



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



In the matter of:)
)
) ADP Case No. 18-01752
)
Applicant for Public Trust Position)

Appearances

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

01/24/2019

Decision

KILMARTIN, Robert J., Administrative Judge:

Applicant mitigated the financial considerations trustworthiness concerns. Applicant's eligibility for access to sensitive information in a public trust position is granted.

Statement of the Case

On September 21, 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 June 8, 2017.

Applicant timely answered the SOR on October 16, 2018, and elected to have a hearing before an administrative judge. The case was assigned to me on November 15, 2018.

The Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing on November 21, 2018, scheduling the hearing on December 6, 2018. I conducted the hearing as scheduled, and Government's Exhibits (GE) 1 – 4 were admitted without objection. Applicant's Exhibits (AE) A and B were also admitted without objection. I left the record open until January 7, 2019, for Applicant to submit supplemental documentation. (Tr. 58) He submitted post-hearing documents during this period including a credit report dated January 7, 2019, and additional documents from a well-known credit-repair agency that Applicant employed. These were collectively marked as AE C and admitted without objection. DOHA received the transcript of the hearing (Tr.) on January 2, 2019.

Applicant is 32 years old. He graduated from high school in 2004 and obtained a bachelor's degree in 2010. He was married in November 2012, and he has three young children. (Tr. 27-28) He reports no military service. He has been working in a position of trust at a federal health-care provider since December 2017, with no problems. (Tr. 25, 54) Applicant testified that he was laid off from his job as an information technology (IT) professional at a corporation, and he was unemployed from June 2013 until October 2014, and again from August to September 2017. (Tr. 50)

In his Answer to the SOR, Applicant admitted the seven alleged delinquent debts placed for collections, including SOR ¶¶ 1.b, 1.c, 1.d, and 1.g, and the charged-off debt at SOR ¶ 1.a for delinquent student loans in the approximate amount of \$11,971. He also admitted the past-due debt for \$8,307 at SOR ¶ 1.f. The debts alleged in the SOR total \$51,966. However, Applicant testified credibly that the debt at SOR ¶ 1.e is a duplicate of the debt placed for collection at SOR ¶ 1.b. (Tr. 22) The higher amount of the debt in SOR ¶ 1.e (\$14,076) reflects the inflated amount that the collection agent for the creditor in SOR ¶ 1.b added on for interest and fees to the deficit owed after repossession of a vehicle in 2015. Applicant disputes this debt. (AE C) Thus, the total owed is more accurately \$37,890.

Applicant testified that he has been working with a well-known credit-repair agency for two years paying \$80 per month. (Tr. 17) This agency purports to reach out to creditors to try to obtain validation of debts and remove erroneous debts from the debtor's credit reports. Applicant produced documents including a computer generated print-out showing 47 negative items removed and 38 remaining on Applicant's credit report. (AE A) It is unclear what the basis or relevance would be for these negative items, since they are not alleged in the SOR. It demonstrates good-faith efforts to obtain counseling and resolve his financial problems. Applicant also provided a print-out showing that he purchased identity-theft insurance in the amount of \$25,000. (AE B)

Applicant moved in with his parents in 2011 after college because he required surgery for a life-threatening condition. (Tr. 23) After recovering, he got a job as an IT specialist but was laid-off in 2013. Next, he tried various jobs outside of his skill set including a home improvement store etc. (Tr. 24) He testified credibly that he is trying to get a deferral on the student-loan debt in the amount of \$11,971 alleged in SOR ¶ 1.a.

(Tr. 30) He was unable to make payments due to his medical condition and periods of unemployment. Applicant produced post-hearing documentation including a January 2019 credit report reflecting several student loans owed to a creditor in the approximate amount of \$17,000. (AE C) These loans were opened from 2004 to 2008 and are presumed to be the same student loans at SOR 1.a. The credit report shows they are all in forbearance until February 2019. Additionally, he testified that he owes approximately \$22,000 to Navient for student loans that are in good standing, and not alleged in the SOR. (Tr. 54) It is unclear what payments Applicant is making monthly on any of his student loans to Navient.

Applicant testified that the debt alleged at SOR ¶ 1.c in the amount of \$2,181 is also for a student loan issued by a bank. Applicant's mother was the primary signatory on the loan and he was a co-signor. They have now paid that creditor in full according to documents produced post-hearing. (AE C) Applicant has also testified credibly and produced documentation showing that the past-due debt for \$1,427 at SOR ¶ 1.f has been satisfied with one final payment of \$382. (Tr. 35-36) This was a loan in the amount of \$8,307 for home furnishings. His post-hearing documentation also reflects that his well-known credit repair agency has recently challenged items on his credit report that are alleged in the SOR. Validation of the debts alleged in SOR ¶¶ 1.b and 1.g was requested on his behalf on January 4, 2019. (AE C)

Applicant testified that he was ready to pay the credit-card debt placed for collection in the amount of \$587 at SOR ¶ 1.d. He was negotiating a payment of \$320 to settle it at the time of his hearing. (Tr. 34) It still appears on his January 2019 credit report. SOR ¶ 1.g arose from Applicant's inability to make rental payments after he was laid off by the state bar association. It was placed for collection in October 2017, and his recent credit reports reflects "account information disputed by debtor." (AE C)

He earns \$5,500 to \$5,800 a month after taxes and he does have a budget. (Tr. 47) He usually has approximately \$1,000 left over each month, after paying expenses. (Tr. 48-49) He had financial counseling from his credit-repair agency that he relied on to help him improve his credit and resolve his financial problems. Applicant stated that his wife recently obtained employment as a consultant earning \$2,200 a month. (Tr. 49). This should help their financial situation. He provided no character references or performance evaluations. He demonstrated that he has either successfully disputed or satisfied (or deferred) six of the seven debts alleged in the SOR.

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 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.

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 sensitive information. An individual who is financially irresponsible may also be irresponsible, unconcerned, or negligent in handling and safeguarding information.

Applicant's admissions and the government's exhibits support the following AG ¶ 19 disqualifying conditions:

- (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 the seven delinquent debts alleged in the SOR totaling approximately \$37,890. The government exhibits admitted at the hearing together with Applicant's admissions substantiate these debts. 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 provided testimony and documentation to show that he satisfied SOR ¶¶ 1.c and 1.f, totaling \$3,608. He disputed SOR ¶ 1.b and SOR ¶ 1.e is a duplicate of 1.b (deficit balance on repossessed vehicle). He stated that he intended to pay his alleged debt at SOR ¶ 1.d imminently and he was negotiating a price with the creditor at the time of the hearing. Intentions to pay debts in the future are not a substitute for a track record of debt repayment or other responsible approaches. See ISCR Case No. 11-14570 at 3 (App. Bd. Oct 23, 2013). He also successfully disputed SOR ¶ 1.g. Applicant obtained deferral of his student loan debts. Additionally, he is already making payments to Navient, the creditor on other student loans. He employed a credit-repair agency, which reached out to creditors in SOR ¶¶ 1.b and 1.g to obtain validation of these debts. Applicant was paying \$80 per month for over two years to the credit-repair agency in good faith and reliance on its supposed expertise in helping to improve his financial situation.

The delinquencies alleged in the SOR are longstanding. Applicant's medical condition and periods of unemployment were conditions beyond his control. He has demonstrated that he acted responsibly under the circumstances in obtaining assistance and resolving six of his seven alleged SOR delinquencies. He satisfied some alleged debts, successfully disputed others, and received a deferral on some of his student loans. He is engaged in a payment plan and demonstrated good-faith efforts to repay other student-loan creditors. This evidence is sufficient to show that his financial problems have been resolved and are under control. 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.

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. Some of the factors in AG ¶ 2(d) were addressed under those guidelines. Applicant is the father of three young children. He has endured serious medical setbacks, and periods of unemployment, and struggled through a downturn in the economy.

Applicant's finances no longer remain a trustworthiness concern. He has met his burden of persuasion. The record evidence leaves me with no questions or doubts as to Applicant's suitability for a public trust position. For all these reasons, I conclude Applicant mitigated 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:	FOR APPLICANT
Subparagraphs 1. b - 1.g:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the interests of national security to grant Applicant eligibility for a public trust position. Eligibility for access to sensitive information is granted.

Robert J. Kilmartin
Administrative Judge