



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:

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ADP Case No. 19-00749

Public Trust Position

Appearances

For Government: Allison Marie, Esq., Department Counsel

For Applicant: *Pro se*

08/02/2019

Decision

WESLEY, Roger C., Administrative Judge:

Based upon a review of the pleadings and exhibits, I conclude that Applicant failed to mitigate the security concerns regarding his financial considerations. Eligibility for holding a public trust position is denied.

Statement of Case

On March 18, 2019 the Department of Defense (DoD) Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) detailing reasons why DoD adjudicators could not make the affirmative determination of eligibility to hold a public trust position, and recommended referral to an administrative judge to determine whether eligibility to hold a public trust position should be granted, continued, denied, or revoked. The action was taken under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), as amended; DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and Security Executive Agent, Directive 4, *National Adjudicative Guidelines* (SEAD 4), effective June 8, 2017.

Applicant responded to the SOR on April 16, 2019, and elected to have his case decided on the basis of the written record. Applicant received the File of Relevant Material (FORM) on May 23, 2019, and interposed no objections to the materials in the FORM. He did not supplement the FORM. The case was assigned to me on July 19, 2019.

Summary of Pleadings

Under Guideline F, Applicant allegedly accumulated seven delinquent debts exceeding \$22,000. Allegedly, these debts remain unresolved and outstanding.

In his response to the SOR, Applicant admitted each of the allegations covered by SOR ¶¶ 1.a-1.g with explanations. He claimed he accrued some of the listed debts during a period of financial hardship between 2011 and 2015. He claimed he never stole, sold out, or took any actions that could put in jeopardy the security or integrity of the U.S. Government. And, he claimed he has a wife and five-year-old son who depend on him.

Findings of Fact

Applicant is a 36-year-old customer service representative for a defense contractor who seeks eligibility to hold a public trust position. The allegations covered in the SOR and admitted by Applicant are incorporated and adopted as relevant and material findings. Additional findings follow.

Background

Applicant married in November 2012 and has one child (age five) from this marriage. (Item 3) He earned an associate's degree in May 2004 and a bachelor's degree from the same university in November 2005. (Item 3) Applicant reported no military service.

Since July 2018, Applicant has worked for his current defense contractor. (Item 3) He was employed by a government agency between 2011 and 2015 and worked temporary jobs for non-defense contractors intermittently between December 2006 and January 2015. (Items 3-4) Applicant reported periods of unemployment between April 2010 and January 2015. (Items 3-4)

Applicant's finances

Between 2011 and 2015, Applicant accumulated seven delinquent debts exceeding \$22,000. He attributed his debts to financial hardships while employed by a federal agency between February 2011 and January 2015. (Items 3-4) To date, Applicant has not addressed any of his identified delinquent debts in any tangible way. Nor has he furnished any documentation of financial planning to resolve his debts or provided evidence of budgeting or financial counseling.

Policies

The SEAD 4, App. A lists guidelines to be used by administrative judges in the decision-making process covering public trust cases. These guidelines take into account factors that could create a potential conflict of interest for the individual applicant, as well as considerations that could affect the individual's reliability, trustworthiness, and ability to handle sensitive information. These guidelines include conditions that could raise a trust concern and may be disqualifying (disqualifying conditions), if any, and many of the conditions that could mitigate trust concerns.

These guidelines must be considered before deciding whether or not eligibility to hold a public trust position should be granted, continued, or denied. The guidelines do not require administrative judges to place exclusive reliance on the enumerated disqualifying and mitigating conditions in the guidelines in arriving at a decision. Each of the guidelines is to be evaluated in the context of the whole person in accordance with App. A, AG ¶ 2(c).

In addition to the relevant AGs, administrative judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in App. A, AG ¶ 2(d) of the AGs, which are intended to assist the judges in reaching a fair and impartial commonsense decision based upon a careful consideration of the pertinent guidelines within the context of the whole person.

The adjudicative process is designed to examine a sufficient period of an applicant's life to enable predictive judgments to be made about whether the applicant is an acceptable trust risk. The following App A, AG ¶ 2(d) factors are pertinent: (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.

Viewing the issues raised and evidence as a whole, the following individual guidelines are pertinent in this case:

Financial Considerations

The Concern: 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. Financial distress can also be caused or exacerbated by, and thus can be a possible indicator of, other issues of personnel [trust] concern such as excessive gambling, mental

health conditions, substance misuse, or alcohol abuse of dependence. An individual who is financially overextended is at greater risk of having to engage in illegal acts or otherwise questionable acts to generate funds. . . . AG ¶ 18.

Burden of Proof

By virtue of the principles and policies framed by the AGs, a decision to grant or continue an applicant's eligibility to hold a public trust position may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires administrative judges to make a commonsense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a public trust position depends, in large part, on the relevance and materiality of that evidence. See *United States, v. Gaudin*, 515 U.S. 506, 509-511 (1995).

As with all adversarial proceedings, the judge may draw only those inferences which have a reasonable and logical basis from the evidence of record. Conversely, the judge cannot draw factual inferences that are grounded on speculation or conjecture.

The Government's initial burden is twofold: (1) it must prove by substantial evidence any controverted facts alleged in the SOR, and (2) it must demonstrate that the facts proven have a material bearing to the applicant's eligibility to obtain or maintain a public trust position. The required materiality showing, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused sensitive information before it can deny or revoke eligibility to hold a public trust position. Rather, the judge must consider and weigh the cognizable risks that an applicant may deliberately or inadvertently fail to safeguard sensitive information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the evidentiary burden shifts to the applicant for the purpose of establishing his or her trust worthiness through evidence of refutation, extenuation, or mitigation. Based on the requirement of Exec. Or. 10865 that all public trust eligibility decisions must be clearly consistent with the national interest, the applicant has the ultimate burden of demonstrating his or her public trust. “[Public trust] determinations should err, if they must, on the side of denials.” See *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

Analysis

Public trust concerns are raised over Applicant's accumulation of delinquent debts between 2011 and 2015. During this time, he has accumulated over \$22,000 in delinquent debts without any probative explanation aside from his periods of unemployment and claimed financial hardships while employed by a federal agency between 2011 and 2015.

Jurisdictional issues

Holding a public trust position involves the exercise of important fiducial responsibilities, among which is the expectancy of consistent trust and candor in protecting and guarding personally identifiable information (PII). DoD Manual 5200.02, which incorporated and canceled DoD Regulation 5200.2-R, covers both critical-sensitive and non-critical sensitive national security positions for civilian personnel. See 5200.02, ¶ 4.1a(3)(c)3.

Definitions for critical-sensitive and non-critical sensitive positions provided in 5200.02, ¶ 4.1a (3)(c) contain descriptions similar to those used to define ADP I and II positions under DoD Regulation 5200.2-R. In 32 C.F.R. § 154.13 and Part 154, App. J, ADP positions are broken down as follows: ADP I (critical-sensitive positions covering the direction, design, and planning of computer systems) and ADP II (non-critical-sensitive positions covering the design, operation, and maintenance of computer systems). Considered together, the ADP I and II positions covered in DoD Regulation 5200.2-R refine and explain the same critical-sensitive and non-critical-sensitive positions covered in DoD Manual 5200.02, ¶ 4.1a (3)(c) and are reconcilable as included positions in 5200.02.

So, while ADP trustworthiness positions are not expressly identified in DoD Manual 5200.02, they are implicitly covered as non-critical sensitive positions that require “access to automated systems that contain active duty, guard, or personally identifiable information or information pertaining to Service members that is otherwise protected from disclosure by DoD 5400.11-R. . . “. DoD 5200.02, Sec. 4.1, ¶ 3(c). See DoD Directive 5220.6 ¶¶ D5(d) and D8. By virtue of the implied retention of ADP definitions in DoD Manual 5200.02, ADP cases continue to be covered by the process afforded by DoD 5220.6.

Financial Concerns

Applicant’s history of financial difficulties warrant the application of three of the disqualifying conditions (DC) of the Guidelines: DC ¶¶ 19(a), “inability to satisfy debts”; 19(b), “unwillingness to satisfy debts regardless of ability to do so”; and 19(c), “a history of not meeting financial obligations.” Applicant’s admitted delinquent debts negate the need for any independent proof. See Directive 5220.6 at E3.1.14; *McCormick on Evidence*, § 262 (6th ed. 2006). Each of Applicant’s admitted debts are fully documented and create some judgment issues. See ISCR Case 03-01059 at 3 (App. Bd. Sept. 24, 2004).

Financial stability in a person cleared to protect sensitive information is required precisely to inspire trust and confidence in the holder of a public trust position that entitles him to access to sensitive information. While the principal concern of a public trust holder’s demonstrated financial difficulties is vulnerability to coercion and influence, judgment and trust concerns are implicit in cases involving debt delinquencies.

Historically, the timing of addressing and resolving debt delinquencies are critical to an assessment of an applicant's trustworthiness, reliability, and good judgment in following rules and guidelines necessary for those seeking access to sensitive information or to holding a sensitive position. See ISCR Case No. 14-06808 at 3 (App. Bd. Nov. 23, 2016); ISCR Case No. 14-01894 at 5 (App. Bd. Aug. 18, 2015). Applicant's cited circumstances (brief unemployment in 2010) provide little extenuating benefit. MC ¶ 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, or a death, divorce or separation), and the individual acted responsibly under the circumstances," has minimal application to Applicant's situation. His failure to address the financial hardships he claims to have endured between 2011 and 2015 precludes him from taking advantage of the "acted responsibly" prong of MC ¶ 20(b).

In evaluating Guideline F cases, the Appeal Board has stressed the importance of a "meaningful track record" that includes evidence of actual debt reduction through voluntary payment of debts, and implicitly where applicable the timely resolution of delinquent debts. ISCR Case No. 07-06482 at 2-3 (App. Bd. May 21, 2008) In Applicant's case, his failures or inability to establish documented payment initiatives with his listed SOR creditors, both before and after the initiation of the public trust eligibility adjudication process, preclude favorable findings and conclusions with respect to raised trust concerns over the state of his finances.

Whole-Person Assessment

Whole-person assessment is unfavorable to Applicant. He has shown insufficient progress to date in addressing his delinquent debts to merit enough positive credit to mitigate financial concerns. Overall, Applicant's actions to date in addressing his finances reflect little evidence of restored financial responsibility and judgment to overcome reasonable doubts about his trustworthiness, reliability, and ability to protect classified information. See AG ¶ 18.

Conclusions are warranted that his finances are not sufficiently stabilized at this time to meet minimum eligibility requirements for holding a public trust position. Eligibility to hold a public trust position under the facts and circumstances of this case is inconsistent with the national interest.

Formal Findings

In reviewing the allegations of the SOR and ensuing conclusions reached in the context of the findings of fact, conclusions, conditions, and the factors listed above, I make the following formal findings:

GUIDELINE F (FINANCIAL CONSIDERATIONS): AGAINST APPLICANT

Subparagraphs 1.a-1.g:

Against Applicant

Conclusions

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue Applicant's eligibility to hold a public trust position. Public trust eligibility is denied.

Roger C. Wesley
Administrative Judge