



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



In the matter of:)
)
) ADP Case No. 18-01708
)
Applicant for Public Trust Position)

Appearances

For Government: Tara R. Karoian, Department Counsel
For Applicant: *Pro se*

11/30/2018

Decision

KILMARTIN, Robert J., Administrative Judge:

Applicant did not mitigate the financial considerations trustworthiness concerns. Applicant's eligibility for access to sensitive information in a public trust position is denied.

Statement of the Case

On July 3, 2018, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) 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's) effective within the DOD for SORs issued after September 1, 2006. This decision is based on the adjudicative guidelines effective June 8, 2107.

Applicant answered the SOR on July 18, 2018, and elected to have his case decided on the written record. Department Counsel submitted the Government's file of relevant material (FORM) on September 19, 2018. The FORM was mailed to Applicant, and it was received on October 1, 2018. Applicant was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation within 30 days

from receipt of the FORM. Applicant did not object to the Government evidence and he provided a 33-page response to the FORM. The Government's exhibits identified as Items 1 through 6 are admitted into evidence without objection. The case was assigned to me on November 14, 2018.

The SOR contains one allegation that Applicant is indebted to DFAS-CL on an account that has been charged off in the approximate amount of \$36,230. Defense Finance Accounting Service (DFAS) is the sole creditor at issue. Applicant answered this single allegation on June 17, 2018, admitting that he is indebted to DFAS but denying that he has failed to live within his means, to satisfy debts, and to meet his financial obligations. He also attached a January 20, 2018 three-bureau credit report to his answer.³ After a thorough and careful review of the pleadings and exhibits submitted, I make the following findings of fact.

Applicant is 34 years old. He graduated from high school in 2002 and completed some college courses. He earned a Naval Reserve Officers Training (NROTC) scholarship through college from 2002 to 2006, but he did not obtain a degree or take a commission in the military. Therefore, he was required to pay back some of the scholarship money pursuant to its terms. He has never been married and reports no children. He has been employed as a system architect for a federal contractor since 2011. Before that, his SCA reflects that he was employed full time in various positions since 2007, with only short periods of unemployment lasting two or three months.

Applicant reports no military service. He applied for a previous security clearance in December 2008, but Defense Security Services (DSS) denied it without explanation and the contract ended anyway. He is applying for a position of trust for the first time. He reported no financial problems in section 26 of his December 2, 2016 Questionnaire for National Security Positions (Security Clearance Application) (SCA). However, in his personal subject interview (PSI) on January 19, 2018, with an office of personnel management (OPM) investigator, he disclosed that he lost interest in military service while he attended college. He was sent to a peer review board and lost his scholarship. His commanding officer gave Applicant the option of enlisting in the Navy or paying the NROTC scholarship money back in accordance with the terms of the scholarship. He surmised that his earlier 2008 SCA was denied because he owed money to Defense Finance Accounting Service (DFAS) for the scholarship.⁵

² Unless otherwise indicated, the findings of fact were derived primarily from Applicant's Questionnaire for National Security Positions (SF 86) (Security Clearance Application) (SCA) dated December 2, 2016 (Item 3), and his personal subject interviews (PSI) on January 18, 2018, and March 5, 2018 (Item 5).

³ Paragraph 4.3 of this credit report shows that the delinquent debt to DFAS was closed, and Applicant has no new delinquent debts.

⁵ Item 5, p. 3.

In his June 18, 2018 PSI, Applicant stated that DFAS contacted him in 2007 after he left college. DFAS wanted him to pay \$500 per month but he could not afford that much. No action was taken and Applicant tried to call DFAS twice, but was told that his account could not be found in their system.⁶ He continued to receive letters from DFAS for about a year and a half, but he ignored them. Then, he heard nothing until 2014.⁷ He never paid DFAS.

In a September 10, 2018 e-mail from Applicant to Department Counsel, he stated that he had conversations with DFAS in 2011 stemming from a letter that he received threatening to move his account to wage garnishment, while his income tax refunds were already being seized and applied to his DFAS debt. (Item 6) He told the DFAS representative that he could not afford \$300 per month payments as requested. He agreed to \$225 payments, but could not keep up with them, making only six payments from April to November 2011, out of ten that he agreed to make. When Applicant tried to call DFAS to find out his balance, the lady answering the phone tried to look up his account and said he did not have one. So, Applicant stopped paying on this debt. Applicant provided no documentation to substantiate these phone calls or any dispute of the debt. He stated “I have the ability to pay the \$300/ month, but I cannot in good conscience, funnel \$300/ month into a website where I have no account, cannot see my balance, and cannot correlate that data to ensure my payment is being applied to that balance.” (Item 6)

Applicant responded to the FORM on October 11, 2018, and provided supplemental documentation including: three pages of e-mail correspondence with DFAS; four favorable character reference letters; five years of positive performance reviews (2014 – 2018); a one-page screenshot from pay.gov; and seven pages of receipts from 2011 and 2018 from pay.gov website. The latter receipts reflect six payments of \$225 to DFAS from February 2011 to November 2011, and one \$300 payment to DFAS on July 17, 2018. Applicant has documented payments totaling \$1,650 toward this \$36,230 debt that he has known about since 2007.

Policies

Positions designated as ADP I and ADP II are classified as “sensitive positions.” (See Code of Federal Regulations Title 32 – National Defense, part 154.13 and part 154, Appendix J – ADP Position Categories and Criteria for Designating Positions) “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.” 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

⁶ Item 5, p. 3.

⁷ Item 5, PSI of March 5, 2018.

afforded the right to the procedures contained in DOD Directive 5220.6 before any final unfavorable access determination may be made.

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(a), 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 relating to the guideline 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 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. Compulsive gambling is a concern as it may lead to financial crimes including espionage. Affluence that cannot be explained by known sources of income is also a [trustworthiness] concern insofar as it may result from criminal activity, including espionage.

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

The guideline notes several 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; and
- (c) a history of not meeting financial obligations.

Applicant admitted to the single delinquent debt owed to DFAS alleged in the SOR totaling over \$36,230. This is a longstanding debt, as evidenced by his testimony about the numerous letters he received from DFAS in 2007-2008, and the April 2017 credit bureau report, which reflects that it was opened in 2007, and the last activity occurred in November 2011. He admits to ignoring the earlier letters from DFAS in 2007 – 2008, and he took no action until 2011. Then, he failed to fulfil the terms of his repayment agreement with DFAS, making only six of the 10 payments he agreed to. There is sufficient evidence to support the application of the above disqualifying conditions.

Conditions that could mitigate trustworthiness concerns arising from financial difficulties 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;
- (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; and

(e) the individual has a reasonable basis to dispute the legitimacy of 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.

Applicant disclosed that he owed a delinquent debt to DFAS in section 26 of his SCA. He does not dispute or deny the delinquency, which he was aware of since 2007. Yet, he produced no documentation to show sustained payments or progress on this delinquent debt aside from the six payments of \$225 in 2011, and one payment of \$300 made in August 2018 on the eve of the hearing. Then, he just stopped making payments based on a putative phone conversation with an anonymous clerk at DFAS. His efforts were too little, too late. The single delinquency alleged in the SOR is recent and ongoing. Arguably, his short periods of unemployment were conditions beyond Applicant's control. Yet, he has not demonstrated that he has acted responsibly under the circumstances. He provided no evidence of financial counseling, good-faith efforts to repay DFAS, or a budget to show that his financial problems have been resolved or are under control. None of the mitigating conditions enumerated above apply.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a position of trust 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.

