



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



In the matter of:)
)
 [Redacted]) ADP Case No. 19-00123
)
 Applicant for Public Trust Position)

Appearances

For Government: Raashid S. Williams, Esq., Department Counsel
For Applicant: *Pro se*

06/25/2019

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves trustworthiness concerns raised under Guidelines F (Financial Considerations) and E (Personal Conduct). Eligibility for assignment to a public trust position is denied.

Statement of the Case

Applicant submitted an application for public trust eligibility on February 6, 2017. On January 24, 2019, the Department of Defense (DOD) sent him a Statement of Reasons (SOR), citing trustworthiness concerns under Guidelines F and E. DOD acted under DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); DOD Manual 5200.02, *Procedures for the DoD Personnel Security Program (PSP)*, (April 3, 2017) (Manual); and the adjudicative guidelines (AG) promulgated in Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (December 10, 2016), for all adjudicative decisions on or after June 8, 2017.

Applicant answered the SOR on February 4, 2019, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on March 6, 2019, and the case was assigned to me on April 4, 2019. The Defense Office of Hearings and Appeals (DOHA) sent Applicant a notice of hearing on April 17, 2019,

scheduling the hearing for May 30, 2019. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 4 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibits (AX) 1 through 7, which were admitted without objection. I kept the record open until June 14, 2019, to enable him to submit additional documentary evidence. He timely submitted AX 8 through 12, which were admitted without objection. DOHA received the transcript (Tr.) on June 10, 2019. (The transcript erroneously reflects that AX 5 consists of 11 pages. It should reflect that it consists of six pages.)

Findings of Fact

Applicant is a 63-year-old program analyst employed by a defense contractor since December 2016. He has worked for federal contractors since May 2009, and he has been a self-employed consultant since October 2005.

Applicant married in June 1988 and has two adult children. He obtained a bachelor's degree in January 1979, a master's degree in December 1989, and a second master's degree in August 1993. He served on active duty in the U.S. Army from April 1979 to January 2000 and retired as a lieutenant colonel. While he was on active duty, he was a healthcare administrator. (Tr. 32.) He currently serves as a subject-matter expert on resource sharing between governmental agencies on health care for veterans. (Tr. 48.) He has applied for and received eligibility for public trust positions several times. He held a security clearance and eligibility for access to sensitive compartmented information while on active duty.

The SOR alleges a single delinquent debt, which is a credit-card account charged off by the issuing bank for \$30,625. Applicant opened the account in February 2000 but rarely used it. (GX 3 at 5; Tr. 25.) In 2009-2010, he incurred a substantial federal income-tax debt when he incorrectly estimated his tax liability as a self-employed subcontractor. He used the credit card to make two payments of past-due federal income taxes in 2011 and 2012, and he began making monthly payments on the credit-card account, which were about \$1,000 per month. He closed the account in 2015 after his account was repeatedly hacked, but he continued to make payments on the balance due. (Tr. 27.) When he was interviewed during his background investigation in May 2018, he admitted that he owed the amount claimed by the bank. (GX 2 at 5.) At the hearing, he testified that all the fraudulent charges on the account had been resolved, and he believed he owed the bank about \$26,000 or \$27,000. (Tr. 33-34.) He did not submit any documentation of the basis for his computation.

In 2013, Applicant refinanced his home to obtain a lower interest rate, and his lender suggested that he hire a debt-management company to lower his payments on the credit-card account. In October 2013, he hired Company A. (AX 1.) Company A advised Applicant to stop making payments to the bank and start making payments to them. Company A offered payments of about \$503 for 42 months instead of the \$1,000 per month that Applicant was paying the bank. (AX 8; Tr. 49.)

Applicant received several delinquency notices from the bank, which he forwarded to Company A. He contacted Company A, and a representative informed him that the company intended to accumulate more funds before starting to pay the bank. (Tr. 28.) The bank charged off the account in December 2013. (GX 3 at 6.)

Applicant made payments to Company A from November 2013 to July 2015. In August 2015, he was notified that the Consumer Financial Protection Bureau had filed an action against Company A for defrauding its customers by converting funds to its own use instead of paying the customers' debts. A federal district court appointed a receiver, and the assets of Company A were liquidated. Applicant had paid \$9,934 to Company A, and he received a settlement of \$5,404. (AX 8-12.)

Applicant did not submit any evidence that he contacted the bank directly or made any effort to resolve the debt after Company A was liquidated. On January 3, 2019, shortly before receiving the SOR, Applicant hired Company B to help him resolve the credit-card debt. (AX 3.) With Company B's assistance, Applicant contacted the bank in February 2019 and again in March 2019, requesting the bank to validate the debt. The bank responded, continuing its claim that the amount owed was \$30,625. (AX 6; AX 7.) Company B sent additional letters to the bank in May 2019. Copies of the May 2019 letters are not included in the record. (AX 5 at 2.) Applicant testified that Company B anticipates it will take 6 to 18 months to resolve the debt. (Tr. 36.) He testified that if the debt is not resolved by July 2020, he will negotiate directly with the bank and either pay the entire \$30,625 claimed by the bank or any lesser amount that can be negotiated. (Tr. 37, 52.) He currently has about \$26,000 in his bank account that he has earmarked for payment of the debt. (AX 9.)

Applicant is financially secure. His current annual income is about \$194,000, plus his military retired pay of about \$42,000 after taxes. His wife earns about \$45,000 per year. Their two children are self-sufficient. (Tr. 39-42.)

When Applicant submitted his applicant for a public trust position in February 2017, he answered "No" to questions whether, during the last seven years, he had defaulted on any type of loan; had any bills or debts turned over to a collection agency; had any account or credit card suspended, charged off, or cancelled for failing to pay as agreed; or had been more than 120 days delinquent on any debt. He also answered "No" to a question whether he was currently more than 120 days delinquent on any debt.

When Applicant was interviewed by a security investigator in May 2018, the investigator confronted him with a credit report reflecting that the credit-card account had been charged off, and Applicant explained why it had not been resolved. (GX 2 at 4-5.) In Applicant's answer to the SOR and at the hearing, he stated that he did not believe the debt was delinquent because he had been making payments on it and because the amount of the debt was disputed. He testified that he had never before been in a situation where he was paying one company to pay off a debt with another company while amount of the debt was in dispute. He had not seen his credit report before he was interviewed in May 2018, and he was unaware that the bank had

charged off the debt. He admitted that he struggled with the answers to the financial questions in his application, but he persuaded himself that negative answers were correct. (Tr. 52-54.)

Policies

The Manual covers sensitive positions, but it does not include specific provisions for ADP cases. ADP cases continue to be adjudicated in accordance with the Deputy Under Secretary of Defense's Memorandum for the Director, Defense Office of Hearings and Appeals, dated November 19, 2004. The Under Secretary of Defense's Memorandum treats ADP positions as sensitive positions, and it entitles applicants for ADP positions to the procedural protections in the Directive before any final unfavorable access determination may be made. The standard set out in the Manual and the adjudicative guidelines for assignment to sensitive duties is that 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. AG ¶ 2.b.

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. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard sensitive information.

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 an evaluation of the whole person. The administrative judge's overarching adjudicative goal is a fair, impartial and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The protection of the national security is the paramount consideration. Under AG ¶ 2(b), "[a]ny doubt concerning personnel being considered for access to [sensitive] information will be resolved in favor of national security." The Government must present substantial evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.14. Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). An applicant has the ultimate burden of demonstrating that it is clearly consistent with national security to grant or continue eligibility for access to sensitive information.

Analysis

Financial Considerations

SOR ¶ 1.a alleges that Applicant is indebted to a bank on an account that has been charged off for \$30,625. The concern under this guideline 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. . . . 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 or sensitive information to raise money. It encompasses concerns about a person's self-control, judgment, and other qualities essential to protecting classified or sensitive information. A person who is financially irresponsible may also be irresponsible, unconcerned, or negligent in handling and safeguarding classified or sensitive information. See ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012).

Applicant's admissions and the documentary evidence in the record establish two disqualifying conditions under this guideline: AG ¶ 19(a) ("inability to satisfy debts") and AG ¶ 19(b) ("unwillingness to satisfy debts regardless of the ability to do so"). The debt alleged in the SOR initially arose because Applicant was unable to pay it in full. He now has the means to pay it but is hoping to settle it for less than the full amount claimed. AG ¶ 19(c) ("a history of not meeting financial obligations") is not established because only a single debt is involved.

The following mitigating conditions are potentially applicable:

AG ¶ 20(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;

AG ¶ 20(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;

AG ¶ 20(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;

AG ¶ 20(d): the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts; and

AG ¶ 20(e): the individual has a reasonable basis to dispute the legitimacy of the 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.

AG ¶ 20(a) is not fully established. Applicant's indebtedness was infrequent, but it is recent and did not occur under circumstances making it unlikely to recur.

AG ¶ 20(b) is not fully established. Company A's fraud was a condition beyond Applicant's control. However, he did not act responsibly after discovering the fraud. He took no action to resolve the debt between August 2015, when he was notified of the fraud, and January 2019, when he hired another debt-management company.

AG ¶ 20(c) is not established. The debt-management advice Applicant has received does not constitute financial counseling within the meaning of this mitigating condition, and the debt is not resolved.

AG ¶ 20(d) is not established. Applicant has not reached an agreement with the creditor and has not tendered any payments on the debt. A promise to pay a delinquent debt in the future is not a substitute for a track record of paying debts in a timely manner. ISCR Case No. 07-13041 at 4 (App. Bd. Sep. 19, 2008).

AG ¶ 20(e) is not established. Applicant disputes the amount of the debt, but he admitted that the bank resolved all the fraudulent transactions after his account was hacked. At the hearing, he conceded that he might owe \$26,000 or \$27,000. He submitted no documentation of the basis for his computations.

Guideline E, Personal Conduct

SOR ¶ 2.a alleges that Applicant falsified his application for a public trust position by answering "No" to all questions about delinquent debts and failing to disclose the delinquent debt alleged in SOR ¶ 1.a. The concern under this guideline is set out in AG ¶ 15:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes. . . .

The relevant disqualifying condition is AG ¶ 16(a): “deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire personal history statement, or similar form used to conduct investigations . . . [or] determine national security eligibility or trustworthiness” When a falsification allegation is controverted, as in this case, the Government has the burden of proving it. An omission, standing alone, does not prove falsification. An administrative judge must consider the record evidence as a whole to determine an applicant’s state of mind at the time of the omission. See ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004). An applicant’s experience and level of education are relevant to determining whether a failure to disclose relevant information on a security clearance application was deliberate. ISCR Case No. 08-05637 (App. Bd. Sep. 9, 2010).

Applicant financial naiveté is somewhat surprising in light of his extensive formal education, administrative background, and previous experience with the adjudicative process for public trust positions. He was negligent in failing to check his credit record, seek advice from a security manager, or at least explain his uncertainty about the status of the debt in his application. However, his negligence and naiveté fall short of intentional falsification. I conclude that the AG ¶ 16(a) is not established. No other disqualifying conditions under this guideline are established.

Whole-Person Concept

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. In applying the whole-person concept, an administrative judge must evaluate an applicant’s eligibility for a public trust position by considering the totality of the applicant’s conduct and all relevant circumstances. An 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.

I have incorporated my comments under Guidelines F and E in my whole-person analysis, and I have considered the factors in AG ¶ 2(d). Applicant has the financial means to resolve the debt but is waiting for his debt-management company to resolve it for him. He has not adequately explained why he needs another year to resolve it. Once the debt is resolved, his eligibility for a public trust position may warrant reconsideration. See Directive ¶¶ E3.1.37 through E3.1.39 (reconsideration authorized after one year). However, based on the record before me, I conclude Applicant has not mitigated the trustworthiness concerns raised by his indebtedness. After weighing the disqualifying

and mitigating conditions under Guidelines F and E, and evaluating all the evidence in the context of the whole person, I conclude he has not carried his burden of showing that it is clearly consistent with national security to continue his eligibility for a public trust position.

Formal Findings

Paragraph 1, Guideline F (Financial Considerations): AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

Paragraph 2, Guideline E (Personal Conduct): FOR APPLICANT

Subparagraph 2.a: For Applicant

Conclusion

I conclude that it is not clearly consistent with the interests of national security to continue Applicant's eligibility for a public trust position. Eligibility for a public trust position is denied.

LeRoy F. Foreman
Administrative Judge