



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



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| In the matter of: |) | |
| |) | |
| |) | ADP Case No. 12-08437 |
| |) | |
| Applicant for Public Trust Position |) | |

Appearances

For Government: Gregg A. Cervi, Esq., Department Counsel
For Applicant: *Pro se*

11/03/2015

Decision

HEINY, Claude R., Administrative Judge:

Applicant contests the Department of Defense’s (DoD) intent to deny his eligibility for a public trust position to work in the defense industry. The Statement of Reasons (SOR) alleges he is past due on his student loan, has ten delinquent charged-off and collection accounts, and has unpaid Federal and state income taxes due. Applicant failed to mitigate the trustworthiness concerns arising from his finances. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to sensitive information is denied.

History of the Case

On January 21, 2015, acting under the relevant Executive Order and DoD Directive,¹ the DoD issued an SOR detailing the trustworthiness concerns under

¹ Executive Order 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 the adjudicative guidelines (AG) effective within the DoD on September 1, 2006.

financial considerations. DoD adjudicators could not find that it is clearly consistent with the national interest to grant or continue Applicant a public trust position.

On February 6, 2015, Applicant answered the SOR and elected to have the matter decided without a hearing. Defense Office of Hearings and Appeals (DOHA) Department Counsel (DC) submitted the Government's case in a File of Relevant Material (FORM), dated August 4, 2015. The FORM contained six attachments (Items).

On August 13, 2015, Applicant received a copy of the FORM, along with notice of his opportunity to file objections and submit material to refute, extenuate, or mitigate the potentially disqualifying conditions. He was informed he could submit any material he wished to be considered. His response was due September 12, 2015. No material was received. On October 13, 2015, I was assigned the case.

Findings of Fact

In Applicant's Answer to the SOR, he denied owing three collection accounts totaling approximately \$2,700 and denied having failed to file federal and state income tax returns for two years. He did admit having three charged-off and four collection accounts. He also admitted he had not filed and owed federal and state income tax for 2008. He asserted, but failed to provide documentation, that he had arranged repayment agreements with the Internal Revenue Service (IRS) and the state franchise tax board. I incorporate Applicant's admissions as facts. After a thorough review of the pleadings, exhibits, and submissions, I make the following additional findings of fact.

Applicant is a 39-year-old first alarm dispatcher who has worked for a defense contractor since July 2011 and seeks to obtain access to classified information. (Item 3) From September 1977 through August 1983, he honorably served in the U.S. Navy. (Item 3, 6) Applicant provided no information about his duty performance and provided no character reference letters.

The delinquent SOR obligations appear on Applicant's September 2014 credit report, as do the three SOR debts he denied in his SOR answer. (Item 5) In Applicant's February 2012 Electronic Questionnaires for Investigations Processing (e-QIP), he indicated he failed to pay his 2008, 2009, and 2010 Federal and state income taxes and estimated he owed approximately \$29,000. (Item 3) He indicated in a March 2012 Personal Subject Interview (PSI) that he had begun a dialogue with an IRS representative to pay his past due taxes. (Item 6) In mid-2012, he had received a letter from the IRS regarding the filing of his 2008 federal taxes. (Item 6) In 2009, 2010, and 2011, he was contacted by the state franchise tax board concerning his unpaid state taxes. In his PSI, he indicated he had finished his paperwork related to his federal tax returns, but intended to first make an appointment with a tax attorney to determine the next step in making payments. (Item 6)

In late 2011, Applicant asserted he had entered into a repayment agreement with the state franchise tax board to pay \$92 monthly to address \$1,800 in state taxes due

for tax years 2008 and 2009. (Item 6) He asserted that in June 2012 he intended to start making payments to address the \$900 in state tax owed for tax year 2010. He provided no documentation of repayment agreements with the IRS or the state franchise tax board and no documentation showing pay in accord with a repayment agreement.

The only explanation for Applicant's failure to timely file his income tax returns was that he was self-employed as a travel agent² and was not a good business man. He did not provide any information as to how and why the charged-off and collection accounts became delinquent. Absent documentary evidence of payment, the Government argued, he failed to mitigate the concern.

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 commonsense 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,

² Applicant was a self-employed travel agent from April 2007 through December 2011. (Item 3)

or mitigate facts admitted by applicant or proven by Department Counsel. . . .” The applicant has the ultimate burden of persuasion as to obtaining 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 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 (EO) 10865 provides that decisions shall be “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

Adjudicative Guideline (AG) ¶ 18 articulates the security concerns relating to financial problems:

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 information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

Additionally, an individual who is financially irresponsible may also be irresponsible, unconcerned, negligent, or careless in properly handling and safeguarding classified information. Behaving responsibly or irresponsibly in one aspect of life provides an indication of how a person may behave in other aspects of life.

A person's relationship with his or her creditors is a private matter until evidence is uncovered demonstrating an inability or unwillingness to repay debts as agreed. Absent substantial evidence of extenuating or mitigating circumstances, an applicant with a history of serious or recurring financial difficulties is in a position of risk that is inconsistent with holding a security clearance. An applicant is not required to be debt free, but is required to manage their finances to meet their financial obligations.

Applicant failed to file his Federal and state income tax returns in a timely manner. He asserted, but failed to document, that he filed and paid two of the three years of income taxes he owed. He is also past due on his student loans, and has unpaid charged-off and collection accounts, which total more than \$15,000. Disqualifying Conditions AG ¶ 19(a), “inability or unwillingness to satisfy debts,” AG ¶ 19(c), “a history of not meeting financial obligations,” and AG ¶ 19(g), “failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same” apply.

Five financial considerations mitigating conditions under AG ¶ 20 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, or a death, divorce or separation), and the individual acted responsibly under the circumstances;

(c) 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;

(d) the individual initiated 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 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.

The delinquent obligations are on his credit reports, including the three he denied in his SOR response. There is no evidence he has paid any of his delinquent obligations.

None of the mitigating factors for financial considerations extenuate the security concerns. Applicant's financial difficulties are both recent and multiple. He has been employed with his current employer since July 2011. In March 2012, he was made aware of the Government's concerns about his delinquent debt. He indicated he intended to pay his debts and had a repayment plan to address his Federal and state tax debts. He provided no documentation showing payment on his debts. By failing to document the payment of delinquent debts he has failed to act responsibly under the circumstances.

In January 2015, Applicant, in responding to the SOR, stated he had agreements to repay his delinquent taxes. In August 2015, he received the FORM and informed he could submit documentation as to the status of his delinquent accounts. No documents were received.

Applicant was given sufficient opportunity to address his financial delinquencies. Failing to pay the debts casts doubt on his current reliability, trustworthiness, and good judgment. He has not acted responsibly in addressing his debts. He provided no evidence he has received credit or financial counseling. He has not demonstrated that his financial problems are under control or that he has a plan to bring them under control. The mitigating conditions listed in AG ¶ 20(c) do not apply. There is no showing of a good-faith effort to satisfy debts or a showing that payments have been made in accord with a repayment agreement. The mitigating conditions listed in AG ¶ 20(d) do not apply because Applicant has failed to document payment on his taxes or other delinquent obligations.

Applicant provided no information as to how and why the delinquent debts occurred. His only explanation for failing to timely file and pay his state and Federal income tax was that he was not a very good business person. There is no evidence showing factors beyond his control. AG ¶ 20(b) does not apply. The mitigating condition listed in AG ¶ 20(e) does not apply because Applicant must not only dispute the obligations, but must also provide documented proof to substantiate the basis of the dispute or provide evidence of actions to resolve the issue. He failed to do this.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all relevant 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) 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.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance 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 has failed to document any payment on his delinquent accounts. He has been aware of the Government's concern about his delinquent debts since his March 2012 interview, which was reinforced by the January 2015 SOR, and August 2015 FORM. There is no documentation of payment.

In requesting an administrative determination, Applicant chose to rely on the written record. However, he failed to submit sufficient information or evidence to supplement the record with relevant and material facts regarding his circumstances and facts that would mitigate the financial considerations security concerns. He failed to offer evidence of financial counseling or provide documentation regarding his past efforts to address his delinquent debt. He failed to provide such information, and by relying solely on scant explanation in his response to the SOR, he failed to mitigate the trustworthiness concerns arising from his financial considerations.

The issue is not simply whether all Applicant's debts are paid—it is whether his financial circumstances raise concerns about eligibility and suitability for a public trust position. (See AG ¶ 2 (a)(1).)

This decision should not be construed as a determination that Applicant cannot or will not attain the state of true reform and rehabilitation necessary to be eligible for a public trust position. The determination of an individual's eligibility and suitability for a public trust position is not a once in a lifetime occurrence, but is based on applying the factors, both disqualifying and mitigating, to the evidence presented. Under Applicant's current circumstances, a clearance is not recommended. In the future, if Applicant has paid his delinquent obligations, established compliance with a repayment plan, or otherwise substantially addressed his past-due obligations, he may well demonstrate persuasive evidence of his security worthiness.

Overall, the record evidence leaves me with questions or doubts about 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 problems.

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, Financial Considerations: **AGAINST APPLICANT**

Subparagraphs 1.a – 1.m: Against Applicant

Conclusion

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

CLAUDE R. HEINY II
Administrative Judge