



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



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| In the matter of: |) | |
| |) | |
| [NAME REDACTED] |) | ADP Case No. 17-04117 |
| |) | |
| Applicant for Position of Trust |) | |

Appearances

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

02/28/2019

Decision

MALONE, Matthew E., Administrative Judge:

Available information is sufficient to mitigate the trustworthiness concerns raised by Applicant's financial problems. His request for eligibility to occupy a position of trust is granted.

Statement of the Case

On February 20, 2017, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) to obtain eligibility for an ADP I/II/III position for his job with a defense contractor. After reviewing the results of the ensuing background

investigation, DOD adjudicators were unable to determine that it is clearly consistent with the interests of national security to grant Applicant's request for a position of trust.¹

On April 16, 2018, DOD issued Applicant a Statement of Reasons (SOR) alleging facts raising trustworthiness concerns addressed through the adjudicative guideline (AG)² for financial considerations (Guideline F). Applicant timely responded to the SOR (Answer) and requested a hearing.

I received the case on September 19, 2018, and scheduled the hearing for December 11, 2018. The parties appeared as scheduled. Department Counsel submitted Government Exhibits (GX) 1 – 5. Applicant testified and presented Applicant Exhibits (AX) A – D. I held the record open after the hearing to receive from Applicant additional relevant information. The record closed on December 17, 2018, when I received Applicant's post-hearing submission, presenting AX E – I.³ All exhibits were admitted without objection. I received a transcript of the hearing (Tr.) on January 7, 2019.

Findings of Fact

Under Guideline F, the Government alleged that Applicant owed \$524,191 for four delinquent or past-due debts (SOR 1.a – 1.d). The \$67,363 debt alleged at SOR 1.c is for unpaid federal income taxes for the 2014 tax year. The \$425,873 debt alleged at SOR 1.d is for a delinquent small business loan being enforced by a civil judgment against Applicant, whose pay is being garnished at a rate of \$400 every other week. In response, Applicant denied SOR 1.a – 1.c, but admitted SOR 1.d. As to SOR 1.b, Applicant averred, and the Government agreed, that the credit card at issue belonged to his father (now deceased). SOR 1.b is resolved for Applicant. (Answer; GX 2; GX 3; Tr. 35, 41)

The remaining SOR allegations are supported by Applicant's e-QIP disclosures, his responses to DOHA interrogatories and the SOR, and three credit reports obtained during Applicant's background investigation and by DOD CAF adjudicators. In addition to the facts thus established, I make the following findings of fact.

Applicant is 63 years old and employed by a defense contractor in a position that requires eligibility for a position of trust, because his duties include safeguarding personally identifiable information (PII) and access to sensitive facilities. Applicant has worked for his current employer since January 2017. (GX 1; GX 2; Tr. 38)

¹ Required by DOD Directive 5220.6, as amended (Directive).

² The current adjudicative guidelines were issued by the Director of National Intelligence on December 10, 2016, to be effective for all adjudications on or after June 8, 2017.

³ AX E is a letter of recommendation, dated December 16, 2018 (one page); AX F is a repayment agreement regarding the debt alleged at SOR 1.a, dated March 28, 2018 (one page); AX G is a billing statement from Applicant's accountant, dated May 31, 2016 (one page); AX H is billing and payment information from a tax preparation service, dated June 6, 2013 (two pages); and AX I is a copy of Applicant's most recent performance evaluation, dated November 27, 2018 (five pages).

After graduating from high school, Applicant received training as a paramedic and has worked in that field for most of his adult life. He and his wife have been married since July 1982. He has three children, all adults with children of their own. Applicant and his family lived in State A until 2001. Since then, he has resided in State B, residing in, and paying the mortgage for, a house owned by his late father. Applicant currently is the sole income earner for his wife, who is medically disabled, and two of his adult children and their three children, two of whom have special needs. (Answer; GX 1; GX 2; AX A; AX D; Tr. 51 – 54)

In 1998, while working in State A as a self-employed paramedic, Applicant sought to expand his business by seeking a contract for non-emergency patient transport services with a city in State A. As a prerequisite for such a contract, he obtained from the city a certificate of need for those services. That certificate was valid for a limited period of time, in which it was incumbent on Applicant to get his business up and running. To that end, he obtained approval for a loan to be guaranteed by the Small Business Administration (SBA) through a local bank. With part of the money he had requested in hand, Applicant proceeded to obtain equipment and to lease and renovate a building to house his business. Unfortunately, the bank that was to provide the loan failed to fully fund the loan Applicant had requested. Before Applicant could resolve matters with the bank (which later went out of business), the certificate of need expired and Applicant could not begin doing business with the city as he had planned. He had to auction off the equipment he had purchased, but still owed between \$150,000 and \$200,000 for the portion of the loan that was funded, which he could not afford to pay. (Answer; GX 1; GX 2; AX A; Tr. 32 – 35, 54 – 58)

In 2002, after the original lender went out of business, the creditor listed in SOR 1.d bought the account and obtained a civil judgment against Applicant to enforce the debt through levy and wage garnishment. Over the past 18 years, the amount owed under that judgment, has grown to more than \$608,000 as a result of a 10 percent interest rate assigned to the debt. Starting in 2002, every time Applicant has obtained new employment, as much as 25 percent of his pay has been garnished by the creditor. On one occasion, the garnishment made it more advantageous for Applicant to choose to collect unemployment and public assistance rather than work for a net income that was insufficient, after garnishment, to support his family. In 2014, Applicant exhausted his retirement savings account (\$8,700) in an unsuccessful attempt to settle this debt. Currently, \$400 of Applicant's bi-weekly pay is garnished for this debt. In 2013, Applicant consulted a bankruptcy attorney who advised him that he could not include an SBA-guaranteed loan in a bankruptcy petition. At the current rate of wage garnishment, Applicant will be unable to resolve the SOR 1.d debt in his lifetime. (Answer; GX 1; GX 2; AX A; AX B; Tr. 26 – 27, 41 – 43, 60 – 61)

Applicant's business continued after his failed attempt to expand. He did not wrap up the incorporated business until 2016. The tax debt addressed in SOR 1.c arose after he used a nationally-known tax service to prepare his state and federal returns starting in 2014. That tax service characterized Applicant's business as a Subchapter-S corporation, meaning that any income from the business flowed through the business to Applicant as

personal income. Because of these complications, Applicant was late in filing his tax returns between 2012 and 2015.⁴ In 2016, when Applicant filed his 2014 tax return, it resulted in a debt for unpaid income taxes totaling about \$50,000. That debt has since grown, through interest and penalties, to nearly \$68,000. In 2016, Applicant consulted with an accountant who advised that filing as a Subchapter-S corporation was a mistake and that he should have filed as a sole proprietor. Applicant has no outstanding federal and state income tax returns and he is currently negotiating a monthly repayment plan with the IRS. He does not yet know how much he will have to pay, but he has obtained a second job with a medical transport company to earn the extra money he will need for that debt. Applicant disclosed the debt in his e-QIP, but it is not listed as a delinquency in any of the credit reports obtained by the Government. (Answer; GX 1 – 5; AX A; AX B; AX G; AX H; Tr. 34 – 36, 43 – 48, 50, 59 – 60)

In addition to being self-employed, Applicant worked in several paramedic and emergency medical services positions between 2002 and 2016. A job as a paramedic on an offshore oil platform provided him with a significant increase in pay and benefits; however, he lost that job in May 2016 due to a fall in oil prices that resulted in numerous oil-industry layoffs. Applicant was unemployed from May 2016 until being hired for his current job in January 2017. While he was unemployed, Applicant relied on unemployment benefits and food assistance programs to support his family. He also used a credit card to make ends meet, but he was unable to stay current on the balance due. That debt is reflected in SOR 1.a. After Applicant started his current job and again had a steady income, he entered into a repayment agreement whereby he would pay \$100 monthly on this debt. In March 2018, Applicant negotiated a new repayment plan and now pays \$25 monthly until February 2019, at which time he will be able make further settlement arrangements. (Answer; GX 1 – 5; AX A; AX F; Tr. 36 – 37, 40)

Applicant currently has little money remaining each month after expenses, including debt repayments and garnishments. His wife suffers from serious medical problems, the medications for which cost as much as \$3,000 each month. His medical insurance only covers 80 percent of her medical bills. He and his wife have applied for Social Security disability benefits, but that process is not likely to finish for another year. Applicant has not incurred any new unpaid debts since he started working again in January 2017. He is well-regarded by his current supervisor as reliable, honest, hardworking, and professional. Applicant's only performance evaluation to date reflects excellent work and trustworthiness. (Answer; GX 1 – 5; AX A; AX E; AX I; Tr. 48 – 50)

Policies

Eligibility for a position of public trust must be based on a determination that it is “clearly consistent with the interests of national security” to do so.⁵ All such adjudications

⁴ He is now current on all of his state and federal income tax reporting. (GX 2; Tr. 31, 48)

⁵ Security Executive Agent Directive (SEAD) 4, Appendix A, Paragraph 1(d).

must adhere to the procedural protections in the Directive before any adverse determination may be made. Each decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information,⁶ and consideration of the pertinent criteria and adjudication policies in the adjudicative guidelines. Decisions must also reflect consideration of the factors, commonly referred to as the “whole-person” concept, listed in the guidelines at AG ¶ 2(d).⁷ The presence or absence of a disqualifying or mitigating condition is not, by itself, conclusive. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of eligibility for a position of trust.

The Government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a position of trust for an applicant. Additionally, the Government must be able to prove controverted facts alleged in the SOR. If the Government meets its burden, it then falls to the applicant to refute, extenuate, or mitigate the Government’s case. Because no one is entitled to a position of trust, an applicant bears a heavy burden of persuasion. A person who has access to sensitive information enters into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring applicants possess the requisite judgment, reliability, and trustworthiness of one who will protect sensitive information as his or her own. Any reasonable doubt about an applicant’s suitability for access should be resolved in favor of the Government.

Analysis

Financial Considerations

The facts established by this record reasonably raise a trustworthiness concern about Applicant’s finances that is addressed, in relevant part, at AG ¶ 18, as follows:

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

⁶ Directive, 6.3.

⁷ (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.

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.

Applicant's financial problems arose from a failed expansion of his small business between 1998 and 2000. The original debt incurred (alleged at SOR 1.d) was about one-third of the amount he now owes. For about 15 years, this obligation has been addressed through involuntary wage garnishment at a rate that will never result in full repayment, especially with an ongoing 10 percent interest rate. Additionally, Applicant incurred a debt (alleged at SOR 1.c) for unpaid taxes as a result of a 2014 income tax year return filed as a Subchapter-S corporation rather than as a sole proprietorship. Finally, Applicant accrued unpaid debt (alleged at SOR 1.a) from his reliance on a credit card to meet expenses while he was unemployed for eight months before being hired by his current employer. Applicant has been repaying that debt through a plan agreed to by the creditor in early 2017. Aside from the debt at SOR 1.b, which was actually his late father's account, none of the debts alleged in the SOR have been resolved. This information requires application of the disqualifying conditions at AG ¶¶ 19(a) (*inability to satisfy debts*); 19(c) (*a history of not meeting financial obligations*); and 19(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*).

The following AG ¶ 20 mitigating conditions are potentially applicable here:

- (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
- (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.

As to Applicant's delinquent small business loan at SOR 1.d, but for the failure of his bank to fully fund the SBA loan on which he relied to start his business, Applicant would at least have been able to expand his business rather than default on that obligation 20 years ago. Applicant has paid what he can, even liquidating his retirement savings. He also was advised that he cannot liquidate this debt through bankruptcy. Although wage garnishment is involuntary, it is the route this creditor has chosen to pursue in its claim against Applicant, but it will never result in satisfaction of the debt. Applicant, for his part, continues to work and has adjusted his finances to the best of his ability to support his family with what remains after the garnished wages are deducted from his pay.

As to Applicant's unpaid taxes, it is not clear that a delinquency exists. No such entry is found in his credit history. Nonetheless, he acknowledges the debt and is ready to make what payments he can by taking a second job. Although not specifically alleged, Applicant was late in filing some of his tax returns between 2012 and 2015. He has since brought his filing status current and is working with the IRS to establish an affordable repayment plan for his 2014 taxes.

Finally, soon after he was hired by his current employer, Applicant established a repayment plan with the collection agency for a credit card account he used to excess while unemployed. His efforts to resolve that account continue. Based on all of the foregoing, I conclude that Applicant's debts arose from unusual circumstances and events that were beyond his control. Applicant experienced an unexpected failure by his bank in 1998 and debt from a poorly executed tax return in 2016. Additionally, he has had to support his entire family, including his disabled wife, thus limiting his ability to make more progress on those debts that he might be able to resolve. In response to those circumstances, Applicant has tried to address his debts to the best of his ability, and to manage his finances responsibly so as to avoid any additional unpaid debts. AG ¶¶ 20(a) and 20(b) apply.

The continued presence of unpaid debts is not, by itself, disqualifying. Financial problems present a two-fold inquiry. First, does the presence of unpaid debt or other unresolved financial burdens present a likelihood that Applicant would resort to illegal acts or other conduct that might compromise national interests? Here, that appears unlikely. Applicant is a solid employee with an excellent record in his current position. His employer supports Applicant's request for eligibility and regards Applicant as a trustworthy and integral member of his team. In addition, Applicant has worked steadily in his chosen profession for most of his adult life, he is working a second job solely to repay his tax debt, and he has no record of improper conduct of any kind.

Second, did Applicant's financial problems arise from irresponsible decisions, poor judgment, or other factors that indicate he is unreliable or untrustworthy? I conclude they did not. Applicant's tax and small business debts arose from circumstances beyond his control. His credit card debt accrued during a period of unemployment and, under the circumstances, was an understandable use of personal credit, which he is now repaying. At present, his personal finances are sound, in that, he is able to meet all of his current obligations. The record evidence as a whole regarding Applicant's judgment is sufficient to mitigate the trustworthiness concerns raised by Applicant's financial problems.

I have evaluated the facts and have applied the appropriate adjudicative factors under Guideline F. I also have reviewed the record before me in the context of the whole-person factors listed in AG ¶ 2(d). Although Applicant is not debt-free, his response to his financial problems has been prudent under the circumstances. Combined with the favorable information about his character and reliability, this record supports a fair and commonsense conclusion in favor of Applicant.

Formal Findings

Formal findings 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: FOR APPLICANT

Subparagraphs 1.a - 1.d: For Applicant

Conclusion

In light of all of the foregoing, it is clearly consistent with the interests of national security for Applicant to occupy a position of trust. Applicant's request for public trust eligibility is granted.

MATTHEW E. MALONE
Administrative Judge