



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



In the matter of:)
)
-----, -----) ADP Case No. 06-21835
SSN: -----)
)
Applicant for Public Trust Position)

Appearances

For Government: Melvin A. Howry, Esquire, Department Counsel
For Applicant: *Pro Se*

August 29, 2008

Decision

WHITE, David M., Administrative Judge:

Applicant has a lengthy history and substantial amount of delinquent debt that he cannot repay. He falsified his Trustworthiness Application concerning these debts. Based upon a review of the case file, pleadings, and exhibits, eligibility for access to sensitive information is denied.

Applicant submitted his Questionnaire for Public Trust Positions (SF 85P), on October 26, 2005. On April 4, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the trustworthiness concerns under Guideline F (Financial Considerations), Guideline E (Personal Conduct), and Guideline J (Criminal Conduct for Applicant. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); Department of Defense (DoD) Regulation 5200.2-R, *Personnel Security Program*, dated Jan. 1987, as amended (Regulation), and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant acknowledged receipt of the SOR on April 15, 2008. He answered the SOR in writing, and requested a hearing before an administrative judge, in an undated response that was received by DOHA on April 28, 2008 (Answer). Department Counsel was prepared to proceed on May 30, 2008, and DOHA assigned the case to me on June 4, 2008.

DOHA issued a notice of hearing on June 10, 2008, and Applicant acknowledged receiving it at least 15 days before the hearing. (Tr. at 11.) Although his signed receipt for the hearing notice that was delivered through his company's facility security officer was dated June 24, 2008, he did receive a copy of the notice via electronic mail on June 10, 2008. I convened the hearing as scheduled on June 25, 2008. Department Counsel offered Government Exhibits (GE) 1 through 7, which were admitted without objection. Applicant testified on his own behalf, and submitted Applicant's Exhibits (AE) A through C, which were admitted without objection. I granted Applicant's request to leave the record open until July 11, 2008, in order for him to submit additional evidence. DOHA received the transcript of the hearing (Tr.) on July 3, 2008. On July 11, 2008, Applicant submitted two additional documents to Department Counsel. He did not submit any further evidence, and Department Counsel forwarded Applicant's submission without objection to its consideration on July 12, 2008. These documents were marked AE D, and the record was closed.

Findings of Fact

Applicant is a 34-year-old employee of a defense contractor. His two annual performance evaluations reflected ratings of 3.05 and 3.20 on a scale of 1 to 5. (AE A; AE B.) In his answer to the SOR, Applicant admitted the factual allegations in ¶¶ 1.b, 1.g, and 1.m, of the SOR, and denied the remaining allegations. These three admitted delinquent debts, totaling \$6,482, are owed to a jewelry store, a credit union and a university. They became delinquent in 2001, 2004, and 2007, respectively. Applicant's admissions are incorporated herein as findings of fact.

Applicant claimed that the three delinquent debts totaling \$2,685, described in SOR ¶¶ 1.a, 1.f, and 1.i, were fraudulently opened in his name by someone else. One was a credit card account and two were for mobile phone services. During an interview with an OPM investigator on March 7, 2007, he claimed a man stole his driver's license and military ID, and these accounts were opened shortly thereafter. He disputed the debts with the creditors, who insisted that they were legitimately his debts after investigations. During the hearing, he said it was a woman to whom he had given access to everything in his apartment who he suspected of starting these accounts. He confirmed that, after investigation, the companies insisted the debts were his, and acknowledged that they remain unpaid. (Answer at 1, 2, 4; GE 5 at 4; Tr. at 31-33, 40, 44-45.)

Applicant claimed to have paid the \$1,738 judgment debt listed in SOR ¶ 1.d. Actually, he said his mother paid it by credit card and he repaid her with cash and money orders. Although he testified that he had no evidence that this debt was paid, he later submitted a letter from the judgment creditor showing that an apartment-related

debt had been paid. (Tr. at 68-69; AE D at 3.) However, the record evidence reflects that this judgment related to a different debt, since the payment of the apartment debt was reflected on two subsequent credit bureau reports (CBR) along with the unpaid judgment, which remains reported as unpaid on his most recent CBR as well. During his OPM interview, he explained that a judgment was entered against him during the same month, and in the same court, as the allegation in ¶ 1.d, for unpaid traffic tickets. He then stated that he had paid that judgment, although no such payment is reflected in any record CBR. (Compare GE 2 at 1-2; GE 3 at 3, 10; GE 5 at 4; GE 6 at 1.) The same collection agency creditor has reported two additional apartment-related debts in collections, as alleged in SOR ¶¶ 1.e and 1.h. Applicant stated that these debts are for past-due rent on his wife's apartment before they were married, and on their shared apartment where she remained when he moved to another city after they separated in 2004. He testified that they are still married, though separated, and he will likely be held responsible for both debts, totaling \$2,606. (Tr. at 37-40.)

Applicant denied owing the four remaining debts, listed in SOR ¶¶ 1.c, 1.j, 1.k, and 1.l, because he does not know what each of them is. However, he has neither disputed them with the credit bureaus, nor made any effort to investigate their validity. These debts, of which two became delinquent in 2001 and the other two in 2005, total \$3,398. (GE 4 at 1-2; Tr. at 35-36, 43-44.)

In late April 2008, Applicant retained an attorney to file for Chapter 7 bankruptcy relief. (AE C.) In July, after his hearing, he provided the remaining necessary paperwork to the attorney. As of the date the record closed, the petition had not been prepared or filed. (AE D at 4.) Applicant's income is barely sufficient to meet his monthly expenses, and he has no savings. His two cars are paid off. His net pay is about \$1,000 each two weeks. He pays \$750 per month to his wife for child support and \$600 per month in rent. The remainder of his earnings go toward present living expenses. He attributed his financial problems to, "unemployment and just being un-responsible altogether," and said his wife did not cause any of his delinquent debt. He was unemployed from April 2001 to May 2002, after his productivity at the car dealership where he worked declined, and again from September 2003 to January 2004 for unexplained reasons. He was enrolled in a credit counseling program for about six months in the late 1990s in an effort to improve his finances and pay his bills. He stopped participating when he could not make the agreed payments. (Tr. at 48-60; GE 1 at 3; GE 5 at 3, 6.)

Applicant answered "NO" in response to questions 19 and 20 on his SF 85P, that asked whether any judgments had been entered against him in the last 7 years or was then over 180 days delinquent on any debt. These answers were false, in that he was more than 180 days delinquent on those debts listed in SOR ¶¶ 1.a, 1.b, 1.c, 1.e, 1.f, and 1.g, as described above. Of these debts, Applicant admitted knowing about and owing the ¶¶ 1.b and 1.g debts. He further described actively, but unsuccessfully, protesting the ¶¶ 1.a and 1.f debts with the companies involved, demonstrating that he also knew them to be outstanding and unresolved obligations. He consistently said he did not know anything about the ¶ 1.c debt, and did not believe he owed the ¶ 1.e debt for his wife's pre-marriage rent, so his omission of those two debts was not a deliberate falsification. Applicant's testimony to the effect that he did not understand what a

judgment was, or that one had been entered against him, was unpersuasive because he described having a judgment entered against him for unpaid traffic tickets during his March 2007 OPM interview. His explanation for denying the 180-day delinquencies was, "that probably was just me not actually paying attention to the question closely." (GE 5 at 4; Tr. at 47-48.)

Policies

Positions designated as ADP I and ADP II are classified as "sensitive positions." (See Regulation ¶¶ C3.1.2.1.1.7 and C3.1.2.1.2.3.) "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." (See Regulation ¶ C6.1.1.1.) 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 the Directive before any final unfavorable access determination may be made. (See Regulation ¶ C8.2.1.)

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 over-arching adjudicative goal is a fair, impartial and common sense decision. According to AG ¶ 2(c), 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." In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

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 the applicant or proven by Department Counsel." The applicant has the ultimate burden of persuasion as to obtaining a favorable trustworthiness decision.

A person who applies for access to sensitive information seeks to enter 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 protect or safeguard sensitive information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of sensitive information.

Section 7 of Executive Order 10865 provides that “Any determination under this order adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or 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 [sensitive] information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

The guideline notes several conditions that could raise trustworthiness concerns. Under AG ¶ 19(a), an “inability or unwillingness to satisfy debts” is potentially disqualifying. Similarly under AG ¶ 19(c), “a history of not meeting financial obligations” may raise trustworthiness concerns. Applicant accumulated more than \$16,900 in delinquent debt during a period of consistent financial irresponsibility stretching back at least ten years. He claimed some of these debts were not his and did not know about others, but showed nothing to document the validity of such disputes. The evidence is sufficient to raise these potentially disqualifying conditions, requiring a closer examination and shifting the burden to Applicant to establish mitigation of the resulting trustworthiness concerns.

The guideline also includes examples of conditions that could mitigate trustworthiness concerns arising from financial difficulties. Under AG ¶ 20(a), the disqualifying condition may be mitigated where “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.” Applicant’s history of inability to pay his debts spans more than a decade, and continues to date. He provided no evidence this would not continue or recur, so this mitigating condition is not supported by the record.

Under AG ¶ 20(b), it may be mitigating where “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.” Applicant’s financial problems were partially caused by two periods of unemployment that resulted from his choices, not due to business failures or unexpected layoffs. His voluntary separation from his wife did increase family living expenses, but that was also a choice he made. He denied that his wife was responsible for his delinquencies. He has not demonstrated that this potentially mitigating condition is a factor for significant consideration in this case.

Evidence that “the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control” is potentially mitigating under AG ¶ 20(c). Similarly, AG ¶ 20(d) applies where the evidence shows “the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.” Applicant’s counseling during the late 1990s ended when he could not meet program requirements. He has continued to incur delinquent debt, so the problem is neither resolved nor under control. He offered no proof of resolution or repayment of any SOR-listed debt. He has taken preliminary steps to file a bankruptcy petition, but it is premature to consider this potential resolution as substantial mitigation based on evidence presented to date.

Applicant also failed to establish mitigation under 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.” While he asserted a potentially valid basis to dispute the validity of several of the debts, he provided no documented proof corroborating those assertions, and testified that his minimal efforts in that regard on some of the debts had been unsuccessful in convincing the creditors that the debts were not his.

Guideline E, Personal Conduct

AG ¶ 15 expresses the trustworthiness concern pertaining to personal conduct:

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 information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

AG ¶ 16 describes conditions that could raise a trustworthiness concern and may be disqualifying. The disqualifying condition alleged in the SOR and raised by the evidence in this case is:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities.

Applicant omitted responsive information about his 2002 judgment debt, and his multiple debts that were more than 180 days delinquent in response to questions 19 and 20 on his October 2005 Questionnaire for Public Trust Positions. In fact, he answered “NO” in response to each question, denying that those debts existed. He certified the completeness and accuracy of his answers, acknowledging the obligation to be truthful. His rationale during his hearing for failing to report the judgment differed markedly from his comments about it to the OPM investigator which he later ratified as being true in his interrogatory response. He then explained his false answer to question 20 happened because he wasn’t paying attention to the question. Neither attempted justification for the omissions was persuasive. The weight of evidence in this record leads to the conclusion that his false denials and omissions of relevant information concerning his judgment and delinquent debts in response to questions 19 and 20 were deliberate.

Applicant did not disclose any information about these matters until he was asked about it by the OPM investigator during his March 7, 2007 personal subject interview. This does not establish the personal conduct mitigating condition set forth in AG ¶ 17(a): “the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts.” His conflicting statements about why he omitted this information significantly undermine the credibility of his assertion that he did not intend to mislead the Government about the existence of these debts and his underlying actions that gave rise to them. He neither asserted nor established any other personal conduct mitigating condition with respect to these denials and omissions.

Guideline J, Criminal Conduct

AG ¶ 30 expresses the trustworthiness concern pertaining to criminal conduct: “Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations.” AG ¶ 31 describes conditions that could raise a trustworthiness concern and may be disqualifying, including: “(a) a single serious crime or multiple lesser offenses;” and “(c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.” The criminal statute codified at 18 U.S.C. § 1001 states:

(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—

(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;

(2) makes any materially false, fictitious, or fraudulent statement or representation; or

(3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

shall be fined under this title, imprisoned not more than 5 years...

Applicant's deliberate omission and concealment of his 2002 judgment debt and substantial delinquent indebtedness, as discussed above, constituted a violation of this statute. This, as a felony, is a serious offense within the meaning of AG ¶ 31(a), and does call into question Applicant's ability or willingness to comply with laws, rules and regulations. Applicant neither asserted nor introduced any evidence that would support application of any criminal conduct mitigating condition as set forth in AG ¶ 32.

Whole Person Concept

Under the whole person concept, the administrative judge must evaluate an applicant's eligibility for a public trust position 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(a):

(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) 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.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant's history of financial irresponsibility is lengthy and ongoing, resulting in a large number and amount of delinquent debts. His only realistic potential for resolution of these debts is through bankruptcy proceedings which he has made only preliminary efforts toward filing. He is a mature individual who is accountable for the voluntary choices that led to these circumstances. He demonstrated no rehabilitation or other permanent behavioral changes that could support a conclusion that continuation or recurrence is unlikely. These debts continue to create potential for coercion, pressure and duress, as

demonstrated in his attempts to hide them by falsifying his Trustworthiness Questionnaire. That falsification itself is of serious concern, and constitutes criminal behavior. Overall, the record evidence leaves me with substantial questions and doubts as to Applicant's eligibility and suitability for a public trust position. For all these reasons, I conclude Applicant failed to mitigate the trustworthiness concerns arising from his financial considerations, personal conduct and criminal conduct.

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:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	Against Applicant
Subparagraph 1.e:	Against Applicant
Subparagraph 1.f:	Against Applicant
Subparagraph 1.g:	Against Applicant
Subparagraph 1.h:	Against Applicant
Subparagraph 1.i:	Against Applicant
Subparagraph 1.j:	Against Applicant
Subparagraph 1.k:	Against Applicant
Subparagraph 1.l:	Against Applicant
Subparagraph 1.m:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	Against Applicant
Paragraph 3, Guideline J:	AGAINST APPLICANT
Subparagraph 3.a:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the interests of national security to grant Applicant eligibility for a public trust position. Eligibility for access to sensitive information is denied.

DAVID M. WHITE
Administrative Judge