



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
 [NAME REDACTED]) ADP Case No. 19-01882
)
)
 Applicant for Public Trust Position)

Appearances

For Government: Allison Marie, Esq., Department Counsel
For Applicant: *Pro Se*

07/14/2020

Decision

MALONE, Matthew E., Administrative Judge:

Applicant became delinquent on numerous student loans and credit card accounts due to periods of unemployment, loss of other household income, and increased expenses. He is repaying his student loans through a rehabilitation program. Although he has received financial counseling, he has yet to begin repaying his past-due credit card accounts. Additionally, he has not yet filed his federal and state income tax returns for the tax years 2015 through 2018. Applicant’s request for eligibility to occupy a position of trust is denied.

Statement of the Case

On October 6, 2018, 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 federal contractor. After reviewing the results of the ensuing background investigation, DOD adjudicators were unable to determine, as required by Security

Executive Agent Directive (SEAD) 4, Section E.4, and by DOD Directive 5220.6, as amended (Directive), Section 4.2, that it is clearly consistent with the interests of national security for Applicant to occupy a position of trust.

On July 19, 2019, DOD issued Applicant a Statement of Reasons (SOR) alleging facts raising trustworthiness concerns addressed under the adjudicative guideline (AG) for financial considerations (Guideline F). 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.

Applicant timely responded to the SOR (Answer) and requested a hearing. I received the case on January 16, 2020, and scheduled the requested hearing for March 4, 2020. The parties appeared as scheduled. Department Counsel submitted Government Exhibits (GX) 1 – 4. Applicant presented Applicant Exhibits (AX) A – E, and he and one witness testified. All exhibits were admitted without objection. I held the record open after the hearing to allow Applicant to submit additional relevant information. The record closed on March 23, 2020, when I received AX F – H and Department Counsel's waiver of objection. I received a transcript of the hearing (Tr.) on March 12, 2020.

Findings of Fact

Under Guideline F, the Government alleged that Applicant owed \$106,920 for 19 delinquent or past-due debts (SOR 1.a – 1.s). Twelve of the debts alleged (SOR 1.a – 1.k, 1.n) are for delinquent student loans totaling \$97,238, or about 90 percent of the total debt at issue. In response, Applicant admitted with brief explanation all of the SOR allegations.

At the hearing, additional relevant information was produced that showed Applicant had not filed his state or federal income tax returns for the tax years 2015 through 2018. (Tr. 58 – 59, 64 – 66) As provided for by Directive, Section E3.1.17, Department Counsel moved to amend the SOR to conform to this new information by adding a new allegation (SOR 1.t). The proposed amendment was presented as follows:

1.t You failed to timely file, as required, your federal and state income tax returns for tax years 2015, 2016, 2017, and 2018. As of the date of this amended Statement of Reasons, the tax returns remain unfiled. (Tr. 69)

Applicant did not object and I granted the motion. Additionally, he admitted the new allegation, and I left the record open for 16 days so that Applicant could provide information in response to SOR 1.t. (Tr. 69 – 72) As noted above, Applicant provided three post-hearing exhibits. Only one of those exhibits, AX G, addresses the information presented in SOR 1.t. In addition to the facts established by Applicant's admissions to all of the SOR allegations, I make the following findings of fact.

Applicant is 33 years old and employed by a defense contractor in a position that requires eligibility for a position of trust. His duties in an information technology (IT)

position includes safeguarding personally identifiable information (PII) and access to sensitive facilities. Applicant has worked for his current employer since September 2018. Between December 2006 and October 2017, he worked in a similar position for a large telecommunications company. He was involuntarily terminated for violating company policies, and he was unemployed until being hired for his current position. This is his first request for position of trust eligibility. (GX 1; GX 4; Tr. 12, 41, 33)

Applicant attended college between 2005 and 2009, when he received a bachelor's degree. He also attended a technical college in 2011 and 2012. The student loans addressed in the SOR were obtained to pay his tuition at both colleges. He and his wife have been married since 2011. In addition to her 12-year-old child from before the marriage, they have two children together, ages 5 and 6. Additionally, in 2014, Applicant and his wife were given custody of his then 15-year-old cousin who had been sexually molested by her mother's boyfriend. The child joined the military when she turned 18, but now has left the service and is looking for work. Applicant and his wife have provided sporadic financial assistance to her over the past year or so. (GX 1; Tr. 25 – 30, 51 – 55, 59 – 61)

Since March 2019, Applicant's wife has held both a full-time and a part-time job, and she now earns about \$72,000 annually. She was unemployed between January and September 2014, between March and September 2015, and between May and December 2018. Her 2014 and 2015 periods of unemployment arose from medical problems related to the birth of their two children. Her 2018 unemployment started when she was laid off from a previous job. (Answer; GX 1; GX 2; Tr. 33 – 35, 51 – 55)

Applicant's financial problems arose from a combination of circumstances. His two children were born within 16 months of each other, and his wife was unable to work for medical reasons for most of 2014 and 2015. His own unemployment between October 2017 and September 2018 also created financial burdens that he struggled to carry. Applicant remained in good standing with his student loans until about April 2018; however, both he and his wife found themselves unemployed for most of 2018. In July 2019, he began the process of trying to resolve those debts and, since October 2019, has been making monthly payments through a student-loan rehabilitation program. Satisfactory participation in that program will bring his loans current. As of February 2020, the total due, with interest and penalties, for all 12 accounts was \$120,359. (GX 4; AX A; AX B; Tr. 37 – 39, 55 – 56)

During his wife's unemployment in 2014 and 2015, Applicant resorted to using credit cards to make ends meet. He eventually became unable to pay those accounts as required. Between 2016 and 2018, the accounts were either charged off as business losses or referred for collection. The debts alleged at SOR 1.l, 1.m, and 1.o – 1.s reflect those debts, which total \$9,682. In January 2019, Applicant was interviewed by a government investigator as part of Applicant's background investigation. During the interview, he discussed all of the debts alleged in the SOR and stated that his intent to resolve his debts within two years by saving money and reducing expenses, such as moving his children from private school to public school. In August 2019, he started

working with a professional financial counselor to improve his finances. He has established a monthly budget and has corrected discrepancies in his credit history to increase his credit score; however, Applicant has not yet established a plan to repay or otherwise resolve those debts. The budget he submitted post-hearing does not reflect any debt payments other than his student-loan rehabilitation payments. Additionally, it reflects a negative monthly cash flow of about \$100 after deducting expenses from Applicant's pay alone. He earns \$43,000 annually. With his wife's income, the total household income is about \$115,000 annually. It is unclear what access Applicant has to his wife's income to resolve debts and to pay unplanned expenses. Applicant testified that the net remainder each month is actually about \$150. (Answer; GX 1 – 4; AX C; AX F; AX G; Tr. 33 – 36, 43 – 48)

During Applicant's testimony about the state of his current monthly finances, Applicant revealed that he had not filed his federal or state income tax returns for the 2015 through the 2018 tax years. Applicant had not disclosed this information in his e-QIP, and it was not discussed during his January 2019 interview. In July 2019, Applicant and his wife (they have always filed joint returns) started working with a tax-debt-relief and tax-preparation company to resolve their past-due tax filings and any unpaid tax debt that may result. Applicant did not present any additional information regarding the status of his past-due returns. (AX G; Tr. 58 – 59, 64 – 67)

Applicant has a good reputation in the workplace. In February 2020, he was promoted on the strength of his job performance and professional expertise. (AX D; Tr. 33 – 36)

Policies

Security Executive Agent Directive (SEAD) 4, Appendix A, Paragraph 1(d) requires that a decision to grant eligibility for a position of public trust must be "clearly consistent with the interests of national security." All such adjudications 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, and consideration of the pertinent criteria and adjudication policies in the adjudicative guidelines. (Directive, 6.3) Decisions must also reflect consideration of the following factors, commonly referred to as the "whole-person" concept, listed in the guidelines 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.

Additionally, when applying the adjudicative guidelines, the presence or absence of a disqualifying or mitigating condition is not, by itself, conclusive. Nonetheless, 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 individual who is financially overextended is at greater risk of having to engage in illegal or otherwise questionable acts to generate funds.

Available information shows that Applicant accrued significant delinquent and past-due debt starting in 2016. The record also shows that Applicant did not file any income tax returns for the 2015 through 2018 tax years. 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*).

I also have considered the following pertinent AG ¶ 20 mitigating conditions:

(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;

(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

(g) the individual has made arrangements with the appropriate tax authority to file or pay the amount owed and is in compliance with those arrangements.

AG ¶ 20(a) does not apply because Applicant's financial problems are recent and largely unresolved. Although Applicant is addressing his student loan debts through a rehabilitation program, his efforts in that regard are still in their nascent stages and he has not established a sufficient track record of consistent payments to resolve more than \$120,000 in educational debt. Additionally, because Applicant has yet to directly address his delinquent credit card debts, AG ¶ 20(d) does not apply.

Applicant benefits from AG ¶ 20(c) because he has been working with a financial counselor since August 2019 and has introduced structure to his financial management that may not have existed previously. Nonetheless, as shown by a negative monthly cash flow and the absence of credit-card debt payments, he did not establish clear indications that his financial problems are under control.

As to his taxes, Applicant did not present any information that supports application of AG ¶ 20(g). Even though he contacted a tax-resolution service last year, there is no indication in this record that any past-due returns have been filed or that he is working with federal and state tax authorities to resolve this issue.

All of the foregoing precludes application of AG ¶ 20(b). Although Applicant's financial problems arose from unforeseen or uncontrollable circumstances, he did not establish that he acted responsibly in the face of those circumstances. Based on the record evidence as a whole, none of the pertinent mitigating conditions apply, and the trustworthiness concerns raised under this guideline are not resolved.

I have evaluated the facts and have applied the appropriate adjudicative factors under Guidelines E and F. I also have reviewed the record before me in the context of the whole-person factors listed in AG ¶ 2(d). Applicant is a conscientious, responsible husband, father, and employee. He also is starting to take the steps necessary to resolve his financial problems. Nonetheless, this positive information does not outweigh the trustworthiness concerns raised by the Government's information. His debts remain largely unaddressed, and he has not sufficiently acted to resolve his past-due income tax returns. Therefore, doubts about his trustworthiness remain. Because protection of the national interest is the principal focus of these adjudications, any remaining doubts must be resolved against the 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:	AGAINST APPLICANT
Subparagraphs 1.a – 1.t:	Against Applicant

Conclusion

In light of all of the foregoing, it is not clearly consistent with the interests of national security for Applicant to occupy a position of trust. Applicant's request for public trust eligibility is denied.

MATTHEW E. MALONE
Administrative Judge