



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



In the matter of:)
)
) ADP Case No. 14-06876
)
Applicant for Public Trust Position)

Appearances

For Government: Daniel F. Crowley, Esq., Department Counsel
For Applicant: *Pro se*

04/12/2016

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant did not mitigate the financial considerations trustworthiness concerns. Eligibility for access to sensitive information is denied.

Statement of the Case

On August 4, 2015, the Department of Defense (DOD) 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); DOD Regulation 5200.2-R, *Personnel Security Program* (January 1987), as amended (Regulation); and the adjudicative guidelines (AG) implemented by the DOD on September 1, 2006.

Applicant responded to the SOR on August 17, 2015, and requested a hearing before an administrative judge. The case was assigned to another administrative judge on December 4, 2015, and reassigned to me on January 15, 2016. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on January 15, 2016, scheduling the hearing for February 1, 2016. The hearing was convened as scheduled. A letter from Department Counsel to Applicant was marked Hearing Exhibit (HE) I.

Government Exhibits (GE) 1 and 2 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibit (AE) A, which was admitted without objection. The record was held open until March 7, 2016, and extended to April 4, 2016, for Applicant to submit additional information. He submitted documents that were marked AE B through H and admitted without objection. DOHA received the hearing transcript (Tr.) on February 9, 2016.

Findings of Fact

Applicant is a 31-year-old employee of a defense contractor. He has worked for his current employer since 2011. He is applying for eligibility to hold a public trust position. He has a bachelor's degree that was awarded in 2006 and a master's degree that was awarded in 2010. He is married without children.¹

Applicant did not file federal income tax returns for tax years 2009 and 2011 through 2014 when they were due. He stated that he did not file some years because of an oversight, but he also admitted that "other years, it was just [him] being lazy and not getting them done."²

Applicant reported on his February 2014 Questionnaire for National Security Positions (SF 86) that he did not file his tax return for tax year 2012. When he was interviewed for his background investigation in March 2014, he stated that he missed the deadline to file his 2012 return. He stated that he would file the return with his 2013 return. Applicant responded to DOHA interrogatories in November 2014. He still had not filed his late returns.³

Applicant filed his federal income tax returns for 2009 and 2011 through 2014 in about July 2015. He owed taxes for every year. As of January 2016, he owed \$21,500 in taxes, penalties, and interest. In January 2016, he entered into an installment agreement with the IRS to pay \$300 per month. He established that he made the \$300 monthly payments in January, February, and March 2016.⁴

Policies

Positions designated as ADP I and ADP II 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

¹ Tr. at 21-22, 26, 30; GE 1, 2.

² Tr. at 14-19, 25-26; Applicant's response to SOR; GE 1, 2. The SOR only alleged that Applicant did not file income tax returns in 2012 and 2013. Any matter that was not alleged in the SOR will not be used for disqualification purposes. It may be used in the application of mitigating conditions, and in the whole-person analysis.

³ GE 1, 2.

⁴ Tr. at 14-25, 32; AE A-H.

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 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 access to [sensitive] information will be resolved in favor of national security.”

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 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 for financial considerations is set out 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 [sensitive] information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

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

(g) failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same.

Applicant did not file his 2012 and 2013 federal income tax returns when they were due. AG ¶ 19(g) is applicable.

Conditions that could mitigate the financial considerations 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

(c) the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control.

Applicant admitted that laziness contributed to him not filing his tax returns. He knew when he submitted the SF 86 that his unfiled returns were a problem. During his background interview in March 2014, he stated that he would file the 2012 return with his 2013 return. He still had not filed his late returns when he responded to DOHA interrogatories in November 2014. He finally filed the returns in about July 2015. He entered into an installment agreement with the IRS in January 2016 to pay \$300 per month, and he made the first three required payments. However, he still owes more than \$20,000.

Applicant's financial issues are recent. They continue to cast doubt on his judgment, reliability, trustworthiness, and ability to comply with laws and regulations. AG ¶ 20(a) is not applicable. AG ¶ 20(c) is partially applicable because the returns have been filed. Nonetheless, financial considerations concerns remain despite the presence of some mitigation.⁵

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

⁵ See ISCR Case No. 12-05053 at 4 (App. Bd. Oct. 30, 2014).

applicant's conduct and all relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

(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. I have incorporated my comments under Guideline F in my whole-person analysis.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a public trust position. For all these reasons, I conclude Applicant did not mitigate the 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
Subparagraph 1.a:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, 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.

Edward W. Loughran
Administrative Judge