U.S. Army National Guard until 1994. (Tr. 11) He received his associate's degree in 1996. This is his first application for a public trust position. (Tr. 9)

Applicant did not file his state and federal income tax returns while he was on active duty in the U.S. Army. He believed he was exempt from filing. After he left active duty, he did not file his tax returns for several years, because he was earning less than the threshold amount that triggers a requirement to file. Applicant may have filed state and federal tax returns for two or three years sometime after he left the U.S. Army in 1990, but he cannot remember the last time he filed his federal or state tax returns, prior to 2016. (Tr. 17-19, 30-31)

In 1999, Applicant started working as a network engineer for a law school (Employer A) earning \$25,000 a year. Prior to leaving Employer A in 2014, he was earning approximately \$92,000 a year.

Applicant did not file state and federal income tax returns from 1999 to 2015, because:

- He was busy, disorganized, and procrastinated. (Tr. 17-18, 21, 28)
- He calculated his returns for each year and believed he would receive a refund.¹ He did not believe the amount of the refunds that he was expecting was worth the effort it took to prepare and file the tax returns. (GE 1 at 33-35)
- He was under the impression that because he paid his taxes through payroll deductions and did not owe, he was not required to file. (GE 2 at 11)
- He was unemployed for 11 months in 2015, and he believed he earned less than the threshold amount that triggers a requirement to file. (GE 2 at 5)
- He moved into a new home in August 2016. During the move, he lost the paperwork he needed to file his various unfiled tax returns. (Tr. 12, 14; GE 2 at 5)

¹ Applicant did not file state and federal income tax returns from approximately 1989 through 2015. Because tax years 1989 through 2008 were not alleged in the SOR, I am considering this information only to evaluate the mitigating conditions and whole person concerns.

Applicant and his wife filed their 2016 joint federal and state tax returns in May 2017, and received refunds. (GE 2 at 18; AE C; AE D) They filed their 2017 joint federal and state tax returns in March 2018, and received refunds. (AE E; AE F) Applicant filed their 2016 and 2017 tax returns only at the insistence of his wife, and with the assistance of her tax professional. (Tr. 20-21, 25, 29-30; GE 2 at 18)

Applicant disclosed his failure to file state and federal income tax returns from 2009 through 2015, in his June 2016 e-QIP. In his November 2016 interview, Applicant confirmed that he had not filed those returns. In September 2017, DOHA sent Applicant interrogatories, and requested that he provide state and federal tax transcripts for tax years 2009 through 2016. In December 2017, Applicant responded and provided Internal Revenue Statements (IRS) statements for tax years 2013, 2015, and 2016. The statements indicated he had not filed for tax years 2013 and 2015. He did not provide state tax statements. (Tr. 20-22; GE 2)

At the hearing, Applicant acknowledged the importance of filing the missing tax years, but he was still waiting for paperwork from his mortgage holder. (Tr. 15-17, 20, 24; GE 2 at 5) He had not hired an attorney or tax professional to assist him in filing his returns. He also did not have an active plan to file the necessary tax returns, despite a desire to file. (Tr. 23-26, 29, 31)

Applicant's other financial obligations are current and in good standing. (Tr. 25-26; AE A; AE B) He and his wife follow a budget. Applicant is a good person and a trustworthy employee (Tr. 12, 23-26, 29, 31)

Policies

This case is adjudicated 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 (AG), which became effective on June 8, 2017.

Positions designated as ADP I/II/III are classified as "sensitive positions." (See Regulation ¶¶ C3.1.2.1.1.7 and C3.1.2.1.2.3.) "The standard that must be met for . . . assignment to sensitive duties is that, based on all available information, the person's loyalty, reliability, and trustworthiness are such that . . . assigning the person to sensitive duties is clearly consistent with the interests of national security." (See Regulation ¶ C6.1.1.1.) 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. (See Regulation ¶ C8.2.1.)

When evaluating an Applicant's suitability for a public trust position, the administrative judge must consider the disqualifying and mitigating conditions in the Administrative Guidelines (AG) ¶ 2 (a). 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 access to [sensitive] information will be resolved in favor of 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.

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 as to obtaining 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 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.

Analysis

Guideline F: Financial Considerations

The trustworthiness security 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

This concern is broader than the possibility that a person might knowingly compromise classified information to raise money. It encompasses concerns about a person's self-control, judgment, and other qualities essential to protecting classified information. A person who is financially irresponsible may also be irresponsible, unconcerned, or negligent in handling and safeguarding classified information.²

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

(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 file state and federal income tax returns. The evidence is sufficient to raise the above disqualifying condition.

Conditions that could mitigate the financial considerations trustworthiness security 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; 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 cannot remember the last time he filed his state and federal income tax returns, prior to 2016. He has not yet filed returns for tax years 2009 through 2015. Starting in June 2016, when he completed an e-QIP, Applicant was on notice of the Government's concerns regarding his failure to file his tax returns. Those concerns were raised again during a November 2016 interview and in October 2017 DOHA interrogatories. Applicant's failure to file tax returns is an ongoing problem, and he has not demonstrated that the behavior was infrequent, nor that it occurred under circumstances that are unlikely to recur. Applicant failed to file the tax returns for a number of different reasons, none of which are valid excuses. He did not act responsibly to address the unfiled tax returns. Mitigation under AG ¶ 20(a) and 20(g) is not established.

² ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012).

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 the 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.

Overall, the record evidence leaves me with questions or doubts as to Applicant's eligibility and suitability for a public trust position. For all these reasons, I conclude Applicant did not mitigate the trustworthiness concerns arising from his financial considerations.

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 (Financial Considerations): **AGAINST APPLICANT**

Subparagraphs 1.a -1.b:

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 national security to grant Applicant eligibility for a public trust position. Eligibility for access to sensitive information is denied.

CAROLINE E. HEINTZELMAN
Administrative Judge